

STATE OF MICHIGAN
COURT OF APPEALS

KAREN S. ELLSWORTH,

Plaintiff-Appellant,

v

KURT LEE SMITH,

Defendant-Appellee.

UNPUBLISHED
February 23, 2010

No. 294002
Alpena Circuit Court
LC No. 00-000970-DC

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order authorizing the domicile of the parties' child to remain in Maryland until further order, and increasing defendant's parenting time. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant are the parents of a son, Kameron (DOB 3-15-98). In an order entered on January 27, 2000, the trial court awarded plaintiff sole legal and physical custody of Kameron, and granted defendant "reasonable and liberal" parenting time. A stipulated order entered on September 24, 2004, provided that plaintiff would continue to have sole legal and physical custody of Kameron, and that defendant would have parenting time pursuant to a specified schedule. In an order entered on July 10, 2006, the trial court granted defendant an additional four overnights of parenting time. The order specified that all other terms of the September 24, 2004, stipulated order remained in effect.

In June 2007, plaintiff filed a motion to change Kameron's domicile to Maryland. Plaintiff noted that she had graduated from Thomas Cooley Law School, and had been accepted at the University of Baltimore's Law School to complete an LLM degree in tax law. The trial court held a hearing on June 19, 2007, and in a subsequent written opinion and order entered on July 5, 2007, granted plaintiff's motion on a conditional basis. The court considered the factors set out in MCL 722.31(4),¹ and concluded that the change of domicile was warranted for a period

¹ These factors, i.e., whether the proposed change of domicile had the capacity to improve the quality of life for the child and the relocating parent; whether the relocating parent's plan to
(continued...)

of two years. The order provided that if after two years plaintiff wished to continue living with Kameron in a state other than Michigan, plaintiff would be required to seek approval from the court to do so. On December 21, 2007, the trial court entered an amended order making certain changes to defendant's parenting time schedule.

In May 2009, defendant filed a motion to review the December 2007 amended order. Defendant noted that plaintiff had informed him that she wished to make her move to Maryland permanent. Defendant asserted that that would not be in Kameron's best interests, and requested that the court order plaintiff and Kameron to return to Michigan. In the alternative, defendant requested that the court review the parenting time provisions of the amended order, and grant him additional parenting time during Kameron's summer vacation and Christmas break.

The trial court held a hearing on defendant's motion; plaintiff was not present at the hearing because her adult son (who is not connected to this case) was undergoing chemotherapy treatments. In an amended order entered on August 19, 2009, the trial court ordered that Kameron's legal residence would remain in Maryland until further order of the court, and would not change absent a petition and hearing. The trial court also made certain adjustments to defendant's parenting time schedule. It is this order from which plaintiff appeals.

On appeal, plaintiff first argues that the trial court erred in granting defendant additional parenting time without first determining whether a change of circumstances had occurred, determining a custodial environment, and considering the statutory best interest factors. We disagree.

The Child Custody Act, MCL 722.21 *et seq.*, governs parenting time decisions. "MCL 722.27a(1) requires that parenting time "shall be granted in accordance with the best interests of the child.'" *Berger v Berger*, 277 Mich App 700, 716; 747 NW2d 336 (2008). We review a parenting time order de novo, but "must affirm the trial court unless its findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Id.*; see also MCL 722.28.

Plaintiff has conflated the procedure for seeking a change of custody with that for seeking a modification of parenting time. The procedure for seeking a change of custody is as follows:

A party that seeks a change in custody has the initial burden of establishing, by a preponderance of the evidence, that either proper cause or a change of circumstances exists to warrant a change in custody. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847

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change the child's domicile is motivated by a desire to frustrate or defeat the other parent's parenting time schedule; whether a modification of parenting time could be accomplished in order to preserve and foster the relationship between the child and each parent; whether the parent opposing the change is motivated by a desire to secure a financial advantage; and whether the child has suffered or witnessed any domestic violence, are commonly referred to as the "*D'Onofrio*" factors, after *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976), the case in which they were enumerated.

(2003). Thereafter, the trial court then determines whether an established custodial environment exists and analyze[s] the best-interest factors set forth in MCL 722.23. *Id.* If the court finds that an established custodial environment exists, it may not change the established custodial environment unless it finds clear and convincing evidence that a change of custody is in the child's best interest. MCL 722.27(1)(c). See also *Dumm v Brodbeck*, 276 Mich App 460, 462; 740 NW2d 751 (2007). [*Powery v Wells*, 278 Mich App 526, 527-528; 752 NW2d 47 (2008).]

Defendant's motion to review the December 2007 amended order did not seek a change of custody, and his requested modification of parenting time was not so extensive that it would have changed Kameron's established custodial environment. Therefore, the trial court was not required to conduct the extensive inquiry required by a motion for change of custody. *Powery*, 278 Mich App at 528.

A court "shall" grant parenting time "in accordance with the best interests of the child." MCL 722.27a(1). A court "may" consider various enumerated factors "when determining the frequency, duration, and type of parenting time to be granted[.]" MCL 722.27a(6). In this case, the trial court considered defendant's request for increased parenting time, and granted an increase of what seems to amount to a couple of weeks spread throughout the year. Plaintiff does not specifically contend that this increase in defendant's parenting time was not in Kameron's best interests.

Nothing on the record establishes that the trial court made factual findings against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. *Berger*, 277 Mich App at 716. Plaintiff has not established that she is entitled to relief on this issue.

Next, plaintiff argues that in 2007, the trial court erred by analyzing the factors set out in MCL 722.31(4) when it considered plaintiff's motion to change Kameron's domicile to Maryland. Plaintiff had at that time and still has sole legal and physical custody of Kameron. The factors set out in MCL 722.31(4) had no applicability to plaintiff's request to change Kameron's domicile. We agree, but find the error harmless under the circumstances.

We review a trial court's interpretation and application of a statute de novo on appeal. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 187; 732 NW2d 88 (2007).

MCL 722.31 provides in pertinent part:

(1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of a child 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.

(2) A parent's change of a child's legal residence is not restricted by subsection (1) if the other parent consents to, or if the court, after complying with subsection

(4), permits, the residence change. This section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents.

* * * *

(4) Before permitting a legal residence change otherwise restricted by subsection (1), 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.

In 2007, the trial court granted plaintiff's motion to change Kameron's domicile to Maryland on a conditional basis, and stated that if after two years plaintiff wished to continue living with Kameron in a state other than Michigan, plaintiff would be required to seek approval from the court. In the August 19, 2009, order from which plaintiff appeals, the trial court stated that Kameron's domicile was to remain in Maryland until further order, and was not to be changed absent a proper motion and hearing.

In *Brausch v Brausch*, 283 Mich App 339, 349-350; 770 NW2d 77 (2009), this Court stated:

Simply stated, when a parent with sole legal custody desires to relocate, he or she must first obtain the trial court's approval, but the factors set forth in *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976), and codified in MCL 722.31(4) do not apply to the request.

The trial court erred in 2007 when it considered the factors set out in MCL 722.31(4) when deciding plaintiff's motion to change Kameron's domicile to Maryland. However, the error

should be considered ultimately harmless because the trial court granted plaintiff's motion. Thus, under *Brausch*, if in the future plaintiff wishes to relocate with Kameron, plaintiff must obtain the approval of the trial court; however, the factors set out in MCL 722.31(4) would not be applicable to plaintiff's request.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Alton T. Davis