

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA LEE POULTON-ZAREMBA,

Plaintiff-Appellee,

v

RAND ANTHONY ZAREMBA,

Defendant-Appellant.

UNPUBLISHED

April 12, 2005

No. 257376

Tuscola Circuit Court

LC No. 02-021056-DM

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals by right from a judgment of divorce awarding the parties joint legal and physical custody of their minor child with plaintiff to provide primary domicile and granting plaintiff's motion for a change of domicile. We affirm.

Defendant first argues that the trial court abused its discretion when it found that plaintiff had proven that a change in circumstances existed. We disagree. This Court applies three standards of review in custody cases:

The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law (citations omitted). [*Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).]

MCL 722.27(1)(c) provides that a court may modify or amend its previous judgments or orders only "for proper cause shown or because of change of circumstances." This Court has interpreted this statutory language to mean that a party seeking a modification or amendment of a trial court's judgment or order for custody must first prove by a preponderance of the evidence the existence of proper cause or a change of circumstances before the trial court can consider whether an established custodial environment exists and conduct a review of the best interest factors. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). To establish proper cause necessary to revisit a custody order, "a movant must prove by a preponderance of

the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well being." *Id.* at 512. To establish a change of circumstances, "a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well being, have materially changed." *Id.* at 513 (emphasis in original).

In the present case, defendant asserts that the trial court abused its discretion because the findings of fact on which the court relied in making its ruling were against the great weight of the evidence. We find that this argument is without merit.

At the time of the referee hearing, both plaintiff and a member of her company's personnel department testified that it was unclear whether plaintiff would lose her job if she chose not to transfer to Tennessee. However, by the time of the de novo hearing plaintiff testified that her boss had recently informed her that she would lose her job if she did not accept the transfer to Tennessee. Defendant presented no evidence to the contrary. Under these circumstances, the evidence does not clearly preponderate against the trial court's finding that plaintiff was required to move to Tennessee in order to retain her job.

At the referee hearing plaintiff also testified that she had made efforts to find an appropriate replacement position in Michigan so as to avoid the necessity of changing the then existing custody arrangement. These efforts included sending out resumes to various businesses. However, plaintiff testified that there simply were not many positions available in her area, and she stated that she had not received any responses to her resumes. At the de novo hearing plaintiff reaffirmed that she had continued to look for appropriate work in Michigan, but that she had been unable to find any open jobs in the area. Again, defendant presented no evidence to the contrary. Thus, again, the evidence does not clearly preponderate against the trial court's finding that plaintiff had made a sincere effort to locate appropriate substitute employment in Michigan.

Defendant also asserts that, even if the trial court's findings of fact were not against the great weight of the evidence, the trial court nonetheless abused its discretion when it found that a change of circumstances existed, because plaintiff failed to prove that the change in circumstances was not simply a normal life change. We find that this argument, also, is without merit. In this instance, the change of circumstances in question was more than simply a minor change in the child's environment, behavior, and well-being. Rather, the change in circumstances in this instance involved a move to a distant state and necessitated a substantial change from the custody arrangement set forth in the temporary order whereby the child saw each of her parents virtually every day. Accordingly, the trial court properly found that plaintiff met her burden of proving by a preponderance of the evidence that a change of circumstances existed sufficient to re-open the question of custody.

Defendant next argues that the trial court erred when it changed the existing custody arrangement by granting the parties joint custody of their child with plaintiff to provide the primary domicile. Again, however, we disagree.

Defendant first asserts that the trial court erred in awarding plaintiff primary domicile in that it committed clear legal error by finding that because a change of circumstances existed a

change of custody was automatically required. We note that, were the court to have so found, the court would indeed have committed clear legal error. A custody award may be modified on a showing of proper cause or change of circumstances establishing that the modification is in the child's best interest. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). However, when a modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that the change is in the child's best interest. MCL 722.26a; *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999).

In the present case defendant's argument is based on a single statement of the trial court, taken out of context. The court did in fact state "there has been a change of circumstances requiring a change of custody." However, the court then immediately went on to explain that what it was really saying was that under the circumstances, having found that plaintiff had to move to Tennessee, it was impossible for the then-existing arrangement where the child saw each parent every day to continue, and thus, in this particular instance the change in circumstances necessitated a change in custody. The court then continued on to hold plaintiff, the moving party, to the clear and convincing evidence standard, and found that plaintiff had demonstrated by clear and convincing evidence that a change in custody with plaintiff providing the child's primary domicile was in the child's best interest.

In context, the trial court was simply explaining the reality of the circumstances. Given that the court then followed the proper procedure in making its ruling regarding changing the existing custody arrangement, we conclude that the court did not commit any legal error in awarding plaintiff the primary domicile of the parties' child.

Defendant also argues that the trial court erred in awarding plaintiff primary domicile of the child because the court abused its discretion when it found that it was in the child's best interest for plaintiff to provide her primary domicile. Specifically, defendant asserts that the court's findings of fact as to best interest factors (b), (c), (j), and (l) were against the great weight of the evidence. MCL 722.23(b), (c), (j), and (l). We disagree.

Factor (b), MCL 722.23(b), concerns the capacity and disposition of the parties to give their minor child the love, affection, and guidance she needs, as well as to continue her education and raising her in her religion. With regard to factor (b), the trial court found this factor favored neither party. Defendant asserts that this factor should favor him. In support of this assertion, defendant points to evidence that he was extremely active in the child's school and extracurricular activities, while plaintiff was less involved.

It is true that defendant presented evidence that he was deeply involved in the child's school and extracurricular activities, both before and after the parties' separation. However, defendant also admitted that when he was working the day shift he was not able to volunteer in his daughter's classroom or participate in her school functions very often. Defendant further admitted that if he were to be awarded primary domicile he would work the day shift. Plaintiff presented evidence that she had been as active in her children's school and extracurricular activities as she could be, given her work schedule. Looking at this evidence as a whole, we conclude that it does not clearly preponderate against a finding that this factor favors neither party. Accordingly, the trial court's findings of fact with regard to factor (b) are not against the great weight of the evidence.

Factor (c), MCL 722.23(c), concerns the capacity and disposition of the parties to provide their minor child food, clothing, medical or other remedial care, and other material needs. With regard to factor (c), the trial court found that this factor weighed “significantly and heavily” in plaintiff’s favor. The primary basis for this finding was that defendant had not paid any child support and had only provided minimal other financial support during the pendency of the case.

Defendant asserts that this factor should favor neither party. Defendant admitted below that he had never paid any child support, and that he had never informally given plaintiff money for their child since the parties separated. He notes, however, that he paid plaintiff’s truck payment and insurance for approximately one year following their separation, and paid for the furnishings for plaintiff’s home. Defendant contends that these payments were made in lieu of paying child support. He also notes that plaintiff had never requested that he pay child support. Plaintiff admitted that the parties had originally agreed that defendant would not pay child support while he was making her truck payments, and that she had never petitioned the court to force defendant to pay child support. However, plaintiff asserted that defendant was making her truck payments not in lieu of child support, but rather as payment for plaintiff’s equity in the marital home. Moreover, approximately one year after the parties separated, plaintiff sold the truck and defendant’s payments stopped. The parties also testified that defendant made approximately \$100,000 a year, while plaintiff made approximately \$49,000 a year. Looking at this evidence as a whole, the evidence does not clearly preponderate against a finding that this factor favors plaintiff. Accordingly, the trial court’s findings of fact with regard to factor (c) are not against the great weight of the evidence.

Factor (j), MCL 722.23(j), concerns the willingness and ability of each party to foster and encourage the relationship between their child and the other party. With regard to factor (j), the trial court found that this factor weighed in plaintiff’s favor because it concluded that defendant was unwilling to foster and encourage a relationship between the parties’ child and plaintiff. Defendant asserts that this factor should favor neither party. In support defendant points to the fact that the parties had worked together successfully in the previous two years to fashion a custody schedule acceptable to both parties, and to defendant’s testimony that he would do everything possible to encourage a close relationship between the child and plaintiff.

It is true that defendant testified repeatedly that he would do whatever was necessary to facilitate the child’s and plaintiff’s relationship. However, at the same time defendant also testified that he would try to facilitate plaintiff’s visits with the child only when plaintiff comes to Michigan, and that plaintiff could visit with the child anytime, but only in Michigan. Defendant further testified that he did not believe that he should have to help in facilitating the child’s transport between Tennessee and Michigan. Plaintiff testified that defendant had informed her that if he were to be granted primary domicile, plaintiff would only be allowed to visit the child two weeks per year, and only in Michigan. Plaintiff also testified that defendant had refused to be flexible with her in regard to the then-existing custody schedule and arrangement.

At the same time, plaintiff testified, and defendant admitted, that plaintiff had offered defendant extensive visitation rights in the event that the trial court were to award plaintiff primary domicile. These visitation rights included defendant having the child during the summer vacation, all holidays except Christmas to be shared in Michigan, and three weeks of school breaks each year. It further included an offer for plaintiff to bring the child up, or pay for her

transportation, to Michigan to visit with defendant one weekend a month, and an offer for defendant to come to Tennessee any time to visit the child with the option of staying at plaintiff's home during these visits.

Looking at the evidence as a whole, the evidence does not clearly preponderate against a finding that this factor favors plaintiff. Accordingly, the trial court's findings of fact with regard to factor (j) are not against the great weight of the evidence.

Factor (l), MCL 722.23(l), in this instance, concerns avoiding separating the parties' child from her half-brother. The trial court found that this factor weighed heavily in plaintiff's favor. The primary basis for this finding was that the two children were particularly close, and that because of plaintiff's son's own divided custody schedule it was likely that were defendant granted primary domicile the two children would never or rarely ever see each other. Defendant asserts that this finding was against the great weight of the evidence because the trial court itself created the circumstances where the children would be separated by allegedly failing to consider the option of retaining the then-existing custody arrangement, which defendant asserts was the custody arrangement in the parties' daughter's best interest.

However, the trial court explicitly found that plaintiff had to move to Tennessee. As a result, it is obvious that the then-existing custody arrangement could not possibly continue. Thus, the court did not create the circumstances giving rise to the children's potential separation. Rather, the change in circumstances itself did so. Moreover, although the court recognized that the optimum situation would be to maintain the then-existing custody arrangement, the court did not find, as defendant asserts, that it was in the parties' child's best interest for the then-existing custody arrangement to continue. To the contrary, the trial court explicitly found, after considering the best interest factors, that it was in the child's best interest for her primary domicile to be with plaintiff. Defendant presented no evidence that clearly preponderates against a finding that factor (l) favored plaintiff. Accordingly, the trial court's findings of fact with regard to factor (l) are not against the great weight of the evidence.

Because none of the trial court's challenged findings of fact were against the great weight of the evidence, we conclude that the trial court did not abuse its discretion when it concluded that it was in the child's best interest for plaintiff to provide the child's primary domicile.

Defendant also argues that the trial court abused its discretion when it found that plaintiff had met her burden of proving that a change of the minor child's domicile was in the child's best interests. Again, we disagree. This Court reviews a trial court's findings in applying the *D'Onofrio*¹ test, as codified in MCL 722.31, under the great weight of the evidence standard. *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). This Court reviews a trial court's decision on a petition to change the domicile of a minor child for an abuse of discretion. *Id.*

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

In connection with a motion for a change of domicile, the party seeking the change bears the burden of proving by a preponderance of the evidence that the change is warranted. *Mogle v Scriver*, 241 Mich App 192, 203; 614 NW2d 696 (2000). The right to petition for a change of domicile is not limited to parents having sole custody of the affected children. *Brown, supra* at 589.

We note that defendant appears to be suggesting that the trial court, by stating its intention to view the evidence in connection with this question as if plaintiff had already established that she was the parties' child's primary custodian, somehow shifted or changed the burden of proof and created a presumption that defendant was then required to overcome. However, there is no evidence on the record to support such an assertion. The trial court clearly placed the burden of proof on plaintiff as the moving party. Moreover, there is nothing in the record to suggest that the court was viewing the evidence from the standpoint that defendant had some sort of presumption to overcome. Rather, it appears that the court's statement was simply an acknowledgement of the fact that the court had already determined that it was in the child's best interest for plaintiff to provide the child's primary domicile. Accordingly, the trial court did not act improperly in connection with how it viewed the evidence in making its decision on the change of domicile question.

We also disagree with defendant's argument that the trial court abused its discretion in granting plaintiff's motion for change of domicile because the court's findings of fact as to factors (a), (c), and (d) were against the great weight of the evidence. MCL 722.31(4)(a), (c), and (d).

Factor (a) concerns "[w]hether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent." MCL 722.31(4)(a). With regard to factor (a), the trial court found that the failure to permit the change in domicile would greatly diminish the quality of life of plaintiff and the parties' daughter because their standard of living would be greatly curtailed. Certainly there is evidence on the record to support this finding. As set forth above, plaintiff presented evidence that were she not to accept the transfer to Tennessee, she would lose her employment and no suitable replacement employment was available in Michigan. Defendant introduced no evidence to suggest that this evidence was not accurate.

It is true, as defendant points out, that in making its findings of fact as to this factor the trial court did not appear to consider the impact that the change in domicile would have on the child's quality of life with regard to the altering her near daily contact with defendant. This court has held that in evaluating this factor a trial court must measure the impact of the move on the child and any purported improvements in the child's life must be balanced against the day-to-day presence and relationship with the parent opposing the move. *Dick v Dick*, 147 Mich App 513, 517, 520-521; 383 NW2d 240 (1985). Given the circumstances, in this case, where plaintiff was required to move in order to keep her job regardless of whether or not the court permitted the child to move with her, no matter which way the court found on this factor it would result in an equal diminishment of the losing party's contact with the child. For these reasons, we conclude the evidence does not clearly preponderate against the trial court's findings of fact with regard to factor (a).

Factor (c) concerns "[t]he 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 . .

. in a manner that can provide an adequate basis for . . . fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.” MCL 722.31(4)(c). With regard to factor (c), the trial court found that it was satisfied that it could provide provisions for parenting time for defendant that would provide him with “a realistic, albeit imperfect opportunity” for visitation which would provide him an adequate basis for preserving and fostering his relationship with his daughter. This court has held that the new visitation plan need not be equal to the prior visitation in all respects, but rather need only provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the noncustodial parent. *Mogle, supra* at 204.

Defendant, while acknowledging the above, asserts that the trial court’s findings of fact as to this factor are against the great weight of the evidence because there is no way that the court, in permitting the child to move to Tennessee, can preserve the parental relationship previously enjoyed by defendant, namely seeing the child daily. Again, however, under the particular circumstances of this case, whichever parent was separated from the child would face this same problem, because it simply is not possible for each parent to see her every day. Further, both parties testified that while defendant had the child during most days and on alternate weekends, the child spent virtually every night in plaintiff’s home, and plaintiff was almost solely responsible for getting her up in the mornings and getting her ready to go to school. This fact tends to tip the scale slightly in plaintiff’s favor. As such, the evidence does not clearly preponderate against the trial court’s findings of fact with regard to factor (c).

Factor (d) concerns “[t]he 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.” MCL 722.31(4)(d). With regard to factor (d), the trial court found that defendant’s objection to the child’s moving to Tennessee was at least in part motivated by a desire on his part to minimize his support obligation. As discussed above, the record indicates that defendant has never paid any child support, nor provided more than minimal contributions to the child’s living expenses since the parties separated. This situation would clearly change if the child were to move to Tennessee because, as the trial court noted, defendant could no longer claim that he should not be required to pay child support because the child was in his custody virtually fifty percent of the time. Thus, the evidence does not clearly preponderate against the trial court’s findings of fact with regard to factor (d).

For the above stated reasons, we conclude the trial court did not abuse its discretion when it found that plaintiff had met her burden of proving that a change in domicile was warranted.²

² We note that the trial court considered this issue as if plaintiff’s burden of proof was by clear and convincing evidence. In connection with a motion for a change of domicile, the party seeking the change bears the burden of proving by a preponderance of the evidence that the change is warranted. *Mogle, supra* at 203. Accordingly, the court committed clear legal error in applying the clear and convincing standard. However, the clear and convincing evidence standard is a higher standard of proof than the proper preponderance of the evidence standard. This Court will not reverse when the trial court reaches the correct result regardless of the reasoning employed. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Hilda R. Gage