STATE OF MICHIGAN

COURT OF APPEALS

LINDA SUE BRADY,

Plaintiff-Appellee,

v

HENRY RAY LANDSGAARD,

Defendant-Appellant.

UNPUBLISHED
November 16, 1999

No. 214992
Genesee Circuit Court
LC No. 93-022204 DP

Before: Jansen, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting the parties joint legal custody and granting plaintiff sole physical custody of the parties' son. We remand for further proceedings.

The parties have never been married to each other. They had a son together, born on August 21, 1993. Subsequent blood tests conducted in November 1993 confirmed that defendant was indeed the father of the child. In an order entered on February 1, 1994, the trial court granted plaintiff physical custody, granted defendant "all reasonable rights to visitation. . . as agreeable between the parties," and ordered that defendant pay child support in the amount of $78 a week. From the period of February 1994 until the trial court's final order entered on September 29, 1998, there were several motions for and orders concerning visitation, custody, and child support. Ultimately, a friend of the court referee, in a report dated May 14, 1996, recommended that the parties have joint legal custody and that plaintiff have sole physical custody on an interim basis. On April 7, 1997, the trial court entered an order implementing the referee's recommendation with some changes to visitation. Plaintiff objected to the referee's recommendation and a de novo hearing was held in November 1997. The trial court did not issue its order until September 25, 1998, granting the parties joint legal custody and plaintiff having sole physical custody.

We begin with the various standards of review involved in a child custody matter. MCL 722.28; MSA 25.312(8) states:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal

> unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

Defendant first argues that the trial court erred by not determining whether an established custodial environment existed. We agree. Whether an established custodial environment exists is a question of fact, which the trial court must address before it determines the child's best interest. *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). "[T]he first step in considering a petition to change custody is to determine whether an established custodial environment exists; it is only then that the court can determine what burden of proof must be applied." *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995).

In its opinion, the trial court stated:

> The Court does not make a finding as to whether a custodial environment exists. The orders entered since the Referee hearing have substantially increased defendant-father's parenting time. The decision of this Court to leave physical custody with the mother is not dependent on a finding of a custodial environment. Under either standard of proof, i.e., clear and convincing evidence or preponderance of the evidence, defendant-father has failed to convince this Court that a change of physical custody is in the best interest of the minor child.

The trial court's ruling in this regard is error. As we have stated, it is well established that the first step in deciding a petition for a change of custody is to determine whether an established custodial environment exists. *Hayes, supra*, p 387; *Overall, supra*, p 455; *Treutle v Treutle*, 197 Mich App 690, 692; 495 NW2d 836 (1992). The trial court's failure to determine whether an established custodial environment existed was error and the error is not harmless. Although the trial court purported to state that defendant failed to convince the court that under either a clear and convincing standard or a preponderance of the evidence standard a change in custody would be warranted, the trial court made no findings concerning why defendant had failed to overcome either standard. Considering the number of orders that have been entered concerning this case and the fact that the trial court's opinion was not entered until 2 ½years after the referee's hearing, it was necessary for the trial court to first determine whether an established custodial environment existed. Moreover, we note that the permanency of the relationship that the child has with each parent was not provided at the de novo hearing. Likewise, the issues of to whom the child naturally looks to for guidance, discipline, and comfort were not the subject of testimony.

Given the lack of relevant information before the court and the time lapse between the court's opinion and the referee's recommendation, the trial court's failure to determine whether an established custodial environment existed was error and the error cannot be deemed harmless. Accordingly, we remand to the trial court for it to determine whether an established custodial environment exists under the criteria set forth in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) and to consider up-to-date information on this issue. See, e.g., *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996); *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).[1]

Defendant next argues that the trial court erred when it did not make specific findings on the best interest factors. We agree. In a custody dispute, the child's best interests shall control, as measured by the factors set forth in MCL 722.23; MSA 25.312(3). *Soumis v Soumis*, 218 Mich App 27, 34-35; 553 NW2d 619 (1996). The trial court must make specific findings of fact regarding each of the enumerated factors in MCL 722.23; MSA 25.312(3). *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998); see also *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993) (the trial court must consider each of the factors set forth in § 3 of the Child Custody Act and explicitly state its findings and conclusions regarding each factor). Although the trial court need not comment on every matter in evidence or declare acceptance or rejection of every proposition argued, *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981), brief, definite, and pertinent findings and conclusions on the contested matters without over elaboration of detail or particularization of facts is required. *Fletcher, supra*, p 883; MCR 2.517(A)(2). In deciding a disputed custody or visitation matter, the trial court's failure to make specific findings and state a conclusion on each of the statutory factors constitutes error requiring reversal. *Schubring v Schubring*, 190 Mich App 468, 470; 476 NW2d 434 (1991); *Snyder v Snyder*, 170 Mich App 801, 806; 429 NW2d 234 (1988).

Here, the trial court failed to determine any of the best interest factors individually based on its own evidentiary hearing:

> As indicated, this Court affirms the findings of the Referee. This includes the findings with respect to the factors contained within the Child Custody Act, MCL 722.23. The referee made detailed findings with respect to each factor and the Court adopts the conclusions of the Referee as to each factor. Some circumstances have changed since the date of the Referee's report. Defendant-father has remarried and settled in Grand Blanc. He has obtained employment in his specialty as an emergency room physician. His income has increased significantly. However, these changed circumstances do not alter the ultimate findings.

Although a trial court may consider a friend of the court report, the trial court must reach its own conclusions. *Truitt v Truitt*, 172 Mich App 38, 42; 431 NW2d 454 (1988). Further, the trial court's custody decision must be based on its own evidentiary hearing, rather than the friend of the court's hearing and conclusions. *Id.*, p 43. Where a de novo hearing has been requested, as in the present case, the trial court must conduct a de novo hearing as if no friend of the court hearing had been conducted previously and arrive at an independent conclusion. *Id.*, p 44; quoting *Marshall v Beal*, 158 Mich App 582, 591; 405 NW2d 101 (1986).

The trial court did not fulfill its obligation to independently determine the best interests of the child. Moreover, the trial court failed to make its own findings and conclusions on the statutory best interests factors. We again cannot deem this error to be harmless and remand to the trial court for consideration of all the statutory factors. *Ireland, supra*, pp 468-469; *Fletcher, supra*, pp 888-889.

Defendant's final issue is that the trial court erred when it failed to utilize the shared economic responsibility formula in setting child support.

Pursuant to MCL 722.717(3); MSA 25.497(3), "the court shall order support in an amount determined by application of the child support formula developed by the state friend of the court bureau." The court is permitted to deviate from the amount mandated by the guidelines, but only if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record the following:

> (a) The support amount determined by application of the child support formula.
>
> (b) How the support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case. [MCL 722.717(3); MSA 25.497(3).]

According to the 1999 Michigan Child Support Formula Manual, the shared economic responsibility formula should be applied when both parents spend a substantial amount of time with the child:

> When children share substantial amounts of time with each parent, whether or not there is a joint physical custody order, child support should be calculated by offsetting the parties support obligations. Substantial shared time with children translates into economic sharing beginning when the parent with the lesser amount of time with the children has the children in his/her care for a minimum of 128 overnights annually. The formula should only be used if it can be determined from the specific terms of the custody/parenting time order that the children will be with that parent for at least the 128 overnight threshold. The economic sharing formula should only be applied to support orders entered concurrent with an initial custody/parenting time determination or to modifications of custody/parenting time based upon changed circumstances. It shall not be retroactively applied to existing orders. [Michigan Child Support Formula Manual, 1999, IV Miscellaneous Provisions, (B) Shared Economic Responsibility.]

On June 6, 1997, the trial court entered an order denying defendant's motion for the calculation of child support based upon a shared economic responsibility formula. However, in the opinion and order regarding custody, the trial court instructed the parties to submit a statement of earnings for 1997 and 1998 to date. The trial court stated that it would determine support based on the standard support schedules as well as shared economic responsibility. On October 7, 1998, defendant's counsel submitted the relevant information to the trial court. On December 4, 1998, plaintiff filed a motion and notice of hearing requesting that the trial court enter an order regarding holiday parenting time and setting child support based on the shared economic responsibility formula. On January 29, 1999, the court entered an order setting holiday parenting time, but did not address child support. No further order regarding child support is contained in the lower court file.

MCL 722.717(3); MSA 25.497(3) specifically states that the trial court set forth in writing or on the record why the child support formula would be unjust or inappropriate. Here, the June 6, 1997, order denying defendant's motion for reduction in child support was denied without stating a reason in writing or on the record for deviating from the shared economic responsibility formula. Consequently, we remand to the trial court to state on the record or in writing why it determined the shared economic formula was unjust or inappropriate in this case.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] We note that clear and convincing evidence must be presented to change custody if an established custodial environment exists; however if there is no established custodial environment, then a change in custody may be granted upon a showing by a preponderance of the evidence. *Hayes*, *supra*, p 387.