STATE OF MICHIGAN

COURT OF APPEALS

MARK T. WEBER,

Plaintiff-Appellee,

v

TRACIE A. WEBER a/k/a TRACIE A. LETHORN,

Defendant-Appellant.

UNPUBLISHED
April 22, 2010

No. 293002
Saginaw Circuit Court
Family Division
LC No. 05-055451-DM

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying her petition to change the domicile of the parties' minor son and granting plaintiff's petition to change custody. Because none of the trial court's findings of fact were against the great weight of the evidence, we affirm.

Plaintiff and defendant were divorced in April 2006. The consent judgment of divorce granted the parties joint legal custody of their son. Defendant received physical custody, and plaintiff was granted parenting time every Wednesday from 10:00 a.m. to Thursday at 9:00 a.m. and every other weekend. Plaintiff's first parenting time weekend of each month was extended until Monday morning. In February 2008, defendant, who was engaged to a member of the United States Army, petitioned to change the child's domicile from Michigan to Kansas and then ultimately to Fort Campbell, Kentucky. Plaintiff opposed the petition, and moved for physical custody of the child. The trial court denied defendant's petition, finding that defendant had not established that a change in domicile was in the child's best interest. Then, after finding that the child had an established custodial environment with both parties, it granted plaintiff's motion for a change in custody. It concluded that the child's needs were best met by remaining in the Saginaw area with plaintiff.

Defendant first argues that the trial court erred in finding that the child had an established custodial environment with plaintiff. We disagree. We review a trial court's findings regarding the existence of an established custodial environment under the great weight of the evidence standard. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id.* at 706.

Pursuant to MCL 722.27(1)(c), an established custodial environment is established if

> over an appreciable 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 permanency of the relationship shall also be considered.

An established custodial environment may exist with the mother and the father if the child looks to both parents for care, discipline, love, guidance, and attention. *Berger*, 277 Mich App at 706-707.

Defendant claims that the trial court erred in finding that the child had an established custodial environment with plaintiff because she had been the primary caregiver since the child's birth and the child had grown accustomed to her in the role of being the primary parent. Contrary to defendant's assertions, a finding that one parent is the primary caregiver does not preclude a finding that an established custodial environment exists with the other parent. The determination of where an established custodial environment exists is not a competition between two contrasting environments that results in the declaration of one winner. Case law has clearly recognized that an established custodial environment can exist with both parents in their respective households. See, e.g., *id*. at 707; *Mogle v Scriver*, 241 Mich App 192, 197-198; 614 NW2d 696 (2000).

After reviewing the record, we conclude that the trial court's finding that the child had an established custodial environment with plaintiff was not against the great weight of the evidence. It was undisputed that plaintiff exercised all of his parenting time with the child, and defendant acknowledged that the child looked forward to spending time with plaintiff. Defendant also admitted that the child was equally bonded to her and plaintiff. There was evidence that plaintiff provided a home, food, and clothing for the child, helped the child with his speech homework and attended parent-teacher conferences, attended church with the child, engaged in fun and recreational activities with the child, and took the child to the doctor when necessary. The evidence does not clearly preponderate in the opposite direction of the trial court's finding that the child had an established custodial environment with plaintiff.[1]

Defendant next argues that, in ruling on plaintiff's motion for change of custody, the trial court erred in finding that factors (d) and (h) of the best interest factors, MCL 722.23, favored plaintiff. We disagree. We review a trial court's findings on the best interest factors under the great weight of the evidence standard. *Berger*, 277 Mich App at 705.

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[1] Throughout her brief on appeal, defendant relies on the findings and reasoning of Jill Hogenson, a custody specialist. However, because the hearing before the trial court was de novo, MCL 552.507(4), the trial court was not bound by or required to give any deference to Hogenson's findings.

Factor (d) requires a court to consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). Defendant claims that the trial court ignored or gave inadequate weight to her role and impact in the child's life.

The trial court did not ignore defendant's role in the child's life. In its consideration of factor (d), the trial court acknowledged that defendant was the child's primary caregiver. It stated that defendant was an "extremely loving and devoted parent" and that she had a "strong bond" with the child. The court further stated that it was " not overlooking what this child will miss by being separated from Defendant." However, the primary concern of the court was the desirability of maintaining continuity in the child's environment, given that the child "is a high maintenance child who likes routine and has a difficult time adapting to change." The trial court discussed the child's past living arrangements, and compared the custodial homes offered by defendant and plaintiff. The trial court concluded that plaintiff's home in Saginaw offered the child a greater sense of stability. It noted that if the child moved to Kentucky, he would have to adapt to a new family environment, as well as a new school, and would not have the benefit of the involvement of extended family members in his life. In contrast, the court explained that plaintiff's home was familiar to the child, and was a place where the child was "comfortable, happy and well cared for." It also explained that the child would have the continued benefits of the involvement of relatives in his life and remaining at his current school, where his teachers were acquainted with his special needs. The trial court's finding that factor (d) favored plaintiff was not against the great weight of the evidence.[2]

Factor (h) requires a court to consider "[t]he home, school, and community record of the child." MCL 722.23(h). Defendant claims that the trial court's opinion was "absolutely silent" regarding her contributions to the child's home, school, and community record.

The trial court's analysis of factor (h) was silent regarding defendant's contributions to the child's home, school, and community record. However, the trial court was not specifically required to analyze the parents' involvement in Saginaw. The trial court found the pertinent issue to be the child's school record. It noted that the staff at the child's current elementary school had demonstrated a willingness to ensure that the child's unique development, behavioral, and emotional needs were met, and that the child's behavioral issues had improved and he was no longer behind academically. It then explained that defendant presented no evidence to demonstrate that the schools in Fort Campbell were better equipped to meet the child's needs. The trial court's finding that factor (h) favored plaintiff was not against the great weight of the evidence.

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[2] Defendant also argues that the trial court's finding that factor (l), "[a]ny other factor considered by the court to be relevant to a particular child custody dispute," MCL 722.23(l), favored neither party was against the great weight of the evidence because the trial court failed to consider her impact and significance in the child's life. However, from the trial court's statements in its discussion of factor (d), it is clear that the trial court was aware of and did not ignore the role defendant played in the child's life.

Finally, defendant argues that the trial court erred in denying her petition to change the child's domicile. Specifically, defendant argues that the trial court erred in finding that factors (a) and (c) of the *D'Onofrio*[3] factors, codified at MCL 722.31(4), did not favor a change in domicile. We disagree. We review a trial court's findings regarding the *D'Onofrio* factors under the great weight of the evidence standard. *Rittershaus v Rittershaus*, 273 Mich App 462, 464; 730 NW2d 262 (2007). A trial court's ultimate decision on a petition to change the domicile of a minor child is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs when "the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger*, 277 Mich App at 705.

MCL 722.31(4) provides, in pertinent part:

> 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.
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> * * *
>
> (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.

The trial court's determination that the move to Kentucky had "the capacity to improve the quality" of defendant's life but not the child's was not against the great weight of the evidence. Defendant is correct that the trial court did not explore all the nuances of her absence on the child's quality of life; however, the record indicates that the court was cognizant that her absence would affect the boy's quality of life. In addition, the trial court stated that the child "favors routine, and has a very difficult time adapting to changes in his surroundings," and that defendant failed to show that her new family unit offered the child more stability than plaintiff's home. It also stated that defendant failed to show that the child would receive superior medical care in Fort Campbell. The evidence does not clearly preponderate in the opposite direction of the trial court's finding.

With regard to factor (c), the evidence does not clearly preponderate against the trial court's finding that the visitation schedule recommended by the Friend of the Court would not adequately substitute for the weekly contact that plaintiff previously enjoyed with the child.

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[3] *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976).

Defendant argues that, because under the recommended schedule plaintiff would only have 21 less overnights than the previous schedule, the schedule adequately preserved plaintiff's relationship with the child. However, the trial court noted that under the recommended schedule several months would likely elapse between the visits. It concluded that the quality of the plaintiff's relationship with the child would be affected because of the long time spent apart and plaintiff's inability to meaningfully participate in his son's education. The trial court did not err in affording great weight to the quality and frequency of the visits, rather than focusing on the raw number of visits.

Because there is no error in the trial court findings of fact regarding the *D'Onofrio* factors, the trial court did not abuse its discretion in denying defendant's petition to change the boy's domicile.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray