

STATE OF MICHIGAN
COURT OF APPEALS

MYRIAH JO REICHOW,

Plaintiff-Appellant,

v

YAO WISDOM AGBOYI,

Defendant-Appellee.

UNPUBLISHED

April 19, 2005

No. 258176

Osceola Circuit Court

LC No. 03-009707-DP

Before: Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court awarding primary physical custody of the parties' minor child to defendant. We reverse and remand for further proceedings.

I

Pursuant to a consent judgment of filiation signed by plaintiff and defendant on April 28, 2003, plaintiff was awarded primary physical custody of the parties' daughter, who was born December 12, 2002. Approximately one year after the child's birth, the parties appeared at the Osceola County Friend of the Court, where they requested that the custody order be modified so that they would have joint physical custody of their daughter on a schedule of alternating weeks. However, the following day, plaintiff went back to the Friend of the Court, tried to disavow the new custody arrangement, and filed a motion to modify it. The referee who heard the motion recommended that plaintiff have primary physical custody of the child. Defendant objected to this recommendation, and a *de novo* hearing was scheduled to resolve the issue.

The circuit court analyzed the case in accord with the Child Custody Act of 1970, MCL 722.21 *et seq.* The court found that the child had no established custodial environment, and that all of the best interest factors enumerated in MCL 722.23 were equal as to the parties, except that factors (j) (how well the parties facilitated the other parent's relationship with the child) and (g) (mental and physical health of the parties) weighed in favor of defendant. Consequently, the court awarded primary physical custody to defendant.

II

Plaintiff first argues on appeal that the circuit court judge should have disqualified himself from hearing the case because he was biased against her on the basis of his interactions with her when she appeared before him as a juvenile.¹ Plaintiff did not preserve this issue for review by raising it in the circuit court. *In re Forfeiture of \$53*, 178 Mich App 480, 497; 444 NW2d 182 (1989). But plaintiff's failure to move for disqualification is not dispositive of the issue if she can establish that the judge should have raised it sua sponte. *People v Dixon*, 403 Mich 106, 109; 267 NW2d 423 (1978); *People v Gibson (On Remand)*, 90 Mich App 792, 796; 282 NW2d 483 (1979); Code of Judicial Conduct, Canon 3(C).

The procedure for disqualification of a judge is set forth in MCR 2.003. MCR 2.003(B)(1) provides that a judge may be disqualified if the judge "is personally biased or prejudiced for or against a party." Under subrule (B)(1), a party must show actual and personal prejudice to warrant disqualification. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). The party who asserts partiality has to overcome the heavy presumption that a judge is impartial. *Id.* at 497.

"Opinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg v Rochester, MI, Lodge No. 2225 of Benevolent & Protective Order of Elks of USA*, 228 Mich App 20, 39; 577 NW2d 163 (1998). A judge's comments during trial, which are critical of or hostile to the parties, also do not ordinarily support a judicial disqualification. *Id.* The source of the bias must constitute events or information gleaned outside the judicial proceeding. *Cain, supra* at 495-496. The fact that a judge has presided over unrelated proceedings involving a party is insufficient by itself to establish bias. *Impullitti v Impullitti*, 163 Mich App 507, 514; 415 NW2d 261 (1987).

In support of her claim of bias, plaintiff cites several comments by the judge that reference his earlier contact with her. The first remark by the judge of which plaintiff complains occurred at a February 9, 2004 hearing regarding defendant's motion to show cause why plaintiff had denied him visitation pursuant to the consent order of custody. Plaintiff acknowledged that she had refused to permit defendant's last two or three weeks of visitation under the order, which she claimed defendant had coerced her to sign. When the judge stated that defendant would begin his missed visitation period with the child the same day, plaintiff repeatedly expressed her intent not to give defendant custody that day because the child had an immunization appointment, and defendant did not possess the required insurance and medical records. After permitting plaintiff to make her protestations, the judge stated as follows:

The Court: You don't understand how close I am to finding you in contempt. You really don't understand that, Ms. Reichow. This is not some

¹ Neither defendant nor anyone on behalf of the child has filed a brief on appeal.

game. *You're not in Juvenile Court anymore. This involves another life and you can't play games with this other life.*

Plaintiff: I'm trying to protect another life.

The Court: You are playing games with this other life, Ms. Reichow. On one day you sign an order and on the next day you change your mind. [Emphasis added.]

Before concluding the hearing, the judge entertained plaintiff's further objections to the location at which she would have to turn over the child to defendant and her assertions that defendant owed child support, and did not again mention his prior contact with plaintiff.

The judge next referred to his prior interactions with plaintiff during a brief hearing on March 22, 2004. The court first discussed with defendant, who was from Togo, the arrangement of a translator in the appropriate dialect of French who could attend the de novo custody hearing and interpret on his behalf. Next, the judge again discussed at some length the procedure by which the parties would exchange custody of the child at the conclusion of their visitation periods. The judge suggested that the parties "just drop and pick up . . . where you live," and inquired of plaintiff where she currently resided. Plaintiff replied that since March 5, 2004, when she left the women's shelter where she had been staying, she had rented "half of a house [in Reed City] from two people out there that are like my second parents." The following colloquy then occurred:

The Court: You and I go way back, don't we?

Plaintiff: Yeah.

The Court: Way back. I—I think one of the main problems you've always had is you've been pretty much homeless; you move from spot to spot.

Plaintiff: This is a permanent residency right now.

The Court: All right. . . . [W]hy would you not want him to come pick the child up at your home?

Plaintiff replied that defendant's girlfriend had assaulted her, and the court instructed that "[w]hen you drop off and pick up, it should be just between the parents."

The court then permitted the parties to air their grievances against each other, including plaintiff's assertion that defendant owed her child support, and defendant's complaint that plaintiff was "not good [a] mother to take care for [sic] the daughter, because . . . she don't [sic] have a fix [sic] place to live," which led to the following dialogue:

Plaintiff: Your Honor, can I say something?

The Court: Yes, ma'am.

Plaintiff: I have not been moving from house to house. I went from Evert to my residential place, to a shelter because of him, and from the shelter I'm where I'm at now.

The Court: Myriah, I started with you when you were twelve, didn't I, somewhere along there?

Plaintiff: And I've come a long ways. I've grown up a lot.

The Court: Yeah. Well, it sounds familiar to me. Now when you say "domestic violence," I've got a long memory, Myriah, and to me domestic violence means hitting, means convictions. Has there been any of that?

Plaintiff: Like I say, he was never charged. The prosecutor threw it out. He did spend time in jail. . . . I got pictures. You signed the PPO order.

The Court: And . . . the prosecutor kicked it out?

Plaintiff: Yeah, but then—

The Court: All right.

Plaintiff: —I ended up getting a Personal Protection Order.

The Court: Yeah. Well, Myriah, I'm just not buying it. All right? And part of . . . what you're . . . up against, Myriah, is that I'm the Judge that had you as a little girl. And I remember what you were like in the foster care homes that we had you in. Remember that?

Plaintiff: Yeah, a lot of times I was in—

* * *

—foster care because of my—you know, my life.

* * *

I didn't have a Dad. I want her to have her Dad, my daughter, you know, but I'm an awesome mother. I'm not perfect, but I'm a good Mom, and I've been giving him his visitations.

The Court: You had a lousy life, Myriah—

Plaintiff: I know, and that's—

The Court: —but I—

Plaintiff: —why I'm trying to change—

The Court: —I want you to understand—

Plaintiff: —for my kids.

The Court: —something: That I have a long memory, and I remember how you went from spot to spot to spot, and I remember having nice long talks with you about how you were going to end up pregnant and there wasn't going to be any Daddy around. Now—how many children do you have now?

Plaintiff: Two.

The Court: And one on the way?

Plaintiff: (Nodding).

The Court: And . . . who's the father of this one?

Plaintiff: I don't want to say.

The Court: Well, you don't have to; you don't have to, Myriah. I'm not saying you're a bad Mom.

* * *

. . . I'm just saying it's time to settle down.

The hearing concluded after further discussion regarding the exchange of the child, the arrangement of a translator for defendant, and defendant's support obligation.

The record does not substantiate that the judge had an actual and personal bias against plaintiff. Viewed in context, the above-quoted remarks by the judge do not reflect a predisposition to disbelieve plaintiff, or to possess any other bias against her. The comment during the February 9, 2004 hearing expressed the judge's impatience with plaintiff's ongoing objections to his visitation decision, and his emphasis that plaintiff should act in the best interests of the child. During the March 22, 2004 hearing, the judge's references to past contacts with plaintiff simply helped him emphasize his (1) observation that plaintiff had lacked a stable home since her juvenile days, which plaintiff essentially admitted by acknowledging at least four different residences during the instant child's lifetime, (2) disbelief of plaintiff's allegation that defendant assaulted her, which allegation the judge discounted after plaintiff conceded that the prosecutor never filed charges against defendant, and (3) advice to plaintiff that she should focus on settling down and caring for her children. Furthermore, the judge did not reference his prior contacts with plaintiff at any point either during the subsequent hearings on July 16, 2004 and August 30, 2004, or in explaining his custody ruling. In light of the mere fact that the judge had presided over unrelated juvenile proceedings involving plaintiff, and the absence of any further showing by plaintiff to overcome the heavy presumption that the judge conducted the proceedings and rendered the custody ruling in an impartial manner, we conclude that no basis exists for judicial disqualification under MCR 2.003(B)(1). *Impullitti, supra* at 514.

III

Plaintiff next challenges the circuit court's finding that at the time of the de novo custody hearing, the child did not have an established custodial environment with her. "Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests." *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). In the context of a child custody dispute, we review the trial court's factual findings to determine whether they are against the great weight of the evidence. MCL 722.28.

An established custodial environment exists "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). In this case, the circuit court addressed the child's established custodial environment by repeatedly and exclusively referring to the multiple residence changes by plaintiff and the child, without considering to whom the child looked for care, the child's age, or the inclination of the child and plaintiff as to the permanency of their relationship.²

Because the court entirely failed to make findings concerning multiple statutorily required elements defining an established custodial environment,³ we remand for the court to engage in the appropriate analysis and make the appropriate findings regarding an established custodial environment, before proceeding to consider the child's best interests. *Foskett v Foskett*, 247 Mich App 1, 12; 634 NW2d 363 (2001); *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000).

² While the court initially and correctly observed that "established custodial environment doesn't simply mean that a child is living with one person or another," the court went on to catalogue plaintiff's various moves with the child before offering the following conclusion solely on the basis of the relocations:

Frankly, it appears that this child has had a lot of moves in her young life. She has been virtually all over the map. She has been taken from spot to spot. I cannot, in good conscience as a finding of law, say that there's been . . . a suitable established custodial environment. Then that makes the burden of proof, fifty-fifty, equal.

³ The outcome of the established custodial environment determination affects the burden of proof applicable to the court's analysis of the child's best interests, the evidence concerning which did not strongly favor one party over the other. MCL 722.27(1)(c). Because the case must be remanded for reconsideration of the child's established custodial environment, we need not address plaintiff's challenges to the circuit court's findings regarding the child's best interests.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Michael J. Talbot