

STATE OF MICHIGAN
COURT OF APPEALS

DENISE M. SPRANGER,

Plaintiff-Appellant,

v

RICHARD G. SPRANGER,

Defendant-Appellee.

UNPUBLISHED

June 29, 2001

No. 231265

Macomb Circuit Court

LC No. 97-003376-DM

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order awarding defendant immediate temporary custody of the parties' two minor children. We reverse and remand for further proceedings.

On August 12, 1998, a consent judgment of divorce was entered, awarding the parties joint legal and physical custody of their two children. On August 18, 2000, the trial court entered an order suspending defendant's parenting time pending the result of a Family Independence Agency (FIA) investigation regarding plaintiff's allegations that defendant was sexually abusing their children. After the FIA report was released, the Friend of the Court recommended that defendant's parenting time be immediately reinstated, but that defendant's request for a change of custody should be denied.

On October 23, 2000, the trial court conducted a hearing regarding the parties' objections to the Friend of the Court recommendation. At the hearing, the trial court reinstated defendant's parenting time after hearing brief testimony from defendant regarding his ability to care for the children. The trial court then interviewed one of the children and subsequently ruled:

[T]he Court has reviewed the file, reviewed the report from the Family Independence Agency, Child Protective Services. And as previously cured [sic], if I'm going to err, I'm going to err on the side of safety. So in order to protect these children from any further quote, mental abuse, as we see in the Child Protective Services' report, I'm going to temporar[il]y transfer custody to defendant father.

The Court makes this finding and makes this conclusion based on the twelve statutory factors that have been thoroughly reviewed, [and] considers it to be an emergency. That's why it's rather precipitous action on the part of the Court.

* * *

Parenting time for plaintiff mother will be suspended pending release and review of the psychological report.

Thereafter, assuming that there's a favorable report, it will be supervised visitation until such time the Court is satisfied that any danger to the children [is] removed.

The trial court then ordered that there be an accelerated evidentiary hearing on the issue of custody. On November 8, 2000, the trial court entered an order of immediate change of custody, awarding defendant immediate temporary custody of the children.

As a preliminary matter, defendant argues that this Court should dismiss plaintiff's appeal because she is not appealing a final order. This Court has jurisdiction of an appeal of right filed by an aggrieved party from "a postjudgment order affecting the custody of a minor." MCR 7.203(A)(3). The order that plaintiff is appealing, an order of immediate change of custody, is a postjudgment order that temporarily changes the custody of the parties' children. Although the order only temporarily changes custody, it is an "order affecting the custody of a minor." MCR 7.203(A)(3). Therefore, this Court has jurisdiction to hear plaintiff's appeal.

On appeal, plaintiff argues that the trial court erred by failing to conduct an evidentiary hearing before temporarily changing custody of the children. The standard of review in child custody cases is set forth in MCL 722.28, which provides:

To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

An evidentiary hearing is required before custody can be changed, even on a temporary basis. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999); *Mann v Mann*, 190 Mich App 526, 529-530; 476 NW2d 439 (1991); see also MCR 3.210(C). A trial court may not temporarily change custody by a postjudgment interim order when it could not do so by a final order changing custody. *Mann, supra* at 529-530. Further, where a party objects to a Friend of the Court recommendation, as here, the trial court may not temporarily change custody without first holding a hearing. *Id.* at 531. As stated by this Court in *Mann, id.* at 532:

Moreover, we conclude that in determining whether a temporary change is appropriate or necessary, a hearing must be conducted. Without considering admissible evidence—live testimony, affidavits, documents, or other admissible

evidence—a court cannot properly make the determination or make the findings of fact necessary to support its action under § 7(1) of the Child Custody Act. [MCL 722.27(1).] Unless the parties stipulate, a Friend of the Court report and recommendation are not evidence. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989).

In the present case, the trial court clearly erred by failing to conduct an evidentiary hearing before temporarily changing custody of the children. The evidence considered by the trial court in making its decision to change custody was severely limited in scope. The only admissible evidence the trial court considered was the court file, defendant's brief testimony regarding his ability to care for the children, and possibly the interview with the child.¹ The trial court stated that it relied on the FIA report in making its decision, but Friend of the Court reports are not admissible as evidence unless agreed to by both parties. *Mann, supra* at 532. Additionally, the trial court did not state its conclusions regarding each statutory best interest factor, but merely stated that it had "thoroughly reviewed" all of the statutory best interest factors. Generally, the trial court must consider and explicitly state its findings and conclusions regarding each best interest factor, and the failure to do so is usually reversible error. *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000). Therefore, we find that the trial court clearly erred by temporarily changing custody based on very limited admissible evidence and without conducting an evidentiary hearing.

Consequently, we reverse the trial court's order temporarily changing custody and we remand to the trial court to conduct a proper evidentiary hearing. On remand, the trial court must consider and explicitly state its findings and conclusions regarding each best interest factor set forth in MCL 722.23. *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). We note that the first step in considering a petition to change custody is to determine whether an established custodial environment exists. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). In this regard, we caution the trial court that its custody order by itself does not establish a custodial environment. *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993). The trial court's order is irrelevant to the existence or establishment of a custodial environment. *Hayes, supra* at 388. Therefore, the trial court's erroneous order in granting defendant temporary custody of the children will not affect the trial court's analysis on remand of whether an established custodial environment exists. *Id.* The importance of determining whether a custodial environment exists relates to determining the appropriate standard of review. If there is no established custodial environment, then the petitioning party need prove by a preponderance of the evidence that custody should be changed; however, if an established custodial environment exists, then there must be clear and convincing evidence presented to change custody. *Id.* at 387. We further order that the evidentiary hearing be expedited and that the hearing shall be conducted within twenty-one days of the issuance of this opinion since this involves a child custody dispute.

¹ The trial court did not state that it was relying on its interview with the child in making its decision, but only that its decision was based on the best interest factors.

We deny plaintiff's request for a different trial judge on remand because plaintiff did not move in the trial court to disqualify the trial judge pursuant to MCR 2.003. Furthermore, a trial judge is generally not disqualified absent a showing of actual bias or prejudice. *Ireland v Smith*, 214 Mich App 235, 250; 542 NW2d 344 (1995), aff'd as modified on different grounds 451 Mich 457 (1996). Plaintiff has not alleged that the trial judge was actually biased or prejudiced by the FIA reports. Therefore, plaintiff's request for a different trial judge on remand is denied.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Kathleen Jansen