STATE OF MICHIGAN

COURT OF APPEALS

DEMETRIUS A. DAVIS,

Plaintiff-Appellee,

v

LATOYA TURNER,

Defendant-Appellant.

UNPUBLISHED
April 15, 2021

No. 355500
Genesee Circuit Court
Family Division
LC No. 14-313719-DP

Before: CAMERON, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

In this custody matter, defendant Latoya Turner appeals the trial court's November 9, 2020 order granting plaintiff Demetrius A. Davis's motion to change custody and to change the minor child's domicile. We vacate and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Davis and Turner began a relationship when Davis was separated from his wife. After Turner became pregnant with the minor child, Davis and his wife reconciled. A few months after the minor child was born in September 2014, Davis sought an order of filiation and joint legal and physical custody of the minor child. An order of filiation, which established Davis as the minor child's legal father, was entered in March 2015. In May 2015, an order was entered with the consent of the parties and granted the parties joint legal custody. Turner was granted primary physical custody, and Davis was granted "frequent and liberal parenting time," including when Turner was at work or school.

In July 2020, Davis filed a "motion to enter order recognizing [Davis's] physical custody of [the] minor child and for change of domicile[.]" Davis alleged that there had "been a material change in circumstance that would warrant a change in custody" because Davis's wife planned to relocate to Mansfield, Texas, following a promotion. According to Davis, the move would not alter the established custodial environment, which existed solely with Davis. Davis alleged that, since 2017, the minor child had been in his care for a "majority of the time" due to Turner's work schedule. Davis also alleged that he was a stay-at-home-father and, therefore, was always

available to care for the minor child's physical, financial, and educational needs. Davis generally alleged that moving to Texas would improve the minor child's quality of life, and that Turner and the minor child's relationship could be preserved through visitations during the holidays and the summer and by Turner visiting the minor child in Texas. Davis requested that the trial court enter an order granting joint custody, permitting the minor child's domicile to be changed to Texas, and modifying the parties' parenting time. Turner opposed the motion, arguing that she was the minor child's primary caregiver and that Davis was not a stay-at-home-father. Rather, according to Turner, Davis had a job in Michigan and planned to start his own business in Texas. Turner argued that the trial court should not modify the May 2015 custody order and that the trial court should deny Davis's motion for change of domicile.

On September 30, 2020, the trial court held an evidentiary hearing on the matter. At the hearing, Davis, Turner, and Turner's grandmother testified. Davis testified that he had already moved to Texas and planned to remain there regardless of the outcome of the motion. During the hearing, there was conflicting testimony concerning Turner and Davis's level of involvement with the minor child and the stability of Davis's relationship with his wife. Davis acknowledged that, contrary to the arguments contained in his motion that he was a stay-at-home-father, he had worked at a café while living in Michigan. Davis also acknowledged that he desired to open his own business in Texas. Davis noted that his wife and adult daughter helped him to care for the minor child and indicated that he had only done a cursory inquiry into the schools in the Mansfield area. Davis believed that the Mansfield area would be a better environment for the minor child.

Turner and Turner's grandmother both testified that the minor child had many maternal relatives in the Grand Blanc area, which was where Turner lived, to whom the minor child was close. Turner testified that, because of her work schedule, her family members helped her care for the minor child. Because Turner worked "second shift," the minor child would go to sleep at Turner's grandmother's house and, when Turner left work, she would travel to her grandmother's home, wake up the minor child, and transport him to her apartment. Turner also testified about an incident of domestic violence between her and Davis. However, Turner did not fear that domestic violence would occur in the future. Turner acknowledged that she planned to move to Texas if the motion to change domicile was granted.

At the conclusion of the hearing, the trial court granted Davis's motion. The trial court ordered that, for the remainder of the school year, the parties would exercise joint legal custody and joint physical custody with month-on, month-off visitation. Thereafter, the minor child would reside primarily with Davis in Texas during the school year. Turner was granted visitation during the summer. The trial court ordered that, if Turner moved to Texas, the parties would have week-on, week-off custody with alternating holidays. This appeal followed.

II. STANDARDS OF REVIEW

"All custody orders must be affirmed on appeal unless the [trial] court's findings were against the great weight of the evidence, the [trial] court committed a palpable abuse of discretion, or the [trial] court made a clear legal error on a major issue." *Lieberman v Orr*, 319 Mich App 68, 76-77; 900 NW2d 130 (2017) (quotation marks and citations omitted). A finding is against the great weight of the evidence when "the evidence clearly preponderates in the opposite direction." *Id*. at 77 (quotation marks and citation omitted). An abuse of discretion occurs when a trial court's

decision "is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013) (quotation marks and citations omitted). "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Lieberman*, 319 Mich App at 77 (quotation marks and citation omitted).

III. ANALYSIS

A. CHANGE OF CUSTODY

Turner argues that the trial court's order changed custody and that the trial court erred by failing to follow the appropriate framework before issuing its order. We agree.

"Before modifying or amending a custody order, the [trial] court must determine whether the moving party has demonstrated either proper cause or a change of circumstances to warrant reconsideration of the custody decision." *Dailey v Kloenhamer*, 291 Mich App 660, 665; 811 NW2d 501 (2011). "The movant . . . has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists *before* the trial court can consider whether an established custodial environment exists . . . and conduct a review of the best[-]interest factors." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). "If the movant seeking to change custody . . . successfully establishes proper cause or a change of circumstances under the applicable legal framework, the trial court must then evaluate whether the proposed change is in the best interests of the child by analyzing the appropriate best-interest factors." *Lieberman*, 319 Mich App at 83.

In this case, the 2015 custody order granted the parties joint legal custody, with Turner having primary physical custody of the minor child. The same order granted Davis "frequent and liberal parenting time," including parenting time when Turner was at work or school. In July 2020, Davis moved the trial court to enter an order "recognizing that the parties share . . . joint legal and physical custody of the minor child." Davis also requested that the trial court "modify the current parenting time schedule" so that the minor child would reside with Davis during the school year and Turner would be granted parenting time during the summer, on holidays, and when Turner visited Texas. As already stated, Turner opposed the motion.

After the hearing, the trial court granted Davis's motion to change custody, finding that an established custodial environment existed with both parties[1] and ordering that Davis and Turner would share joint physical custody of the minor child. The trial court ordered that, "commencing November 1, 2020, the parties shall exercise parenting time with the minor child one month on/one month off, with [Davis] having the first month of parenting time in November." Turner was permitted to "commence summer parenting time the first weekend following the end of the school year[.]" Turner was to return the minor child to Davis "on the weekend prior to the child's first day of school." The trial court then ordered that, at the beginning of the 2021 school year, the minor child's primary residence would be with Davis in Texas. The minor child was to "reside

[1] Turner does not dispute the trial court's finding that an established custodial environment existed with both her and Davis.

primarily with [Davis] during the school year and with [Turner] during the summer." The trial court ordered that, if Turner moved to Texas, the parties would have week on, week off custody with alternating holidays.

Despite the fact that the November 9, 2020 order changed the custody of the minor child, the trial court did not adhere to the *Vodvarka* framework and determine whether proper cause or a change of circumstances existed that warranted modification of the custody arrangement. Rather, the trial court first considered whether an established custodial environment existed and, after determining that an established custodial environment existed with both parents, the trial court ordered the change of custody. In doing so, the trial court failed to consider whether the established custodial environment would be altered and failed to evaluate the best-interest factors identified in MCL 722.23 to determine whether a change in the minor child's custodial environment was in his best interests. Because the trial court entirely failed to adhere to the *Vodvarka* framework before issuing an order that changed custody, we conclude that the trial court committed error. See *Lieberman*, 319 Mich App at 87 ("the trial court committed error requiring reversal . . . by not analyzing the motion under the applicable legal framework set forth in *Vodvarka*."). We therefore vacate the portion of the November 9, 2020 order concerning custody and remand to the trial court for consideration of the *Vodvarka* framework.

B. CHANGE OF DOMICILE

Turner next argues that the trial court erred by failing to follow the appropriate framework before issuing its order to change the minor child's domicile. We agree.

Contained within the Child Custody Act of 1970, MCL 722.21 *et seq.*, is MCL 722.31, which provides:

> (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.
>
> * * *
>
> (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 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.

Thus, "[w]hen . . . one parent is seeking permission to relocate more than 100 miles away, the [trial] court must consider the factors of MCL 722.31(4)." *Spires v Bergman*, 276 Mich App 432, 436-437; 741 NW2d 523 (2007).

In this case, it is undisputed that custody was governed by court order and that Mansfield, Texas, is located more than 100 miles from the minor child's legal residence. Consequently, the trial court was required to evaluate Davis's motion for change of domicile using the factors set forth in MCL 722.31(4). See *id*. After the close of proofs, the trial court stated the following from the bench:

This is a case that's a very close call. I think I've got the benefit and certainly [the minor child] has the benefit of two really good parents who have excellent support systems.

Dad's support system is all within his household, mom's is within the community but it's a, a family support system. And, from what I'm hearing, [the minor child] is very close with everyone that is in his life.

The dispute about what's been going on, I don't know if it's any clearer after the testimony. It sounds like we're not that far apart.

I'm hearing from the one witness that's not a party that dad was having three overnights a week and dad's position coming into trial was it was four to five to six, depending on the week.

And I think prior to this case being filed and the change in the relationship with these parties, they did have kind of an open parenting time schedule. It just depends on what was going on, what was working.

Mom, single mom, and going to school, working, and so she did have to rely on aunt, grandma, dad, step-mom, half-sister. And it worked.

Now, everything is changed. And the only things that are giving me hesitation in applying the factors that the Court is required to, I've got concerns

about some of the things I'm hearing from mom but they're not horrible concerns but they're the scale tipping kind.

Because, like I said, it's—dad sounds like his household is a more stable environment but there's nothing wrong with mom's environment.

So it's a little more stable because it's not an issue of a child getting woken up at 11:00 o'clock because mom got off of work . . . .

And so it's not that it's a—anything wrong with it. It's just I have to make my decision, this is consistent with MCL 722.31, sub-section four, and the Court's focus has to be on the child. This Court is given direction in the statue [sic], that is—my focus is on the child.

* * *

So, for the remainder of the well, let me start with this, I do find that both parties have an established custodial environment with this child.

* * *

The—I'm still not crystal clear on exactly where he was spending nights and how many with each parent because they don't agree on it and the one witness we had didn't really offer a lot of clarity but it was not what mom was saying, it wasn't what dad was saying. It was kind of somewhere in the middle.

For the remainder of the 2020, 2021, school year, I am going to maintain a joint physical custody situation. It's online school and he will finish up school . . . but part of it's going to be done at dad's house.

* * *

After this school year, I am going to order that, for the following school year, which is the—I just want to make sure I have it correctly, the 2021 to 2022 and there forward, I am going to grant the request and allow for the change of domicile to the State of Texas.

Although the trial court acknowledged that it was required to consider the factors outlined in MCL 722.31(4), the trial court did not do so on the record. Rather, the trial court found that Davis was able to provide more stability to the minor child and that Davis and Turner had enjoyed an "open parenting time schedule." However, none of the trial court's findings directly relate to the factors outlined in MCL 722.31(4).

Because the trial court was mandated to consider the factors of MCL 722.31(4), and the trial court did not do so, it is necessary to remand to the trial court. See *Spires*, 276 Mich App at 436-437. In deciding whether to grant or deny the motion to change domicile on remand, the trial

court must consider the four-step approach set forth by this Court in *Rains*, 301 Mich App at 325:

> 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 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 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.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly