STATE OF MICHIGAN

COURT OF APPEALS

BRIAN LEE LOUGHMILLER,

Plaintiff-Appellant,

v

REBECCA LARKINS,

Defendant-Appellee.

UNPUBLISHED
October 31, 1997

No. 201887
Wexford Circuit Court
LC No. 95-011813-DC

Before: O'Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

Plaintiff father appeals as of right from an order granting primary physical custody of the parties' minor child to defendant mother and modifying plaintiff's parenting time schedule. We vacate and remand.

The essential facts are not in dispute. The parties lived together in Cadillac and had one child, Brian, born January 14, 1994. In August 1995, the parties separated. On January 8, 1996, a custody order was entered awarding them joint legal and joint physical custody of Brian. Under the terms of the order, plaintiff father was granted parenting time every other weekend and two nights per week.

In fall 1996, defendant mother moved from Cadillac to Owosso. Plaintiff then filed a petition for sole physical custody or, in the alternative, continued joint physical custody but with parenting time switching between the parties on a weekly basis. The friend of the court recommended joint custody with each party having parenting time on alternating weeks. Defendant objected to the recommendation and requested a de novo hearing. That hearing resulted in an order changing the previous joint physical custody arrangement to sole physical custody in defendant mother. Plaintiff was awarded parenting time every other weekend and six weeks in the summer.

The best interests of the child control in custody disputes. MCL 722.25; MSA 25.312(5). In determining the child's best interests, the trial court must first determine whether an established custodial environment exists; it is only then that the court can determine what standard of proof must be applied. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). If no custodial environment exists, the trial court may modify a custody order if a preponderance of the evidence indicates a change is

warranted. *Id.* If an established custodial environment exists, however, clear and convincing evidence that a change of custody is in the child's best interest must be presented. *Id.* The application of the higher standard of proof is intended to erect a barrier against removal of a child from an established custodial environment except in the most compelling cases and to minimize unwarranted and disruptive changes of custody. *Baker v Baker*, 411 Mich 567, 576-577; 309 NW2d 532 (1981), *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995).

In this case, the parties stipulated at the beginning of the de novo hearing that there was no established custodial environment. The trial court accepted this stipulation and applied the less stringent, preponderance of the evidence standard of proof in ordering a change in custody. On appeal, plaintiff first argues that the court's acceptance of the parties' stipulation as to the nonexistence of an established custodial environment constituted clear legal error requiring reversal. We agree. The determination regarding an established custodial environment results in a determination of whether the standard of proof is clear and convincing evidence or a preponderance of the evidence. The proper standard of proof in custody matters should not be left to the parties, but should be made by the trial judge. *Wilson v Gauck*, 167 Mich App 90, 96; 421 NW2d 582 (1988). See also *DeRush v DeRush*, 218 Mich App 638, 641; 554 NW2d 322 (1996) (stipulations of law are not binding on courts). Thus, the trial court erred in accepting the parties' stipulation as to the nonexistence of an established custodial environment and the standard of proof necessary to effectuate a change in custody. *Id.*

The error cannot be considered harmless, since the record suggests that the child may have had an established custodial environment with both parents. See *Duperon v Duperon*, 175 Mich App 77, 80-81; 437 NW2d 318 (1989); *Nielsen v Nielsen*, 163 Mich App 430, 433; 415 NW2d 6 (1987). If that is the case, then the trial court used the wrong, lesser standard of proof when he ordered a change in custody. *Id.* Moreover, we reject defendant's contention that the error is "moot" because her move to Owosso forced a custody change regardless of the applicable standard of proof. An intrastate change of domicile, without more, is not sufficient to warrant a change in custody. *Dehring v Dehring*, 220 Mich App 163, 165-166; 559 NW2d 59 (1996). The less drastic step of modifying the parties' parenting time schedule could well provide an adequate method to deal with the increased travel time necessitated by defendant's move. We therefore vacate the trial court's order modifying the parties' joint physical custody of Brian.

Given our decision that the trial court's child custody modification must be vacated, we need not address plaintiff's remaining claims of error. For purposes of a rehearing, however, we note that because plaintiff originally petitioned for a change in custody or parenting time, the burden of proof to establish that a change would be in the best interests of the child was properly placed on him at both the friend of the court referee hearing and the de novo hearing. See *Wilson, supra*, p 95; *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991).

Vacated and remanded. This Court does not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage