

STATE OF MICHIGAN
COURT OF APPEALS

MARC D. CHRISTY,
Plaintiff-Appellant,

UNPUBLISHED
December 23, 2008

v

MARIA A. CHRISTY,
Defendant-Appellee.

No. 284327
Dickinson Circuit Court
LC No. 06-014418-DM

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right that portion of the amended judgment of divorce awarding physical custody of the parties' minor child to defendant. We reverse and remand for further proceedings consistent with this opinion.

Plaintiff asserts that the trial court committed clear legal error by applying a preponderance of the evidence standard when analyzing the best interest factors set forth in MCL 722.23, having determined, as a factual matter, that the child had an established custodial environment with both parents. We agree.

Custody orders are to be affirmed on appeal unless the trial court's findings are against the great weight of the evidence, the trial court committed a palpable abuse of discretion, or the trial court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994); *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). This Court reviews a trial court's application of the law for clear error. *Berger, supra* at 706; *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). A trial court commits legal error when it incorrectly chooses, interprets or applies the law. *Fletcher, supra* at 881; *Berger, supra* at 706.

MCL 722.27(1)(c) provides in relevant part that a "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 interests of the child." Clearly, then, if a court determines that an established custodial environment exists with either or both parents, it is required by statute to apply the clear and convincing evidence standard of proof to its determination whether a change in that custodial environment is in the child's best interest. *Id.*; *Foskett, supra* at 6. Here, the trial court determined that the minor child had an established custodial environment with both parties.

Thus, it could only change that custodial environment, by awarding primary physical custody to either party, on the basis of clear and convincing evidence that such change was in the child's best interest. Instead, however, the trial court changed the child's established custodial environment based on application of the preponderance of the evidence standard, appropriate only where there is no established custodial environment. *Foskett, supra* at 6-7; *Underwood v Underwood*, 163 Mich App 383, 390; 414 NW2d 171 (1987). This was clear legal error that we are bound to correct. MCL 722.27(1)(c); *Fletcher, supra* at 881. Accordingly, the trial court's custody determination must be reversed and this matter remanded to the trial court for reevaluation of the best interest factors pursuant to the correct evidentiary standard. On remand, "the court should consider up-to-date information, including . . . that the child[] ha[s] been living with [defendant] during the appeal and any other changes in circumstances arising since the trial court's original custody order."¹ *Fletcher, supra* at 889.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

¹ Defendant acknowledges that the trial court applied an incorrect evidentiary standard to its analysis, but asserts that the trial court's legal error in this regard was harmless. We decline defendant's invitation to speculate that the trial court would have reached the same result had it applied the correct legal standard. We express no opinion regarding the trial court's analysis of the best interest factors or its ultimate discretionary decision to award primary physical custody to defendant.