

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL PAUL BOOTS,

Plaintiff-Appellant,

v

TIFFANY LEIGH VOGEL-BOOTS,

Defendant-Appellee.

UNPUBLISHED

November 19, 2013

No. 317229

Wayne Circuit Court

Family Division

LC No. 10-110752-DM

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from an opinion and order that granted sole physical custody of the parties' minor child to defendant. The order was entered following remand by this Court. *Boots v Vogel-Boots*, unpublished opinion per curiam of the Court of Appeals, issued February 5, 2013 (Docket No. 309265). We vacate and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

In this custody dispute regarding the parties' only minor child, the trial court originally determined that an established custodial environment existed with plaintiff, only. In applying a preponderance of the evidence standard, the trial court then granted defendant sole physical custody of the child. On appeal, this Court reversed, concluding that the trial court erred in failing to find that an established custodial environment existed with both parents. Given this error, we remanded the case to the trial court for a determination on custody utilizing the more stringent clear and convincing burden of proof. *Id.* at 11.¹

On remand, the trial court issued an opinion without considering any up-to-date information from the parties or conducting any type of hearing. The trial court adopted its

¹ We left undisturbed the trial court's other rulings relating to property division and spousal support. *Id.*

previous findings and concluded that, even applying the clear and convincing evidence standard, defendant should have sole physical custody of the child. Plaintiff now appeals as of right.

II. ANALYSIS

Plaintiff argues that the trial court erred by failing to hold an evidentiary hearing on remand and consider up-to-date information as required under *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994). When reviewing a custody order, this Court must determine if the trial court made a clear legal error on a major issue; a clear legal error occurs when the trial court “errs in its choice, interpretation, or application of the existing law.” *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). While we agree that a trial court must consider up-to-date information when revisiting a custody issue on remand from this Court, the decision whether to conduct an additional evidentiary hearing or other proceeds is within the trial court’s discretion after providing the parties an opportunity to be heard.

On remand, a trial court must consider up-to-date information when making child custody determinations. *Fletcher*, 447 Mich at 889-890. In *Ireland v Smith*, 451 Mich 457, 468-469; 547 NW2d 686 (1996), our Supreme Court clarified its holding in *Fletcher* and instructed that the trial court “is to review the entire question of custody on remand.” The trial court should consider all of the statutory factors and conduct “whatever hearings or other proceedings are necessary to allow it to make an accurate decision concerning a custody arrangement that is in the best interests of [the child].” *Id.* Here, the record indicates that the trial court did not seek to obtain up-to-date information on remand. Instead, the trial court considered only the information available to it when it made its original determination.² As such, we remand this matter once again so that the trial court may properly consider up-to-date information or changes that have occurred since the original custody order. See *Ireland*, 451 Mich at 468-469; *Fletcher*, 447 Mich at 889.

Plaintiff next asks this Court to remand to a different trial court judge due to alleged trial court bias. However this issue is unpreserved; to preserve this issue for appellate review, a party seeking judicial disqualification must first move to disqualify in the trial court. See MCR 2.003; *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006). Plaintiff failed to do so, and thus, we decline to address this issue. See *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). We note that even if plaintiff had preserved this issue, it lacks merit, given that there is no record evidence to support such a claim.

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

² We note that the trial court’s error is understandable considering the lack of specificity in our remand order. We further note that the trial court did properly apply the proper burden of proof on remand.