

STATE OF MICHIGAN
COURT OF APPEALS

AMY S. DEMENTER, f/k/a AMY S. HUNTEY,

Plaintiff-Appellant,

UNPUBLISHED
November 21, 2000

v

CRAIG W. HUNTEY,

Defendant-Appellee.

No. 227261
Mecosta Circuit Court
Family Division
LC No. 88-007768-DM

Before: Neff, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting permanent physical custody of the parties' minor child to defendant. We affirm.

Plaintiff argues on appeal that the trial court erred when it granted temporary physical custody to defendant without first holding an evidentiary hearing. Whether the trial court erred in granting temporary custody to defendant without holding an evidentiary hearing is a question of law this Court reviews for clear legal error. *Schlender v Schlender*, 235 Mich App 230, 232-233; 596 NW2d 643 (1999). We conclude that the trial court erred in granting custody without holding an evidentiary hearing, but we decline to reverse on this basis because a custody hearing was ultimately held.

It is well settled that a trial court may not order a change in custody, even on a temporary basis, without first holding an evidentiary hearing. *Mann v Mann*, 190 Mich App 526, 530; 476 NW2d 439 (1991); *Schlender, supra* at 233. An evidentiary hearing is the proper forum for a trial court to consider whether proper cause or a change in circumstances exists that warrants modification of a prior custody order. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Terry v Affum (On Remand)*, 237 Mich App 522, 535; 603 NW2d 788 (1999). The prevailing consideration in a child custody hearing is the best interests of the child. *Hawkins v Murphy*, 222 Mich App 664, 674; 565 NW2d 674 (1997). Before a trial court can delve into the best interests analysis, it must first make a factual determination regarding the existence of an established custodial environment. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000); *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). Once the trial court makes this factual determination, it must weigh the statutory best interests factors, and make a factual finding regarding each factor. *Schlender, supra* at 233; *Overall, supra* at 455-456.

The trial court did not hold an evidentiary hearing before it granted temporary custody to defendant in November 1999, nor did it make any factual findings regarding the existence of an established custodial environment, or weigh the statutory best interests factors. During a hearing in February 2000, however, the trial court found that an established custodial environment existed with defendant. The trial court went on to weigh the statutory best interests factors, finding the child's interests would best be served if she were placed in the permanent physical custody of defendant. Because the trial court subsequently held an evidentiary hearing on the issue of custody and made the required factual findings on the record, any prior error was harmless, and does not require reversal. *Mann, supra* at 533.

Plaintiff further challenges the trial court's factual determination that an established custodial environment existed with defendant. Because plaintiff has not raised the issue in her statement of questions presented, appellate review of this issue is inappropriate. *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998). In any event, we are not persuaded after a review of the record that the trial court's factual determination was against the great weight of the evidence. *Fletcher v Fletcher*, 447 Mich 871, 878-879; 526 NW2d 889 (1994). Moreover, as the court noted, the determination was not central to the court's decision given its findings on the best interest factors.

Plaintiff also contends that the trial court erred in not considering the child's reasonable preference when weighing the statutory best interests factors. A trial court, when evaluating the statutory best interests factors, is required to determine the reasonable preference of the child if the court considers the child to be of a sufficient age. MCL 722.23(i); MSA 25.312(3)(i). This Court has previously held that the failure of a trial court to consider the reasonable preference of a child in relation to custody may amount to clear legal error requiring reversal. *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991); *Stringer v Vincent*, 161 Mich App 429, 434; 411 NW2d 474 (1987).

The trial court ruled that it would not consider the minor child's preference because in its determination, she was not of sufficient age. At the time of the February 2000 custody hearing, the child was eleven years old. The determination whether a child is of sufficient age to express a reasonable preference regarding custody arrangements is within the discretion of the trial court. *Dempsey v Dempsey*, 96 Mich App 276, 282-283; 292 NW2d 549, modified on other grounds 409 Mich 495 (1980). With due deference to the discretion of the trial court, we are also mindful of previous decisions of this Court that have found clear error where a trial court failed to obtain the preferences of children as young as six and nine years old. *Bowers, supra* at 55-56. Absent a finding by the trial court that the child was unable to express a reasonable preference despite her age, we conclude that trial court erred in not considering the reasonable preference of the eleven-year-old minor child.

Nevertheless, we are satisfied that plaintiff was not prejudiced by this error because the trial court weighed the majority of the other factors in favor of defendant. Specifically, the trial court found in favor of defendant with regard to factors (b), (c), (d), (e), (h), and (j). The court found that factors (c) and (j) in particular weighed heavily in defendant's favor. The trial court did not find in favor of plaintiff with regard to any of the factors, but found plaintiff and defendant equal in reference to factors (a), (k) and (l). In light of the trial court's findings, we are

not persuaded that any opinion the minor child may have expressed in favor of plaintiff would have altered the trial court's final determination. See *Treutle v Treutle*, 197 Mich App 690, 695-696; 495 NW2d 836 (1992). In child custody matters, this Court need not remand for reevaluation where any error made was harmless. *Fletcher, supra* at 889.

Finally, because the record does not indicate any actual bias on the part of the trial judge against plaintiff, plaintiff's claim of bias is without merit.

Affirmed.

/s/ Janet T. Neff

/s/ William B. Murphy

/s/ Richard Allen Griffin