

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER ELLIS,

Plaintiff-Appellee,

v

MELISSA MARIE EVERS, f/k/a, MELISSA
MARIE ELLIS,

Defendant-Appellant.

UNPUBLISHED

March 21, 2006

No. 264700

Clare Circuit Court

LC No. 96-900271-DM

Before: Smolenski, P.J., Whitbeck, C.J., and O’Connell, J.

PER CURIAM.

Defendant appeals as of right from an order of the circuit court changing physical custody of the parties’ daughter Bethany Ellis to plaintiff. This case is before this Court for a second time following an order of remand in *Ellis v Evers*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2004 (Docket No. 253712). We again remand for reevaluation.

A judgment of divorce was entered on January 9, 1997, dissolving the parties’ marriage. The parties have two minor children, Preston Ellis (DOB 3/27/89) and Bethany Ellis (DOB 6/9/93). At the time of the divorce, defendant was awarded physical custody of both children. On November 14, 2002, plaintiff moved to change physical custody of the children. While defendant agreed to grant plaintiff physical custody of Preston, she contested the requested change in physical custody of Bethany. In its initial ruling on the matter, the circuit court denied plaintiff’s motion for a change in the physical custody of Bethany.

On appeal, we rejected plaintiff’s argument that the evidence clearly preponderated against the trial court’s finding that an established custodial environment existed between the children and defendant. *Id.*, slip op at 2. We concluded, however, that the trial court erred when considering the statutory best interest factors and remanded the case for reevaluation. *Id.*, slip op at 2-5. On remand, the circuit court determined that Bethany no longer had an established custodial environment with defendant and that it was in her best interest that physical custody be changed to plaintiff. Defendant now appeals.

Defendant first asserts that the circuit court violated the law of the case doctrine when it found that an established custodial environment no longer existed and addressed the best interest factors beyond those with which we had previously found error. Whether law of the case applies is a question of law subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13;

627 NW2d 1 (2001). Custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Harvey v Harvey*, 257 Mich App 278, 282-283; 668 NW2d 187 (2003).

“Under the law of the case doctrine, ‘if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.’” *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). “The appellate court’s decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court.” *Lopatin*, *supra* at 260.

In this case the circuit court’s reevaluation of its custody determination was consistent with this Court’s prior decision. We remanded this case for reevaluation of all the best interest factors in light of any and all up-to-date information. *Ellis*, *supra*, slip op at 4. Further, between the time of the circuit court’s first and second rulings in this matter, material facts impacting Bethany’s custody had changed. Specifically, Preston and Bethany had been separated and defendant had moved in with her boyfriend and his wards, requiring Bethany to adjust to a new family dynamic and a new school. The law of the case doctrine does not apply where the facts do not remain materially the same. *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000).

Defendant next argues that neither proper cause nor a change of circumstances existed to warrant review of the last custody order entered. Pursuant to MCL 722.27(1)(c), a party seeking a change in custody must first establish the existence of proper cause or a change in circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003).

[T]o establish ‘proper cause’ necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child’s well-being. [*Id.* at 512.]

To establish a sufficient change of circumstances, “a movant must prove that, since entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child’s well-being, have materially changed.” *Id.* at 513 (emphasis in original).

In this case, Preston’s separation from Bethany was a sufficient change of circumstances to warrant reconsideration of the last custody order. The separation of siblings is generally a more significant event “than the normal life changes (both good and bad) that occur during the life of a child.” *Vodvarka*, *supra* at 513; see also *Lustig v Lustig*, 99 Mich App 716, 731; 299 NW2d 375 (1980). The separation of the siblings could have a very significant effect on their future relationship and accordingly their future well-being. See *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001) (noting that, in most cases, it will be in the best interests of each child to keep siblings together). Therefore, we conclude that the circuit court did not err when it

found that there was sufficient change of circumstances to warrant reconsideration of the last custody order.

We agree with defendant, however, that the circuit court erred when it concluded that she no longer had an established custodial environment with Bethany. An established custodial environment exists “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.” MCL 722.27(1)(c) An established custodial environment stems from a custodial relationship of “significant duration” and is “an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability, and permanence.” *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). “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.” MCL 722.27(1)(c).

In this case, the circuit court made the following observations about the existence of an established custodial environment:

Bethany’s environment has changed considerably in the past year, i.e., she has changed to a completely new household, changed schools, and her parental guidance has changed in that Defendant mother’s new boyfriend has assumed part of this role. It is uncertain as to how long this will continue. As such, the court concludes that there is no longer an established custodial environment for purposes of standard of proof.

We conclude that the circuit court placed too much emphasis on a change in Bethany’s physical environment in reaching its decision that she no longer had an established custodial environment with defendant. At the time of the circuit court’s decision on remand, Bethany had been in defendant’s primary physical custody for more than eight years following the judgment of divorce. Further, as the trial court itself noted, Bethany was emotionally tied to defendant. The fact that Bethany indicated a preference to remain with defendant strongly suggests that she still looked to defendant for parental comfort and guidance, and that their relationship had a quality of permanence. Nor do we believe that the fact Bethany had apparently also come to look to defendant’s boyfriend for additional guidance necessarily undermines the nature and quality of the custodial environment. While the physical and organization aspects of Bethany’s custodial environment had changed, the evidence strongly preponderates in favor of the conclusion that the psychological environment remained strong and unaltered. Therefore, after considering the record as a whole, we conclude that the evidence clearly preponderates against the circuit court’s conclusion that Bethany no longer had an established custodial environment with defendant.

The fact that the circuit court erred in finding that no established custodial environment existed with defendant renders the trial court’s ultimate decision concerning custody an abuse of discretion because the court’s subsequent analysis of the best interest factors was predicated on an incorrect evidentiary standard. See *Foskett, supra* at 8. We are bound to correct this error by remanding this case to the trial court for reevaluation pursuant to the correct legal standard and considering all up-to-date information. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). Accordingly, we decline to address defendant’s challenge to the court’s analysis of several of the best interest factors.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck