# STATE OF MICHIGAN

# COURT OF APPEALS

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| ANGELA SUE BEACH,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 30, 2011 |
| v | No. 302626<br>Genesee Circuit Court<br>Family Division |
| ERIC GILVONN HYMAN,<br><br>Defendant-Appellant. | LC No. 07-272720-DS |

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Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting legal and physical custody of his minor daughter, A., to plaintiff, the child's mother. We agree with defendant that further findings were necessary before the trial court could properly alter the existing custody arrangement. Accordingly, we reverse and remand for further proceedings.

Our review of custody disputes is governed by the Child Custody Act (CCA), MCL 722.21 *et seq.* MCL 722.26(1); MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). Under the CCA, "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 evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Pierron*, 486 Mich at 85. Here, the trial court erred as a matter of law by ordering a change in the parties' custody arrangement without first determining whether A. had an established custodial environment with either or both of her parents and, in light of this determination, whether the new arrangement was in her best interests.

The CCA provides:

> 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. . . . [MCL 722.27(1)(c).]

A child may have an established custodial environment with one or both parents. See *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). It is also possible for a child to have no

established custodial environment. See *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). If an established custodial environment exists, a 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." MCL 722.27(1)(c); *Pierron*, 486 Mich at 86. Thus, if a "proposed change would modify the established custodial environment of the child, then the burden is on the parent proposing the change to establish, by clear and convincing evidence, that the change is in the child's best interests" according to the best interests factors listed in MCL 722.23. *Pierron*, 486 Mich at 90, 92. The clear and convincing standard applies equally if the child has an established custodial environment with both parents. Under such circumstances, "*neither* . . . established custodial environment may be disrupted except on a showing, by clear and convincing evidence, that such a disruption is in the child[]'s best interests." *Foskett*, 247 Mich App at 8 (emphasis in original). When no established custodial environment exists—or if a proposed change will not affect an established custodial environment—"the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests." *Pierron*, 486 Mich at 93; see *Hayes*, 209 Mich App at 388.

Court orders regarding custody, alone, do not of themselves establish custodial environments. "In determining whether an established custodial environment exists, it makes no difference whether that environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed." *Hayes*, 209 Mich App at 388. Rather, the issue requires an "intense factual inquiry," *Foskett*, 247 Mich App at 6, and because a "trial court's custody order is irrelevant to this analysis . . . 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*, 209 Mich App at 388. Accordingly, prior errors by the court—including, for example, by failing to conduct a complete evidentiary hearing before issuing the temporary custody order—do "not affect the trial court's analysis of whether an established custodial environment existed." *Id*. at 388-389.

Here, the trial court erred by basing its custody determination on potential past mistakes and events during the ongoing custody dispute, such as coercion of the in propria persona plaintiff and the effective transfer of primary custody from plaintiff to defendant by way of stipulated temporary orders that were entered without the benefit of a best interests hearing. While these issues are troubling—and while the court correctly stressed that any prior, significant changes to custody or parenting time generally should have been accompanied by clear consideration of the child's best interests—these issues were not dispositive at the time of the January 28, 2011, hearing. Rather, the inquiry should have focused "on the circumstances surrounding the care of the child[] in the time preceding trial, *not* the reasons behind the existence of a custodial environment." *Id*. at 388 (emphasis added). Therefore, the court erred by restoring the custody arrangement to comply with the original, July 13, 2007, custody order merely on the basis of potential errors during the intervening proceedings and the arguably temporary nature of the intervening orders. Instead, the court should have considered A.'s custodial relationship to the parties and best interests at the time of the January 2011 hearing.

Accordingly, on remand, the trial court should first determine whether A. has an established custodial environment with one, both, or neither of her parents. She could conceivably have such an environment with neither parent because, in some cases, "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); see *Hayes*, 209 Mich App at 388. If the court concludes that one or more established custodial environments exist, it shall not alter the custody arrangement so as to disrupt the established custodial environment(s) unless there is presented clear and convincing evidence that it is in A.'s best interests. MCL 722.27(1)(c); *Pierron*, 486 Mich at 86; *Foskett*, 247 Mich App at 8. If the court concludes that no established custodial environment exists, it must consider whether a new arrangement is in A.'s best interests according to a preponderance of the evidence. See *Pierron*, 486 Mich at 93; *Hayes*, 209 Mich App at 388. In rendering its findings, the court may rely on the prior record and prior findings or recommendations of the referee to the extent such reliance is relevant and permitted under MCL 552.507(6).

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering