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UNPUBLISHED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.

PER CURIAM.

Plaintiff appeals as of right from the judgment of divorce, contesting the trial court's award of sole physical custody of the parties' three minor children to defendant. We reverse and remand for further proceedings.

The parties were married on June 6, 1987, and had three children during their marriage. Plaintiff did not work full-time during the marriage, so that she could remain at home to be the primary caregiver for the children. Defendant worked full-time and was earning about $900 a week at the time of trial. Plaintiff filed her complaint for divorce on September 3, 1998, and a bench trial was held in March 1999. The main issue at trial was the custody of the children. The trial court ultimately granted sole physical custody of the children to defendant, while the parties have joint legal custody. Defendant was also awarded the marital home; however, he was to pay plaintiff half of the equity value of the home, which was determined to be $66,328.50.

On appeal, plaintiff's issues relate solely to the trial court's award of sole physical custody of the children to defendant. We begin with the standard of review in a child custody case. Section 8 of the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.*, provides that all orders and judgments of the circuit court shall be affirmed on appeal unless the trial court made factual findings against the great weight of the evidence, committed a palpable abuse of discretion, or committed clear legal error on a major issue.

We first address plaintiff's argument that the trial court erred when it ruled on the custody issue without first determining whether an established custodial environment existed.

MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides that the "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." In *Bowers v Bowers*, 190 Mich App 51, 53; 475 NW2d 394 (1991), this Court noted that prior decisions of this Court had held that in original custody actions in which a temporary custody order exists, the trial court has the responsibility of making a definite finding regarding the issue of a custodial environment, citing *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987); *Schwiesow v Schwiesow*, 159 Mich App 548, 557; 406 NW2d 878 (1987); *Curless v Curless*, 137 Mich App 673, 676-677; 357 NW2d 921 (1984).[1] Although no temporary custody order existed in this case, and the parties were still in the marital home at the time of trial, we agree with *Bowers* that the trial court must first address whether an established custodial environment exists before ruling on the children's best interests. Accord, *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 1994); *Thames v Thames*, 191 Mich App 299, 304; 477 NW2d 496 (1991).

It is undisputed in this case that the trial court failed to determine whether an established custodial environment existed before it ruled on the best interest factors. The trial court's failure to first determine whether an established custodial environment existed is clear legal error on a major issue, *Bowers, supra*, p 54, and the error is not harmless. If an established custodial environment exists, then the court may change custody only upon a presentation by clear and convincing evidence that it is in the best interests of the children to do so. Otherwise, the court may award custody to either parent by determining the best interests of the children as that standard is defined in § 3 of the act. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981).

We reject defendant's contention that we may, on de novo review of the record, find that no established custodial environment existed. In *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994), our Supreme Court made clear that review of custody orders is not de novo. Rather, custody cases must be reviewed in accordance with § 8 of the Child Custody Act.

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[1] This Court in *Bowers, supra*, p 53, noted this Court's contrary decision in *Helms v Helms*, 185 Mich App 680, 682; 462 NW2d 812 (1990), where this Court held that the establishment of a custodial environment is a factor only when considering a petition for a change of custody. This holding is contrary to the language of subsection 7(1)(c) of the Child Custody Act because the statute states that the court shall not issue a new order so as to change the established custodial environment of a child unless there is clear and convincing evidence that to do so would be in the best interest of the child. Although this Court's decision in *Bowers* is binding under MCR 7.215(H)(1), we would follow *Bowers* in any event because it is consistent with the statutory language and allows for situations involving separations of the parties during divorce proceedings, even if no temporary custody order was issued.

Fletcher, supra, p 876.[2] The failure to apply the law is legal error. *Id.,* p 881. Upon a finding of error, we are required to remand to the trial court unless the error is harmless. *Id.,* p 882. The error is not harmless because the existence of a custodial environment directly affects the burden of proof to be applied in awarding custody.

Accordingly, on remand, the trial court must determine whether an established custodial environment existed before it determines the best interest factors. We caution that the trial court's custody order is irrelevant to the analysis of whether an established custodial environment exists. *Hayes v Hayes,* 209 Mich App 385, 388; 532 NW2d 190 (1995). "Rather, the focus is on the circumstances surrounding the care of the children in the time preceding trial, not the reasons behind the existence of a custodial environment." *Id.*

Because we conclude that the trial court committed legal error in failing to first determine whether an established custodial environment existed, we need not address whether the trial court erred in considering plaintiff's extramarital conduct[3] under the best interest factors and whether the trial court's findings with respect to certain best interest factors were against the great weight of the evidence. Because the error in not first determining whether an established custodial environment existed is not harmless error, a remand is required for reevaluation. In other words, the trial court should consider up-to-date information and all the statutory best interest factors should be reconsidered, with further

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[2] We acknowledge that this Court has recently held that where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make it own determination by review de novo. *Jack v Jack,* 239 Mich App 668, 670; ___ NW2d ___ (2000), citing *Thames, supra,* p 304 and *Bowers, supra,* pp 53-54. Both *Thames* and *Bowers* were decided before our Supreme Court decided *Fletcher* and this Court in *Jack* did not acknowledge *Fletcher*. The Court in *Fletcher, supra,* pp 882, 889, made clear that review of custody orders is not de novo and that de novo review of the ultimate custodial disposition is not appropriate. Thus, in light of *Fletcher,* we believe that we are not permitted to engage in review de novo of the record and make a factual finding regarding whether an established custodial environment exists. Although we would hold that this Court's decision in *Jack* was wrongly decided on this point, we do not find the decision in *Jack* to be outcome determinative because there is not sufficient information for us to determine this issue de novo. Therefore, we believe a new custody trial where additional evidence may be put forth will lead to a far more accurate custody determination in the best interests of the children.

[3] We note, however, that to the extent that the trial court does consider plaintiff's extramarital relations under best interest factor f contained in § 3 of the Child Custody Act, such conduct is relevant to factor f only if it is of a type that necessarily has a significant influence on how that person functions as a parent. *Fletcher, supra,* p 887. We emphasize this because it appears that the trial court failed to consider plaintiff's extramarital relations with respect to the parent-child relationship, that is, her fitness as a parent, but not as a spouse.

hearings or other proceedings as necessary to decide the custody matter. *Ireland v Smith,* 451 Mich 457, 468-469; 547 NW2d 686 (1996); *Fletcher, supra,* p 889.

Although we need not address the challenges to the trial court's factual findings with regard to the best interest factors, plaintiff's further contention that the trial court erred when it used "constructive" admissions as determinative of the best interest factors in ruling on the custody matter requires some attention.

On February 12, 1999, approximately six weeks before trial, defendant served interrogatories, request for production of documents, and request for admissions on plaintiff. The interrogatories and request for admissions comprised 123 paragraphs, and the request for admissions included requests pertaining to most of the best interest factors set forth in § 3 of the Child Custody Act, as well as plaintiff's alleged extramarital affairs . Pursuant to court rule, answers were due on March 12, 1999. See MCR 2.312(B)(1). Plaintiff did not answer the request for admissions until March 25, 1999, the day before trial. Because the answers were not timely, the matters covered by the requests were deemed to be admitted. MCR 2.312(B)(1). On the first day of trial, plaintiff moved to withdraw the admissions and requested that the trial court permit her to file the late answers. The trial court denied plaintiff's motion.

During trial, while plaintiff's counsel was conducting his direct examination of plaintiff, defendant objected to a line of questioning regarding who was primarily responsible for the children's emotional support, contending that the issue was covered by the admissions. The trial court ruled that it would "take the testimony" in spite of the admissions, and further stated, "I'm going to go through the admissions, and I'm going to filter out what applies and what doesn't." The admissions were ultimately used by the trial court in determining the best interest factors and a review of the record indicates that it repeatedly used the admissions as factors weighing against plaintiff.

First, we note that even if it was proper to use the admissions under MCR 2.312, the trial court did not use the correct procedure in utilizing the admissions. As our Supreme Court has stated, admissions under MCR 2.312 are "judicial" admissions which "are not really 'evidence' at all." *Radtke v Miller, Canfield, Paddock & Stone,* 453 Mich 413, 420; 551 NW2d 698 (1996). See also, Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2312.6, p 384 (admissions under MCR 2.312 are judicial, that is, binding, admissions, rather than evidentiary admissions, which are subject to counter-proof). As provided by MCR 2.312(D)(1), a matter admitted under this rule is *conclusively* established unless the court on motion permits withdrawal or amendment of the admission. The import of the judicial admission is that it is conclusive in the case and is not subject to contradiction or explanation. *Radtke, supra,* p 421. Therefore, the trial court incorrectly ruled that it could take additional testimony with regard to the matters covered by the admissions.

This, of course, is the problem with the trial court's initial decision to allow the use of the judicial admissions and to deny plaintiff's motion to file late answers to the request for admissions. Having ruled in this manner, the admissions are conclusive and cannot be explained or contradicted. It was thus error for the trial court to allow further explanation. However, the use of the judicial admissions in this manner

was contrary to the dictates of the Child Custody Act. We first reiterate our Supreme Court's pronouncements concerning judicial admissions from *Radtke, supra*, pp 420-421:

> Admissions under MCR 2.312 are "judicial" admissions. 2 McCormick, Evidence (4th ed), § 254, p 142, n 11. In contrast to "evidentiary" admissions, i.e., admissions of a party opponent under MRE 801(d)(2), judicial admissions are not really "evidence" at all:
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> > Rather, they are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. [*Id.*, p 142.]
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> In essence, admissions under MCR 2.312 are more a matter of civil procedure that of evidence law. The party who makes such an admission "has conclusively (or 'judicially') admitted such facts . . . and the opposing side need not introduce evidence to prove the facts." 2 Jones, Evidence (6th ed), § 13C:14, p 310 (Nov 1995 supp).
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> A judicial admission differs dramatically from an evidentiary admission with respect to the effect of the admission. Although both judicial and evidentiary admission are subject to all pertinent objections to admissibility that might be interposed at trial (4A Moore, Federal Practice [2d ed], ¶ 36.08, p36-82, and Martin, Dean & Webster, Michigan Court Rules Practice [3d ed], R 2.312, p 357),
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> > the judicial admission, unless allowed by the court to be withdrawn, is conclusive in the case, whereas the evidentiary admission is not conclusive but is always subject to contradiction or explanation. [McCormick, p 142.]

MCL 722.24; MSA 25.312(4) provides that the court shall declare the inherent rights of the children and establish the rights and the duties regarding custody, support, and visitation. MCL 722.25; MSA 25.312(5) also provides that when a custody dispute is between the parents, the best interests of the children control. "This standard cannot be abrogated, even in fairness to the parties." *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 619 (1996). Therefore, the overriding concern in any custody dispute is the best interests of the children as gauged by the factors set forth in MCL 722.23; MSA 25.312(3). *Soumis, supra*, p 35. As required by statute, the factors set forth in § 3 are to be considered, evaluated, and determined by the court.

Recently, this Court held that the trial court had initially erred in entering a stipulated order to change custody without making any independent determination regarding the best interests of the child pursuant to the Child Custody Act. Thus, it was proper for the trial court to later set aside that stipulated order and make its own determination whether a change of custody was in the child's best interests. *Phillips v Jordan*, ___ Mich App ___; ___ NW2d ___ (Docket No. 216559, issued May 9, 2000), slip op, pp 2-3. In noting that stipulated orders are like contracts and are construed under the

same rules of construction as contracts, this Court stated that "contract principles do not govern child custody matters." *Id.*, 2. Rather, the Child Custody Act imposes a duty on trial courts to "pass upon changes in child custody to determine whether the change would be in the best interests of the child." *Id.* "The trial court cannot blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child." *Id.*

As the Court stated in *Radtke, supra,* p 420, a judicial admission is a formal concession or stipulation that has the effect of withdrawing a fact from issue and dispensing the need for proof of the fact. This Court has held on numerous occasions that the parties to a child custody dispute cannot stipulate to anything that might usurp the trial court's obligation to determine the child's best interest in a custody dispute. *Terry v Affum (On Remand),* 237 Mich App 522, 534-537; 603 NW2d 788 (1999) (the trial court erred when it failed to conduct a hearing to determine the best interests of the child and entered orders that merely modified parenting time arrangements that had been based on a stipulation of the parties when the plaintiff later sought an evidentiary hearing to address the child's best interests and alleged a proper cause and change in circumstances to support a change in custody); *Lombardo v Lombardo,* 202 Mich App 151, 160; 507 NW2d 788 (1993) (parties to a divorce judgment cannot by agreement usurp the court's authority to determine suitable provisions for the child's best interests and the court should not relinquish it authority to determine the best interests of the child to the primary physical custodian); *Wilson v Gauck,* 167 Mich App 90, 95; 421 NW2d 582 (1988) (the parties cannot stipulate to the burden of proof to be borne by either party); *Napora v Napora,* 159 Mich App 241, 246; 406 NW2d 197 (1986) (although stipulations are favored by the judicial system and generally upheld, a parent may not bargain away a child's right by agreement with a former spouse); *Williamson v Williamson,* 122 Mich App 667, 671-672; 333 NW2d 6 (1982) (the parties cannot stipulate to limit the best interest factors to be considered by the court).

Since a judicial admission is formal concession or stipulation, then, based on the preceding authority, such a stipulation cannot bind the court; rather, it is the court's duty to determine the best interests of the child pursuant to the factors enumerated in § 3 of the Child Custody Act. Moreover, it is clear that this case presents a clear custody *dispute* between the parents and the trial court should not have utilized "judicial" admissions, or stipulations, to determine the best interest factors. Thus, in this regard, the trial court clearly abused its discretion in denying plaintiff's late answers to the request for admissions. MCR 2.312(D)(1); *Janczyk v Davis,* 125 Mich App 683, 691-693; 337 NW2d 272 (1983).

Accordingly, the trial court abused its discretion in denying plaintiff's motion to file late answer to the request for admissions and erred in the manner in which it utilized the judicial admissions at trial. On remand, and reconsideration of the best interest factors, the trial court must accept plaintiff's answers, although it is preferable for the trial court to determine the best interest factors based on all the evidence put before it rather than on any "judicial admissions."

Plaintiff also requests that a new trial judge be assigned on remand. Plaintiff notes that the same trial court has been assigned to the present case and to the divorce case involving her current romantic interest. Given the trial court's apparent inability to separate plaintiff's extramarital conduct from her fitness as a parent, we believe that it would be unreasonable to expect the trial court to put previously

expressed findings out of mind without substantial difficulty. Accordingly, on remand, this case shall be assigned to a new judge. *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992); *DeRush v DeRush*, 218 Mich App 638, 642; 554 NW2d 332 (1996).

Reversed and remanded for further proceedings before a different trial judge. Jurisdiction is not retained.

/s/ Kathleen Jansen

I concur in result only.

/s/ William B. Murphy