

STATE OF MICHIGAN  
COURT OF APPEALS

---

REZA BAYATI,

Plaintiff-Appellant,

v

BAHAREH BAYATI, a/k/a BAHAREH BAHIR-  
HOSSEINI BAYATI,

Defendant-Appellee.

---

UNPUBLISHED  
February 28, 2006

No. 258378  
Oakland Circuit Court  
LC No. 2003-678242-DM

AFTER SECOND REMAND

Before: Cavanagh, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

This case is before us following a second remand. By way of review, in the first appeal we vacated a custody order awarding defendant sole physical custody and allowing her to remove the children to California because the trial court adopted the arbitration award and did not independently consider the best interests of the children. *Bayati v Bayati*, 264 Mich App 595, 597; 691 NW2d 812 (2004). In a subsequent appeal, we vacated a parenting time modification order because no evidentiary hearing was conducted and the trial court failed to consider the best interests of the children and determine whether an established custodial environment existed. *Bayati v Bayati*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005 (Docket No. 258378). On remand the trial court conducted an evidentiary hearing but failed to properly consider whether an established custodial environment existed and failed to determine whether the change in domicile was proper, therefore we remanded the matter a second time. *Bayati v Bayati*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 2005 (Docket No. 258378).

In this second remand, the trial court was to determine (1) whether an established custodial environment existed before the divorce proceedings were completed and the move to California, (2) whether the change of domicile was proper, (3) the issue of physical custody, and (4) the issue of parenting time. After a four-day evidentiary hearing, the trial court issued its very thorough and well-written opinion and order concluding that (1) an established custodial environment did not exist with either parent before the divorce proceedings were completed and the move to California because of the young age of the children and the excessive changes in their schedules and lives in a short period of time, (2) considering the factors provided by MCL 722.31(4), the change of domicile was proper as the pre-move and post-move to California evidence demonstrated, (3) considering the statutory best interest factors, MCL 722.23, four and one-half of which favored defendant and one of which favored plaintiff, physical custody was

properly vested in defendant, and (4) a parenting time schedule cognizant of the proximity issue and the relevant schedules was appropriate. We affirm.

Pursuant to MCL 722.28, “all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.” In other words, “[f]indings of fact are to be reviewed under the ‘great weight’ standard, discretionary rulings are to be reviewed for ‘abuse of discretion,’ and questions of law for ‘clear legal error.’” *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). Guided by these standards of review, we turn to the decisions on the issues.

First, because a temporary custody order existed that provided for shared joint legal custody of the children with defendant having physical custody in Michigan, the trial court was required to make a finding whether an established custodial environment existed before rendering any decision related to custody. MCL 722.27(1)(c); see, also, *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000).

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. [MCL 722.27(1)(c).]

Stated another way, an established custodial environment “is one of significant duration ‘in which the relationship between the custodian and child is marked by qualities of security, stability and permanence.’” *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000), quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). We have reviewed the extensive findings of fact made by the trial court and conclude that these findings of fact were not against the great weight of the evidence, i.e., the evidence did not clearly preponderate in the opposite direction. See *Fletcher, supra* at 878-879. The circumstances surrounding the care of these young children in the time preceding trial, including the excessive changes in their schedules and lives, destroyed any previously established custodial environment. See *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Accordingly, the trial court could have modified the custody order upon a showing by a preponderance of the evidence that such change was warranted.

However, while the temporary custody order was in force and the divorce was pending, defendant requested to change the domicile of the children from Michigan to California. Pursuant to MCL 722.31, “[a] child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent.” And, neither parent may change that residence to a location more than 100 miles away unless (1) the other parent consents, or (2) the court permits such change after consideration of the statutory factors set forth in MCL 722.31(4). See MCL 722.31(2). But, the trial court granted defendant’s request in the absence of plaintiff’s consent and without considering the statutory factors. Therefore, on second remand the trial court was ordered to determine whether the change in domicile was proper under MCL 722.31(4).

As the moving party, defendant had the burden to establish by a preponderance of the evidence that the change in domicile was warranted. See *Overall v Overall*, 203 Mich App 450, 459; 512 NW2d 851 (1994). We have reviewed the extensive findings of fact made by the trial court and conclude that these findings of fact were not against the great weight of the evidence. See *Fletcher, supra* 876-877. In brief, it was sufficiently established that the change in domicile had the capacity to improve the quality of life for both the children and their mother in light of plaintiff's refusal to provide financial support, defendant's lack of work history in Michigan, and defendant's uncle's offer and ability to provide necessary assistance to defendant in California. Further, the evidence did not support plaintiff's theory that defendant wanted to move to California to frustrate his parenting time schedule and it was sufficiently established that the parenting time schedule could be modified so as to preserve and foster the relationship between each parent and each child. In sum, the evidence relevant to the statutory factors, on whole, favored the change in domicile; therefore, the trial court did not abuse its discretion in granting the request. See *Mogle, supra* at 202.

Next, the trial court considered the issue of physical custody. Because only a temporary custody order was in effect, a determination of the children's permanent custody was required. The Child Custody Act is intended to promote the best interests of children thus, "[a]bove all, custody disputes are to be resolved in the child's best interests," utilizing the factors set forth in MCL 722.23. See *Mason v Simmons*, 267 Mich App 188, 194-195; 704 NW2d 104 (2005), quoting *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Here, the trial court thoroughly reviewed each of the best interest factors and found the parties equal on six of the factors, namely factors a, b, c, e, g and h. See MCL 722.23. The court concluded that factor i was not applicable, that factor f weighed slightly against defendant and substantially weighed against plaintiff, and that factor j weighed equally against both parties. See MCL 722.23. Factor d slightly favored defendant and factors k and l weighed against plaintiff. See MCL 722.23. Thus, tallied, four and one-half of the statutory best interest factors favored defendant and one favored plaintiff. We have reviewed the extensive findings of fact made by the trial court in support of its decisions, including those pertaining to factors f, k, and l which were weighed against plaintiff, and conclude that these findings of fact were not against the great weight of the evidence. See *Fletcher, supra* 876-877. We agree that the evidence clearly preponderated in favor of defendant being awarded physical custody of the children, and that such decision is in the children's best interests.<sup>1</sup> Therefore, the trial court's decision did not constitute an abuse of discretion. See *id.* at 880.

Finally, the trial court determined the issue of parenting time. We review parenting time orders de novo. *Brown v Loveman*, 260 Mich App 576, 591; 680 NW2d 432 (2004). And, such orders are affirmed unless the trial court's factual findings were against the great weight of the evidence, the court abused its discretion, or committed a clear legal error on a major issue. MCL 722.28; *Brown, supra* at 591-592.

---

<sup>1</sup> Because an established custodial environment did not exist, the trial court could modify the custody order if the custody decision was supported by a preponderance of evidence. See *Jack, supra* at 670-671; *Hayes, supra* at 387.

Again, the best interests of the children is the key consideration when granting parenting time. Because a strong relationship between the children and both parents is presumed to be in the children's best interests, parenting time is granted "in a frequency, duration, and type reasonably calculated to promote" the same. MCL 722.27a(1). The court may consider relevant factors when determining the appropriate parenting time schedule. MCL 722.27a(6). Here, the trial court considered several relevant factors, including the proximity between California and Michigan, the modes of transportation available and their related schedules, the parents' schedules, and the school district's school year schedule before rendering its parenting time schedule. The court also considered all of its findings as pertained to the other issues it decided and declared that its foremost consideration was the best interests of the children. We hold that the trial court's parenting time schedule is indeed in the best interests of the children, in light of the circumstances, and find no grounds to reverse the order. Further, we applaud the trial court's patience in presiding over these very trying and contentious custody proceedings. We echo the sentiments of the trial court and strongly urge the parties to consider their children before permitting their anger and disappointment to further burden these children and otherwise negatively impact, interrupt, and influence their lives.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Peter D. O'Connell

/s/ Michael R. Smolenski