

STATE OF MICHIGAN
COURT OF APPEALS

CHERYL A. SMITH, formerly known as
CHERYL A. JAGNOW,

Plaintiff-Appellee,

v

J. CHRISTOPHER KENT JAGNOW,

Defendant-Appellant.

UNPUBLISHED
September 16, 2014

No. 320205
Wayne Circuit Court
Family Division
LC No. 08-118363-DM

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

In this child custody dispute, defendant appeals by leave granted¹ the trial court's order granting plaintiff's motion for change of domicile and denying defendant's motion for change of custody. Because the trial court did not abuse its discretion in changing the children's domicile and denying defendant's request for a change in custody, we affirm.

The present custody case involves a motion by plaintiff to change the domicile for the parties' three children from Michigan to Florida. Defendant responded to this motion with a request to change primary physical custody of the children from plaintiff to defendant, in order that the children could remain in Michigan. The trial court ruled in plaintiff's favor, determining that the requested change in domicile was warranted and finding that defendant had not presented clear and convincing evidence that a change in custody would be in the children's best interests. On appeal, defendant argues that plaintiff failed to prove by a preponderance of the evidence that a change of domicile was supported by the factors listed in MCL 722.31(4) and that he presented the trial court with clear and convincing evidence to justify his requested change in custody.

The following facts are relevant to resolution of the parties' dispute. Plaintiff and defendant divorced in December of 2009. Pursuant to their divorce judgment, the parties shared

¹ *Smith v Jagnow*, unpublished order of the Court of Appeals, entered April 22, 2014 (Docket No. 320205).

joint legal and physical custody of their three children. The children's primary residence remained with plaintiff in the family's home in Northville, Michigan where the children were enrolled in school. Defendant was awarded parenting time with the children each weekend and on Wednesday evenings, including some Wednesday overnights. The parties agreed to modify the custody arrangement in April of 2012, at which time the trial court entered a consent order modifying parenting time so that defendant had parenting time on the first, third, fourth and, when applicable, fifth weekends of the month as well as one weekday evening during the week of plaintiff's weekend with the children.

Some of the issues raised in this case relate specifically to the need for medical care and physical therapy for the parties' eldest daughter, KJ. KJ has cerebral palsy, a condition which affects her ability to walk and which requires special accommodations in her household. KJ also frequently attends physical therapy sessions, and plaintiff has had the primary responsibility for arranging these sessions and transporting KJ to physical therapy. Moreover, part of KJ's therapy involves stretching exercises to be completed at home. Both plaintiff and defendant assist KJ with her stretches while she is in their respective care. However, KJ's physical therapist has noted that KJ requires more stretching at her Monday sessions, after her weekends with defendant, than on her Wednesday sessions. This suggests that KJ was not doing as much stretching over the weekends while in defendant's care. In addition, evidence was presented that the children's pediatrician in Michigan has plans to retire and that KJ's physical therapist would no longer be available to conduct KJ's physical therapy.

In terms of the parties' personal and employment situations, both parties have remarried since their divorce. Defendant began a relationship with his current wife, Melissa Jagnow, in 2008 and they married in 2011. After the parties' divorce, defendant and Melissa moved to Manchester, Michigan, 42 miles from Northville. They still reside in Manchester, making it unclear where the children would attend school if they remained in Michigan. Defendant works as a salesman for Navistar, a position which requires him to travel frequently in the course of his employment, often taking him from home on Monday mornings until Wednesday or Thursday evening each week. Because of this travel, he has often had difficulty exercising his weeknight parenting time. Melissa also works full-time. Melissa also has a son from a previous marriage who is in the custody of her former husband in Indiana. Melissa has parenting time with him on weekends, and defendant's children have a relationship with Melissa's son as well as some of her extended family in Indiana.

Plaintiff began living with her current husband, Steven Smith, in 2010, and they married in April of 2013. Smith works for National Airlines, an airline previously based in Michigan, which relocated to Orlando, Florida in 2013. Smith relocated with his employer to Orlando with the incentive of a promotion, for a salary of \$140,000 and a minimum bonus of 20 percent. In contrast, if Smith remained in Michigan he would not have continuing employment with National Airlines and he had no other job prospects. Given Smith's higher salary in Florida, plaintiff plans to stay at home with the children. She has left a part-time position at a bank, which was insufficient to meet the family's financial needs in Northville, and is no longer working. In anticipation of the move to Florida, plaintiff and Smith have purchased land in Florida to build a new home and they have listed their home in Northville for sale. The new house in Orlando will include specific accommodations for KJ, and it is located within close proximity to the children's schools, a highly rated children's hospital, and year-round outdoor

activities important for KJ's physical therapy. Plaintiff conducted significant research on schools and medical facilities in Orlando to ensure the schools would be comparable to those in Northville, and she has already met with pediatricians in the area.

Plaintiff moved to change the children's domicile in May of 2013. In her motion, plaintiff argued that the move would benefit the children, providing them access to comparable schools and activities, while allowing them to enjoy Smith's substantially higher salary. She maintained that she would coordinate continued parenting time with defendant and she expressed her willingness to split the costs of transporting the children from Florida to Michigan for visits. Defendant responded to plaintiff's motion and filed a separate motion to change custody. He asserted that the move would not improve the children's quality of life, but instead remove them from the support system of extended family, friends, and known medical professionals. He contended that the move would frustrate his relationship with the children and he argued that he should be awarded primary custody of the children.

Over the course of a two day hearing, the trial court heard testimony from the parties, their spouses, KJ's physical therapist, and Melissa's step-mother. Following that hearing, the court issued an extensive opinion and order resolving the parties' motions. The trial court granted plaintiff's motion to change the children's domicile and denied defendant's request for a change of custody.

Specifically, regarding plaintiff's motion to change the children's domicile, the court found, relevant to defendant's arguments on appeal, that: (1) plaintiff's proposed move to Florida would improve the quality of life for the children and plaintiff because of Smith's improved financial situation and the accommodations included for KJ in the new house; (2) the parties had both exercised their parenting time and plaintiff's motivation in seeking the change in domicile was not to frustrate defendant's parenting time; (3) an adequate parenting time schedule could be created to provide defendant the opportunity to foster a relationship with the children; (4) defendant did not oppose the move in the hopes of securing a financial advantage; and (5) there was no indication of domestic violence in either party's home. Based on these findings, the court concluded that plaintiff established, by a preponderance of the evidence, that the change in domicile was warranted, and it ultimately granted plaintiff's request.

Considering defendant's motion for a change of custody, the trial court determined that an established custodial environment existed with both parents. The trial court made express factual findings regarding each best interests factor set forth in MCL 722.23, concluding that several factors favored plaintiff, while none favored defendant.² For example, the trial court concluded that plaintiff possessed a higher capacity and disposition to give the children love, affection, and guidance as evidenced by the fact that plaintiff bears the primary responsibility for caring for the children during the week, she provides guidance and assistance with their schoolwork, and she generally oversees their medical care, a fact which is particularly important given KJ's specific medical needs. MCL 722.23(b). In contrast, because of defendant's

² The trial court determined that factors (b), (d), (e), and (j) favored plaintiff, and that factors (a), (c), (f), (g), (h), and (k) favored neither party.

employment related travel requirements, he is away from home 11 to 12 nights per month and he voluntarily moved more than 40 miles away from the children, which somewhat limited his involvement with their day-to-day activities, and he does not have plans in place for the children's schooling should they remain in Michigan. Concerns regarding continuity and stability also favored plaintiff because the children had lived their entire lives primarily in plaintiff's care. MCL 722.23(d). Given that the children had always lived with plaintiff and that she was responsible for the primary care of the children, the trial court also concluded that plaintiff had established a permanent family unit such that MCL 722.23(e) also favored plaintiff. Finally, plaintiff had demonstrated a willingness and ability to facilitate and encourage a close parent-child relationship between the children and defendant, while defendant offered no testimony regarding how he would foster such a relationship with plaintiff if he were awarded custody. MCL 722.23(j). Ultimately, after interviewing the children and taking the children's wishes into consideration, the trial court determined that defendant had failed to demonstrate by clear and convincing evidence that his proposed change would be in the children's best interests.

After resolving the parties' motions, the trial court established a parenting time schedule, which awarded defendant parenting time consisting of six consecutive weeks in the summer, Christmas breaks in alternating years, Thanksgiving break, one school break during the second half of the year and any other parenting time agreed to by the parties. It ordered plaintiff to pay 2/3rds of the cost of transportation and defendant to pay the remaining 1/3rd of that cost.

Defendant now appeals as on leave granted, challenging the change of the children's domicile and the denial of his request to modify custody. Defendant first argues that plaintiff failed to establish by a preponderance of the evidence that a change to the children's domicile was warranted. In particular, he contends that a change in domicile will deprive the children of their relationships with defendant, Melissa, Melissa's son and Melissa's other family members in Indiana, whom the children often see during their weekend visits with defendant. Defendant emphasizes that Melissa's son, like KJ, has a physical disability, which defendant asserts has led to a special bond between the children. According to defendant, the parenting time schedule adopted by the trial court will be insufficient to maintain these relationships, particularly given the added difficulty and expenses involved with transporting the children from Florida to Michigan. He also argues that the children will be removed from their schools, religious community, and charitable works they perform with defendant and Melissa. He asserts that he and Melissa can alter their work schedules to accommodate the children. In addition, defendant maintains that he provides significant financial support for his children, meaning that the children "don't need [Smith's] money" and the trial court relied too heavily on Smith's increased salary when approving the change in domicile.

The trial court's resolution of a motion for a change in domicile requires a four-step approach, the first of which is to determine whether the moving party has established that the five factors enumerated in MCL 722.31(4) support a motion for a change of domicile. *Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013). Specifically, MCL 722.31(4) requires the court to consider:

- (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.

In considering these factors, the trial court must keep the child as the primary focus of the analysis. MCL 722.31(4); *Rittershaus v Rittershaus*, 273 Mich App 462, 465; 730 NW2d 262 (2007). The moving party has the burden of establishing by a preponderance of the evidence that the change in domicile is warranted under these factors. *McKimmy v Melling*, 291 Mich App 577, 582; 805 NW2d 615 (2011). It is well-recognized that a relocating parent's increased earning potential may improve a child's quality of life, as may additional resources available in the new location. See *Rittershaus*, 273 Mich App at 466-467. In this case, on appeal, defendant challenges only the trial court's findings regarding this first step, that is, whether plaintiff showed, by a preponderance of the evidence, that a change in domicile was warranted under the factors delineated in MCL 722.31(4).³

"This Court reviews a trial court's decisions regarding a motion for change of domicile for an abuse of discretion and a trial court's findings regarding the factors set forth in MCL 722.31(4) under the 'great weight of the evidence' standard." *Rains*, 301 Mich App at 324. Under this standard, this Court may only disturb the trial court's findings of fact if the facts "clearly preponderate in the opposite direction." *McKimmy*, 291 Mich App at 581. An abuse of discretion occurs "only in extreme cases in which the result is so palpably and grossly violative

³ The second, third, and fourth steps require consideration of whether an established custodial environment exists, whether, if such an environment exists, the change of domicile would modify or alter that established custodial environment, and finally, if, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment, whether clear and convincing evidence shows that the change in domicile would be in the child's best interests under MCL 722.23. *Rains*, 301 Mich App at 327-329. Defendant does not address these considerations on appeal in relation to plaintiff's motion to change the children's domicile.

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).

In this case, the decision regarding whether to change the children’s domicile presented a close question and, having reviewed the record, we are not persuaded that it would be appropriate to disturb the trial court’s findings of fact or its ultimate decision to order a change in domicile. The trial court’s findings were based on the evidence presented, and certainly, despite defendant’s protests to the contrary, the evidence did not “clearly preponderate in the opposite direction.” Plaintiff presented ample evidence regarding the improvement the move would afford to the children’s quality of life, including her ability to stay at home with the children given Smith’s increased salary, specific accommodations to the new home in Florida for KJ, access to year-round outdoor activities important for KJ’s therapy, nearby medical facilities, and high quality schools.

In disputing the trial court’s conclusions, defendant largely ignores plaintiff’s evidence and merely rehashes the evidence favorable to his position without providing any basis to conclude that the trial court’s factual findings were contrary to the great weight of the evidence. Defendant essentially argues that he has the financial ability to support the children, that he can alter his schedule to accommodate the children, and that the children will be deprived of important relationships if they move to Florida. But, based on the evidence presented, the trial court reasonably concluded that those relationships can be maintained under the new parenting time schedule and that the children will benefit from the increased income and resources available to the family in Florida. Further, despite defendant’s active participation in parenting time with the children and the importance he places on the children’s relationship with Melissa’s family, the fact remains that, for their entire lives, the children have resided primarily with plaintiff and it is plaintiff who bears the responsibility for the bulk of the children’s day-to-day care, as well as KJ’s specific medical needs. Defendant, while undoubtedly a loving father, moved to Manchester after the parties’ divorce, 42 miles away from the children, and he travels from home 11 to 12 days per month. Despite his purported plans to accommodate the children and their schedules, he and Melissa work full-time, he travels extensively, and it remains unclear how the children could continue at their Northville schools. Plaintiff in contrast presented a thorough plan for improving the quality of the children’s lives in Florida and for ensuring that the children retain their relationship with defendant in the process. While the case might have posed a close question, the trial court was cognizant of the competing concerns, and it made a decision after personally witnessing the testimony presented and after interviewing the children regarding their wishes. On the whole, the record presented is such that the trial court’s findings cannot be characterized as against the great weight of the evidence, and the trial court did not abuse its discretion in granting plaintiff’s request to change the children’s domicile from Michigan to Florida.

Defendant also argues on appeal that the trial court erred when it denied his motion to change custody of the children. Defendant contends that he demonstrated by clear and convincing evidence that the best interest of the children would be served if he was awarded physical custody and the children remained in Michigan. Specifically, he challenges the trial court’s findings regarding MCL 722.23(b), (c), (d), (e), and (j). In doing so, defendant again emphasizes the children’s support network and activities in Michigan and Indiana as well as his ability to financially provide for the children. He argues that the children will enjoy a

continuation of their stable and healthy family life if they remain in Michigan with him, and that he is willing and able to facilitate a parent-child relationship between plaintiff and the children if he is awarded custody.

Where, as in this case, an established custodial environment exists with both parents, the trial court may not modify custody unless it finds clear and convincing evidence that modification is in the child's best interests. *Dailey v Kloenhamer*, 291 Mich App 660, 667; 811 NW2d 501 (2011). Specifically, the trial court must review the statutory best-interest factors listed in MCL 722.23. The trial court "must expressly evaluate each best-interest factor and state its reasons for granting or denying the custody request on the record." *Id.* at 667. The best-interest factors listed in MCL 722.23 are:

- (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.

Pursuant to MCL 722.28, in child custody disputes, “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 the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.” *Dailey*, 291 Mich App at 664, quoting MCL 722.28. We review the trial court’s findings of fact, including its finding on the best interest factors, under the great weight of the evidence standard. *Fletcher v Fletcher*, 447 Mich 871, 877-879; 526 NW2d 889 (1994). Discretionary rulings, including the ultimate award of custody, are reviewed for an abuse of discretion. *Id.* at 879. “Clear legal error” occurs when the trial court chooses, interprets, or applies the law incorrectly. *Id.* at 881.

Reviewing the trial court’s decision in this case, we conclude that the trial court’s decision to deny defendant’s motion to change custody was not an abuse of discretion. As required, the trial court carefully considered each factor, offering specific factual findings regarding each one. Having examined the record, we are persuaded that nothing in the record demonstrates that any of the trial court’s findings regarding the best interest factors were against the great weight of the evidence or that the trial court committed clear legal error.

Specifically, factor (b) involves the capacity and disposition of the parties involved to give the children love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any. While defendant argues this factor favors him given the family and community resources available to him in Michigan, the trial court’s finding to the contrary was not against the great weight of the evidence considering that plaintiff bears primary responsibility for caring for the children during the week, including schoolwork and medical care, while in contrast defendant travels extensively each month. Indeed, in Florida, given Smith’s increased earnings, plaintiff will be able to be home with the children, a fact especially important considering KJ’s specific medical needs. On this evidence, the trial court’s findings regarding factor (b) were not against the great weight of the evidence.

Defendant also challenges factor (c), which involves the parties’ capacity and disposition to provide the children with food, clothing, medical care, and other material needs, a factor which the trial court determined favored neither party. Although defendant claims that he is the primary financial provider for the children, neither party has financial limitations, and plaintiff is, as noted, the children’s primary caregiver during the week. On these facts, the trial court’s findings regarding factor (c) were not against the great weight of the evidence.

Regarding factors (d) (the length of time the children have lived in a stable, satisfactory environment) and (e) (the permanence, as a family unit, of the existing custodial home), the trial court reasonably found that these factors favored plaintiff given that the children reside primarily with plaintiff and it is she who cares for the majority of their day-to-day needs. Although defendant argues that a move to Florida will disrupt the children’s lives, plaintiff has provided a permanent family unit for the children their entire lives and her continued primary custody of the children will promote the desired sense of stability. Accordingly, the trial court’s findings regarding factors (d) and (e) were not against the great weight of the evidence.

Lastly, factor (j) relates to the parties’ willingness to facilitate and encourage a continuing parent-child relationship with the other parent, a factor which the trial court reasonably concluded favored plaintiff given her long history of promoting a strong relationship between

defendant and the children, and her plans to continue this practice while in Florida, including her willingness to contribute to the children's transportation expenses during their travels to and from Michigan. While defendant asserts on appeal that he has no intention of interfering with plaintiff's relationship with the children if he is awarded custody, his assertions are speculative and, unlike plaintiff, he has not provided specific indications regarding how he would foster the relationship between the children and plaintiff. On this record, the trial court's findings regarding factor (j) were not against the great weight of the evidence.

Given the trial court's findings regarding the best interest factors, the trial court did not abuse its discretion in determining defendant had not shown, by clear and convincing evidence, that a change in custody was in the children's best interests. Consequently, the trial court's decision must be affirmed on appeal. See MCL 722.28.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood