# STATE OF MICHIGAN

# COURT OF APPEALS

---

TRACY A. ALBERS, f/k/a TRACY A. HOLAWAY,

Plaintiff-Appellee,

v

JEFFREY HOLAWAY,

Defendant-Appellant.

---

UNPUBLISHED
January 18, 2002

No. 231914
Macomb Circuit Court
Family Division
LC No. 97-000319-DS

Before: Hood, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant father appeals by leave granted from an order denying his motion for custody of the parties' minor son, Layne Albers Holaway, and finding both parents in contempt for violating a parental cooperation order. We vacate that part of the order finding the parties in contempt and affirm the court's decision not to change custody.

The parties were married in Michigan in 1985 and had two children, Amanda Holaway (born 1/7/88), and Layne (born 8/21/91). They later moved to Alabama, where they separated in August 1994 and divorced in 1996. The children were with plaintiff mother during the separation period, and the Alabama judgment of divorce awarded her physical custody of them. Both parties returned to Michigan the same year, and the Macomb County Circuit Court subsequently entered a consent judgment for support reiterating plaintiff's custody of the children subject to defendant's right of reasonable visitation. Ultimately, parenting time was scheduled so that defendant had both children on Thursday evenings and alternate weekends and holidays. After some disputes over parenting time and support, the trial court entered a July 28, 1998, order of parental cooperation to benefit the minor children. Parenting time and support disputes continued, however.

In his motion to change custody, defendant alleged that on October 5, 2000, an incident of what he characterized as plaintiff's abuse of Layne took place. He further claimed that the problem was compounded by another incident on October 15, 2000 when plaintiff took the child to defendant's house because he was a "monster" whom she could not control. Plaintiff denied any abuse or reference to the boy as a "monster." She agreed that Layne had become out-of-control by October 2000, but she contended that she remained in the better position to be the child's primary caregiver. The trial court concluded that there existed an established custodial environment with plaintiff and that defendant failed to show by clear and convincing evidence

that a change of custody was in the child's best interest. The court also summarily found both parents in contempt for failing to obey the terms of the parental cooperation order and ordered them to spend ten days in jail, seek counseling, and pay $200. The court later suspended the jail sentences.

On appeal, defendant first raises a series of related issues concerning the court's ruling that the parties were in contempt of court. As a threshold matter, we do not agree with defendant's claim that it is "obvious" the trial court transformed the custody hearing into a hearing on whether the parties obeyed the parental cooperation order. Defendant is correct that the court took a hands-on approach to the case, frequently questioning witnesses and sometimes chastising them or expressing frustration with the parties. The court did not focus on the terms of the order to the exclusion of deciding the custody question, however.

The decision to hold a party in contempt is reviewed for an abuse of discretion. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714; 624 NW2d 443 (2000). We agree that the trial court abused its discretion in summarily holding the parties in contempt. MCL 600.1711 provides:

> (1) When any contempt is committed in the immediate view and presence of the court, the court may punish it summarily by fine, or imprisonment, or both.
>
> (2) When any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend.

Under this statute, the court was without authority to summarily find the parties in contempt because the alleged contemptuous acts were not committed in the immediate view and presence of the court. The words "immediate view and presence" must be strictly construed and exclude the idea of constructive presence. *In re Collins*, 329 Mich 192, 196; 45 NW2d 31 (1950). Thus, the case law uniformly demands that the act being punished be witnessed by the trial court in order to be summarily punished; it typically involves disruption of courtroom decorum or disobedience of an order during court proceedings resulting in an interference with the orderly administration of justice. See, e.g., *People v Ahumada*, 222 Mich App 612, 617-618; 564 NW2d 188 (1997); *Schoensee v Bennett*, 228 Mich App 305, 317-318; 577 NW2d 915 (1998); *In re Contempt of Warriner*, 113 Mich App 549, 552-554; 317 NW2d 681 (1982), modified on other grounds 417 Mich 1100.26 (1983). On the other hand, acts such as filing a false pleading, *Collins*, *supra* at 195, or failing to appear in court either as a witness, *In re Contempt of Robertson*, 209 Mich App 433, 439; 531 NW2d 763 (1995), or as an attorney, *In re Contempt of McRipley*, 204 Mich App 298, 301; 514 NW2d 219 (1994), are considered acts committed outside the presence of the court. In this case, although the parties testified in court about acts the judge deemed to be in contempt of the parental cooperation order, the acts themselves were committed outside the presence of the court and did not affect the proceedings. Accordingly, the trial court abused its discretion in summarily holding the parties in contempt, and we vacate that portion of the court's order.

We take this opportunity to remind the parties, however, that this does not mean that the trial court lacked the power to hold them in contempt "for disobeying any lawful order,

decree, or process of the court." MCL 600.1701(g). If necessary, the court in the future may exercise its contempt powers regarding indirect contempt in either civil or criminal proceedings. See, generally, *Contempt of Auto Club, supra* at 711-714. However, the court must hold a hearing following the procedures established in MCR 3.606 and afford some measure of due process before determining whether sanctions are warranted. *Id.* at 713, 714. Defendant's claim that the parental cooperation order is too vague to be enforceable may be addressed at that hearing if he is again alleged to be in contempt.

Defendant also contends that the trial court abused its discretion in refusing to allow Layne to be called as a witness. We find no palpable abuse of discretion. *Mogle v Scriver,* 241 Mich App 192, 196; 614 NW2d 696 (2000). As noted by defendant, in *Breneman v Breneman,* 92 Mich App 336, 343; 284 NW2d 804 (1979), this Court held that the trial court did not err in allowing the parties' son to testify about his mother beating him with a paddle because the boy was not called to testify about his custody preference and he "was the only witness with firsthand knowledge to give his point of view." *Breneman* is on point insofar as it establishes that it is not necessarily an abuse of discretion to allow a child to testify against a parent in a custody case. In this case, however, the question is whether the trial court abused its discretion in disallowing such testimony, and we are satisfied that it did not. Unlike *Breneman,* the substance of Layne's version of events found its way into the record in the form of the extensive testimony of a counselor and defendant. The trial court was fully aware of that version and could weigh it against other evidence without putting the child through the ordeal of being examined and cross-examined by his parents' attorneys.

Defendant next contends that the trial court erred in ruling that an established custodial environment still existed with plaintiff. Whether an established custodial environment exists is a question of fact, and this Court reviews the trial court's findings of fact to determine whether they are against the great weight of the evidence. *Mogle, supra* at 196-197.

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). Here, the trial court found that an established custodial environment existed with plaintiff because she had continuous physical custody of the children since 1994 and throughout that time, she was primarily responsible for their care. The court further concluded that Layne's more recent "oppositional behavior," along with plaintiff's taking him to defendant's house for a cooling-off period, did not destroy that established custodial environment. This finding was not against the great weight of the evidence. Defendant argues that the established custodial environment was destroyed by plaintiff's conduct shortly before the hearing. This overlooks that plaintiff has been Layne's primary caregiver and nurturer for two-thirds of the boy's life. Further, defendant cites no authority for the proposition that a relatively brief disruption in the parent-child relationship after several years without incident should form the basis for concluding that an established custodial environment no longer exists. In our view, it would have been premature for the trial court to adopt defendant's reasoning and conclude that a few weeks of discord were sufficient to destroy the established custodial environment.

Defendant's remaining claims all relate to the trial court's findings and conclusions on the best interests of the child factors listed in MCL 722.23. Initially, we disagree with defendant's claim that the court's findings were inadequate. *Bowers v Bowers*, 198 Mich App

320, 328; 497 NW2d 602 (1993). Moreover, after a thorough review of the record, we conclude that the trial court's findings on each factor were not against the great weight of the evidence. *Mogle, supra* at 196. The consistent theme throughout defendant's brief on appeal is that the court minimized plaintiff's mistreatment of Layne and put its "passion" for adherence to the parental cooperation order ahead of the evidence. However, the record is not as clear as defendant would lead this Court to believe in respect to whether plaintiff mistreated Layne. The trial court was in the better position to weigh the evidence and assess credibility on this issue, *Fletcher v Fletcher*, 447 Mich 871, 889-890 (Brickley, J.), 890 (Mallett, J.); 526 NW2d 889 (1994), and on the whole record, we cannot say that the trial court committed clear legal error or abused its discretion in failing to give more weight to plaintiff's alleged inappropriate discipline.

We do agree with defendant that the court committed clear legal error in its analysis of factor (h), the "home, school, and community record of the child." MCL 722.23(h). The court incorrectly equated this factor with factor (d), the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). However, because the court's ruling on this factor was not dispositive in the decision not to change custody, the error was harmless. Compare *Ireland v Smith*, 214 Mich App 235, 247; 542 NW2d 344 (1995), affirmed as modified 451 Mich 457; 547 NW2d 686 (1996).

In summary, while the trial court committed clear legal error in its application of factor (h), the error was harmless. The court's findings with regard to the remaining best interest of the child factors were not against the great weight of the evidence, and its decision not to change custody was not an abuse of discretion. Accordingly, we affirm that portion of the court's order denying defendant's motion to change custody.

We affirm in part and vacate in part.

/s/ Harold Hood
/s/ William B. Murphy
/s/ Jane E. Markey