

141 Mich.App. 15  
Court of Appeals of Michigan.

John A. BEDNARSKI, Plaintiff-Appellee,  
v.  
Vicky L. BEDNARSKI, Defendant-Appellant.

Docket No. 74532.

Submitted June 8, 1984.

Decided Feb. 20, 1985.

Released for Publication April 24, 1985.

Mother appealed from order of the Circuit Court, Genesee County, Judith A. Fullerton, J., granting divorce and awarding sole physical and legal custody of her two minor children to paternal grandparents. The Court of Appeals held that: (1) **Deaf** Persons' Interpreters Act required appointment of interpreter for each plaintiff and defendant, and third interpreter for the court, if necessary; (2) evidence of mother's immorality was insufficient to justify weighing morality factor in favor of paternal grandparents; (3) failure to consider statutory presumption that best interests of child are served by awarding custody to parent was reversible error; (4) failing to find established custodial environment and not applying clear and convincing evidentiary standard to determine whether change of custody was in three-year-old child's best interest was error; and (5) mother's **deafness** was inappropriately weighed against her.

Reversed and remanded.

West Headnotes (9)

[1] **Trial**  
🔑 Appointment and Services of Interpreter

In action in which both parties and several additional witnesses were **deaf**, **Deaf** Persons' Interpreters Act required appointment of interpreter for each plaintiff and defendant, and third interpreter for the court, if necessary. M.C.L.A. §§ 393.501 et seq., 393.503(1, 3, 4), 393.504(2).

2 Cases that cite this headnote

[2] **Witnesses**  
🔑 Witnesses Ignorant of Language, and Interpreters

In divorce proceeding in which both parties and several witnesses were **deaf**, stipulation that interpreter would "paraphrase" the answers of the witnesses to "expedite" the proceeding may have violated provisions of **Deaf** Persons' Interpreters Act regarding interpreter's oath or affirmation. M.C.L.A. § 393.506(1).

2 Cases that cite this headnote

[3] **Child Custody**  
🔑 Decision and Findings by Court

When deciding a custody matter, trial court must evaluate each of the factors contained in the **Child Custody** Act of 1970, and state a conclusion on each, thereby determining the best interests of the child. M.C.L.A. § 722.23.

1 Cases that cite this headnote

[4] **Child Custody**  
🔑 Grandparents

Evidence of mother's immorality was insufficient to justify weighing morality factor in favor of paternal grandparents in deciding **custody** of two **children**. M.C.L.A. § 722.23.

Cases that cite this headnote

[5] **Child Custody**  
🔑 Findings and Verdict by Jury

**Child Custody**

🔑 **Presumption in Favor of Parent**

In custody dispute between mother and paternal grandparents, failure to consider statutory presumption that best interests of child are served by awarding custody to parent was reversible error. M.C.L.A. § 722.25.

[Cases that cite this headnote](#)

and paternal grandparents, mother's **deafness** was inappropriately weighed against her in light of evidence that alternative means were available to develop children's verbal and oral communicative skills and that proper development of communication skills did not require removing children from their mother's custody. M.C.L.A. § 722.23.

[1 Cases that cite this headnote](#)

[6]

**Child Custody**

🔑 **Degree of Proof**

Under statute relating to change in custody, court must find clear and convincing evidence that change of **custody** is in **child's** best interests before such a change may be ordered. M.C.L.A. § 722.27(c).

[Cases that cite this headnote](#)

[9]

**Child Custody**

🔑 **Right of Biological Parent as to Third Persons in General**

**Child Custody**

🔑 **Grandparents**

Awarding **custody** of **child** to his paternal grandparents rather than his mother was not necessarily abuse of discretion in light of evidence concerning his severe eye problem and his need for medical care, in conjunction with parties' and child's expressed preferences. M.C.L.A. § 722.23.

[Cases that cite this headnote](#)

[7]

**Child Custody**

🔑 **Grandparents**

**Child Custody**

🔑 **Degree of Proof**

Failing to find established custodial environment and not applying clear and convincing evidentiary standard to determine whether change of custody was in three-year-old child's best interests was error where child had never lived with her grandparents and had lived all her life with her mother and looked to mother for guidance, discipline, necessities of life, and parental comfort. M.C.L.A. § 722.27(c).

[Cases that cite this headnote](#)

**Attorneys and Law Firms**

**\*\*70 \*19** James R. Buckley, P.C. by Kathleen Buckley, Flint, for plaintiff-appellee.

Dorean M. Koenig, Lansing, for defendant-appellant.

Before GRIBBS, P.J., and BRONSON and SHEPHERD, JJ.

**Opinion**

PER CURIAM.

Defendant, Vicky Bednarski, appeals as of right from an order of the circuit court awarding sole physical and legal **custody** of her **children** to their paternal grandparents.

Plaintiff, John Bednarski, and defendant, Vicky

[8]

**Child Custody**

🔑 **Conduct or Status of Child's Parent or Custodian**

In **child custody** dispute between **deaf** mother

Bednarski, were married in 1973 and separated in December, 1982. They have two children, Timothy, born June 15, 1975, and Rebecca, born September 21, 1979. John and Vicky are **deaf** and unable to speak. Their children, as well as John Bednarski's parents, have normal hearing ability. The temporary order of the court, entered January 10, 1983, awarded joint custody of the minor children to both parents and further awarded physical custody of Timothy to plaintiff while physical custody of Becky was awarded to defendant. Following trial, held on July 28, 1983, the minor children were awarded to their 63- and 68-year-old paternal grandparents.

## I

This appeal raises serious questions concerning the right of **deaf** persons to meaningful participation in judicial proceedings. Defendant was unquestionably entitled to meaningful participation in a proceeding which resulted in the loss of **custody** of her **children**. That her **deafness** seriously impairs meaningful participation is ironically reflected in the term used to describe such a proceeding—a “hearing”. To deal with the unique **\*20** problems encountered by the involvement of **deaf** persons with the judicial process, the Legislature has enacted the **Deaf Persons' Interpreters Act**, **M.C.L. § 393.501 et seq.**; **M.S.A. § 17.55(101) et seq.**

The **Deaf** Persons' Interpreters Act, which became effective July 1, 1982, provides for the mandatory appointment of an interpreter in any action before a court or a grand jury where a **deaf** person is a participant in the action, either as a plaintiff, defendant, or witness, to perform three specific functions: (1) to interpret the proceedings to the **deaf** person; (2) to interpret the **deaf** person's testimony or statements; and (3) to assist in preparation of the action with the **deaf** person. **M.C.L. § 393.503(1)**; **M.S.A. § 17.55(103)(1)**. Any waiver of the right to an interpreter must be in writing by the **deaf** person. **M.C.L. § 393.503(3)**; **M.S.A. § 17.55(103)(3)**. Furthermore, an appointing authority—in this case, the circuit court—who knows a **deaf** person will be coming before it is obliged to inform the **deaf** person of the right to an interpreter. **M.C.L. § 393.504(2)**; **M.S.A. § 17.55(104)(2)**.

In addition to plaintiff and defendant, four other **deaf** persons testified at trial. One interpreter was sworn to interpret. The record indicates that the interpreter's function was to communicate questions and answers of each of the six **deaf** witnesses as they testified. She

translated spoken questions into sign language for a **deaf** witness on the stand and then translated the sign language of the **deaf** witness into spoken words for the court.

**\*\*71** Although the procedure followed at trial was designed to satisfy one of the functions prescribed by the **Deaf** Persons' Interpreters Act, that of interpreting the **deaf** person's testimony or statements, the record fails to indicate compliance with the two other mandated functions. Since the sole **\*21** interpreter was occupied with interpreting testimony of the various witnesses, defendant, when not on the stand herself, was unable to ask questions or otherwise communicate with others, including her counsel, during the course of trial. Moreover, the record is completely devoid of any evidence that an interpreter was involved with defendant and her counsel in the preparation of the action.<sup>1</sup>

<sup>[1]</sup> Defendant is entitled to a trial which complies with the **Deaf** Persons' Interpreters Act. Therefore, we vacate the custody order and remand this case for a new trial. Under the circumstances of this case, where both parties and several additional witnesses are **deaf**, we think that the provisions of the act require the appointment of an interpreter for each plaintiff and defendant,<sup>2</sup> and a third interpreter for the court, if necessary. Either party may waive the right to an interpreter, so long as the waiver conforms with **M.C.L. § 393.503(3)**; **M.S.A. § 17.55(103)(3)**. The interpreters should be appointed well in advance of trial so as to enable their full assistance in preparation of the action.

Defendant raises additional requirements of the act with which the court failed to comply. The act provides:

**\*22** “(4) A certified interpreter or qualified interpreter <sup>[3]</sup> shall not be appointed unless the appointing authority and the **deaf** person make a preliminary determination that that certified interpreter or qualified interpreter is able to readily communicate with the **deaf** person and to interpret the proceedings in which the **deaf** person is involved.” **M.C.L. § 393.503(4)**; **M.S.A. § 17.55(103)(4)**.

On retrial, the record should affirmatively disclose that the required preliminary determination was made.

<sup>[2]</sup> Prior to trial, counsel stipulated that the interpreter would “paraphrase” the answers of the witnesses to “expedite” the proceeding. Such a stipulation may have violated the provision of the act which requires an interpreter to make an oath or affirmation that the interpreter “will make a true interpretation in an understandable manner to the **deaf** person for whom the [interpreter] is appointed” and that the interpreter “will

interpret the statements of the **deaf** person in the English language to the best of the interpreter's skill". M.C.L. § 393.506(1); M.S.A. § 17.55(106)(1). Due to the conceptual nature of sign language, a verbatim translation of oral testimony (or vice versa) may not be possible. However, the very fact of the unavoidable translation difficulty renders the need for accurate and skillful interpretation even more critical.<sup>4</sup>

In summary, on remand, the court, as well as counsel, should ensure that the proceedings are conducted in full accordance **\*\*72** with the **Deaf** Persons' Interpreters Act.

**\*23 II**

In addition to the issues concerning the propriety of the trial proceedings, defendant assigns numerous errors in connection with the trial court's awarding of custody to the paternal grandparents. Because we find many of defendant's contentions meritorious and to ensure a fair custody determination on remand, we will address defendant's remaining arguments. We bear in mind that the standard of review of **child custody** cases is *de novo*. *Deel v. Deel*, 113 Mich.App. 556, 317 N.W.2d 685 (1982). This Court will not disturb a custody order unless the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. M.C.L. § 722.28; M.S.A. § 25.312(8).

(1)

<sup>[3]</sup> <sup>[4]</sup> When deciding a custody matter, the trial court must evaluate each of the factors contained in the **Child Custody** Act of 1970, M.C.L. § 722.23; M.S.A. § 25.312(3), and state a conclusion on each, thereby determining the best interests of the child. *Currey v. Currey*, 109 Mich.App. 111, 117, 310 N.W.2d 913 (1981). In making the requisite findings, the trial court weighed the factor of moral fitness of the competing parties in favor of the paternal grandparents.

Questions as to defendant's moral fitness were raised repeatedly throughout trial. Plaintiff's counsel continually insinuated, through the interrogation of witnesses, that defendant was adulterous and generally immoral. This Court has previously held that a mother's unfaithfulness would not necessarily preclude her from having **custody** of her **children**. **\*24** *Williamson v. Williamson*, 122

Mich.App. 667, 673-674, 333 N.W.2d 6 (1982). Moreover, in spite of a multitude of incriminating questions, there was little evidence of defendant's immorality and certainly not enough to justify weighing the morality factor in favor of the grandparents.

(2)

<sup>[5]</sup> This custody dispute was between the minor children's mother and their grandparents. In such a situation, there is a statutory presumption that the best interests of the child are served by awarding custody to the parent, unless there is clear and convincing evidence to the contrary. M.C.L. § 722.25; M.S.A. § 25.312(5). "[T]his remains a presumption of the strongest order and it must be seriously considered and heavily weighted in favor of the parent." *Bahr v. Bahr*, 60 Mich.App. 354, 359, 230 N.W.2d 430 (1975), *lv. den.* 394 Mich. 794 (1975).

In *Williamson, supra*, 122 Mich.App., pp. 672-673, 333 N.W.2d 6, this Court found reversible error in the trial court's failure to consider the statutory presumption in a custody dispute between a mother and the paternal grandparents. Likewise in the instant case, the court's failure to consider, either expressly or implicitly, the statutory presumption was reversible error.

(3)

<sup>[6]</sup> <sup>[7]</sup> In its findings, the trial court considered factor (d) of M.C.L. § 722.23; M.S.A. § 25.312(3), the length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity. The court rated this factor equal for the competing parties since neither child had lived over seven months in the current environment, *i.e.*, Timothy with his grandparents and Rebecca with her mother. As to Rebecca, this finding was against the great weight of the evidence. Moreover, the finding failed to take into **\*25** account M.C.L. § 722.27(c); M.S.A. § 25.312(7)(c), which states in 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 \*\*73 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.”

Under this section, once a custodial environment has been established, a court must find clear and convincing evidence that a change of custody is in the child’s best interest before such a change may be ordered. *Lyons v. Lyons*, 125 Mich.App. 626, 632, 336 N.W.2d 844 (1983).

Rebecca had never lived with her grandparents and had lived all her life with her mother. The evidence introduced indicated that three-year-old Rebecca looked to her mother for guidance, discipline, the necessities of life, and parental comfort. The trial court erred in failing to find an established custodial environment and in not applying a clear and convincing evidentiary standard to determine whether a change of custody was in Rebecca’s best interest.

(4)

[8] The trial court’s findings reveal that defendant’s **deafness** was a highly important factor in the court’s resolution of the custody dispute.

It was undisputed that the minor children had developed non-verbal communicative skills. Joanne \*26 Gates, a psychologist who had experience working with the hearing impaired, testified that she had interviewed plaintiff, defendant, and the paternal grandparents. In her opinion, defendant was an adequate caretaker for her children, provided the children receive daily intensified verbal language stimulation. Another psychologist, Stephanie Hawka, interviewed the minor children. She testified that Timothy had no communicative deficits and that although she had seen some three-year-olds with better language skills than Rebecca, Rebecca’s skills were not necessarily below normal. Both psychologists opined that Rebecca’s verbal skills could develop normally if proper arrangements were made for her to attend counseling, head start, or other kind of special education

program.

On this issue, the court found:

“The last fact is, anything else considered by the court to be relevant to a particular **child custody** dispute.

“This is exactly the kind of case where this factor is important. This is a very unusual case. We have two normal children, born to hearing impaired parents. Two normal children in the sense that they are possessed of the ability to speak and hear as most of us are able, and they must compete, as has been described by one of the psychologists today, in a world of persons who do speak and hear and rely heavily on linguistic skills, and I refer particularly to Miss-Mrs. Joanne Gates.

“And, the court having interviewed, or discussed for some time with Rebecca, or attempted to-anything frankly-was of the impression that the situation is, that she is developed mentally slow, or perhaps retarded without insulting her, in verbal skills, and that is is appropriate and necessary, if proper development is to take place, that she be placed in some of [sic] intensified language stimulation program. An environment that will enable her to develop her oral language \*27 skills, so that as an adult, she is able to function at the highest possible level.

“Timothy is verbal, and I don’t expect the problem to be nearly as severe with him. He has other special problems, which I’ll comment on in a moment, but Rebecca is at a critical age in the court’s opinion, and an extremely important factor that weighs in favor of the grandparents, in this court’s opinion, is the need to be exposed to other persons who use their oral language skills to develop her ability to communicate on a regular basis, as well as providing the special training.”

While we share the trial court’s concern that the children develop adequate verbal and oral communicative skills, we think the court inappropriately weighed this factor against defendant. The testimony uniformly \*\*74 established that alternative means were available and that proper development of communication skills did not require removing the children from their mother’s custody.

What constitutes proper consideration of a parent’s physical disability or handicap as a factor in a custody award was the subject of *In re Marriage of Carney*, 24 Cal.3d 725, 157 Cal.Rptr. 383, 598 P.2d 36 (1979). Taking note of the strong state and federal policies of pursuing the total integration of handicapped persons into

the mainstream of society, the court stated:

“No less important to this policy is the integration of the handicapped into the responsibilities and satisfactions of family life, cornerstone of our social system. Yet as more and more physically disabled persons marry and bear or adopt **children** \* \* \* **custody** disputes similar to that now before us may well recur. In discharging their admittedly difficult duty in such proceedings, the trial courts must avoid impairing or defeating the foregoing public policy.” *In re Marriage of Carney, supra*, 24 Cal.3d 741, 157 Cal.Rptr. 383, 598 P.2d 36.

This statement applies with equal force in our own \*28 state, particularly in view of the Legislature’s enactment of the Michigan Handicappers’ Civil Rights Act, M.C.L. § 37.1101 *et seq.*; M.S.A. § 3.550(101) *et seq.*

III

<sup>19)</sup> In conclusion, the existing record does not contain clear

Footnotes

- 1 The record strongly suggests that neither the court nor counsel were aware of the **Deaf** Persons’ Interpreters Act, although the court, as appointing authority, was on notice that the plaintiff and defendant were **deaf** from the initial filing of plaintiff’s complaint for divorce.
- 2 In a report on a workshop on interpreting for **deaf** people, Joseph P. Youngs discusses the participation of **deaf** persons in judicial proceedings. Youngs advises: “In a case involving the interests of two **deaf** persons, one against the other, it is recommended that each have his own interpreter. For one interpreter to serve both principals in a court case is to place him in an unfair, awkward, and complicated situation.” *Interpreting for Deaf People*, Stephen P. Quigley, Editor, U.S. Department of Health, Education and Welfare Social and Rehabilitation Service, Rehabilitation Services Administration, Washington, D.C. (1965), p 46.
- 3 The act allows the appointment of either a certified interpreter or qualified interpreter. The definitions of each are set forth in M.C.L. § 393.502; M.S.A. § 17.55(102).
- 4 “Above all, the interpreter’s foremost desire should be to give a verbatim translation of the terminology used in legal proceedings. It is in his Code of Ethics. He is sworn to it by oath. The **deaf** have a right to it.” *Interpreting for Deaf People, supra*, p 56.
- 5 Aside from the violations of the **Deaf** Persons’ Interpreters Act, much of the conduct of plaintiff’s counsel was improper and violated evidentiary rules, although defendant’s attorney raised few objections. Furthermore, both sides failed to establish pertinent facts. As a consequence, the trial court at one point requested plaintiff’s counsel to ask certain questions of defendant on cross-examination. Although the court’s attempt to remedy the inadequate record is laudable, the method chosen provided plaintiff’s counsel with yet another opportunity to transgress evidentiary rules.

and convincing evidence that it was in Rebecca’s best interest to remove her from the custody of defendant. The evidence concerning Timothy’s severe eye problem and his need for medical care, in conjunction with the parties’ and Timothy’s expressed preferences, convince us that it was not necessarily an abuse of discretion to award custody of Timothy to his grandparents. However, because of the unfairness of the trial, for reasons stated and unstated<sup>5</sup> in this opinion, and because more than a year has elapsed since the trial, we think it best that a new trial be held to determine **custody** of both **children**. The trial should be held before a different trial judge and additional evidence concerning the past year may be introduced. We retain jurisdiction.

Reversed and remanded.

All Citations

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