STATE OF MICHIGAN

COURT OF APPEALS

SALLY A. BUZALSKI,

Plaintiff-Appellant,

v

STEVEN J. BUZALSKI,

Defendant-Appellee.

UNPUBLISHED
February 29, 2000

No. 217409
Kent Circuit Court
LC No. 97 2201 DM

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Following a five-day custody trial, the Kent Circuit Court changed physical custody of the parties' minor child from plaintiff to defendant. Plaintiff filed an application for leave to appeal the custody decision, before a final judgment of divorce had been entered. We granted leave to appeal, and now remand to the circuit court for further factual findings.

Plaintiff first contends that the trial court erred as a matter of law in holding that an established custodial environment cannot exist during the pendency of a divorce action. Plaintiff therefore concludes that the trial court erroneously applied the preponderance of the evidence standard to change custody of the minor child, instead of the clear and convincing evidence standard. Because the trial court did not make adequate findings of fact with regard to the existence of an established custodial environment with plaintiff before trial, we remand.

The trial court essentially made two rulings. First, the trial court ruled that a temporary custody order does not give an advantage to the party who obtains it by automatically establishing a custodial environment with that party. Second, the trial court ruled that an established custodial environment cannot exist during a pending divorce action, before an original award of custody has been entered. While the first holding is a correct statement of the law, the second is clear legal error. Temporary custody orders do not, of themselves, establish a custodial environment under the Child Custody Act. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981); *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Therefore, the entry of a temporary custody order cannot *require* a finding that an established custodial environment existed with plaintiff. However, the converse is also true, as the entry of a temporary order cannot *preclude* the existence of an established custodial

environment. This Court has repeatedly held that the reasons behind the creation of a custodial environment are irrelevant. Rather, the trial court's concern is whether such an environment actually exists. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992); *Bowers v Bowers, supra*, 190 Mich App 51, 54; 475 NW2d 394 (1991); *Schwiesow v Schwiesow*, 159 Mich App 548, 557; 406 NW2d 878 (1987). Whether the temporary custodial arrangement is created by court order or by stipulation of the parties, the trial court is "required to look into the actual circumstances of the case to determine whether an established custodial environment existed." *Bowers, supra* at 54. "The first step in deciding a petition for change of custody is to determine the established custodial environment." *Treutle, supra* at 692. In this case, the trial court failed to examine the circumstances to determine whether an established custodial environment existed. Rather, it simply decided that no such environment could exist during the pendency of a divorce action. This was clear legal error.

The trial court also drew a distinction between an original custody order and a post-judgment order, ruling by implication that it was not required to examine the existence of an established custodial environment when making its original custody determination, but was only required to do so on post-judgment motions. This Court expressly rejected that position in *Bowers, supra* at 53. Furthermore, such a ruling is inconsistent with the Child Custody Act provision which describes when an established custodial environment exists:

> 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 is in the best interest of the child. [MCL 722.27(1)(c); MSA 25.312(7)(1)(c), emphasis added.]

Therefore, insofar as the trial court ruled that an established custodial environment can only exist in a post-judgment context, it committed clear legal error. The trial court was required to determine whether an established custodial environment existed with plaintiff before deciding whether sufficient proof existed to support a change of custody from plaintiff to defendant.

The Child Custody Act provides that a trial court may change custody of a minor, when an established custodial environment exists, only upon a showing of clear and convincing evidence. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). The Michigan Supreme Court has interpreted this provision as creating a high standard of proof for changing an established custodial environment. As the Court held:

> In adopting § 7(c) of the act, the Legislature intended to minimize 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. [*Baker, supra*, 411 Mich at 576-577.]

Furthermore, an established custodial environment may not be changed in order to achieve a "marginal, though distinct, improvement" in the child's life. The Child Custody Act requires "a compelling reason for a change in custody when an established custodial environment has been proven." *Carson v Carson*, 156 Mich App 291, 301-302; 401 NW2d 632 (1986). In contrast, when an established custodial environment does not exist, the trial court may order a change in custody under a

preponderance of the evidence standard. *Hayes, supra*, 209 Mich App at 387. In this case, the trial court applied the preponderance of the evidence standard to its custody award, instead of the clear and convincing standard. The trial court explicitly stated, "It's not a clear and convincing standard, it's just a preponderance of the evidence standard." If plaintiff had established a custodial environment, as she argues, then the trial court applied the incorrect standard to its custody determination.

However, defendant argues that the lower standard of proof properly applied to this custody determination because an established custodial environment could not have existed with plaintiff in the marital home. First, defendant argues that an established custodial environment could not have existed because the child knew his custody was in dispute. A child's expectations as to the permanency of his custody situation are relevant to the establishment of a custodial environment. *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993); *VanderMolen v VanderMolen*, 164 Mich App 448, 456-457; 418 NW2d 108 (1987); *Curless v Curless*, 137 Mich App 673, 676-677; 357 NW2d 921 (1984). In fact, the Child Custody Act specifically requires that "the inclination of the custodian and the child as to permanency of the relationship shall also be considered." MCL 722.27(1)(c); MSA 25.312(7)(1)(c). However, the fact that he knew the custody situation might change in the future would not, *standing alone*, require a finding that plaintiff had not established a custodial environment. The trial court was also required to consider whether the child looked to plaintiff for "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c); MSA 25.312(7)(1)(c). The trial court did not make findings of fact on those issues.

Second, defendant argues that he maintained frequent contact with the child by exercising parenting time, and plaintiff therefore could not have established a custodial environment, citing *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492, 499; 417 NW2d 542 (1987); *Breas v Breas*, 149 Mich App 103, 107-108; 385 NW2d 743 (1986); *Curless, supra*, 137 Mich App at 676-677. However, an "established custodial environment can exist in more than one home." *Duperon v Duperon*, 175 Mich App 77, 80; 437 NW2d 318 (1989). Both parties essentially admit that this may have occurred here. Furthermore, the friend of the court custody evaluation gave both parties credit for having simultaneously established custodial environments. Therefore, defendant's involvement with parenting time may have created a second and simultaneous custodial environment with defendant, without destroying such an environment with plaintiff. However, the trial court made no findings of fact on this issue.

Plaintiff argues in response that, if an established custodial environment did exist simultaneously with both parents, then the trial court lacked authority to change the physical custody arrangement without compelling reasons which amounted to clear and convincing evidence supporting that change. In *Duperon, supra*, 80, and *Nielsen v Nielsen*, 163 Mich App 430, 433; 415 NW2d 6 (1987), this Court upheld the trial courts' application of the clear and convincing evidence standard to petitions for a change of custody, where established custodial environments existed with both parents. If an established custodial environment did exist simultaneously with both parties in this case, the trial court was therefore required to find clear and convincing evidence to support a change in physical custody, rather than a mere preponderance of the evidence supporting such a change.

The evidence before the trial court did not compel a finding that plaintiff had failed to establish a custodial environment. Rather, the record supports, but does not necessarily require, a finding that plaintiff did so. The record also supports a finding that a custodial environment simultaneously existed with both parents. Whether an established custodial environment exists is a question of fact for the trial court. *Hayes*, *supra*, 209 Mich App at 387-388. Because the trial court did not make any findings of fact on this issue, this matter should be remanded for such a factual determination.

Plaintiff next contends that the trial court erred in finding that the statutory best interest custody factors required changing custody from plaintiff to defendant. In child custody matters, findings of fact are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the other direction. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998); MCL 722.28; MSA 25.312(8). "If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse." *Bowers*, *supra*, 53. We cannot say that the trial court's findings of fact on the contested best interest factors violate this standard of review. Upon a review of the whole record, this Court is convinced that the trial court's findings of fact on the best interest factors are correct, and that they would support a change of custody from plaintiff to defendant under a preponderance of the evidence standard. However, this Court will reserve its judgment on whether those findings provide clear and convincing evidence to change custody where an established custodial environment exists. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). On remand, the trial court shall determine whether the burden of proof was properly applied, by determining whether plaintiff had established a custodial environment during the period preceding the custody trial.

Finally, plaintiff contends that the trial court erred in failing to determine the child's reasonable preference with regard to custody, because the child was of sufficient age to express a preference. The trial court did not interview the child, and did not appear to make a specific finding of fact regarding whether the child was of sufficient age to express a preference. Although the friend of the court investigator interviewed the child, he did not ask the child to express a preference. A trial court's failure to determine the preference of a child who is of reasonable age to state a preference is error mandating reversal. *Bowers*, *supra*, 55-56; *Stringer v Vincent*, 161 Mich App 429, 434; 411 NW2d 474 (1987). Generally, a trial court must state on the record whether the child was able to express a reasonable preference and whether his preference was considered. When the issue of custody is close, an expression of preference by an intelligent, unbiased child might be the determining factor. *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993). On remand, the trial court must also interview the parties' minor child to determine his reasonable preference with regard to custody.

Remanded with instructions for the trial court to make factual findings regarding the existence of an established custodial environment before trial, and factual findings regarding the child's reasonable preference with regard to custody.

/s/ Michael J. Kelly
/s/ Gary R. McDonald