

STATE OF MICHIGAN  
COURT OF APPEALS

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CHARLOTTE MARIE GOBLE,  
Plaintiff-Appellee,

UNPUBLISHED  
June 18, 2013

v

JAMES GOBLE,

Defendant-Appellant.

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No. 313988  
Jackson Circuit Court  
LC No. 11-000255-DM

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's November 9, 2012 decision granting plaintiff sole physical custody of the minor child. We reverse and remand for further proceedings consistent with this opinion.

In a November 30, 2011 judgment of divorce, the trial court granted plaintiff sole physical custody of the child. Defendant appealed the judgment of divorce, and we reversed and remanded for further proceedings consistent with our opinion. *Goble v Goble*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2012 (Docket No. 307614). We found that an established custodial environment existed with both parties and, thus, the trial court erred by granting sole physical custody to plaintiff without requiring plaintiff to prove by clear and convincing evidence that granting her sole physical custody of the child was in the child's best interests. *Id.* at 3.

On remand, without taking any additional evidence from the parties, or holding any type of hearing, the trial court issued a written opinion in which it found by clear and convincing evidence that it was in the child's best interests to grant plaintiff sole physical custody and entered an order consistent with that finding. Defendant appeals the trial court's order following remand.

Defendant argues that the trial court erred by failing to obtain and consider up-to-date information on remand and by making best interest findings that were inconsistent with its original findings. We agree.

We employ three different standards when reviewing a trial court's decision in a child-custody dispute. We review the trial court's findings of fact to determine if they are against the great weight of the evidence, we review

discretionary decisions for an abuse of discretion, and we review questions of law for clear error. [*Frowner v Smith*, 296 Mich App 374, 380-381; 820 NW2d 235 (2012).]

“All custody orders must be affirmed on appeal unless the circuit court’s factual 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.” *Gerstenschlager v Gertenschlager*, 292 Mich App 654, 657; 808 NW2d 811 (2011).

On remand, the trial court must consider up-to-date information when making child custody determinations. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). In *Ireland v Smith*, 451 Mich 457, 468-469; 547 NW2d 686 (1996), the Supreme Court instructed that the trial court “is to review the entire question of custody on remand. The court should consider all 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].” In the present case, the record indicates that on remand, the trial court did not hold any hearings or otherwise seek to obtain up-to-date information. Rather, the trial court evaluated the child’s best interests on the basis of the evidence of record from the original proceedings. We find that the trial court plainly erred by not seeking and considering up-to-date information before it rendered its decision on remand. *Ireland*, 451 Mich at 468-469; *Fletcher*, 447 Mich at 889.

We acknowledge that defendant has not provided this Court with any information to indicate what up-to-date information he would have provided the trial court and, therefore, we cannot evaluate whether this evidence would have made any difference in the outcome. Nevertheless, we do not find this fatal to his claim. Indeed, because it was not previously presented to the trial court, it could have been disregarded by this Court as an improper attempt to expand the record on appeal. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) (“This Court’s review is limited to the record established by the trial court, and a party may not expand the record on appeal.”). In light of the trial court’s obligation to consider up-to-date information and its complete failure to even attempt to receive such, we cannot fault defendant for the lack of a record on what might have been presented.

Defendant also argues that the trial court erred in its best interest determination because it found on remand that plaintiff prevailed on more best interest factors than she did in the original action. Although the record does not reveal plain error, we share some concerns in this regard. When the trial court initially reviewed the best interest factors, it found that factors a, b, d, e, f, g, i, j, and k favored both parties equally, factors c and l favored defendant, and factor h favored plaintiff. After remand, without taking any additional evidence, the trial court reversed findings on four factors—a, d, k, and l, finding the first three now favored plaintiff and that the last no longer favored defendant. We acknowledge that the trial court prefaced its opinion with a blanket statement that it had “gone back and reviewed and reconsidered the testimony in its entirety” and essentially supplemented, amended, or deleted its prior findings by the present opinion. Such action is not error. When a case is remanded on the basis of an erroneous best interest determination, the trial court “is to review the entire question of custody on remand.” *Ireland*, 451 Mich at 468-469. Hence, we believe the trial court’s review and reconsideration of the record appropriate. In addition, we are not holding that the trial court’s findings on remand

were against the great weight of the evidence. See *Fletcher*, 447 Mich at 881 (“[A] court’s ultimate finding regarding a particular factor is a factual finding that can be set aside if it is against the great weight of the evidence.”). Rather, the problem is that the trial court never explained on what basis it shifted its findings. Instead, reviewing the reasoning behind both opinions, the trial court appears to have considered the exact same testimony, but reached a different result without any explanation for the change.

For example, when the trial court first considered factor d, the length of time the child lived in a stable satisfactory environment and the desirability of maintaining continuity, the trial court: considered that the child “has not had a stable environment,” given the alcohol and domestic violence issues; found acceptable plaintiff’s current residence where the child lived just with plaintiff and her grandmother was next door; and expressed concern about defendant’s living arrangements being above a bar and including a roommate with alcohol problems; and concluded that the factor “equally favors both of you” but “d[id]n’t mean that in a positive way.” After remand, however, the trial court relied on these very same factors and concerns,<sup>1</sup> but found in favor of plaintiff. Moreover, one of the reasons the trial court relied on after remand was an area where it had previously expressed concern about plaintiff’s credibility on the record.

After remand, the trial court’s opinion concluded:

The mother testified that she participated in a substance abuse assessment as mandated by the terms of her probation for a domestic violence conviction. She testified the assessment indicated that she did not need alcohol treatment. The mother also denied having issues with alcohol but testified that she too refrained from alcohol use.

And yet, previously, the trial court had stated “I don’t know that I find you—your testimony [on this issue] as credible as [defendant]’s.” Although caselaw holds that “trial courts are in a superior position to make accurate decisions concerning the custody arrangement that will be in a child’s best interests . . . [and] are more experienced and better situated to weigh evidence and assess credibility,” *Fletcher*, 447 Mich at 889-890, we find it difficult to reconcile the trial court’s express credibility determination with its subsequent change of position absent additional evidence or further explanation.

Regarding factor l, the trial court took time in both decisions to enumerate why it discredited Dr. Lazarr’s testimony. After remand, however, when the trial court found the factor

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<sup>1</sup> “Alexandra has not lived in a stable environment.” “There have been many alcohol related and domestically violent situations that have occurred (both parties being the aggressor on various occasions) in the presence of Alexandra.” “The father also testified that his roommate has ongoing alcohol issues. This is particularly concerning to the Court because the father is an alcoholic who testified he is in recovery.” “The mother lives in the home only with Alexandra. No other people live there. It is a suitable environment where Alexandra has all the necessities of life. Most importantly, the maternal grandmother lives right next door and Alexandra finds comfort in being with her grandmother daily.”

avored plaintiff, the trial court failed to explain why her initial concerns about plaintiff potentially leaving with the child which had originally weighted this factor in favor of defendant, suddenly were not worthy of any mention.

Ultimately, we can find no justification in the record before us that explains *why* the trial court altered its findings of fact, particularly given that no new evidence taken. We wish to be clear that we are not holding that the trial court’s revised findings of fact are unsupported by the record or against the great weight of the evidence. We are also not holding that a trial court cannot alter its findings of fact after remand. Instead, we are holding that the trial court’s determination that the same evidence created a different result, without any additional explanation—whether witness credibility issues, discovering something in the record that was previously missed, or concluding that something which carried weight before no longer carried weight, or vice versa—raises significant concerns that the trial court was performing a results-oriented analysis.<sup>2</sup>

When these concerns are considered together with the trial court’s failure to consider up-to-date information, we believe the best result is to reverse the trial court’s decision and remand for the trial court to hold a new best interests hearing. On remand, the trial court shall accept and consider any relevant evidence the parties submit that relates to the time period after the original November 2011 decision. The trial court may, but is not required to, consider new evidence offered by the parties that relates to the time period prior to that decision; the trial court may rely solely on the previous record with respect to that time period.

For clarity on remand, “the primary concern in child custody determinations is the stability of the child’s environment and avoidance of unwarranted and disruptive custody changes . . . .” *Shade v Wright*, 291 Mich App 17, 28-29; 805 NW2d 1 (2010). Where “the record supports an established custodial environment with both parents . . . *neither* plaintiff’s nor defendant’s established custodial environment may be disrupted except on a showing, by clear and convincing evidence, that such a disruption is in the children’s best interests.” *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001) (emphasis in original).

The sole issue before the trial court on remand is whether, after reviewing the prior record and accepting any new relevant evidence provided by the parties, plaintiff has shown by clear and convincing evidence that sole custody with her is in the child’s best interests. Under the law of the case, defendant failed to meet his burden in this regard and is precluded from relitigating this issue absent a motion alleging proper cause or change of circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003).

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<sup>2</sup> We note that we find nothing in the record that evidences judicial bias that would require remand before a different trial judge. Moreover, given the significant time the parties have already invested in this case, we conclude that it is in everyone’s best interest to have the remand before the same trial judge, rather than start from scratch in front of a new one.

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

/s/ Donald S. Owens  
/s/ Elizabeth L. Gleicher  
/s/ Cynthia Diane Stephens