STATE OF MICHIGAN

COURT OF APPEALS

LAURA FOCKS a/k/a LAURA WELCH, Plaintiff-Appellee,	UNPUBLISHED January 2, 2014
V	No. 316715 Oakland Circuit Court
ROBERT STANTON, Defendant-Appellant.	LC No. 2009-758327-DM

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Defendant-father appeals by right from the trial court order that granted plaintiff-mother's motion for a change in domicile and custody of the formerly married couple's four children. Because the trial court did not abuse its discretion by determining that the change of domicile was proper and in the children's best interests, we affirm.

I. FACTS

Plaintiff and defendant were married in 2001 and had four children together. They divorced in 2010. The judgment of divorce provided that plaintiff and defendant would have joint legal and physical custody of the children and equal parenting time. The judgment also contained a clause providing that the children would attend Lake Orion School District schools as long as either plaintiff or defendant resided in the district. Defendant sought the school district provision because he was concerned that plaintiff would take the children and leave the state. The judgment provided that neither party was allowed to move the children's domicile or residence outside of Michigan without court approval. After the divorce, both parties experienced significant financial hardship.

In November 2012, plaintiff married Andy Welch who lives in West Milford, New Jersey. Welch testified that the nature of his job requires to him to work out of the company's New York office and that he likely could not find a comparable job in the Detroit area. On August 29, 2012, plaintiff moved the court to change the children's domicile to New Jersey. After holding an evidentiary hearing, the court granted plaintiff's motion and awarded plaintiff sole physical custody of the children.

II. CHANGE OF DOMICILE

Defendant argues that the trial court erred by determining that the change in the children's domicile was proper and in the children's best interests.

> This Court reviews a trial court's decision regarding a motion for change of domicile for an abuse of discretion and a trial court's findings regarding the factors set forth in MCL 722.31(4) under the "great weight of the evidence" standard. 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 extreme passion or bias. This Court may not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction. [*Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013) (quotation marks, brackets, and citations omitted).]

MCL 722.31(1) provides that, "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" without court approval. In this case, it is undisputed that the children's custody is governed by court order, i.e., the judgment of divorce, and that West Milford, New Jersey is more than 100 miles from Lake Orion.

> 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 facts 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.[1] 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. [*Rains*, 301 Mich App at 325.]

A. MCL 722.31(4)

The trial court found that plaintiff established by a preponderance of the evidence that the following factors, enumerated in MCL 722.31(4), supported a change in the children's domicile:

[1] The trial court found that the children had an established custodial environment with both parties and that the proposed change in domicile would modify or alter that environment. Defendant does not challenge these findings on appeal.

(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 party requesting the change of domicile has the burden of establishing by a preponderance of the evidence that the change is warranted." *Rains*, 301 Mich App at 326-327 (quotation marks and citation omitted). The court must consider the above factors "with the child as the primary focus in the court's deliberations[.]" MCL 722.31(4).

1. QUALITY OF LIFE

The trial court's finding that the change in domicile would improve the children's quality of life was not against the great weight of the evidence.[2]

Defendant raises several points in support of his argument. First, that the trial court's opinion did not mention that the children have friends, family, and good schools in Lake Orion. However, the trial court's "findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties." *Rains v Rains*, 301 Mich App 313, 329; 836 NW2d 709 (2013) (citation omitted). More significantly, the trial court found, based on record evidence, that New Jersey would also provide the children with friends and that the schools the children would attend there are "excellent." The court also took into account that under plaintiff's proposed parenting time arrangement, the children would often return to Michigan to visit friends and family.

[2] Defendant does not argue that the change would not improve plaintiff's quality of life.

Defendant next argues that he has been the primary caregiver to the children in Michigan and that the move will therefore have a predominantly negative effect. However, witness testimony belied defendant's assertion that he had the children nearly two-thirds of the time. The children lived with the parties on a week-on, week-off basis while attending Lake Orion schools. The court noted that, while the children may have spent some extra weekends with defendant, they did so because plaintiff worked a second job to attempt to support them.

Defendant also argued that he was primarily responsible for the children's medical needs. However, plaintiff also took the children to their medical appointments when her work schedule allowed, took the children to their eye doctor appointments, and took her daughter to the hospital when she had a kidney infection. Plaintiff also took the two oldest children to a therapist when she was concerned for their safety.

The trial court relied heavily on the issue of the ability to provide financial support for the children. The evidence demonstrated that both parents have struggled financially in recent years. Each has been only intermittently employed and has required assistance to maintain housing. As the trial court noted, plaintiff's new home in New Jersey provides a stable setting, and Welch has executed a document agreeing to contribute to the support of the children so long as they primarily reside with plaintiff and himself. "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, 466; 730 NW 262 (2007); see also *Gagnon v Glowacki*, 295 Mich App 557, 566-567; 815 NW2d 141 (2012). While the increase in earning potential in this case is indirect, in that it derives from Welch, not plaintiff (the relocating parent), given the financial difficulties that have affected the provision of basic necessities to the children, we conclude that the trial court did not err in considering this evidence.

Defendant also argues that plaintiff's new marriage to Welch is potentially unstable. However, the trial court heard testimony from Welch and plaintiff, found that "both were extremely sincere and credible," and concluded that they "have a very strong marriage and intend to build a strong family with the children while also respecting and fostering the children's relationships with their father." Welch and plaintiff testified that they have known each other since 2006 and have been dating since 2009. Welch stated that he was in love with both plaintiff and the children. Although defendant also argues that Welch has not spent much time with the children, Welch and plaintiff testified that the children like to spend time with Welch, and that he regularly speaks to them on Skype. Accordingly, the trial court's findings that Welch has a strong bond with the children and that his relationship with plaintiff is stable were not against the great weight of the evidence, particularly as we defer to the trial court as to credibility. *Rains*, 301 Mich App 329.

2. PAST USAGE OF PARENTING TIME AND INTENTIONS OF MOVING PARENT

The trial court's finding that plaintiff and defendant both exercised their parenting time and that plaintiff's intent in moving was not to frustrate defendant's relationship with the children was not against the great weight of the evidence. There was evidence that defendant, at times, had the children more than plaintiff. However, as noted above, plaintiff exercised her parenting time when she was financially able to do so and the evidence indicated that plaintiff, defendant, and defendant's mother shared in the responsibility for caring for the children. The

evidence also demonstrated that plaintiff's intent was not to frustrate defendant's relationship with the children because she proposed a visitation schedule that would allow defendant to spend significant amounts of time with the children without imposing any additional financial burden.

3. PRESERVING AND FOSTERING THE PARENTAL RELATIONSHIP

The trial court's finding that plaintiff's proposed parenting time schedule would preserve and foster defendant's relationship with the children was not against the great weight of the evidence. "[W]hen the legal residence of a child is changed, the new visitation plan need not be equal with the old visitation plan, as such equality is not possible." *McKimmy v Melling*, 291 Mich App 577, 583; 805 NW2d 615 (2011). Instead, the proposed schedule must "provide[] 'a realistic opportunity' or 'an adequate basis,' [] to preserve and foster the relationship [] currently shared." *Id.* at 584. "The separation between a parent and a child can be diminished by the use of modern communication technology." *Id*. at 583 (quotation marks and citation omitted). "[A] trial court should consider the financial feasibility of the new visitation plan and the ages of the children." *Id.* This Court has found that it is possible that "extended periods of visitation will foster, not hinder, a closer parent-child relationship." *Id.*

Plaintiff's proposed schedule does not allow defendant the same degree of involvement he now has in the children's education and school-year activities. However, the proposed schedule provides for the children to stay with defendant in Michigan for the entirety of their summer break excepting the first and last weeks, as well as over winter break, spring break, Thanksgiving break, and most of Christmas break. Plaintiff has agreed to transport the children to and from Michigan for each of these time periods. Moreover, plaintiff and Welch have agreed to pay for defendant to fly to New Jersey to spend three weekends per school year with the children. Consistent with plaintiff's proposed schedule, the children's therapist opined that longer stays in each parent's home would benefit the children because they would not have to adjust to different homes on a weekly basis. Lastly, plaintiff agreed to encourage the children to communicate with defendant through Skype.

4. FINANCIALLY MOTIVATED OPPOSITION

The trial court's finding that defendant's opposition to the change in domicile was partially motivated by a desire to procure a financial advantage was against the great weight of the evidence. The court based its finding on testimony that defendant misstated his parenting time on a food and cash assistance application, was struggling financially, and would benefit from having the children during the school year because he would receive food and cash assistance as well as child support from plaintiff. However, there was no direct testimony indicating that financial gain was a motivating factor. When asked about the financial advantage of having the children during the school year, defendant responded that he did not view the situation from a financial perspective. In fact, there was evidence that defendant not only loved and cared for his children, but spent a significant amount of his current income in an attempt to prevent the children from moving away. Thus, the evidence indicates that defendant opposed plaintiff's motion to change the children's domicile only because he did not want them to move away, and the trial court's finding to the contrary was against the great weight of the evidence.

5. DOMESTIC VIOLENCE

The trial court's finding that the domestic violence factor favored plaintiff was against the great weight of the evidence. The court relied on unsubstantiated Child Protective Services (CPS) complaints made by plaintiff. While there is no evidence that plaintiff falsified the complaints, the court erred in relying on the unsubstantiated hearsay statements contained in those reports. There was testimony that defendant was sometimes short-tempered with and around the children. However, this evidence did not rise to the level of domestic violence. Further, in a May 2012 CPS report, the children's pediatrician stated that she had never observed any unusual marks or bruises on the children and had no reason to suspect any abuse on the part of defendant.

6. CONCLUSION

The trial court's findings that the change in domicile had the capacity to improve the quality of life for the children, that plaintiff's intent was not to frustrate the childrens' relationships with their defendant, and that those relationships could continue to be fostered by a change in the parenting time schedule were not contrary to the great weight of the evidence. Its findings that defendant was motivated by financial advantage and that he had engaged in domestic violence were contrary to the great weight of the evidence. Considering these factors, we agree with the trial court that plaintiff established by a preponderance of the evidence that the factors in MCL 722.31(4) supported her requested change in domicile.

B. BEST INTERESTS

Once a trial court determines that "the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4) . . . support a change in domicile[,]" "the trial court [must] determine whether the change in domicile would be in the child[ren]'s best interest by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence." *Rains*, 301 Mich App at 325. We defer to the trial court's credibility determinations and "the trial court has the discretion to accord differing weight to the best-interest factors." *Id.* at 329 (citation omitted). MCL 722.23 provides:

> As used in this act, "best interest of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The 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.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The 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.

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

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

The trial found that factors (a), (e), and (h) favored each party equally and that factors (b), (c), (d), (f), (g), (i), (j), (k), and (l) favored plaintiff. Defendant challenges each of the trial court's findings as against the great weight of the evidence except as to factors (a) and (e).

1. CAPACITY AND DISPOSITION FOR LOVE, AFFECTION, GUIDANCE, AND CONTINUED EDUCATION, AND RELIGION

The trial court's finding that factor (b) favored plaintiff was against the great weight of the evidence. There was evidence that plaintiff and defendant each loved the children and were capable of providing them with affection and guidance as well as supporting their education and religious upbringing. Therefore, this factor favors neither either party.

2. CAPACITY AND DISPOSITION TO PROVIDE FOOD, CLOTHING, AND MEDICAL CARE

The trial court's finding that factor (c) favored plaintiff was not against the great weight of the evidence although we find this to be a close question. Both parents struggled financially and both worked hard to provide for the children. Both took the children to the doctor and to school. We agree with defendant that the trial court should not have used the fact that he utilized food and cash assistance to provide for his children against him. At the same time, we cannot ignore the fact that plaintiff's marriage to Welch provides a level of material stability and security that has been lacking from the children's lives. We conclude that, while a finding that

the factor did not favor either party would have been proper, the trial court's conclusion that this factor favored plaintiff was not against the great weight of the evidence.

3. STABLE AND SATISFACTORY ENVIRONMENT AND DESIRABILITY OF MAINTAINING CONTINUITY

The trial court's finding that factor (d) favored plaintiff was not against the great weight of the evidence. "Factor d calls for a factual inquiry (how long has the child been in a stable, satisfactory environment?) and then states a value (the desirability of maintaining continuity)." *Ireland v Smith*, 451 Mich 457 n 8; 547 NW2d 686 (1996). We reject defendant's argument that it was not proper for the trial court to consider the children's prospects for a stable family environment in New Jersey. Moreover, we do not agree that the trial court's conclusion that the children's present situation lacked stability was against the great weight of the evidence.

4. PARENTS' MORAL FITNESS

The trial court's finding that factor (f) favored plaintiff was not against the great weight of the evidence. "[T]he issue is not who is the morally superior adult, but rather the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Berger v Berger*, 277 Mich App 700, 713; 747 NW2d 336 (2008). Defendant's missed house payments and inconsistent employment history are not related to his moral fitness to provide for the children. However, the trial court's finding that defendant failed to provide accurate information to the Department of Human Services regarding parenting time and refused to help plaintiff obtain food and cash assistance are both related to his moral fitness to provide for the children and are supported by the evidence. We defer to the trial court's finding that defendant was not credible when he testified that his statements on the food assistance application were accurate. See *Rains*, 301 Mich App 329. Further, there was also evidence that defendant had a propensity to scare the children with angry outbursts.

5. PARENTS' MENTAL AND PHYSICAL HEALTH AND DOMESTIC VIOLENCE

The trial court's findings that factors (g) and (k) favored plaintiff were against the great weight of the evidence. The trial court's findings were based almost exclusively on hearsay statements drawn from unsubstantiated CPS reports. As discussed above, the court's finding of domestic violence was against the great weight of the evidence. In the absence of any evidence that either party has other physical or mental health issues, these factors did not favor either party.

6. CHILDREN'S HOME, SCHOOL, AND COMMUNITY RECORD

The trial court's finding that factor (h) did not favor either party was not against the great weight of the evidence. The evidence indicated that both parents are involved in the children's schooling and upbringing. Accordingly, the trial court properly determined that this factor did not favor either party.

7. WILLINGNESS AND ABILITY TO FACILITATE AND ENCOURAGE A CLOSE AND CONTINUING PARENT-CHILD RELATIONSHIP WITH THE OTHER PARENT

The trial court's finding that factor (j) favored plaintiff was not against the great weight of the evidence. Plaintiff submitted a parenting time proposal that provided for the children to be with defendant nearly the whole summer and the majority of school breaks during holidays. Plaintiff and Welch also offered to bring defendant to New Jersey on three weekends during the school year at their expense. While defendant stated that he was willing to give plaintiff more parenting time, he presented no proposed parenting time schedule. Accordingly, the trial court properly found that plaintiff was willing to facilitate and encourage the relationship between defendant and the children.

8. OTHER RELEVANT FACTORS

The trial court's finding that factor (l) favored plaintiff was not against the great weight of the evidence. The court properly considered that plaintiff had no financial support system in Michigan, that her financial struggles sometimes deprived the children of essential needs and that her marriage to Welch has alleviated those financial concerns.

9. CONCLUSION

Factors (a), (b), (g), (h), and (k) weighed equally between the parties and factors (c), (d), (f), (j), and (l) weighed in favor of plaintiff. Because five factors favored plaintiff, five favored neither party, and because "the trial court has the discretion to accord differing weight to the best-interest factors[,]" *Rains*, 301 Mich App 329, we conclude that the trial court did not err by finding that the change in domicile was in the children's best interests. Moreover, many of the factors came down to questions of credibility and the weighing of evidence, determinations both reserved for the trial court. *Id*.

III. MCR 2.612(C)

Lastly, defendant argues that the trial court committed clear legal error by modifying the judgment of divorce without making specific findings pursuant to MCR 2.612(C). Because plaintiff's requested change of domicile would require the children to attend West Milford schools and because defendant still lived in the Lake Orion School District, defendant argues that the court improperly modified the judgment of divorce without first evaluating the modification as a relief from judgment.

The Legislature and the courts have specifically outlined the method for modifying custody and changing domicile. MCL 722.26 "vests the circuit court with continuing jurisdiction [over all custody disputes]." *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). As discussed, a trial court may grant a change to the children's domicile if it determines that the factors in MCL 722.31(4) support a change in domicile, a change in domicile would modify or alter the established custodial environment, and that the change in domicile is in the children's best interest. *Rains*, 301 Mich App at 325. As required, the trial court analyzed whether plaintiff's proposed change in domicile was proper under MCL 722.31(4) and whether the change was in the children's best interests under MCL 722.23. Therefore, the trial court

employed the proper legal standards in addressing plaintiff's motion and did not err by failing to address the motion as a request for relief from judgment under MCR 2.612(C).

Defendant's reliance on *Moxon v Moxon*, 475 Mich 860; 714 NW2d 287 (2006) is unpersuasive. In *Moxon*, the plaintiff requested the trial court modify a judgment of divorce, providing that the children were to be enrolled in the Grosse Pointe Farms School District, so as to allow the children to be enrolled in the St. Clair Shores School District. *Id*. Our Supreme Court remanded the case to the trial court to consider "whether MCR 2.612(C)(1)(f) authorizes the court to grant plaintiff's request to modify the parties consent judgment of divorce . . . ." *Id*. Unlike this case, *Moxon* did not involve a request to change the children's domicile. MCL 722.31 provides an explicit framework for a trial court to analyze a proposed change of domicile, a framework that the trial court properly employed here. Thus, to the extent that the order in *Moxon* even provides a cognizable principle of law, it does not apply in this case.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro