

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL K. LoVETTE,

Plaintiff-Appellee,

v

ROCHELL E. MAHALEY,

Defendant-Appellant.

UNPUBLISHED

February 18, 2000

No. 220486

Ingham Circuit Court

LC No. 91-071513-DC

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Defendant Rochell E. Mahaley appeals as of right an order awarding sole physical custody of the parties' minor daughter to plaintiff Michael K. LoVette after Mahaley had custody for several years. We vacate and remand.

I. Basic Facts And Procedural History

LoVette and Mahaley are the parents of the minor child, although they never married. In 1991, LoVette commenced this action requesting joint legal and physical custody of their daughter as well as establishing parenting time for the parties. The trial court subsequently entered a judgment awarding LoVette and Mahaley joint legal custody, with Mahaley having physical custody. In early November 1997, LoVette moved to amend the judgment's provisions regarding parenting time and physical custody. According to LoVette, Mahaley had informed him that she intended to remove their daughter from the state for "an indefinite period of time between three and six months." Accordingly, LoVette sought an injunction barring Mahaley from taking any action in violation of the trial court's order regarding parenting time. It appears from the record that Mahaley sent the child to live with her parents (the girl's grandparents) in New Jersey.

LoVette learned that in October 1997 Mahaley had pleaded guilty to a federal charge of giving false statements to a federally insured financial institution and was serving a sentence for this offense. LoVette again moved for a change in custody, seeking an ex parte order granting him "immediate custody . . . pending a hearing scheduled for April 9, 1998." In response, the trial court entered an ex parte order giving LoVette temporary custody of the minor child. Mahaley objected to the ex parte

order and the trial court held a hearing regarding the motion to change custody in early April 1998 (the “April change of custody hearing”).

At the April change of custody hearing, the trial court reviewed a friend of the court’s report recommending that LoVette receive full physical custody. However, the trial court only received evidence regarding Mahaley’s confinement. Critically, the trial court did not make a finding concerning whether a custodial environment existed for the child. Nor did the court make any factual findings regarding the statutorily required best interest factors. MCL 722.23; MSA 25.312(3). The trial court ordered that LoVette be given “the physical care, custody and control of [the minor child] . . . until the minor child reaches the age of 18 or until further order of this Court.” The trial court further ordered that Mahaley was entitled to supervised visitation only. The trial court denied Mahaley’s motion for reconsideration.

II. Preservation Of The Issues And Standard Of Review

Mahaley argues that the trial court committed legal error by not conducting an evidentiary hearing prior to changing custody and by failing to consider, evaluate, or make factual findings regarding any of the best interests factors enumerated in MCL 722.23; MSA 25.312(3). These issues were raised in and addressed by the trial court. They are therefore preserved for appellate review. *Napier v Jacobs*, 429 Mich 222, 227-229; 414 NW2d 862 (1987). The Michigan Supreme Court has expressly prohibited de novo review of custody cases. *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994). All custody orders must be affirmed on appeal unless the trial court’s findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; MSA 25.312(8); *Fletcher, supra* at 882. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher, supra* at 881.

III. Changes In Custody Orders

A custody award may be modified when the party requesting the modification shows proper cause or change of circumstances, which establish that the modification is in the child’s best interests. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Dehring v Dehring*, 220 Mich App 163, 166; 559 NW2d 59 (1996). However, the court must hold an evidentiary hearing before it can change custody. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). Moreover, the first step in deciding any child custody dispute is to determine if there exists an established custodial environment. *Stringer v Vincent*, 161 Mich App 429, 434; 411 NW2d 474 (1987). For the trial court not to do so is legal error. See *id.* It is improper for a trial court to decide the issue of custody on the pleadings and the friend of the court report alone. *Schlender, supra* at 233. If a trial court improperly adjudicates a child custody dispute, and the impropriety is not harmless, the appropriate remedy is to remand for reevaluation. *Fletcher, supra* at 889, 900.

No matter how contemptuous, spiteful, or misleading Mahaley’s conduct may have been, the trial court had an obligation to choose, interpret and apply the law correctly before changing the minor child’s custody. *Fletcher, supra* at 881. To do so, the trial court had to hold an evidentiary hearing

and make appropriate factual findings on the best interests of the child. *Schlender, supra* at 233. Our review of the record shows that the trial court did not conduct a proper evidentiary hearing or make a determination regarding the existence of a custodial environment prior to changing custody. This, alone, constituted legal error requiring remand. *Schlender, supra* at 233; *Stringer, supra* at 434. Moreover, we conclude that the trial court essentially decided to change custody on LoVette's pleadings and the friend of the court report alone. This was also clear legal error. *Schlender, supra* at 233. "[B]oth the Legislature and the judiciary recognize the need to proceed cautiously in this sensitive and critical" area surrounding custody decisions. *Id.* The trial court's error in this case deprived Mahaley of the opportunity to present evidence that a change in custody was not in the minor child's best interests. Thus, the trial court's errors were not harmless. See *Fletcher, supra* at 889, 900.¹

IV. Conclusion

We vacate the trial court's change of custody order and remand this case for further proceedings consistent with this opinion. See *Fletcher, supra* at 889, 900. On remand, the trial court should consider up-to-date information, including the child's current and reasonable preferences and any other changes in circumstances arising since the original custody order. *Id.*

Vacated and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad

/s/ William C. Whitbeck

¹ We note that the trial court could have continued the ex parte order, which gave LoVette temporary custody of the minor child until Mahaley was able to be present at a change of custody hearing.