

STATE OF MICHIGAN
COURT OF APPEALS

AMBER LYNNE WRIGHT,

Plaintiff-Appellee,

v

KEVIN JAMES SNYDER,

Defendant-Appellant.

UNPUBLISHED

July 13, 2010

No. 295196

Allegan Circuit Court

LC No. 07-040787-DC

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

In this child custody dispute, defendant Kevin James Snyder appeals as of right challenging an August 2009 order denying his motion to modify custody. We reverse and remand for further proceedings.

I. FACTS AND UNDERLYING PROCEEDINGS

The parties are the parents of EMS, who is now five-years-old. In January 2007, plaintiff Amber Lynne Wright filed a complaint seeking child support and physical custody of EMS. The circuit court awarded plaintiff primary physical custody, gave the parties joint legal custody, and ordered defendant to pay \$267 a month in child support.

In July 2008, defendant petitioned for a modification of the custody and child support orders. The circuit court referred to matter to a Friend of the Court investigator, and a referee later conducted an evidentiary hearing. The referee found that proper cause and changed circumstances justified revisitation of the original custody order, and that because “the majority of parental care for the child has been provided by individuals other than the plaintiff/mother,” an established custodial environment did not exist with plaintiff. After weighing the statutory best interest factors, MCL 722.23, the referee recommended that the court award defendant primary physical custody of the child. The circuit court initially adopted the referee’s recommendation.

Plaintiff filed an objection, and on August 10, 2009, the circuit court held a de novo evidentiary hearing. In a bench opinion, the circuit court rendered the following relevant findings and conclusions:

Under the Uniform Child Custody Act, the Court is not to change a previous order if there is an established custodial environment, unless the evidence is clear and convincing that it's in the best interest of the child.

If there's not [an] established custodial environment, then the burden on the petitioner would [be] a preponderance of the evidence.

The first thing I think that the Court should address is that fact that there was a recommendation here by the Friend of the Court investigator to change custody, but it did not address by what standard, if any, it used. It was just looking at the factors.

So that isn't really helpful to the Court until and unless it's determine[d] what standard of proof . . . [is] required. Now, under the law of this state . . . [t]he order itself doesn't, in and of itself, create an established custodial environment. The facts create that. And that's what the Court has to look at. And I have to look at it at the time the order was entered.

The order in this case was initially entered back in—on *February 28th, 2007*. At that time, it appears to the Court, at least on the evidence that has been submitted, the parties had been separated for approximately one year. During that period of time, the defendant had little, if any, contact with the child.

He provided no support of any substantial nature. The mother was left with the entire burden during that period of addressing all of the needs of the child.

Under the statute, an established custodial environment exists if over an appreciable period of time the child naturally looks to the custodian and that environment for guidance, discipline, and the necessities of life—the necessities of life and parental comfort. The age of the child, the physical environment, and the inclination of the custodian of the child as to permanency of the relationship shall also be considered.

For whatever reason, the parties separated. That's really not material. But what is material is that for a substantial period of time, the only reason that child had any parental comfort, necessities of life, discipline, care, were all provided by the Plaintiff.

Now things may have changed since then, but that's what existed at the time this Court order was entered on February 28th [2007].

So there isn't any question in the Court's mind that at the time the Court entered its order, there was an established custodial environment with the Plaintiff, the respondent in this particular hearing.

Now, that being said, then, there has to be a change of circumstances from the time the Court entered that order, from that point—because of what in fact

existed—and now, *to show that it's in the best interest of the child by clear and convincing evidence. That's the burden that's placed on the petitioner.* [Emphasis added.]

The court then considered the best interest factors, and concluded:

Now, basically I think the parties are equal in most areas, a couple areas Mr. Snyder is superior to Mrs. Wright. And a couple areas she has the advantage over him. Therefore, the Court concludes the evidence is not clear and convincing. The motion to change custody is denied and the previous orders of the Court will stand.

On November 18, 2009, defendant filed a claim of appeal. A month later, defendant filed in the circuit court an emergency motion for temporary custody of EMS, alleging that EMS had fallen from a second-story window while being inadequately supervised by plaintiff's boyfriend. The parties agree that in March 2010, the Kent Circuit Court exercised jurisdiction over the child on the basis of a petition filed by the Department of Human Services (DHS).

II. ANALYSIS

Defendant challenges the circuit court's denial of the motion to modify custody, contending that the court committed several legal errors in its analysis. This Court must affirm all orders concerning custody "unless the trial court's findings of fact 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." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

As a preliminary matter, because the Kent Circuit Court has assumed jurisdiction over the child, that court's orders "supercede all previous orders, including custody orders entered by another court, even if inconsistent or contradictory." *In re AP*, 283 Mich App 574, 593; 770 NW2d 403 (2009). When the Kent Circuit Court terminates its jurisdiction over the child, the last circuit court custody order in this case will revive. At that point, we direct the circuit court in this case to reconsider defendant's motion for a change of custody in light of the legal standards set forth in this opinion.

We agree with defendant that the circuit court committed clear legal error by making a determination of EMS's established custodial environment premised on the conditions that had existed at the time it entered the February 28, 2007 custody order, rather than at the time of the evidentiary hearing. On remand, the proper question for consideration is whether, at the time of an evidentiary hearing, the child has an established custodial relationship with one or both parties. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). "Whether an established custodial environment exists is a question of fact for the trial court to resolve on the basis of statutory criteria. The trial court's custody order is irrelevant to this analysis. Rather, the focus is on the circumstances surrounding the care of the children in the time preceding trial,

not the reasons behind the existence of a custodial environment.” *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995) (internal citations omitted).

After a decision is made regarding EMS’s established custodial environment, the court must 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 plaintiff, it may order a custodial change only if defendant presents clear and convincing evidence that a custodial change would serve the child’s best interests. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). Clear and convincing evidence is also required to change custody if the court finds that an established custodial environment exists 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 defendant’s proof, by a preponderance of the evidence, that the change serves EMS’s best interests. *Foskett*, 247 Mich App at 6-7.

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

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher