

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY ANDERSON

Plaintiff-Appellant,

v

RENEE ANDERSON-KUNZE and DEPARTMENT
OF SOCIAL SERVICES,

Defendant-Appellee.

UNPUBLISHED

June 7, 1996

No. 187885

LC No. 91-113885-DM

Before: Reilly, P.J., and Michael J. Kelly and C.L. Bosman,* JJ.

PER CURIAM.

Plaintiff filed for divorce from defendant, Renee Anderson-Kunze, on May 28, 1991, in Wayne County Circuit Court. On October 6, 1992, a consent judgment of divorce was entered by Judge James Rashid which provided for joint legal custody of the parties' two minor children, Erica and Joseph, and which awarded physical custody of the children to defendant. Plaintiff began living with his girlfriend soon after his divorce from defendant was finalized. On September 25, 1993, defendant married her current husband, Michael Kunze. Michael Kunze was, thereafter, offered a job in Ohio and, on October 4, 1993, defendant filed a petition to remove the domicile of the children from the State of Michigan and to modify visitation.

On October 23, 1993, during a scheduled visitation, plaintiff became aware that Erica's vaginal area was red and swollen. Plaintiff took Erica to the hospital and the examining doctor filed a report alleging possible sexual abuse of Erica with Children's Protective Services. Thereafter, plaintiff refused to return the children to defendant when his scheduled visitation time was over because of his belief that Erica had been abused while in defendant's custody. On October 26, 1993, defendant filed a petition for immediate return of the children. On November 1, 1993, plaintiff filed an emergency motion for temporary change of custody which was granted on November 10, 1993. The trial court's order granting the temporary change of custody allowed for limited visitation by defendant and ordered that the parties and the children be evaluated at the Family Assessment Clinic at the University of Michigan

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

to determine whether Erica had been sexually abused and, if so, by whom. During this time, investigations were also initiated by the Wayne County Prosecutor's Office and the Department of Social Services. In January 1994, Erica was examined by Dr. Church at St. Joseph's Mercy Hospital. Dr. Church's examination revealed a three millimeter tear in Erica's hymen. On March 10, 1994, the trial court issued another temporary custody order, awarding physical custody of the children to plaintiff's sister and defendant's sister on alternating weeks.

Subsequently on May 11, 1994, plaintiff filed a motion for modification of the judgment of divorce with respect to custody, visitation, and support, and requested an evidentiary hearing pursuant to MCR 3.210(C). Judge Rashid then assigned the case to visiting Judge Joseph B. Sullivan, and the evidentiary hearing on plaintiff's motion to modify the judgment of divorce as well as defendant's motion to change the domicile of the children from the State of Michigan was conducted before Judge Sullivan. At the evidentiary hearing, the investigator of the Family Assessment Clinic, testified that, after evaluating the parties and the children, her finding on whether Erica had been sexually abused was inconclusive and that further evaluation was required. At the conclusion of the evidentiary hearing, Judge Sullivan determined that it was in the childrens' best interest to award custody to plaintiff. On September 20, 1994, the court issued an order denying defendant's petition for change of domicile of the children from the State of Michigan and awarding legal and physical custody of the children to plaintiff, Jeffrey Anderson.

On October 11, 1994, defendant filed a motion for new trial. The hearing on defendant's motion for new trial was conducted on December 28, 1994, before Judge Sullivan. On January 3, 1995, an order was issued granting defendant's motion for new trial. On March 28, 1995, plaintiff filed a motion to disqualify Judge Sullivan on the ground that he had a personal bias against plaintiff receiving custody of the children because plaintiff was cohabiting with a person of the opposite sex. Judge Sullivan declined to disqualify himself, and plaintiff appealed to Chief Judge Rashid. Judge Rashid denied the motion on July 5, 1995. Plaintiff filed an application for leave to appeal the denial of the motion to disqualify Judge Sullivan and this Court on August 1, 1995, along with a motion for immediate consideration. On August 15, 1995, this Court issued an order granting the motions and staying further proceedings below. The children are currently in foster care pursuant to an order of the court issued August 11, 1995.

Plaintiff argues that the record of the proceedings shows a continuing predisposition on the part of Judge Sullivan to identify unmarried cohabitation as an overriding factor in making custody determinations. Plaintiff claims this factor had a significant impact on the court's rulings in the aftermath of its original decision.

To properly preserve an issue of judicial disqualification due to lack of impartiality, the procedure for disqualification set forth in MCR 2.003 must be followed. *Law Offices of Lawrence J. Stockler PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989). In the present case, plaintiff properly -preserved the issue. However, plaintiff's motion for disqualification made no reference to judicial bias as a result of the trial judge's knowledge, through no fault of the judge, of polygraph tests

taken by plaintiff and defendant's husband. Therefore, the issue of bias based on knowledge of the polygraph tests is not properly preserved for appeal and not considered in this appeal.

A denial of a motion for disqualification will be reversed only if it constituted an abuse of discretion. *Michigan Association of Police v City of Pontiac*, 177 Mich App 752, 757; 442 NW2d 773 (1989). Disqualification is appropriate when a judge cannot impartially hear a case, including when the judge is personally biased or prejudiced for or against a party or attorney. MCR 2.003(B)(2); *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). A judge is presumed to be impartial and the party challenging a judge on the basis of bias or prejudice bears the heavy burden of overcoming that presumption. *Id.* at 151. An actual showing of prejudice is required before a trial judge will be disqualified. In the present case, plaintiff has failed to show that the trial judge was actually prejudiced.

The trial judge expressed his preference for placing children in a married home on several occasions. At the hearing on defendant's motion for new trial, the trial judge stated:

I gave him [plaintiff] custody and maybe that was right and maybe it was wrong. I was very reluctant to give him custody. As I mentioned before, at one of these hearings, I have never given custody to parents who were living in a situation where there is a live-in partner to whom they are not married. That deeply disturbed me. That is no way for children to be brought up.

At the motion hearing on defendant's motion to compel a deposition of psychologist Tracey Stolberg, the trial judge stated:

I do know that there is physical abuse of those children, and because of that I gave custody to Mr. Anderson, that and a few other things. But I did something that I have never done before and I will never do again, I believe. I granted custody to a parent who was living with the person of the opposite sex not married. Ms. Anderson-Kunze has married. She has remarried, Mr. Anderson has not. And always before I found it under those circumstances, a party should not have custody. But under the circumstances of this case, I granted custody. But it is conceivable [sic] to me that anybody thinks they and they alone should have a right to visit those children and to divide [sic] the other parent all right of visitation. That, itself is a tragedy.

In the present case, Judge Sullivan's personal views did not prevent him from

deciding the case based on the law. In making a custody determination, the judge is required to determine the best interests of the child by evaluating the eleven factors set forth in MCL 722.23; MSA 25.312(3). *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993). The factors include the moral fitness of the parties involved and the performance, as a family unit, of the existing or proposed custodial homes. MCL 722.23(e)(f); MSA 25.312(3)(e)(f). Unmarried cohabitation, standing alone, is not enough to constitute immorality under the Child Custody Act, MCL 722.21, *et*

seq.; MSA 25.312(1), *et seq.*; *Truitt v Truitt*, 172 Mich App 38, 46; 431 NW2d 454 (1988). However, it is proper for the court to consider the fact that a parent is engaged in unmarried cohabitation as long as that factor is not the sole basis for the court's custody decision and as long as the trial court makes an independent evaluation of the other ten factors set forth in the Child Custody Act. *Truitt*, at 46; *Helms v Helms*, 185 Mich App 680, 684-685; 462 NW2d 812 (1990).

In the present case, Judge Sullivan noted that, although he prefers not to place children in an unmarried home, such a situation is only one of many factors he considers when making a custody determination. Judge Sullivan evaluated, on the record, the eleven factors set forth in MCL 722.23; MSA 25.312(3), to determine the best interests of the children. During his evaluation, he stated that the fact that plaintiff lived with a woman to whom he was not married for three years "certainly marks against them." However, it is evident that the trial judge's negative view of unmarried cohabitation was not a determining factor in his decision because, after considering all of the factors, the trial judge determined that it was in the children's best interest to award custody to plaintiff.

Furthermore, it does not appear that the trial judge's decision to grant defendant's motion for new trial was affected by his personal views on plaintiff's marital status. At the hearing on defendant's motion for new trial, the trial judge admitted that he had become "somewhat prejudiced by Mr. Anderson's refusal to grant visitation." However, the trial judge then stressed that his decision to grant a new trial was based on what was best for the children. The trial judge's comment did not appear to reflect personal animosity toward plaintiff, but rather reflected the trial judge's concern over the effect of plaintiff's refusal to allow visitation.

Judge Sullivan explained that "if there is prejudice, it's a legal prejudice because I think this man should follow the orders of the court to help these children." Judge Sullivan repeatedly stressed throughout these proceedings that he ordered a new trial because of plaintiff's refusal to allow defendant visitation in compliance with the court order and because of the allegations of sexual abuse of the children that were interjected throughout the proceedings. There is no indication in the record of actual prejudice against plaintiff based on his marital status. On one occasion, the judge stated, "[t]he whole problem is that your client, Mr. Anderson, refused to give visitation to the mother of these children. He hid them from her. He took them away. He did everything he could to frustrate every court order that I entered. That is why I found him in contempt." MCL 722.23(j); MSA 25.312(3)(j) requires the judge to evaluate the willingness of each of the parties to facilitate and encourage a close and continuing parent-child relationship with the other parent in determining the best interests of the children. The judge's consideration of plaintiff's repeated interference with defendant's court ordered visitation was proper. The trial court's denial of plaintiff's motion for disqualification on the ground that Judge Sullivan was personally biased against plaintiff was not an abuse of discretion.

Plaintiff in the present case was represented by counsel when the grounds for disqualification occurred, mainly in December, 1994, and could have filed a timely motion. Furthermore, on December 22, 1994, at the conclusion of the motion for new trial, Judge Sullivan informed the parties that they were free to object to his hearing the new trial and that, if they did, the case would be assigned to a

different judge. However, neither party objected until plaintiff's motion was filed three months later on March 28, 1995.

Plaintiff failed to show that Judge Sullivan's preference for not placing children with a parent engaged in unmarried cohabitation resulted in actual prejudice to him. We affirm the order of the Wayne Circuit Court denying plaintiff's motion for disqualification of Judge Sullivan.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Michael J. Kelly

/s/ Calvin L. Bosman