

STATE OF MICHIGAN
COURT OF APPEALS

HEIDI ELORE,

Plaintiff-Appellee,

v

ERIK ELORE,

Defendant-Appellant.

UNPUBLISHED

October 21, 2004

No. 254744

Alger Circuit Court

LC No. 00-003564-DM

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order granting plaintiff primary physical custody of the parties' minor child. The child was born on June 28, 1997, the parties were married on October 4, 1997, and the parties were divorced on March 12, 2001. The parties had joint physical and legal custody until plaintiff moved approximately sixty-five miles away and sought custody of the child so that he could attend school near plaintiff's new home. After an evidentiary hearing, the trial court granted plaintiff primary physical custody of the minor child during the school year and ordered the parties to submit proposed parenting time schedules. On May 10, 2004, we granted leave to file this delayed appeal, and we now reverse and remand.

"Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests." *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). "Findings of fact are reviewed under the great weight of evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction" whereas "questions of law in custody decisions are reviewed for clear legal error." *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 24; 581 NW2d 11 (1998). "A trial court commits legal error when it incorrectly chooses, interprets, or applies the law." *Id.*

Defendant argues that the trial court committed clear legal error when it failed to consider the "best interest factors" set forth in MCL 722.23. Plaintiff argues that the court need not consider these factors because the order merely changed the child's domicile. Our analysis of the trial court's order shows that a change in domicile was only part of the effect of the court's order. Indeed, the trial court clearly found that continuing shared physical custody had become a logistical impossibility and that custody must be primarily with one parent or the other. Therefore, because the trial court changed the child's custody, it should have analyzed the best interest factors under MCL 722.23. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363

(2001). This Court is required to correct misapplications of law. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). Therefore, this Court must remand the case for reevaluation and consideration of up-to-date information. *Id.*, 888-890. On remand, “[t]he trial court must consider and explicitly state its findings and conclusions with respect to each of these factors.” *Bowers v Bowers*, 190 Mich App 51, 54-55; 475 NW2d 394 (1991).

Defendant also argues that the trial court failed to recognize that an established custodial environment existed with both parents and that the trial court contradicted itself in this regard. We disagree with both assertions. The trial court found that an established custodial environment existed with each party, although not with both parties together. On remand, the court shall again consider whether an established custodial environment now exists with either or both parties and state its findings on the record. MCL 722.27(1)(c); MCR 2.517(A).

Finally, defendant argues that the trial court failed to state that the burden of proof was on the party seeking to alter the custodial environment. Although it is unnecessary to consider this issue because we conclude that the trial court’s legal error requires the case to be remanded, we note briefly that the trial court did state the appropriate burden during trial and did not improperly assign the burden in its order. *Gillette Co v Dep’t of Treasury*, 198 Mich App 303, 318; 497 NW2d 595 (1993).

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

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey