

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER DAWN SMITH, a/k/a JENNIFER
DAWN WASSON,

UNPUBLISHED
October 9, 2014

Plaintiff-Appellee,

v

MICHAEL WILLIAM SMITH,

No. 318465
Alpena Circuit Court
LC No. 08-002126-DM

Defendant-Appellant.

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff's motion to change the domicile and custody of their minor child from Alpena, Michigan, to Benzie County, Michigan. Because further findings are required to review this issue, we remand to the trial court for further proceedings.

The basic facts are undisputed. The parties divorced in 2008. The trial court granted the parties joint legal and physical custody of their minor child. The parenting time schedule provided for a week-on/week-off schedule, with holidays, birthdays, and spring break also divided on a set schedule. Between 2008 and 2013, the parties followed the parenting time schedule with slight mutually agreed upon modifications. However, in 2013, plaintiff quit her job in Alpena, Michigan, and accepted a position in Traverse City, Michigan. The parties were unable to come to an agreement regarding plaintiff's proposed move from the Alpena area to the Traverse City area. Accordingly, defendant filed a motion to restrict plaintiff's move or to change the minor child's custody to stay with defendant in Alpena. Plaintiff filed a competing motion requesting permission to change the child's domicile.

The trial court, after acknowledging that a change of domicile in this case would be equivalent to a change of custody, heard testimony on both motions and then took the matter under advisement. Subsequently, the court granted plaintiff's motion to change domicile. Defendant filed a motion for reconsideration, arguing that the trial court failed to make a finding regarding the established custodial environment and failed to make adequate findings regarding the best-interest factors in MCL 722.23. The trial court denied defendant's motion for reconsideration.

This Court reviews “a decision on a petition to change the domicile of a minor child for an abuse of discretion.” *Gagnon v Glowacki*, 295 Mich App 557, 565; 815 NW2d 141 (2012). “We review the trial court’s findings in applying the MCL 722.31 factors under the great weight of the evidence standard.” *Id.* “Under this standard, we may not substitute our judgment on questions of fact unless the facts clearly preponderate in the opposite direction.” *Id.* (citation and quotation marks omitted).

“A motion for a change of domicile essentially requires a four-step approach.” *Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013). The first step is to determine whether, by a preponderance of the evidence, the factors enumerated in MCL 722.31(4) support a motion for change of domicile. *Id.* MCL 722.31(1) indicates that if a child’s custody is governed by court order then that child has a legal residence with each parent. MCL 722.31(1) also provides that a parent may not change the legal residence of the child to a location more than 100 miles from the original residence unless the other parent consents or by court order. MCL 722.31(2). Further, the trial court must consider the following factors, while focusing on the child, when determining whether to grant a motion to change domicile:

(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. [MCL 722.31(4).]

Here, the trial court, in granting plaintiff’s motion, held:

It is this Court’s opinion that requiring [the child] to remain in Alpena would result in a separation of him from his half-siblings. Of course, allowing him to move with his mother to Benzie County would necessitate a change in the amount of time he spends with his father. Both are grim propositions. However, this Court is of the opinion that the change in residence has the capacity to improve the quality of life for both the child and the relocating parent. This Court also finds that both parents have complied with and utilized the time under the

Court order governing parenting time, and that the plan to relocate [the child] is not inspired to defeat or frustrate the previous Court order. This Court is also of the opinion that [plaintiff's] proposal of a parenting time schedule for [defendant] is adequate to preserve the parental relationship between [the child] and [defendant].

Defendant does not appear to argue that the trial court erred in finding that the statutory factors in MCL 722.31(4) favor relocation. Moreover, the court's decision on these statutory factors is consistent with the evidence presented by both parties. Consequently, the trial court satisfied the first step in the change of domicile analysis.

After finding that the factors support a change of domicile, the trial court's second step is to determine whether an established custodial environment exists. *Rains*, 301 Mich App at 325. According to MCL 722.27(1)(c),

[t]he custodial environment of a child is established 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 permanency of the relationship should also be considered.

In this case, the trial court made no express findings on whether an established custodial environment existed. However, "a case in which the proposed change would modify the custodial environment is essentially a change-of-custody case." *Pierron v Pierron*, 486 Mich 81, 92-93; 782 NW2d 480 (2010). Here, the trial court found that changing the child's domicile was "tantamount to changing primary physical custody as it will be impossible to continue the current schedule of week-on/week-off between" the parties' households. Accordingly, implicit in the trial court's ruling is a finding that an established custodial environment existed for the child.

The third step in the analysis is to determine whether the change of domicile would alter the established custodial environment. *Rains*, 301 Mich App at 325. During the motion hearing, the court acknowledged that the move to the Traverse City area would amount to a change of custody. The trial court's ruling suggests, but does not confirm, that allowing the change in domicile would alter the child's established custodial environment.

Given these findings, the trial court was required to proceed to the fourth step in the analysis: the trial court must 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."¹ *Rains*, 301 Mich App at 325. In this case, the

¹ MCL 722.23 provides:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

trial court stated that it “considered all of the relevant factors of the ‘Best Interests of the Child,’ (MCL 722.23), and finds that the parties are equal on all of the factors with the exception of Factor (e).”

However, although the court professed to consider all relevant factors, it did not identify which factors it found relevant and which it found irrelevant. When determining whether a proposed change is in the best interests of a child, the court must determine whether each of the best-interest factors applies. *Pierron*, 486 Mich at 93. In this case, the trial court did not provide a complete analysis for the best-interest factors. In addition, although the trial court stated that the parties were not equal with regard to MCL 722.23(e), the court did not state what facts led to a finding that the parties were unequal and did not state whether the factor favored plaintiff or defendant. Consequently, there is nothing on the record that would explain how the trial court reached its decision.

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The 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.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The 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.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

Lastly, the trial court's opinion does not expressly or implicitly recognize that a decision under MCL 722.31(4) is subject to the preponderance of the evidence standard of proof, and that a decision under MCL 722.23 is subject to the clear and convincing standard of proof. *Brown v Loveman*, 260 Mich App 576, 594-595; 680 NW2d 432 (2004). In this case, the standard of proof may have controlled the trial court's decision. Without knowing the standards applied by the trial court, our review cannot proceed. We remand to the trial court with instructions to make express findings regarding the established custodial environment, and, if necessary, the best-interest factors, in accordance with the applicable standards of proof.

Remanded. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Christopher M. Murray