

STATE OF MICHIGAN
COURT OF APPEALS

TED M. CHICHESTER,

UNPUBLISHED

Plaintiff-Appellant,

v

JODDIE L. CHICHESTER, a/k/a JODDIE L. KENT,

No. 198181

Calhoun Circuit Court

LC No. 95-002133-DM

Defendant-Appellee.

Before: Neff, P.J., and Jansen and Markey, JJ.

JANSEN, J. (concurring in part and dissenting in part).

I concur with the majority that the trial court's factual finding that there was no established custodial environment is against the great weight of the evidence. Rather, the record indicates that an established custodial environment existed with plaintiff-father. Therefore, the trial court was required to find by clear and convincing evidence that changing custody from plaintiff to defendant was in the best interests of the children. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). The trial court's erroneous factual finding, coupled with the failure to find by clear and convincing evidence that changing custody from plaintiff to defendant was in the best interests of the children, is not harmless error and the case must be remanded to the trial court for reevaluation. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).

Plaintiff also argues that the trial court's factual findings with regard to factors (b), (d), (h), and (k) of MCL 722.23; MSA 25.312(3) are against the great weight of the evidence. While I agree with the majority that the trial court's findings with respect to factors (b) and (d) are against the great weight of the evidence, I dissent with respect to the majority's discussion of factor (k). Regarding factor (k), I believe that the majority is improperly making additional factual findings in place of the trial court, rather than simply ruling that the trial court's findings are against the great weight of the evidence. Further, I dissent from the majority's decision to sua sponte find that the trial court's factual findings with respect to factors (c) and (e) are against the great weight of the evidence. None of the parties are challenging the trial court's findings with respect to factors (c) and (e) and I find it inappropriate to address matters not raised before this Court.

In light of the fact that the trial court erred in finding that there was no established custodial environment, that it failed to find by clear and convincing evidence that changing custody from plaintiff to defendant was in the best interests of the children, that its factual findings with respect to the factors (b) and (d) are against the great weight of the evidence, and that such errors cannot be considered harmless, I would simply remand to the trial court with instructions to reevaluate the factors set forth in MCL 722.23; MSA 25.312(3), and that the trial court should consider all relevant up-to-date information. *Fletcher, supra*, p 889. The trial court may not change custody from plaintiff to defendant unless it finds by clear and convincing evidence that it is in the best interests of the children to do so.

/s/ Kathleen Jansen