STATE OF MICHIGAN

COURT OF APPEALS

ANNA MARIA SALATKA-BELCOVSON, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED June 16, 2009
v	No. 289686 Macomb Circuit Court
DAVID C. BELCOVSON, Defendant/Counter-Plaintiff-Appellee.	LC No. 2008-000127-DM

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. On appeal, plaintiff argues that the trial court erred in awarding the parties joint legal and physical custody of the parties' two minor children, that the court erred in denying her request for attorney fees, and that the court was biased against her. We affirm.

I. Established Custodial Environment

Plaintiff first argues that the trial court erred in finding that an established custodial environment existed with both parents.

MCL 722.27(1)(c) provides that a "court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." Conversely, if an established custodial environment does not exist, an award of custody need only be supported by a preponderance of the evidence. *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000). As this Court stated in *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008):

> Whether an established custodial environment exists is a question of fact that we must affirm unless the trial court's finding is against the great weight of the evidence. MCL 722.28; *Mogle v Scriver*, 241 Mich App 192, 196-197; 614 NW2d 696 (2000). A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction.

MCL 722.27(1)(c) provides, in pertinent 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.

As further explained in *Berger, supra* at 706-707:

> An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian. *Id.* at 579; *Moser v Moser*, 184 Mich App 111, 114-116; 457 NW2d 70 (1990). A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

Plaintiff suggests that it was improper for the trial court to consider that the parties had always lived together in the marital home, because "it speaks only to the physical environment of the children." However, MCL 722.27(1)(c) provides that a child's "physical environment" is an appropriate consideration in deciding whether an established custodial environment exists. Plaintiff's principal argument with respect to this issue is that the evidence showed that she was primarily responsible for the day-to-day care of the children. Although we do not disagree with this characterization of the evidence, and we agree that it supports the trial court's finding that an established custodial environment existed with plaintiff, it does not negate the trial court's finding that an established custodial environment also existed with defendant. The evidence showed that defendant also regularly spent time with the children, participated in activities with them, and that he was actively involved in their care and development. The evidence supports the trial court's determination that, despite plaintiff's role as primary caregiver, the children also had an established custodial environment with defendant.

In considering this issue, it was not improper for the trial court to consider the testimony of defendant's former wife, given her testimony that she frequently interacted with the family and was in a position to observe defendant's relationship with the children. There is no indication that the court gave inappropriate or undue weight to her testimony. Similarly, we find nothing improper with the trial court's consideration of defendant's relationship with his older son. The trial court merely noted that defendant had been an engaged father in the past, which was a relevant consideration in evaluating the credibility of plaintiff's and defendant's competing

testimony regarding whether defendant was also engaged with his two younger children. We also find no merit to plaintiff's argument that the trial court improperly considered that both parties had generally demonstrated good parenting skills, where, according to plaintiff, "good parenting skills does not equate with an established custodial environment." Defendant's parenting skills were relevant to whether he fostered an environment in which the children naturally looked to him for guidance, discipline, the necessities of life, and parental comfort.

In sum, the trial court did not err in finding that an established custodial environment existed with both parties.

II. Children's Best Interests

Next, plaintiff argues that the trial court erred in its evaluation of several of the statutory best interest factors and in awarding the parties joint legal and physical custody of the children. We disagree.

In a child custody case, the trial court's "[f]indings of fact are reviewed pursuant to the great weight of the evidence standard." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). Under this standard, the trial court's findings of fact will be upheld unless "'the evidence clearly preponderates in the opposite direction.'" *Id*. (citation omitted). This Court defers to the trial court's findings on issues of credibility. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

Child custody disputes are to be resolved according to a child's best interests. MCL 722.25(1). The best interests of the child are determined by considering the sum total of the statutory factors set forth in MCL 722.23(a) – (l). However,

> [t]he trial court need not . . . give the statutory factors equal weight, and its finding regarding one factor does not necessarily countervail its other findings. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). Further, mathematical equality on the statutory factors does not necessarily amount to an evidentiary standoff that would preclude a change in custody. *Heid* [*v AAASulewski (After Remand)*, 209 Mich App 587, 594; 532 NW2d 205 (1995)]. The overwhelmingly predominant factor is, as always, the welfare of the child. *Id*. [*Winn v Winn*, 234 Mich App 255, 263; 593 NW2d 662 (1999), vacated in part on other grounds and remanded 459 Mich 1002 (1999).]

On appeal, plaintiff challenges the trial court's findings with respect to best interest factors (a), (b), (c), (f), (g), (h), (i), (j), and (k).

Plaintiff argues that the trial court should have weighed factor (a) in her favor, rather than equally, because she spent more time with the children, provided their daily care, and their youngest son was uncomfortable around defendant. The fact that plaintiff spent more time with the children does not mean that her love or bond with them was stronger. Moreover, only plaintiff testified that their youngest child was uncomfortable around defendant. Defendant denied this and the trial court found that defendant's testimony was more credible. Also, contrary to what plaintiff asserts, the trial court considered the parties' emotional ties, finding that both had "expressed their love, affection and emotional ties with the minor children." The

evidence does not clearly preponderate against the trial court's finding that the parties were equal with respect to this factor.

The trial court concluded that the parties were relatively equal with respect to factor (b) because they were both committed to the children's religious educations and both had the capacity to provide love, affection, and guidance for the children. Plaintiff argues that this factor should have been decided in her favor because she was the primary caretaker. However, the focus of this factor is the "capacity and disposition" of the parties to provide love, affection, and guidance, and to continue the education and raising of the child in their religion or creed. The evidence showed that plaintiff had assumed a role as primary caretaker because defendant worked full time, not because defendant lacked the capacity or disposition to do so. Further, despite plaintiff's role, defendant had also been actively involved in raising the children and protecting their welfare, and he was willing to place their interests before his own. Further, both parties had attempted to introduce the children to their respective religions. The trial court did not err in finding that this factor did not weigh in favor of either party.

With respect to factor (c), it was appropriate for the court to consider what defendant had done in the past, because it demonstrated his capacity to financially provide for the children. See *Berger*, *supra* at 712. Further, considering the questions about plaintiff's ability to support herself and care for the children as a single parent, the trial court did not err in finding that this factor favored defendant. The court did not penalize plaintiff for placing her career on hold, but rather found that she had not pursued opportunities for her own financial support or made concrete plans to ensure that she could support herself and the children in the future.

The trial court concluded that the parties were relatively equal with respect to factor (f), the moral fitness of the parties involved. First, the trial court's finding that plaintiff's extramarital affair affected the marriage is supported by plaintiff's testimony. Plaintiff also argues, however, that the trial court erred in finding that she had denied various alcohol-related incidents. Viewing the trial court's findings in context, it appears that the court was principally referring to plaintiff's attempts to deny her culpability or the seriousness of the incidents. Plaintiff explained that while she was arrested for driving while intoxicated, she was only convicted of reckless driving. She also explained that the effects of alcohol were sometimes exaggerated because of other medications she was taking and that she fell in her house on the morning after she had been drinking because she was tired and dehydrated. Despite the prior incidents, however, the trial court found that nothing suggested a long-term substance abuse problem and that "no credible evidence was offered to suggest that it significantly impacts her ability to parent." Thus, the court did not ascribe undue weight to these incidents. Indeed, despite the incidents, the court found that "both parties generally appear to be morally fit," and plaintiff does not contend on appeal that the evidence showed that defendant was not morally fit. Thus, we find no basis for concluding that the evidence clearly preponderates against the trial court's finding that the parties were relatively equal with respect to this factor.

The trial court concluded that factor (g) slightly favored defendant. Although the court inaccurately stated that plaintiff was taking medication for depression in addition to anxiety, it did so in the context of addressing plaintiff's claim that her health was excellent. The court noted that plaintiff had been taking prescription drugs for several years because of her ADD and anxiety conditions, and there was ample testimony explaining how plaintiff's anxiety disorder affected her relationships with the children because of her impulsiveness, impatience, anger, and

volatility. Although plaintiff argues that the trial court should have given more weight to defendant's colorblindness, he denied that this was a problem and the court found no credible evidence that it affected his ability to parent. The evidence does not clearly preponderate against the trial court's finding that this factor slightly favored defendant.

The court found that the parties were equal with respect to factor (h), the home, school, and community record of the child. Plaintiff argues that this factor should have been weighed in her favor because she signed the children up for extracurricular activities, volunteered at their school, and was mostly responsible for preparing them for activities. However, the evidence indicated that defendant was also involved in the children's extracurricular activities, having coached them in hockey and baseball. In addition, he helped them with their homework and had established funds for their college educations. We disagree with plaintiff that the college funds were not relevant to the trial court's consideration of factor (h). They reflect defendant's views on the importance of a good education and his commitment to see that they do well in school. The trial court did not err in finding that the parties were equal with respect to this factor.

Plaintiff argues that the trial court erred in its analysis of factor (i), where the parties stipulated that the court could consider the children's preferences as expressed to a Friend of the Court investigator, and where the trial court's ultimate custody decision was contrary to the investigator's recommendation that plaintiff receive physical custody of the children and defendant be awarded parenting time every other weekend. The mere fact that the trial court's ultimate custody decision differed from the investigator's recommendation does not establish any error with respect to the court's resolution of factor (i). Plaintiff asserts, without record support, that the children preferred to remain with her. The trial court did not reveal the children's preferences in its decision, nor does plaintiff argue that the court was required to do so. Although plaintiff testified at trial that the youngest child was apprehensive about spending time with defendant, defendant denied this and the trial court found that defendant's testimony was more credible than plaintiff's. On this record, there is no basis for disturbing the trial court's findings regarding factor (i).

The trial court found that the parties were equal with respect to factor (j), the willingness and ability of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. The trial court's analysis of this factor was largely based on credibility. Both parties testified that they were willing to encourage a relationship with the other party, but were concerned about the other party's willingness to reciprocate. The trial court found that defendant's testimony was credible and that some of plaintiff's concerns were not credible. We defer to the trial court on issues of witness credibility. Despite the trial court's resolution of credibility issues in favor of defendant, it found the parties equal with respect to this factor. Because the evidence does not clearly preponderate against this finding, we find no error.

The trial court found that factor (k), domestic violence, did not favor either party. Although plaintiff argues that this factor should have been weighed in her favor because she offered examples of defendant's assaultive behavior, the trial court found that plaintiff's accounts of the various incidents were not credible and that defendant's testimony was "much more reasonable and credible." Plaintiff has not provided any persuasive reason for rejecting the trial court's credibility determinations. Giving deference to those determinations, the trial court did not err in finding that the parties were equal with respect to this factor.

We review the trial court's ultimate custody decision in light of its findings for an abuse of discretion.

> An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. [*Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994)], citing *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). This standard continues to apply to a trial court's custody decision, which is entitled to the utmost level of deference. *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533 (2006). [*Berger, supra* at 705-706.]

Because an established custodial environment existed with both parents, the trial court properly applied a clear and convincing evidence standard to determine whether the children's best interests would be served by changing that environment.

Evidence is clear and convincing when it

> "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted. [In *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995), quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987).]

Considering the trial court's determination that the parties were equal with respect to most of the best interest factors, its decision to award them joint legal and physical custody of the children was not an abuse of discretion. We also disagree with plaintiff that the trial court's parenting time schedule is unfair because it places all the caretaking responsibilities on her and allows defendant to have custody during the children's leisure time. The schedule provides that plaintiff will have physical custody of the children during the school week, and defendant will have custody of them on weekends and during a two-hour period one evening during the week. The weekday arrangement is not significantly different from how things were before the divorce. Moreover, the children will still have "leisure" time with plaintiff on weekdays after school, and defendant will have full childcare responsibility on weekends. The arrangement is reversed during the summer months, with plaintiff primarily having custody on weekends and defendant during the week. Each party is also permitted three uninterrupted weeks with the children during the summer. The trial court's parenting time schedule appropriately balances the parties' interests in remaining involved in the care and custody of their children with the children's interests in maintaining stability and consistency.

In sum, plaintiff has not demonstrated that the trial court's custody decision was based on improper findings of fact or amounted to an abuse of discretion. Thus, we affirm the court's decision.

III. Judicial Bias

Plaintiff next argues that the trial judge was biased against her because the judge's mother formerly lived next door to defendant's mother and because the judge wrote a letter to plaintiff several years earlier "scolding" plaintiff for remarks she made about a coworker of plaintiff's father. Plaintiff concedes that she did not preserve this issue by filing an appropriate motion for disqualification in the trial court. MCR 2.003(C); *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006). Moreover, the argument fails on substantive review.

"A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise." *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). An actual showing of prejudice is required before a judge will be disqualified. *In re Contempt of Steingold*, 244 Mich App 153, 160; 624 NW2d 504 (2000). See also MCR 2.003(B)(1).

Although plaintiff asserts that the trial judge wrote a letter to her several years earlier "scolding" her for remarks she made about a coworker of plaintiff's father, plaintiff has not presented any evidence of the contents of the letter, when it was written, or any other details concerning the circumstances under which it was written. Plaintiff also asserts that the judge's mother formerly lived next door to defendant's mother, but does not indicate whether there was any type of actual relationship between the two, the nature of any relationship that did exist, or whether the judge was even aware of the connection. We note that limited contact between a judge and litigants in the distant past is generally not sufficient to require disqualification. See *Anson v Barry Co Drain Comm'r*, 210 Mich App 322, 327; 533 NW2d 19 (1995). Here, plaintiff's vague, unsupported allegations about the alleged letter and alleged connection between defendant's mother and the judge's mother are insufficient to establish that the trial court was biased against her. If plaintiff believed that these circumstances prevented the judge from being fair and impartial, she had an obligation to raise the issue in an appropriate motion and submit an affidavit identifying all known grounds for disqualification. Likewise, the mere fact that the trial judge made some findings against plaintiff does not prove that the judge was biased. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001); *People v Fox (After Remand)*, 232 Mich App 541, 559; 591 NW2d 384 (1998); *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 344 (1995), aff'd as modified 451 Mich 457 (1996). In the absence of specific evidence of bias or prejudice, plaintiff has not overcome the presumption of judicial impartiality. *In re Susser Estate*, *supra* at 237.

IV. Exclusion of Sarah Powell's Testimony

Plaintiff next argues that the trial court erred when it precluded her from calling Sarah Powell, the therapist for one of the children, as a witness because plaintiff did not file a witness list.

A trial court has discretion whether to allow an unlisted witness to testify. *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628-629; 506 NW2d 614 (1993). We review the trial court's decision for an abuse of discretion. *Id*. at 629-630.

In this case, plaintiff's attorney never filed a witness list. Despite the omission, defendant did not object to allowing plaintiff to call lay witnesses, but argued that he would be prejudiced if plaintiff were allowed to call expert witnesses because he was not prepared for their examination and had not obtained any expert witnesses to rebut any testimony they provided.

Because there is no indication in the record that defendant had prior notice that plaintiff intended to call Powell and did not have a prior opportunity to prepare for her testimony or conduct discovery, the trial court did not abuse its discretion in precluding her testimony. See *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90-91; 618 NW2d 66 (2000).

V. Attorney Fees

Plaintiff lastly argues that the trial court erred by denying her request for attorney fees. We review the trial court's decision for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). However, any factual findings on which the court bases its decision are reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

As plaintiff argues, a court in a divorce action may award attorney fees to a party when necessary to preserve that party's ability to carry on or defend the action. *Stoudemire*, *supra* at 344. The party requesting attorney fees has the burden of alleging facts sufficient to show that the party is unable to bear the expense of the action and that the other party is able to pay. MCR 3.206(C)(2)(a).

In this case, plaintiff testified that she had paid $5,000 in attorney fees. The evidence discloses that in addition to the property plaintiff received as part of the divorce settlement, she had recently received an inheritance of approximately $100,000 from her mother and that approximately $60,000 of those funds still remained. Because the evidence did not show that plaintiff was unable to pay her attorney fees, the trial court did not err in denying her request for attorney fees.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray