STATE OF MICHIGAN

COURT OF APPEALS

SALLY A. BUZALSKI,

Plaintiff-Appellant,

v

STEVEN J. BUZALSKI,

Defendant-Appellee.

UNPUBLISHED
February 29, 2000

No. 217409
Kent Circuit Court
LC No. 97-002201 DM

Before: Zahra, P.J., and Kelly and McDonald, JJ.

ZAHRA, J. (Dissenting).

I respectfully dissent from the majority's conclusion that the trial judge ruled as a matter of law that an established custodial environment cannot exist while a divorce action is pending. I find that the trial judge properly considered the proofs, applied the proper legal standard and reached a decision that is not contrary to the great weight of the evidence. I would therefore affirm.

The majority reach their conclusion by parsing the trial court's findings. While the trial court's findings were not stated with ideal clarity, when viewed in proper context I find no evidence that the trial court erroneously concluded as a matter of law that there could not exist an established custodial environment in favor of plaintiff. At the conclusion of a five day trial the learned trial judge held:

> First of all, *this Court determines* that there is no established custodial environment. It's always been this Court's position, and I think that case law supports it, that when you have a new case and custody is contested, no matter which party has temporary custody [*sic*] does not get an advantage under established custodial environment. There really is no established custody during the pendency of a divorce. Things are in flux, they are up in the air, and obviously a decision needs to be made, and obviously, post-judgment it would be different. (Emphasis added.)

The court also referred to its finding of no established custodial environment while making findings on the best interest custody factors:

> The next factor: "The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
>
> I did not give either party, either parent [an] edge here. I rate them equal. By agreement, the child will remain in the marital home with whichever parent receives custody. The situation during the pendency of a case like this with contested custody is always somewhat unstable. And as I said earlier, there is no established custodial environment.

The first sentence of the trial court's holding evidences an exercise of discretion: "this Court *determines* that there is no established custodial environment." Implicit in the exercise of discretion is the understanding that there is a choice to be made. If, as the majority concludes, the trial judge was under the misperception that as a matter of law he could not find an established custodial environment in favor of plaintiff, merely because she was the temporary custodian, there would have been nothing for the court to determine. In my opinion, the trial court's express finding of no custodial environment undermines the majority's conclusion.

I also do not find error in the remainder of the trial court's statements relating to the non-existence of an established custodial environment. Regardless of whether these statements are viewed as general observations or specific factual findings applicable to this case, they demonstrate that the trial court considered the issue, weighed the evidence and found no established custodial environment.

I am also not persuaded that the trial court erred by not making specific factual findings relating to the nonexistence of an established custodial environment with plaintiff. The issue of established custodial environment is a preliminary matter to a custody trial. While there are numerous published decisions requiring trial courts to reach very specific factual findings as to each and every best interest factor under the Child Custody Act, MCL 722.23; MSA 25.312(3), see, e.g. *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998); *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988); *Arndt v Kasem*, 156 Mich App 706, 709; 402 NW2d 77 (1986); *Curry v Curry*, 109 Mich App 111, 118; 310 NW2d 913 (1981), I have found no case that requires such specificity as it relates to the preliminary issue of whether an established custodial environment exists. Indeed, a survey of the cases that have reversed or vacated a trial court's custody determination on this issue have done so for the failure to reach any conclusion as to established custodial environment or because the court's determination was against the great weight of the evidence, not for the failure to make factual findings to support the court's conclusion. See, e.g. *DeVries v DeVries*, 163 Mich App 266, 272; 413 NW2d 764 (1987); *Underwood v Underwood*, 163 Mich App 383, 393-394; 414 NW2d 171 (1987); *Stringer v Vincent*, 161 Mich App 429, 434-435; 411 NW2d 474 (1987).

As observed by the majority, the record could support the conclusion that there was no established custodial environment with plaintiff. When a trial court renders a judgment in favor of a litigant but fails to make clear findings to support the judgment, appellate courts should presume that the trial court resolved factual disputes in favor of the party in whose favor judgment is entered. In *Shaver v Associated Truck Lines*, 322 Mich 323, 329; 33 NW2d 815 (1948), our Supreme Court held:

> [W]e are governed by the general rule that, in the absence of a finding of fact by the trial court, we must assume that every finding of fact was made which was necessary to support the judgment, provided there is sufficient evidence in the record to sustain such finding. See 3Am.Jur.P.516, Appeal and Error, § 954 and *Warren v. Mosher*, 312 Ariz. 33; 250 P. 354, 49 A.L.R. 1311, and 3 Comp. Laws 1929, § 14265 (Stat. Ann. § 27.994).

In this case there were more than sufficient facts to support the conclusion of the trial judge. Defendant maintained frequent contact with the child during the pendency of the divorce. Defendant had parenting time every other weekend and two evenings each week. There was evidence that the child was closely bonded with defendant and interacted with defendant more on a daily basis than with plaintiff prior to the parties' separation, and that the child saw defendant as the primary caretaker. Moreover, the child knew that the divorce was pending and that custody of the child was in dispute.

I also find that the trial court's failure to interview the child does not require reversal. As a general rule, where a child is old enough to express unbiased views the trial court should interview the child to ascertain and consider the reasonable preference of the child. *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1993). The trial court did not interview the child in this case but the court noted that the Friend of the Court psychologist interviewed the child. Although the psychologist did not ask the child's preference, the child did not indicate a preference for either party during the interview. The court further noted that the child was young while making findings as to the preference of the child. In this context, it is reasonable to conclude that the court found the child, age six, too young to express an *unbiased preference* for custody. Moreover, plaintiff did not object to the court's failure to interview the child. Accordingly, plaintiff's claim of unpreserved error is waived on appeal.

For all of these reasons, I would affirm the judgment of the trial court.

/s/ Brian K. Zahra