

STATE OF MICHIGAN
COURT OF APPEALS

SHANNON YOTHER,

Plaintiff-Appellant,

v

BRIAN YOTHER,

Defendant-Appellee.

UNPUBLISHED

November 13, 2001

No. 233133

Jackson Circuit Court

LC No. 00-002821-DM

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the judgment of divorce in which defendant was awarded joint legal custody and unsupervised visitation rights with the parties' minor daughter. We reverse and remand.

The parties were married on May 8, 1998, and their daughter was born on September 30, 1998. Plaintiff filed a complaint for divorce on May 30, 2000. On that same date, plaintiff filed a petition for temporary physical and legal custody of the child and requested that defendant's parenting time be supervised. On June 28, 2000, the trial court entered an order awarding to plaintiff temporary physical and legal custody of the child and referred other issues to the friend of the court. Trial in the divorce matter was held on January 25, 2001, and the trial court entered the judgment of divorce on March 2, 2001. The only issues being raised on appeal concern the award of custody. Under the child custody provision, the trial court awarded the parties joint legal custody and plaintiff was awarded physical custody. Defendant was awarded parenting time, with no indication that the visits would be supervised.

Plaintiff first argues that the trial court committed clear legal error when it failed to make the necessary findings of fact by considering the best interest factors set forth in MCL 722.23. The standard of review in child custody cases is set forth in MCL 722.28:

To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

We agree with plaintiff that the trial court committed clear legal error when it failed to state on the record its reasons for granting defendant's request for joint legal custody and failed to consider whether a joint legal custody award was in the best interests of the child applying the statutory factors set forth in MCL 722.23. MCL 722.26a(1) provides:

In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) The factors enumerated in section 3 [MCL 722.23].

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

Here, defendant requested joint legal custody, thus, the trial court was required to consider whether joint custody was in the best interests of the child applying the statutory factors set forth in MCL 722.23 and state its reasons on the record for granting that request under MCL 722.26a(1). *Mixon v. Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999). Because the trial court failed to state on the record its reasons for granting defendant's request for joint legal custody and failed to review the statutory best interest factors, the trial court committed clear legal error. *Id.* at 162.

We reject defendant's contention that the parties either stipulated to joint legal custody or waived any objections when the trial court awarded joint legal custody without considering the best interest factors and without stating its reasons on the record. The trial court cannot accept the stipulation of the parents, but must independently determine what is in the best interests of the child. *Phillips v. Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). Moreover, the record does not factually support defendant's argument because the parties' pleadings and trial testimony indicate that they never agreed to joint legal custody. Further, there was no waiver of the issue because "[n]o exception need be taken to a finding or decision" of the trial court in an action tried without a jury. MCR 2.517(A)(7).

Additionally, we find that the error was not harmless. When a trial court considers custody issues without regard to the factors enumerated in MCL 722.23 and fails to make reviewable factual findings, the proper remedy is to remand for a new child custody hearing. *Foskett v. Foskett*, 247 Mich App 1, 12; ___ NW2d ___ (2001). On remand, the trial court should consider all relevant up-to-date information. *Fletcher v. Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). In accordance with MCL 722.26a(1), the trial court shall determine whether joint legal custody is in the best interest of the child by considering the best interest factors under MCL 722.23, state those findings on the record or in a written opinion, and state its final decision granting or denying defendant's request for joint legal custody on the record.

We need not address plaintiff's second claim of error that the trial court abused its discretion when it awarded defendant joint legal custody and unsupervised visitations, because

the trial court did not make the necessary factual findings considering the best interest factors. This issue may be reargued following remand.

Accordingly, we reverse and remand for the trial court to hold a new child custody hearing regarding the issues of joint legal custody and unsupervised visitation. The hearing shall be held within twenty-eight days of the issuance of this opinion. The trial court shall make its findings on the record or by written opinion within seven days of the hearing. The transcript of the proceedings on remand shall be filed with the Clerk of the Court of Appeals within twenty-one days of the hearing. Plaintiff must file with the Clerk of this Court all orders or opinions entered on remand within fourteen days after entry. Plaintiff's supplemental brief must be filed with this Court within twenty-one days of the filing of the transcript or the trial court's decision, whichever is later. Defendant shall file his supplemental brief within fourteen days after plaintiff's supplemental brief is filed. No further extensions will be granted. We retain jurisdiction.

/s/ Hilda R. Gage

/s/ Kathleen Jansen

/s/ Peter D. O'Connell