

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ALBERT PAUL LEPOROWSKI,  
Plaintiff-Appellant,

UNPUBLISHED  
February 21, 2003

V

KELLIE DIANN LEPOROWSKI,  
Defendant-Appellee.

No. 235646  
Wayne Circuit Court  
LC No. 98-821022-DM

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Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant primary physical custody of the parties' minor child and changing the parenting time schedule that had been in effect since the parties' consent judgment of divorce was entered in March 1999. We reverse and remand.

Plaintiff contends that the parenting time schedule outlined in the parties' 1999 judgment of divorce created a joint custodial situation in which the minor child spent nearly one-half of his time with plaintiff. Plaintiff contends that the interim order established a "custodial environment" that should not have been disturbed without defendant making a proper showing that the change was in the best interests of the minor child. We agree.

MCL 722.27(1)(c) provides, in relevant part:

The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

Thus, in the instant matter, if the interim order established a joint custodial environment, the trial court could not change that custodial environment unless defendant presented clear and convincing evidence that the change was in the best interest of the minor child.

Whether a “custodial environment” exists is a factual inquiry. *Foskett v Foskett*, 247 Mich App 1, 5, 8; 634 NW2d 363 (2001). We must sustain the trial court’s factual finding unless it is against the great weight of the evidence, that is, unless “the evidence clearly preponderates in the opposite direction.” *Id.* at 5, quoting *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000).

Here, the trial court found that the interim order did not create a joint custodial environment because it awarded, albeit temporarily, primary physical custody to defendant. However, we have opined that the underlying custody order is “irrelevant” to the determination of whether a custodial environment exists. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). “In determining whether an established custodial environment exists, it makes no difference whether that environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed.” *Id.* Indeed, the primary issue is not “the reasons behind the custodial environment, but . . . the existence of such an environment.” *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992). Because the trial court relied exclusively on the interim order, and failed to consider any of the statutory factors, MCL 722.27(1)(c), the trial court’s finding was not supported by any relevant evidence. *Hayes, supra* at 388. Therefore, we conclude that the trial court’s finding was against the great weight of the evidence. *Foskett, supra* at 5, 8.

Although the record *suggests* that a custodial environment existed with both parents, the record is not sufficient for us to make our own factual determination. See *Jack v Jack*, 239 Mich App 668, 670-671; 610 NW2d 231 (2000), quoting *Thames v Thames*, 199 Mich App 299, 304; 477 NW2d 496 (1991). Accordingly, this issue must be remanded. *Jack, supra* at 670, quoting *Thames, supra* at 304.

In *Foskett*, we explained the procedure that the trial court should follow on remand:

If the trial court finds that an established custodial environment exists, then the trial court can change custody only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child. This higher standard also applies when there is an established custodial environment with both parents. On the contrary, if the court finds that no established custodial environment exists, then the court may change custody if the party bearing the burden proves by a preponderance of the evidence that the change serves the child’s best interests. [*Foskett, supra* at 6-7 (citations omitted).]

Moreover, to the extent that plaintiff moved for joint physical custody, MCL 722.26a(1) mandates that the trial court consider such a request.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck, C.J.  
/s/ Richard Allen Griffin  
/s/ Donald S. Owens