

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ANGELA L. CAVINESS, f/k/a ANGELA L.  
DEWATERS,

UNPUBLISHED  
November 2, 2001

Plaintiff-Appellant,

V

No. 231982  
Jackson Circuit Court  
LC No. 97-081525

RICHARD DEWATERS, III,

Defendant-Appellee.

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Before: K.F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order granting defendant's motion for change of custody. We reverse and remand.

I. Basic Facts and Procedural History

The parties' married shortly after their son was born on April 10, 1996. The marriage, however, lasted approximately one year and the plaintiff filed for divorce on September 17, 1997. The judgment of divorce provided both parties with joint legal and physical custody.

Pursuant to the parenting time provisions of the divorce judgment, the parties' son spent alternating weeks with each parent, both of whom lived in Jackson at the time. Defendant moved for a change in custody arguing that because plaintiff moved to Howell, joint physical custody was no longer possible. After an evidentiary hearing, the trial court found that an established custodial environment existed with both parents stating:

The court should first start out by indicating that the court finds that there is an established custodial environment. Ordinarily there would need to be clear and convincing evidence to change that environment; however, the court has determined and I would think – I think counsel agrees, that there is a necessity for a change in custody at this time due to the move to the Howell area and the need particularly when the child is in school for him to be in on [sic] community and that the current custodial plan, now, which allows each parent to have the child on a rotating basis, is not able to be accomplished due to that move.

The court would find that then the – the court’s determination as to the custody and what’s in the child’s best interest would be by a preponderance of the evidence, since there is a need for a change from the current alternating physical custody.

The trial court then reviewed the best interest of the child factors and concluded, by a preponderance of the evidence, that a change of custody was in the minor child’s best interest. Plaintiff brought the instant appeal arguing that the trial court applied an incorrect legal standard and further arguing that the trial court’s factual findings were against the great weight of the evidence.

## II. Burden of Proof

First, plaintiff argues that the trial court committed a clear legal error when it applied the preponderance of the evidence standard to determine whether a change in custody from an established custodial environment was in the minor child’s best interests. We agree.

There are three different standards of review applicable to child custody cases. The clear legal error standard applies where the trial court errs in its choice, interpretation or application of the existing law. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000).<sup>1</sup> Findings of fact are reviewed pursuant to the great weight of the evidence standard. In accord with that standard, this court will sustain the trial court’s factual findings unless “[t]he evidence clearly preponderates in the opposite direction.” *Id.* And, discretionary rulings are reviewed for an abuse of discretion, including a trial court’s determination on the issue of custody. *Id.*

Where an established custodial environment exists, a court may order a change of custody only if clear and convincing evidence is presented that the change is in the child’s best interest. MCL 722.27(1)(c) provides in relevant part that:

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 Legislature’s intent underlying the Child Custody Act was to “[m]inimize 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 v Baker*, 411 Mich 567; 309 NW2d 532 (1981) [emphasis added]; See also *Ireland v Smith*, 214 Mich App 235; 542 NW2d 344 (1995). This pivotal legislative mandate is only served when trial courts apply the correct evidentiary standard to issues relating to child custody. If the trial court finds that an established custodial environment exists, then the trial court can only change custody if the party bearing the burden presents clear and convincing evidence that the change serves the best

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<sup>1</sup> See also *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000); *McCain v McCain*, 229 Mich App 123, 129; 580 NW2d 485 (1998).

interest of the child. *Phillips v Jordan*, 241 Mich App 17; 614 NW2d 183 (2000) (citing *Rummelt v Anderson*, 196 Mich App 491, 494; 493 NW2d 434 (1992)). This higher standard also applies when there is an established custodial environment with both parents. *Jack v Jack*, 239 Mich App 668; 610 NW2d 231 (2000).<sup>2</sup> On the contrary, if the court finds that no established custodial environment exists, then the court may change custody if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interests. *Id.* (citing *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991)).

In the case *sub judice*, the trial court found that the joint physical custody arrangement resulted in an established custodial environment in both parties' homes. Thus, *neither* plaintiff's nor defendant's established custodial environment may be disrupted except upon a showing, by clear and convincing evidence, that such a disruption is in the children's best interests. *Jack, supra*. However, the trial court expressly declined to apply the clear and convincing evidence standard and instead opted for the less burdensome preponderance of the evidence standard. The trial court thus committed clear legal error requiring reversal by failing to apply the appropriate evidentiary standard.

### III. Change of Circumstances

The plaintiff's move to the Howell area constituted the sole rationale upon which the trial court entertained the motion to change custody. Upon remand, it may very well be that there will be insufficient clear and convincing evidence to support a change of custody. However, even where there is insufficient evidence to support a change of custody, a party may still request a modification in parenting time. In the instant case, this is particularly appropriate where all parties acknowledged that the prior weekly parenting time schedule is no longer tenable.

Upon remand, the trial court should consider whether plaintiff set forth a change in circumstances sufficient to justify a modification in the parenting time arrangement, but not a change in custody. Parenting time shall be granted in accordance with the best interests of the child and in a frequency, duration, and type reasonably calculated to promote a strong relationship between the parent and the child. MCL 722.27a(1). Indeed, it is presumed to be in the best interests of the child for the child to have a strong relationship with both parents. MCL 722.27a(1). Thus, the best interest of the child controls when fashioning an appropriate parenting time schedule. *Deal v Deal*, 197 Mich App 739, 742; 496 NW2d 403 (1993).

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<sup>2</sup> In *Jack, supra*, the trial court failed to make a finding regarding the existence of an established custodial environment. This Court recognized that remand was required unless there was sufficient evidence on the record "[f]or this Court to make its own determination of this issue by de novo review." *Jack, supra* at 670. On de novo review of the record, this Court ruled that the children looked to *both* parents equally and that as a result, an established custodial environment existed with *both* parents. Because the trial court in *Jack* did not find that both parents established a custodial environment, this Court held that the trial court committed clear legal error and remanded the case so that the trial court could determine whether clear and convincing evidence existed to warrant a change in custody.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Helene N. White

/s/ Michael J. Talbot