STATE OF MICHIGAN

COURT OF APPEALS

COLLEEN MARIE KANE,

Plaintiff-Appellee,

v

GARY WILLIAM HAASE,

Defendant-Appellant.

UNPUBLISHED
June 24, 2010

No. 295966
Montmorency Circuit Court
LC No. 01-002192-DS

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff sole legal and physical custody of the parties' two minor children. We affirm in part and remand for further proceedings.

A trial court may modify a previous custody order if a change in circumstances renders modification in the child's best interest. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). After the party seeking modification establishes that a change in circumstances exists, the trial court must address whether an established custodial environment exists with both or either party. *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW2d 77 (2009). If modifying a custody award changes the established custodial environment, then the moving party must show by clear and convincing evidence that a change in the custodial environment is in the best interest of the child. MCL 722.27(1)(c); *Pierron v Pierron*, 282 Mich App 222, 244-245; 765 NW2d 345 (2009). However, if modifying a custody order will not change the established custodial environment, the moving party must show by a preponderance of the evidence that a change serves the child's best interests. MCL 722.27(1)(c); *Pierron*, 282 Mich App at 245.

Once the trial court has determined the applicable burden of proof, it must next determine whether a change or modification of the existing custody order is in the child's best interests. This analysis involves a consideration of the statutory best interests factors enumerated in MCL 722.23. A trial court must evaluate each of the best interest factors and explicitly state its findings and conclusion with respect to each. *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008). "To reach a conclusion requires weighing the factor for one party or the other or weighing it equally. It does not mean merely mentioning it." *Wolfe v Howatt*, 119 Mich App 109, 111; 326 NW2d 442 (1982). "These findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties.

However, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings." *MacIntyre v MacIntyre* (*On Remand*), 267 Mich App 449, 452; 705 NW2d 144 (2005). If the trial court commits error by failing to make such findings and conclusions, this Court must remand for "reevaluation." *Fletcher v Fletcher*, 447 Mich 871, 882, 889 (BRICKLEY, J.), 900 (GRIFFIN, J.); 526 NW2d 889 (1994).

Defendant argues that the trial court's failure to address all of the statutory best interest factors constitutes clear error on a major issue. We agree. See *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), citing MCL 722.28. After finding that an established custodial environment existed solely with plaintiff, the court considered whether a change of custody was in the best interest of the children. However, the court's opinion and order only addressed factors (a), (b), and (i). The trial court's opinion did not reach any conclusion on factors (c), (d), (e), (f), (g), (h), (j), (k), or (*l*). Given this minimal analysis, we are unable to effectively determine whether the trial court's findings are against the great weight of the evidence. The record appears to be sufficient for review, but the court's silence on nine of the 12 best interest factors renders any consideration of the record a speculative exercise. Because the trial court failed to explicitly state its findings and conclusions regarding each factor, we remand for a reevaluation. *Fletcher*, 447 Mich at 882, 889 (BRICKLEY, J.), 900 (GRIFFIN, J.).

Defendant also argues that the court erred in concluding that no established custodial environment existed with him at the time of the custody hearing. An established custodial environment exists where a parent provides the care, discipline, love, guidance, and attention the particular child requires, thereby creating a permanent, secure tangible and intangible environment for the child. MCL 722.27(1)(c); *Berger*, 277 Mich App at 706. Contrary to defendant's assertion, it is clear that the court was aware of the former custody arrangement because the trial court included these facts in its opinion. The failure of the court to rule in defendant's favor is not evidence that it did not consider the prior circumstances before ruling. Moreover, "[c]ustody orders, by themselves, do not establish a custodial environment." *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993); see also *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Nor are custodial environments immutable once established. "[T]he focus is on the circumstances surrounding the care of the children *in the time preceding trial*." *Hayes*, 209 Mich App at 388 (emphasis added). After reviewing the record, the court's findings at the time concerning the existence of an established custodial environment were not against the great weight of the evidence. MCL 722.28. The testimony established that up until about May 2009, the children had looked to both plaintiff and defendant for guidance, discipline, the necessities of life, and parental comfort. See MCL 722.27(1)(c). However, in the time preceding trial, the relationship between defendant and the children deteriorated. While the record evidence is somewhat mixed, it does not "clearly preponderate in the opposite direction" of finding that no established custodial environment existed with defendant. *Berger*, 277 Mich App at 706. On remand, the court should consider if circumstances have changed.

Defendant also argues that the court's handling on an in camera interview with the children was flawed. Again, we disagree. Contrary to defendant's assertion, there is no requirement that the parties request an interview before the court may conduct one. See MCR 3.210(C)(5). Further, in camera interviews do not need to be recorded for later scrutiny. *Molloy v Molloy*, 466 Mich 852; 643 NW2d 574 (2002). Finally, the court clearly indicated that it spoke with the children and that it had considered their reasonable preferences. Although the court's

observation on the children's preference was made in context of examining best interest factor (a), it nonetheless indicates that the reasonable preferences of the children were considered.

We note, however, that the subject matter of an in camera interview must be limited to the child's parental preference, and the information received can only be applied to best interest factor (i), the reasonable preference of the child. *In re HRC*, 286 Mich App 444, 451; 781 NW2d 105 (2010); see also MCL 722.23(i); MCR 3.210(C)(5). In the case at hand, the court's opinion strongly suggests that what the children had to say impacted other considerations and determinations of the court. On remand, the court will consider those discussions only to the extent that they impact best interest factor (i).

We will not address challenges made to the court's finings on factors (b) and (i), given that the court is required to consider up-to-date information, including the children's current and reasonable preferences and any other changes in circumstances arising since the original custody order. *Fletcher*, 447 Mich at 882, 889 (BRICKLEY, J.), 900 (GRIFFIN, J.); *In re AP*, 283 Mich App 574, 605; 770 NW2d 403 (2009); *Pierron*, 282 Mich App at 262.

Affirmed in part and remanded to the trial court for a reevaluation of the best interest factors. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck