STATE OF MICHIGAN

COURT OF APPEALS

BILLIE J. DERRY,

Plaintiff-Appellant,

v

JAMES A. DERRY,

Defendant-Appellee.

UNPUBLISHED
August 31, 2010

Nos. 294029; 294167
Wayne Circuit Court
Family Division
LC No. 03-318588-DM

Before: JANSEN, P.J., and CAVANAGH and TALBOT, JJ.

JANSEN, P.J. (*dissenting*).

I cannot conclude that the trial court's findings were against the great weight of the evidence or that the court abused its discretion by denying plaintiff's motion to change the minor child's domicile. Nor do I perceive any other errors requiring reversal in this case. Accordingly, I respectfully dissent.

The trial court credited defendant with factor (a), which concerns whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent. MCL 722.31(4)(a). Although the court found that the planned move to Massachusetts would substantially improve plaintiff's quality of life from a financial standpoint, the court did not believe that the move would improve the child's overall quality of life. The court observed that the child had a strong relationship with defendant and defendant's extended family in Michigan, and that defendant and his family provided the child with stability and a sense of familial permanence. The court found that the child's friends were in Michigan and that he was doing well academically and socially in Michigan. The court concluded that the requested move to Massachusetts would be disruptive to the child's life.

These findings on factor (a) were not against the great weight of the evidence. As an initial matter, the planned move to Massachusetts did have the potential to provide benefits to the child. The family would earn more money and be moving to a larger, nicer home. Moreover, the Massachusetts school district in which the child would be enrolled is at least as good, if not better, than the child's present school district as measured by test scores. Notwithstanding these benefits, however, the move would be costly for the child in other, more significant ways. The trial court was correct in finding that the child is closely bonded with defendant and defendant's extended family. Defendant and his extended family spend time with him on a weekly basis, and he looks to defendant for fatherly love and guidance. Furthermore, the child has close friends in

Michigan and is doing well in the Michigan school district. Plaintiff presented no evidence to rebut these facts. A move to Massachusetts, where the child has no family or friends, would strongly undermine his relationships and ties to his Michigan family and friends. I cannot conclude that the trial court erred with respect to factor (a).

Next, the court found that the parties were equal with regard to factor (b), which pertains to the degree to which each parent has complied with and utilized his or her time under a court order governing parenting time, 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. MCL 722.31(4)(b). First, the trial court opined that plaintiff's proposed move was not being made to frustrate defendant's parenting time. Second, the court determined that, for the most part, defendant had exercised his parenting time. The court found that defendant's occasional failure to exercise his parenting time was not motivated by complacency or a lack of interest in the child.

I cannot conclude that the trial court's findings concerning factor (b) were against the great weight of the evidence. There was no evidence that plaintiff's proposed move was inspired by a desire to frustrate defendant's parenting time or otherwise motivated by bad faith. With regard to parenting time, it is undisputed that plaintiff has consistently utilized her time under the parenting time order. Defendant concedes that he frequently does not utilize his Thursday parenting time, allowing the child to spend Thursdays at plaintiff's house since he attends school in Trenton on Friday. But defendant maintains that he consistently utilizes his Thursday parenting time on the occasions when the child does not have school on Friday, and notes that he makes up the parenting time for the Thursdays that he misses. Defendant does not address plaintiff's assertion that he fails to utilize his school break and holiday parenting time or his two consecutive weeks in the summer. However, I agree with the trial court that the total parenting time that defendant has failed to exercise is not a significant amount, and that defendant's failure to utilize all of his parenting time is not motivated by complacency or a lack of desire to foster a relationship with the child. Indeed, it appears to me that defendant's weekday work schedule is mostly the cause. I cannot say that the trial court erred in finding that the parties were equally situated with regard to factor (b).

Next, the trial court credited defendant with factor (c), which concerns the degree to which it is possible to order a modification of the parenting time schedule to preserve and foster the parental relationship between the child and each parent. MCL 722.31(4)(c). While acknowledging that plaintiff proposed an extensive visitation scheme, the court concluded that relocation to Massachusetts would nevertheless substantially impair defendant's parenting time to the detriment of the child and the father-son relationship. The trial court's findings concerning factor (c) were not against the great weight of the evidence. It is true that, to plaintiff's credit, she proposed a new parenting time schedule that would allow the child to visit defendant in Michigan several times throughout the year. But although plaintiff's proposed visitation schedule is extensive, I agree with the trial court that it would not preserve the strong relationship presently existing between defendant and the child. See *Mogle v Scriver*, 241 Mich App 192, 204; 614 NW2d 696 (2000) (stating that although the new visitation plan need not be equal to the prior visitation plan in all respects, it must provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the noncustodial parent). Presently, defendant and the child spend every weekend together. The record demonstrates that defendant

and the child have a close and loving relationship, and that the child looks to defendant for love and guidance. Further, during defendant's parenting time, the child looks to him for basic necessities. Defendant's extended family is close to the child as well, and spends time with him on a weekly basis. If the child were in Massachusetts during the school year and could visit defendant only one extended weekend per month, the relationship between the child and defendant—heretofore characterized by weekly, hands-on parenting—would be meaningfully undermined. I perceive no error with regard to factor (c).[1]

In sum, the trial court concluded that plaintiff had not sustained her burden of proof, and her motion to change domicile was therefore denied. I do not believe that the trial court's findings of fact were against the great weight of the evidence, and I cannot conclude that the court's decision to deny plaintiff's petition for a change of domicile constituted an abuse of discretion.

Nor do I agree with plaintiff's contentions that the trial court erred by failing to articulate and apply the correct evidentiary standard or that the trial court erred with regard to its finding concerning the established custodial environment. To support a change of domicile petition, the moving party need only show that such is warranted by a preponderance of the evidence. *Anderson v Anderson*, 170 Mich App 305, 309; 427 NW2d 627 (1988). Here, the trial court never articulated which standard of proof it was applying. Plaintiff is incorrect, however, to assert that the court applied the clear and convincing evidence standard. Plaintiff does not point to any statement of the court, nor does one exist, to support her allegation in this regard. It is well settled that a judge is presumed to know and apply the correct law. *In re Costs & Attorney Fees*, 250 Mich App 89, 101; 645 NW2d 697 (2002).

With regard to the established custodial environment, the trial court's failure to expressly indicate that the child had an established custodial environment with plaintiff, in addition to the one that he had with defendant, appears to be a simple oversight. There is no evidence upon which to conclude that plaintiff played any less a role in the child's life than defendant did. The record reflects that plaintiff has consistently provided the child with love, guidance, discipline, and the basic necessities of life. If the child has an established custodial environment with defendant, as the court concluded, he certainly has one with plaintiff as well. "Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review." *Thames v Thames*, 191 Mich App 299, 304; 477 NW2d 496 (1991). I believe that there is sufficient evidence in the record to conclude that the child had an established custodial environment with both parents.

I must also reject plaintiff's assertion that the trial court erred by failing to consider what will become of the child's custody if plaintiff moves to Massachusetts. Plaintiff disregards the

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[1] Factor (d) concerns 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, and factor (e) concerns domestic violence. MCL 722.31(4)(d) and (e). The court found that these two factors were irrelevant. Plaintiff does not contest this finding.

facts that the trial court denied her motion to change the child's domicile and that neither party has moved for a change in custody. Consequently, the trial court was not obligated to consider the best-interest factors of MCL 722.23.

Finally, plaintiff contends that this case raises public policy concerns, including whether it is appropriate to force someone in her position to choose between living with her child or her husband. While it might be true that plaintiff is in an unenviable position, this Court's role is limited to applying the applicable law. See *Henry v Dow Chemical Co*, 473 Mich 63, 88; 701 NW2d 684 (2005) (stating that it is the Legislature's function, not that of the courts, to draw lines reflecting public policy considerations). The Legislature has clearly indicated that change of domicile disputes must be decided on the basis of the factors set forth in MCL 722.31. As the trial court concluded, plaintiff failed to sustain her burden under MCL 722.31. In my opinion, plaintiff's motion to change the child's domicile was properly denied. I would affirm the trial court's decision in full.

/s/ Kathleen Jansen