STATE OF MICHIGAN

COURT OF APPEALS

ASHLEY M. MITCHELL, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 292725 Oakland Circuit Court Family Division
BRYAN A. MITCHELL, Defendant-Appellant.	LC No. 2006-728325-DM

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff's motion to change the domicile of the parties' minor children. We affirm.

I. Change of Domicile Factors

Defendant first argues on appeal that the trial court's analysis of four of the five change of domicile factors under MCL 722.31(4) included factual determinations in favor of plaintiff that were against the great weight of the evidence. We disagree.

This Court reviews a trial court's factual findings in regard to the change of domicile factors, MCL 722.31(4), under the great weight of the evidence standard. *Rittershaus v Rittershaus*, 273 Mich App 462, 464; 730 NW2d 262 (2007), quoting *Brown v Loveman*, 260 Mich App 576, 594, 600; 680 NW2d 432 (2004). "When reviewing the trial court's findings of fact, this Court defers to the trial court on issues of credibility." *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

"The Child Custody Act, MCL 722.21 *et seq.*, governs child-custody disputes between parents." *Shulick v Richards*, 273 Mich App 320, 326; 729 NW2d 533 (2006). Further,

> When a parent wishes to move with a minor child to a location more than 100 miles away, and the parent does not have sole legal custody, the trial court must consider the following factors, keeping the child as its primary focus:
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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.

> (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.
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> (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. [*Rittershaus, supra* at 465, quoting MCL 722.31(4).]

"The moving party has the burden of establishing by a preponderance of the evidence that the change in domicile is warranted." *Mogle, supra* at 203.

Regarding factor (a), the trial court found that plaintiff's job opportunity in Louisiana would provide stability for her and the children and give plaintiff an opportunity to advance in the school system. Further, the court concluded that plaintiff would have the same schedule as the children, unlike in her current job, and there was a great deal of family support in Baton Rouge as well. Defendant argues that the trial court's finding for this factor was against the great weight of the evidence. We disagree.

The trial court's finding that factor (a) favored plaintiff is supported by *Rittershaus*, where this Court determined that "[i]t is well established that the relocating parent's increased earning potential may improve a child's quality of life . . . ." *Rittershaus, supra* at 467. It is true that, in the case at bar, plaintiff was in fact taking a pay cut (from $50,000 to $43,000) to move to Baton Rouge, however, a lower cost of living and increased job stability negated any ill effects from a slightly lower salary. Further, plaintiff's goal was to become a principal after three years of teaching. Defendant's argument that surviving "the latest round of job cuts" proves plaintiff's job is secure is not persuasive, as ThyssenKrupp had closed two facilities and engaged in several rounds of job cuts by the time of trial.

In *Rittershaus, supra* the trial court also considered the benefits of the presence of the plaintiff's extended family. *Id.* Similarly, in the case at bar, plaintiff would enjoy the support of her extended family. Also, plaintiff's schedule as a teacher would mirror that of the children's unlike in Michigan, where the children were home from school before she finished her workday. Finally, the schools to which plaintiff planned to send the children were reasonably comparable to Rochester Hills. Therefore, the findings of the trial court for factor (a) were not against the great weight of the evidence.

Regarding factor (b), the degree to which each parent has complied with the parenting time provided for in the judgment of divorce and whether the proposed move was inspired by a desire to frustrate the schedule, the trial court concluded that plaintiff's testimony about the amount of time defendant spent with the children was more credible. The trial court found defendant's testimony on the matter confusing and inconsistent. The court determined that defendant had not complied with and utilized his time under the judgment of divorce, especially since January, 2009. Finally, the court determined that plaintiff's desire to move to Louisiana was not inspired by a desire to thwart defendant, but rather, "by her intention to provide a better life for [the children] with a stable job, extended family, and better economic conditions." Defendant argues that these findings are against the great weight of the evidence. We disagree.

First, it should be noted that despite defendant's claim regarding plaintiff's motivation in filing the motion to change domicile, he testified that she had never denied him parenting time, and further, as reflected in the order appealed from, she agreed at trial that he could visit the children in Louisiana any time he wanted. Regarding parenting time, plaintiff testified quite clearly that defendant did not exercise his time at all in September 2008, and prior to that, in July and August 2008, he exercised slightly fewer days than he had been awarded. After September 2008, defendant exercised his parenting time through approximately January 20, 2009, as provided for in the divorce judgment. After that date in January, however, and throughout February 2009, he took the children for only four overnights; in March he did not have them for any overnights; in April he exercised only two overnights, and further, he did not take the children for Easter, even though it was his scheduled holiday; and, in the first two weeks of May, he had the children for just one overnight.

Defendant, on the other hand, testified that he exercised all of his parenting time in January 2008, and further, stated that he lived in plaintiff's home during the month of February 2009[1] while they considered reconciling, thereby exercising his overnights for that month. He stated that he also spent several nights at plaintiff's home in March and his children also spent some nights at his home – he did not lose his car until March 24, 2009, which then hindered his ability to take the children for parenting time. He further testified that, in April, he had three or four overnights with the children and had to rent a car in order to pick them up on the occasions where plaintiff did not drop them off. Upon testifying during his own case, however, defendant changed his story somewhat, stating that rather than residing with plaintiff for the entire month of February, he consulted a calendar and was able to identify specific days that he stayed with her, which he estimated was about 21 to 22 days. After viewing a calendar on the stand, however, he changed his mind again and stated that it was 18 nights. Thus, defendant did not dispute plaintiff's claim that he did not follow the parenting time schedule for three months in 2008, and his testimony differed significantly from plaintiff's regarding parenting time in 2009. Because this Court defers to a trial court's assessment of credibility, we cannot say that the trial court's findings for factor (b) are against the great weight of the evidence. *Mogle*, *supra* at 201.

[1] Plaintiff testified that he spent only one night in February 2009 and one night in March 2009.

Regarding factor (c), the degree to which it would be possible to order a modification of the parenting time 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," the court noted that that plaintiff had consented to the recommendation by the Friend of the Court (reflected in the order appealed from), pursuant to which defendant would have the children during the summer months of June and July and the Thanksgiving holiday, and the parties would split winter break, spring break, and Christmas break (alternating Christmas Day). Further, plaintiff agreed that the children would be able to communicate with their father via phone and web cam, and defendant could see the children any time he came to Louisiana. The court concluded:

> While moving to Louisiana would change the current parenting time schedule in the Judgment, the court would note that defendant has exercised much less parenting time than that provided to him in the judgment since January 2009. Further, although the change would change defendant's ability to participate in the children's school and extra curricular activities, such as Bryan's football and basketball teams, the court is satisfied that there will be a realistic opportunity for parenting time on holidays, school breaks, and the entire summer, either in person or via phone or other technological methods, in lieu of the parenting time schedule in the Judgment if removal is allowed.

Defendant argues that this finding is against the great weight of the evidence. We disagree.

Regarding factor (c), this Court has held that "the new visitation plan need not be equal to the prior visitation plan in all respects. It only need provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the noncustodial parent." *Mogle*, *supra* at 205. In fact extended periods of visitation can foster, not hinder, "even closer" parent-child relationships "than a typical weekly visitation schedule." *Id.*, quoting *Anderson v Anderson*, 170 Mich App 305, 309; 427 NW2d 627 (1988). In *Anderson*, for example, in place of having the child "on alternate weekends (and other, impromptu times), [the] defendant has the child for six weeks during the summer, the entirety of each Christmas vacation, alternate spring vacations, and other times which can be arranged." *Anderson, supra* at 311. Because the case at bar presents a substantially similar parenting time schedule, the trial court's findings are not against the great weight of the evidence.

Finally, regarding factor (e),[2] domestic violence, the court referenced the incident wherein plaintiff struck Arnell with a belt, but did not characterize it as domestic violence. Defendant disagrees with this conclusion and further states that the court's minimization of this event is against the great weight of the evidence. We disagree.

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[2] Defendant does not challenge the court's findings under factor (d), defendant's motivation in resisting the move, because the court determined that defendant's motivation stemmed from a desire to remain close to his children, not to secure financial advantage.

Plaintiff testified that during the incident, she and Arnell were both upset, and in fact, plaintiff thought it would be a good idea for defendant to come and get Arnell. Plaintiff explained that defendant declined to pick up Arnell, telling plaintiff that Arnell felt uncomfortable at his home and there was nowhere for her to stay. Defendant testified that he could not retrieve Arnell because he did not have a car, however, he called neither the police nor social services. Thus, defendant's lack of action indicates that he did not find the situation to be a cause for concern, and therefore, the trial court's finding that there was no evidence of domestic violence is not against the great weight of the evidence.

II. Established Custodial Environment

Defendant next argues that the trial court's determination that there was no established custodial environment with the defendant father was against the great weight of the evidence, and thus, the trial court abused its discretion in allowing the plaintiff to remove the minor children from the state of Michigan. We disagree.

"Whether an established custodial environment exists is a question of fact that [this Court] must affirm unless the trial court's finding is against the great weight of the evidence. A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). "Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review." *Rittershaus, supra* at 472 (internal citations omitted). Finally, "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." *Id.* at 464-465, quoting *Brown, supra* at 600-601.

When considering a motion for a change in domicile, "the trial court is not required to consider the best-interest factors [of MCL 722.23] until it first determines that the modification actually changes the children's established custodial environment." *Id.* at 471. "A custodial environment 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.'" *Id.*, quoting MCL 722.27(1)(c). "An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence . . . . An established custodial environment may exist with both parents . . . ." *Berger, supra* at 707. The trial court must articulate its reasons for reaching a particular conclusion. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). When an established custodial environment exists, a party must establish by clear and convincing evidence that a change in custody would be in the child's best interest. *Rittershaus, supra* at 473.

In this case, the court reasoned:

> The children have resided with plaintiff since the judgment of divorce in July 2008. Defendant has exercised significantly less parenting time than that provided him in the judgment, especially since January 2009. Generally, the children look to plaintiff for guidance, discipline, the necessities of life, and parental comfort. MCL 722.27(1)(c). The court has also considered the ages of the children, the physical environment, and the inclination of the custodian and the children as to permanency of the relationship. MCL 722.27(1)(c).
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> The court finds that there is an established custodial environment with plaintiff, and therefore, the court need not conduct an inquiry into the best interest factors set forth in MCL 722.23.

Defendant argues that the trial court did not take into consideration the involvement of defendant in the day-to-day life of the Bryan and Arnell. Defendant further contends that the trial court considered the lack of overnights with defendant, despite the fact that nowhere in the definition of established custodial environment is there consideration of overnights, but rather, the focus is on the relationship. Therefore, according to defendant, the trial court's findings were against the great weight of the evidence and it abused its discretion by granting plaintiff's motion to change domicile. We disagree.

It is true that defendant plays an active role in the lives of his children. He coaches Bryan's football and basketball teams, attends games and practices, takes the children to doctor appointments, helps them with their homework and attends parent-teacher conferences. Testimony also indicated that when plaintiff forgot to sign a form for school, Arnell called defendant and asked him to contact the teacher. However, there was also evidence that, after the divorce judgment, defendant's relationship with his children was marked by instability and impermanence. Defendant lost his job in June 2008 and as a result, in September 2008, the gas was shut off in the former marital home where he was living. In October 2008, the house itself was lost to foreclosure, forcing defendant to move to Southfield with his mother, and in March 2009, defendant lost his car. All of these incidents contributed to defendant not being able to, or choosing not to, exercise the parenting time provided for in the divorce judgment for the months of September 2008 and February through May 2009.

By contrast, since entry of the divorce order, plaintiff has exercised primary physical custody of Bryan and Arnell in Rochester Hills, Michigan, where the children attend school and participate in activities. Thus, aside from the $350 a month in child support from defendant, plaintiff, who has a full-time job, is the primary source of financial support. She, too, takes the children to their doctor appointments, attended some of Bryan's games, took him to practices when defendant was unavailable, and worked with Arnell's guidance counselor to ensure that Arnell's grades improved. As discussed above, her motion to change domicile was motivated by desire for job security and family support, and her new job as a teacher would allow her to continue to provide the children with the aforementioned, "guidance, discipline, necessities of life, and parental comfort." Therefore, the trial court's finding that an established custodial environment existed with plaintiff, but not defendant, was not against the great weight of the

evidence, and as a result, the trial court did not abuse its discretion in granting plaintiff's motion to change domicile.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens