STATE OF MICHIGAN

COURT OF APPEALS

PETER J. KORDA, a/k/a PETRU J. CORDA,

Plaintiff-Appellee,

v

DONNY H. KORDA, a/k/a DONNY H. CORDA,

Defendant-Appellant.

UNPUBLISHED
October 10, 1997

No. 200366
Oakland Circuit Court
LC No. 85-304634-DM

Before: Holbrook, Jr., P.J., White and R. J. Danhof,* JJ.

PER CURIAM.

Defendant appeals as of right from an order granting permanent physical and legal custody of the parties' minor child to plaintiff. We affirm.

The parties' daughter was born on January 7, 1985. Shortly thereafter, plaintiff filed divorce proceedings. A consent judgment of divorce was eventually entered on October 27, 1988, which awarded defendant mother physical and legal custody of the child and provided for specific visitation with plaintiff. Plaintiff filed a petition to modify custody in June 1989, while defendant was incarcerated following her conviction of obtaining money under false pretenses. Without holding a hearing, the trial court entered an ex-parte interim order on June 27, 1989, which granted plaintiff temporary physical and legal custody of the child. Plaintiff took custody of the child on either June 28 or June 29, 1989, and the child has lived with him and his new wife since that time. Proceedings continued, numerous motions were filed, hearings held, and the matter was referred to the friend of the court for updated reports and recommendations several times. An evidentiary hearing on the issue of custody began in December 1995, continued in June 1996, and concluded in July 1996. Following the hearing, the trial court made findings on the statutory best interest factors and entered an order granting custody to plaintiff.

Defendant first argues that her due process rights were violated because the trial court did not hold an evidentiary hearing or make findings on the best interest factors prior to entering the 1989 ex-parte interim order modifying custody.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

This case involved much acrimony and spanned eleven years. The two issues defendant raises on appeal focus largely on the prejudice she claims as a result of the passage of years between plaintiff's June 1989 petition to modify custody and the evidentiary hearing to determine custody, which began in December 1995. In this regard, we note that the record is clear that, before the entry of the interim order, the child lived with and was cared for by defendant until she was 4 ½years old, with relatively minor involvement by plaintiff in the child's upbringing during that time. However, in June 1989, defendant was incarcerated for two months, during which time defendant left the child in the care of a non-party, apparently a neighbor, rather than notifying plaintiff, who had joint legal custody at the time, that she was unavailable to care for the child. Plaintiff's petition was granted during the time that defendant was incarcerated. Defendant's motion to set aside the order was denied and the matter referred to the friend of the court. Defendant did not appeal the interim custody order. The subsequent delays appear to be attributable primarily to 1) the need on several occasions for updated recommendations by the friend of the court, the court-appointed psychologist, and the guardian ad litem;[1] and 2) to adjournments and delays brought about by various substitutions of attorneys for defendant.

We agree that the trial court committed clear legal error by not holding an evidentiary hearing and not making findings on the best interest factors before issuing its interim order granting plaintiff temporary custody in 1989. *Mann v Mann*, 190 Mich App 526, 532-533; 476 NW2d 439 (1991). However, we conclude that reversal is not warranted for several reasons. First, the trial court eventually held a lengthy hearing and determined at the conclusion of the hearing that the custodial environment was with plaintiff, and that it was in the best interest of the child to remain in plaintiff's custody. See *Mann*, *supra* at 533 (noting that the fact that the trial court committed clear legal error by temporarily changing custody without conducting a hearing did not warrant reversal where an evidentiary hearing was eventually held). Second, although defendant argues that the court's interim order prejudiced her because it, in effect, acted as a permanent change in custody, defendant does not argue that the trial court's findings in 1996 were against the great weight of the evidence, nor does she challenge that the established custodial environment was with plaintiff.[2] A custodial environment can be established as a result of a temporary or permanent custody order, in violation of a custody order, in the absence of a custody order, or pursuant to an order that was later reversed. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Third, we have concluded after thoroughly reviewing the record that even if defendant had so argued, the evidence presented in the 1995-1996 evidentiary hearing does not clearly preponderate in the opposite direction of the trial court's determinations, nor was there clear legal error on a major issue or a palpable abuse of discretion. *Fletcher v Fletcher*, 447 Mich 871, 876-877(Brickley, J.), 900 (Griffin, J); 526 NW2d 889 (1994).

Defendant also argues that the trial court's errors impinged on her fundamental right as a parent to have a relationship with her child, citing in support an unpublished decision of this Court. Unpublished opinions are not binding precedent. MCR 7.215(C); *In re Skotzke Estate*, 216 Mich App 247, 251; 548 NW2d 695 (1996). Moreover, the case defendant relies on is distinguishable in that the defendant in that case was totally deprived of visitation by the court's interim custody order. Further, defendant fails to acknowledge that she was partially responsible for the delay in holding the evidentiary hearing, due to the many times she changed counsel. While we agree that a trial court has

the responsibility to assure that a delay of this length does not occur, regardless of the causes of the delay, we conclude that defendant's rights were not violated so as to entitle her to relief without regard to the best interests of the child.

Defendant also argues that the trial court erred by ruling, at the beginning of the evidentiary hearing and before any evidence was taken, that there was an established custodial environment with the plaintiff. We agree. *Mann*, *supra* at 532. However, we conclude that any error was harmless because, after the lengthy evidentiary hearing, the court articulated its findings on the best interest factors, and noted:

> As to the length of time the child has lived in the stable, satisfactory environment, the desirability of maintaining continuity, I think we've thrashed that into the ground as to who had a burden of proof of not. I really don't care. I listened to it from the preponderance of the evidence, I listened to it from the burden of proof [sic]. There is no question in my mind, regardless of which standard you apply. I am overwhelmingly satisfied that the child is much better off in the stable, satisfactory environment in which she presently lives than living with the mother, and that there's, obviously [,] a desirability of maintaining continuity.

Moreover, the trial court again addressed the issue at the hearing on defendant's motion to disqualify the judge and motion for new trial that the court recognized that it had prematurely determined the custodial environment issue, but made clear that regardless of its premature ruling, it arrived at the same conclusion following the hearing:

> The only issue that I think that may have some degree of merit . . . is the issue of the Court making a determination that there had been an established custodial environment. Now, there's tons of case law on this.
>
> . . . . at 165 Mich App, Page 71, ... 'that the child custody act requires the court refrain from changing custody if it would change the established custodial environment, unless presented with clear and convincing evidence that such change is in the best interest of the child; whether or not an established custodial environment exists is a question of fact for the trial court to resolve based on the statutory factors; where the Court determines that an established custodial environment exists, it makes no difference whether that environment was created by a court order, or in violation of a court order, or by a court order which was subsequently reversed.'
>
> And what the Court must look at, quite clearly, from the language is what are the circumstances. The circumstances are that Giselle had been raised for a number of years by her father, and there was clearly an established custodial arrangement. **The reason the Court made that finding at the beginning of the hearing is simply because there had been a discussion among the attorneys of who has the burden of proof. We had a long conference in chambers in connection with it. And the discussion simply led [sic] that there was obviously, based on all—I**

> **mean, this is not a new case to this Court. The Court has lived with this case now eleven years. And I obviously know exactly what the circumstances are. So I made the finding.**
>
> Now, what is the distinction that is to be made from that? The burden was then clear and convincing evidence, clear and convincing, as opposed to versus [sic] preponderance of the evidence.
>
> So that we can save some time on an appeal, I don't think I'm wrong; I think I'm absolutely right in making that determination on the established custodial environment, but just in the event that we don't get a remand back for a determination on this particular point, forget clear and convincing. Based on preponderance of the evidence at the hearing, based sheerly and purely upon preponderance of evidence, the plaintiff had the preponderance and bore the burden of the preponderance of evidence.
>
> So if we - if I announced at the beginning there was none, and we had the trial, I would still come to the same conclusion based upon a preponderance of evidence. [Emphasis added.]

The trial court's decision on the established custodial environment determines the burden of proof. If there is an established custodial environment, then clear and convincing evidence must be presented to change custody, while the trial court may modify a previous custody order in the absence of an established custodial environment if the petitioning party can convince the court by a preponderance of the evidence that it should grant a custody change. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). The trial court twice stated on the record that regardless of the burden of proof, it was satisfied that it was in the child's best interest to remain in plaintiff's custody. Under these circumstances, we conclude there is no basis for remand.

Finally, defendant argues that this matter should be assigned to a different judge because the circuit court judge was biased against her. After a thorough review of each of defendant's claims, we find that she has not overcome the presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). The record does not support that the trial court displayed a deep-seated favoritism or antagonism that would make fair judgment impossible. *Id.* at 496.

Affirmed.

/s/ Donald E. Holbroook, Jr.
/s/ Helene N. White
/s/ Robert J. Danhof

[1] One unexplained lengthy delay was in receiving the guardian ad litem's report; she was appointed in September 1991 but did not issue a report until August 1995. The guardian ad litem wrote the court in February 1992 that she would not prepare a report until defendant's criminal case was resolved. Defendant was apparently released from prison around November 1992 and was then on tether for a number of months. Defendant unsuccessfully appealed her conviction. The case did not come to a standstill during this time, however, as the court entertained motions and discovery proceeded.

[2] While defendant's brief does not seek reversal, at oral argument counsel asked for this relief. For the reasons stated *infra*, reversal is not warranted.