STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL K. COLDWELL,

Plaintiff-Appellee,

v

DARLENE M. COLDWELL,

Defendant-Appellant.

UNPUBLISHED
October 2, 1998

No. 201085
Midland Circuit Court
LC No. 86-004958

Before: MacKenzie, P.J., and Whitbeck and G.S. Allen, Jr.*, JJ.

PER CURIAM.

Defendant appeals as of right from an order modifying an amended judgment of divorce and transferring physical custody of the parties' minor child from defendant to plaintiff. We affirm.

Defendant argues that the trial court committed clear legal error by exercising personal jurisdiction over the minor child and herself, both nonresidents, and by failing to determine whether it had subject matter jurisdiction under the Uniform Child Custody and Jurisdiction Act (UCCJA), MCL 600.651 *et seq*; MSA 27A.651 *et seq*. Under MCL 600.705(7); MSA 27A.705(7), a trial court has sufficient minimum contacts to exercise limited personal jurisdiction over a nonresident defendant in a divorce action when the basis for that exercise of jurisdiction arises out of the maintenance of a domicile in Michigan while subject to a family or marital relationship which is the basis for a claim of divorce. *Lowe v Lowe*, 107 Mich App 325, 327-328; 309 NW2d 254 (1981), citing MCL 600.705(7); MSA 27A.705(7). Because defendant last resided with plaintiff as a family unit in Michigan, specifically in plaintiff's parents' basement, we find that the trial court had minimum contacts sufficient to exercise personal jurisdiction over defendant for purposes of granting the parties' divorce. *Id*. Further, under MCL 552.17; MSA 25.97, after the trial court obtained personal jurisdiction over the parties during the original divorce proceeding, the trial court retained continuous "jurisdiction to revise, alter, or amend the original judgment of divorce." *Dittenber v Rettelle*, 162 Mich App 430, 435; 413 NW2d 70 (1987), citing *Kelley v Hanks*, 140 Mich App 816, 821; 366 NW2d 50 (1985). Therefore, the trial court did not clearly err by amending the original judgment of divorce regarding custody issues involving defendant and the parties' minor child. Once jurisdiction is obtained through divorce proceedings,

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

jurisdiction over custody and visitation issues is maintained by the trial court until a child reaches eighteen years of age. MCL 552.17a(1); MSA 25.97(1)(a); *DenHeeten v DenHeeten*, 163 Mich App 85, 88; 413 NW2d 739 (1987); *Eigner v Eigner*, 79 Mich App 189, 196; 261 NW2d 254 (1977).

Because the trial court obtained subject matter jurisdiction through the original judgment of divorce, neither the issue of subject matter jurisdiction under the UCCJA nor the issue of *forum non conveniens* is "involved" in this case. *Anderson v Anderson*, 142 Mich App 837, 840; 371 NW2d 435 (1985). Prior to the enactment of the UCCJA, a trial court retained jurisdiction over custody issues even when a custodial parent and child lived in another state. *Id*. Enactment of the UCCJA did not change the law regarding subject matter jurisdiction in a custody dispute where conflicting custody orders do not exist. Therefore, the UCCJA is inapplicable to this case. Because custody modification represents a continuation of the original dispute between divorcing parties, *Eigner*, *supra* at 197-198, we conclude that the trial court retained subject matter jurisdiction over custody issues and need not have addressed jurisdiction under the UCCJA.

At any rate, we note that the trial court had jurisdiction under the UCCJA to enter the order. MCL 600.653; MSA 27A.653, the critical portion of the UCCJA, provides in pertinent part:

> (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree or judgment if any of the following exist:
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> * * *
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> (b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least 1 contestant, have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

The trial court entered its order changing physical custody of the minor child to plaintiff in January, 1997. Previously, the minor child resided with defendant in Toledo, Ohio. The lower court record reflects that, in 1994, the minor child began extensive periods of visitation with plaintiff in Michigan. The minor child was therefore in Michigan for months at a time in the summer. The Michigan trial court in this case was the only court to ever enter any orders regarding the minor child's custody and visitation.[1] Under these circumstances, the trial court properly exercised jurisdiction under the UCCJA based on the minor child's best interest, *the significant connection of the minor child and plaintiff with Michigan* and the presence of substantial evidence in Michigan regarding (at least) plaintiff's care and protection of and relationship with the minor child. See *Green v Green*, 87 Mich App 706, 710-711 & n, 1; 276 NW2d 472 (1978) ("significant connection" jurisdiction under the UCCJA existed in light of the child's stay in Michigan for a period of months, the father's domicile in Michigan, the participation of the parties in custody proceedings in Michigan and the availability of substantial evidence in Michigan).

Defendant next argues that the trial court failed to consider whether a change in circumstances occurred warranting analysis of the statutory best interest factors, that the trial court's factual findings regarding the best interest factors were against the great weight of the evidence, and that the trial court's decision to modify the amended judgment of divorce and award plaintiff physical custody of the minor child represented a palpable abuse of discretion. We recognize that expediting the resolution of child custody disputes by prompt and final adjudication requires that all judgments and orders of the trial court be affirmed on appeal unless the trial court's factual findings were against the great weight of the evidence, the trial court made a discretionary ruling representing a palpable abuse of discretion, or it committed clear legal error on an issue of law. MCL 722.28; MSA 25.312(8). On a showing of proper cause or a change of circumstances, a custody award may be modified if it is in the best interests of the minor child. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Dehring v Dehring*, 220 Mich App 163, 166; 559 NW2d 59 (1996). Plaintiff established a change of circumstances sufficient to justify consideration of the existence of an established custodial environment and the statutory "best interest" factors, *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994), when he produced evidence of the minor child's serious educational problems and his recent dyslexia diagnosis.

In order to determine the "best interests" of the minor child, the trial court must first determine whether an established custodial environment exists. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). Defendant does not challenge the court's determination that such an environment existed with her. Modification of custody which removes a child from an established custodial environment requires clear and convincing evidence that the change is in the child's best interests. *Rummelt v Anderson*, 196 Mich App 491, 494; 493 NW2d 434 (1992). The child's best interests must be redetermined by weighing the twelve statutory factors set forth in MCL 722.23; MSA 25.312(3). *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988). Defendant argues that the trial court's findings with regard to several of these factors were against the great weight of the evidence, specifically factors (a), (b), (c), (d), (e), (h) and (i).

Factor (a) requires that the trial court consider the "love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23; MSA 25.312(3). Defendant argues that the trial court erred by finding that this factor favored neither party and that it should have weighed in favor of her because the child expressed a preference to live with her and plaintiff did not begin regular visitations with the child until several years after his birth. We disagree. The trial court properly addressed the child's preference under its analysis of factor (i) and the father's past visitation under factor (j). Because these facts were appropriately addressed in other portions of the trial court opinion, and the trial court record indicates that both parties have the capacity to be fit parents, we conclude that the trial court's factual finding regarding factor (a) was not against the great weight of the evidence.

Factor (b) requires that the trial court consider "[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; MSA 25.312(3). Defendant argues that the trial court's finding that this factor favored plaintiff was against the great weight of the evidence. The trial court relied on objective evidence received from a clinical psychologist who interviewed the parties

and the minor child and concluded that the father was better suited to address the minor child's educational needs. Plaintiff had already conducted research and found a "Chapter one" reading program to assist the minor child with his reading difficulties. Also, defendant was unwilling to acknowledge that the minor child may have dyslexia. Given this evidence, we conclude that the trial court's decision that factor (b) weighed in favor of plaintiff was not against the great weight of the evidence.

Factor (c) requires that the trial court consider "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . . ." MCL 722.23; MSA 25.312(3). Defendant argues that this factor should have favored her because she has provided for all of the minor child's needs since birth. However, defendant misinterprets the purpose of this factor which is to determine the "capacity" or "ability" of the parent to provide for these needs. The record indicates that both parents have the capacity to meet the child's material needs. Therefore, the trial court's finding regarding this factor is not against the great weight of the evidence.

Factor (d) requires that the trial court consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23; MSA 25.312(3). Defendant argues that this factor should not have favored plaintiff because plaintiff showed little interest in the child until several years after his birth. However, the trial court properly assessed the parties' present capacity to provide the minor child with a stable home environment. The record reflects that plaintiff remarried in 1993 and has since maintained a permanent home with his wife, four stepchildren and two foster children. Defendant has been involved in two significant relationships with men who have largely served as father figures for the minor child and has had two additional children. Because these changing relationships do not reflect a stable environment, we conclude that the trial court's finding regarding this factor was not against the great weight of the evidence.

Factor (e) requires that the trial court consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23; MSA 35.312(3). Defendant argues that this factor should not have favored plaintiff because changing physical custody of the minor child to plaintiff will separate the minor child from his natural sibling. For the reasons mentioned under factor (d), we conclude that the trial court's finding that factor (e) favored plaintiff was not against the great weight of the evidence. Although it is generally in a child's best interests to keep natural siblings together, a trial court does not abuse its discretion by separating natural siblings when it is in the child's best interests. *Weichmann v Weichmann*, 212 Mich App 436, 440; 538 NW2d 57 (1995).

Factor (h) requires that the trial court consider "[t]he home, school, and community record of the child." MCL 722.23; MSA 25.312(3). Defendant argues that because the minor child's school psychologist believed that his reading skills were not underdeveloped, and because the minor child had a long-term attachment to the Toledo community, this factor should have favored her instead of plaintiff. However, the record reflects that the minor child was unable to begin kindergarten on schedule, was held back for one year following first grade, has been diagnosed as having a mixed form of dyslexia, and has severely underdeveloped reading skills. Given these facts, and plaintiff's efforts to enroll the minor child in classes and provide additional assistance at home, we conclude that the trial court's finding that this factor favored plaintiff was not against the great weight of the evidence.

Factor (i) requires that the trial court consider "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23; MSA 25.312(3). The record reflects that the minor child expressed a preference to live with defendant. Defendant argues that the trial court failed to give this factor sufficient weight when it awarded physical custody to plaintiff. However, the trial court explained that the minor child preferred to live with defendant because life was less challenging with her and that he appeared to have a strong connection with both parents. Given this additional information, we conclude that the trial court did not commit an abuse of discretion by failing to "strongly" consider this factor in its ultimate determination.

Defendant also argues that the trial court committed a palpable abuse of discretion by awarding plaintiff physical custody of the minor child. We disagree. After recognizing that defendant had an established custodial environment with defendant, the trial court explained that two of the statutory best interest factors favored defendant and four favored plaintiff. The trial court correctly explained that a custody determination is not a mathematical process and even near equality between parties does not prevent a conclusion that one party has presented clear and convincing evidence supporting a change in custody. *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995). Because plaintiff established by clear and convincing evidence that the minor child had learning difficulties that he was willing to immediately address, awarding plaintiff physical custody of the child did not constitute a palpable abuse of discretion. We conclude that immediate attention to these issues will provide the minor child with "a chance at a better life." See *Wilson v Upell*, 119 Mich App 16, 20-21; 325 NW2d 611 (1982) (Allen, J.).

Defendant's final argument is that the trial court erred by failing to address plaintiff's lack of credibility and to properly weigh the opinion of the minor child's school psychologist regarding the child's dyslexia diagnosis. With regard to the school psychologist's opinion, we conclude that the trial court's findings based on the opinions of plaintiff's experts, which contradicted the school psychologist's opinion, were not against the great weight of the evidence. The trial court explained that through cross-examination of plaintiff's experts, it was confident that the experts' opinions were based on sound analysis. Because the trial court was in the best position to assess and weigh the credibility and testimony of the parties, and defendant provides no evidence that these findings were against the great weight of the evidence, the trial court's findings based on the testimony of plaintiff and his experts were not clearly erroneous.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ William C. Whitbeck
/s/ Glenn S. Allen, Jr.

[1] Notably, the jurisdictional issue that the defendant advances on appeal was not raised below. However, "[l]ack of subject-matter jurisdiction may be raised at any time, and parties to an action can

neither confer jurisdiction by their conduct or action nor waive the defense by not raising it." *Winters v Dalton*, 207 Mich App 76, 79; 523 NW2d 636 (1994).