STATE OF MICHIGAN

COURT OF APPEALS

SONYA FOSKETT a/k/a SONYA DECOE, Plaintiff-Appellant,	FOR PUBLICATION July 24, 2001 9:00 a.m.
v	No. 230222 Tuscola Circuit Court Family Division
LOUIS FOSKETT, Defendant-Appellee.	LC No. 95-013848-DM

Before: Hood, P.J., and Doctoroff and K.F. Kelly, JJ.

K.F. Kelly, J.

Plaintiff appeals as of right from an order changing physical custody of the parties' minor children to defendant. We reverse and remand.

I. Basic Facts and Procedural History

The parties were divorced in 1996. The judgment of divorce granted joint legal custody of the three minor children to both parties, with plaintiff retaining physical custody. Pursuant to the judgment, defendant had parenting time from Tuesday evening until Thursday evening each week, as well as certain time periods in the summer. This parenting time schedule was orally modified to accommodate changes in the parties' schedule. Although the dates and times of the parenting schedule changed by mutual agreement of the parties, the amount of time defendant spent with the children remained essentially unaffected. A review of the record indicates that despite their personal differences, these parties were able to work together for the greater good of their children. Both parents are actively involved with the children's schooling, extracurricular activities and meeting their material and medical needs. Until the instant litigation, both parties cooperated together, actively facilitating and encouraging a close and continuing relationship between the children and the other parent.[1]

On April 4, 2000, plaintiff filed a petition with the Family Division seeking: (1) to reduce the oral parenting time agreement to an order; (2) a review of the child support obligation

[1] In fact, the trial court referred to the parents as "models of conduct" in this regard.

of defendant; and (3) to clarify which party could claim the children as dependents for tax purposes. In response, defendant filed for a change of custody.

On May 18, 2000, a referee held a hearing on both petitions. At the hearing, the referee found that plaintiff had an established custodial environment with the children and therefore held defendant to the more exacting clear and convincing evidentiary standard. After the hearing, the referee concluded that defendant failed to meet his burden of proof and recommended that plaintiff retain physical custody and defendant have liberal parenting time consistent with the parties' respective schedules.

Defendant sought a de novo review of the referee's recommendation and the court conducted a short evidentiary hearing wherein defendant argued that plaintiff was verbally abusive. At the evidentiary hearing, plaintiff, together with all of the witnesses called by defendant to testify at the hearing, denied any and all allegations of physical or verbal abuse on plaintiff's part.

After the conclusion of testimony, the court arranged to interview the children in camera.[2] The court allowed the parties the opportunity to present questions that it would ask the children and indicated that it would also ask the children about plaintiff's drinking habits, alleged verbal abuse, the frequency of police presence at the home, as well as the source of clothing for the children. The trial court did not make any record whatsoever, by transcript or judicial summary, relative to the substance of the in camera interview with the three minor children. Accordingly, none is available for our review. After the evidentiary hearing and after the trial court conducted its in camera interview with the children, the court issued a written opinion granting defendant's request for a change of custody. Comparing the evidence on the record and the trial court's written opinion it is evident to this Court that the trial court substantially relied upon the unrecorded information garnered from the in camera interview with the children to make its ultimate decision. Plaintiff appeals as of right. We reverse and remand to the trial court for further proceedings consistent with this opinion.

II. Established Custodial Environment

There are three different standards of review applicable to child custody cases. The clear legal error standard applies where the trial court errs in its choice, interpretation or application of the existing law. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000).[3] Findings of fact are reviewed pursuant to the great weight of the evidence standard. In accord with that standard, this court will sustain the trial court's factual findings unless "[t]he evidence clearly preponderates in the opposite direction." *Id.* Discretionary rulings are reviewed for an abuse of discretion, including a trial court's determination on the issue of custody. *Id.*

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[2] At the time of the interview, the children were thirteen, eleven and eight years old.

[3] See also *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000); *McCain v McCain*, 229 Mich App 123, 129; 580 NW2d 485 (1998).

MCL 722.27(1)(c) provides for modification of a custody order upon "[p]roper cause shown" or "[a] change in circumstances." Therefore, when confronted with a petition to change custody, a trial court must first determine the appropriate burden of proof to place upon the party seeking the change. To discern the proper burden, the trial court's initial inquiry is whether or not an established custodial environment exists. *LaFleche, supra* at 695-696. MCL 722(1)(c) provides in relevant part:

> The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. 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.

Ever mindful that our Legislature's intent underlying the Child Custody Act was to "[m]inimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an `established custodial environment' *except in the most compelling cases,"* whether a custodial environment has been established is an intense factual inquiry. *Baker v Bake*r, 411 Mich 567; 309 NW2d 532 (1981) [emphasis added]; See also *Ireland v Smith*, 214 Mich App 235; 542 NW2d 344 (1995).

This pivotal legislative mandate is only served when trial courts apply the correct evidentiary standard to issues relating to child custody. If the trial court finds that an established custodial environment exists, then the trial court can only change custody if the party bearing the burden presents clear and convincing evidence that the change serves the best interest of the child. *Phillips v Jordan*, 241 Mich App 17; 614 NW2d 183 (2000) (citing *Rummelt v Anderson*, 196 Mich App 491, 494; 493 NW2d 434 (1992)). This higher standard also applies when there is an established custodial environment with both parents. *Jack v Jack*, 239 Mich App 668; 610 NW2d 231 (2000).[4] On the contrary, if the court finds that no established custodial environment exists, then the court may change custody if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interests. *Id*. (citing *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991)).

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[4] In *Jack, supra*, the trial court failed to make a finding regarding the existence of an established custodial environment. This Court recognized that remand was required unless there was sufficient evidence on the record "[f]or this Court to make its own determination of this issue by de novo review." *Jack, supra* at 670. On de novo review of the record, this Court ruled that the children looked to *both* parents equally and that as a result, an established custodial environment existed with *both* parents. Because the trial court in *Jack* did not find that both parents established a custodial environment, this Court held that the trial court committed clear legal error and remanded the case so that the trial court could determine whether clear and convincing evidence existed to warrant a change in custody.

In the case at bar, the trial court found that no custodial environment existed, stating:

> It is the court's *impression* . . .that because of problems in mother's home that *the children have looked to the father for guidance, discipline, and necessities of life with the same frequency as they looked to the mother for such nurture and support*. Therefore, the court finds that by the conduct of the parties, no established custodial environment exists. Therefore the burden of proof for father is by a preponderance of the evidence, not by clear and convincing evidence to prove that the best interests of the children are served by a change of custody. (Emphasis added.)

First, we note that by its own terms, the trial court merely formed an "impression" regarding the alleged problems in the mother's home. This Court is unable to discern from whence the trial court's "impression" came. A review of the record establishes nothing more than allegations of verbal and physical abuse within the mother's home with the exception of one isolated incident. The record is clear that on *one* occasion, plaintiff and her boyfriend apparently had a verbal altercation to which the police responded. However, we note further that despite police involvement, no charges relative to this incident were instituted.

Second, the trial court's opinion is internally inconsistent. The trial court found that the children looked to both their mother and father, with the same frequency, for guidance, discipline and the necessities of life, yet curiously declined to find an established custodial environment in *either* household. The trial court did not further expound upon or articulate its reasons for reaching this particular conclusion.

Because the existence of a custodial environment is a factual inquiry, the great weight of evidence standard applies. The appropriate inquiry therefore, is whether the evidence upon which the trial court determined that neither parent established a custodial environment "[c]learly preponderates in the opposite direction." *Ireland, supra* at 242, thus rendering the trial court's ultimate decision regarding custody an abuse of discretion. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). We find that it does.

In the case *sub judice*, a de novo review of the record amply supports the existence of a custodial environment with both parents. Both parties contributed to the financial needs of the children and were active participants in the children's school and extracurricular activities. The children were doing well in school and sought support from both parents.

A careful review of the record supports an established custodial environment with both parents. Thus, *neither* plaintiff's nor defendant's established custodial environment may be disrupted except upon a showing, by clear and convincing evidence, that such a disruption is in the children's best interests. *Jack, supra.* The trial court thus abused its discretion on two levels. First, the trial court failed to find an established custodial

environment in and through both homes. Second, the trial court failed to apply the appropriate evidentiary standard in accord therewith.

III. Best Interest Factors

To determine the best interests of the children in child custody cases, a trial court must consider all of the factors delineated in MCL 722.23(a)-(l) applying the proper burden of proof. A trial court must consider and explicitly state its findings and conclusions with respect to each of these factors. *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991) (citing *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988)). As this Court judiciously observed two decades ago:

> A child custody determination is much more difficult and subtle than an arithmetical computation of factors. It is one of the most demanding undertakings of a trial judge, one in which he must not only listen to what is said to him and observe all that happens before him, but a task requiring him to discern and feel the climate and chemistry of the relationships between children and parents. This is an inquiry in which the court hopes to hear not only the words but the music of the various relationships. *Dempsey v Dempsey*, 96 Mich App 276, 288 (1980).

The most difficult aspect of the case at bar is that almost all of the trial court's factual findings are not reviewable. Indeed, after the trial court spoke with the children in camera, the trial court suddenly concluded that mother was "cursed with a very volatile temper" and that mother is "verbally abusive." A review of the trial court's written opinion is laden with referrals to mother's "nasty tempter" or otherwise volatile behavior. Most striking however, is the trial court's conclusion that mother has "a mental problem" and that it "appears" that domestic violence plagues mother's home environment.

The only conceivable explanation to account for the stark difference between the evidence presented on the record which amounted to nothing more than mere *allegations* of mother's violent conduct and the trial court's *conclusions* that mother has a "volatile," "nasty" temper and further exhibits signs of mental illness, is the intervening in camera interview with the children which was not, in any way, made part of the reviewable record.[5] Thus, even a most cursory review of the existing record reveals that the trial court's in camera interview strongly influenced if not *completely* determined its factual findings on all of the best interest factors[6]. However, to maintain a certain level of

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[5] Having a reviewable record of the in camera interview is even more critical when considering the number and ages of the children. Obviously, a statement by a thirteen-year-old is evaluated by a different standard that that of an eight-year-old, particularly in light of developmental and emotional maturity.

[6] Precedent established by this court recognizes that when determining the best interests of the child in a custody dispute, a trial court's in camera interview may extend to any matter relevant to a trial court's decision. *Hilliard v Schmidt*, 231 Mich App 316, 320-321; 586 NW2d 263 (1998). However, the court in *Malloy v Malloy*, 243 Mich App 595; ___ NW2d ___ (2000) criticized this aspect of the *Hilliard* decision. Accordingly, on January 12, 2001, a conflict panel

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judicial integrity, and to provide for meaningful appellate review, there must be a modicum of extraneous testimony on the record that would, at the very least, support a reasonable inference attesting to the trustworthiness and indeed the veracity of the information obtained through the in camera interview with the children.

If a trial court relies significantly on information obtained through the in camera interview to resolve factual conflicts relative to any of the other best interest factors and fails to place that information on the record, then the trial court effectively deprives this Court of a complete factual record upon which to impose the requisite evidentiary standard necessary to ensure that the trial court made a sound determination as regards custody. Indeed, decisions that will profoundly impact the lives and well being of children cannot be left to little more than pure chance. These critical decisions must be subject to meaningful appellate review.

We further note that the trial court entered an order changing the custody of all three children. Indeed, this Court applauds efforts to ensure that siblings remain in the same household. *Weichmann v Weichmann*, 212 NW2d 436, 439; 538 NW2d 57 (1995). As we stated in *Weichmann, supra*, "[w]e believe that *in most cases* it will be in the best interests of each child to keep brothers and sisters together. However, if keeping the children together is contrary to the best interest of an *individual* child, the best interest of *that* child will control." *Id*. at 440. [Emphasis added.] Incumbent upon the trial court therefore, is the duty to apply all of the statutory best interest factors to each individual child. To fully discharge this duty, and arrive at a decision that serves a particular child's best interests, trial courts must recognize and appreciate that implicit in the best interest factors themselves, is the underlying notion that as children mature their needs change. And, as a child progresses through the different life stages, what they need from each parent necessarily evolves therewith. Thus, what may be in the "best interest" of an eight year old may materially differ from the "best interest" of that child's thirteen-year-old sibling. Accordingly, the best interest factors must be fluid enough in their application to accommodate these differences. Indeed, unyielding judicial adherence to the notion that a child's best interest requires that siblings remain in the same household, may very well, in some cases, create a judicial straight jacket that brings an individual child's personal growth to a screeching halt.

In this case, evident from a review of the very limited record is the eldest child's representation that she desires to live with her father. This child's preference was acknowledged and not contested by plaintiff. Perhaps at this particular developmental juncture, she would derive a greater benefit from her father's home. According to the statutory factors, it may even be in her best interest to reside with her father. That does not, in any way, suggest that the other two children would similarly benefit. On the limited record available however, the trial court's factual findings evade meaningful review and we are thus unable to say this with any reasonable degree of certainty.

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was convened by order of Chief Judge Richard Bandstra to resolve this issue.

Notwithstanding, crucial to making sound judicial decisions in this exceptionally delicate area of domestic law is to appreciate and evaluate each individual child in light of the statutory best interest factors.

Where a trial court fails to consider issues pertaining to custody without due regard for the mandates set forth in MCL 722.23; MSA 25.312(3), "[a]nd make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing." *Bowers, supra* at 56. The trial court need not necessarily engage in elaborate or ornate discussion as brief, definite, and pertinent findings and conclusions on the contested matters are sufficient MCR 2.517(A)(2); *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994). In this case, although the trial court set forth its findings, those findings were nevertheless not independently supported or otherwise corroborated by the evidence on the record and thus amenable to appellate review. In the absence of a reviewable record, we are unable to determine whether there is any support for the trial court's conclusions. A trial court has discretion to be sure, but it does not and cannot have unbridled discretion. The trial court's ultimate decision must comport with the great weight of the evidence. *Id.*

The trial court's finding as to established custodial environment was against the great weight of the evidence. Further, for the reasons stated herein, we also find that the trial court abused its discretion by changing the children's custodial environment without the attendant clear and convincing evidence presented to justify the substance of the trial court's ultimate decision and disposition.

Reversed and remanded for further proceedings consistent with this opinion[7]. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M. Doctoroff

[7] Because we are remanding this case for further proceedings on custody, we do not address the child support and tax deduction issues.