STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW A DUNKLE, Plaintiff-Appellant,	UNPUBLISHED July 9, 2013
v	No. 313127 Clare Circuit Court
KATHERINE DUNKLE, Defendant-Appellee.	LC No. 12-900087-DM

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by right from the judgment of divorce arising from a trial on the merits which granted defendant sole physical custody of their minor child and which permitted defendant to move with the child from Michigan to North Carolina. For the reasons set forth below, we affirm.

I. STANDARDS OF REVIEW

Three standards of review apply to child custody disputes. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). First, this Court reviews factual findings, such as the existence of an established custodial environment, under the great weight of the evidence standard. *Id*. A trial court's findings should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id*. Second, this Court reviews a trial court's discretionary rulings on issues such as the ultimate custody and change of domicile for an abuse of discretion. *Id*. Finally, this Court reviews questions of law for clear legal error and a trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id*.

> This Court reviews a trial court's decision on a petition to change the domicile of a minor child for abuse of discretion. An abuse of discretion is found only in extreme cases in which 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. [*Rittershaus v Rittershaus*, 273 Mich App 462, 464-465; 730 NW2d 262 (2007) (citation and quotation marks omitted).]

However, this Court reviews a trial court's factual findings in applying the statutory change of domicile factors under the great weight of the evidence standard. *Gagnon v Glowacki*, 295 Mich App 557, 565; 815 NW2d 141 (2012).

II. ANALYSIS

A. CHANGE OF DOMICILE AND ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff first argues that the trial court erred when it granted defendant's request to move with the child to North Carolina, and that an established custodial environment existed with defendant alone. We disagree.

As this Court recently explained:

> A motion for a change of domicile essentially requires a four-step approach. First, a trial court must utilize a preponderance of the evidence standard when determining whether 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 will modify or alter the child's established custodial environment, the trial court, utilizing a clear and convincing standard, must determine whether the change in domicile would be in the child's best interests applying the best interest factors, MCL 722.23. [*Rains v Rains*, ___ Mich App ___; ___ NW2d ___ (Docket No. 312243, issued June 14, 2013, slip op, p 7).

Indeed, "[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 [a] court must determine whether an established custodial environment exists." *Rains*, ___ Mich App at ___ (slip op at 8) (citation omitted, emphasis in original). In the instant case, the trial court improperly considered whether an established custodial environment existed before it considered defendant's request to move to North Carolina. However, because the trial court properly granted defendant's request to move to North Carolina and did not err with regard to the established custodial environment, any error with regard to the trial court's sequence of considerations is harmless. We, however, will address these issues in the order instructed by *Rains*, ___ Mich App at ___ (slip op at 8) (citation omitted).

1. CHANGE OF DOMICILE FACTORS

The change of domicile factors are:

> (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.
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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.
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> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

In the instant case, defendant met her burden to show by a preponderance of the evidence that a change in domicile was proper under these factors. *Rains*, ___ Mich App at ___ (slip op at 7, 8). First the trial court noted that defendant had both a job and a housing opportunity waiting for her in North Carolina. There was no evidence introduced that she had a similar opportunity in Michigan. The trial court held that the move would improve the quality of life for defendant and the child, MCL 722.31(4)(a), stating it would have "more than a little chance of providing the child with a greater capacity for her wellbeing." Accordingly, the first factor favors approval of the change of domicile. Second, the trial court found that the move was not being proposed to frustrate parenting time. There was no evidence introduced that either parent had interfered with the parenting time of the other during the months prior to trial when they had a temporary parenting order. MCL 722.31(4)(b). Accordingly, the second factor favors allowing the move. Third, in the order from which appeal is taken the trial court granted plaintiff visitation every summer, during Christmas and spring breaks, and over alternating Thanksgivings. The court ordered defendant to pay for all of the child's travel to and from plaintiff. Accordingly, the trial court was apparently satisfied that the move would not impact plaintiff's ability to have a meaningful relationship with his daughter, MCL 722.31(4)(c), and we cannot conclude that this determination was against the great weight of the evidence. The trial court did not make any findings with regard to whether the move was designed to secure a financial advantage over plaintiff, MCL 722.31(4)(d); however, we cannot find any evidence in record that the move was designed to gain a financial advantage over plaintiff. Finally, although the trial court noted that defendant alleged domestic violence, MCL 722.31(4)(e) the court explicitly did not credit that testimony.

In light of the fact that all of the change of domicile factors favor granting the change of domicile, we conclude that defendant has met her burden to show by a preponderance that the change of domicile is warranted. *Rains*, ___ Mich App at ___ (slip op at 7, 8). To the extent the trial court made specific findings on the factors, those findings were not against the great weight of the evidence, *Gagnon*, 295 Mich App at 565, and its ultimate decision to permit defendant to move was not an abuse of discretion. *Rittershaus*, 273 Mich App at 464-465

2. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff argues that the trial court erred by determining that an established custodial environment existed with defendant only. We disagree.

> [T]he 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

If an established custodial environment exists, "then the burden is on the parent proposing the change to establish, by clear and convincing evidence, that the change is in the child's best interests." *Id.;* see also MCL 722.27(1)(c).

In the instant case, plaintiff served out of state in the military during the first 11 months of the child's life and was in Michigan for approximately 14 months after he left the military. However, plaintiff has not offered any evidence that since his return from the military the child looked to him more than defendant for "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). By contrast, defendant brought evidence that she was the child's primary caretaker even after plaintiff returned from his military service. She introduced evidence that she brought the child to church on a weekly basis and that she appeared to others to be an appropriate parent. Defendant also offered evidence that she regularly took the child to her doctor's appointments, whereas plaintiff has only attended two doctor's appointments. Plaintiff, by contrast, called only one witness at trial and that witness did not address this factor. Although the trial court found that plaintiff was a good father who had taken advantage of parenting time opportunities under the temporary order, the trial court concluded that the established custodial environment was with defendant and not plaintiff. Accordingly, we cannot conclude that the trial court's conclusion was against the great weight of the evidence. See *Phillips*, 241 Mich App at 20.

Plaintiff argues that the trial court "fail[ed] to note any analysis of whether [p]laintiff also has an established custodial environment" in addition to defendant. We disagree. Plaintiff fails to cite any authority for the proposition that the trial court is required to conduct a separate analysis on the record explaining why a custodial environment does not exist with a second parent after having already determined that an established custodial environment exists with the first. Accordingly, plaintiff has abandoned this argument. *Villadsen v Mason Co Rd Com'n*, 268 Mich App 287, 303; 706 NW2d 897 (2005). Plaintiff also argues that the trial court improperly relied on plaintiff's military service when determining that there was an established custodial environment with defendant. Indeed, MCL 722.27(1)(c) specifies that military service time cannot be considered by a trial court when it makes its determination with regard to the established custodial environment. However, our review of the transcript indicates that the trial court squarely acknowledged that it could not consider plaintiff's military service and did not do so when making its determination. Although the trial court acknowledged that plaintiff "wasn't around much" and that defendant was the child's primary caretaker while plaintiff was in the military, the court also noted that it "certainly [was] not [plaintiff's] fault" that he was not around much because of his service; significantly, the court noted that *even since* plaintiff's return from

the military the established custodial environment was with defendant. In other words, the Court found that even putting aside defendant's military service, the established custodial environment was with defendant, and we cannot conclude that this conclusion was against the great weight of the evidence. See *Phillips*, 241 Mich App at 20.

Plaintiff also appears to argue that the trial court erred by concluding that an established custodial environment existed with defendant because there was a temporary order granting joint custody. However, this Court has held that trial court should not "presume an established custodial environment by reference only to the temporary custody order, but [should] look into the actual circumstances of the case." *Curless v Curless*, 137 Mich App 673, 676-677; 357 NW2d 921 (1984); see also *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004) (party not required to show proper cause or change of circumstance from a temporary custody order). Indeed, temporary custody orders are not dispositive on the trial court's ultimate decision regarding to whom to award custody, and plaintiff's argument accordingly lacks merit.

Having determined that an established custodial environment existed with defendant, plaintiff bore the burden to show by clear and convincing evidence that a change in custody, either to joint custody or to grant the sole physical custody to him as he requested, would be in the child's best interest. *Pierron*, 486 Mich at 92. The trial court applied the best interest factors and determined that there was not clear and convincing evidence to change the established custodial environment, and after reviewing the record we conclude that the trial court did not abuse its discretion in reaching that conclusion.

Finally, because the trial court concluded that the established custodial environment was with defendant, granting defendant's request to change domicile would not alter the established custodial environment. *Rains*, ___ Mich App at ___ (slip op at 7). Accordingly, we need not reach whether the change of domicile is in the child's best interest. *Id*.

B. REQUEST FOR JOINT CUSTODY

Next, plaintiff argues that the trial court erred when it ignored his request for joint custody, thus violating MCL 722.26a. Again, we disagree.

MCL 722.26a specifies in pertinent part that:

> (1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:
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> (a) The factors enumerated in section 3.
>
> (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

Initially, defendant argues that MCL 722.26a is not implicated in this case at all because plaintiff requested sole physical custody in his trial brief and therefore "never formally requested joint physical custody." However, defendant never cites any authority to support her position that a party must state the request in a pretrial filing. To the contrary, the statute merely requires that "either parent" make a "request" for joint custody. MCL 722.26a(1). In this case, although plaintiff expressed a preference for sole custody, he did make a request for joint physical custody; specifically, plaintiff requested a "seven-on/seven-off, weekly" arrangement, and stated that he desired for the child to not move to North Carolina.

Because plaintiff made a request for joint physical custody, the trial court was required to state its reasons on the record for granting or denying his request. MCL 722.26a. In *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999), this Court reversed and remanded to the trial court a judgment of divorce where the plaintiff/father's request for joint custody was denied without the trial court having stated its reasons on the record. *Id*. at 162. This Court determined that even though the trial court had applied the statutory best interest factors, it still failed to state on the record its reasons for denying joint physical custody. *Id*. at 163.

In this case, the trial court found that an established custodial environment existed with defendant and noted that "if we're going to crack that to get to some sort of *joint relationship* . . . ." (emphasis added). We are persuaded that the trial court "consider[ed] an award of joint custody" within the meaning of MCL 722.26a(1). Moreover, there is enough evidence in the record to satisfy MCL 722.26a(1)(a) and (b). The trial court did apply the best interest factors, concluding that they favored defendant. Regarding "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child," MCL 722.26a(1)(b), there was sufficient evidence presented below that defendant and plaintiff could not cooperate with each other in making significant parenting decisions. As the trial court noted, plaintiff could not identify a single positive attribute about defendant. The trial court also found that plaintiff had already made a unilateral significant parenting decision when he changed the child's physician. The trial court satisfied the requirements of MCL 722.26a.

Affirmed.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens