

STATE OF MICHIGAN
COURT OF APPEALS

KELLY RAE MITCHELL,

Plaintiff-Appellee,

v

TODD CHRISTOPHER MITCHELL,

Defendant-Appellant.

UNPUBLISHED

August 17, 2006

No. 266161

Wayne Circuit Court

LC No. 02-209761-DM

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant, Todd Christopher Mitchell, appeals the trial court's order that granted a change of domicile and amended the judgment of divorce with respect to parenting time in favor of plaintiff, Kelly Rae Mitchell. We affirm, but remand for further proceedings consistent with this opinion.

I. Procedural History

Mr. and Mrs. Mitchell had two minor children when they were divorced on July 12, 2002. Under the consent judgment of divorce, Mr. and Mrs. Mitchell agreed to retain joint legal custody of the children. The judgment also provided that Mrs. Mitchell would have physical custody of the children and that Mr. Mitchell would have regular parenting time. On April 12, 2005, Mrs. Mitchell filed a motion to relocate the children from Michigan to Tennessee. Mrs. Mitchell stated that, because of financial hardship, she intended to move in with her parents in Nashville and attend college classes to obtain a marketable degree. Mr. Mitchell opposed the motion and argued that the move would interfere with his parenting time and would not be in the best interests of the children. In an order entered on October 6, 2005, the trial court granted Mrs. Mitchell's motion and amended the parties' parenting time schedule.

II. Analysis

A. Standards of Review and Applicable Law

Mr. Mitchell claims that the trial court failed to properly apply MCL 722.31, which governs the change in legal residence of a minor child who is subject to a custody order.¹ Our courts have repeatedly held that “[t]o expedite the resolution of a child custody dispute by prompt and final adjudication, all 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).² This case also involves the interpretation and application of MCL 722.31, which we review de novo. *Grew v Knox*, 265 Mich App 333, 338; 694 NW2d 772 (2005).

If a party has joint legal custody and seeks permission to relocate more than 100 miles away, the trial court must review the factors set forth in MCL 722.31(4), which provides:

(4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court’s deliberations:

(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

¹ MCL 722.31 provides, in relevant part:

(1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child’s legal residence at the time of the commencement of the action in which the order is issued.

(2) A parent’s change of a child’s legal residence is not restricted by subsection (1) . . . if the court, after complying with subsection (4), permits, the residence change. This section does not apply if the order governing the child’s custody grants sole legal custody to 1 of the child’s parents. [MCL 722.31]

² Under the great weight of the evidence standard, this Court will not disturb a trial court’s finding of fact unless the facts “clearly preponderate in the opposite direction” or the decision would result in a miscarriage of justice. *Fletcher v Fletcher*, 447 Mich 871, 876-878; 526 NW2d 889 (1994) (citation omitted). “An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made.” *Pickering v Pickering*, 253 Mich App 694, 700-701; 659 NW2d 649 (2002) (citation omitted). A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

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 moving party has the burden of establishing by a preponderance of the evidence that the change in domicile is warranted.” *Mogle v Scriver*, 241 Mich App 192, 203; 614 NW2d 696 (2000).

B. Residence Change Under MCL 722.31(4)

We hold that the trial court correctly ruled that Mrs. Mitchell established, by a preponderance of the evidence, that a residence change is warranted under MCL 722.31(4).³

MCL 722.31(4)(a) addresses whether the move will improve the quality of life for the child and the relocating parent. Mrs. Mitchell presented evidence that the schools the children would attend in Tennessee would provide a richer educational environment than the schools the children attended in Michigan. The trial court also noted, however, that the children have a network of family and friends in Michigan that they will not see as often if they moved to Tennessee. Further, the trial court correctly observed that Mrs. Mitchell did not establish that the relocation would certainly result in better employment opportunities for her. While this “Court has held that a substantial increase in income that will elevate the quality of life of the relocating parent and child supports a finding that a party has met its burden of proof” under MCL 722.31(4)(a), here, evidence showed that Mrs. Mitchell would have to pay school tuition and that she would not be earning as much while she attended classes. *Brown v Loveman*, 260 Mich App 576, 601; 680 NW2d 432 (2004). However, Mrs. Mitchell presented evidence that she could manage her medical transcription business from Tennessee, that she could save money while living with her parents, and that her mother would provide free day care for the children. In light

³ We reject Mr. Mitchell's argument that the trial court was required to consider the factors set forth in *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A 2d 27 (1976) because this Court has explained that MCL 722.31 is the statutory equivalent of the “*D'Onofrio* factors.” *Brown v Loveman*, 260 Mich App 576, 579 n 2, 586 n 3; 680 NW2d 432 (2004).

of this evidence, the trial court did not err when it ruled that this factor did not specifically favor either party.

With regard to the ease of modifying the parenting time schedule, MCL 722.31(4)(c), “one must start with the premise that implicit in this factor is an acknowledgement that weekly visitation is not possible when parents are separated by state borders.” *Brown, supra* at 603, quoting *Costantini v Costantini*, 446 Mich 870, 873; 521 NW2d 1 (1994) (Riley, J., concurring). Clearly, “the new visitation plan need not be equal to the prior visitation plan in all respects.” *Mogle, supra* at 204. Rather, “the new schedule need only provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the noncustodial parent.” *Id.*

Here, Mrs. Mitchell established that the new schedule satisfies this requirement because it provides Mr. Mitchell with unlimited phone and email communication with the children, one weekend of parenting time per month, five total weeks of parenting time in June, July and August, and a fair division of time during holidays or the children’s breaks from school. The trial court correctly found that this provides a realistic opportunity for Mr. Mitchell to preserve and foster the parental relationship he previously enjoyed. *Id.*⁴

The trial court also correctly ruled that factors MCL 722.31(4)(b) and (e) favor Mrs. Mitchell. Mr. and Mrs. Mitchell have a well-documented history of domestic abuse charges and personal protection orders. The trial court held that, in light of evidence of Mr. Mitchell’s history of anger and control issues, Mrs. Mitchell was justified in her desire to move to Tennessee to put some distance between herself and defendant. Further, Mr. Mitchell conceded that Mrs. Mitchell had not interfered with his parenting time in the eight months leading up to the hearing. The trial court, therefore, did not err in ruling that MCL 722.31(4)(e) favored plaintiff. For the same reasons, the trial court did not err by ruling that, while Mrs. Mitchell’s motion may have been motivated, to some extent, by an interest in placing some distance between them, no evidence showed that it was motivated by a desire to frustrate the parenting schedule. MCL 722.31(4)(b).⁵

⁴ We reject Mr. Mitchell’s argument that this factor favors him because Mrs. Mitchell is likely to interfere with his parenting time. The trial court warned the parties that because it would continue to have jurisdiction, the parties would be required to follow the court’s new order affecting parenting time or they could lose further parenting rights. Accordingly, the trial court’s ruling under MCL 722.31(4)(c) was not erroneous.

⁵ Mr. Mitchell incorrectly asserts that the trial court failed to set forth its findings of fact with the specificity required by MCR 2.517(A)(2) and MCR 2.517(A)(3). A trial court must make findings of fact and conclusions of law. MCR 2.517(A)(1). Findings are sufficient if brief, definite and pertinent, without over-elaboration of detail or particularization of facts. MCR 2.517(A)(2); *Fletcher, supra* at 883. The trial court’s findings in a child custody case “need not include consideration of every piece of evidence entered and argument raised by the parties.” *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). The trial court may state its findings and conclusions on the record or in a written opinion. MCR 2.517(A)(3). Here, as set forth above, the trial court systematically analyzed the facts in light of the statutory factors in MCL 722.31(4). Accordingly, Mr. Mitchell’s argument is without merit.

For these reasons, the trial court correctly ruled that Mrs. Mitchell proved by a preponderance of the evidence that a change of domicile was warranted. *Mogle, supra* at 203. Mr. Mitchell has not shown that the trial court's findings were against the great weight of the evidence or that the trial court abused its discretion when it granted Mrs. Mitchell's motion. *Brown, supra* at 600. Therefore, we affirm the trial court's order.

C. Compliance with MCL 722.31(5)

We agree with Mr. Mitchell that the trial court failed to comply with MCL 722.31(5), which provides:

Each order determining or modifying custody or parenting time of a child shall include a provision stating the parent's agreement as to how a change in either of the child's legal residences will be handled. If such a provision is included in the order and a child's legal residence change is done in compliance with that provision, this section does not apply. If the parents do not agree on such a provision, the court shall include in the order the following provision: "A parent whose custody or parenting time of a child is governed by this order shall not change the legal residence of the child except in compliance with section 11 of the "Child Custody Act of 1970", 1970 PA 91, MCL 722.31."

While the trial court's order sets forth how the relocation to Tennessee would affect Mr. Mitchell's parenting time, it did not contain any further statement about how the parties will handle any further residence change by Mr. or Mrs. Mitchell. Accordingly, while we affirm the trial court's decision, we remand for the trial court to amend its order to include this provision or, if Mr. and Mrs. Mitchell cannot agree on the terms, a statement that neither parent may change the child's legal residence without complying with MCL 722.31.

Affirmed, but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Helene N. White