

Order

Michigan Supreme Court
Lansing, Michigan

December 9, 2022

Elizabeth T. Clement,
Chief Justice

164888

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

RACHEL ANNE BUTTERS,
Plaintiff-Appellee,

v

SC: 164888
COA: 359665
Kent CC: 15-000548-DM

PATRICK LEE BUTTERS,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the July 28, 2022 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE in part the judgment of the Court of Appeals. The Court of Appeals correctly explained that, on remand, the trial court “ ‘should consider up-to date information, including the children’s current and reasonable preferences’ ” when determining whether a modification of the previous custody order is warranted. *Butters v Butters*, ___ Mich App ___, ___ (2022); slip op at 6, quoting *Fletcher v Fletcher*, 447 Mich 871, 889 (1994). However, the Court of Appeals erred by instructing the Kent Circuit Court on remand to apply the best-interest factors under the clear-and-convincing-evidence standard without regard to any changed circumstances that might have occurred during the pendency of this appeal. When nonharmless errors occur in child custody cases that necessitate a remand to the circuit court for reevaluation, those courts should address the circumstances of the child as they exist at the time of remand. See *O’Brien v D’Annunzio*, 507 Mich 976 (2021); *Fletcher*, 447 Mich at 889; *Dempsey v Dempsey*, 409 Mich 495, 496 (1980).

On remand, when addressing the issues remanded by the Court of Appeals, we DIRECT the Kent Circuit Court to reevaluate the children’s established custodial environments based upon up-to-date information in existence at the time of the evidentiary hearing. If the circuit court concludes that the children have established custodial environments with plaintiff or with both parents at the time of the hearing on remand, then “[t]he 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.” MCL 722.27(1)(c). See also *Foskett v Foskett*, 247 Mich App 1, 5-6 (2001). We further direct the circuit court to expedite its consideration and resolution of this case.

We do not retain jurisdiction.



t1206

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 9, 2022

Clerk