

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

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JAMIE PALAN, n/k/a JAMIE BARKER,

Plaintiff-Appellant,

v

DAVID PALAN,

Defendant-Appellee.

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UNPUBLISHED

June 28, 2002

No. 238542

Washtenaw Circuit Court

LC No. 99-015482-DM

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order for interim parenting time, signed on December 5, 2001. We affirm.

This appeal stems from a motion by plaintiff seeking permission to move the parties' two minor children from Ann Arbor, Michigan to Akron, Ohio. Plaintiff, who lived in Ann Arbor with defendant during their marriage, divorced defendant and married Steve Barker. Plaintiff and defendant had two children together and shared joint legal and physical custody. Plaintiff would have the children on Mondays and Tuesdays, defendant would have the children on Wednesdays and Thursdays, and the parties would alternate Fridays, Saturdays and Sundays. Because Steve Barker resided and worked in Akron, plaintiff sought permission from the trial court to move the children to Ohio. The trial court denied her motion. Following this denial, plaintiff relocated to Akron. Both parties subsequently moved to set parenting time. After a hearing, the trial court denied plaintiff's request and awarded defendant primary physical custody.

Plaintiff initially contends that the trial court applied the incorrect legal standard when considering her motion to change the children's domicile. Specifically, plaintiff argued during trial that the four-part test outlined in *Overall v Overall*, 203 Mich App 450, 458-459; 512 NW2d 851 (1994), applied because a change in domicile was involved. Conversely, defendant asserted that because the contemplated move would essentially result in a change in custody, altering the planned visitation arrangement, the trial court should utilize the best interest factors test set forth in MCL 722.23. The trial court noted the difference but declined to rule on which standard was appropriate. Rather, the trial court concluded that plaintiff failed to satisfy her burden of proof under both tests. Thus, plaintiff's contention that the trial court erred by applying the wrong standard is meritless given the trial court's finding that the result would be the same under both standards.

To the extent plaintiff further challenges the trial court's decision, we review its factual findings under the "great weight of the evidence" standard, its discretionary rulings for an abuse of discretion, and questions of law for clear legal error. *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). In this instance, a trial court's decision to permit a parent to remove a child from the state is reviewed for an abuse of discretion. *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183, (2000). "An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Id.*

Plaintiff claims the trial court erred in finding that the factors under MCL 722.31 do not weigh in her favor. MCL 722.31 states in pertinent part:

(4) Before permitting a legal residence change . . . 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. [Emphasis added.]

Plaintiff challenges the trial court's finding that she failed to establish the first part of this test. Particularly, plaintiff finds fault with the trial court's assessment of her economic situation. However, we do not find the trial court's factual findings to be against the great weight of the evidence. There was significant testimony about plaintiff's employment status and the fact Steve Barker was going to lose his part-time job. Moreover, Steve Barker testified that he had substantial debts from his previous marriage, along with approximately \$12,000 in credit card debts that he had not made payments on in over a year. Steve Barker also admitted that he intended to file for bankruptcy. While it is true that, at the time of the hearing, defendant was also unemployed and the cost of living was higher in Ann Arbor than in Akron, plaintiff fails to show how the trial court's ruling amounted to error.

Plaintiff further argues that the trial court failed to consider the benefits to her children of her being a stay-at-home mother. However, there was testimony concerning defendant's involvement with the schooling and rearing of the children. Defendant's former co-workers, a child psychologist, and the principal at their son's school testified that the children were doing very well in their present situation. Given the evidence presented, plaintiff fails to show how the trial court's conclusion that the move to Akron would not benefit *both* the children and the custodial parent amounts to clear error. Therefore, we reject her challenge to the trial court's denial of her motion to move the children to Akron.

Plaintiff's final contention on appeal concerns the trial court's award of primary physical custody to defendant. Following the trial court's denial of her motion to move the children, plaintiff sought to set parenting time. However, it is important to note that the trial court previously informed plaintiff that if she moved to Akron she would destroy the joint custody arrangement and defendant would be awarded primary physical custody. When plaintiff argued her motion, the trial court reminded her of its earlier statement and granted defendant primary physical custody. Plaintiff now challenges that ruling asserting that, under MCL 722.27(1)(c), "[t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is clear and convincing evidence that it is in the best interests of the child."

At the outset, we find that the "change" in the children's custodial environment did not result from the actions of the trial court, but rather from plaintiff's actions in moving to another state. Thus, we disagree with plaintiff's argument that the trial court erred by failing to consider the best interests of the children when it modified the custody of the children. However, even if we found plaintiff's claim to be meritorious, a careful review of the record shows that the trial court actually considered the best interests of the children.

When the trial court denied plaintiff's motion for permission to move the children to Ohio, it analyzed the best interest factors set out in MCL 722.23. The trial court noted that all of the factors weighed either in defendant's favor or were evenly balanced between the parties. Although we recognize the subtle distinction in the trial court's inquiry of the children's best interests in moving to Akron, as opposed to whether the best interests of the children are met in giving primary custody to defendant, remanding this case to the trial court to re-conduct the best interests analysis would merely be an academic exercise.<sup>1</sup> For these reasons we affirm the trial court's award of primary custody to defendant.

Affirmed.

/s/ Donald S. Owens  
/s/ David H. Sawyer  
/s/ Jessica R. Cooper

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<sup>1</sup> For purposes of appellate review, we would have much preferred that the trial court delineate its findings of fact as to each factor of the Child Custody Act, MCL 722.23. Nevertheless, after a careful review of the record, we find that there is sufficient proof to sustain the trial court's finding for change of the physical custody arrangement.