

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of DEVANTE BRITTON, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner,

and

DARRYL BRITTON,

Respondent-Appellee,

v

KELLY SEABERRY,

Respondent-Appellant.

UNPUBLISHED

July 23, 2009

No. 288397

Wayne Circuit Court

Family Division

LC No. 06-455854-NA

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In this child protective action initiated by the Department of Human Services (DHS), respondent-mother, Kelly Seaberry, appeals as of right the September 15, 2008, order changing physical custody of the minor child to respondent-father Darryl Britton.¹ We remand for further proceedings.

On June 8, 2006, a preliminary child protective hearing was conducted regarding the minor child. The previous day, the child had been removed from mother's home based on allegations of physical abuse and marijuana use by mother. The original petition for temporary custody alleged, in part, that mother physically and verbally abused the child, including striking the child with a metal pole and hanger, and that mother admitted to regular use of marijuana. Mother was offered services, but refused. The court authorized the petition and the child was placed in the temporary care of respondent-father.

¹ Mother and father were never married, but the record reflects that father had court ordered visitation with the child.

A series of dispositional review hearing and permanency planning hearings took place between October 2006 and July 15, 2008. In a report dated April 8, 2008, the Family Independence Agency (FIA) recommended that father have sole legal and physical custody of the child and that the wardship be terminated. On August 7, 2008, father moved for sole physical custody of the child. A hearing was held on father's motion on August 22, 2008. The trial court found that it was in the child's best interest to award the parties joint legal custody of the child, to award sole physical custody to father, and to dismiss the child protective proceeding and terminate the wardship.

Mother contends that the trial court erred by failing to determine whether a custodial environment existed before awarding custody to father and by failing to address each of the statutory best interest factors. We agree.

Three different standards of review apply in child custody proceedings:

First, the trial court's findings of fact are reviewed under the "great weight" standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. This Court defers to the trial court's determinations of credibility. Second, a trial court commits clear legal error under MCL 722.28 when it incorrectly chooses, interprets, or applies the law. Third, discretionary rulings are reviewed for an abuse of discretion.

A trial court's findings regarding each best interest factor are reviewed under the great weight of the evidence standard. The trial court's ultimate custody decision is reviewed for an abuse of discretion. The overriding concern is the child's best interests. (Citations omitted.) [*McIntosh v McIntosh*, 282 Mich App 471, 474-475; ____ NW2d ____ (2009).]

Mother first argues that the trial court failed to make a factual determination of whether an established custodial environment existed. A trial court must make a factual determination about whether an established custodial environment exists in order to determine the movant's burden of proof. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). "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." *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). "An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008), citing *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

Father argues that the trial court did make such a finding when it found that the child had "been living with father in a stable satisfactory environment and it's in the child's best interests to continue that living environment." The court's statement is general and lacks specific factual

findings. Further, the statement was made in reference to statutory factor (a). The trial court failed to properly determine the existence of a custodial environment. However, “[w]here a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of the issue by de novo review.” *Jack, supra* at 670.

It appears that the child resided primarily with mother. Mother testified that she raised the child from birth until age 11, and provided him with a home during that time. But Devante was removed from her home during the child protective proceeding and began living with father. Father testified that he was employed and provided health care coverage for the child. Although this evidence demonstrates that father provided a home for the child for approximately two years, we do not believe that there is enough evidence in the record to evaluate whether he provided an established physical and psychological environment. Thus, remand is necessary for the trial court to determine whether a custodial environment existed.

Mother next contends that the trial court did not address all the best interest factors enumerated in MCL 722.23. When making a determination regarding a child’s best interest, a trial court is required to state its factual findings and conclusions with regard to each relevant statutory best interest factor listed in MCL 722.23. *Ritterhaus v Ritterhaus*, 273 Mich App 462, 472-475; 730 NW2d 262 (2007). The trial court failed to consider factors (g), (i), (j), and (k), and failed to at least make explicit factual findings with regard to the applicability of each of these factors. “Where a trial court fails to consider custody issues in accordance with the mandate set forth in MCL 722.23 and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing. *Id.* at 475. Consequently, this matter must be remanded to the trial court to afford the court the opportunity to place on the record its findings regarding the best interest factors enumerated in MCL 722.23, or, if necessary, a new hearing that may include consideration of up-to-date evidence. In the interests of maintaining as stable an environment for the child as possible, the trial court’s present order shall remain in effect until the trial court has the opportunity to issue a new order based on the above analysis or hearing after determining whether a custodial environment exists.”²

Remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

² Because we are remanding the case for further proceedings, we decline to address mother’s argument that the trial court abused its discretion in awarding physical custody to father.