

STATE OF MICHIGAN
COURT OF APPEALS

SERENA RODRIGUEZ,

Plaintiff-Appellee,

v

REYNALDO D. PEREZ,

Defendant-Appellant.

UNPUBLISHED

January 24, 2008

No. 279576

Genesee Circuit Court

Family Division

LC No. 00-221510-DP

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order modifying custody and transferring sole physical custody of the parties' minor child from defendant to plaintiff. We vacate the trial court's order and remand for further proceedings.

The parties, who never married, are the parents of Anastasia Perez. Several months after Anastasia's birth in November 1999, the trial court granted plaintiff sole legal and physical custody. In 2002, plaintiff voluntarily entered a substance abuse treatment program, and the trial court awarded defendant temporary physical custody; plaintiff retained limited, unsupervised, parenting time. In October 2002, while plaintiff remained in treatment, the trial court increased her parenting time to include an overnight visit. After a review hearing in May 2003, however, the trial court reduced plaintiff's parenting time to a three-hour, supervised weekly visit. In June 2003, the trial court awarded defendant permanent physical and legal custody.

Plaintiff subsequently completed a residential substance abuse treatment program, and in February 2005, she petitioned the court for joint physical custody. The trial court submitted plaintiff's custody petition to a referee. Based on the referee's recommendation, the trial court increased plaintiff's parenting time in lieu of granting joint physical custody.

Approximately one year later, plaintiff again petitioned for joint physical and legal custody. In her petition, she alleged that defendant abused alcohol, and had not lived with Anastasia "for about 4 months." The petition averred that defendant's mother was Anastasia's primary care-giver, and opined, "I feel that she has a right to be raise[d] by one of the parents." A referee conducted a hearing on March 10, 2006, and issued written findings and a recommendation on July 12, 2006. The findings included the referee's conclusion that an established custodial relationship did not exist with either parent:

In this case, it is a close call as to whether there is an established custodial environment with the father. Although he does have physical custody, it appears that the paternal grandmother is the actual caregiver. It is the grandmother who feeds and cares for the child and who has attended parent teacher conferences.

Therefore, the undersigned finds that an “established custodial environment” does not exist with either parent and that Plaintiff’s burden of proof is that of preponderance of the evidence.

The referee then determined that the statutory best interest factors, MCL 722.23, preponderated in favor of defendant, and recommended against a custodial change.

Plaintiff requested a de novo hearing. At the March 29, 2007 hearing in the trial court, the testimony focused on plaintiff’s recovery from her alcohol abuse problem, defendant’s mental health, and the nature of Anastasia’s custodial environment. When the hearing concluded, the trial court rendered a bench opinion awarding custody to plaintiff. In its opinion, the trial court did not specifically articulate a finding regarding Anastasia’s established custodial environment. While discussing Anastasia’s best interests, specifically the element in MCL 722.23(d), the trial court stated the following:

...[I]t really appears to be the paternal grandmother who is providing the home environment [T]he testimony that I’ve heard suggests that she has assumed the position of mother. She has gone beyond care-giver, gone beyond grandmother; and because the responsibility has been so clearly placed at her feet, I don’t know how the circumstance could be otherwise.

Aside from this statement, the trial court did not address the question of Anastasia’s established custodial environment.

The trial court’s analysis of the statutory best interest factors differed from that of the referee. According to the trial court, the parties were equal as to all of the pertinent best interests factors except one, subsection 3(g), which the court scored for plaintiff by a “slight[]” margin. Based on this preponderance, the trial court awarded plaintiff full physical custody.

Defendant argues on appeal that the trial court erred in failing to determine whether an established custodial environment existed. Alternatively, defendant contends that the trial court should have denied a change of custody on the basis of *LeFleche v Ybarra*, 242 Mich App 692; 619 NW2d 738 (2000), because an established custodial environment existed in the grandmother’s home. Defendant’s claim that the trial court employed a flawed legal analysis is reviewed for “clear legal error on a major issue.” MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). “When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct.” *Fletcher, supra* at 881.

We agree with defendant that the trial court erred by failing to determine whether an established custodial relationship existed between Anastasia and defendant, and remand this case to the trial court for an evidentiary hearing regarding both Anastasia’s established custodial environment and her best interests. Because the existing record leaves somewhat unclear whether an established custodial environment existed with Anastasia’s grandmother or defendant

himself, we do not wish to make a de novo finding in this regard. On remand, the trial court should ascertain, clearly and on the record, Anastasia's established custodial environment. In making this determination, the trial court should take into account factual developments that have occurred during the pendency of this appeal. *Fletcher, supra* at 889. The court should also consider whether joint physical custody would comport with Anastasia's best interests.¹

Because legal issues regarding the appropriate burden of proof likely will arise on remand, we briefly address them to provide guidance to the trial court.

Both the referee and the trial court expressed a belief that defendant's mother, and not defendant, provided the majority of Anastasia's care. Neither fact finder, however, specifically determined whether Anastasia's established custodial environment existed with defendant, plaintiff, both plaintiff and defendant, or neither of them. To discern the proper burden of proof to be placed on the parties, the trial court's initial inquiry is whether an established custodial environment exists. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The determination of a child's established custodial environment generally requires "an intense factual inquiry." *Id.* at 6. A custodial environment is established where, "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

Only after a decision is made regarding Anastasia's established custodial environment can the court determine which burden of proof to apply. *Wealton v Wealton*, 120 Mich App 406, 410; 327 NW2d 493 (1982). If the court finds that an established custodial environment exists with defendant, it may order a custodial change only if plaintiff presents clear and convincing evidence that a change would serve Anastasia's best interests. *Foskett, supra* at 6. Clear and convincing evidence is also required to change custody if the court finds that there is an established custodial environment with both parents. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000). If no established custodial environment exists with either parent, the court may change custody on plaintiff's proof, by a preponderance of the evidence, that the change serves Anastasia's best interests. *Foskett, supra* at 6-7.

In light of our decision to remand for a hearing regarding Anastasia's established custodial environment, we decline to address defendant's argument that the trial court's factual findings on all of the best interest factors other than (d), (g), and (h), were insufficient. On remand, the trial court shall make specific, reviewable findings regarding Anastasia's best interests, on the basis of current information. *Bowers v Bowers*, 190 Mich App 51, 56; 475 NW2d 394 (1991).

¹ Plaintiff's petition sought joint physical custody. The record reveals that the trial court failed to consider this option, in contravention of MCL 722.26a.

We vacate the trial court's custody modification order, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher