STATE OF MICHIGAN

COURT OF APPEALS

JEANI STEPKE,

Plaintiff-Appellant,

v

DOUGLAS STEPKE,

Defendant-Appellee.

UNPUBLISHED
June 23, 2000

No. 220499
Jackson Circuit Court
LC No. 98-090100-DM

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

O'CONNELL, P.J. *(concurring in part and dissenting in part).*

I concur only in the majority's conclusion that the trial court erred by not first determining whether an established custodial environment existed. Because this error impacts the burden of proof with regard to the best-interest factors, it requires reversal.

Additionally, I disagree with the majority's conclusion that the trial court "erred in the manner in which it utilized the judicial admissions at trial. The trial court, although taking the "admissions" into account, did not in fact treat them as conclusive admissions under the court rule. Instead, the court independently weighed the evidence and made specific factual findings regarding the best-interest factors. Indeed, the court even found that the parties were equally favored on many factors that were subject to the admissions. I believe that the best approach on remand is simply to require the trial court to accept the answers plaintiff filed late. MCR 2.312(B)(1). [1]

[1] The court rules governing civil procedure apply to "all civil proceedings in all courts established by the constitution and laws of the State of Michigan, except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure." MCR 2.001. The exceptions listed in MCR 2.001 do not apply here. Thus, in order to circumvent the application of MCR 2.312 in child-custody cases, the majority would have to conclude that the court rule is in direct conflict with a statute and that the conflict involves a matter of substance, not procedure. *McDougall v Schanz*, 461 Mich 15, 26-27, 31; 597 NW2d 148 (1999). This involves a constitutional analysis of whether the statute impermissibly infringes on the Supreme Court's exclusive constitutional authority to promulgate rules governing practice and

Given this result, I find the majority's analysis of judicial admissions to be unnecessary. This Court should generally decline to address issues not necessary to the resolution of the case at hand. *Kosmyna v Botsford Community Hospital*, 238 Mich App 694, 702; 607 NW2d 134 (1999).

Furthermore, I do not believe that assignment to a new judge is warranted. In *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992), the trial court was assigned to the parties' divorce action and to a divorce action involving the plaintiff's reputed lover, the court had heard the cases within one day of each other, and the defendant's attorney referred several times to the testimony from the other action. Under these circumstances, our Supreme Court held that "the judge may have been influenced by matters discussed in the previous day's proceedings," and that assignment to a different judge on remand would thus be appropriate. *Id*. In this case, however, the record does not indicate that the trial court was possibly influenced by the divorce action involving plaintiff's current romantic interest. Thus, reassignment is not necessary under *Sparks*.

I also disagree with the majority's criticism of the trial court's "apparent inability to separate plaintiff's extramarital conduct from her fitness as a parent." Without determining whether the trial court's findings were against the great weight of the evidence, I note that the trial court discussed plaintiff's extramarital conduct in relation to its effect of plaintiff's parenting abilities. Even if the court erred in considering this extramarital conduct, I do not find support for the contention that the court was so biased by this consideration that it would be unable, on remand, to put its "previous expressed findings out of mind without substantial difficulty." *DeRush v DeRush*, 218 Mich App 638, 642; 554 NW2d 332 (1996). Accordingly, I would not order reassignment to a new judge.

In conclusion, I join with the majority in reversing the trial court's custody decision and remanding for further proceedings, but do so only because the trial court erred by failing to initially determine whether an established custodial environment existed.

/s/ Peter D. O'Connell

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procedure. *Id*. at 18. The majority does not undertake this task, but instead simply concludes, without engaging in the requisite analysis, that MCR 2.312 should not apply in child-custody cases.