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STATE OF MICHIGAN

COURT OF APPEALS

ROBERT G. STEELE,

Plaintiff-Appellee,

v

CHELSEA L. HERTZFELD, also known as CHELSEA LYNN WELLMAN,

Defendant-Appellant.

UNPUBLISHED
June 18, 2019

No. 345664
Jackson Circuit Court
LC No. 06-002200-DP

Before: METER, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying her motion to change domicile of the minor child, CDW, awarding physical custody to plaintiff, and awarding parenting time to defendant. We affirm.

The parties were never married, and CDW is their only child together. The parties shared joint legal custody of the child. Defendant had primary physical custody, and plaintiff exercised parenting time. Pertinent to this appeal, defendant filed a motion to change the child's domicile from Michigan to Missouri. Defendant's husband was stationed at an army base in Missouri, and defendant wished to move there with her children, including CDW. The trial court held an evidentiary hearing regarding defendant's motion, and defendant offered the only testimony. Defendant stated that she would move to Missouri regardless of whether the trial court granted her motion. Following defendant's testimony, the trial court met the parties' respective counsel in chambers to discuss the case. During that meeting, the trial court indicated that defendant failed to establish her burden to change the child's domicile. The parties then negotiated a custody and parenting time agreement during a two-hour recess. The provisions of that agreement were read into the record. The agreement provided primary physical custody to plaintiff, with CDW's domicile remaining in Michigan, and parenting time to defendant. The trial court entered an order memorializing this agreement. The trial court later entered an amended order denying defendant's motion to change domicile, which included the parties' agreement. This appeal followed.

We note that defendant argues on appeal that this Court lacked jurisdiction over the order modifying custody because plaintiff consented to the agreement included in the order, and did not reserve her right to appeal. " '[O]ne may not appeal from a consent judgment, order or decree[.]' " *Dybata v Kistler*, 140 Mich App 65, 68; 362 NW2d 891 (1985) (citation omitted). This is because a party who enters a consent judgment is not an aggrieved party. *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990), overruled in part on other grounds by *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549; 640 NW2d 256 (2002). A party who wishes to retain the right to appeal from a consent judgment must condition the agreement on the right to appeal. *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994).

However, subsequent to plaintiff filing her claim of appeal, the trial court entered an amended order on October 1, 2018, specifically indicating that the court denied defendant's motion to change domicile, which was not included in the original September 4, 2018 order, and that the parties reached an agreement. At the time that plaintiff's appeal was filed, MCR 7.202(6)(a)(*iii*) provided that a final order included an "order affecting the custody of a minor." See Administrative Order No. 2017-20, 503 Mich ___, ___ (2018), amending MCR 7.202(6)(a)(*iii*), effective January 1, 2019. Prior to the amendment of MCR 7.202, this Court determined that an order regarding a motion for change of domicile that could affect the established custodial environment of the child was appealable by right. See *Rains v Rains*, 301 Mich App 313, 320-324; 836 NW2d 709 (2013); *Thurston v Escamilla*, 469 Mich 1009, 1009; 677 NW2d 28 (2004). MCR 7.202(6)(a)(*iii*) was amended in 2019 to specify that a final order includes "in a domestic relations action, a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile." We note that plaintiff has not brought a motion to dismiss this appeal for lack of jurisdiction. Moreover, even if we were to conclude that the order denying defendant's motion to change domicile was not appealable as of right, we could nonetheless consider the merits of defendant's appeal as on leave granted in the interest of judicial economy. See *Rains*, 301 Mich App at 323; see also *In re Investigative Subpoena*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003). Therefore, this case is properly within the jurisdiction of this Court.

First, defendant argues that the trial court erred in entering the parties' custody and parenting time agreement into an order because she did not consent to the agreement. We disagree.

A trial court's finding regarding the validity of consent to a settlement agreement will not be disturbed absent an abuse of discretion. *Vittiglio v Vittiglio*, 297 Mich App 391, 397; 824 NW2d 591 (2012). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010).

MCR 2.507(G) provides:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Trial courts "are bound by . . . settlements reached through negotiations and agreement by parties . . . , in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged." *Vittiglio*, 297 Mich App at 400. "However, the parties must have actually consented to the settlement agreement." *Id.*

It appears that as a result of the discussion that occurred in chambers, the parties negotiated a parenting time agreement during a two-hour recess. The trial court then returned to the record, and specifically asked plaintiff's counsel, "Is there a final agreement that you wanted [to] place on the record[?]" Plaintiff's counsel answered in the affirmative, and read the provisions of the parenting time agreement into the record. Defendant did not object. In fact, after plaintiff's counsel finished reading the agreement, the trial court asked whether the recitation was accurate. Defendant's counsel stated that it was.

Defendant relies on a statement made by her counsel to support her contention that she did not consent to the custody and parenting time agreement:

> [*Defense Counsel*]: You've heard all of the recommendations that the Court has helped us make, all the parenting time and transportation provisions. Do you understand all of them—
>
> [*Defendant*]: I understand.
>
> [*Defense Counsel*]: —as they were read? I know you don't necessarily agree with them, but are you going to abide by them?
>
> [*Defendant*]: Yes.

We believe that this statement was made in light of the fact that defendant wanted to move CDW to Missouri with her, and have plaintiff exercise parenting time during CDW's school breaks. In other words, defendant filed the motion seeking a different outcome. Considering the discussion held on the record, it appears that once defendant knew that the trial court would not grant her motion to change domicile, the parties negotiated a custody and parenting time agreement because defendant had already decided to move to Missouri regardless of the trial court's decision. Considering the underlying facts of this case, defendant knew that she would be unable to move CDW to Missouri. As a result, she participated in negotiations with plaintiff, instead of requiring the trial court to determine custody and parenting time. Accordingly, defendant consented to the agreement, even though it did not reflect her desired outcome. See *Vittiglio*, 297 Mich App at 400.

Based on her assertion that an agreement was not reached by the parties, defendant next argues on appeal that the trial court erred by failing to make findings of fact or addressing on the record whether a change in domicile would modify CDW's established custodial environment, or was in CDW's best interests. We disagree.

This Court also reviews a trial court's decision whether to grant a motion for change of domicile for an abuse of discretion. *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838

(2014). In custody cases, "[t]he great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). The abuse of discretion standard is applied to a trial court's discretionary rulings, such as a custody decision. *Id*. Finally, this Court reviews questions of law for clear legal error. *Id*. "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id*.

Defendant moved to change CDW's domicile from Michigan to Missouri. MCR 3.211(C)(3) provides that a change of the legal residence of a child subject to a custody order must comply with MCL 722.31. When a parent moves for change of domicile, a four-step approach is used. *Rains*, 301 Mich App at 325. This Court stated:

> First, a trial court must determine whether the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4), the so-called *D'Onofrio*[1] factors, support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must then determine whether an established custodial environment exists. Third, if an established custodial environment exists, the 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*.]

"An established custodial environment may exist with both parents where a child looks to both mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

In this case, the trial court explained that it did not believe that defendant had established the factors listed in MCL 722.31(4) by a preponderance of the evidence (the first step enumerated in *Rains*, 301 Mich App at 325). The trial court indicated that it informed the parties' respective counsel of this in chambers. "It 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 (emphasis original). Thus, because the trial court determined that the change of domicile, or *D'Onofrio*, factors were not met, and a change of CDW's domicile was unwarranted, it was not required to move to the second step in the four-part analysis. *Id*. at 325, 327.

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

Although the trial court determined that an established custodial environment existed with both parties, it was not required to do so. *Id*. As such, the court was not required to proceed to the third and fourth steps of the analysis, including determinations whether a change of domicile modified the established custodial environment, and whether the change of domicile was in CDW's best interests.

> After the trial court determines that the moving party has shown by a preponderance of the evidence that a change of domicile is warranted and if there is an established custodial environment, the trial court must determine whether the change in domicile would cause a change in the established custodial environment.
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> * * *
>
> If the trial court concludes that a change in an established custodial environment would occur, then the party requesting the change of domicile must prove by clear and convincing evidence that the change is in the child's best interests. [*Id*. at 328.]

Although the court determined that an established custodial environment existed with both parties, and a change of domicile would interrupt CDW's established custodial environment with plaintiff, it was not required to advance to these steps because it did not first determine that a change of domicile was warranted. *Id*.

Pursuant to MCL 722.21(1)(c), the trial court "shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." This Court has recognized that at this point in the analysis, the trial court "cannot blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child." *Phillips*, 241 Mich App at 21. However, it is not until the third and fourth steps of the analysis that the court reaches this point, which the court was not required to do in this matter because defendant did not establish by a preponderance of the evidence that a change of domicile was warranted under the first step of the analysis. *Rains*, 301 Mich App at 325.

Therefore, the trial court did not abuse its discretion when it denied defendant's motion to change domicile, and entered the order including the parties' custody and parenting time agreement.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Kelly