STATE OF MICHIGAN

COURT OF APPEALS

NICHOLAS SCOTT BLANCHARD, Plaintiff-Appellee,	UNPUBLISHED March 23, 2017
v	No. 334495 Ionia Circuit Court
AIMEE DIVINE-COVELL, also known as AIMEE DIVINE-WEEKS, Defendant-Appellant.	LC No. 2011-028883-DC

Before: STEPHENS, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant, Aimee Divine-Covell, appeals as of right the trial court's order denying her motion to change domicile under MCL 722.31. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant and plaintiff, Nicholas Blanchard, are the parents of twin girls who were born in 2007. The parties were never married. They lived together for approximately four years after the children were born, but separated in March 2011. There is no dispute that plaintiff and defendant both continued to live in Saranac, Michigan after they separated. In October 2011, plaintiff submitted a complaint to the trial court seeking joint physical and legal custody of the children. Thereafter, the trial court issued an order granting the parties joint legal custody of the children and requiring plaintiff to receive reasonable and liberal parenting time according to the mutual agreement of the parties. The court also ordered plaintiff to pay child support. The court noted that defendant was concerned that the children's paternal grandfather consumed alcohol and that their paternal aunt used harsh discipline methods. On March 28, 2012, the court ordered plaintiff to supervise any contact between the children and the grandfather and ordered that the aunt was not permitted to physically punish the children.[1]

[1] The March 28, 2012 order arose following an incident in which the grandfather was inebriated and shouting inappropriately in the children's presence during a sporting event and an incident in which the aunt physically disciplined one of the children for chewing her fingernails, causing the child to fall over.

On March 16, 2016, defendant moved the trial court under MCL 722.31(4) to change her and the children's domicile from Saranac to Grayling, Michigan. Defendant alleged that she intended to marry Dr. Eric Weeks in June 2016, and that Weeks lived in Grayling. She argued that moving to Grayling had the capacity to improve her own and the children's quality of life for various reasons. For instance, she argued that moving to Grayling would allow her to stop working and devote more time to the children. She also argued that the move would allow the children to live in a nicer house and attend a better school, and that Grayling had more outdoor activities than Saranac. Defendant asserted that plaintiff failed to take full advantage of his parenting time, and that the parenting-time schedule could be modified to preserve his relationship with the children despite the move. In response, plaintiff argued that the move to Grayling would alienate the children from him and negatively impact his relationship with them. He argued that the move would make it difficult for him to actively participate in the children's everyday lives.

At April and May 2016 hearings before a referee on defendant's motion, plaintiff testified that he was employed full-time as a truck driver. He began and ended work approximately eight miles from his house, although occasionally his job required him to spend nights away from home. Plaintiff explained that he participated in day-to-day activities with the children, such as attending their softball games, volunteering at their school, attending parent-teacher conferences, helping the children with their homework, and exercising occasional overnight visits during the school week. Plaintiff testified that the children liked going to school in Saranac and they had many friends there. He testified that the children had no family or friends in Grayling, and if they moved there, it would be more difficult for him to participate in their daily lives. Visits would require the children to ride in a vehicle for five hours and winter weather would make visits difficult. Plaintiff agreed that the schools in Grayling were better than the schools in Saranac and that the move would benefit the children financially because Weeks's income was greater than his own. However, he testified that it would be "heartbreaking" for the children to be away from him. Plaintiff acknowledged that he did not use all of the parenting time that was available to him, but explained that this was only when his work interfered.

Defendant testified that she was a self-employed massage therapist, but her declining health made it difficult for her to work. She testified that moving to Grayling would allow her to stop working because she would have monetary support from Weeks. Because she would no longer need to work, she would have more time to participate in the children's lives. Defendant acknowledged that plaintiff was a devoted parent. She testified that even if she and the children moved to Grayling, the parenting-time schedule could be modified to maintain the amount of parenting time offered to plaintiff.

On May 17, 2016, the trial court adopted the referee's recommendations and found that allowing a change of domicile to Grayling would improve defendant's quality of life, but it would not likely improve the children's lives because they were flourishing in Saranac. The trial court found that the move would deprive the children of time with plaintiff's relatives and that it would require them to adjust to a new home. Although the children would benefit from defendant staying home, this benefit would be offset by the children's restricted access to plaintiff and his family. The trial court further found that plaintiff and defendant largely complied with the existing parenting-time order. With regard to whether a parenting-time schedule could be arranged to preserve plaintiff's relationship with the children, the trial court

found that plaintiff's access to the children would be negatively affected if they moved to Grayling. Accordingly, the trial court denied defendant's motion.

Defendant objected under MCR 3.215(E)(4)[2] and moved the trial court to allow her to supplement the record. The trial court granted defendant's motion to supplement the record with regard to the children's relationship with plaintiff's family, and a hearing was held on July 15, 2016. At the hearing on her motion, defendant stated that she had married Weeks. Kimberly Delinsky testified that she knew defendant, plaintiff, and the children. She testified that there was an incident in which the paternal grandmother told defendant that she did not care about the trial court's March 28, 2012 order, which required plaintiff to supervise the children in the grandfather's presence. Delinsky testified that the grandfather had a reputation for drinking alcohol and that he once attended one of the children's softball games while drunk. Defendant testified, however, that she did not worry that the grandfather would behave violently, and she once gave him permission to take the children to school.

Thereafter, the trial court again found that allowing a change of domicile to Grayling had the capacity to improve defendant's life, but because she was now married to Weeks, she already had his financial support regardless of whether the trial court granted her request to move. The trial court further found that allowing the children to move to Grayling would reduce plaintiff's involvement in their lives, and that it would not be possible to alter the parenting-time schedule to preserve plaintiff's relationship with the children in light of the significant distance between Saranac and Grayling. Accordingly, the trial court concluded that the move to Grayling did not have the capacity to improve the children's lives and denied defendant's motion.

II. STANDARD OF REVIEW

In child custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. "Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Brausch v Brausch*, 283 Mich App 339, 347; 770 NW2d 77 (2009). In the child custody context, "[a]n abuse of discretion exists 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 v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

III. CHANGE OF DOMICILE

When parents share joint custody of a child and one parent seeks to move more than 100 miles away, a trial court must first determine whether the moving party has established the

[2] MCR 3.215(E)(4) provides that "[a] party may obtain a judicial hearing on any matter that has been the subject of a referee hearing and that resulted in a statement of findings and a recommended order" if the party files a written objection within 21 days after service of the referee's recommendation for an order.

factors set forth in MCL 722.31(4) by a preponderance of the evidence. *Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013). The factors in MCL 722.31(4) are as follows:

> (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.
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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.
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> (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.

If the factors in MCL 722.31(4) support a change in domicile, the court must next decide whether an established custodial environment exists, and if so, must decide whether the change of domicile would alter the established custodial environment. *Rains*, 301 Mich App at 325. "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.*

In this case, there is no dispute that the parties shared joint custody of the children, that defendant and the children lived in Saranac, and that Saranac and Grayling are more than 100 miles apart. Therefore, to prevail on a motion for a change of domicile, defendant had to first establish the factors in MCL 722.31(4) by a preponderance of the evidence. With regard to MCL 722.31(4)(a), defendant testified that she married Weeks, who lived and worked as a physician in Grayling. Moving to Grayling would have the capacity to improve defendant's life because it would allow her to be closer to her husband. Defendant argues that moving to Grayling would also benefit the children because it would increase defendant's income and allow her to stop working so she could spend more time with the children. "It is well established that the relocating parent's increased earning potential may improve a child's quality of life" with regard to MCL 722.31(4)(a). *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007). However, as the trial court found, the evidence showed that defendant's increased income and her consequent lack of a need to work resulted from her marriage to Weeks, not from

moving to Grayling. As such, we fail to see how defendant's income is relevant to determining whether moving to Grayling had the capacity to improve the children's lives.

Defendant argues that the trial court failed to give sufficient weight to evidence showing that Grayling schools were superior to Saranac schools. However, the trial court explicitly found that Grayling schools were better than Saranac schools and that there were more activities available to the children in Grayling than in Saranac. Plaintiff also admitted that Grayling schools were superior. In spite of the superiority of the Grayling schools, however, the trial court concluded that the Grayling move did not have the capacity to improve the children's lives because the move would reduce plaintiff's participation in their daily lives. Considering the evidence showing plaintiff's strong bond with the children and his involvement in their day-to-day activities, the trial court's findings were not against the great weight of the evidence.

Defendant also argues that the trial court failed to account for the children's inability to take music lessons at the Saranac school and one of the children's academic struggles. Although there is evidence that the children did not like the music teacher at the Saranac school, there is no evidence that they were unable to take music lessons in Saranac. Further, we see no evidence that either child struggled academically. To the contrary, defendant testified at the April 12, 2016 hearing that both children's performance in school was "excellent." Defendant testified that the children were tardy and absent from school on multiple occasions, but there is no evidence that this was related to the Saranac school; rather, defendant testified that it resulted from the children being sick and being difficult to motivate in the morning. Defendant also asserts that the trial court relied on speculation when finding that the move to Grayling did not have the capacity to improve the children's lives. However, the trial court's finding that moving the children to Grayling would reduce plaintiff's visits with the children and his involvement in their lives was a reasonable inference based on the evidence presented at the hearings. See *Wright v Wright*, 279 Mich App 291, 301-302; 761 NW2d 443 (2008). For the above reasons, defendant has not shown that the trial court's findings with regard to MCL 722.31(4)(a) were against the great weight of the evidence.

With regard to MCL 722.31(4)(b), the trial court found that plaintiff's failure to take full advantage of his parenting time did not weigh in favor of granting defendant's motion. Although defendant testified that plaintiff did not use all of his parenting time during the summer, there is abundant evidence that plaintiff participated in the children's lives when his work schedule allowed him to do so. Plaintiff testified that he attended the children's softball games and parent-teacher conferences and volunteered at the children's school. He further testified that he occasionally had overnight visits with the children during the school week. Defendant acknowledged that plaintiff was a good father and that he loved the children. In light of the evidence showing plaintiff's involvement in the children's lives, evidence that he did not take full advantage of his parenting time in the summer did not mean that the trial court's finding regarding MCL 722.31(4)(b) was against the great weight of the evidence.

Similarly, regarding MCL 722.31(4)(c), although defendant proposed a parenting plan that would allow plaintiff 80 overnight visits per year with the children if they moved to Grayling, it is clear that the distance between Grayling and Saranac would diminish plaintiff's daily participation in the children's lives. Therefore, the trial court's findings regarding MCL 722.31(4)(c) were not against the great weight of the evidence.

There is no dispute that MCL 722.31(4)(d) is not a factor in this case, and the trial court found that MCL 722.31(4)(e) was also not at issue. On appeal, defendant appears to argue that MCL 722.31(4)(e) weighed in favor of granting her motion because plaintiff failed to properly secure firearms and he allowed the children to be in the grandfather's presence unsupervised. However, plaintiff testified that he properly secured his firearms and weapons after Child Protective Services addressed the issue, and there is no evidence to the contrary. Although there is evidence that plaintiff allowed the children in the grandfather's presence, defendant testified that she was not worried that the grandfather would behave violently. She also testified that she allowed the grandfather to take the children to school. We find no evidence in the record indicating that domestic violence was ever "directed against or witnessed by" the children. MCL 722.31(4)(e). Therefore, the trial court's finding in that regard was not against the great weight of the evidence.

In sum, defendant failed to demonstrate by a preponderance of the evidence that a change of domicile was warranted under the factors in MCL 722.31(4) because the support she received from Weeks was not dependent on moving to Grayling, the benefit of the schools and extracurricular activities available to the children in Grayling would be offset by plaintiff's decreased involvement in their day-to-day lives, plaintiff exercised his parenting time whenever he could, and there was no evidence that the children were exposed to domestic violence or that plaintiff's opposition to the move resulted from improper financial motives. Under these circumstances, the trial court did not abuse its discretion by denying defendant's motion to change the children's domicile to Grayling.

Defendant argues that the trial court erred by failing to address the children's established custodial environment. However, "[i]t is only *after* the trial court determines that the moving party has shown by a preponderance of the evidence that a change of domicile is warranted that the trial court must determine whether an established custodial environment exists." *Rains*, 301 Mich App at 327. Because defendant failed to prove that a change in domicile was warranted, the trial court was not required to reach issues concerning the children's established custodial environment. See *id.* Defendant also makes the unpreserved argument that the trial court's decision goes against public policy because it requires her to choose between living with her children and living with her husband. However, it is MCL 722.31(1) that prevents defendant from moving from Saranac to Grayling without permission from the Court. Insofar as defendant's inability to change the children's residence implicates public policy considerations, those considerations concern MCL 722.31(1), not the trial court's denial of defendant's motion. See *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002) ("In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law."). The trial court's decision was appropriate under MCL 722.31 and caselaw; therefore, defendant has not

shown that the decision was contrary to public policy, nor has she established any plain error arising from the trial court's actions.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola