STATE OF MICHIGAN

COURT OF APPEALS

KELTECA M. MITCHNER, Plaintiff-Appellee,	UNPUBLISHED June 26, 2018
v	No. 341802 Genesee Circuit Court Family Division
ALFRED PERRY POLLARD, Defendant-Appellant.	LC No. 17-918772-DS

Before: BECKERING, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

In this child-custody case, defendant, Alfred Pollard, appeals by right the trial court order awarding plaintiff, Kelteca Mitchner, physical custody of their child, AP, during the school year and permitting Mitchner to change AP's domicile from Michigan to Virginia. In the same order, the court also awarded Mitchner sole legal custody of AP. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

AP was born in January 2014. In July 2017, the Genesee County Prosecutor's Office filed a complaint for support against Pollard on behalf of Mitchner because Mitchner was receiving public assistance. In his answer to the complaint, Pollard requested the court grant the parties joint legal and physical custody of AP. Pollard also filed an ex parte motion requesting a court order prohibiting Mitchner from removing AP from Michigan. In the ex parte motion, Pollard again requested that he be granted joint legal and physical custody of AP. Thereafter, on September 5, 2017, the court entered an ex parte order stating that AP could not be removed from the state. Mitchner, however, had apparently already moved to Virginia with AP before the trial court's ex parte order was entered. On December 1, 2017, the court held an evidentiary hearing to resolve (1) whether the change of domicile was permissible and (2) to make an initial custody determination. Following the hearing, the trial court "approved" the change of AP's domicile from Michigan to Virginia, awarded Mitchner physical custody during the school year, and awarded Mitchner sole legal custody. This appeal follows.

II. CHANGE OF DOMICILE

A. STANDARD OF REVIEW

Pollard first argues that the trial court erred by permitting Mitchner to change AP's domicile without following the legal framework set forth in *Rains v Rains*, 301 Mich App 313; 836 NW2d 709 (2013). A challenge to a trial court's decision to permit a parent to change his or her child's domicile is reviewed for an abuse of discretion. *Gagnon v Glowacki*, 295 Mich App 557, 565; 815 NW2d 141 (2012).

B. ANALYSIS

In *Rains*, this Court explained that "[a] motion for a change of domicile essentially requires a four-step approach." *Rains*, 301 Mich App at 325.

> First, a trial court must determine whether the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4), the so-called *D'Onofrio*[1] factors, support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must then determine whether an established custodial environment exists. Third, if an established custodial environment exists, the trial court must then determine whether the change of domicile would modify or alter that established custodial environment. Finally, if, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence. [*Id*. (footnote in original)]

Pollard argues the trial court did not strictly follow this four-step approach when evaluating whether it was proper to change AP's domicile from Michigan to Virginia. However, he fails to recognize that—under the facts of this case—the trial court was under no obligation to do so. MCL 722.31(1) provides:

> (1) A child *whose parental custody is governed by court order* has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child *whose custody is governed by court order* shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued. [Emphasis added.]

Because there was no court order governing AP's custody in effect at the time AP moved to Virginia, Mitchner was legally free to change AP's domicile without regard to the restrictions set forth in MCL 722.31. See also *Kessler v Kessler*, 295 Mich App 54, 58; 811 NW2d 39 (2011)

[1] *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976).

("According to the plain language of the statute, the change-of-domicile factors specifically apply only to petitions for change of domicile in situations where there is already a custody order governing the parties' conduct."). Therefore, to the extent that Pollard seeks reversal on the basis of MCL 722.31, his argument is without merit.

III. CUSTODY

A. STANDARD OF REVIEW

The trial court awarded Mitchner physical custody during the school year and awarded her sole legal custody. An order resolving a child custody dispute "shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. A factual finding is against the great weight of the evidence when "the evidence clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994) (quotation marks and citation omitted). "In reviewing the findings, this Court defers to the trial court's credibility determinations." *Butler v Simmons-Butler*, 308 Mich App 195, 200; 863 NW2d 677 (2014).

B. ANALYSIS

1. PHYSICAL CUSTODY

In the proceedings before the trial court, Pollard requested joint physical custody of AP. The trial court, however, awarded primary physical custody to AP to Mitchner during the school year. To the extent that Pollard challenges that decision on appeal, we find his position to be without merit.

There was no child-custody order in place prior to the instant proceedings. In addition, the court found that AP had an established joint custodial environment with both Pollard and Mitchner and that if he were to remain in Virginia with his mother the custodial environment would be changed. MCL 722.27(1)(c) provides that before a trial court can "issue a new order" that changes a child's established custodial environment, the court must find by clear and convincing evidence that the change is in the child's best interest. When determining a child's best interests, the trial court must look to the best-interest factors in MCL 722.23. Here, the court found that the parties were equal on factors (a), (b), (c), (d), and (e), that factors (f), (g), (*i*), and (k) were not at issue, and that factors (h) and (j) slightly favored Mitchner.

On appeal, Pollard argues that he should have been favored on factor (c), which addresses "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c). The court found this factor equal, reasoning that both parties have the capacity and disposition to provide AP with food, clothing, and medical care. The court also commented that the fact that Mitchner did not go to dental appointments or meet with AP's dentist was not "a mark against her." On appeal, Pollard complains that he should have been favored on this factor because he has a well-paying job through which AP receives medical insurance whereas Mitchner has held and lost numerous jobs throughout AP's short life and has had to seek financial assistance from others, including

Pollard. However, factor (c) does not mandate that a court look at both parties situations and then determine which of them is in a "better" financial position to provide care. Instead, it looks at whether each parent has the "capacity and disposition" to do so. Here, the record reflects that both parties were employed throughout AP's life, and there was no testimony that Mitchner was unable, at any time, to provide AP with food, clothing, or medical care. Accordingly, the court's finding that this factor is equal is not against the great weight of the evidence.

Pollard next argues that he should have been favored on factor (e), which addresses, "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). Pollard contends that the trial court erred when it found that this factor to equally favor the parties because Mitchner had already moved from Michigan to Virginia, which separated AP from his friends and family, and because Mitchner intended on moving again in the future from Virginia to Maryland. Mitchner did testify that she intended on moving out of her Virginia apartment within a year, possibly to Maryland, and that she planned on taking a four-month long medical assistant class while AP's maternal grandmother babysat. However, the trial court found that while Pollard's "circumstances have been a little more fixed," it was also true that "[p]eople move," and "[w]e have a very transitional society." Thus, the trial court acknowledged that Mitchner had moved from Michigan to Virginia, and she would likely move again to provide "an independent living situation" for AP. The trial court found both parties' residences to be stable regardless of whether Mitchner elected to stay in AP's maternal grandmother's apartment or whether she elected to move to another state in the future. In doing so, the trial court focused its attention on the stability of Mitchner's family unit and home with AP. Indeed, the trial court explained that when it examined this factor, its concern went towards looking at "people that are being put out of their homes because they haven't paid their rent or they're being condemned." While Pollard has made clear that he objects to Mitchner's decision to move to Virginia because he believes it will adversely impact AP, he has not shown that Mitchner's home or family unit was, in fact, unstable. As a result, Pollard has failed to demonstrate that the evidence clearly preponderated in the opposite direction of the trial court's determination that the parties' residences were both stable.

Pollard next challenges the trial court's finding that factor (h) slightly favored Mitchner. Factor (h) addresses "[t]he home, school, and community record of the child." MCL 722.23(h). Pollard contends that the trial court only found that this factor slightly favored Mitchner because of Pollard's "preoccupation" with AP's education. He contends that the trial court weighed this in Mitchner's favor because it was frustrated with Pollard's lawyer's extensive questions about AP's education. During trial, Pollard testified at length about AP's education at the "Cummings Campus," and he emphasized how AP thrived in that program. However, Mitchner testified that AP was three years old, and that his schooling was only broadly educational at this juncture because it consisted of half playtime and half "learning moments." Moreover, Mitchner explained that AP primarily needed love at this point in his life. Ultimately, the trial court only found that this factor slightly favored Mitchner because Pollard had placed too much emphasis on AP's education despite AP's young age, and the court it agreed with Mitchner's sentiment

regarding the importance of how love is demonstrated. Given the record, the court's findings were not against the great weight of the evidence.[2]

Pollard also asserts that the trial court erred by finding factor (j) slightly favored Mitchner. Factor (j) requires the trial court to consider "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). Pollard argues this factor should be weighted equally because, under the circumstances, his refusal to communicate with Mitchner after she moved to Virginia was reasonable. The testimony, however, reflects that Mitchner reached out to Pollard multiple times since she moved to Virginia. It appears that on one occasion Pollard sent a reply text message asking what she wanted, and she told him that AP wanted to talk with him. Pollard did not call and talk to his son. Mitchner testified that AP was confused about why Pollard did not answer the phone. Mitchner also testified that she was willing to communicate with Pollard about AP. Accordingly, the trial court's finding that this factor favored Mitchner was not against the great weight of the evidence.

Finally, Pollard argues that, under factor (*l*), the trial court should have considered how losing the relationship with his step-siblings and other family would impact AP. He asserts that AP lost 90% of his support system by moving. Factor (*l*) allows the trial court to consider "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(*l*). The trial court did not make any findings under factor (*l*). At trial, Pollard argued that factor (*l*) favored him because it was not in AP's best interest to "rip" him out an environment where he was thriving, where he had a support system, and where he had a "foundation." We recognize that a child's bond with his or her siblings can be a relevant consideration. *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001). However, it is not something that a court *must* consider or expressly comment upon. Moreover, although Pollard contends that the move from Michigan to Virginia has cost AP about 90% of his support system, the record reflects that he still has the support of both his mother and his father, albeit in a different fashion than he had when he moved between two different households in Michigan. Accordingly, the trial court's decision not to make findings under factor (*l*) is not against the great weight of the evidence.

In sum, the evidence did not clearly preponderate in the opposite direction of the trial court's findings on factors (c), (e), (h), (j), and (*l*). Therefore, we affirm the court's decision to award Mitchner physical custody of AP during the school year.

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[2] To the extent that Pollard argues the trial court failed to consider a letter authored by AP's teacher, we note that the trial court is not required to "include consideration of every piece of evidence entered and argument raised by the parties." *MacIntyre v MacIntyre*, 267 Mich App 449, 452; 705 NW2d 144 (2005). Moreover, the letter is not dispositive, as it merely highlighted both Mitchner and Pollard's involvement in AP's schooling and was generally positive about both parents.

2. LEGAL CUSTODY

The trial court also awarded Mitchner sole legal custody of AP. Generally, "legal custody is understood to mean decision-making authority as to important decisions affecting the child's welfare." *Grange Ins Co of Michigan v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013). Because Pollard requested joint legal custody, the issue was properly before the court.

With regard to a request for joint custody, MCL 722.26a provides:

> (1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:
>
> (a) The factors enumerated in [MCL 722.23].
>
> (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

As noted above, the trial court found that the best-interest factors in MCL 722.23 slightly favored Mitchner, and those findings were not against the great weight of the evidence. In addition, the court found that the parties were unable or unwilling to communicate with each other. The court did not expressly state whether the parties would be able to cooperate and generally agree concerning important decisions affecting AP's welfare.

Until Mitchner moved to Virginia, the parties were able to agree on AP's schooling and medical care. However, even before the move, there were communication problems between the parties. Mitchner testified that they primarily communicated via text message, but only "sometimes" were able to do so effectively. Pollard testified that they had a major dispute about whether a 19 year old girl could babysit AP while Pollard was at work and that, as a result of Mitchner's refusal to cooperate, their voluntary parenting-time schedule had to be altered. There was also testimony that before making a major life decision—such as whether to remain in Michigan or move to Virginia with AP—Mitchner only sent a text message to Pollard about two weeks before moving explaining her intentions. Given that the move would definitely impact AP's school and medical needs going forward, the lack of communication beforehand is indicative of the parties' unwillingness to cooperate on major issues. The record is also replete with testimony that, after Mitchner moved, Pollard refused to communicate with Mitchner and the relationship between them was volatile. Further, we note that at one point the trial court interrupted Mitchner's cross examination of Pollard to comment on the "disdain" and "seething anger" he was displaying toward her. Although Pollard thought things might improve once a court order was in place, he testified that given the communication difficulties, he believed a parenting time schedule would be necessary. Accordingly, although Pollard contends that because he and Mitchner cooperated in the past, the court should have found that they would continue to cooperate in the future, the fact is that on the record before the court there was no evidence that the parties could currently cooperate on major life decisions. As a result, the

court's decision to award Mitchner sole legal custody was not against the great weight of the evidence.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien