STATE OF MICHIGAN

COURT OF APPEALS

JOHN WESLEY MEADOWS, Plaintiff-Appellee,	UNPUBLISHED September 30, 2010
v	No. 296056 Antrim Circuit Court Family Division
SANDRA KAY MEADOWS/HENDERSON, Defendant-Appellant.	LC No. 03-002805-DM

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff sole legal and physical custody of the parties' two minor children. We affirm.

Plaintiff originally filed his request for change of custody alleging a change in circumstances on December 6, 2006. However, it was not until October 28, 29, and November 13, 2008 that a hearing on the motion was held before the referee. Although defendant was represented by counsel the first two days of the hearing, she fired her attorney just before the final hearing day.[1] At the November 13, 2008 hearing, defendant requested an "indefinite suspension" of the hearing based on her lack of counsel, which the referee denied. Defendant then indicated that she would not present any witnesses "at this hearing," but would present them "at a different hearing." At the close of plaintiff's proofs, the referee again questioned defendant as to whether she would be presenting any evidence, and she indicated, "not until I have an attorney." After the referee consulted with the children, defendant then requested that her son Dustyn be permitted to testify, which the referee permitted.

After Dustyn testified, defendant wanted to call another witness. Because this witness was not on the witness list, plaintiff's counsel objected. Defendant indicated the witness was not on the witness list because "this was kind of an emergency type thing." When asked what the

[1] Throughout the course of the divorce and custody proceedings, defendant had at least five attorneys. The record reveals that defendant often fired her counsel when things appeared to not be going her way in an effort to gain a strategic advantage.

emergency was, defendant responded, "Because I didn't know I . . . wasn't going to get an adjournment to get an attorney to be able to represent me." The referee sustained the objection to the witness, in part because defendant had previously represented that she was not going to be calling any witnesses.

Also at the November 13 hearing, the guardian ad litem moved that the children be placed with plaintiff on an emergency basis while the referee took plaintiff's motion under advisement. After hearing testimony on the matter, the referee recommended the request be granted, and the trial court signed the recommendation and order on November 14, 2008.

On November 18, 2008, the referee entered an order concluding that a change in circumstances had occurred, evaluating the best interests factors, and recommending that plaintiff be awarded sole legal and physical custody of the children. The order also recommended that defendant have parenting time on alternate Sundays from 1:00 p.m. to 4:00 p.m. and alternate holidays. The trial court signed the order on November 20, 2008.

On December 9, 2008, defendant objected to the referee's November 13 interim recommendation and order and November 18 recommendation and order. On April 27, 28, 29 and May 11, 2009, the trial court held a de novo hearing on plaintiff's motion, at which time both parties represented themselves; only the children were represented by counsel. During the hearing, the trial court allowed defendant to present six witnesses that were not presented at the referee hearing, although it indicated its displeasure at having been "sandbagged." On December 29, 2009, the trial court issued its opinion and order adopting and affirming the referee's recommendation and orders "in their entirety." Defendant now appeals.

Defendant first argues that the trial judge erred in failing to recuse himself when it was clear that the judge was biased against her. Defendant failed to preserve this issue for appellate review because she did not object to the trial court's conduct or move below to disqualify the court. *People v Mixon*, 170 Mich App 508, 514; 429 NW2d 197 (1988), rev'd in part on other grounds 433 Mich 852 (1989). Accordingly, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 597 NW2d 130 (1999).

Viewed in context, the remarks cited by defendant do not reflect any predisposition or any bias on the part of the trial judge. The judge was clearly critical of defendant's failure to follow proper procedure and call witnesses at the referee hearing that she proposed to call at the de novo hearing. However, he still allowed defendant to call these witnesses. While the judge did express concern with defendant's unwillingness to compromise, the judge was not focused solely on defendant. His comments about being disappointed and upset were directed at both parties, as they both created problems by being unfamiliar with the rules of evidence and attempted to testify by the nature of the "questions" they were asking the witnesses. Other comments cited by defendant as evidence of bias were also addressed to both parties. The judge's comments were an expression of frustration with the way proceedings were progressing and are insufficient to support a finding that the he had an actual and personal bias against defendant. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Thus, the trial judge did not commit plain error in failing to sua sponte recuse himself.

Defendant next argues that the trial court made findings of fact that were against the great weight of the evidence. MCL 722.28. A finding is against the great weight of the evidence

when the evidence of record "clearly preponderates in the opposite direction." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

Much of defendant's great weight argument focuses on the testimony of two witnesses who testified largely in her favor and concludes that "[t]he court's cursory analysis of three days of trial overlooked significant contradictions and inconsistencies." That conflicting evidence exists in the record, however, is not sufficient grounds for concluding that the decision is against the great weight of the evidence. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Having reviewed the record, we do not find that the evidence clearly preponderates in the opposite direction. *Berger*, 277 Mich App at 705.

Defendant does specifically challenge the trial court's finding that the testimony established that defendant had made twenty or more unsubstantiated complaints about plaintiff to Child Protective Services. Defendant asserts that this finding is against the great weight of the evidence because some of the complaints were made by other people. Defendant admitted at the de novo hearing that 23 or 24 complaints were made,[2] and additional testimony indicated that one of the minor children had made statements on two occasions which resulted in teachers or counselors making the complaint to Child Protective Services. Based on this evidence, the trial court's finding is not against the great weight of the evidence.

Defendant also takes issue with the trial court's finding that psychologist John D. Ulrich, Ph.D., testified that he concluded that defendant had engaged in a pattern of parental alienation. Although defendant is correct that Ulrich did not testify at the de novo hearing, he did testify at the referee hearing that defendant's actions could constitute parental alienation.[3] This finding is also not against the great weight of the evidence.

Finally, defendant argues that the trial court erred in finding that no established custodial environment existed with her. The existence of an established custodial environment is a question of fact that a trial court must address before determining whether a change in a previous custody order is in a child's best interest. *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW2d 77 (2009). If modifying a custody award changes the established custodial environment, then the moving party must show by clear and convincing evidence that a change in the custodial environment is in the best interest of the child. MCL 722.27(1)(c); *Pierron v Pierron*, 282 Mich App 222, 244-245; 765 NW2d 345 (2009). However, if modifying a custody order will not change the established custodial environment, the moving party must show by a preponderance of the evidence that a change serves the child's best interests. MCL 722.27(1)(c); *Pierron*, 282 Mich App at 245.

MCL 722.27(1)(c) provides in part as follows:

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[2] The trial court stated, "my point is that there were twenty-three or twenty-four unsubstantiated allegations of neglect, unsubstantiated, right?" to which defendant replied, "I know."

[3] Ulrich described parental alienation as "[t]he process of one parent trying to undermine and destroy to varying degrees the relationship that the child has with the other parent."

> 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. . . .

An established custodial environment exists where a parent provides the care, discipline, love, guidance, and attention the particular child requires, thereby creating a permanent, secure tangible and intangible environment for the child. *Berger*, 277 Mich App at 706.

After reviewing the record, we conclude that the court's finding that no established custodial environment existed with defendant was not against the great weight of the evidence. MCL 722.28. Although the children resided primarily with defendant until November of 2008, it is clear that the established custodial environment broke down during the period preceding the trial court's decision to grant plaintiff sole legal and physical custody of the children. During this period, defendant refused to participate in court ordered counseling with Ulrich and, according to a social worker assigned to counsel the children, exposed the children to emotional neglect and abuse. Because defendant behaved in a manner that was self-serving and detrimental to the parent-child relationship, she was unable to provide the children with appropriate guidance or create an emotionally secure environment for the children. Thus, the trial court did not err in finding that no established custodial environment existed with defendant.

Affirmed.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro