STATE OF MICHIGAN

COURT OF APPEALS

HEATHER RENEE OCHARZAK,

Plaintiff-Appellant,

v

PATRICK WILLIAM OCHARZAK,

Defendant-Appellee.

UNPUBLISHED
April 23, 2020

No. 350493
Oakland Circuit Court
Family Division
LC No. 2009-766777-DM

Before: RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

In this case, plaintiff appeals as of right the trial court's opinion and order denying her motion for a change of domicile. Although plaintiff established that her proposed out-of-state move could increase her income, she did not establish that it would improve the child's quality of life, or that the move would allow the preservation of the parental relationship between defendant and the child. Because plaintiff has not shown that the trial court's factual findings were against the great weight of the evidence, we affirm.

I. BACKGROUND

Plaintiff and defendant married in 2003, and their only child, ERO, was born in 2004. Defendant, plaintiff, and ERO lived in Rochester Hills until the parties divorced. Plaintiff has two older daughters from a previous marriage, and she remarried in 2016. Defendant did not remarry, and ERO is his only child. Plaintiff is president and founder of a financial-advisor business. Defendant is a teacher. The trial court entered a consent-judgment of divorce in 2010. The parties agreed to share joint-legal and joint-physical custody of ERO, with the child's primary residence with plaintiff. After the divorce, defendant regularly exercised parenting time with the child, including overnight visits, weekends, and dinners.

In May 2014, defendant filed a motion seeking to prevent plaintiff from changing ERO's school and residential neighborhood after learning that plaintiff planned to move from Rochester Hills to Bloomfield Hills and enroll ERO in a new school without defendant's consent. In March 2015, the trial court issued an opinion and order on that motion and several others. By the time

the trial court ruled on the motions, plaintiff had already relocated to Bloomfield Hills and enrolled the child in a new school. The trial court concluded that plaintiff violated the judgment of divorce by moving the child's residence and changing her school without defendant's consent.

In March 2019, plaintiff filed a motion for a change of domicile. According to plaintiff, it was necessary for her to move to Chicago because the recent expansion of her business required her to meet with clients there on a regular basis. Defendant objected to the change of domicile. Plaintiff's testimony at the evidentiary hearing revealed that she had purchased a financial-advisor business in Chicago for approximately $1.9 million and had signed a 10-year lease for office space in Chicago. Plaintiff and her new husband had also spent over $1 million to purchase and renovate a condominium near Chicago.

At the time of the evidentiary hearing, ERO was 14 years old and about to enter the ninth grade at a high school in Bloomfield Hills. She was diagnosed with a speech and a processing disorder when she was four years old. To address her special needs, she received speech therapy and tutoring, paid for by plaintiff. ERO was also an avid swimmer who participated on two competitive-swim teams.

Defendant's annual income was $55,000 in 2016, $65,000 in 2017, $68,000 in 2018, and $36,000 in 2019. In contrast, plaintiff's annual income was approximately $500,000 in 2016, $709,266 in 2017, and $520,000 in 2018. Between 2016 and 2018, the average income of plaintiff and her new husband was $1.73 million.

Plaintiff proposed a new parenting-time schedule to accommodate her desired move to Chicago. During the school year, defendant would have no parenting time with ERO on week nights, but would have nine weekends with her. To make this possible, defendant would be required to spend those weekends in Chicago. For certain holidays, defendant would have overnights with ERO so long as he traveled to Chicago. Plaintiff offered to pay for the expenses that defendant incurred traveling to Chicago to exercise parenting time with the child. For other holidays, such as Thanksgiving and Christmas, defendant would have parenting time with her, on an alternating yearly basis, in Michigan. Under plaintiff's proposal, defendant would have a total of 105 annual overnights with the child, compared to an average of 128 annual overnights that he exercised between 2017 and 2019.

The trial court denied plaintiff's motion for a change of domicile, holding that plaintiff had failed to prove by a preponderance of the evidence the factors set forth in MCL 722.31(4). The trial court concluded that, while plaintiff could earn more money if she moved to Chicago, the increased income would not improve ERO's quality of life. The trial court noted that ERO had friends, family, a support system, and commitment to extracurricular activities in Michigan—things that would be eliminated if she moved to Chicago. The trial court also concluded that defendant consistently complied with the parenting-time schedule and exercised his parenting time since entry of the consent judgment of divorce, and that he and the child had a "tight bond." The trial court further concluded that, if it granted a change of domicile, it would be unreasonable and unduly expensive for defendant to travel to Chicago to see ERO. The trial court concluded that it was likely impossible to modify the parenting-time schedule in a way that would adequately preserve and foster the parental relationship between ERO and each parent, if plaintiff took the child to Chicago.

This appeal followed.

II. ANALYSIS

Plaintiff argues on appeal that the trial court erroneously denied her motion for a change of domicile because the factors outlined in MCL 722.31(4) favor a change of domicile. We conclude that the trial court's factual findings under the statute were not against the great weight of the evidence.

"All orders and judgments of the circuit court 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. This Court reviews a trial court's discretionary rulings for "a palpable abuse of discretion." MCL 722.28; *Gagnon v Glowacki*, 295 Mich App 557, 565; 815 NW2d 141 (2012). Under this standard, "[a]n abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Brown v Loveman*, 260 Mich App 576, 600-601; 680 NW2d 432 (2004) (cleaned up).

We review the trial court's factual findings when applying the factors outlined in MCL 722.31 under the great weight of the evidence standard. *Gagnon*, 295 Mich App at 565. This Court may not substitute its "judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *McKimmy v Melling*, 291 Mich App 577, 581; 805 NW2d 615 (2011).

"A child whose parental custody is governed by court order has . . . a legal residence with each parent." MCL 722.31(1). Under this statute, "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." In addition to this statutory requirement, the consent judgment of divorce in this case expressly stated that "neither party shall change the domicile or residence of the minor child from the State of Michigan without first obtaining the approval of the [c]ourt."

Before a trial court permits a change of a child's legal residence, it must consider the factors set forth in MCL 722.31(4). The child is always "the primary focus in the court's deliberations" in deciding whether to permit a change of domicile. MCL 722.31(4). Because plaintiff requested the change of ERO's domicile, she had "the burden of establishing by a preponderance of the evidence that the change is warranted." *McKimmy*, 291 Mich App at 582.

A. SECTION (4)(a)

Plaintiff argues that the trial court's conclusion that a change of domicile was not warranted under MCL 722.31(4)(a) was against the great weight of the evidence. Section (4)(a) addresses whether changing the child's legal residence has the capacity to improve the lives of the child and the relocating parent. We conclude that the trial court's factual findings under Section (4)(a) were not against the great weight of the evidence.

The trial court found that plaintiff failed to prove by a preponderance of the evidence that changing ERO's residence to Chicago had the capacity to improve ERO's life. Although the trial

court recognized the possible financial gains of a move to Chicago, it ultimately determined that plaintiff's increased earning potential would not "further increase" ERO's quality of life.

Plaintiff's well-paying career had already afforded ERO an excellent quality a life in Michigan. Between 2016 and 2018, plaintiff earned an average annual income of $576,422, and the average annual income of plaintiff and her new husband was $1.73 million. Since 2014, ERO had lived in a large home. She received regular tutoring that cost approximately $5,500 a year. ERO was also involved in competitive swimming, a sport that has cost plaintiff approximately $3,000 a year. According to plaintiff, she paid for the child's tutors and swimming. "It is well established that the relocating parent's increased earning potential may improve a child's quality of life." *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007). Yet, plaintiff fails to demonstrate how, specifically, plaintiff's increased earning potential had the capacity to improve ERO's life. A parent's ability to earn more money does not guarantee a better quality of life for a child.

Quite simply, the potential for plaintiff's increased earning potential was outweighed by what ERO would lose if she moved to Chicago. ERO has lived in Michigan her entire life. She has friends from school and her swim teams. Because ERO has special needs, she has a close relationship with her school, counselor, and speech therapist. ERO has worked hard, with the assistance of tutoring and support from her school, to become a student who earned good grades. A change of domicile would mean that ERO would have to start over. She would have to make new friends, join a new swim team, and develop new relationships with new teachers, tutors, and therapists. "[R]emaining in a stable environment" is a relevant consideration when considering MCL 722.31(4)(a). *Yachcik*, 319 Mich App at 44.

Moreover, ERO is already on swim teams in Michigan; she swam for two years with a middle-school team in Bloomfield Hills and joined a second competitive swim club. The fact that ERO could also join a swim team in Chicago is not an improvement to her quality of life because she already swims in Michigan. Additionally, the fact that the high school that ERO would attend if she moved to Chicago may be a better-ranked school than her current high school does not mean that her current school is unsatisfactory. In fact, plaintiff conceded that the child's current high school is "an excellent school."

Most importantly, if ERO moved to Chicago, it would be unlikely that she would maintain the same relationship with defendant that she does now. Although the parties dispute the exact number of annual overnights that defendant has exercised since the trial court entered the consent judgment of divorce, it is clear that defendant has played a substantial role in ERO's entire life. Defendant attends ERO's swim meets and practices, and enjoys traveling with ERO to Grand Rapids, Michigan to visit defendant's parents and Sault Ste. Marie, Michigan where defendant's family has a home. If ERO moved to Chicago, defendant would not be able to play the same consistent role in ERO's life that he does now.

Plaintiff's argument primarily focuses on what benefits her. And while plaintiff is part of the analysis to determine whether MCL 722.31(4)(a) is proven by a preponderance of the evidence, the child is always the primary consideration. MCL 722.31(4). While the record shows that moving to Chicago has the capacity to increase plaintiff's quality of life and has the potential of benefitting ERO by providing additional funds for tutoring and swimming, the trial court's

ultimate determination that the proposed move did not have the capacity to increase ERO's overall quality of life was not against the great weight of the evidence.

B. SECTION (4)(b)

Plaintiff argues that the trial court's conclusion that a change of domicile was not warranted under MCL 722.31(4)(b) was against the great weight of the evidence. Section (4)(b) addresses the degree to which each parent has utilized his or her parenting time and complied with the trial court's parenting-time orders. We conclude that the trial court's factual findings under Section (4)(b) were not against the great weight of the evidence.

ERO's primary residence has been with plaintiff since 2010, and the child stays with plaintiff a majority of the time. Yet, the trial court concluded that defendant had been actively involved in ERO's life since she was born. Defendant exercised a significant number of annual overnights with the child and enjoyed weekly dinners with her. The record also demonstrates that plaintiff has fully utilized her parenting time with ERO since the consent judgment of divorce was entered.

In contrast, plaintiff has not always complied with the parenting-time orders. In 2014, plaintiff violated the judgment of divorce by unilaterally moving ERO to Bloomfield Hills and changing her school without defendant's consent. Defendant filed numerous motions over the years seeking to enforce the parenting-time orders. Defendant also filed several FOC complaints over the years, alleging that plaintiff had denied him parenting time or compromised his parenting time with ERO. Although defendant's FOC complaints appear to be the result of the parents' inability to communicate effectively and different interpretations of the parenting-time schedule, the FOC did conclude that plaintiff denied defendant parenting time on one occasion. Plaintiff also filed several motions over the years, but she did not claim that defendant denied her parenting time with the child. Accordingly, the trial court did not clearly err when it concluded that defendant complied with the parenting-time orders and used his parenting time with ERO, and that plaintiff violated the consent judgment of divorce when she moved ERO to Bloomfield Hills and changed her school.

C. SECTION (4)(c)

Plaintiff argues that the trial court's conclusion that a change of domicile was not warranted under MCL 722.31(4)(c) was against the great weight of the evidence. Section (4)(c) addresses the degree to which it is possible to modify the parenting-time schedule and make other arrangements to preserve and foster the parental relationship between each parent and the child should the child's legal residence change. We conclude that the trial court's factual findings under Section (4)(c) were not against the great weight of the evidence.

This Court has summarized MCL 722.31(4)(c) as follows:

> Implicit in factor (c) is an acknowledgement that weekly visitation is not practicable when parents are separated by state borders. Indeed, when the domicile of a child is changed, the new visitation plan need not be equal with the old visitation plan, as such equality is not possible. The new visitation plan only need

> provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the nonrelocating parent. This Court has previously opined that perhaps extended periods of visitation will foster, not hinder, a closer parent-child relationship. In applying factor (c), a trial court should consider the financial feasibility of the new visitation plan and the ages of the children, as well as the use of modern technology. The separation between a parent and a child can be diminished by the use of modern communication technology. [*McKimmy*, 291 Mich App at 583 (cleaned up).]

The trial court concluded that plaintiff failed to prove by a preponderance of the evidence the requirements of Section (4)(c) because "it would not be possible" to modify the parenting-time schedule so as to provide an adequate basis for preserving and fostering ERO's relationship with defendant. ERO's age, school work, therapy, tutoring, and involvement in extracurricular activities would make it incredibly difficult for defendant to spend meaningful time with the child. Furthermore, plaintiff's proposed parenting-time schedule is not feasible. The proposed schedule only awards defendant 105 annual overnights a year, and he would lose weekly parenting time with ERO during the school year. Although defendant would be entitled to nine parenting-time weekends, he would be required to travel to Chicago to exercise that parenting time. Defendant would also have to travel to Chicago to spend certain holidays with the child.

It is unreasonable to expect defendant to travel to and from Chicago to spend the weekends with ERO. Defendant earns $36,000 a year. Spending weekends with ERO in Chicago would be cost prohibitive without plaintiff's financial support. And although plaintiff claimed that she was willing to pay defendant's travel expenses, she did not clarify whether there was a limit to her financial support. For example, plaintiff did not clarify whether she was willing to pay for defendant to stay at a luxury hotel or a simple motel. In addition, the extent to which plaintiff was willing to pay for defendant's and ERO's activities in and around Chicago was not established. The child would also be less able to see her family in Michigan. Plaintiff's proposed parenting-time schedule is more likely to hinder ERO's relationship with defendant than benefit it.

It is unlikely that the separation between defendant and ERO can be alleviated by the use of technology. ERO is now in high school and involved in extracurricular activities. In light of the child's age, extracurricular activities, and the proposed infrequent visits, it is unlikely that modern communication technology would effectively alleviate the distance between her and defendant, if plaintiff were allowed to take the child to Chicago. Accordingly, the trial court properly concluded that there would not be a parenting-time schedule that would provide an adequate basis for preserving and fostering the parental relationship between defendant and ERO.

D. SECTIONS (4)(d) AND (e)

Both parties agree that the factors contained in MCL 722.314(4)(d) and (e) are not applicable to this case because there is no evidence that either wishes to gain a financial advantage over the other, or that domestic violence is an issue in this case.

In summary, plaintiff failed to prove the relevant factors outlined in MCL 722.31(4) by a preponderance of the evidence. The trial court's factual findings in this regard are not against the great weight of the evidence. Accordingly, the trial court did not err when it denied plaintiff's

motion for a change of domicile. Given our resolution of the trial court's decision to deny plaintiff's motion for a change of domicile, we need not address ERO's custodial environment.

Affirmed. Defendant, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Michael J. Riordan
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle