

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

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KURT D. SNYDER,

Plaintiff-Appellant,

v

JANICE A. THOMAS a/k/a JANICE A. SNYDER,

Defendant-Appellee.

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UNPUBLISHED

June 18, 1999

No. 214557

Jackson Circuit Court

LC No. 90-056711 DM

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

PER CURIAM.

Plaintiff appeals as of right from the denial of his motion for a change in physical custody of the minor child Sara Snyder. We affirm.

The parties married in February 1982. Their daughter, Sara, was born in June 1987. In August 1991, a judgment of divorce was entered awarding joint legal custody and physical custody of Sara to defendant. In 1997, plaintiff filed a petition for a change in physical custody. Following a two-day hearing, the trial court held that plaintiff had not proven by clear and convincing evidence that it was in Sara's best interest to modify the custody order.

Plaintiff first argues that the trial court erred in determining that there was an established custodial environment with defendant. We disagree. A custodial environment 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); MSA 25.312(7)(1)(c). Whether a custodial environment exists is a question of fact that must be addressed by the trial court before ruling on the child's best interest. *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). Findings of fact in a child custody case are reviewed under the great weight of the evidence standard. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994). Under that standard, the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Id.* at 878.

The record in this case supports the trial court's decision that an established custodial environment existed with defendant. Although this Court has upheld a finding of no established custodial environment because, among other evidence, there was evidence that the children were aware that the custody granted was temporary and the defendant indicated that he was going to contest custody when it was granted to the plaintiff, *Curless v Curless*, 137 Mich App 673, 676; 357 NW2d 921 (1984), the custody granted to defendant in this case was not temporary, and there was no evidence that Sara ever considered the arrangement to be temporary. Further, although Sara did not look to defendant alone for guidance, discipline, or the necessities of life, an established custodial environment may still exist with defendant. See *Nielsen v Nielsen*, 163 Mich App 430, 433-434; 415 NW2d 6 (1987) (an established custodial environment can exist in more than one home). Also, plaintiff's argument that his frequent visitation with Sara precluded a finding of an established custodial environment is without merit. Although this Court in *Breas v Breas*, 149 Mich App 103, 107-108; 385 NW2d 743 (1986), upheld a lower court's findings that no established custodial environment existed because the child had spent significant amounts of time with the noncustodial parent, the panel in *Breas* also noted that the defendant's relationship with her mother interfered with her relationship with her child and that the child looked primarily to the plaintiff for guidance and discipline. Accordingly, the fact that the noncustodial parent engaged in frequent visitation was not the sole reason for the finding of no established custodial environment. Accordingly, we conclude that the trial court's finding of an established custodial environment with defendant was not against the great weight of the evidence.

Plaintiff next argues that the court erred as a matter of law when it permitted Dr. Emanuel Schreiber to testify regarding plaintiff's communications with him. Plaintiff claims that he had never waived the privilege that was attached to those communications under MCL 551.339; MSA 25.123(9) and MCL 333.16911; MSA 14.15(16911). We disagree. In custody cases, questions of law are reviewed for clear legal error. *Fletcher, supra* at 877.

Plaintiff contends that MCL 551.339; MSA 25.123(9) precludes Schreiber's testimony. This statute states:

(1) Except as provided in subsection (2), a communication between a counselor in the family counseling service and a person who is counseled is confidential. The secrecy of the communication shall be preserved inviolate as a privileged communication which privilege cannot be waived. The communication shall not be admitted in evidence in any proceedings. The same protection shall be given to communications between spouses and counselors to whom they have been referred by the court or the court's family counseling service.

(2) A family referred by the court with custody or parenting time problems whose adult members sign an agreement indicating the purpose of the referral is exempt from subsection (1). A report of an evaluation of those families shall be submitted to the court with indicated recommendations.

Schreiber was not a member of the court's family counseling service, but was a licensed clinical psychologist in private practice. However, under the statute, the privilege against disclosure is also

given to “communications between spouses and counselors to whom they have been referred by the court or the court’s family counseling service.” MCL 551.339(1); MSA 25.123(9). In this case, because the trial court ordered that the parties attend parenting counseling, we find that the order served as a referral by the court so that the communications between the parties and Schreiber were privileged under MCL 551.339; MSA 25.123(9).

However, subsection (2) provides for an exception to the privilege. Under subsection (2) the privilege is waived when a family is "referred by the court with custody or *parenting time* problems whose adult members sign an agreement indicating the purpose of the referral." MCL 551.339(2); MSA 25.123(9)(2); emphasis added. The trial court ordered the parties to attend parenting counseling, and the parties signed an agreement to attend such counseling. Under the plain language of the statute, the communications resulting from this counseling was exempt from the privilege. We conclude that the trial court did not err in allowing Schreiber to testify.<sup>1</sup>

Plaintiff also contends that the trial court erred when it allowed Schreiber to testify because, under MCL 333.16911; MSA 14.15(16911), Schreiber provided marital counseling to the parties before their divorce, and information gathered remained privileged regardless of when the information was obtained. We disagree. MCL 333.16911(1); MSA 14.15(16911)(1) provides in relevant part:

(1) Except as provided in subsection (3), information regarding an individual to whom a licensee provided marriage and family therapy is privileged information and not subject to waiver, regardless of any of the following:

(a) Whether the information was obtained directly from the individual, from another person involved in the therapy, from a test or other evaluation mechanism, or from other sources.

(b) Whether the information was obtained before, during, or following therapy.

(c) Whether the individual involved is a present client or a former client.

A licensee is defined in MCL 333.16106(3); MSA 14.15(16106)(3), which states, in part:

“Licensee” as used in a part that regulates a specific health profession, means a person to whom a license is issued under that part and as used in this part means each licensee regulated by this article.

Schreiber testified that he is a licensed clinical psychologist, and as such he did not receive his license under part 169 of the Public Health Code which provides for the licensing of “marriage and family therapists.” See MCL 333.16909 *et seq.*; MSA 14.15(16909) *et seq.* Thus, under part 169 of the Public Health Code, communications with Schreiber would not fall within the provisions of the MCL 333.16911(1); MSA 14.15(16911)(1), because he was not a licensee as defined in MCL 333.16106(3); MSA 14.15(16106)(3). Accordingly, we conclude that this statute is not applicable to the communications with Schreiber.

Plaintiff finally argues that the trial court erred in its findings regarding the factors under the Child Custody Act. Plaintiff contends that there were two overriding errors that affected the trial court's analysis of all the statutory factors. We disagree.

Plaintiff first contends that the trial court erred when it failed to find that two psychological reports were credible. On review, we give considerable deference to the superior vantage point of the trial judge respecting issues of credibility. *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991). We cannot conclude that the trial court erred in its determination regarding this issue.

Plaintiff next contends that the trial court erred as a matter of law when it failed to interview Sara regarding her reasonable preference. In addressing factor (i), the reasonable preference of the child, MCL 722.23(i); MSA 25.312(3)(i), the trial court stated that Sara had gone "back and forth" regarding her preference with respect to custody. According to the trial court, the history of this case demonstrated that Sara was truly "caught in the middle" and would often change her mind with regard to the issue of preference so as not to displease either parent. The trial court also noted that Sara had been placed in the uncomfortable position of being forced to choose between her parents too many times, and the court was unwilling to force her to make such a decision yet again. Given the trial court's reasons for not seeking Sara's preference with respect to custody, we conclude that even if the court had ascertained Sara's preference, the court would not have given that preference any weight.

This case is distinguishable from decisions of this Court that have reversed and remanded for failure of a trial court to consider the child's preference with regard to custody. See, e.g., *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). In those cases, the trial courts, without explanation, failed to consider the reasonable preferences of the children involved in the custody disputes. The present case is more akin to *Treutle v Treutle*, 197 Mich App 690, 495 NW2d 836 (1992), where this Court affirmed a trial court's decision with respect to custody, even though the court did not ascertain and consider the preference of the child. In *Treutle*, the trial court analyzed the best interest factors as if the child had expressed a preference for living with the plaintiff, but ultimately ruled that the plaintiff had not established by clear and convincing evidence that a change in custody was warranted. Like *Treutle*, assuming that Sara had expressed a preference for living with plaintiff or defendant, the trial court would not have given the preference any weight because Sara had gone "back and forth" regarding her preference with respect to custody. Accordingly, we conclude that an expressed preference to live with plaintiff would not have been sufficient to satisfy plaintiff's burden of establishing by clear and convincing evidence that a change in custody was in Sara's best interest.

Affirmed.

/s/ Janet T. Neff  
/s/ Harold Hood  
/s/ William B. Murphy

<sup>1</sup> Under this statute, plaintiff also notes that Schreiber failed to submit a report of an evaluation of the parties to the court. While subsection (2) states that such a report shall be submitted, the validity of the

exemption is not tied to the submission of the report. The communications are exempt from privilege if the family has been referred by the court with custody or parenting problems and the adult members sign an agreement that indicates the purpose of the referral. MCL 551.339(2); MSA 25.123(9)(2). While Schreiber has failed to submit a report, this failure does not affect the exemption to the privilege as found in subsection (2).