STATE OF MICHIGAN

COURT OF APPEALS

RANDI GAGNON,

Plaintiff-Appellee,

v

GARY GLOWACKI,

Defendant-Appellant.

FOR PUBLICATION
March 6, 2012

No. 303449
Wayne Circuit Court
LC No. 06-660387-DP

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

JANSEN, P.J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that the circuit court did not err with regard to its evaluation of the change-of-residence factors of MCL 722.31(4) or its determination that plaintiff met her burden of establishing by a preponderance of the evidence that the move to Windsor, Ontario, was warranted. I respectfully dissent, however, from the majority's conclusion that the circuit court properly determined that the move to Windsor would not alter the child's established custodial environment.

The circuit court correctly determined that an established custodial environment existed with both parents in this case. See *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008) (noting that "[a]n established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort"). I fully acknowledge that "[i]t is possible to have a change of domicile . . . without disturbing the established custodial environment." *Brown v Loveman*, 260 Mich App 576, 596; 680 NW2d 432 (2004); see also *Pierron v Pierron*, 282 Mich App 222, 249-250; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010); *DeGrow v DeGrow*, 112 Mich App 260, 267; 315 NW2d 915 (1982). However, on the facts of this case, I conclude that the move to Windsor, Ontario, would change the child's established custodial environment and that the circuit court erred by determining that it would not.

Defendant has been closely involved in the child's upbringing since the child was born in 2005. Along with plaintiff, defendant has joint legal and physical custody of the child. The record evidence establishes that defendant consistently exercises his full complement of parenting time and spends additional time with the child whenever possible. Defendant spends time with the child both during the week and on weekends. In addition to defendant's regularly scheduled parenting time, he frequently brings the child lunch, has taken the child on vacations,

and talks to the child on the telephone two or three times per day. Further, defendant is responsible for the vast majority of the child's transportation needs, and takes the child to all of his medical and dental appointments. Even plaintiff admits that defendant has an extremely close relationship with the child and that the child looks to defendant for guidance and discipline in his day-to-day life.

The majority concludes that plaintiff's move to Windsor with the child would not destroy defendant's strong relationship with the child and would not render defendant a "weekend" parent. Consequently, according to the majority, the circuit court correctly determined that the move to Windsor would not affect the child's established custodial environment with defendant. I must respectfully disagree.

I realize that Canada is to be treated as a "state" for purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), that Canada is a signatory to The Hague Convention, and that Canada "has adopted specific and far-reaching legislation protecting the rights of noncustodial parents, including those who are not Canadian citizens." *Brausch v Brausch*, 283 Mich App 339, 354; 770 NW2d 77 (2009); see also MCL 722.1105; *Atchison v Atchison*, 256 Mich App 531, 536-537; 664 NW2d 249 (2003). But I nevertheless believe that one parent's act of moving to a *foreign country* with a minor child is both quantitatively and qualitatively different than the scenario presented by a mere interstate move with a minor child within the United States. Traveling from one state to another is relatively simple; it does not require a passport or any special papers, and does not subject the traveler to potentially lengthy stops or searches at the border between the states. Indeed, the United States Constitution implicitly guarantees the right to interstate travel, "a right that has been firmly established and repeatedly recognized." *United States v Guest*, 383 US 745, 757-758; 86 S Ct 1170; 16 L Ed 2d 239 (1966); see also *Griffin v Breckenridge*, 403 US 88, 105-106; 91 S Ct 1790; 29 L Ed 2d 338 (1971). By contrast, the freedom to travel outside the United States, including to and from Canada, is clearly accorded less stature than the right to interstate travel. *Califano v Aznavorian*, 439 US 170, 176-177; 99 S Ct 471; 58 L Ed 2d 435 (1978); *Haig v Agee*, 453 US 280, 306-307; 101 S Ct 2766; 69 L Ed 2d 640 (1981). Particularly in today's post-9/11 world, the act of traveling to or from a foreign country, even if only Canada, has become a much more complicated, burdensome, and time-consuming prospect.

I realize that plaintiff has agreed to bring the child into the United States for defendant's parenting time so that defendant, himself, does not have to face the burdens of traveling to Canada to see the child. However, I still believe that plaintiff's international move with the child poses substantial difficulties for defendant. The circuit court determined that despite plaintiff's move to Windsor with the child, defendant would still be able to spend time and interact with the child on a regular basis. The circuit court further observed that, even though defendant might lose his overnight visits with the child during the week, this could be remedied by granting defendant an additional weekend of parenting time each month. But unlike a move to Ohio or Indiana, it strikes me that plaintiff's move to Canada will have the potential of significantly obstructing defendant's weekday visitation schedule. Neither the parties nor the circuit court can know for certain whether plaintiff will be able to bring the child to Michigan for all scheduled parenting time with defendant. For instance, what will happen if plaintiff must wait to cross the international border with the child or, worse yet, if the border is closed completely? While such questions are not germane in the context of interstate moves, they are certainly relevant in the

context of international moves. In short, I agree with defendant that the unpredictable and time-consuming nature of crossing the international border may ultimately affect his weekday parenting-time schedule so greatly that he will have to opt out of weekday visitation altogether on certain occasions. In contrast to the majority, I conclude that such a scenario would effectively relegate defendant to the role of a weekend-only parent, thereby altering the child's established custodial environment with defendant. *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008).

On the facts before us, I conclude that plaintiff's move to Windsor with the child would alter the established custodial environment that currently exists with defendant. I believe that the circuit court's finding to the contrary was clearly against the great weight of the evidence. MCL 722.28; *Berger*, 277 Mich App at 705.

Once a circuit court has granted a party permission to remove a minor child from the state, and assuming that the party's move would effectively alter the child's established custodial environment, the court must undertake an analysis of the best-interest factors of MCL 722.23 to determine whether the party can prove by clear and convincing evidence that the removal and consequent change in the established custodial environment will be in the child's best interests. *Brown*, 260 Mich App at 576. In the instant case, the circuit court granted plaintiff's request for permission to remove the child to Windsor. Moreover, as I have already explained, I believe that such a move would alter the child's established custodial environment with defendant. Accordingly, in my opinion, the circuit court should have undertaken an analysis of the best-interest factors to determine whether the move to Windsor and consequent change in the established custodial environment was in the child's best interests. *Brown*, 260 Mich App at 576. I would reverse the circuit court's determination that the move to Windsor will not affect the child's established custodial environment and remand this matter to the circuit court for a best-interests determination in accordance with *Brown* and MCL 722.23.

/s/ Kathleen Jansen