



## UNPUBLISHED DECISION OF THE MONTH

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### **Landon v Shelton, Court of Appeals Docket No. 297064, Decided December 21, 2010, MARKEY, P.J., AND WILDER AND STEPHENS, JJ.:**

**Summary and Overview:** The father appealed the lower court's decision to award sole legal and sole physical custody of the parties' 7 year old son to the mother. The Court of Appeals vacated the trial court's decision and remanded for further proceedings. This case is interesting for the Court of Appeals' treatment of the established custodial environment ("ECE") question. The Court of Appeals disagreed with the trial court's finding that the ECE existed solely with the mother because it had failed to consider the significant amount of time the child previously spent with the father prior to the mother changing residences. The Court of Appeals held that a custodial environment existed with both parents and that the trial court was not permitted to alter that arrangement absent clear and convincing evidence. The Court of Appeals also found two of the trial court's factual findings on the best interest factors to be against the great weight of the evidence. The custody issue was remanded to the trial court to reevaluate and weigh the factors consistent with the appellate panel's analysis.

**Summary of Facts:** The parties were never married, but had one child together. Noah was born in 2001. The parties maintained separate residences from the child's birth until 2005. During this time, Noah was in the constant care of the father who took care of him during the day while the mother worked. The parties also frequently spent the night at each other's residences with the child. In May 2005, when Noah was four years old, the parties moved-in together. During this time, the father continued to provide care for Noah during the day while the mother worked. The father also provided care for Noah during the evening while the mother took classes. The father also regularly provided care for the mother's child from a previous relationship. The mother moved out in

January of 2008, returning to the home of her mother, and taking both children with her.

Shortly after the mother moved out, the trial court entered a temporary custody order granting the father a "standard" parenting time schedule of alternating weekends and every Wednesday evening. The schedule greatly reduced the amount of time the father spent with Noah. The trial court, with the school's consent, allowed the father to spend lunch time with Noah at school, which he did regularly. This parenting time schedule remained in effect until the trial court issued its opinion in March of 2010, which awarded mother sole legal and sole physical custody of Noah.

**Established Custodial Environment:** The trial court found that an established custodial environment existed solely with the mother because "the child has lived with the Defendant [mother] his entire life." While the trial court acknowledged that the father had spent a "liberal amount of time" with the child, including overnights, it concluded that because the child had always resided with the mother, the child looked exclusively to her for daily guidance, discipline, the necessities of life and parental comfort.

The Court of Appeals disagreed with the trial court's analysis of the ECE issue. It found the trial court's apparent focus on the number of overnights Noah spent with his mother in comparison with his father to be misplaced. Instead, Noah's residence with the mother did not preclude father from also providing an established custodial environment for the child. The appellate panel focused on evidence demonstrating that Noah had been with his father while his mother worked from age 1½ years until age 4 years. This made the father a "regular presence" in Noah's life during which he provided for Noah's needs. The Court of Appeals also found significant father's care-giving during the time the parties resided together, finding that the father had been a continuous presence in the child's life until he was nearly 7 years old (when the temporary custody/parenting time order changed the arrangement to "standard" parenting time).



Although the trial court's temporary order significantly reduced the father's parenting time, the record was devoid of evidence that Noah ceased looking to his father for "guidance, discipline, the necessities of life, and parental comfort" after entry of this order. The temporary order and resultant reduction in father's parenting time did not negate the 5½ years of the father's constant presence in Noah's life. On that basis, the Court of Appeals reversed the trial court's ECE ruling and held that an ECE existed with both parents. Accordingly, the trial court was not permitted to change that environment absent clear and convincing evidence.

**Best Interests Factors:** The trial court found factors (b), (c), (g), (i) and (l) favored the mother, while only factor (d) favored the father. The trial court also found that factor (f) (moral fitness) was equal as to the parties. The child's preference was not considered (i) and factor (a) favored neither party. The Court of Appeals held that the trial court's findings on factors (f) and (g) were against the great weight of the evidence.

As to factor (f), the trial court expressed concern about the mother's alcohol abuse and lifestyle choices, as well as concern about what it deemed to be father's "obsessive behavior." The Court of Appeals found that the father's "obsessive behavior" related only to his "fervor" in collecting evidence during the custody proceeding. Because there was no evidence introduced demonstrating how father's behavior affected his ability to function as a parent, the Court of Appeals held that the trial court's findings on this factor to be against the great weight of the evidence.

Factor (g) deals with the physical and mental health of the parties. The trial court compared the mother's immaturity and alcohol abuse with the father's "unhealthy" obsession with visiting the child every day at lunchtime. The trial court was also concerned about the father paying the child a penny a minute to run on a treadmill and his general "excessive focus" on the child. The trial court weighed this factor in favor of the mother despite its concern about her history of coming home drunk and being absent from the home, and exposing Noah to second hand smoke because she smoked cigarettes in his presence. The Court of Appeals found no evidence that the father's alleged "obsessive behavior" was worse for Noah than the mother's alcoholic behavior and held that at a minimum the parties were equal on this factor, but it was more likely that the factor favored mother.

When evaluating the best interest factors, the trial court found not only by a preponderance of the evidence, but also by clear and convincing evidence, that Noah's best interests were served by awarding the mother sole legal and sole physical custody. The Court of Appeals disagreed. It vacated the custody decision and remanded for further proceedings, stating "many" of the trial court's findings on the best interest

factors were against the great weight of the evidence. This conclusion is interesting because the panel found error on only two of the twelve factors. Based on the trial court's original findings, five factors favored the mother, two favored the father, three were equal, one was not weighed, and one was not favorable to either. If, on remand, the trial court applies the Court of Appeals' determinations as to factors (g) and (f), which would now favor the father, the result would be four factors in favor of the mother, four in favor of the father, two equal, one not weighed and one favoring neither. The question then becomes whether this is enough to meet the clear and convincing standard to alter the ECE with both parents and again award sole custody to the mother.

**Referee Bias:** Another interesting aspect of this decision was the willingness of the Court of Appeals to discuss in detail the bias allegations against the referee whose custody recommendation was adopted by the trial court – and to identify that referee by name. This "naming of names" is unusual, but not unheard of. Two months ago, in the December 2010 issue, this column discussed the Court of Appeals' decision in *Deling v Deling*, Docket Nos. 295272 and 294167. In *Deling*, the panel was openly critical of the trial court judge, naming her in a footnote that also listed other decisions in which the panel thought the trial judge had failed to follow legal requirements when making child custody decisions. In both *Deling* and this case, Court of Appeals Judge Jane Markey was presiding judge on the panel. This may be either coincidence or a sign that Judge Markey is willing to hold trial court judicial officers accountable for their actions, especially where they impact child custody determinations.

Here, the panel quoted at length from what was obviously intended to be an off-the-record discussion between Referee Odette, who made the custody recommendation, and another referee not directly involved in the case. The panel found that the conversation, which was recorded because the recording equipment was left running after the referee hearing concluded and the parties left the room, demonstrated that Referee Odette was actually biased against the father. Yet the panel held that this bias had no legal effect because the judge ultimately held a *de novo* trial. Therefore, the panel reasoned, the father suffered no prejudice as a result of the referee's bias. This determination seems counter-intuitive. In many circuits, family division judges rely heavily on their referees. The referee's recommendation is often given substantial deference. If that recommendation was the product of actual bias against a party, that bias could impact the result in a subsequent *de novo* hearing.

The *Landon v Shelton* decision can be found at:

[http://coa.courts.mi.gov/documents/opinions/final/coa/20101221\\_c297064\\_79\\_297064.opn.pdf](http://coa.courts.mi.gov/documents/opinions/final/coa/20101221_c297064_79_297064.opn.pdf)



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