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STATE OF MICHIGAN

COURT OF APPEALS

ROSHANNA HARMON, also known as ROSHANNA BROOKE-ROSE RUSSELL,

Plaintiff-Appellee,

v

RYAN MICHAEL HARMON,

Defendant-Appellant.

UNPUBLISHED
November 23, 2021

No. 357227
Ottawa Circuit Court
LC No. 17-085840-DM

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by right the trial court's order granting plaintiff's motion to change the domicile of the parties' three minor children. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

A consent judgment of divorce was entered in March 2018 pursuant to which plaintiff was awarded primary physical custody of the parties' three children, the parties were to share legal custody, and defendant was awarded standard parenting time, which he exercised. The parties and their children resided in Grand Haven at the time of the divorce. In July 2020, plaintiff moved to change the domicile of the children, seeking to relocate herself and the children to Virginia. Defendant opposed the motion, and a hearing was held on the motion to change domicile in September 2020. The trial court granted plaintiff's motion, and plaintiff moved with the children to Virginia in October 2020. Defendant then filed a motion for reconsideration, arguing that the trial court was required to hold a hearing regarding the best-interest factors in MCL 722.23 before changing the children's domicile. The trial court granted defendant's motion and conducted an evidentiary hearing over three days. After hearing testimony by plaintiff, defendant, and three medical providers who had treated one of the children, IH, who has cerebral palsy, the trial court again granted plaintiff's motion to change domicile. Defendant now appeals.

II. ANALYSIS

A. OVERVIEW OF DEFENDANT'S APPELLATE ARGUMENTS

Defendant first argues on appeal that the trial court made findings against the great weight of the evidence when it found that the change-of-domicile factors enumerated in MCL 722.31(4) supported plaintiff's motion and the domicile change. Defendant then contends that the trial court made findings against the great weight of the evidence when it found that the established custodial environment existed solely with plaintiff and that the court erred when it applied the preponderance-of-the-evidence standard to the statutory best-interest factors. Finally, defendant maintains that the trial court made findings against the great weight of the evidence when it assessed the best-interest factors and found that they favored changing the children's domicile.

B. STANDARDS OF REVIEW

We review for an abuse of discretion a trial court's ruling on a motion to change domicile. *Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013). A trial court abuses its discretion only in extreme cases where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Id.* The trial court's underlying findings with respect to the factors set forth in MCL 722.31(4) are reviewed under the "great weight of the evidence" standard. *Id.* "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Pennington v Pennington*, 329 Mich App 562, 570; 944 NW2d 131 (2019). "A trial court's findings regarding the existence of an established custodial environment are [also] reviewed under the great weight of the evidence standard and must be affirmed unless the evidence clearly preponderates in the opposite direction." *Rains*, 301 Mich App at 325 (quotation marks and citation omitted). "[Q]uestions of law are reviewed for clear legal error[,]" and "[a] trial court commits legal error when it incorrectly chooses, interprets, or applies the law." *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014).

C. ANALYTICAL FRAMEWORK

In *Rains*, 301 Mich App at 325, this Court described the proper legal framework in deciding a motion for change of domicile:

> A motion for a change of domicile essentially requires a four-step approach. 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) . . . 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.

D. MCL 722.31

MCL 722.31 provides, in pertinent part, as follows:

> (1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, 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.
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> * * *
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> (4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:
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> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
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> (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.

Defendant first argues on appeal that the trial court made findings against the great weight of the evidence when it found that the change-of-domicile factors enumerated in MCL 722.31(4)(a), (b), (c), and (e) supported plaintiff's motion and the domicile change.

1. 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)

As an initial matter, defendant argues that the trial court erred when it found plaintiff to be a credible witness. We defer, however, to the credibility assessments made by the trial court. *Rains*, 301 Mich App at 329. Defendant recognizes this principle but contends that it is inapplicable because plaintiff contradicted "herself several times on the record about a majority of the facts regarding her reasons for moving to Virginia, such that the [t]rial [c]ourt's account of the evidence [was] not plausible." It is true that our Supreme Court has indicated that a finding purportedly based on a credibility determination may still be assailable on appeal when documents or objective evidence directly contradicts a witness's story or when the story itself is so internally inconsistent or implausible on its face that a reasonable factfinder would not give credit to it. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 791 (1990). But the record does not support application of this exception to the rule that we defer to the court's credibility assessments.

Defendant argues that "simply because the move to Virginia had the ability to increase [plaintiff's] earning potential and allegedly offer her assistance in obtaining a new career does not mean that the move would also benefit the children." In support of this proposition, defendant cites and relies on *Yachcik v Yachcik*, 319 Mich App 24; 900 NW2d 113 (2017). In *Yachcik*, this Court concluded that the record demonstrated that a requested move "had the capacity to increase plaintiff's quality of life both financially and emotionally" and "had the potential of benefitting the child by providing additional funds for private school tuition and family trips . . . ." *Id.* at 46. But the *Yachcik* panel also determined that it was not against the great weight of the evidence for the trial court to find that the move did not have the capacity to increase the child's quality of life overall. *Id.* Although *Yachcik* reflects that there are situations in which an increase in the earning potential of a relocating parent may not be sufficient to find that a requested move has the capacity to increase a child's quality of life, the opinion does not support the proposition that an increase in a parent's earning potential in a new locale can never establish that the relocation has the capacity to increase the child's quality of life. To the contrary, "[i]t is well established that the relocating parent's increased earning potential may improve a child's quality of life[.]" *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007).

In the instant case, the trial court found that plaintiff had obtained employment in Virginia, that she had started taking classes, and that she might be able to obtain financial assistance with respect to pursuing a nursing degree. The trial court opined that the increase in earning potential was a "significant advantage" in favor of plaintiff because both parties were unemployed at the time of the initial hearing in September 2020. Under MCL 722.31(4)(a), the trial court acknowledged that the loss of regular parenting time by defendant as well as the greater distance between the children and their extended family bode against the move. But the trial court's conclusion that plaintiff's increased earning potential in Virginia constituted a significant factor that justified the move was not contrary to the holding in *Yachcik* and was not against the great weight of the evidence. See *Brown v Loveman*, 260 Mich App 576, 602; 680 NW2d 432 (2004) ("The trial court believed that defendant's increased earning capacity and the cultural advantages of New York City had the capacity to improve the life of defendant and [the child] more than remaining in Ann Arbor and retaining [the child's] bond with plaintiff's children. The trial court's findings of fact are not against the great weight of the evidence.").

The trial court indicated that the focus of the evidentiary hearing following reconsideration was on the medical care received by IH. The trial court critiqued both parties' roles in obtaining medical care for IH, determining that the problems with the care stemmed largely from a lack of communication between the two parties. The trial court concluded that the problems concerning IH's medical care weighed equally against both parties. On appeal, defendant asserts that the testimony by Dr. Lisa Voss, a pediatric physiatrist, regarding IH's treatment directly contradicted the trial court's finding that both parties were equally to blame for any shortcomings in IH's medical care.

Dr. Voss did testify about some concerns that she had regarding IH's recent medical treatment, but her testimony did not establish that the trial court's stance was against the great weight of the evidence. Dr. Voss testified that it was critical that defendant be involved in IH's medical treatment and care. It appears, however, that Dr. Voss simply believed that it was critical for any caregiver to be involved in IH's medical treatment. This is evident when her testimony is read in context.[1] Dr. Voss did express concern about whether IH was wearing his brace while not in defendant's care, but that alone did not establish that the trial court's decision was against the great weight of the evidence. There was evidence that plaintiff had pursued medical care for IH in Virginia, which included a new prescription medication and Botox treatment.

Plaintiff testified that she was employed and was taking classes full-time at a community college, and she provided information on available financial assistance. Defendant testified that he had not been made aware of IH's medical treatment after the move to Virginia, but defendant also testified that he had intentionally not told plaintiff about medical appointments for IH. On review of the record, the trial court's conclusion under MCL 722.31(4)(a) that the move to Virginia had the capacity to improve the quality of life for both the children and plaintiff was not against the great weight of the evidence.

> 2. 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 – MCL 722.31(4)(b)

The trial court found that both plaintiff and defendant had shown a motivation to defeat or frustrate the other parent's parenting time. On appeal, defendant argues that this finding was against the great weight of the evidence. In support, defendant points to evidence that plaintiff (1) intentionally omitted defendant's name from the children's school and medical forms, (2) did not list the children's legal last name on her Virginia lease, and (3) wrongly believed that defendant

[1] Dr. Voss testified, "I think its critical that his father is involved in his medical treatment. I think anybody who is under—who cares for [IH] should be aware of all of his medical treatments because otherwise harm could come to [IH]."

was dangerous and would abuse the children. Defendant also contends that there was no evidence presented that he had tried to defeat or frustrate plaintiff's parenting time.

Many of the issues raised by defendant on appeal pertain to alienation and do not relate directly to whether plaintiff's move was inspired by a desire to defeat defendant's parenting time. The inquiry relative to this factor is fairly narrow, focusing on the *inspiration* for a parent's move and whether the move was inspired by a desire to defeat the other parent's *parenting time*. See MCL 722.31(4)(b). The actions or conduct that defendant complains about do not demonstrate a desire by plaintiff to defeat his parenting time.

There was some evidence that plaintiff had attempted to defeat defendant's parenting time. Plaintiff obtained an ex parte order that prevented defendant from exercising his parenting time during Thanksgiving 2020. Plaintiff had also expressed a number of concerns with having the children in defendant's care. When asked if one of the reasons she moved to Virginia was to alienate the children from defendant, plaintiff stated that she moved to Virginia to give her children a better life "and if that requires [defendant] to not be an everyday part of it, then, by gosh, yes, I did, but that is not why I moved down here as my main reasons for moving."

On the other hand, plaintiff suggested a new parenting-time schedule that included roughly the same number of parenting-time days for defendant as the pre-move schedule had included. And it appears from the record that defendant's parenting time scheduled for Christmas 2020 and Spring break 2021 occurred as scheduled. Although the relationship between plaintiff and defendant is certainly contentious, we cannot conclude that it was against the great weight of the evidence for the trial court to find that plaintiff's move to Virginia was not inspired by her desire to defeat or frustrate the parenting-time schedule.

> 3. 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 – MCL 722.31(4)(c)

In *McKimmy v Melling*, 291 Mich App 577, 583; 805 NW2d 615 (2011), this Court discussed MCL 722.31(4)(c), observing:

> Implicit in factor (c) is an acknowledgement that weekly visitation is not practicable when parents are separated by state borders. Indeed, when the domicile of a child is changed, the new visitation plan need not be equal with the old visitation plan, as such equality is not possible. The new visitation plan only need provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the nonrelocating parent. This Court has previously opined that perhaps extended periods of visitation will foster, not hinder, a closer parent-child relationship. In applying factor (c), a trial court should consider the financial feasibility of the new visitation plan and the ages of the children, as well as the use

> of modern technology. The separation between a parent and a child can be diminished by the use of modern communication technology. [Quotation marks, citations, and brackets omitted.]

The trial court found that the proposed long-distance, parenting-time schedule would adequately preserve and foster the parental relationships with the children and acknowledged that the frequency of defendant's parenting time would decrease because of the distance between defendant and the children following the move. Defendant argues that this finding was against the great weight of the evidence because the trial court failed to account for plaintiff's history of interference with defendant's parenting time. Defendant highlights evidence that (1) contact between defendant and the children had been "sporadic" since the move to Virginia, (2) the contact between defendant and the children, when it occurs, is only for a short duration, (3) plaintiff refused to allow defendant to exercise his parenting time on October 1, 2020, and (4) defendant had no contact with the children for the first two weeks after they moved to Virginia.

As the trial court acknowledged, the move to Virginia would require a change to defendant's parenting-time schedule. Instead of shorter, weekly parenting time, the new schedule would provide for longer, less frequent parenting time. Defendant originally had parenting time for three hours every Tuesday and Thursday, along with every other weekend. Under the new parenting-time schedule, defendant has the children for eight weeks every summer, one week every Spring break, and one week during Christmas break. The trial court cited the principles quoted above from *McKimmy*, concluding that the new parenting-time plan provided a realistic opportunity to preserve and foster the parental relationships previously enjoyed by the nonrelocating parent, defendant. We cannot conclude that the trial court's finding was against the great weight of the evidence. Defendant's complaints chiefly concern problems in the transition immediately following the move and matters that might give rise to contempt but do not undermine the court's ruling. Reversal is unwarranted.

> 4. DOMESTIC VIOLENCE, REGARDLESS OF WHETHER THE VIOLENCE WAS DIRECTED AGAINST OR WITNESSED BY THE CHILD – MCL 722.31(4)(e)

The trial court found that both parties showed some inability to control their language or emotions during the court proceedings and that this factor supported the change in domicile because the court reasoned that greater distance between the parties and fewer parenting-time exchanges would reduce the potential for conflict. On appeal, defendant argues that his behavior should not have been held against him because it reflected a "reasonable and understandable" reaction to plaintiff's conduct.

Defendant does not argue that the trial court's finding about defendant's conduct was inaccurate. It is difficult for this Court to review the trial court's finding on this point, because the transcript alone does not give a full picture of the emotion referred to by the trial court. But the transcript does show *both* parties interrupting at various times throughout the proceedings. On the basis of this record, we cannot conclude that the trial court's finding that both parties were unable to control their language and emotions was against the great weight of the evidence. Moreover, actual "domestic violence" does not appear to have been made an issue on this factor.

In sum, the trial court did not err when it found that the factors enumerated in MCL 722.31(4) supported the change of domicile under a preponderance-of-the-evidence standard.

E. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant next argues that the trial court's finding that the established custodial environment existed with plaintiff and not defendant was against the great weight of the evidence. We disagree.

"The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). When determining whether an established custodial environment exists, the trial court must also consider the "age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship." *Id.* In *Mogle v Scriver*, 241 Mich App 192, 197-198; 614 NW2d 696 (2000), this Court stated:

> Defendant argues that the trial court should have found that an established custodial environment existed with respect to both parties, not just with plaintiff. An established custodial environment is one of significant duration in which the relationship between the custodian and child is marked by qualities of security, stability and permanence. An established custodial environment, however, need not be limited to one household; it can exist in more than one home.
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> We conclude that the trial court did not err in determining that [the minor child] Kaylah had an established custodial environment with plaintiff only. Trial testimony revealed that defendant became involved in Kaylah's life and helped to provide for her care. The trial court noted that the parties' sacrifice and work reflect great credit to all concerned. Nevertheless, Kaylah lived with plaintiff almost exclusively for the first two years of her life, and thereafter she continued to spend the majority of her days and nights with plaintiff. The testimony at trial did not clearly preponderate in defendant's direction, and the trial court did not err in finding that an established custodial environment existed with plaintiff only. [Quotation marks and citations omitted.]

In the instant case, the trial court found that an established custodial environment existed with plaintiff and that one did not exist with defendant. With respect to defendant, the trial court found that he had not shown a level of involvement with the children that would demonstrate or create an established custodial environment. The trial court acknowledged that defendant presented evidence that he was actively involved in IH's medical care, but there was very little evidence presented in regard to the other two children, XH and EH. The trial court found that defendant's involvement in the medical care of one of the children was not adequate to show that there existed an established custodial environment with the three children.

On appeal, defendant argues that the trial court's finding was against the great weight of the evidence. Defendant contends that the trial court ignored defendant's involvement in the schooling and therapy of XH and his similar level of involvement in the life of EH.

There was evidence that defendant had at least some involvement in the children's lives. The record reflects that defendant participated in some of IH's medical care, including taking IH to medical appointments. The record also reveals that defendant was involved in some of XH's therapy and tutoring. Aside from some cancellations due to COVID-19, defendant regularly exercised his parenting time, and there were occasions when, by agreement of the parties, defendant extended his mid-week parenting time to include overnights. On the other hand, there was evidence that even before the move to Virginia, the children spent the majority of their time in the care and custody of plaintiff, where they received guidance, discipline, the necessities of life, and parental comfort in relationships with their mother marked by qualities of security, stability, and permanence.

The vast majority of the testimony was focused on IH's medical care, and there was very little evidence presented regarding the other two children. As the trial court noted, testimony regarding the medical care of IH did not single-handedly establish that defendant had been involved in all of the children's care, comfort, discipline, and guidance. Although the record reflects some involvement in the children's lives by defendant, especially in the case of IH and his medical care, it does not demonstrate that the trial court's finding that an established custodial environment did not exist with defendant was against the great weight of the evidence. There simply was minimal evidence showing that the children looked to defendant for guidance, discipline, the necessities of life, and parental comfort. The trial court's determination that an established custodial environment existed only with plaintiff was not against the great weight of the evidence.

F. BEST-INTEREST FACTORS

Because the trial court did not err in finding that the established custodial environment existed solely with plaintiff, and because a change of domicile to Virginia does not alter that established custodial environment, it was unnecessary for the trial court to even assess the best-interest factors. See *Rains*, 301 Mich App at 325. Accordingly, the trial court's findings on the best-interest factors are irrelevant to our analysis, are moot, and need not be addressed.

We affirm. Having fully prevailed on appeal, plaintiff may tax costs under MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Michael J. Riordan