STATE OF MICHIGAN

COURT OF APPEALS

JOHN ARTHUR PRIAMI,

Plaintiff-Appellee,

v

KATHLEEN MARY PRIAMI,

Defendant-Appellant.

UNPUBLISHED
April 19, 1996

No. 186567
LC No 93-326304-DM

Before: MacKenzie, P.J., and Cavanagh and T.L. Ludington*, JJ.

PER CURIAM.

This is a custody dispute. The parties had two minor children, Justin (born 10/15/86) and Ashley (born 2/6/89). Their final judgment of divorce provided for joint legal custody of the children to both parties, with physical custody of Justin to plaintiff father and physical custody of Ashley to defendant mother. The custody arrangements were reviewable within ninety days of the entry of judgment. Defendant appeals as of right from a judgment review order providing that physical custody of Justin should remain with plaintiff. We vacate and remand.

The first step in considering a change in custody is to determine whether an established custodial environment exists. *Curless v Curless*, 137 Mich App 673, 676; 357 NW2d 921 (1984); *Baker v Baker*, 411 Mich 567; 309 NW2d 532 (1981). Absent the existence of an established custodial environment, custody is determined by a preponderance of evidence standard. *Underwood v Underwood*, 163 Mich App 383, 390; 414 NW2d 171 (1987). If an established custodial environment exists, it must be established by clear and convincing evidence that a change in custody is in the best interests of the child. *Curless, supra*; MCL 722.27(1)(c); MSA 25.312(7)(1)(c). An established custodial environment exists "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); MSA 25.312(7)(1)(c). The child's age, the security and stability of the child's

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* Circuit judge, sitting on the Court of Appeals by assignment.

physical environment, and the inclination or understanding of both the child and the guardian as to the permanence of the custody arrangement should also be considered. *Id*. Custody orders, by themselves, do not establish a custodial environment. *Baker, supra*, p 579. Rather, "[s]uch an environment depend[s] instead upon a custodial relationship of significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Id*., pp 579-580.

Here, the trial court found that Justin had an established custodial environment in plaintiff's home. Initially, we reject defendant's argument that, because the parties' divorce judgment required a review of the custody arrangement within ninety days, plaintiff had only temporary custody of Justin that could not ripen into an established custodial environment. See *Berman v Berman*, 84 Mich App 740, 748; 270 NW2d 680 (1978). See also *Blaskowski v Blaskowski*, 115 Mich App 1, 6-7; 320 NW2d 268 (1982). Although there may have been some uncertainty as to the permanence of Justin's residing with plaintiff, he was not subjected to repeated changes in physical custody that would have precluded a finding that there was an established custodial environment with his father. Compare *Bowers v Bowers*, 198 Mich App 320, 326; 497 NW2d 602 (1993).

Nevertheless, we agree with defendant that the trial court erred in making its determination concerning the existence of an established custodial environment. In finding an established custodial environment with plaintiff, the trial court stated only that the divorce judgment gave plaintiff physical custody of Justin and that Justin had resided with plaintiff since before the judgment of divorce was entered. Specifically, the court found at the conclusion of the May 24, 1995 hearing:

> The parties were divorced in December of 1994, and the judgment of divorce provided that the father have custody of the minor child, Justin, the mother have custody of the daughter.
>
> The son that is the subject of this petition, has resided with the father since the judgment of divorce has been entered. There is an established custodial environment with the father.

It is apparent that the court failed to consider the effect of the custody challenge, the effect of defendant's prior role as a caregiver, her continued involvement in Justin's daily and school life, or the degree of reliance Justin placed on defendant for his material, emotional, and educational needs. Indeed, the court's findings do not indicate that any factors other than Justin's place of residence were considered in determining whether an established custodial environment existed with plaintiff. We can only conclude that the trial court limited its definition of an established custodial environment to the place where the child had resided for a significant period of time without considering any of the other necessary factors. The

application of this definition of established custodial environment constitutes clear legal error and compels this Court to vacate the judgment review order. MCL 722.28; MSA 25.312(8). We therefore remand the case for reevaluation under the proper standard and for entry of adequate factual findings, taking into account current information as to the child's established custodial environment, as well as any other pertinent information that will assist the court in reaching a custody determination. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).

Defendant also argues that the trial court committed clear legal error in its evaluation of the statutory best interest of the child factors set forth at MCL 722.23; MSA 25.312(3). Because we are remanding this case for reconsideration based on current information, we need not reach this issue. Once a proper analysis of the existence of a custodial environment has been undertaken on remand, the court shall reassess the best factors based on current information and, in so doing, shall specifically base its custody decision on (1) the preponderance of the evidence standard if there is no established custodial environment with plaintiff, or (2) the clear and convincing standard if there is an established custodial environment with plaintiff. We remind the court that it must consider each of the best interest of the child factors and explicitly state its findings and conclusions regarding each. *Bowers, supra,* p 328.

Finally, we reject defendant's contention that the case should be remanded to a different judge. There is no evidence that the trial judge in this case would have difficulty putting previously expressed views or findings out of his mind. *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989).

Vacated and remanded. We retain no further jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Mark J. Cavanagh
/s/ Thomas L. Ludington