STATE OF MICHIGAN

COURT OF APPEALS

DONNA LEE (SOLTIS) MAKI

Plaintiff-Appellee,

v

MYRON MAKI,

Defendant-Appellant.

UNPUBLISHED
August 27, 1996

No. 189787
LC No. 92-27765-DM

Before: Hood, P.J., and Markman and A. T. Davis,* JJ.

PER CURIAM.

Defendant appeals by right an order changing custody of the parties' two minor children from defendant to plaintiff. We reverse and remand.

Plaintiff and defendant were divorced on March 30, 1993. The divorce judgment granted physical custody of the children to defendant. Plaintiff and defendant both lived in the Upper Peninsula. In early 1995, defendant learned that he would be transferred to a new job at Selfridge Air National Guard Base near Mount Clemens, Michigan. Plaintiff filed a "Motion to Change Support Order" in February 1995. At the March hearing on this motion, plaintiff argued that the children should remain in the Upper Peninsula with her and not relocate with defendant to the Lower Peninsula. The motion was accordingly treated as a request for change in physical custody. The children were confused about where they wished to reside. The trial court, upon speaking with the children in chambers, found that they clearly expressed a desire to live with defendant in the Lower Peninsula. It granted defendant's motion for change of domicile and removal of the children to the Lower Peninsula. It ordered the children to have visitation with plaintiff from April 1, 1995 through the end of the school year (while defendant moved and started his new job), then to spend three weeks with defendant (to orient them to their new home), then to spend summer vacation with plaintiff, and to return to defendant's custody in the Lower Peninsula seven days before school starts.

On August 3, 1995, plaintiff moved to change the physical custody of the children. A hearing was held on August 17, 1995. Plaintiff asserted that she brought the motion because of a change in the

* Circuit judge, sitting on the Court of Appeals by assignment.

stated preference of the children regarding where they wanted to live. After speaking with the children, the court found that, by this time, they preferred to live with plaintiff in the Upper Peninsula.[1] It noted that the advantage of staying in the Upper Peninsula was the presence of family and friends. It then announced that it would change custody from defendant to plaintiff.

Defendant's counsel then requested that the court address the "best interests" factors of MCL 722.23; MSA 25.312(3) and the plaintiff's burden of proof. In response, the court acknowledged that the children had an established custodial environment with defendant and that the burden was therefore on plaintiff to establish by clear and convincing evidence that a change was in the children's best interests. It stated that there was clear and convincing evidence that the children preferred to live with their mother. The court then addressed the "best interests" factors, finding, (a) that the children had significant and healthy emotional ties with both parents, (b) that there was no difference regarding the parties' capacity and disposition to give love and affection, (c) that both were conscientious about providing for basic needs and medical care, (d) that the children lived in a satisfactory environment with defendant but that it was unclear whether the opportunity to live with plaintiff "for awhile" made it desirable to maintain the existing environment (e) that there was no problem with the permanence of either family unit, (f) and (g) that both were morally, mentally and physically fit, (h) that the children did well in school and socially with both, (i) that the children's preference was to live with plaintiff, (j) that both parties could improve on facilitating relationships with the other (k) that any domestic violence was "ancient history" and (l) that fundamental fairness suggested that the children should spend some time with plaintiff because they had already spent some time living with defendant.

Defendant appeals the order changing custody to plaintiff. MCL 722.28; MSA 25.312(8) sets forth the applicable standards of review:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

MCL 722.27(1)(c); MSA 25.312(1)(c) provides in pertinent part:

> The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The 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.

In *Baker v Baker*, 411 Mich 567, 576-577; 309 NW2d 532 (1981), the Michigan Supreme Court stated regarding this section:

> In adopting s 7(c) of the act, the Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an "established custodial environment", except in the most compelling cases.

Here, the trial court appropriately found that there was an established custodial environment with defendant.[2] The finding was supported by the divorce judgment awarding defendant physical custody of the children and the fact that the children had lived with him for approximately two years. On the bench at the March 1995 hearing and in its May 9, 1995 order, the trial court clearly stated that physical custody of the children was to remain with defendant, even though his job would require him and the children to move to the Lower Peninsula. The trial court provided for extended visitation with plaintiff for the remainder of the school year (while defendant moved and started his new job) and for the majority of the children's summer vacation. The provision of these two extended periods of visitation with plaintiff did not change the "established custodial environment." As a matter of policy, such an inference would be improper because it would discourage custodial parents from voluntarily agreeing to extended visitation by their children with the noncustodial parent. Here, the provision of extended visitation was provided in the context of an order granting defendant's motion for change of domicile and to remove the children to the Lower Peninsula. At the August 1995 hearing, the trial court reiterated that the children had an established custodial environment with defendant.

Having determined that there was an established custodial environment with defendant, the trial court was obligated to consider the "best interests" factors to determine if there was "clear and convincing evidence" to change physical custody of the children. The record indicates that the trial court decided to change the physical custody of the children to plaintiff on the basis of the children's stated preference to live with their mother and the fact that staying in the Upper Peninsula would facilitate contact with the children's extended family. The trial court only addressed the "best interests" factors after defendant's counsel requested that it do so. The trial court's relatively cursory assessment of the "best interests" factors did not result in an explicit determination by the court that there was "clear and convincing evidence" that it was in the children's "best interests" to change their established custodial environment. The trial court committed clear legal error in failing to follow its obligations under § 7 for changing an established custodial environment. We accordingly remand this matter to the trial court for a full consideration of the "best interests" factors and a determination whether there is "clear and convincing evidence" that it is in the children's "best interests" to change the existing custodial environment.[3]

Reversed and remanded.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Alton T. Davis

[1] There is some indication that this might have been the result of plaintiff actively discouraging her children from going to live with defendant in the Lower Peninsula by, inter alia, describing the Detroit area as having a high crime rate. Further, at the March 1995 hearing, the trial court noted that one of the children said that plaintiff had indicated that if the children loved her they would not want to live with defendant.

[2] Plaintiff challenges this determination in her brief on appeal. However, her challenge is not properly before this Court because she failed to cross-appeal this issue. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123 (1993).

[3] We encourage the trial court to carefully assess each of the "best interests" factors set forth by the Legislature in MCL 722.28; MSA 25.312(8). We are concerned, in particular, by the court's assessment of factor (d) -- "the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." With respect to this factor, the trial court stated that it was unclear whether the possibility of expanding the children's "horizons" by living with plaintiff made it desirable to maintain the established custodial environment. It also indicated that "fundamental fairness" required that the children live with plaintiff. Such concerns, if appropriate at all in consideration of the children's "best interests," would properly be articulated under factor (l) - other factors. Factor (d) does not invite a court to consider the desirability of broadening a child's "horizons" by living with the noncustodial parent or the "fundamental fairness" of having a child live with the noncustodial parent.