STATE OF MICHIGAN

COURT OF APPEALS

CHARLOTTE MARIE GOBLE, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED July 19, 2012
v	No. 307614 Jackson Circuit Court
JAMES GOBLE, Defendant/Counter-Plaintiff-Appellant.	LC No. 11-000255-DM

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant James Goble appeals as of right the trial court's judgment of divorce, granting sole physical custody of the minor child to plaintiff Charlotte Marie Goble. Because the trial court erred in its determination of the established custodial environment and consequently applied the wrong burden of proof associated with determining custody, we reverse and remand for further proceedings.

Plaintiff and defendant married on April 1, 2005. The minor child was born in December 2006. By agreement of the parties, plaintiff stayed home and cared for both the child and the household while defendant worked to provide for the family financially. Other than one year in which he was unemployed, defendant worked full-time with typical "banker's hours," i.e., 9:00 a.m. to 5:00 p.m., during the marriage. Plaintiff, defendant, and the minor child lived in the marital residence together until the parties separated on January 24, 2011, when the minor child was four years old.

When the parties separated, plaintiff remained in the marital residence, and defendant moved about one hour away from the marital residence. Pursuant to a temporary custody order, plaintiff had temporary physical custody of the minor child, and defendant had parenting time leading up to the November 1, 2011, bench trial. Defendant had the minor child on Wednesday

nights from 5:00 p.m. to 8:00 p.m.[1] and then Friday at 5:00 p.m. or 6:00 p.m. until Sunday at 6:00 p.m. every weekend. Defendant testified that during his parenting time he reads with the child, builds Legos and watches hockey with her, and takes her places such as to the park, the zoo, the mall, the arcade, out to eat, and to the library on occasion. He also testified that he and the child do chores together, including cleaning the house, doing the dishes, cooking, and doing the laundry.

The parties agreed to joint legal custody of the minor child, but both parties sought sole physical custody. Following the trial, the trial court determined that the minor child had an established custodial environment only with plaintiff and that defendant failed to show by clear and convincing evidence that granting him sole physical custody was in the minor child's best interests.

Defendant first argues that the trial court erred in determining that an established custodial environment existed only with plaintiff and that it should have concluded that an established custodial environment existed with both parties. Defendant contends that, as a result of the error, the trial court applied the wrong burden of proof when determining custody. We agree.

"[W]hen considering an important decision affecting the welfare of the child, the trial court must first determine whether the proposed change would modify the established custodial environment of that child. In making this determination, it is the child's standpoint, rather than that of the parents, that is controlling." *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010). "[W]hether a custodial environment has been established is an intense factual inquiry." *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). An established custodial environment exists if "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). "It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). "An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Id*. at 707.

"If an established custodial environment exists with one parent and not the other, then the noncustodial parent bears the burden of persuasion and must show by clear and convincing evidence that a change in the custodial environment is in the child's best interests." *In re AP*, 283 Mich App 574, 601; 770 NW2d 403 (2009). However, where "the record supports an established custodial environment with both parents . . . *neither* plaintiff's nor defendant's established custodial environment may be disrupted except on a showing, by clear and convincing evidence, that such a disruption is in the children's best interests." *Foskett*, 247 Mich App at 8 (emphasis in original).

[1] Defendant testified that, per plaintiff's instruction, the Wednesday-night visits ceased when the child started school a few months before trial. Plaintiff testified that the Wednesday-night visits were discontinued, per agreement, once the summer ended and the child began school.

Whether an established custodial environment exists is a question of fact. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). The great weight of the evidence standard applies to all findings of fact, and a trial court's findings regarding the existence of an established custodial environment should be affirmed unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

In this case, the trial court did not make findings of fact to support its conclusion that an established custodial environment existed solely with plaintiff other than to point out that, while commendable, during the marriage defendant worked outside the home while plaintiff stayed at home to care for the child. However, the trial court also found that both parties loved the minor child equally and that defendant displayed an equal capacity and disposition to give her love, affection, and guidance. The trial court described both parties as "hands-on parents" and specifically noted that after the parties' separation defendant and the child spent one-on-one time together doing household chores, going to the park, and reading together. The trial court also found that defendant was the primary provider of the minor child's material necessities. Thus, we find on this record that the great weight of the evidence establishes that the minor child (who was too young to weigh in on the matter) looked to both plaintiff and defendant "for guidance, discipline, the necessities of life, and parental comfort[,]" MCL 722.27(1)(c), and that her relationship with both parents was "marked by qualities of security, stability, and permanence." *Mogle*, 241 Mich App at 197. As such, the trial court's contrary finding was against the great weight of the evidence.

Because the minor child had an established custodial environment with both parties, neither party could disrupt the other's established custodial environment without showing by clear and convincing evidence that such a disruption was in the minor child's best interests. See *Foskett*, 247 Mich App at 8. The record before us indicates that plaintiff has been the minor child's primary caregiver since birth and that the minor child has spent the majority of her time, both before and after the parties' separation, with plaintiff. The minor child has lived in the marital residence her entire life, which is approximately one hour away from defendant's residence. Thus, we find that the trial court's finding that granting defendant sole physical custody of the minor child would disrupt her established custodial environment with plaintiff was not against the great weight of the evidence. See *Pierron*, 486 Mich at 86-87, 89. In reaching this conclusion, the trial court properly required defendant to prove by clear and convincing evidence that granting him sole physical custody was in the minor child's best interests. See *Foskett*, 247 Mich App at 8. However, because an established custodial environment existed with defendant as well, in seeking sole physical custody of the minor child, plaintiff likewise bore the burden of showing by clear and convincing evidence that granting her sole physical custody was in the minor child's best interests. See *id*.; see also *In re AP*, 283 Mich App at 601-602. The trial court committed clear legal error by failing to require plaintiff to meet this burden. See *Gerstenschlager v Gertenschlager*, 292 Mich App 654, 657; 808 NW2d 811 (2011) (quotation omitted) ("When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct."). Accordingly, in light of the trial court's factual error in determining that the minor child did not have an established custodial environment with defendant and its legal error in applying the wrong burden of proof, we reverse and remand for further proceedings consistent with this opinion.

Defendant also argues that the trial court erred as a matter of law by applying a "cookie-cutter" approach to custody instead of a more "creative and flexible approach" and, as a result, erroneously rejected the possibility of joint physical custody. Defendant gave this issue only cursory treatment; thus, we need not consider it. See *Badiee v Brighton Area Sch*, 265 Mich App 343, 359; 695 NW2d 521 (2005) ("A party waives an issue when it gives the issue cursory treatment on appeal."). Moreover, this argument is without merit because neither party requested an award of joint physical custody.

Reversed and remanded. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering