

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

---

DANIEL R. MERCER,

Plaintiff-Appellee,

v

TAMMY M. MERCER,

Defendant-Appellant.

---

UNPUBLISHED

February 2, 2001

No. 225403

Genesee Circuit Court

Family Division

LC No. 98-205311 DM

Before: Saad, P.J., and White and Hoekstra, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree with the majority that defendant did not preserve the judicial bias issue and has not shown that she is entitled to relief on this issue. I also agree that defendant did not waive or stipulate to forfeit alimony.

I respectfully dissent from the majority's determination that an established custodial environment was established with plaintiff alone, that the trial court's factual findings on the best interests factors were not against the great weight of the evidence, and that plaintiff was properly awarded sole legal custody.

I

The parties' children, Katelyn and Russell, were born on June 15, 1993 and August 4, 1996, respectively. At the time trial ended in August 1999, Katelyn was six and Russell was three years old. Defendant had been a full-time mother and the children's primary caretaker from their births until mid-1998, while plaintiff worked and was in school. That is, defendant was Katelyn's primary caretaker from birth until she was nearly five years old, and Russell's from birth until he was eighteen months old. The court-appointed psychologist, Dr. Sommerschild, noted the importance of this bond in his written recommendations to the court regarding custody and parenting time.<sup>1</sup> Notwithstanding that for the several months surrounding plaintiff's leaving

---

<sup>1</sup> The parties stipulated to the admission of Dr. Sommerschild's recommendation regarding custody and parenting time, dated October 28, 1998, and to admission of his psychological evaluations of the parties.

the marital home in July 1998 defendant suffered serious depression and that her ability to fully care for the children was temporarily compromised, Dr. Sommerschild recommended that the parties have joint legal custody, and recommended that “both parents consider joint physical custody.” Dr. Sommerschild’s report stated that by the time he conducted the psychological evaluations of the parties (in September or October 1998), defendant “had stabilized and is again focused on loving and raising the children.”<sup>2</sup>

Importantly, defendant cared for the children during the 1999 summer school recess from 7:00 a.m. to 6:00 p.m. every weekday, and had the children overnight six out of every fourteen nights, pursuant to the parties’ stipulation.<sup>3</sup> The point is that defendant once again was the children’s primary caretaker in July and August of 1999.

Dr. Sommerschild’s October 1998 report to the court recommended that if physical custody be granted to one parent alone, it should be to defendant, with plaintiff having as much parenting time as possible. However, when he testified at trial in July 1999, he opined that given the passage of time during which the children had their primary residence with plaintiff, he recommended joint physical custody.

#### A

The trial court’s ruling from the bench stated regarding custodial environment:

Now, was there in fact an established custodial environment? I am satisfied – and I indicated that I would likely do this, and I am satisfied from the period of time that those two children have been with father, sure, there have been some concerns, but I am satisfied they have been provided for. There has been clothing and food and they appear to be doing well down there. That’s no reflection on Mrs. Mercer, as I repeat for the hundredth time here, but there is an established custodial environment.

With that being said, there has to be clear and convincing evidence for this Court to change its mind and to award those children to Mrs. Mercer.

The question whether a custodial environment exists is preliminary<sup>4</sup> and essential, and is entirely a question of fact. *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995), aff’d as modified 451 Mich 457; 547 NW2d 686 (1996). The great weight of the evidence standard applies to the trial court’s findings regarding each best interests factor, and to its

---

<sup>2</sup> Dr. Sommerschild’s report stated that “[a]t this time, Tammy Mercer is not depressed clinically, although she has reactive depression associated with the loss of physical custody.”

<sup>3</sup> In June 1999, defendant filed a motion requesting that she, rather than a daycare provider, be allowed to care for the children daily throughout the summer and until school started, and in early July 1999 the parties so stipulated.

<sup>4</sup> The trial court stated its findings on the best interests factors before addressing the custodial environment question.

findings of ordinary or evidentiary facts. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). A trial court's findings of fact should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.*

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); MSA 25.312(7)(1)(c).]

A temporary custody order alone does not create an established custodial environment. *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993). That the children's primary residence was with plaintiff from July 1998 to July 1999 did not, standing alone, establish a custodial environment. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000). Whether there is an established custodial environment depends on a custodial relationship of a significant duration in which the children were "provided the parental care, discipline, love, guidance and attention appropriate to [their] age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child[ren] is marked by qualities of security, stability and permanence." *Bowers, supra* at 325, quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

There is no dispute that plaintiff provided for the children financially, but plaintiff presented little, if any, evidence that the children had over an appreciable time looked to him alone for guidance, discipline, and parental comfort. See *Bowers, supra* at 326. Plaintiff alone testified regarding his relationship with his children, and on that topic there was scant testimony. Plaintiff testified that when he moved to Clarkston he stayed at his sister's house for a while, then moved in with his aunt and uncle for about three weeks, and that around November 20, 1998, he got an apartment. Plaintiff testified that Katelyn did very well in the half-day kindergarten program she had attended in the Clarkston schools during the 1998-1999 school year, that she would be in a full-day first grade at the same school the following school year, and that during the school year Russell had been at daycare with persons plaintiff had known for over twenty years and trusted to care for Russell. He testified that Russell would go to that daycare during the next school year. He testified that both children are healthy and have a pediatrician in Clarkston, and that Russell was developing and verbalizing, and not fully toilet trained. Plaintiff testified that he alone had provided all of the children's material needs since they had moved to Clarkston, that he cooks, reads to the children and helps Katelyn with her school projects.

Plaintiff presented no testimony regarding the children's disposition toward him or the strength of the bond between him and the children. Plaintiff called only two witnesses, one of them a police officer involved in one of the parties' incidents, and one a neighbor living near the marital home. Neither testified regarding plaintiff's relationship with his children during the time plaintiff alleges a custodial environment was established with him.

Dr. Sommerschild apparently did not meet with or evaluate either of the children. He testified that given Russell's young age it was very important for him to have as much parenting time with defendant as possible, that seeing defendant every other weekend "was really very

difficult for a two-year-old child,” and that it was also very important that the children have as much contact as possible with their half-siblings, defendant’s three children by her first marriage. Dr. Sommerschild’s report stated that since July 1998 plaintiff had “provided a stable and structured environment for the children.”

Several witnesses testified that before and during these proceedings defendant was a loving and concerned mother, had a very strong bond with the children, and engaged in activities with her children. There was testimony that defendant provided discipline and guidance to the children, including having Katelyn and her three children by her first marriage contribute to the upkeep of the home by doing chores. Despite the geographical distance between the parties’ homes, defendant was involved with Katelyn’s schooling in Clarkston. Several witness testified regarding the children’s reluctance to leave their mother when her visitation time ended and to plaintiff’s controlling personality. There was testimony that Katelyn would do things like hide under the bed in order to delay leaving defendant, would hide her clothes and shoes, and that both children cried at having to leave their mother. Dr. Sommerschild testified at trial that he believed defendant had a stronger bond with the children than plaintiff given her involvement in their early lives,<sup>5</sup> and that the children having had their primary residence with plaintiff for a year did not destroy the bond with defendant. Defendant remained in the marital home throughout the proceedings below, with her three children from a previous marriage.

Although this was a ten-day trial, much of it was taken up with testimony regarding specific incidents between the parties that occurred during the months surrounding the breakdown of the marriage and plaintiff’s leaving the marital home with the children in July 1998. Given the absence of testimony that the children looked to plaintiff alone for parental comfort and for their psychological needs; that plaintiff moved three times with the children between July 1998 and November 1998; and the uncertainty created by the instant trial, which began in February 1999 and concluded in August 1999, with the children spending the majority of the time with defendant in July and August 1999; I conclude that there was insufficient evidence to support a finding of an established custodial environment with plaintiff alone, and that defendant’s burden of proof should have been by a preponderance of the evidence. *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991).

B

---

<sup>5</sup> Dr. Sommerschild stated:

The mother and father had a stable environment until Feb. of 1998. During this time the mother was more involved in the stability and activities of the children. Since July [of 1998], the father has provided a stable and structured environment for the children.

Dr. Sommerschild also observed:

I believe that the mother was more involved in the everyday care of the children and hence would have a stronger bond [with the children].

As to the best interests factors, Dr. Sommerschild, whom plaintiff characterizes in his appellate brief as one of only two impartial witnesses at trial,<sup>6</sup> testified that he considered the parties equal on all but one factor, with defendant being stronger on factor (l) on the basis of the children's bond with their three half-siblings, and Russell's young age.

The trial court found that seven factors, including factor (l), favored neither party, that five factors favored plaintiff, some of them only slightly, and none favored defendant. I conclude that the trial court's findings that factor (c) (capacity and disposition to provide food, clothing, medical care and other material needs) favored plaintiff given his career and financial status was not against the great weight of the evidence, and that the trial court's finding that factor (g) (mental and physical health of the parties) favored plaintiff slightly, was not against the great weight of the evidence. However, I conclude that the trial court's findings that plaintiff was favored under factors (d) (length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity); (e) (permanence, as a family unit, of existing or proposed custodial home or homes); and (h) (home, school and community record of the child), are not adequately supported. On this record, given plaintiff's moves, factors (d) and (e) favored neither party, and factor (h) favored defendant.<sup>7</sup> Additionally, consistent with Dr. Sommerschild's testimony, the record shows that factor (l) favored defendant. In sum, seven factors favored neither party: (a), (b), (d), (e), (f), (i), (j), and (k); factors (h) and (l) favored defendant; and factors (c) and (g) favored plaintiff. Thus, the case was far more closely drawn than reflected in the court's decision. Under these circumstances, I would remand for reconsideration of the physical custody issue under the preponderance standard. *Ireland, supra*, 451 Mich at 468-469.

## II

Even assuming no error in the court's disposition of the physical custody issue, I would nonetheless conclude that the trial court's dispositional ruling awarding plaintiff sole legal custody was an abuse of discretion. *Fletcher, supra* at 880.

In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. . . . The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) The factors enumerated in section 3 [best interests factors].

---

<sup>6</sup> The other totally impartial witness according to plaintiff was Sgt. Tocarchick, who was involved in investigating an incident the result of which was defendant pleading to a misdemeanor, giving false information to police.

<sup>7</sup> There was testimony that defendant was involved in Katelyn's school in Clarkston, that defendant took Katelyn around to neighbors of plaintiff's whom Katelyn had not met and introduced her, and that defendant alone attended Katelyn's school functions before plaintiff left the marital home.

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

\* \* \*

Defendant requested joint custody. The trial court stated regarding physical and legal custody:

. . . . I have already stated my findings on the record as it relates to each factor. But I will simply indicate (A), the Court did make a finding and is making a finding there is an established custodial environment, and (B), there is simply not clear and convincing evidence to convince this Court that the physical custody of Katelyn and Russell should be returned to mother.

Therefore, the Court will award the physical custody of the two children to Mr. Mercer. And I will do this. Mrs. Katz [plaintiff's counsel] drafted a proposed judgment. I think the judgment should reflect that school records, medical records, those types of things, should in fact be provided mother. And I don't have any trouble, and I want you to fully understand this, Mrs. Mercer, if we get down to the joint legal custody, which means that you two have to have some input together in terms of major decisions affecting the minor children—the well-being of the minor children, I am going to put a control date on this down the road to allow you two to counsel with each other. Okay? And I don't need anybody to write back and tell me that somebody is being unreasonable. If I am at least getting a report back, that does not need to go into detail, that these parties appear to be communicating better and they seem to be on the same page, there is a better line of communication, I don't have any trouble reviewing that and giving serious consideration to granting that request in three or four months, or whenever I set a control date.

MRS. MERCER [in propria persona]: Are you saying at this point that I am not going to have joint legal custody?

THE COURT: I am indicating that the information that I feel any parent should provide the other will be provided in the judgment. The request for joint legal custody will not be awarded at this time, it will be taken under advisement. Counseling will be ordered for the parties. I will set a control date for about three or four months down the road, and I will give serious consideration to granting it at that time.

MRS. MERCER: Okay, Your Honor, this is the other question. Are you saying that Dan has sole legal custody at this point?

THE COURT: Correct.

The trial court did not state sufficient reasons to deny joint legal custody, even provisionally. At the very least, the record supports that defendant should share legal custody with plaintiff, i.e.,

share decision making authority as to the important decisions affecting the welfare of the children.<sup>8</sup> MCL 722.26a(7)(b); MSA 25.312(6a). I would reverse the trial court's denial of immediate joint legal custody.

/s/ Helene N. White

---

<sup>8</sup> Defendant's appellate brief acknowledges that the trial court stated on the record that it would take the matter of joint legal custody under advisement for a few months. At oral argument before this court in December 2000, defendant's counsel stated that that question remained unresolved. Neither party addresses whether the parties were ordered to attend counseling and, if so, whether they did so.