STATE OF MICHIGAN

COURT OF APPEALS

DI KANG,

Plaintiff/Counterdefendant-Appellee,

v

LUXIN XUE,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
February 27, 2020

No. 350295
Ingham Circuit Court
Family Division
LC No. 17-001808-DM

Before: BORRELLO, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

In this case involving the custody of a minor child, SX, defendant-mother, Luxin Xue, appeals as of right the trial court's order denying her motion for a change of domicile. We affirm.

I. BACKGROUND

The parties are Chinese nationals legally present in the United States on visas. The parties divorced in 2018 and have one minor child together, SX, who was born in 2016. Plaintiff-father, Di Kang, holds a H1-B visa[1] through his employer, which is valid for six years, and at the end of

[1] The H-1B program allows companies in the United States to temporarily employ foreign workers in occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor's degree or higher in the specific specialty, or its equivalent. H-1B specialty occupations may include fields such as science, engineering and information technology, and fields such as teaching and accounting. [US Citizenship and Immigration Services, *H-1B Fiscal Year (FY) 2020 Cap Season* https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialtyoccupations-and-fashion-models/h-1b-fiscal-year-fy-2020-cap-season (accessed January 30, 2020).]

this period plaintiff plans to obtain his permanent-resident card.[2] At the time of her motion to change domicile, defendant held an F-1 student visa[3] allowing her entry in the United States to attend Michigan State University, at which she was studying toward a teaching certificate.

At the time of defendant's motion, the parties shared custody of SX, with defendant having primary physical custody of the child. Plaintiff was entitled to weekly parenting time with the child on Sundays and Mondays as well as on alternating weekends. An extensive holiday schedule ensured that plaintiff received approximately 145 days of parenting time annually. Both parties exercised their parenting-time allotments under this schedule. After the parties' divorce, defendant obtained an apartment, which she shared with a roommate; plaintiff lived primarily with his parents in a home in Grand Ledge. Plaintiff's parents are also Chinese nationals and would rotate into the home on temporary visas; for the majority of the year, one of plaintiff's parents, but not both, would live in the home with plaintiff. Plaintiff also rented an apartment in Portage near his work that he stayed at during the week; however, when SX was in his care, plaintiff and SX spent their time in the Grand Ledge house. If defendant moved from the area, plaintiff and his parents planned to purchase a home in Portage.

After defendant successfully obtained her teaching certification in May 2019, her student visa expired, which required her to obtain another visa to remain in the United States. Defendant initially claimed that she had only 60 days past expiration to obtain a new visa; however, later in the proceedings, plaintiff acknowledged that she had a four-month grace period to find a new visa. Defendant offered no explanation for the conflicting timelines. Defendant testified that she began searching for employment in September 2018 so that she could obtain a work visa after completing her teaching certificate. According to defendant, she had sent out over 100 applications, but was having difficulty finding employment because, to obtain an H-1B or J-1 visa, [4] the Immigration and Naturalization Service allegedly requires proof that the employer cannot find any U.S. citizens to fit the position. Defendant argued that this requirement limited her, within her field, to obtaining

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[2] Colloquially, a permanent-resident card is a "green card." US Citizenship and Immigration Services, *Green Card* <https://www.uscis.gov/greencard> (accessed January 30, 2020).

[3] The F-1 Visa (Academic Student) allows you to enter the United States as a full-time student at an accredited college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program. You must be enrolled in a program or course of study that culminates in a degree, diploma, or certificate and your school must be authorized by the U.S. government to accept international students. [US Citizenship and Immigration Services, *Students and Employment* <https://www.uscis.gov/ working-united-states/students-and-exchange-visitors/students-and-employment> (accessed January 30, 2020).

[4] The J-1 classification (exchange visitors) is authorized for those who intend to participate in an approved program for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, receiving training, or to receive graduate medical education or training. [US Citizenship and Immigration Services, *Exchange Visitors*<https://www.uscis.gov/working-united-states/students-and-exchange-visitors/exchange-visitors> (accessed January 30, 2020).

employment in a Chinese-immersion program[5] and that, because such programs in Michigan hire directly from China, the requirement precluded her from obtaining in-state employment. Defendant's motion for change of domicile was predicated on an employment offer extended to defendant from a school in California. Defendant testified that she was receiving a visa in conjunction with this employment and that she planned to move to California and rent one bedroom in a home with several unknown individuals. Defendant was unable to provide any details on a proposed home, but stated that her parents intended to buy her a home in a few years.

The referee hearing on the motion was split into two days, and, due to scheduling constraints, the second day occurred several weeks after the first day. By the time of the second day, defendant had scheduled interviews for three other positions: one in Minnesota, one in San Francisco, and one in Delaware. Defendant explained that the California school had not yet secured a work visa for her and that she was attempting to find employment closer to Michigan. In the event that she could not secure employment, defendant intended to apply for a B-1 visa[6] which would allow her to stay in the country for six months each year, similar to her former in-laws.

At the conclusion of the referee hearing, the referee recommended denying the motion to change domicile. The referee found that defendant was not forthcoming with information concerning the grace period on her visa and created an "exaggerated sense of urgency in her request." The referee was concerned with defendant's plan to rent a home with strangers and with moving SX away from established familial support through plaintiff and his parents. The referee found that moving the child to another state would make it difficult for SX to continue his current, weekly bond with plaintiff and that defendant was not overly concerned with the fact that this parental bond would be strained.

Defendant challenged the referee's recommendation at a de novo hearing before the trial court on July 31, 2019. At the outset of the de novo hearing, defendant's counsel indicated that defendant had obtained a position at an immersion school in Minneapolis, Minnesota that would begin in mid-August 2019. Defendant explained that she would receive an H-1B visa through this employment but that the visa would not process for approximately six months. In the interim, defendant had enrolled in a graduate program at Minnesota State University and had obtained an F-1 student visa through this enrollment. Defendant testified that she could not attend Michigan State University's similar graduate program because it was an online program which would not meet the requirements for an F-1 visa. Defendant stated that she looked into attending Central Michigan University but her credits from Michigan State would not transfer; nevertheless, defendant acknowledged that her Michigan State credits did not transfer to Minnesota State.

[5] Defendant explained that these programs are essentially schools in which the teacher teaches the subjects in Chinese rather than English.

[6] A B-1 visa allows a foreign national to enter the country for a period of up to six months for legitimate business purposes, such as consulting with business associates, negotiating contracts, or participating in short-term training. US Citizenship and Immigration Services, *B-1 Temporary Business Visitor* <https://www.uscis.gov/working-united-states/temporary-visitors-business/b-1-temporary-business-visitor> (accessed January 30, 2020).

According to defendant, she intended the F-1 visa as a temporary visa until her H-1B visa came through; defendant, however, indicated that she was not allowed to work while attending school under an F-1 visa, so she planned to use "curriculum practice training" until her H-1B visa processed.

At the hearing, defendant raised several concerns regarding plaintiff's parents—claiming that the grandparents were in poor health and acting as the paternal figure in plaintiff's absence. Plaintiff's mother rebutted these concerns, stating that she and her husband were in fine health. Plaintiff also indicated that, although his parents helped raise the child, there was no doubt that he was the child's parent. Defendant proposed that plaintiff could exercise four months of parenting time over the course of a year in one-month intervals. Defendant initially was opposed to sharing transportation costs, but eventually agreed to share some costs. Ultimately, defendant indicated that she would abide by whatever the trial court found reasonable. During the lower-court proceedings defendant oscillated between claiming financial hardships and indicating that "money is not a problem," because she could receive financial assistance from her parents.

The trial court issued independent findings which were consistent, for the most part, with those of the referee. The trial court acknowledged that defendant's immigration status put her in a difficult position, but ultimately concluded that defendant had failed to prove that the change-of-domicile factors supported a change of domicile. The trial court noted that the parties were foreign nationals who did not have much local support outside of plaintiff's parents, whose support was a "major part" of SX's life. The trial court found that SX's quality of life would not improve by moving to California or Minnesota, particularly because he has no support system in those states. According to the trial court, defendant emphasized being allowed to move over ensuring a set, fair parenting schedule. The trial court found that SX's bond with plaintiff—which was developed through weekly contact—would be "heavily disrupted" by the move and the unclear proposals for parenting time. Ultimately, the trial court denied defendant's motion to change domicile. This appeal followed.

II. ANALYSIS

We review for an abuse of discretion the trial court's decision on a motion to change domicile. *Moote v Moote*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No 346527); slip op at 2. A trial court abuses its discretion when its result is "palpably and grossly violative of fact and logic." *Id*. The trial court's factual findings are reviewed under the great-weight-of-the-evidence standard, and must be affirmed "unless the evidence clearly preponderates in the opposite direction." *Id*. Questions of law are reviewed for clear legal error, which occurs when the trial court "incorrectly chooses, interprets, or applies the law." *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014).

In custody cases, MCL 722.31 governs the legal residence of the child. MCL 722.31(1) provides:

> 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.[7]

A parent, however, may move the court under MCL 722.31(4) to allow a change of residence upon a showing that a preponderance of the following factors support the move:

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [See also *Gagnon v Glowacki*, 295 Mich App 557, 566; 815 NW2d 141 (2012) (recognizing that the party requesting the change bears the burden of proof).]

The trial court must evaluate these factors with "the child as the primary focus in the court's deliberations." *Moote*, ___ Mich App at ___; slip op at 4, citing MCL 722.31(4) (quotation marks omitted). If the trial court finds that these factors support a change of domicile, the trial court "must then determine whether an established custodial environment exists." *Id*. at ___; slip op at 3-4 (internal citation and block notation omitted).

> [I]f 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

[7] Subsection (1) does not apply if the parents' residences were more than 100 miles apart at the time the custody order was issued, if the move would close the distance between the parents' residences, or if the nonmoving parent consents to the residence change. MCL 722.31(2), (3).

established by clear and convincing evidence. [*Id.* at ___; slip op at 3-4 (internal citation and block notation omitted).]

In this case, the trial court concluded that defendant had not shown by a preponderance of the evidence that the subsection (4) best-interest factors supported a change of residence. Accordingly, the trial court did not make any findings regarding SX's established custodial environment. We agree with the trial court that defendant failed to meet her burden under subsection (4). Accordingly, we affirm the denial of her motion to change domicile.

Factors (d) and (e) are not at issue in this case. Regarding factor (a), defendant argues that the trial court failed to consider how the proposed move would benefit her and SX. We disagree. There is no doubt that the proposed move would benefit defendant: the move potentially allows defendant to stay in the country, work in her field, and attend a graduate program. The trial court, however, did not deny that the move would benefit defendant. Rather, the trial court found that the move would benefit defendant without ample concern for SX's interests. We agree. Defendant argues that she had no alternative but to take the job in Minnesota and that the move would allow SX to remain with his primary caregiver since birth. As the trial court recognized, however, defendant's testimony raises several questions as to whether the move was actually her only option. Specifically, plaintiff explored a program at Central Michigan University, but chose not to apply because her Michigan State credits would not transfer; plaintiff subsequently enrolled in Minnesota State University despite the credits not transferring. Moreover, defendant initially stated that she had only 60 days to find employment after the expiration of her initial F-1 visa, but subsequently acknowledged that she had a four-month grace period; defendant stated at one point that she would seek a B-1 visa which could allow her six months in the country, but does not appear to have explored this option further. While we acknowledge that these options do not afford defendant any long-term right to stay in the country, we agree with the trial court that defendant's citizenship concerns do not appear to have been as imminent as she claimed.

Similarly, although defendant claimed that her F-1 visa was temporary and that an H-1B visa was imminent, she made similar claims before the referee, which did not pan out. More importantly, while the proposed move would retain SX's bond with defendant, the move came with costs. SX would be moving to a state in which he has no apparent support system, outside of his mother, who would be employed full time and taking courses. Moreover, although defendant claimed that money was not a problem, she also claimed financial hardships at other points in the proceedings and, at one point had intended to live with several unknown roommates to make ends meet. Not only does this discrepancy reflect poorly on defendant's credibility, it creates a concern that defendant is undertaking this move without sufficiently accounting for SX's wellbeing. For these reasons, we agree with the trial court that this factor weighs against granting the motion.

Regarding factor (b), defendant argues that the trial court ignored her willingness to adhere to a schedule that would allow SX to have continued contact with plaintiff. We disagree. While plaintiff did propose a couple parenting-time schedules, these schedules were not fleshed out. Rather, defendant proposed long stretches with either parent with no respect for holidays or sustained contact with the parent without immediate physical custody. Additionally, defendant attempted to diminish plaintiff's role in SX's life; she contended that plaintiff's parents were in reality more of the parents than plaintiff was. The trial court expressed concern over this, and it believed that, based on defendant's attitude, she was not seriously concerned with creating a stable

or fair parenting-time schedule that would foster plaintiff's relationship with SX. While it does not appear that defendant necessarily acted maliciously, we agree that defendant's primary concern was gaining permission to move with SX, not with ensuring plaintiff's continued involvement in SX's life. While this factor may not strongly weigh against plaintiff, it certainly does not weigh in her favor.

Finally, regarding factor (c), the trial court found that, if it allowed the change, there was no parenting-time schedule available to continue to foster plaintiff's relationship with SX. We agree. Under the custody arrangement in place at time of the motion, plaintiff exercised 145 days of parenting time annually. While some of defendant's proposed schedules would still award plaintiff a substantial number of annual days, the residence change would prevent plaintiff from exercising the weekly parenting time he enjoyed under the prior schedule. Plaintiff testified that this weekly contact was important to him and his bond with SX.

Defendant argues that, in finding that this factor weighed against granting the motion, the trial court placed undue emphasis on preserving SX's bond with his paternal grandparents. Defendant is correct that the role of a child's "extended family cannot be the *determining* factor in denying a change of domicile." *Phillips v Jordan*, 241 Mich App 17, 31; 614 NW2d 183 (2000) (emphasis added). Nonetheless, while extended family may not be the determining factor, the trial court is not precluded from considering, in an appropriate case such as the one now before us, the important role extended family plays in a child's life. Here, plaintiff's parents were ostensibly the only nonparental support system for SX. Even discounting the important role a grandparent may play in a child's life, the record shows that plaintiff's parents functioned as a pseudo-daycare for plaintiff and plaintiff and his family intended on purchasing a new home together near his work. In other words, plaintiff's parents' involvement was evidence of the stability that plaintiff provided for SX which contrasted drastically with defendant's ever-changing plans for the child. Moreover, while the trial court certainly weighed the grandparent's involvement against granting the motion, this involvement was only one factor among many that the trial court considered in rendering its decision. The trial court's finding under this subsection does not implicate *Phillips* and is not against the great weight of the evidence.[8]

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Michael J. Riordan

[8] Defendant also appears to argue that the trial court failed to distinguish her original plan to move to California from her subsequent plan to move to Minnesota. We disagree. While the trial court referenced plaintiff's intention to move to California, our review of the record indicates that these references were in the context of showing that defendant made inconsistent parenting-time proposals and was not serious about adequately maintaining plaintiff's relationship with SX. There is nothing in the record which would lead us to believe that the trial court was not aware of defendant's updated plan to move to Minnesota.