

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

KATHLEEN RAE SKEINS,

Plaintiff-Appellee,

v

JEREMIE ALLEN MEAD,

Defendant-Appellant.

---

UNPUBLISHED

March 17, 2009

No. 287426

Crawford Circuit Court

Family Division

LC No. 03-006099-DM

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right an order of the circuit court granting plaintiff's motion for change of domicile. The court's order allows plaintiff to move from Michigan to Texas with the parties' minor child. We reverse and remand for further proceedings.

The parties divorced in 2004 following an 11-year marriage, during which the parties had one child, who is now nine years old. The judgment of divorce awarded the parties joint legal and physical custody of the child. Plaintiff has since remarried, and defendant is engaged. The parties exercised joint physical custody by way of alternating custody on a weekly basis, and it is undisputed that with the exception of defendant's deployment to Kosovo and a short training period after his return, defendant complied with the schedule. Defendant is employed as a trainer with the Michigan National Guard. Plaintiff's motion for a change of domicile was precipitated by economic hardship, i.e., a lack of local employment, that led to plaintiff's new husband finding a good-paying job down south and optimistic hopes by plaintiff to also land a nearby job. The record reveals that both parties have been devoted, caring, and responsible parents who love their child and who have worked together for the child's best interests, which is commendable and not always easy in the context of domestic relations litigation. There is no indication that plaintiff's motion was motivated by anything other than economic circumstances and distress, with which many Michiganders are currently confronted. The circuit court, in a detailed and very thoughtful written opinion, ruled that, under the factors set forth in MCL 722.31(4), a change of domicile was warranted. The court also found that, despite the joint physical custody arrangement, the established custodial environment was with plaintiff; therefore, it was unnecessary to additionally review the child custody factors under MCL 722.23, despite the changes in parenting time resulting from the move to Texas. Defendant appeals as of right.

We will take defendant's appellate arguments somewhat out of order so as to give our analysis a more appropriate framework. Defendant argues that the circuit court's analysis of the change of domicile factors under MCL 722.31(4) included factual determinations in favor of plaintiff that were against the great weight of the evidence.

MCL 722.31(4) provides:

(4) Before permitting a legal residence change otherwise restricted by subsection (1),<sup>[1]</sup> the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

(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.

"The moving party has the burden of establishing by a preponderance of the evidence that the change in domicile is warranted." *Mogle v Scriver*, 241 Mich App 192, 203; 614 NW2d 696 (2000); see also *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). We review the circuit court's ultimate decision on a petition to change domicile for an abuse of discretion. *Id.*; MCL 722.28. This Court reviews a court's underlying findings of fact to determine if the findings are against the great weight of the evidence in proceedings brought pursuant to the Child Custody Act of 1970, MCL 722.21 *et seq.* MCL 722.28; *Brown, supra* at 600.

---

<sup>1</sup> MCL 722.31(1) provides that the legal residence of a child, whose parental custody is governed by court order, cannot be changed, except as otherwise permitted in the statute, "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."

The circuit court found that factor (a), “[w]hether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent,” favored a change of domicile, and defendant does not dispute the court’s finding.

The circuit court found that factor (b), “[t]he 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,” did not favor either party’s position and had no bearing on the court’s ruling. Defendant argues that the court failed to properly credit him under factor (b) and that the court erred in determining that the factor supported a change of domicile. However, the court did not find that factor (b) supported a change of domicile, and the court found that defendant, absent his deployments, had complied with the parenting time order and utilized his time under the order. The court further noted that the periods of deployments did not inure to defendant’s detriment. Moreover, at the hearing, defendant’s counsel indicated that factor (b) was essentially irrelevant and favored no one. The circuit court did not err with respect to factor (b).

The circuit court found, on consideration of the entire record, that factor (c), which addresses the feasibility of reconfiguring parenting time such that parent-child relationships can be preserved and fostered and the likelihood of compliance, supported a change of domicile. Defendant argues that, given the simple logistics of the situation and the circumstances surrounding his hectic summer work schedule as a trainer, the parenting time and custody arrangement ordered by the court is unworkable and does not preserve and foster parent-child relationships. While we are not unsympathetic to defendant’s claims and the court’s ruling is certainly arguable, we cannot conclude that the court’s findings on factor (c) were against the great weight of the evidence.

The circuit court found that factor (d), “[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,” was not an issue in the case. The court did not believe that defendant opposed the motion to change domicile for financial reasons. Defendant argues that the court failed to properly credit him with respect to factor (d), but we fail to understand the nature of this argument. The circuit court found that defendant did not have financial motivations in opposing the move, and the factor does not suggest that if such is the case, a change of domicile should be rejected. Rather, the factor clearly exists to favor a change of domicile when a parent is not motivated by a child’s best interests but by greed. The court did not err in regard to factor (d).

The circuit court found that factor (e), “[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child,” had no relevance or bearing one way or the other. Defendant does not appear to challenge the court’s ruling on factor (e), and we find that the court did not err relative to this factor.

In sum, we find that the circuit court did not abuse its discretion in ruling that a change of domicile was warranted under MCL 722.31(4).

Defendant next argues that, “[a]s an established custodial environment existed with both parties, the [circuit] court committed clear legal error by utilizing a preponderance of the evidence standard, as opposed to a clear and convincing evidence standard, when determining

whether to grant plaintiff/appellee's motion to change of domicile." This argument misconstrues the caselaw and the circuit court's opinion. The issue of the established custodial environment has no bearing on the evidentiary standard applicable to the analysis conducted in reviewing the change of domicile factors under MCL 722.31(4). As indicated above, "[t]he moving party has the burden of establishing by a preponderance of the evidence that the change in domicile is warranted." *Mogle, supra* at 203; see also *Brown, supra* at 600. This is the standard applied by the circuit court, and thus there was no clear legal error by the court in applying the preponderance of the evidence standard. MCL 722.28.

There is no caselaw suggesting that a clear and convincing evidence standard is to be utilized when analyzing MCL 722.31(4). Rather, as discussed below, the caselaw provides that if a change of domicile is warranted on review of MCL 722.31(4), a review of the child custody factors under MCL 722.23 must be undertaken, pursuant to a clear and convincing evidence standard, if the domicile change effectively results in a change of the established custodial environment.<sup>2</sup>

"We reiterate that the trial court is not required to consider the best-interest factors until it first determines that the [domicile] modification actually changes the children's established custodial environment." *Rittershaus v Rittershaus*, 273 Mich App 462, 470-471; 730 NW2d 262 (2007). "Only when the parents share joint physical custody and the proposed change of domicile would also constitute a change in the child's established custodial environment is it also necessary to evaluate whether the change of domicile would be in the child's best interest." *Spires v Bergman*, 276 Mich App 432, 437 n 1; 741 NW2d 523 (2007). In *Brown, supra* at 598 n 7, this Court observed:

[O]nce the trial court granted defendant permission to remove the minor child from the state, and it became clear that defendant's proposed parenting time schedule would effectively result in a change in the child's established custodial environment with both parties, it should have engaged in an analysis of the best interest factors, MCL 722.23, to determine whether defendant could prove, by clear and convincing evidence, that the removal and consequent change in established custodial environment and parenting time was in the child's best interest.

\* \* \*

We are not contending that the use of both the [change of domicile] factors and the best interest factors are necessary in all situations. Rather, it is only in a situation where both parents share joint physical custody, one parent is

---

<sup>2</sup> Defendant's argument appears to also suggest that the court erred by applying a preponderance of the evidence standard relative to the statutory, child best-interest factors, MCL 722.23, instead of a clear and convincing evidence standard. This argument reflects a misreading of the circuit court's opinion. The circuit court never even reached the issue of the best-interest factors under MCL 722.23, let alone applied a particular evidentiary standard to the factors.

granted permission to relocate more than 100 miles away, and the relocation would result in a change in parenting time so great as to necessarily change the established custodial environment that an inquiry into the best interest factors is necessary for the relocating parent to prove by clear and convincing evidence that the change is in the minor child's best interest. [<sup>3</sup>]

The caselaw, therefore, requires us to first determine whether the circuit court correctly found that the established custodial environment rested with plaintiff alone and not jointly with both parties. Specifically, the circuit court found that an established custodial environment did not exist with defendant. Defendant argues that the court erred with respect to its factual findings on the matter.

Whether an established custodial environment exists is a question of fact. *Rittershaus, supra* at 471. As indicated above, a court's findings of fact are reviewed under the great weight of the evidence standard. MCL 722.28. MCL 722.27(1) provides in pertinent part:

An established custodial environment exists if over an appreciable period of 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 the permanency of the relationship shall also be considered.

We initially note that the mere existence of a joint physical custody order does not dictate that there actually was a joint established custodial environment. Custody orders, in and of themselves, do not establish a custodial environment. *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993), citing *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). Rather, the court must examine the facts under the statutory definition and framework set forth in MCL 722.27(1) relative to an "established custodial environment." *Baker, supra* at 579. A custodial environment can be established in more than one home. *Mogle, supra* at 197-198.

Here, the judgment of divorce provided that the parties would share physical custody of the child on a week to week basis. This is not a case in which a custody judgment or order was issued and then completely disregarded by the parties when actually exercising custody and parenting time. Rather, absent his deployments, defendant exercised custody every other week and cared for the child.<sup>4</sup> The parties were truly engaged in jointly raising the child in two home environments. The circuit court resolved the issue in favor of plaintiff on the basis that the child

---

<sup>3</sup> "Where there is a joint established custodial environment, neither parent's custody may be disrupted absent clear and convincing evidence." *Sinicropi v Mazurek*, 273 Mich App 149, 178; 729 NW2d 256 (2006), citing *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

<sup>4</sup> There was testimony that for a brief period the parties alternated custody every two weeks, but that ended, and they returned to the week to week arrangement. Either way, joint physical custody was being exercised.

looked to her for guidance and parental comfort even when the child was with defendant. Although a close call, we hold that the court's finding on the established custodial environment was against the great weight of the evidence. Plaintiff testified that the child did not contact her for guidance and comfort every week that the child was with defendant, and she stated that "at the most it was once a week, but . . . gets less and less over time." Plaintiff testified that defendant is a good father. The testimony reflected that defendant was very involved in his child's life. Further, the testimony indicated that defendant was more of a disciplinarian and stricter than plaintiff, but not inappropriately so, and that this was part of the reason the child sought out plaintiff at times, which is not atypical when one parent is stricter than the other. Under the totality of the circumstances, it is clear that there existed a joint established custodial environment, and the court's ruling to the contrary was against the great weight of the evidence.

The changes made with respect to parenting time and the custodial arrangement that were to be implemented upon the move, which would give significantly more time with the child to plaintiff, results in a change in the established custodial environment. Accordingly, the court on remand must engage in an analysis of the statutory best-interest factors pursuant to a clear and convincing evidence standard, taking more evidence if the court deems it necessary. That being said, nothing in this opinion should be construed as preventing the parties or the court from contemplating the restructuring of a parenting time and custody arrangement that would effectively leave in place the joint established custodial environment even with a move to Texas. If an arrangement comes to fruition that does not change the established custodial environment with a move, there would be no need to have the court examine the best-interest factors under the existing precedent.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Each party having prevailed in part, there is no taxation of costs under MCR 7.219.

/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey