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STATE OF MICHIGAN

COURT OF APPEALS

ALEXANDER MICHAEL SLOAN, Plaintiff-Appellant,	UNPUBLISHED April 18, 2019
v	No. 345275 Livingston Circuit Court Family Division
ASHLEY LAUREN SALA, Defendant-Appellee.	LC No. 17-052498-DP

Before: BORRELLO, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Plaintiff-father appeals a child-support order issued by the trial court pertaining to his child with defendant-mother. Plaintiff challenges the trial court's prior order granting the parties' joint legal custody, granting defendant primary physical custody, and setting a parenting-time schedule for plaintiff. For the reasons stated below, we remand for further proceedings.[1]

I. BACKGROUND

The parties were not married when the minor child was born in September 2017. Plaintiff filed a paternity complaint and subsequently signed an affidavit of parentage. Plaintiff also filed a motion requesting joint legal and physical custody in addition to parenting time. The parties signed a temporary consent order that gave defendant physical custody of the child and awarded plaintiff a parenting-time schedule.

[1] A trial court's order resolving a child custody dispute "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. "A trial court commits legal error when it incorrectly chooses, interprets, or applies the law." *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014).

At a pretrial hearing, the parties stipulated to joint legal custody, and the trial court concluded that only parenting time was at issue. At the evidentiary hearing, plaintiff sought an increased parenting-time schedule, describing his ideal parenting-time schedule as all day, three days per week, and one overnight. Plaintiff's proposed schedule depended on his ability to bring the child to the daycare facility where he worked. Plaintiff maintained that he would be able to watch his own child while also caring for the other children at the daycare facility. The owner of the daycare facility confirmed plaintiff's testimony about this arrangement. The trial court was skeptical that plaintiff would be able to care for the other children while watching his own child and refused to grant plaintiff the parenting-time schedule he requested. Instead, after hearing testimony about both parties' work schedules and childcare arrangements, in addition to testimony about plaintiff's parenting skills and the parties' co-parenting abilities, the trial court determined that plaintiff should have parenting time for four hours on three weekday evenings and for a six-hour block of time on Sunday afternoons.[2] The final order governing custody and parenting time also granted the parties joint legal custody and defendant primary physical custody.

II. DISCUSSION

On appeal, plaintiff argues that the trial court failed to make any findings regarding (1) the child's established custodial environment, (2) the child's best interests regarding the grant of primary physical custody to defendant, (3) the child's best interests with respect to parenting time, and (4) the child's best interests pertaining to the parties' dispute over daycare. We agree that the trial court failed to articulate its findings about the child's established custodial environment and the child's best interests related to physical custody and parenting time, but we disagree that the trial court was required to make separate best-interest findings about which daycare the child attended.

The Child Custody Act of 1970, MCL 722.21 *et seq*., authorizes a trial court to issue custody and parenting-time orders that are in the child's best interests. *Lieberman v Orr*, 319 Mich App 68, 78; 900 NW2d 130 (2017). Before making a custody determination, however, the trial court must first determine whether an established custodial environment exists with either parent. *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011) ("[A] trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination."). Similarly, the trial court is required to make a finding about the child's established custodial environment before ordering parenting time. *Demski v Petlick*, 309 Mich App 404, 445; 873 NW2d 596 (2015). This determination is mandatory because the burden of proof with respect to the child's best interests depends on whether an established custodial environment exists. See *Kessler*, 295 Mich App at 62. Specifically, if an order would change the child's established custodial environment, the trial

[2] Plaintiff's parenting time gradually increased under the trial court's order. Plaintiff was to receive one overnight visit when the child turned one, which increased to two overnight visits after two months. When the child turned 15 months-old, plaintiff was to have the child every other weekend as well as one four-hour midweek visit.

court must determine whether clear and convincing evidence shows that this change is in the child's best interests. *Demski*, 309 Mich App at 446; MCL 722.27(1)(c).

Here, the trial court committed clear legal error in failing to address whether there was an established custodial environment. *Kessler*, 295 Mich App at 62. Nor did the court indicate what burden of proof it applied, so its failure to articulate findings regarding the established custodial environment, whether that environment would change, and what standard of proof applied requires remand. "Whether an established custodial environment exists is a question of fact for the trial court to resolve on the basis of statutory criteria." *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

The trial court also committed clear legal error by not expressly determining the child's best interests before awarding defendant primary physical custody. Trial courts have a "duty to ensure that the resolution of any custody dispute is in the best interests of the child." *Harvey v Harvey*, 470 Mich 186, 191-192; 680 NW2d 835 (2004). MCL 722.23 defines the " 'best interests of the child' " as "the sum total of the" factors set forth in MCL 722.23(a)-(*l*). "In child custody cases, the family court must consider all the factors delineated in MCL 722.23 and explicitly state its findings and conclusions with respect to each of them." *Spires v Bergman*, 276 Mich App 432, 443; 741 NW2d 523 (2007).

Defendant argues that plaintiff waived the issue of physical custody because he stipulated to joint legal custody. Legal custody and physical custody are distinct concepts. *In re AJR*, 496 Mich 346, 361; 852 NW2d 760 (2014). In this case, plaintiff moved for legal and physical custody, and the parties eventually agreed to joint legal custody. While the parties confirmed before the trial court that legal custody was not at issue, there was no discussion of physical custody. A trial court is not required to make explicit best-interests findings when the parties agree to a custody arrangement. See *Harvey*, 470 Mich at 192; *Rettig v Rettig*, 322 Mich App 750, 755-756; 912 NW2d 877 (2018). But the record is insufficient for us to conclude that the parties reached an agreement on physical custody or that plaintiff waived this issue. Further, "[a]n affirmative duty imposed by the Legislature on a trial court cannot be sidestepped merely because a party does not remind the court of its responsibility." *Yachcik v Yachcik*, 319 Mich App 24, 52; 900 NW2d 113 (2017). Accordingly, remand for a new custody hearing is required so that the trial court can expressly determine whether a grant of primary physical custody to defendant is in the child's best interests. See *Foskett v Foskett*, 247 Mich App 1, 12; 634 NW2d 363 (2001) ("Where a trial court fails to consider custody issues in accordance with the mandates set forth in MCL 722.23 and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing."). On remand, "the trial court 'should consider up-to-date information' and 'any other changes in circumstances arising since the trial court's original custody order.' " *Id*. at 63, quoting *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).

Parenting time must also be "granted in accordance with the best interests of the child." MCL 722.27(1). The trial court is required to consider pertinent, contested best-interest factors when making a parenting-time determination. *Shade v Wright*, 291 Mich App 17, 31-32; 805 NW2d 1 (2010). This Court has declined to remand for reconsideration of a parenting-time decision when the trial court failed to address the best-interest factors explicitly, but "it was clear from the trial court's statements on the record that the trial court was considering the minor

child's best interests in modifying [a party's] parenting time." *Id*. at 32. In this case, by contrast, it is not clear from the trial court's remarks that it adequately considered the child's best interests. Accordingly, remand is also required for the trial court to evaluate the child's best interests in relation to parenting time.

Lastly, plaintiff argues that the trial court was required to evaluate the child's best interests to resolve the parties' dispute over daycare. When parents who have joint legal custody "cannot agree on an important decision, such as a change of the child's school, the [trial] court is responsible for resolving the issue in the best interests of the child." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). Plaintiff's proposed parenting time depended on his employment at the daycare center where he worked and his professed intention to bring the child to that daycare as part of his parenting-time plan. The parties did not ask the trial court to resolve the issue of daycare separately from parenting time. Therefore, the issue of daycare was subsumed in the issue of parenting time and did not require a separate resolution.

In sum, we remand for a new custody hearing, after which the trial court will make findings as to the child's established custodial environment, the child's best interests related to the grant of primary physical custody to defendant, and the child's best interests relative to parenting time. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan