

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KATHY J. BROWN,

Plaintiff/Counterdefendant-  
Appellant,

v

TODD D. BROWN,

Defendant/Counterplaintiff-  
Appellee.

UNPUBLISHED

June 29, 2001

No. 229576

Livingston Circuit Court

LC No. 98-027768-DM

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Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right, following a bench trial, from an order granting physical and legal custody to defendant in the judgment of divorce. We affirm.

Shortly after beginning a relationship with defendant, plaintiff became pregnant in 1989, and gave birth to their minor child on July 26, 1990. Within a year of the child's birth, plaintiff and defendant agreed to a sum of child support after plaintiff sought the assistance of legal counsel. As time passed, defendant became involved in the child's life and cared for the child while plaintiff attended school. Plaintiff was "kicked out" of her parent's home, and the minor child stayed with defendant for a month and a half while plaintiff resided with friends. Eventually, plaintiff and defendant rekindled their relationship. The parties moved into a home purchased by defendant, and they later married in October 1994. In November 1998, defendant moved out of the marital home for the second time, and in December 1998, plaintiff filed a complaint for divorce. Each party requested custody of the minor child.

Trial commenced on March 8, 2000. Plaintiff did not expressly testify that defendant was a "bad parent," but stated that defendant inappropriately left the minor child alone on two occasions. Additionally, plaintiff alleged that the minor child was a secondary concern to defendant, who was interested in his social activities with friends and relatives. Plaintiff acknowledged that visitation did not occur as planned between defendant and the minor child. However, plaintiff faulted defendant for the lack of visitation. Plaintiff alleged that defendant traveled frequently and that the minor child did not wish to visit with defendant. Defendant never requested "make up" visits as a result of his travels. Additionally, plaintiff admitted that she refused to allow visits when defendant arrived at the home in a vehicle that she deemed

inappropriate. For example, defendant was not allowed to take the minor child for visitation when he drove a Corvette because the vehicle had an air bag, a Jeep Wrangler with removable doors and roof, and another vehicle because it had a side air bag. Plaintiff testified that the vehicles contained warning labels regarding air bags, but, she did not know the recommended restrictions. Therefore, it is unknown whether the restrictions applied to the age and weight of the parties' son.

Plaintiff acknowledged that her life had changed as a result of the divorce. Plaintiff alleged that she did not have sufficient funds to pay for utilities based on her in home day care service. Additionally, plaintiff failed to maintain the marital home, and the minor child slept in the living room instead of his own bedroom as a result of the home conditions. Plaintiff was responsible for maintaining utilities in the home by court order, but did not seek increased marital support in order to maintain electricity and telephone service. Consequently, defendant was unable to maintain communication with the minor child. Plaintiff denied that the failure to pay the telephone bill or seek increased support was designed to hamper the relationship between defendant and the minor child. Plaintiff admitted that she did not participate in a psychological evaluation until a court order was entered. Plaintiff opined that it was "ridiculous" to spend \$1,000 to talk to someone for two hours "to decide custody on my kid." Plaintiff opined that she was a good parent even though the minor child was suffering from enuresis and encopresis.

Defendant testified that he was frequently deprived of visitation with the minor child. Plaintiff would yell and scream at defendant and use profanities that were audible to the minor child. Plaintiff accused defendant of ruining her life and not loving the minor child. Consequently, the minor child would state that he did not want to leave for visits. Frequently, plaintiff would not be at home with the child when it was time for a visit, would not have the child ready for the visits, or would not dress the child appropriately for the weather conditions. Furthermore, plaintiff would deprive defendant of a visit for her own family events or if she deemed his vehicular transportation as inappropriate. Defendant was forced to file motions in court to obtain compliance with court orders. Plaintiff was fined \$500 as a result of her actions.

Defendant testified that he rented a room in a home, but spent weekends at a family cottage or at his parents' home in Toledo. Defendant participated in activities with the minor child such as skiing, soccer, and cub scouts during the marriage. After the split, plaintiff failed to allow the release of the minor child's skiing equipment. Once the minor child agreed to go on a visit with defendant, the two were usually interacting and talking within ten minutes of the visit. However, plaintiff frequently called the minor child while he was visiting defendant. The telephone calls would last for forty-five minutes. The conversations would trigger enuresis, and the minor child would ask to go home. Defendant reported the minor child's enuresis to the psychological examiner and wanted to get treatment for the minor child's condition. Plaintiff berated defendant for conveying the information and deprived him of visitation for trying to take the minor child in for treatment without her permission. Defendant sought custody of the minor child, but acknowledged that plaintiff should and would play a role in the minor child's life. Defendant proposed a visitation schedule that would allow plaintiff and her family to visit with the minor child. At the end of the second day of trial on April 5, 2000, the trial court instructed defendant's counsel to file an emergency motion for change of custody. The trial court was "alarmed" by the minor child's need for counseling, his living conditions, and the obstructed

visitation. The trial court orally ordered immediate counseling for the child and requested that the child be brought to chambers for an interview. On May 12, 2000, an order granting defendant sole legal custody was entered. On May 24, 2000, an order granting defendant sole legal and physical custody of the minor child was entered.

On June 15, 2000, plaintiff's counsel filed a motion to withdraw based on a breakdown in the attorney/client relationship. Defense counsel objected to the withdrawal because plaintiff was discharging her third attorney since the filing of the divorce complaint, and the trial was to continue on June 19, 2000. The trial court allowed plaintiff's counsel to make inquiry of plaintiff. Plaintiff acknowledged that she did not want counsel's continued representation and knew that the trial was to continue on June 19, 2000. Plaintiff indicated that she had an appointment with a new attorney. The trial court granted the motion to withdraw.

On June 19, 2000, plaintiff appeared at trial, but stated that she wished to leave because she did not have representation. The trial court advised her that she could leave, but the trial would proceed as discussed at the hearing on the motion to withdraw. Plaintiff advised the court that the court rules were not followed. Plaintiff argued with the trial court, made statements that were not preserved on the record, and left the courtroom. The trial court stated that it did not hear the comments, but suspected that the comments would have justified holding plaintiff in contempt. Defendant's counsel stated that he had heard the statements, but would not repeat them. Defendant testified for the remainder of the hearing, and the guardian ad litem for the minor child recommended that legal and physical custody be awarded to defendant in light of his commitment to care for the child and maintain a visitation relationship with plaintiff. The guardian ad litem stated that plaintiff was her own worst enemy. The trial court indicated that it would render its decision on June 28, 2000. On June 28, 2000, the trial court granted legal and physical custody to defendant with visitation for plaintiff after determining that an established custodial environment did not exist with plaintiff, MCL 722.27(1)(c), and the best interests of the child, MCL 722.23, were evaluated based on the evidence presented at trial.

Plaintiff first argues that the trial court erred in determining that plaintiff did not have an established custodial environment with the minor child. We disagree. A custody determination is a discretionary disposition ruling that is reviewed for an abuse of discretion. *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). We examine the trial court's findings of fact to determine whether they are against the great weight of the evidence standard. *Id.* That is, a trial court's factual findings should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* The existence of an established custodial environment presents a question of fact that the trial court must address before it determines the child's best interests. *Id.* at 197. If an established custodial environment exists, there shall be no change of custody unless there is clear and convincing evidence that it is in the best interest of the child. *Phillips v Jordan*, 241 Mich App 17, 23; 614 NW2d 183 (2000); MCL 722.27(1)(c). MCL 722.27(1)(c) provides, in relevant part:

The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical

environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

The trial court's factual conclusion, that an established custodial environment did not exist, was not against the great weight of the evidence and involved an assessment of credibility of the witnesses. We defer to the trial court's factual findings involving issues of credibility. *Mogle, supra* at 201. While plaintiff testified that she was a nurturing mother, the condition of the home did not provide basic necessities and parental comfort. Plaintiff acknowledged that the minor child was unable to sleep in his own bedroom and slept on the living room floor due to the home conditions. Plaintiff allowed the home to go without electricity or telephone service, but asserted that it was due to the lack of financial resources. Plaintiff never filed a motion to increase the amount of support paid by defendant. The trial court held that plaintiff had financial resources, but did not budget appropriately. Instead of maintaining basic services, the trial court held that plaintiff expended funds on unnecessary items. The trial court held that the failure to pay the telephone bill was an attempt to destroy the father/son relationship. Additionally, plaintiff acknowledged the enuresis and encopresis, but did not have the minor child taken in for counseling. The trial court also held that plaintiff made concerted efforts to interrupt defendant's visitation. These efforts included unreasonable demands on defendant's transportation to preclude visitation, excessive telephone calls to the minor child during defendant's visitation, and interruption of the visits by following the two and attending the same functions. The trial court noted that the minor child's reluctance to have visitation with defendant was influenced by plaintiff, and statements or complaints made by plaintiff to the trial court were echoed by the minor child during his interview with the trial court. After hearing the testimony regarding the impact of the divorce on the minor child, the trial court immediately ordered counseling for the minor child and instructed defendant to file an emergency motion for change of custody prior to completion of the trial. Based on our review of the record and deferring to the trial court's assessment of credibility, the conclusion, that an established custodial environment with plaintiff did not exist, was not contrary to the great weight of the evidence. *Mogle, supra*.

Plaintiff's contention, that the failure to find an established custodial environment was a sanction for her violation of court orders, is without merit. When evaluating a claimed established custodial environment, the focus is on the circumstances surrounding the care of the child during the period of time preceding trial, not the reasons behind the existence of the custodial environment. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). An established custodial environment may be created by court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed. *Id.* at 388. In the present case, the trial court did not decline to rule that an established custodial environment existed as a sanction for plaintiff's circumvention of visitation. Rather, the trial court merely noted that despite the increased parenting time that plaintiff received as a result of the violation of court orders, an established custodial environment did not exist with plaintiff. Review of the record reveals that the trial court properly focused on the circumstances surrounding the care of the minor child while he was in plaintiff's custody. *Hayes, supra*.

Plaintiff next argues that the trial court's custody determination was based on inappropriate factors rather than the best interest of the child criteria. Specifically, plaintiff argues that the trial court inappropriately granted custody to defendant based on its frustration

with plaintiff's conduct, failed to consider that the minor child preferred to live with plaintiff, failed to consider that plaintiff was the primary source of care, nurturing, and guidance, failed to consider the minor child's successful academic record while in plaintiff's custody, and failed to consider defendant's depression. We disagree. The trial court's custody determination is reviewed for an abuse of discretion. *Mogle, supra*. An abuse of discretion occurs when the result is so grossly violative of fact and logic that it evidences a perversity of will, defiance of judgment, or the exercise of passion or bias. *Mixon v. Dixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999).

Review of the record reveals that the trial court did not give inappropriate weight to the allegations delineated by plaintiff, but appropriately considered the best interests of the child as required by MCL 722.23. Plaintiff's allegation, that the custody decision was based on the trial court's frustration with plaintiff, is not supported by the record. At the hearing regarding plaintiff counsel's motion to withdraw, the trial court advised plaintiff that trial would continue as scheduled and noted that this was plaintiff's third discharge of an attorney during the divorce. Plaintiff acknowledged that trial would continue, yet appeared at the next trial date without counsel with the expectation that trial would be adjourned. When advised that trial would continue, plaintiff argued with the trial court. The trial court admonished plaintiff that she risked being held in contempt of court, and plaintiff chose to leave the courtroom with trial continuing. This was an isolated incident, and there is no indication it had any bearing on the trial court's custody determination. The trial court also considered the child's preference to live with plaintiff, but noted that the statements made by the minor child mirrored statements made by plaintiff during trial. The trial court also considered the care by plaintiff and the minor child's academic record. However, the living conditions, need for counseling, and the willingness of defendant to remedy the problems outweighed the minor child's bond with plaintiff and plaintiff's love for the child. Finally, the trial court did consider defendant's depression, but noted that plaintiff's psychological evaluation was much more troubling than defendant's diagnosis and conduct at trial. In fact, plaintiff's evaluation for nurturing was particularly troubling in light of the fact that she ran a day care center. The trial court noted that the psychological evaluation was consistent with plaintiff's conduct at trial when she repeatedly cried and screamed. We cannot conclude that the trial court abused its discretion in evaluating the best interest of the child factors, MCL 722.23, in favor of defendant.<sup>1</sup>

Affirmed.

/s/ Harold Hood

/s/ Patrick M. Meter

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<sup>1</sup> We acknowledge that two other counselors testified on behalf of plaintiff. However, plaintiff's counseling attendance was inconsistent, and there was no indication that plaintiff gave an impartial factual scenario to the counselors.