

STATE OF MICHIGAN
COURT OF APPEALS

SAMUEL C. FOERSTER,

Plaintiff/Counter Defendant-
Appellant,

v

CARRICE C. MCKINSTRY,

Defendant/Counter Plaintiff-
Appellee.

UNPUBLISHED
December 9, 2014

No. 321529
Houghton Circuit Court
LC No. 2013-015581-DC

Before: MARKEY, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals from an order of the trial court granting plaintiff joint legal custody of the parties' two minor children, granting defendant sole physical custody of the children, and granting defendant's motion to change domicile subject to certain conditions. We affirm.

Plaintiff and defendant were introduced by a mutual friend and began living together in 2007 or 2008. The couple had two children. Following a breakdown of the parties' relationship, plaintiff filed a child custody complaint requesting joint physical and legal custody of the children. Thereafter, defendant filed a counter-complaint requesting sole legal and physical custody of the children, and requesting the court only grant plaintiff supervised parenting time. Approximately three weeks later, defendant filed a motion to change domicile, claiming that she sought full-time employment in northern Michigan by applying for jobs in her field (she had a master's degree in sculpture), but was unable to find work. Defendant asserted that she was offered employment in Santa Fe, New Mexico.

Following a three-day trial, the lower court determined that the children had an established custodial environment with both parents. The court awarded the parties joint legal custody of the children, and awarded sole physical custody to defendant with liberal parenting time being given to plaintiff. After this, the court addressed the change-of-domicile factors in MCL 722.31(4) and determined that relocation was appropriate so long as defendant's parents followed through on their promise to cover plaintiff's travel expenses and provide free housing. Thereafter, the court issued its initial custody order, which indicated that defendant could exercise up to 23 parenting visits to Santa Fe over the next year, with each visit lasting up to nine days. The order also required defendant to bring the children to Michigan for three trips of three

days each year, and required the parties to submit an agreed upon parenting schedule covering May 1, 2014, through April 30, 2015.

We review a trial court's discretionary rulings in a child custody case for an abuse of discretion. *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). "An 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." *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183 (2000). We review a trial court's factual findings under a great weight of the evidence standard. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451; 705 NW2d 144 (2005). The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. *Id.* at 452. Finally, questions of law are reviewed for clear legal error. MCL 722.28. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). We review de novo questions concerning the interpretation and application of a statute. *Pierron v Pierron*, 282 Mich App 222, 243; 765 NW2d 345 (2009).

Plaintiff first argues that the trial court improperly granted defendant's motion to change domicile under the MCL 722.31(4) factors. Generally, when a parent wishes to change the domicile of a child whose custody has been the subject of a court order, the court is required to utilize the following four-step analysis before granting the proposed change:

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. [*Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013).]

However, the change-of-domicile four-step analysis only applies when parental custody is already governed by a court order. MCL 722.31(1). MCL 722.31 provides the following:

(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

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

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.

* * *

(4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court’s deliberations [Emphasis added.]

In *Kessler v Kessler*, 295 Mich App 54, 58; 811 NW2d 39 (2011), this Court interpreted MCL 722.31(1) and held that “[a]ccording 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.”

In the present case, there was no court order governing custody at the time the court engaged in the change-of-domicile analysis from the bench. The court’s first custody order was not entered until five days later. On three occasions prior to March 13, 2014, the court entered stipulated parenting-time orders, but none of these orders addressed custody of the children. When the court issued its opinion on March 13, 2014, it attempted to issue a court order governing custody from the bench prior to addressing the change-of-domicile factors to accommodate the procedural scheme of MCL 722.31(1). The court stated the following:

Typically, when the Court considers a request, for what we call a change of domicile . . . the Court is supposed to consider [the MCL 722.31(4)] factors first and then evaluate whether it’s necessary to address the best interest factors, as far as, what should happen with the two minor children

This is a little different. In this case we do not have an initial custody order. The action was brought because the parties are, in fact, unmarried and the suit was originally filed in order to determine . . . what the custody situation was and—so in this particular case, this is going to be done a little backwards from the D’Onofrio hearing, because I have to issue an initial custody order before we can get to the issue of whether moving the minor children is appropriate or not.

The court went on to address the MCL 722.23 best-interest factors and stated that it was granting plaintiff and defendant joint legal custody and granting defendant sole physical custody. The court expressly reserved any discussion concerning defendant’s proposed move to Santa Fe until it engaged in its change-of-domicile analysis under MCL 722.31(4). The court based its procedural process on the premise that its opinion from the bench constituted a court order under MCL 722.31(1).

The first question, then, is whether the court’s opinion from the bench constituted a valid “court order” under MCL 722.31(1) such that the court should have addressed the MCL 722.31(4) factors.

MCR 2.602 provides the following:

(1) Except as provided in this rule and in MCR 2.603, all judgments and orders must be in writing, signed by the court and dated with the date they are signed.

* * *

(B) An order or judgment shall be entered by one of the following methods:

(1) The court may sign the judgment or order at the time it grants the relief provided by the judgment or order.

(2) The court shall sign the judgment or order when its form is approved by all the parties and if, in the court's determination, it comports with the court's decision.

(3) Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the original of the proposed judgment or order and proof of its service on the other parties.

* * *

(4) A party may prepare a proposed judgment or order and notice it for settlement before the court.

In *In re Leete Estate*, 290 Mich App 647, 656-657; 803 NW2d 889 (2010), this Court interpreted MCR 2.602(B) and stated the following:

[U]nder MCR 2.602(B), for an order to be valid, it must be entered in one of four ways: it may be signed at the time relief is granted; it may be signed when its "form" is approved by all the parties and if, in the court's determination, it comports with the court's decision; it may be entered pursuant to the "seven-day rule"; or, it may be prepared and noticed for settlement before the court.

Although the court below issued an opinion regarding custody from the bench prior to addressing the change-of-domicile factors in MCL 722.31(4), the opinion did not become a valid court order until the court signed the written order on March 18, 2014. See *Kessler*, 295 Mich App at 58.

Generally, [u]pon a finding of error an appellate court should remand the case for reevaluation, unless the error was harmless. *Fletcher*, 447 Mich at 882. In this case, the court's procedural error was harmless. Initial custody awards are governed by MCL 722.27, which provides the following:

(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

(a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age. . . .

* * *

(c) . . . The 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. The 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 shall also be considered. . . . [Emphasis added.]

Accordingly, “a trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination.” *Kessler*, 295 Mich App at 61 (emphasis in original). Likewise, before a court may issue an order altering an established custodial environment, it must find “clear and convincing evidence that the change is in the child’s best interests” regardless of whether an established custodial environment would be altered by modifying an existing custody order or by issuing a new custody order. *Id.*; see also MCL 722.27(1)(c).

A custody order is not required for the court to determine whether an established custodial environment exists. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). A custodial environment may be created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed. *Hayes v Hayes*, 209 Mich App 385, 388-389; 532 NW2d 190 (1995). The following factors are relevant to determine the existence of a custodial environment:

Such an environment depend[s] instead upon a custodial relationship of significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence. [*Baker*, 411 Mich at 579-580.]

In the present case, the court determined that an established custodial environment existed for the children with both plaintiff and defendant, then analyzed the MCL 722.23 best-interest factors while specifically reserving discussion of defendant’s proposed move to Santa Fe. The court finally addressed the change-of-domicile factors under MCL 722.31(4), but did

not reiterate its assessment of the MCL 722.23 best-interest factors specifically regarding defendant's proposed move. On appeal, neither party disputes the court's decision regarding the custodial environment. Accordingly, the question is whether the court sufficiently examined the children's best interests regarding defendant's proposed change of the children's custodial environment as required by MCL 722.27(1)(c).

Although a court must find by clear and convincing evidence that a change in the custodial environment is in the children's best interests, a court's failure to explicitly articulate its findings of the MCL 722.23 best-interest factors is not error if "such a finding can easily and clearly be drawn from the trial court's . . . opinion." *Powery v Wells*, 278 Mich App 526, 530; 752 NW2d 47 (2008). In this case, the court made the following statement after analyzing the MCL 722.31(4) change-of-domicile factors:

The Court is finding that, in that a custodial environment exists and that bonding is essential at this age, *the burden that Ms. McKinstry bears in convincing the Court that a move is warranted is that of clear and convincing evidence.* In other words, ma'am, you must produce in my mind, or the trier of fact, which is me in this case, a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the finder to come to a clear conviction without hesitancy of the truth of the precise facts and issues. Evidence may be uncontroverted and not be clear and convincing. Conversely, evidence may be clear and convincing, despite the fact it has been contradicted. . . . *And after weighing everything, the Court is finding, ma'am, that you have met that burden.* The Court is finding, without hesitation, with a true conviction that this move can take place and that the bond can be preserved [Emphasis added.]

Moreover, it appears the court understood that a best-interest inquiry is generally part of a change-of-domicile analysis, as the court stated the following: "Typically, when the Court considers request, for what we call a change of domicile . . . the Court is supposed to consider those factors first and then evaluate whether it's necessary to address the best interest factors, as far as, what should happen with the two minor children."

We conclude that the court understood that defendant was required to prove by clear and convincing evidence that a change in the custodial environment was in the best interests of the children, and that the court's finding that the change of the custodial environment was in the children's best interests can be easily drawn from the court's opinion such that the court's failure to reiterate the MCL 722.23 factors specifically as they pertained to defendant's proposed move was not error.

Plaintiff next argues that the trial court's findings under the MCL 722.23 best-interest factors were against the great weight of the evidence. When considering a child's best interests in a custody dispute, a court need not consider every piece of evidence entered and every argument raised by the parties. *MacIntyre*, 267 Mich App at 452. In this case, the court found

that factors (b), (c), (f),² and (l) favored defendant, factors (g) and (j) favored plaintiff, factors (a), (d), and (e) were equal, and factors (h), (i), and (k) were inapplicable due to the age of the children and the lack of evidence supporting a finding that there was domestic violence in the home. Plaintiff argues that factors (b) (love, affection, guidance), (c) (food, clothing, medical care), and (l) (any other factor) should not favor defendant, and that factors (d) (stable, satisfactory environment) and (e) (permanence of the existing or proposed custodial home), which the court scored equally, should have favored him.

The trial court found the parties were equal with regard to factor (a). Factor (a) is “[t]he love, affection, and other emotional ties existing between the parties involved and the child.” MCL 722.23(a). The trial court noted that a report prepared by psychologist Dr. Lawrence J. Pollack indicated that the children were more bonded to defendant than plaintiff, but also indicated that additional bonding opportunities with plaintiff were essential. Further, Dr. Pollack noted that both parties “demonstrate[d] an interest and emotional caring for” the children. The trial court stated that plaintiff had exhibited an ability to “be a dad” and a desire “to be involved with his kids,” and explained that after considering the parties’ testimony it was “absolutely convinced that both [parties] love these children.” Because evidence indicated that both parties had emotional ties and a desire to provide emotional care for the children, the court’s findings on this factor were not against the great weight of the evidence.

The trial court determined that factor (b) favored defendant. Factor (b) is “[t]he 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.” MCL 722.23(b). The trial court expressed concerns about the ability of both parties to provide guidance to the children. Specifically, the court noted that defendant’s decision to bring baseless child abuse allegations against plaintiff on the eve of trial, coupled with the fact that defendant’s minor son from a prior relationship told an investigator that he was being interviewed because he and defendant wanted to get custody of the children and move to Santa Fe, demonstrated a lack of proper parental guidance. However, the trial court also noted that plaintiff’s past decisions on how to discipline this child, including carrying a hammer into the child’s room, smashing the child’s belongings, and spanking him repeatedly with a leather belt, represented “very poor judgment.” Moreover, when defendant was about to give birth to the parties’ second child and was in need of support and care, plaintiff was spending a significant amount of time on pornographic and dating websites. Although both parties demonstrated faults with their parental guidance of the children, the evidence that plaintiff used harmful and unwise disciplinary tactics and admitted to frequenting pornographic and other adult websites in the home at a time when defendant testified she was pregnant and not receiving adequate support from plaintiff, supports the court’s finding on this factor.

² Plaintiff argues that the lower court scored factor (f) in his favor. However, it is clear in light of the evidence and arguments made, that the court’s conclusion that factor (f) slightly favored plaintiff was a slip of the tongue.

The trial court determined factor (c) favored defendant. Factor (c) is “[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). Plaintiff demonstrated an ability to maintain a steady job and income working as a bartender and making approximately \$20,000 annually. Although defendant was only working part-time as an adjunct professor at Finlandia University at the time of trial, she testified that she had received two job offers in Santa Fe that would pay \$42,000 annually. Plaintiff argues that defendant frequently relied on the financial contributions of her parents; however, both parties admitted that they benefitted from the tremendous financial contributions of defendant’s parents. Further, Dr. Pollack reported that defendant was “more cognizant of the day to day needs of the children” and would be better able to meet those needs. Although both parties demonstrated the ability and willingness to earn income and provide for the children, the above cited evidence supports the trial court’s finding on this factor.

The trial court found factors (d) and (e) were equal between the parties. Factor (d) is “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” MCL 722.23(d). Factor (e) refers to “[t]he permanence, as a family unit, of the existing or proposed custodial home or homes.” MCL 722.23(e). Plaintiff argues that the court should not have scored these factors equally because defendant did not provide specific evidence about her living arrangements in Santa Fe. However, factors (d) and (e) are not intended to consider the acceptability of a specific home, but rather to determine a child’s prospects or the potential for a stable family environment. See *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996) (holding that a mother who had recently completed her education and would likely be moving to a currently unknown situation was not disqualified under MCL 722.23(d) and (e)).

In the present case, the trial court noted that since the dissolution of the parties’ relationship, both plaintiff and defendant “contributed to the stability and instability of these children’s lives.” Although the parties’ oldest child lived with both of them, defendant left with the children just days after the parties’ youngest child was born. Defendant lived with the children in a hotel for some time, and then moved back to the home. Plaintiff now lives in a different home, but has consistently participated in visitation with his children throughout these proceedings. The fact that defendant did not provide specific information about her living arrangements in Santa Fe does not automatically favor plaintiff. *Id.* Therefore, the trial court’s findings were not against the great weight of the evidence.

The court found that factor (f) slightly favored defendant. Factor (f) is “[t]he moral fitness of the parties involved.” MCL 722.23(f). Both parties admitted to drug and alcohol abuse. Defendant testified that six years prior, she and plaintiff used cocaine together, and approximately 15 months prior she brought cocaine home for plaintiff to use. Defendant also admitted that she was arrested for drunk driving approximately three years prior to trial. Defendant testified that she continued to consume some alcohol following the birth of the parties’ two children. Plaintiff, who used to have a medical marijuana card, testified that he exchanged marijuana for money and gave it to close friends, was arrested for illegal marijuana possession in 1998 or 1999, inhaled crack in 1997 or 1998 while at a party, used cocaine with defendant several times in the past, and used cocaine the winter prior to trial when, he asserted, defendant gave it to him.

In sum, both parties have a somewhat checkered past with drugs; however, the sheer volume of incidents involving plaintiff's illegal drug use, and the fact that evidence revealed more incidences involving plaintiff in the recent past, indicates the trial court's finding was not against the great weight of the evidence.

The trial court found factor (g) favored plaintiff. Factor (g) is "[t]he mental and physical health of the parties involved." MCL 722.23(g). Defendant testified that she had been diagnosed with bipolar depression, and plaintiff testified that defendant was currently on medication for depression. Although plaintiff said he was once given a prescription for depression, he testified that he never took the medication and was never diagnosed with depression. Although there is no indication that defendant's depression had impacted her ability to care for the children or was not mediated by tier medication, the evidence did not preponderate against the court's finding on this factor.

The court found factor (j) favored plaintiff. Factor (j) is "[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). The court noted that when defendant initially ended her relationship with plaintiff, she took the children and did not allow him to see them for six days. Further, defendant was a distraction during several of plaintiff's parenting-time visits due to taking volumes of flash photography and following him around with a notepad taking notes. Moreover, plaintiff testified, defendant enrolled both of the children in childcare and had them baptized without permitting him to participate. Based on this evidence, the trial court's finding was not against the great weight of the evidence.

Finally, the court found that factor (l) favored defendant due to the significant support her parents gave to the family and the children. Factor (l) is "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." Plaintiff argues that the court should not have weighed this factor in favor of defendant because the contributions of third-parties may not be considered under the best-interest factors.

The court did not err in considering the contributions of the maternal grandparents to defendant. "Factor l is a 'catch-all' provision" of the best interest analysis. *McIntosh*, 282 Mich App at 482. Nothing in MCL 722.23 expressly limits courts from considering support systems beyond the two parents in a custody dispute. Indeed, in *Rittershaus*, 273 Mich App at 466-467, this Court held that the lower court properly considered the benefits of a parent's extended family and the fact that relatives "would be instrumental to plaintiff in securing child care when needed" as part of the best-interest analysis. Accordingly, the court was permitted to consider the potential contributions and support of defendant's parents.

In sum, the trial court improperly considered the change-of-domicile factors under MCL 722.31(4) because there was not an existing court order governing custody in this case. However, the court's ultimate custody decision was not in error because there is sufficient evidence in the record to indicate the court considered the MCL 722.23 best-interest factors in light of defendant's proposed move to Santa Fe under a clear and convincing evidentiary standard, and the court's factual findings undergirding its best-interest analysis were not against the great weight of the evidence.

Plaintiff next argues that the trial court's order requiring defendant to submit additional proofs to the Friend of the Court Bureau after trial violated his due process rights. This issue was not properly preserved, so our review is for plain error affecting substantial rights. *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 381; 808 NW2d 511 (2011). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We have explained constitutionally sufficient process in a civil proceeding as follows:

Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence. [*Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995) (citation omitted).]

In this case, the court ordered defendant to provide the following proofs to the Friend of the Court following the trial:

That Defendant, CARRICE C. MCKINSTRY, shall provide the following to the Friend of the Court by May 1, 2014:

1. Proof of an appropriate place for the Defendant and the children to live, i.e., a lease.
2. Proof that the amount of Eight Thousand Five Hundred (\$8,500) Dollars has been set aside for the use of the Plaintiff to travel to Santa Fe, New Mexico.
3. Proof that Defendant has accepted positions at both Plaza Hardwoods and Site Santa Fe and the date on which she will begin her employment.

The Defendant shall provide the following to the Friend of the Court no later than April 11, 2014:

1. Written proof from the maternal grandparents allowing for the Plaintiff to stay in their guest house while visiting the minor children.
2. Proof of a signed and agreed to parenting time schedule from May 1, 2014, to April 30, 2015

Plaintiff had an opportunity to, and did, exercise his right to cross-examine defendant and her parents at trial. Moreover, defendant presented competent evidence at trial regarding the

same issues on which the trial court requested additional proofs, and plaintiff had an opportunity to address and challenge that evidence.³ Plaintiff has also not shown that he could not respond by submitting his own contrary documents to any documents defendant submitted to the Friend of the Court. Further, plaintiff has not demonstrated, or even argued, that if the proofs ordered by the court were admitted as part of the trial the outcome would have been different. Therefore, the trial court's order did not constitute plain error affecting plaintiff's substantial rights.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Donald S. Owens

³ Defendant testified at trial that she would create a trust fund holding \$8,500 for plaintiff's travel expenses, that plaintiff could use the guest house at the maternal grandparents' home during visitation with his children in New Mexico, and that defendant had two job offers in New Mexico.