

STATE OF MICHIGAN
COURT OF APPEALS

LILLY HAHN,

Plaintiff-Appellee,

v

BENJAMIN BELOTE,

Defendant-Appellant.

UNPUBLISHED

January 20, 2009

No. 286077

Branch Circuit Court

LC No. 05-050287-DS

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant Benjamin Belote appeals as of right the trial court's decisions to deny Belote's motion for change in domicile from Ohio to Michigan, and to grant a change in physical custody giving him and plaintiff Lilly Hahn joint physical custody of their minor children. We affirm.

I. Basic Facts And Procedural History

Hahn and Belote were never married, but they have two sons together. Hahn and Belote met in 2001, and Hahn became pregnant in 2002. They lived with Belote's parents in Grand Rapids, Michigan from June 2002 until November 30, 2002. At that time, Hahn and Belote moved into an apartment in Grand Rapids. After their first son was born, Hahn and Belote continued to live together in Grand Rapids. In October 2003, Hahn and Belote were involved in an altercation, and Hahn moved to Sunbury, Ohio. After she moved to Ohio, Hahn and Belote continued to date sporadically. In February 2005, Hahn and Belote attempted to reconcile their relationship and leased an apartment together in Coldwater, Michigan. Shortly after moving to Coldwater, Hahn discovered that she was pregnant with their second son. After learning that she was pregnant, Hahn and Belote had another altercation, and Hahn moved back to Ohio. After another attempt to reconcile in 2005, Hahn filed an action for child support in Michigan, but she permanently moved to Ohio. Belote thereafter moved to Ohio in May 2005.

In March 2006, the trial court ordered Hahn and Belote to share joint legal custody of their children. The trial court also ordered that Hahn was to retain physical custody and granted Belote parenting time of one full week and one weekend per month. In August 2006, police were dispatched to Hahn's residence because she threatened suicide and cut herself. In February 2007, the Friend of the Court recommended that Belote be given primary care of the children. After an evidentiary hearing, the trial court ordered that Hahn and Belote continue to share joint legal custody, but the court felt it was in the children's best interest to change primary care of the

children to Belote. The trial court cited Hahn's mental health issues and lack of a satisfactory stable environment as reasons to change custody. The trial court granted Hahn parenting time of one full week and one weekend per month; however, the parenting time was contingent upon Hahn complying with the requirements proscribed by mental health professionals. The trial court stated that this was a "provisional order" and that if Hahn complied with the conditions, the trial court would consider an expansion of parenting time.

On October 31, 2007, Belote moved for change of domicile and sought permission to move back to Michigan. In February 2008, Hahn moved for a change in custody, asking the trial court to order joint physical custody. Both motions were heard at the same time.

Belote testified that after moving to Ohio in 2005, he was employed at Advanced Auto Distribution earning \$12.75 an hour. In October 2007, Belote was laid off because of a lack of business. After he was laid off, Belote was temporarily employed at a Ford Dealership for approximately three weeks as a mechanic earning \$16 an hour, but he was laid off when there was insufficient business to sustain his position. Belote receives unemployment and food stamp assistance. Belote also supplements his income with his savings and using his mechanic skills to perform side jobs. Belote wished to move to Michigan because the job prospects for his position were better, and he had family in Michigan to help support the children.

Since losing his job, Belote utilized various services offered through the Ohio Work Force Program to improve his resume and interview skills. Belote also performed several internet searches looking for available jobs in the automotive or mechanical field. Over a 60-day period, Belote searched the five counties closest to his residence and found only one job matching his criteria. Belote excluded the southern part of Columbus, Ohio in his job search because the commute would be too long from his present home. Additionally, Belote has performed several job searches through the Michigan Talent Bank and, using the same criteria, found 78 jobs over a 30-day period. Belote received two job offers from employers in Michigan but turned them down because he was not allowed to move the children out of Ohio. Belote is on good terms with the manager at one of the employers that offered him a job, and he expected that he would be offered a job again when a position became available. In addition, the two offered jobs in Michigan had a higher rate of pay than Belote was earning in Ohio. Belote acknowledged that the overall unemployment rate was worse in Michigan than Ohio, but he testified that in his specific field, there were more opportunities in Michigan.

Belote also testified that he was not moving to take the children away from Hahn, and he submitted a proposed plan for parenting time. Belote proposed that Hahn receive one weekend a month and six weeks during the summertime. As for holidays and vacations, Belote proposed that the parties either split the time or have alternating schedules with the children. Belote planned to move approximately 300 miles away from Hahn and recognized that parenting time would be a struggle. Belote proposed that he meet Hahn at the halfway point in Fort Wayne, Indiana. In addition, to foster a relationship between the children and Hahn, and because telephone calls were a point of contention between Hahn and Belote, Belote proposed that he purchase a cellular telephone for the children to enable Hahn to call them directly.

Hahn testified that Belote told her three weeks after he was awarded custody that he and the children were planning to move back to Michigan. Hahn stated that Belote wanted to return to Michigan because his dad and uncle were sick. Hahn refused to give permission for Belote to

move the children to Michigan because she felt that she did not get enough time with the children under the existing arrangement, and she recognized that if the children moved to Michigan she would see them even less. Hahn testified that Belote refuses to allow her to speak over the telephone with the children while they are with him. Despite the fact that Hahn and Belote agreed to a telephone schedule of 5:00 p.m. to 8:00 p.m. on Wednesdays and Saturday, Hahn said that sometimes Belote would just answer the telephone then hang up without talking.

Hahn testified that she deserved joint custody of the children because she fostered a good relationship between the children and Belote by avoiding negative talk about Belote. Hahn attended church three out of four weeks, did not use drugs, and only consumed alcohol occasionally. Hahn testified that she complied with the trial court order that she receive mental health treatment by seeing a therapist and taking medication. In addition, Hahn said she was learning stress coping techniques and had not cut herself or attempted suicide since the incident in August 2006. Hahn further testified that her fiancé had a connection with the children and loved them. Hahn asserted that she kept her house clean, kept food in the house, and when she traveled with the children, she made sure they were in a car seat.

Belote testified that he had full physical custody of the children since July 2007. While in his care, Belote made sure that the children's shots were up to date and that they had regular dentist appointments. Belote acknowledged that the children love Hahn, but he testified that at times, they seem unmotivated to go see her. Belote related an incident where he saw that Hahn's vehicle was pulled over by the police and the children were inside the car wearing only diapers. One of the children was not in a car seat. Belote drove Hahn and the children home and found beer bottles scattered around Hahn's apartment and a gun on the couch. Belote admitted that Hahn had been more stable since seeing the therapist, but he was concerned that she would not be able to handle the stress associated with extended visitation.

Belote testified that frequently Hahn was late or refused to come to the planned exchanges for parenting time. On one incident, Hahn did not appear and Belote took the children directly to Hahn's house. Belote found Hahn in her pajamas and the house in disarray. At another incident, Hahn refused to allow the children to leave with Belote, and he had to call the police to intercede. Belote confronted Hahn and her fiancé after he found out that the fiancé was spanking the children, and he noticed bruises and marks on the children's buttocks and upper thighs. Belote testified that the interaction between him and Hahn needed to be clearly defined.

Following the testimony, the trial court denied Belote's request to change domicile and granted Hahn's motion for joint physical custody.

II. Change Of Domicile

A. Standard Of Review

Belote argues that the trial court abused its discretion in denying his motion for a change of domicile because the facts and circumstances supported his request to move to Michigan. We review a decision on a petition to change the domicile of a minor child for abuse of discretion.¹

¹ *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004).

In reviewing the decision, the trial court's findings are reviewed under the great weight of the evidence standard.² "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."³

B. The Factors

In determining whether a change in domicile is appropriate, the trial court is required to weigh the factors listed in MCL 722.31(4), keeping the child as the primary focus:

- (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.^[4]

In considering factor (c), the proportion of time the child spends with the parent after the move does not need to be identical to the time before the move, and it is recognized that weekly visitation may not be possible when state borders separate the parents.⁵ The proposed plan, however, needs to "provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the noncustodial parent."⁶

² *Id.*

³ *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183 (2000). See *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533 (2006) (stating that this definition of the abuse of discretion standard still applies to decisions under the Child Custody Act, MCL 722.21 *et seq.*).

⁴ MCL 722.31(4).

⁵ *Brown, supra* at 603.

⁶ *Mogle v Scriver*, 241 Mich App 192, 204; 614 NW2d 696 (2000).

C. Analysis

The trial court reviewed all the necessary factors in MCL 722.31(4), and determined that the facts of this case did not implicate MCL 722.31(4)(b), (d), and (e). Specifically, the trial court found that both parties utilized their parenting time with the children and even though the trial court was skeptical of Belote's motives for moving, the trial court found no evidence that he was attempting to frustrate Hahn's parenting time. The trial court also determined that a desire to gain a financial advantage with regard to child support did not motivate either party, and neither party alleged domestic violence.

With regard to MCL 722.31(4)(a), the trial court accepted Belote's claim that there may be more jobs in Michigan for his skill set and that a change in residence could improve his current circumstances. "It is well established that the relocating parent's increased earning potential may improve a child's quality of life."⁷ However, the parent's increased earning potential alone does not compel a finding that a move will improve the child's quality of life.⁸ Here, the record does not support that there was any other significant benefit to the children in the area where Belote proposed to move. Moreover, the trial court suggested that Belote broaden his job search to include portions of the Columbus Metro Area, which he had not done. Thus, it appears that this factor did not weigh in favor of allowing the change of domicile.

The trial court appears to have based its decision primarily on its weighing of MCL 722.31(4)(c). The trial court first found that both parties would do everything to comply with a modification, but the trial court found that the proposed schedule would not give Hahn "adequate opportunity to preserve and foster the relationship she has with the [children]." The trial court focused on the ages of the children and its desire to see that Hahn receive more time with the children in deciding this factor. The trial court recognized that, until recently before the hearing, Hahn was the primary caregiver to the children since birth, and the proposed parenting time schedule of one weekend a month and six weeks in the summer did not give Hahn an adequate opportunity to maintain her relationship with the children. In addition, the trial court recognized that the children were very young and that only one of them was of age to start in preschool. The trial court said that it did not "see any feasible way of maintaining the contact between the kids and their mom if they were to be removed to Michigan."⁹

The trial court's findings of fact were not clearly erroneous. On the record, the trial court properly considered all the factors mandated under MCL 722.31(4), and its decision to deny Belote's motion for a change of domicile was not "so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias."¹⁰ The trial court

⁷ *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007).

⁸ See *id.* at 466-467 (finding that, in addition to an increased earning component, the children would be benefited by the presence of a large extended family and beneficial school programs).

⁹ Cf. *id.* at 468 (finding that it was possible to order a modification of the parenting time schedule in a way that would adequately preserve and foster the parent-child relationship when 1) the children there were older than the children at issue herein and 2) the relocating parent had physical custody of the children since the parties' divorce).

¹⁰ *Phillips, supra* at 29.

kept its primary focus on the young children, their needs, and their relationship with their mother.

III. Change In Circumstance

A. Standard Of Review

Belote argues that the trial court erred when it granted Hahn's request for a change in physical custody because the facts did not support a change in circumstances. According to Belote, the trial court determined that a custodial environment existed with him but failed to show either a change in circumstances or a proper cause before proceeding with its analysis of the best interest factors. A trial court's decision on whether an established custodial environment exists is a question of fact, and this Court must affirm the trial court's findings unless those findings were "against the great weight of the evidence."¹¹ "A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction."¹² "A trial court's discretionary rulings, such as the court's determination on the issue of custody, are reviewed for an abuse of discretion."¹³

B. Applicable Legal Principles

A trial court may amend its previous custody judgment or order only for proper cause shown or because of a change in circumstances.¹⁴ The party petitioning for a change of custody always bears the burden of proving proper cause or change in circumstance by a preponderance of the evidence.¹⁵ If this initial burden is not met, "the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors."¹⁶ "These initial steps to changing custody . . . are intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders."¹⁷

To constitute proper cause meriting consideration of a custody change, there must be "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken."¹⁸ The appropriate grounds should be relevant to at least one of the statutory best interest factors, determined on a case-by-case basis.¹⁹ In addition, to establish a change of circumstances, "a

¹¹ *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008); see also MCL 722.28.

¹² *Id.*

¹³ *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

¹⁴ MCL 722.27(1)(c); *Rittershaus*, *supra* at 473.

¹⁵ *Rittershaus*, *supra* at 473; *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991).

¹⁶ *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

¹⁷ *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (quotations omitted).

¹⁸ *Id.* at 511.

¹⁹ *Id.* at 511-512.

movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed."²⁰ The trial court should keep in mind that "[p]roviding a stable environment for children that is free of unwarranted custody changes (and hearings) is a paramount purpose of the Child Custody Act."²¹ The trial court should generally limit its consideration to events occurring after entry of the most recent custody order.²²

C. Applying The Law

Here, the trial court erred by failing to clearly make the threshold determination that there existed proper cause or a material change of circumstances before analyzing the best interest factors to determine whether to change the child's primary physical custody from Hahn to Belote.²³ An evidentiary hearing, however, is not always required to resolve this initial issue because "[o]ften times, the facts alleged to constitute proper cause or a change in circumstances will be undisputed, or the court can accept as true the facts allegedly comprising proper cause or a change in circumstances, and then decide if they are legally sufficient to satisfy the standard."²⁴ Therefore, we find the court's failure to make a threshold determination harmless on the basis of our conclusion that the facts alleged by Hahn were sufficient to find proper cause or a change in circumstances.²⁵

The record reflects that until August 2007, Hahn enjoyed primary physical custody of the children. After the trial court changed the custody of the children to Belote, Hahn continued to enjoy extensive parenting time. Hahn is actively seeking treatment for her anxiety and is enrolled in child development classes. When the trial court initially removed the children from Hahn, it indicated that the change in custody was temporary and would be reviewed after Hahn's behavior was properly evaluated. We conclude that Hahn's swift handling of her problems and behavioral corrections, along with her desire to regain physical custody of the children under her new circumstances, are sufficient to find proper cause or a change in circumstances.²⁶ Therefore, despite the trial court's failure to find a proper cause or a change in circumstances explicitly, the record clearly supports a conclusion that there was "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken."²⁷

²⁰ *Killingbeck v Killingbeck*, 269 Mich App 132, 145; 711 NW2d 759 (2005).

²¹ *Vodvarka*, *supra* at 511.

²² *Id.* at 501.

²³ See *id.* at 508-509.

²⁴ *Id.* at 512; see MCR 3.210(C)(8).

²⁵ *Id.* at 512.

²⁶ See *Smilgus v Smilgus*, 328 Mich 19, 21-22, 42 NW2d 898 (1950).

²⁷ *Vodvarka*, *supra* at 511.

IV. Joint Custody Determination

A. Standard Of Review

Belote argues that joint custody was inappropriate because the parties are unable to cooperate. Notably, Belote does not argue that the trial court's findings in weighing the best interest factors were against the great weight of the evidence or that there was not clear and convincing evidence. We review a trial court's discretionary rulings, such as to whom custody is granted, for an abuse of discretion.²⁸

B. Applicable Legal Principles

A trial court may change an existing custodial environment into a joint physical custody situation if the court finds that it is beneficial for the children to see both parents and that only minor alterations to the physical custody arrangement are required.²⁹ The parties' ability to cooperate is only one factor for the court to consider in its decision to award joint custody.³⁰

C. Applying The Law

Belote's argument that the trial court should not have awarded joint custody because the parties are unable to cooperate is without merit. The parties have shared joint legal custody since the original custody award. In order to have joint legal custody the parents must share decision-making authority for the important decisions affecting the welfare of the child including medical and educational decisions.³¹ The parties have generally agreed concerning the children's religious beliefs and schooling. Personal animosity, not the welfare of the children, seems to be the subject of the parties' disputes. Despite occasional disputes, the parties have been able to maintain an extensive parenting time schedule and their contact with each other will not significantly change because of the new custody arrangement. Therefore, the trial court did not abuse its discretion in awarding joint custody.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly

²⁸ *Sinicropi, supra* at 155; *Vodvarka, supra* at 507-508.

²⁹ *Shulick, supra* at 333.

³⁰ MCL 722.26a(1).

³¹ *Shulick, supra* at 327.