

STATE OF MICHIGAN  
COURT OF APPEALS

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RICHARD LEON MCCOWEN, III,

Plaintiff-Appellee,

V

AMY CATHERINE RAMSDELL,

Defendant-Appellant.

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UNPUBLISHED

July 25, 2006

No. 268398

Gladwin Circuit Court

LC No. 05-001872-DM

Before: Donofrio, P.J., and O’Connell and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court’s judgment granting physical custody of the parties’ minor child to plaintiff. We vacate the trial court’s decision and remand for a new trial.

The minor child (DOB 4/7/03) was born to the parties when they were unmarried. At the time of the child’s birth and until the parties married in July, 2004, the minor child resided with defendant and plaintiff would visit the child, sometimes staying weekends at defendant’s home. After the parties were married, defendant and the child moved in with plaintiff for approximately two months beginning in August 2004. The marriage broke down shortly thereafter and, in October 2004, defendant and the child moved out of plaintiff’s home. Plaintiff had frequent visitation with the child after he and defendant moved out, including overnight visitation.

Plaintiff filed for divorce in January, 2005. In May, 2005 a temporary order for custody, visitation, and child support was entered, vesting defendant with primary physical custody of the child. The order provided plaintiff with parenting time from 8:00 a.m. to 8:30 p.m. on Fridays alternate weekends, and alternate holidays. Although the parties were able to resolve all property issues implicated in the divorce action, custody of the minor child remained at issue. A bench trial was thus held in this matter, at the conclusion of which the trial court awarded plaintiff sole physical custody of the child. Defendant moved for a new trial and, when such motion was denied, filed the instant appeal.

In a child custody case, this Court reviews findings of fact under the great weight of the evidence standard, discretionary rulings for an abuse of discretion, and questions of law for clear error. *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). On appeal, all custody determinations must be affirmed unless the trial court’s findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a

clear legal error on a major issue. MCL 722.28; *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005). A trial court's factual findings are against the great weight of the evidence if they clearly preponderate in the opposite direction. *Thompson v Thompson*, 261 Mich App 353, 363; 683 NW2d 250 (2004).

Child custody disputes are to be resolved in the best interests of the children, using the factors set out in MCL 722.23. *Thompson, supra* at 356-357. A trial court must explicitly state its findings and conclusions with respect to each of these factors. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2004). Our Supreme Court has held that in adopting this standard, "the Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment', except in the most compelling cases." *Baker v Baker*, 411 Mich 567, 577; 309 NW2d 532 (1981). Thus, a trial court must find a compelling reason to change custody, requiring more than a marginal improvement in the minor's life. *Carson v Carson*, 156 Mich App 291, 301-302; 401 NW2d 632 (1986).

Before a trial court makes a determination regarding the child's best interests, it must first determine whether an established custodial environment exists. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). A custodial environment 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. MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000). "An established custodial environment is one of significant duration 'in which the relationship between the custodian and child is marked by qualities of security, stability and permanence.'" *Mogle, supra* at 197, quoting *Baker v Baker*, 411 Mich 567, 579-580. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship are also considered. MCL 722.27(1)(c); *Phillips, supra* at 25. An established custodial environment can exist in more than one home. *Mogle, supra* at 197-198. "When a modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest." *Phillips, supra* at 25.

Defendant first argues on appeal that the trial court erred when it failed to determine whether an established custodial environment existed. We agree. When a temporary custody order is in place a trial court must make a specific finding regarding the existence of a custodial environment. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). Whether an established custodial environment exists comprises a question of fact that must be addressed by a trial court before it makes any determination regarding what is in a child's best interests. *Mogle v. Scriver*, 241 Mich.App 192, 197; 614 NW2d 696 (2000). Where a trial court fails to make a finding regarding an established custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination. *Jack, supra*.

In this case, a temporary custody order was in place which awarded temporary custody to the parties but gave plaintiff parenting time every other weekend and Fridays during the day, with the remaining parenting time to defendant. A review of the trial transcript clearly shows that the trial court failed to address whether an established custodial environment existed. Indeed, the trial court recognized at the hearing on defendant's motion for a new trial that it probably did not "get into" the issue of custodial environment in its decision. Thus, the trial

court's failure to address whether an established custodial environment existed was clear legal error. *Jack, supra* at 670-671. In the absence of the trial court's legal determination of the existence of an established custodial environment, this record is insufficient for the Court to make its own determination.<sup>1</sup>

Vacated and remanded for a new trial. We do not retain jurisdiction.

/s/ Pat M. Donofrio  
/s/ Peter D. O'Connell  
/s/ Deborah A. Servitto

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<sup>1</sup> Because we conclude that this matter should be remanded for a new trial, we do not reach defendant's remaining arguments on appeal.