

STATE OF MICHIGAN
COURT OF APPEALS

BETHANIE BRADY,

Plaintiff-Appellant,

v

MICHAEL HECK,

Defendant-Appellee.

UNPUBLISHED

June 10, 2021

No. 355417

Allegan Circuit Court

LC No. 2020-062624-DC

Before: BOONSTRA, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court’s order granting joint physical and legal custody of the minor child, JH. We vacate the physical custody portion of the order and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant were in a romantic relationship from at least 2013 to 2019, and had a child, JH, in 2015. In 2019, the parties separated¹ and initially worked out their parenting time without court involvement. In 2020, plaintiff filed a complaint for sole physical custody of JH and requested that defendant receive supervised parenting time. Defendant responded, seeking joint physical custody of JH. Before the custody hearing, the trial court entered a temporary custody order granting plaintiff sole physical custody and granting the parties joint legal custody. The trial court’s temporary order also granted defendant supervised parenting time. In a subsequent temporary order, the trial court changed defendant’s parenting time to unsupervised.

At the custody hearing, the trial court concluded that an established custodial environment (ECE) for JH existed solely with plaintiff. It further determined that three best-interest factors

¹ The parties were never married.

avored plaintiff, while the remaining factors favored neither party. Ultimately, the trial court entered an order granting the parties joint physical and legal custody of JH.

This appeal followed.

II. STANDARD OF REVIEW

“All custody orders must be affirmed on appeal unless the circuit court’s findings were against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue.” MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). “Under the great weight of the evidence standard, this Court defers to the trial court’s findings of fact unless the trial court’s findings clearly preponderate in the opposite direction.” *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (quotation marks and citation omitted). A “trial court’s findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction.” *Pennington v Pennington*, 329 Mich App 562, 570; 944 NW2d 131 (2019) (quotation marks and citation omitted). In the child custody context, “[a]n abuse of discretion exists when the trial court’s decision is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment or the exercise of passion or bias.” *Berger*, 277 Mich App at 705. “A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law.” *Lieberman v Orr*, 319 Mich App 68, 77; 900 NW2d 130 (2017) (quotation marks and citation omitted). “In reviewing factual findings, this Court defers to the trial court’s determination of credibility.” *Demski v Petlick*, 309 Mich App 404, 445; 873 NW2d 596 (2015).

III. ANALYSIS

Plaintiff argues that the trial court erred by granting the parties joint physical custody of JH,² despite the trial court’s determination that an ECE existed solely with plaintiff and that none of the best-interest factors favored defendant. We agree.

MCL 722.27(1) “allows a court to award custody to one or more of the parties and reasonable parenting time to the parties involved, both in accordance with the best interests of the child.” *Lieberman*, 319 Mich App at 79. “[A] trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination.” *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011). Therefore, although the trial court in this case was making an initial custody determination, it was still required to determine whether an ECE existed with one, both, or neither of the parties before issuing a custody order. See *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000); see also *Bowers v Bowers*, 190 Mich App 51, 53; 475 NW2d 394 (1991). If a trial court finds that an ECE exists, it may not issue a custody order that changes the ECE without clear and convincing evidence that it is in the best interests of the child. MCL 722.27(1)(c); *Mogle*, 241 Mich at 197. However, because this was an initial custody determination, neither party was required to show

² Plaintiff does not challenge the trial court’s grant of joint legal custody.

proper cause or change in circumstances to warrant reconsideration of a previous custody decision. *Thompson v Thompson*, 261 Mich App 353, 361-362; 683 NW2d 250 (2004).

Whether an established custodial environment exists with one or both parents is a question of fact to be determined before the trial court makes any custody determination. If an established custodial environment exists with either or both parents, the trial court must find clear and convincing evidence that a change in the established custodial environment is in the child's best interests. [*Riemer v Johnson*, 311 Mich App 632, 641; 876 NW2d 279 (2015) (citations omitted).]

An ECE 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered." MCL 722.27(1)(c). "An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Demski*, 309 Mich App 404, 446 (quotation marks and citation omitted). "A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." *Berger*, 277 Mich App at 707.

In this case, the trial court determined, after the custody hearing, that an ECE had existed only with plaintiff since the parties' separation in 2019. The trial court's temporary custody order had continued that status. Because plaintiff had sole physical custody of JH at the time of the custody hearing, the burden therefore fell on defendant to prove by clear and convincing evidence that a change in the child's established custodial environment was in the child's best interests. See *Riemer*, 311 Mich App at 641; *Kessler*, 295 Mich App at 62-63.

"In determining whether a change of custody is in the best interests of a child, the best-interest factors set forth in MCL 722.23 are the appropriate measurement." *Id.* "Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor, and failure to do so is usually error requiring reversal." *Id.* (quotation marks and citation omitted).

In this case, it is evident that the trial court stated its findings and conclusions regarding each factor. The trial court concluded that three factors favored plaintiff, and that the remaining factors were neutral. Yet, despite these findings, the trial court ordered joint physical custody of JH. We conclude that the trial court abused its discretion by doing so. See *Berger*, 277 Mich App at 705. In light of the court's determination that *none* of the factors weighed in favor of defendant, and several factors weighed in favor of plaintiff, we find palpable error in its conclusion that a change in JH's ECE was in the child's best interests. See *Berger*, 277 Mich App at 705. Furthermore, because the trial court did not explicitly hold that defendant had proven by clear and convincing evidence that a change in the ECE was in JH's best interests, or in fact make any reference to the applicable evidentiary standard or allocation of the burden of proof, it appears that the trial court's error was premised on a misapplication of the law. *Lieberman*, 319 Mich App at 77.

We therefore vacate the physical custody portion of the trial court's order, and remand for further proceedings consistent with this opinion. On remand, the trial court "should consider up-

to-date information, including the child[’s] current and reasonable preferences, as well as the fact that the child [has] been living with [a party] during [an] appeal and any other changes in circumstances arising since the trial court’s original custody order.” *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994); see also *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996). The trial 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. *Id.* at 469.

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

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Deborah A. Servitto