

STATE OF MICHIGAN
COURT OF APPEALS

CASEY KESSLER, f/k/a CASEY STOVER,

Plaintiff-Appellee,

v

RYAN THOMPSON,

Defendant-Appellant.

UNPUBLISHED
November 14, 2013

No. 316317
Lenawee Circuit Court
Family Division
LC No. 03-026539-DP

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from an order that granted plaintiff sole legal and physical custody of the parties' only minor child. The order also implicitly granted plaintiff's petition to change the minor child's domicile from Morenci, Michigan, to Toledo, Ohio. We vacate the trial court's order and remand for further proceedings not inconsistent with this opinion.

I. BASIC FACT AND PROCEDURAL HISTORY

The parties, who were never married, shared joint legal custody of the minor child for the first 10 years of the child's life. Plaintiff enjoyed sole physical custody, but defendant was an active parent and had parenting time every other weekend and every Wednesday evening. The child, the parties, and the extended families all lived in Morenci. Plaintiff worked in Toledo, Ohio and had been commuting to her job from Morenci for a number of years.

On February 17, 2012, defendant moved for additional parenting time with the child. In response, plaintiff filed a petition to change the child's domicile. Plaintiff asserted that she and her fiancée worked in Toledo. In addition, her fiancée, whom she was to marry on June 2, 2012, lived in Toledo and they intended to live there after the wedding. Defendant opposed the motion.

A hearing on the two motions was conducted by a court referee on July 17, 2012. By that time, plaintiff had already moved with the child to Toledo in violation of the court's order. The referee recommended that plaintiff's petition to change the child's domicile be granted. The referee further recommended that defendant's parenting time schedule stay the same. Defendant objected to the recommendation and a hearing before the trial court judge was scheduled. In the

meantime, on February 14, 2013, the trial court ordered the parties to follow a week on/week off custody schedule, and for the child to continue going to school in Morenci.

Following the hearing, the trial court concluded that the child had an established custodial environment with plaintiff. The court awarded plaintiff sole legal and physical custody and granted defendant parenting time every other weekend and on Wednesday evenings. The court did not specifically rule on plaintiff's motion to change domicile, but the court implicitly granted the motion, as evidenced by its custody and parenting time awards. Defendant now appeals as of right.

II. ANALYSIS

Defendant argues that the trial court erred in granting plaintiff's petition to change domicile because she did not prove by a preponderance of the evidence that changing the child's domicile was warranted. Defendant further argues that the trial court erred in granting plaintiff sole physical and legal custody of the minor child. Because the trial court did not follow the proper framework in evaluating this case, we must remand the matter for further consideration.

When reviewing a custody order, this Court applies three standards of review. See MCL 722.28; *Brausch v Brausch*, 283 Mich App 339, 347; 770 NW2d 77 (2009). First, this Court will not disturb the trial court's findings of fact unless they are against the great weight of the evidence. *Brausch*, 283 Mich App at 347. A trial court's factual findings are against the great weight of the evidence if the facts "clearly preponderate in the opposite direction." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). Second, this Court reviews the trial court's discretionary rulings for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008); *Mogle v Scriver*, 241 Mich App 192, 202; 614 NW2d 696 (2000). In custody cases, 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. Finally, this Court must determine if the trial court made a clear legal error on a major issue; a clear legal error occurs when the trial court "errs in its choice, interpretation, or application of the existing law." *Shade*, 291 Mich App at 21.

This Court reviews a trial court's decision on a petition to change domicile for an abuse of discretion. *Gagnon v Glowacki*, 295 Mich App 557, 565; 815 NW2d 141 (2012). The trial court's findings with respect to the change of domicile factors are reviewed using the great weight of the evidence standard. *Id.* A trial court's findings regarding whether an established custodial environment exists are also reviewed under the great weight of the evidence standard. *Rains v Rains*, 301 Mich App 313, __; __ NW2d __ (2013) (slip op at 7). This Court "may not substitute our judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *Gagnon*, 295 Mich App at 565. We review questions of law de novo. *Rains*, 301 Mich App at __ (slip op at 7).

The Child Custody Act, MCL 722.31, provides that "a parent of a child whose custody is governed by court order shall not change a legal residence of the 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." In this case, plaintiff sought to change the minor child's legal

residence to Toledo, which is not more than 100 miles from her former home in Morenci. However, the distance involved is irrelevant if the proposed residence change involves moving a child to another state and the custody order requires court permission to move the child to another state. *Gagnon*, 295 Mich App at 566; *Mogle*, 241 Mich App at 202-203. The custody order in this case contained such a provision. Therefore, MCL 722.31 applies.¹

The trial court rendered its decision in this case without the benefit of our recent opinion in *Rains*, wherein we set forth the proper framework for evaluating a motion for a change of domicile. First, the trial court must determine if the party seeking the change has established, by a preponderance of the evidence, that the change is warranted, given the factors enumerated in MCL 722.31(4). *Rains*, 301 Mich App at ___ (slip op at 7). If the court determines that this burden is met, then it must decide whether an established custodial environment exists with either or both parents. *Id.* “[T]he trial court must then determine whether the change of domicile would modify or alter that established custodial environment. Finally, if, and only if, the trial court finds that a change of domicile would modify or alter the child’s established custodial environment must the trial court determine whether the change in domicile would be in the child’s best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence.” *Id.*

¹ MCL 722.31(4) provides that the trial court should consider these factors, with the child as the primary focus, when deciding a motion to change domicile:

- (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.

Here, although clearly aware of the issues involving this particular family, the trial court conflated its approach to the motion for change of domicile. Instead of first applying a preponderance of the evidence standard in considering whether a change in domicile was warranted, the trial court announced that the child's custodial environment was solely with plaintiff.² The trial court then inexplicably granted plaintiff sole legal and physical custody of the child absent a request to do so and without first finding that a change of circumstances had occurred to revisit the custody arrangement. See MCL 722.27(1)(c). We must, therefore, remand this matter for additional proceedings. On remand, the trial court is to first determine whether a preponderance of the evidence supports a change of domicile. We remind the trial court that it must consider the factors listed in MCL 722.31(4), keeping *the child* as the primary focus. If the factors do not weigh in favor of a change of domicile, then the trial court must deny plaintiff's motion for a change of domicile and proceed to address defendant's motion for additional parenting time. If the factors *do* weigh in favor of a change of domicile, the trial court must re-visit the issue of custodial environment, keeping in mind that a child may enjoy a custodial environment with both parents. The trial court may proceed with the framework as set out in *Rains*.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

² We question the soundness of this conclusion where it appears that the trial court did not even consider if the minor child also had an established custodial environment with defendant. A child can have an established custodial environment with both parents. *Berger*, 277 Mich App at 707. Additionally, the trial court committed legal error by concluding that it was precluded from considering the period during which the change of domicile motion was pending. "A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." *Id.*