

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL THOMAS MAPES,
Plaintiff-Appellee,

UNPUBLISHED
March 21, 2006

v

KIMBERLY DAWN EATON, a/k/a KIMBERLY
DAWN GRUELL,

No. 266144
Calhoun Circuit Court
LC No. 93-003569-DC

Defendant-Appellant.

Before: Smolenski, P.J., Whitbeck, C.J., and O’Connell, J.

PER CURIAM.

Defendant Kimberly Eaton appeals as of right from the trial court’s order adopting the referee’s findings regarding the best interest factors and the conclusion that it was in the best interest of the child to grant plaintiff Michael Mapes sole physical and legal custody. We vacate the trial court’s order and remand for further proceedings consistent with this opinion.

I. Established Custodial Environment

A. Standard Of Review

Eaton argues that the trial court erred in finding that no established custodial environment existed with her. Whether an established custodial environment exists is a question of fact.¹ The great weight of the evidence standard applies to all findings of fact, and a trial court’s findings regarding the existence of an established custodial environment should be affirmed unless the evidence clearly preponderates in the opposite direction.²

B. The Existence Of An Established Custodial Environment

An established custodial environment exists if:

¹ *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

² *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

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.^[3]

An established custodial environment

depend[s] . . . upon a custodial relationship of a significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his [or her] age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence.^[4]

C. The Trial Court's Decision

The trial court adopted the recommendation and opinion of the referee that custody be granted to Mapes based on its review of the record of the referee hearing. Due to an equipment malfunction, the testimony of Eaton's parents' during that hearing could not be transcribed; thus, the trial court relied on the referee's summary of this testimony in adopting the referee's findings. [Whether this was permissible is discussed later in this opinion. For purposes of the instant issue, we consider Eaton's parents' testimony as summarized by the referee.] At the referee hearing, various witnesses, including Mapes, his wife, the Friend of the Court investigator, and the child's therapist, testified that the child has always lived with her maternal grandparents; however, Eaton has not always resided with the child in that home. Eaton testified to the contrary, as did her parents, according to the referee's summary. Further, there was testimony from various witnesses that the maternal grandmother provided the majority of the child's care, attended the child's school conferences, and signed the child up for extra curricular activities. Eaton did not dispute that her mother provided a substantial amount of care; however, she testified that she is also actively involved in caring for the child. Eaton testified that she has been married twice, but neither marriage was with the child's father. Further, she testified that she only lived with her husbands for a short time.

We must give deference to a trial court's determination of credibility.⁵ After reviewing the referee hearing transcripts, along with the referee's summary of the testimony of Eaton's parents at that hearing, we are satisfied that the trial court's factual findings were not against the great weight of the evidence. The testimony established that Eaton has not been an active participant in the child's life and that any permanence and stability that exists for the child is attributable to the grandparents. Therefore, we are satisfied that a finding that no established custodial environment existed with Eaton was not an abuse of discretion.

³ MCL 722.27(1)(c).

⁴ *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

⁵ *Henry v Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999).

II. Best Interest Factors

A. Standard Of Review

Eaton argues that the trial court erred in finding in favor of Mapes or in favor of neither party on various best interest factors and in ultimately concluding that it was in the child's best interest to change physical and legal custody to Mapes. All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the trial court committed a palpable abuse of discretion, or the trial court made a clear legal error on a major issue.⁶ The great weight of the evidence standard applies to all findings of fact, including the findings as to each custody factor, and should be affirmed unless the evidence clearly preponderates in the opposite direction.⁷ To whom custody should be granted is a discretionary ruling that we review for an abuse of discretion.⁸ 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.⁹ Because there was no established custodial environment, the trial court could modify the previous custody award if the preponderance of the evidence showed that it was in the child's best interest.¹⁰

B. Applying The Best Interest Factors

(1) Factor (b)

The best interest factors are set forth in MCL 722.23. Eaton argues that a finding in favor of Mapes in regard to factor (b) (the capacity and disposition of the parties to give the child love, affection, and guidance) was against the great weight of the evidence. However, there was testimony that Mapes attended the child's school conferences, class parties, and chaperoned school outings. Further, there was testimony that Mapes coached the child's sports teams, and helped her with her homework when she was at his house. On the other hand, Eaton testified that she attended conferences only the previous year and attended only a handful of the child's sporting events because she had to care for her other children. Eaton also testified that the amount of time she spent helping the child with her homework was dependant on her other obligations. As stated previously, various witnesses testified that Eaton's mother was providing for the child on a regular basis and that Eaton did not always reside with the child. Thus, we conclude that a finding that Mapes had a greater capacity to provide the child with love and affection was not against the great weight of the evidence.

⁶ MCL 722.28.

⁷ *Fletcher v Fletcher*, 447 Mich 871, 876-878; 526 NW2d 889 (1994).

⁸ *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003).

⁹ *Fletcher*, *supra* at 879-880.

¹⁰ *Stringer v Vincent*, 161 Mich App 429, 435; 411 NW2d 474 (1987).

(2) Factor (d)

Eaton disputes the trial court's findings regarding factor (d) (the length of time the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity) and asserts that she should be favored because the evidence established that she and the child have lived with her parents for the majority of the child's life. However, as stated previously, there was evidence that although the child may have always resided with her maternal grandparents, Eaton has not; that at times, the child resided with her grandparents while Eaton resided elsewhere. Additionally, Eaton testified that she plans to move the child into a new home with her current husband of two years, with whom the child has never lived. In contrast, there was testimony that Mapes has been living in the same house for eight years with his wife and stepdaughter of four years and that the child has visited them regularly. Therefore, a finding in favor of Mapes was not against the great weight of the evidence.

(3) Factor (e)

The trial court favored Mapes regarding factor (e) (the permanence of the family unit) because there was no evidence that there would be any change in Mapes's home, whereas Eaton had yet to live with her husband and planned to move in with him shortly. Eaton asserts that Mapes should not have been favored because she has been married for two years and the child has been in a stable environment with "the parents" and siblings for a number of years. However, as stated previously, there was evidence that Eaton has not always lived with the child at the home of Eaton's parents; Eaton admitted that she lived elsewhere for short periods of time. Therefore, a finding for Mapes was not against the great weight of the evidence.

(4) Factor (k)

Eaton argues that a finding for Mapes in regard to factor (k) (domestic violence) was against the great weight of the evidence because the incidents of domestic violence involving her were in the past. However, there was no testimony that Mapes had any incidents of domestic violence, whereas Eaton had at least one incident with her current husband and at least one incident with her previous husband. Therefore, it was not against the great weight of the evidence for the trial court to favor Mapes in this regard.

(5) Factor (c)

Eaton takes issue with the trial court's lack of specific findings regarding factor (c) (the ability of the parties to provide the child with food, clothing and medical care) because there was evidence that Mapes is in arrears for child support for more than \$13,000. Eaton argues that factor (c) should have weighed in her favor. Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor.¹¹ However, in child custody cases a court is not required to "comment upon every matter in evidence or declare acceptance or

¹¹ *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001).

rejection of every position argued.”¹² In the present case, it is clear from the trial court’s opinion that it was aware of the issue of unpaid support and considered whether the parties were financially capable of providing for the child and likely made no comment on the matter because it would have weighed the parties equally.

Additionally, even if we concluded that factor (c) weighed in favor of Eaton, the outcome of the dispute would not change. In making its final decision regarding custody the trial court focused on the lack of stability in Eaton’s home, on her anticipated move with the child to a new home with a step-father who has never lived with the child, and on Mapes’ more active participation in the child’s life. The trial court determined that Eaton is not offering the child a stable environment and is not actively involved in the child’s life, even if she was providing the child with her basic needs. Therefore, the trial court did not abuse its discretion when it determined that it was in the child’s best interest for Mapes to have physical custody.

(6) Sole Legal Custody

The trial court also concluded that Mapes should have sole legal custody. Both Eaton and Mapes testified that they do not communicate. Therefore, a determination that it was in the child’s best interest for Mapes to have sole legal custody was not an abuse of discretion.

III. De Novo Hearing

A. Standard Of Review

Eaton argues that she was not given an appropriate de novo hearing following her objection to the referee’s proposed order. Whether the trial court conducted a proper de novo review following Eaton’s objection to the referee’s opinion and recommendation presents a question of law that we review de novo.¹³

B. The Trial Court’s Decision

Eaton timely objected to the referee’s recommendation and opinion, asserting that the referee’s findings and conclusions were against the great weight of the evidence. At the hearing on Eaton’s objections, the trial court asked her to provide it with a transcript of the referee hearing. As previously noted, due to a malfunction in the recording system, the testimony of the maternal grandparents was not available for transcription. Eaton amended her objections and added a specific objection to the incomplete hearing transcript. After reviewing the available evidence and the referee’s summary of the maternal grandparents’ testimony, the trial court adopted the referee’s findings. The trial court did not afford either party the opportunity to present evidence or testimony at a judicial hearing before issuing its order adopting the referee’s opinion.

¹² *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981).

¹³ *Cochrane v Brown*, 234 Mich App 129, 131; 592 NW2d 123 (1999).

C. MCR 3.215(F)(2)

MCR 3.215(F)(2) provides:

To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court *must* allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:

(a) prohibit a party from presenting evidence on findings of fact to which no objections was filed;

(b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;

(c) Prohibit a party from introducing new evidence or calling new witness unless there is an adequate showing that the evidence was not available at the referee hearing;

(d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court. [Emphasis added.]

MCR 3.215(F)(2) unequivocally requires that the trial court allow the parties to present live testimony at the judicial hearing. Within that context, MCR 3.215(F)(2) does provide the trial court with the discretion to limit that testimony in certain respects, including to impose "any other reasonable restrictions and conditions" to conserve resources. However, that discretion is limited by MCL 552.507(5), which provides that:

A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following conditions are met:

(a) The parties have been given a full opportunity to present *and preserve* important evidence at the referee hearing.

(b) For findings of fact to which the parties have objected, the parties are afforded *a new opportunity to offer the same evidence to the court as was presented to the referee* and to supplement that evidence with evidence that could not have been presented to the referee. [Emphasis added.]

Thus, a trial court may not simply refuse to hear testimony and instead resolve a party's objections to a referee's recommendation solely on the record of the referee hearing. Rather, a trial court must afford the parties the opportunity to present evidence at a judicial hearing. The trial court did not do that here. Further, given the malfunction of the recording equipment at the referee hearing, it cannot be said that Eaton had a "full opportunity to present and preserve

important evidence at the referee hearing.”¹⁴ Thus, neither condition that MCL 55.507(5) imposes was met so as to allow the trial court to resolve Eaton’s objections on the basis of the record of the referee hearing.

Mapes argues that Eaton received a satisfactory de novo hearing because MCL 552.507(6) provides that a de novo hearing includes “[a] new decision based entirely on the record of a previous hearing.” However, this provision is expressly subject to the limitations set forth in MCL 552.507(5). Therefore, “a new decision based entirely on the record” of the referee hearing constitutes a de novo hearing *only if* the parties have had a full opportunity to present and preserve evidence at the referee hearing and the parties are afforded a new opportunity to present the same evidence to the court as was presented to the referee for any finding of fact to which the parties have objected. As just noted, neither of these conditions was met here. Thus, the trial court failed to afford Eaton a proper de novo review under MCR 3.215(F) and MCL 552.507.

For the foregoing reasons, we vacate the trial court’s order adopting the referee’s recommendation and opinion and remand to the trial court for a proper de novo hearing. On remand, the trial court must afford defendant the opportunity to present the testimony of her parents in accordance with MCR 3.215(F)(2) and MCL 552.507. [Eaton raised other objections to the referee’s recommendation and opinion below. On appeal, however, she has limited her complaint to the denial of an opportunity to present the testimony of her parents to the court.] Because Eaton asserts that the her parents’ testimony was essential to determination of whether there was an established custodial environment, on remand the trial court shall determine whether that testimony changes its conclusion that no established custodial environment exists with either parent. If the trial court’s conclusion on this issue remains unchanged, the trial court’s original ruling granting custody to Mapes must stand. If, however, the trial court concludes that there is an established custodial environment with Eaton, the trial court must then review the best interest factors under the more stringent standard of clear and convincing evidence as set forth in MCL 722.27

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Peter D. O’Connell

¹⁴ MCL 552.507(5)(a).