

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
June 28, 2011

In the Matter of J. D. HARDY, Minor.

No. 300305
Wayne Circuit Court
Family Division
LC No. 08-480310

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Respondent mother appeals as of right from an order that granted respondent father's motion, brought during child protective proceedings, to change physical custody of the minor child to him. We reverse.

Respondent mother had physical custody of the child, and respondent father had visitation, under a domestic relations order. The child and his two half-siblings came to the attention of the Department of Human Services (DHS) upon allegations regarding respondent mother's substance abuse and domestic violence between respondent mother and her living-together partner, E. King, who was the father of the other two children. The minor child's father was named a respondent because he had failed to support the child and had significant child support arrearages. The court asserted jurisdiction over the child and his half-siblings, and the parents were all ordered to comply with parent-agency agreements (PAAs). Ten months after the minor child came into the court's custody, the trial court found that all the parents were compliant with their PAAs and ordered the minor child returned to respondent mother's care. However, before the order could be effectuated, an emergency hearing was held based on allegations that respondent mother had been hiding ongoing domestic abuse between herself and King. One of the child's half-siblings had also made an allegation of sexual abuse against respondent mother, although this allegation was never substantiated and likely the result of coaching by the child's foster mother. The trial court modified its prior order and temporarily placed the minor child with respondent father.

Respondent mother once again made progress on her PAA. She was no longer with King and was receiving domestic violence services. She had obtained a new apartment. Still, respondent father moved for a change of custody, seeking sole physical custody of the child. The trial court found, by a preponderance of the evidence, that a change of custody was

warranted. The trial court specifically found that no custodial environment existed for the child, who had been out of his mother's care for quite some time during the child protective proceedings.¹

On appeal, respondent mother argues that the trial court erred in awarding sole physical custody of the child to respondent father because, contrary to the trial court's findings, there was an established custodial environment with her. As such, the "clear and convincing evidence" standard, not the "preponderance of the evidence" standard, should have been used in determining whether a change of custody was in the child's best interests. We agree.²

This matter involves the intersection of the Juvenile Code, MCL 712A.1 *et seq.*, and the Child Custody Act (CCA), MCL 722.21 *et seq.* When a juvenile court assumes jurisdiction over a child then the child is a ward of the juvenile court, whose orders supersede all prior custody orders by any other court. *In re AP*, 283 Mich App 574, 593; 770 NW2d 403 (2009). It is only after a juvenile court dismisses a case that existing custody orders resume their effect and can only be changed by proceeding under the CCA. *Id.* A juvenile court may determine custody of a child ancillary to making determinations under the juvenile code. *Id.* at 598-599. However, when the juvenile court orders a change of custody, it must then abide by the requirements of the CCA, including a more formal determination regarding the child's best interests. *Id.* at 603-604.

In order to grant a change of custody under the CCA, the trial court was required to find by a preponderance of the evidence that a change of circumstances existed. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 527-528; 752 NW2d 47 (2008). The parties do not dispute that a "change of circumstances" existed by virtue of the fact that the child was removed from respondent mother's care and made a temporary ward of the court in July 2008.

The next step was for the trial court to determine whether a custodial environment existed. MCL 722.27(1)(c) provides:

The 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 interest of the child. The custodial environment of a child is established 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

¹ After the trial court's order was entered, the minor child was removed from respondent father's care, based on allegations of physical abuse, and placed with relatives.

² We reject the guardian ad litem's argument that the matter is now moot since the child was subsequently removed from his father's care. Although the child was removed from respondent father's care, respondent mother sought physical custody of the child and therefore has not been afforded a remedy. Thus, the issue is not moot. See *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004).

An established custodial environment is “one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child.” *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). “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.” *Id.* An established custodial environment may exist regardless of the existence of a custody order, a violation of a custody order, or the total absence of a custody order. *Id.* at 707. The focus is on the circumstances surrounding the care of the child in the time preceding the custody trial. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). In addition, “where there are repeated changes in physical custody and uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed and the establishment of a new one is precluded.” *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993).

Whether an established custodial environment exists is critical to the trial court’s decision whether to grant a change in custody because of the standard utilized in reviewing a motion for change of custody. If an established custodial environment exists, the trial court may only change custody upon finding clear and convincing evidence that it is in the child’s best interests. If no established custodial environment exists, the trial court may order a change of custody upon finding, by only preponderance of the evidence, that a change of custody is in the child’s best interests. MCL 722.27(1)(c); *Pierron v Pierron*, 282 Mich App 222, 245; 765 NW2d 345 (2009). A trial court’s findings regarding the existence of an established custodial environment is reviewed under the great weight of the evidence standard. *Berger*, 277 Mich App at 706.

The trial court’s finding that no established custodial environment existed was against the great weight of the evidence. The child was almost seven years old when DHS sought his removal from respondent mother’s care in July 2008. There is no dispute that during the first seven years of his life the child looked almost exclusively to his mother for his care. In fact, a custody order was in place granting the mother custody of the child, with visitation rights granted to the father. Respondent father may have exercised his visitation rights, but even he admitted that he was in significant arrearage in terms of child support, owing more than \$11,000. While it is true that the child was out of respondent mother’s care for an extensive period of time during the juvenile proceedings, the established custodial environment was not destroyed or extinguished during the proceedings under the Juvenile Code. The trial court acknowledged as much at prior hearings. The court noted at one dispositional hearing that “the mother is the custodial parent pursuant to the domestic relations order of the court” and a change of custody motion would have to be filed before an official change could take place. At another hearing, the court noted, “as long as mother is substantially in compliance with her Treatment Plan, it is the policy of the court, at least this Judge, to return children back to the custodial parent that had them in the first place and not get into changing custody when I don’t see clear and convincing evidence to do so, which is what one would need in order to change the custodial environment the children were in.”

The court changed its position regarding the established custodial environment only after the child had been living with the father for a period of time. However, the fact that the child lived with the father from July 2009 until April 2010 did not destroy the established custodial environment with the mother because the placement was only temporary. The trial court specifically noted in July 2009 when the court placed the child with his father that it was *not* a

change of custody, but was a change in placement. The trial court should have determined that a custodial environment existed and used the “clear and convincing” standard in determining whether a change of custody was in the child’s best interests. And, although there was some support for each of the trial court’s findings under the best interest factors, the evidence was not clear and convincing that a change of custody was in the child’s best interests. Thus, the trial court abused its discretion in granting the father’s motion. See *Brausch v Brausch*, 283 Mich App 339, 347; 770 NW2d 77 (2009).

Reversed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto