

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SANDRA PANCOTTO,

Plaintiff-Appellant,

V

BRIAN ALAN BOOKS,

Defendant-Appellee.

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UNPUBLISHED

March 1, 2002

No. 235089

Macomb Circuit Court

LC No. 96-006050-DP

Before: Cavanagh, P.J., and Neff and B. B. MacKenzie\*, JJ.

PER CURIAM.

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

I

Plaintiff argues that the trial court's findings were against the great weight of the evidence. We disagree. All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *York v Morofsy*, 225 Mich App 333, 335; 571 NW2d 524 (1997). The great weight of the evidence standard applies to all findings of fact. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

Whether an established custodial environment exists is a question of fact, which the trial court must address before it determines the child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

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. [MCL 722.27(1)(c).]

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

In analyzing whether a custodial environment exists, it is irrelevant whether the environment was 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 which was later reversed. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

In this case, the trial court properly found that, although a custodial environment had existed with plaintiff, a custodial environment was subsequently established with defendant. The trial court based its finding on the facts that the child had lived with defendant for twenty-one months and had established a stable routine. The trial court also found that defendant provided discipline, necessities of life, parental comfort, and guidance during this time. The lower court record supports these findings. The fact that the custodial environment arose from an ex parte order does not alter the outcome; a custodial environment can be established as a result of a temporary court order. *Hayes*, supra at 388. The trial court is not concerned with the reason the custodial environment was established, but with whether it exists. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992).

Plaintiff contends that the ex parte order was improper because it was not based on credible facts, and the trial court did not make the required factual findings. However, the record does not support this argument. In her efforts to prevent defendant from having joint legal custody and liberal parenting time, plaintiff simply disregarded the court's orders. Although plaintiff claimed that her failure to abide by the court's parenting time was due to a misunderstanding, she admitted at the hearing that she was actually motivated by hurt. The trial court's order granting defendant temporary custody was based on facts that even plaintiff does not deny. Therefore, the custodial environment resulted from proper action by the court.

If an established custodial environment exists, a court may order a change of custody only if clear and convincing evidence is presented that the change is in the child's best interests. MCL 722.27(1)(c); *Phillips*, supra at 25. The party seeking the change bears the burden of proof. *Id.* at 25-26. The child's best interests is measured by the factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). This standard cannot be abrogated, even in fairness to the parties. *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 619 (1996).

The trial court properly found that defendant had a better capacity and disposition to give the child love, affection, and guidance. The trial court found, and the evidence showed, that plaintiff isolated the child and prevented his development of normal relationships with others including his father, and other children, which also affected plaintiff's interaction with educators. In contrast, defendant helped the child associate with others and assisted him in his education. Additionally, the trial court found that the parties had equal ability to provide the child with food, clothing, medical care, and other material needs despite plaintiff's lack of a stable job and questionable approach to his medical care.

The trial court also properly found that the child lived with defendant for nearly two years in a stable, satisfactory environment that should be maintained. There was evidence that defendant had established a regular family schedule and a nurturing environment. The child, defendant, defendant's girlfriend, and defendant's brother took part in the daily schedule, which included going to school, playing and conversing, eating dinner, doing homework, and a regular

bedtime. Defendant had completed two parenting classes. The trial court properly found that defendant provided more permanence of family unit. The evidence showed that plaintiff lived alone and did not have close ties to her family. The trial court properly found that the child's home, school, and community record factors weighed in favor of defendant. The child's teacher reported that he seems happy and is doing well in school.

The trial court properly found that plaintiff had shown no ability to encourage a close relationship between the child and his father despite her contrary assertions. The evidence showed that plaintiff is unable to maintain a working relationship with the child's father, resulting in much conflict. Plaintiff had intervened in defendant's arrangements for the child's care. She argued with defendant at the child's school and accused defendant of trying to steal the child. Plaintiff admitted that when defendant was scheduled to pick up the child for visitation, she took the child to K-Mart, and sat in the car in the parking lot, crying. Plaintiff admitted that she disobeyed the court's order because she was hurt by what she viewed as defendant's lying to the court. Plaintiff gave evasive answers when the trial court questioned her about the child's whereabouts and was sentenced to jail for failure to comply with the court's order.

There was evidence that plaintiff often refused to permit defendant's parenting time. According to defendant, when he did have parenting time in her presence, she would often scream and swear at him and insult him in front of the child. She stated in the child's presence that defendant did not love the child, and had never loved him, that defendant was not the child's father because she had been raped by someone else, and she also called him a child molester.

In contrast, defendant has shown an ability to foster a relationship between plaintiff and the child. According to defendant, he has purchased cards for plaintiff from the child. The child has a picture of plaintiff on the dresser in his bedroom. Defendant has not denied plaintiff her parenting time when she shows up on time with the required supervisor and additionally has allowed her to visit with the child in his house at other times. The trial court found the remaining factors to weigh equally in favor of both parties. Based on these facts, the trial court's findings under the Child Custody Act were not against the great weight of the evidence.

## II

Plaintiff next argues that the trial court abused its discretion in granting physical custody to defendant. A custody award should be affirmed unless it constitutes an abuse of discretion. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 24; 581 NW2d 11 (1998). An abuse of discretion occurs when the result was so 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 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994).

Based on the facts set forth above, the result of this case reflects no abuse of discretion. In regard to plaintiff's assertion that the trial court did not take into account her self-asserted innocence in disobeying the trial court's order and was biased against plaintiff, this Court defers to the trial court's determination of credibility. *Mogle, supra* at 201.

### III

Plaintiff next argues that the trial court committed clear legal error in restricting the evidence to be admitted at the evidentiary hearing, and failing to make specific findings of fact in regard to plaintiff's requests for alternative relief. Questions of law are reviewed for clear legal error. *Schoensee v Bennett*, 228 Mich App 305, 312; 577 NW2d 915 (1998). A trial court commits legal error when it incorrectly chooses, interprets or applies the law. *Id.*

The trial court did not fail to make specific findings of fact. The court must consider and explicitly state its findings and conclusions with respect to each of the best interests factors. *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991). The findings need not discuss all evidence; brief, definitive, and pertinent findings and conclusions regarding the contested matters are sufficient. MCR 2.517; *Fletcher, supra* at 883-884 (Brickley, J.), 900 (Griffin, J.).

Plaintiff contends that the trial court failed to make specific findings of fact in regard to plaintiff's request for full custody, joint custody, and unsupervised parenting time. The written opinion of the trial court belies this argument. The trial court found that, although a custodial environment existed with plaintiff, a custodial environment was subsequently established with defendant. The trial court based its finding on the facts that the child had lived with defendant for twenty-one months and had established a stable routine. The trial court also found that defendant provided discipline, necessities of life, parental comfort, and guidance during this time. The record supports these findings. As discussed above, the trial court stated its findings on the best interests factors and support for those findings, concluding that several factors weighed against plaintiff. The trial court considered the evidence presented to the friend of the court and to the trial court. It is implicit that the reasons the trial court stated for its decision to grant physical custody to defendant, joint legal custody, and limited parenting time to plaintiff are the same reasons for its decision to deny plaintiff's requests for custody and/or more parenting time. Therefore, the trial court did not fail to make specific findings of fact.

The trial court did not fail to conduct a de novo hearing. If a party objects to a friend of the court recommendation regarding a change in custody, a court may not change custody without first holding a hearing de novo. *Mann v Mann*, 190 Mich App 526, 529-530; 476 NW2d 439 (1991). Plaintiff argues that the trial court committed clear legal error in severely restricting the testimony and evidence at the evidentiary hearing, entitling her to a new hearing. Plaintiff complains that the trial court did not allow any supplemental evidence or witnesses, but points to no evidence that was relevant, but omitted. We find plaintiff's argument without merit.

Following plaintiff's objections to the friend of the court recommendation, the trial court granted plaintiff's request for an evidentiary hearing, indicating that the trial court would review the complete transcripts and record, including the friend of the court hearing and that testimony before the trial court would be limited to the parties' testimony. On October 26, 2000, the court held the evidentiary hearing. Plaintiff offered testimony, which essentially related to her testimony from the original hearing. Defendant did not testify. At no point did plaintiff offer

evidence that was rejected by the trial court.<sup>1</sup> Moreover, the trial court accepted additional evidence at the hearing, stating that the court would consider it, along with the entire file.

The trial court's opinion and order reflects that the court reviewed the transcripts from the friend of the court hearing as well as the evidence before it and came to an independent decision. The trial court granted joint legal custody despite the friend of the court's recommendation that legal custody remain with defendant. We find no error.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Janet T. Neff

/s/ Barbara B. MacKenzie

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<sup>1</sup> In fact, the record reflects that at one point during direct examination, plaintiff's counsel rejected plaintiff's request to provide the court additional evidence, stating that the court had all the exhibits needed.