STATE OF MICHIGAN

COURT OF APPEALS

SCOTT KEVIN PECK, Plaintiff-Appellee,	UNPUBLISHED March 8, 2012
v	No. 306329 Clare Circuit Court Family Division
SARAH CATHERINE PECK a/k/a SARAH CATHERINE CLINARD, Defendant-Appellant.	LC No. 07-900331-DM

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

In this child custody dispute involving both natural parents, defendant appeals as of right the circuit court's order denying her motion for change of domicile and granting sole physical custody to plaintiff. We reverse and remand.

I. BASIC FACTS

Plaintiff and defendant share joint legal custody of their son, with defendant having sole physical custody and plaintiff receiving parenting time every other weekend. Plaintiff has consistently exercised his parenting time with his son.

In April 2011, defendant moved the circuit court for permission to change her son's domicile from Midland, Michigan to Fayetteville, Arkansas, where she had accepted a lateral transfer with her employer. Defendant proposed a modified parenting time schedule for plaintiff, providing him with 7 to 12 visits per year, including all holidays and the entire summer, for a total of 95 to 98 overnights, in addition to frequent telephone and Skype contact. Although plaintiff only received 87 overnights under the schedule then in place, he believed the proposed plan would reduce his parenting time because he would be unable to participate in day-to-day events, such as doctor visits, sporting events, and school functions. Plaintiff argued that defendant's move constituted a change in circumstances and that it was in their son's best interests that he be given sole physical custody.

The parties appeared before a referee who denied both motions. Both parties objected and requested a de novo review by the circuit court. They stipulated that the circuit court could make its determination based on the transcripts and exhibits from the referee hearing.

The circuit court denied defendant's motion for change of domicile. The circuit court concluded that, while the proposed move was not based on defendant's desire to defeat plaintiff's parenting time, however, the move to Arkansas would not improve the child's quality of life. In support of that conclusion, the circuit court found that the move would result in a loss of access by the child to his extended family here in Michigan, and that defendant's lateral job move, even though it involved a raise, would not provide a better quality of life for defendant and that any potential future job advancement was speculative. The circuit court also noted its confidence that the parties would comply with a modification of plaintiff's parenting time, if a change of domicile was granted, but nevertheless, held that "[n]o order of this Court as to plaintiff's parenting time could provide the kind of positive, intimate and regular parenting time he has enjoyed."

Next, the circuit court granted plaintiff's motion to change custody. The circuit court determined that defendant's move to Arkansas was a change in circumstances sufficient to revisit custody. After evaluating the statutory best interest factors, MCL 722.23, the circuit court concluded that the parties were equal on all except factor (d) (continuity), factor (j) (facilitating a relationship), and factor (*l*) (any other factor), for which it concluded plaintiff held the advantage. On the basis of these findings, the circuit court granted plaintiff's motion to change custody and awarded sole physical custody of the minor child to the plaintiff..

On appeal, defendant argues that the circuit court's order denying her motion to change domicile and granting plaintiff's motion to change custody were both against the great weight of the evidence.

II. STANDARD OF REVIEW

"We review a trial court's ultimate decision whether to grant a motion for change of domicile for an abuse of discretion." *McKimmy v Melling*, 291 Mich App 577, 581; 805 NW2d 615 (2011). 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 v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

> However, the trial court's findings of fact regarding the statutory change of domicile factors are reviewed under the great weight of the evidence standard. Under this standard, [this Court] may not substitute [its] judgment on questions of fact unless the facts clearly preponderate in the opposite direction. But where a trial court's findings of fact may have been influenced by an incorrect view of the law, . . . review is not limited to clear error. [*McKimmy*, 291Mich App at 581, (citations omitted).]

Clear legal error occurs when a trial court "incorrectly chooses, interprets, or applies the law." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003) (quotation marks and citations omitted).

III. ANALYSIS

"A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent" and neither parent may "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." MCL 722.31(1). However, subsection (1) is inapplicable "if the other parent consents to, or if the court, after complying with subsection (4), permits, the residence change." MCL 722.31 (2); see also *McKimmy*, 291 Mich App at 581-582. MCL 722.31(4) provides as follows:

> 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:
>
> (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.

The parties agree that only factors (a), (b), and (c) are at issue in this case. Defendant, as the party requesting the change of domicile, has the burden to establish by a preponderance of the evidence that the change is warranted. *McKimmy*, 291 Mich App at 582.

The circuit court held:

> Defendant's move to Arkansas prior to her filing her motion seeking to change the child's domicile does not necessarily have the capacity to improve either her or her son's quality of life. As previously stated, her Arkansas employment is nearly identical to her prior employment in Michigan. The Court does not embrace a child's domicile change to another state under these facts based on speculation or conjecture. The child's quality of life vis á vis [sic] his

> mother's new job is the same if not lesser than it was in Michigan. The child would, to his detriment, no longer have regular contact with his extended family, all of whom reside in Michigan. The Friend of the Court record does not support the conclusion that better educational opportunities would be afforded to [the child] to address his ADHD and reading deficiencies in Arkansas.
>
> Plaintiff has complied with and made use of every opportunity reasonably available to exercise parenting time as provided in the judgment. As to whether defendant's plan to change [the child's] residence to a city nearly a thousand miles from his prior home was inspired by defendant's desire to frustrate the father's parenting time schedule the Court concludes she has not done so, rather, this move appears to be motivated by her own somewhat selfish desires. Her ambition is what has driven this move.
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> While some Michigan case law seems to embrace, at least partially, virtual parenthood, this Court does not. No order of this Court as to plaintiff's parenting time could provide the kind of positive, intimate and regular parenting he has enjoyed. It would not be possible for him to attend IEPC's, watch [the child's] athletic events, or share close father-son interaction. On the other hand, if the move would be approved the Court is confident both parents would comply with a modification of plaintiff's parenting time. . . .
>
> Based upon the Court's transcript review per stipulation and its conclusions and with the parties' son as the Court's primary focus the request to move the child's residence to Arkansas is denied.

Looking first at factor (a), the circuit court clearly erred in several respects. First, its holding that defendant "move[d] to Arkansas prior to filing her motion" is unsupported by the record.

In addition, the circuit court's conclusion that the change in domicile would not improve defendant's or the child's life is against the great weight of the evidence. According to the record, defendant received a one-time bonus of $4,500 and her company purchased her home. Although defendant received only a minimal raise of $2,500, her retirement benefits and insurance are based on her salary, so both of those benefits increased as well. "It 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; 730 NW2d 262 (2007). In addition, defendant testified that, although the change was a lateral move, she would have more opportunities for advancement and be closer to the counties she was serving, requiring less travel. Although the testimony was uncontradicted, the circuit court dismissed it as "speculation and conjecture." Given that defendant has worked for her employer for 11 years, she would clearly be familiar with the inner workings of the company. The circuit court stated no basis on which to discredit defendant's testimony, and given that the circuit court was not hearing live testimony, but acting more as a reviewing court, there was no basis to find defendant's testimony on this point lacking in credibility.

The circuit court also improperly focused on the fact that the move would remove the child from his extended family in Michigan. Because this will always be the case where a move takes a child out of state, "the role of the extended family cannot be the determining factor in denying a change of domicile." *Phillips v Jordan*, 241 Mich App 17, 31; 614 NW2d 183 (2000). Furthermore, the trial court failed to address the child's close relationship with his 2-year-old half-brother and how denying the change in domicile would affect their bond. "The sibling bond and the potentially detrimental effects of physically severing that bond should be seriously considered . . . ." *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440; 538 NW2d 57 (1995). "[I]n most cases it will be in the best interests of each child to keep brothers and sisters together." *Id.* at 440.

We agree with the circuit court that the record does not support that the educational opportunities would necessarily be better in Arkansas. However, the great weight of the evidence does support a finding that the schooling would be more than adequate to provide the child with what he needs to address his developmental issues, and as such, the move would not have a negative impact on the child's education.[1] Furthermore, it is clear from the record that it is defendant who takes the initiative for testing for the child's medical, behavioral, and developmental issues and is generally the better advocate. We do not suggest that plaintiff is irresponsible; simply that defendant is more proactive.

In sum, the circuit court's conclusion that the move would provide the child with a lesser quality of life is against the great weight of the evidence. Furthermore, the record as a whole evidences that the change of domicile would improve the quality of life for both defendant and the child. Thus, defendant met her burden with respect to factor (a) to show that the change in domicile was warranted.

Looking at factor (b), none of the circuit court's conclusions appear erroneous. Plaintiff certainly utilized every opportunity to exercise parenting time and there is no indication that defendant was attempting to move to frustrate plaintiff's exercise of parenting time. The record supports that professional opportunities available to defendant was the motivating factor behind the move. However, there is nothing inherently wrong with ambition being the motivator to take a job that will require moving out of state. Thus, to the extent that this conclusion was considered a negative in the circuit court's calculus of whether the change of domicile was warranted, that conclusion was erroneous.

Finally, the circuit court's determination as to factor (c) evidences both legal error and an abuse of discretion. First, the circuit court committed clear legal error by refusing to consider the proposed parenting time plan defendant was suggesting on its own merits. Instead, it would only consider it in comparison to what the minor child currently received and determined that "[n]o order of this Court" could provide the equivalent. However,

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[1] Plaintiff's representation that the child must repeat kindergarten because of defendant's move is not in keeping with the record. The record reveals that the parties attended a meeting at the school whereby the school recommended, and the parties agreed, that the child should repeat kindergarten, and that the meeting and recommendation took place prior to defendant's move.

> [i]mplicit in factor (c) is an acknowledgement that weekly visitation is not possible 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. [*McKimmy*, 291 Mich App 583.]

As in *McKimmy*,

> the trial court failed to recognize that the parenting time plan proposed by [the moving parent] need not be equal with the current visitation plan. . . . The trial court essentially compared [the] proposed parenting time schedule with the current visitation, and found that the current plan was in the best interests of the [children]. But the inquiry under factor (c) is not which plan, the current visitation plan or the proposed schedule, is the best plan. Rather, the inquiry is only whether the proposed parenting time schedule provides "a realistic opportunity to preserve and foster the parental relationship previously enjoyed" by the nonrelocating parent. [*Id.*]

Therefore, the circuit court committed clear legal error by comparing the two plans rather than evaluating defendant's plan on its own merit.

Additionally, the circuit court's conclusion that "no order" would be sufficient and that it did not even partially subscribe to the notion of virtual parenthood was an abuse of discretion. Defendant's testimony was that plaintiff would receive a week of visitation every month, plus summers and holidays. Also, defendant offered to take care of all the scheduling and all of the expense—providing for travel either by plane or car, with plane travel supervised by herself or her husband, and car travel by either them or her parents. Under these circumstances, the circuit court's assertion that "no order of this Court as to plaintiff's parenting time" could ever measure up to what plaintiff currently received implies that the circuit court had pre-determined that it would never approve a transfer of domicile out of state, regardless of the significant actions defendant was proposing to undertake to foster the relationship between plaintiff and the child. Furthermore, the circuit court held that "[a]lthough some Michigan case law seems to embrace, at least partially, virtual parenthood, this Court does not." Thus, the circuit court indicated a complete prohibition to any plan that intended to use modern technology to diminish separation, without providing any analysis of the individual plan itself, a strong inference that as far as the circuit court was concerned, no plan involving technology would ever be good enough, and no technology ever acceptable. A denial under these circumstances is not an exercise in discretion, but a failure to exercise discretion. See *Reith v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998) (noting that a trial court's failure to exercise its discretion, when properly asked to do so, is itself an abuse of discretion).

In evaluating factor (c), the circuit court focused on the fact that plaintiff would not be able to be involved in the day-to-day details. However, the record did not support a finding that plaintiff had been engaged in active involvement in day-to-day details of the child's life. Plaintiff's testimony showed that he attended only "a couple" soccer games and no hockey

games based on the current distance. Plaintiff would attend some school meetings and some doctor's appointments, although it had been six months since he had taken his son to the doctor. Generally, however, plaintiff's interaction consisted of exercising his alternating weekends, which resulted in 87 overnights in 2010. Defendant's proposed schedule permitted frequent telephone and Skype conversations, as well seven extended visits per year. She offered every Christmas, Easter, and Thanksgiving, every holiday, and the entire summer. The plan would provide plaintiff with 98 overnights—more than under the present plan.

Plaintiff contends that the child will suffer from having to spend all of his time traveling 1,900 miles seven times per year as opposed to traveling the hour and a half to Grayling under the current plan. However, because defendant's move is permanent, trips of 1,900 miles are likely in the child's future regardless of which parent has primary custody. Further, plaintiff's argument ignores the fact that the child was already traveling 180 miles (90 miles each way) at least every other weekend. Plaintiff's assertion that seven long trips would cause the child to "suffer" more than the numerous shorter ones undertaken when both parties were living in Michigan is unsupported by the record. Under the circumstances, defendant's proposed plan provides a realistic opportunity to preserve and foster the parental relationship between plaintiff and the child.

Because the record showed by a preponderance of the evidence that the change of domicile would improve the quality of life for defendant and the child, that the change of domicile was not inspired by an intent to defeat plaintiff's parenting time, and that the proposed parenting-time schedule provided an adequate basis for preserving and fostering the relationship between plaintiff and the child, the circuit court erred in concluding that the change of domicile was unwarranted.

Defendant next argues that the circuit court erred in changing physical custody of the child from her to plaintiff. We agree.

> "[A]ll custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005). Clear legal error occurs when a trial court "incorrectly chooses, interprets, or applies the law." *Id.* (citation and internal quotation marks omitted). [*Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008) (alteration by *Powery* Court).]

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.

Defendant does not challenge that her move constituted a change in circumstances, and plaintiff does not contest the trial court's conclusion that the child had an established custodial environment with defendant. Therefore, plaintiff bore the burden of proving by clear and convincing evidence that the change in custody was in the child's best interest. *Powery*, 278 Mich App at 527-528.

In making a determination of a child's best interests, a trial court must consider the factors contained in MCL 722.23. Defendant has accepted the circuit court's determination that the parties were equal as to factors (a), (b), (e), (f), (g), (h), (i), and (k), and only disputes the decisions as to factors (c), (d), (j) and (*l*). Accordingly, we have limited our analysis to those factors.

Factor (c) is "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c). The circuit court found: "Both parties are fully employed. Their son will not go without the necessities of life as alluded to in this factor regardless of who is the physical custodian. Plaintiff and defendant are equal in this factor."

Defendant contends that this factor favors her based on the evidence that she has been the child's advocate for medical care and development testing. Although the record does support that defendant has taken the lead in this regard, there is no evidence to suggest that plaintiff does not have the capacity and disposition to do so. Thus, although there is certainly evidence that would have supported a conclusion that this factor favored defendant, the evidence does not preponderate toward that conclusion. There is no error.

Factor (d) is "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court concluded: "This factor favors plaintiff. Defendant has moved to Arkansas. She wishes to subject her son to an entirely new environment. The current non-custodial parent has an established residence in Grayling which the child is familiar with. This factor favors plaintiff."

Defendant argues that this factor does not favor plaintiff because, whether the child lives in Arkansas or Grayling, he will be living in a new home and attending a new school. We agree, and find that this factor favors neither party. Although the child previously had stability and continuity with defendant, defendant has moved to Arkansas. And although the child had previously visited with plaintiff in Grayling, it was not his established custodial environment. Therefore, regardless of the location of the primary custodial home, the child will experience a change in housing and schooling. We agree with the circuit court that plaintiff's home is "established" in the sense that the child has been there before so it is less of a change. However, neither parent is maintaining continuity. Accordingly, the circuit court erred in concluding that this factor favored plaintiff. It favors neither party.

Factor (j) is "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). The circuit court concluded:

> As to this matter the Court finds there is an advantage to plaintiff. The Friend of the Court hearing transcript discloses that defendant has consistently failed to appropriately engage plaintiff concerning legal custodial issues. It has also been noted, however, that plaintiff has not complained about defendant's failure to engage him relative to such matters. Nevertheless, the Court concludes that defendant shares information with plaintiff but it is often after the fact. She on

> occasion makes legal decisions about the child and then advises the father as to what has been decided. On the other hand, defendant articulates she appreciates the importance of the father's involvement in the minor's life. For instance, she mentions the Donuts with Dad program at the child's school, St. Brigid. Nevertheless, it is obvious defendant has been very assertive concerning planning for this young child and has not permitted or sought appropriate input from plaintiff before such decisions are made. While plaintiff has been passive about this situation, he still has the advantage as to this provision.

The record does not support that plaintiff has the advantage on this provision. Although there is evidence that defendant tends to make decisions and only tells plaintiff about them after the fact, we conclude that totality of the evidence shows that both parents foster the relationship of the child with the other parent. Both testified that they would do whatever was necessary and whatever the court ordered them to do. Both testified that, prior to the move to Arkansas becoming an issue, they had been able to talk frequently about the child. The great weight of the evidence is that the parties were equal in this factor.

Factor (*l*) is "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(l). The trial court held:

> Defendant has sold her residence, purchased a new residence in Arkansas, moved permanently to Arkansas, and accepted a position with her current employer in Arkansas nearly identical to the job she had in Midland. She is not returning to Michigan. These facts leave to a large advantage in favor of plaintiff under this miscellaneous provision. The child's extended family both maternal and paternal, pursuant to the record reviewed by this Court, all reside in Michigan.

Defendant argues that the circuit court is attempting to penalize her for her move. She notes that there would be no way for her to move back to Michigan, no matter how badly she wants to after the trial court's ruling. Regardless of whether defendant is correct about the circuit court's motives, the circuit court's findings on this factor are true and relevant to a determination of custody. However, defendant is correct that the trial court failed to consider the child's brother in Arkansas, even though it mentioned the extended family in Michigan. While this is problematic, it does not necessarily change the balance of this factor in defendant's favor. There is nothing erroneous about the circuit court finding factor (*l*), as framed, favored plaintiff.

Accordingly, the circuit court should have concluded that the parties were equal on all the factors, except (*l*), which favors plaintiff. As previously noted, plaintiff bore the burden of proving by clear and convincing evidence that changing primary physical custody to him was in the child's best interests.

> Neither the circuit court nor this Court is required to "mathematically assess equal weight to each of the statutory factors." [*McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998)]. Nor does a finding regarding one factor necessarily countervail the findings regarding the other factors. *Winn v Winn*, 234 Mich App 255, 263; 593 NW2d 662 (1999). [*Pierron v Pierron*, 282 Mich App 222, 261; 765 NW2d 345 (2009).]

At the same time, findings of equality or near equality on a factor do not necessarily prevent plaintiff from satisfying his burden of proof. *Id.*

Factor (*l*) related solely to defendant's move—a move which we have concluded was warranted because defendant established the move would improve the child's quality of life. In light of our analysis, we conclude that plaintiff failed to satisfy his burden of proof that a change of custody is in the child's best interests. Accordingly, the circuit court erred in granting plaintiff's motion.

Although this Court remanded a similar case back to a trial court where legal error was present, see *McKimmy*, 291 Mich App at 585, we find remand unnecessary in the present case for several reasons. First, given the nature of custody proceedings and how long court proceedings take, a remand with the chance of another appeal will needlessly lengthen this process and the parties, particularly the child, should have some certainty and stability. Second, because the circuit court did not hold new hearings but made its decision based on the record of the proceedings before the referee, the circuit court has made no credibility determinations and possessed no more information than is already before this Court. See *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 265 Mich App 185, 220-221; 693 NW2d 850 (2005) (Whitbeck, J., dissenting).

III. CONCLUSION

We reverse the circuit court's denial of defendant's motion to change domicile and its grant of plaintiff's motion to change custody, and remand for entry of an order granting the change of domicile and denying plaintiff's motion to change custody. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot