

STATE OF MICHIGAN
COURT OF APPEALS

RYAN DARROLL EARL,

Plaintiff-Appellant,

v

HEATHER JOY EARL,

Defendant-Appellee.

UNPUBLISHED

November 15, 2007

No. 276049

Ottawa Circuit Court

LC No. 05-052825-DM

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right a divorce judgment entered following a bench trial. The judgment awarded defendant sole physical custody of the parties two minor children, Royston (d/o/b 7/24/1997) and Olivia (d/o/b 11/2/2000). Plaintiff also challenges the property distribution set forth in the divorce judgment. We affirm in part and remand.

All child 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. *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999). The first step in considering a custody issue is to determine whether an established custodial environment exists. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). Whether an established custodial environment exists determines the burden of proof the trial court must apply in its custody decision. *Id.* If no established custodial environment exists, custody is determined by a preponderance of evidence standard. *Id.* If an established custodial environment exists, it must be established by clear and convincing evidence that a change in custody is in the best interests of the child. MCL 722.27(1)(c).

Plaintiff argues on appeal that the trial court erred when it applied the wrong evidentiary standard in deciding whether a modification of the custodial environment was warranted. We agree. A trial court commits clear legal error when it errs in its choice, interpretation, or application of the existing law. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). The trial court correctly recited the burden of proof applicable when a custodial environment exists and the burden of proof applicable when a custodial environment does not exist. The trial court then decided that an established custodial environment existed with both parties because the parties shared physical custody of the children during the divorce proceedings. However, instead of applying the clear and convincing evidence standard, as is required when a custodial environment exists, the trial court applied the preponderance of the

evidence standard. It specifically found “by a preponderance of the evidence that the children’s best interest require that their mother be their primary care provider” Because the trial court committed clear legal error, reversal and remand for application of the correct burden of proof is necessary. *Mixon, supra* at 162.

In light of the need to remand for application of the correct standard, we do not address plaintiff’s arguments addressed to the court’s findings, except to observe that we find no error in the court’s consideration of the children’s relationship with their half-brother, Kody, in deciding what custodial arrangement was in their best interests. *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1995). Further, the court should interview Royston and Olivia in camera on remand and consider their reasonable preference. MCL 722.23(i).

On appeal, plaintiff also argues that the property distribution was inequitable. Plaintiff raised this issue in his motion for relief from judgment and reconsideration; therefore our review is for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999).

Plaintiff first argues that he was precluded from presenting evidence, in the form of an appraisal, as to the value of the marital home. We disagree. The trial court properly denied plaintiff post-judgment relief on this issue and instead enforced the parties’ settlement agreement and stipulated order regarding the property division. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). Plaintiff agreed to the settlement and a stipulated order was entered regarding the amount he was to receive in equity from the house. An adjustment was to be made only if an appraisal was required in conjunction with the refinancing of the home and the appraisal differed from the value agreed on by the parties. There is no evidence in the record that an appraisal was required for refinancing. Therefore, plaintiff is not entitled to relief.

Plaintiff also asserts that trial court abused its discretion by failing to consider his contributions to the marital estate during the divorce proceedings. Although plaintiff raised the issue at various times, it was not preserved for separate adjudication or mediation in the parties’ settlement. The court did not err in refusing to consider the issue after the agreement was placed on the record.

Affirmed in part and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Helene N. White

/s/ Michael J. Talbot