STATE OF MICHIGAN

COURT OF APPEALS

ERIN L. ESCAMILLA THURSTON, Plaintiff-Appellee,	UNPUBLISHED August 10, 2004
v	No. 250568 Saginaw Circuit Court
FELIX G. ESCAMILLA, Defendant-Appellant.	LC No. 97-020999-DM

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right[1] from an order granting plaintiff's motion for a change in domicile of the parties' minor children. We affirm in part, reverse in part, and remand for an evidentiary hearing to determine whether plaintiff can prove, by clear and convincing evidence, that the change in domicile and consequent change in parenting time, which effectively amounted to a change in the children's established custodial environment, is in their best interest pursuant to MCL 722.23.

[1] This case comes to this Court on remand from our Supreme Court. *Thurston v Escamilla*, unpublished order of the Supreme Court, entered February 27, 2004 (Docket No. 125142). In lieu of granting leave to appeal, our Supreme Court vacated the September 10, 2003 order of this Court dismissing the appeal for lack of jurisdiction on the basis that the trial court's August 12, 2003 order was a postjudgment order that did not affect the custody of a minor. *Thurston v Escamilla*, unpublished order of the Court of Appeals, entered September 10, 2003 (Docket No. 250568).

Our Supreme Court determined that "[t]he divorce judgment awarded joint legal and physical custody to both parties, and there was, in fact, an established joint custodial environment under which defendant had nearly daily contact with the children." As such, our Supreme Court found that the order "granting plaintiff's motion for change of domicile does not mention a change of custody, but by permitting the children to be removed by plaintiff to the State of New York, the order is one '*affecting* the custody of a minor…' within the meaning of MCR 7.202(7)(a)(iii) [emphasis supplied]." Our Supreme Court held that the order was final and appealable by right, pursuant to MCR 7.203(A)(1), and remanded the case to this Court for plenary consideration.

The parties shared joint legal and physical custody of their two minor daughters. This case arose when the trial court granted plaintiff's motion for a change in domicile, which allowed her to move the children from Michigan, where they alternated staying with each parent on a daily basis, to New York, where she sought to reside with her new husband.

Defendant first argues that the trial court abused its discretion in finding that plaintiff proved by a preponderance of the evidence that the *D'Onofrio* factors[2] supported a change in the children's domicile. We disagree.

MCL 722.31(4) provides:

> 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.

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[2] The "*D'Onofrio* factors" set out in *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976) were adopted by this Court in *Dick v Dick*, 147 Mich App 513, 517; 383 NW2d 240 (1985), and were codified (using slightly different terminology, and reordering the factors and adding an additional factor) by the Michigan Legislature at MCL 722.31(4) on January 9, 2001. Despite the fact that the instant case occurred after MCL 722.31(4) became effective, the trial court referred to the "*D'Onofrio* factors" instead of MCL 722.31(4). See *Brown v Loveman*, 260 Mich App 576, 579-580 n 2; 680 NW2d 432 (2004). While the trial court clearly should have applied and referred to MCL 722.31(4) instead of relying on the *D'Onofrio* factors, we find that in applying the *D'Onofrio* factors, the trial court addressed the pertinent factors of MCL 722.31(4). *Brown, supra* at 587. Moreover, defendant does not argue that the trial court erred in applying the *D'Onofrio* factors instead of the statutory factors set out in MCL 722.31(4).

(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 parties agree that only factors (a) and (c) are at issue here.

The petitioning parent bears the burden of proving by a preponderance of the evidence that a change in domicile is warranted. *Mogle v Scriver*, 241 Mich App 192, 203; 614 NW2d 696 (2000); *Brown*, *supra* at 600. We review a trial court's decision to grant a change of domicile for an abuse of discretion. *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183 (2000). And we will not disturb a trial court's ruling on a petition to remove a minor child from the state unless the court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. *Dick*, *supra* at 516; see also *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001) and MCL 722.28.

We do not conclude that the trial court's factual determinations were against the great weight of the evidence. The trial court found that the change in domicile had the potential to improve the quality of life for the children as well as plaintiff. MCL 722.31(4)(a). In support of its findings, the trial court stated that the children would benefit from the two-parent home they would have in New York. There, plaintiff planned to be a stay at home parent. The trial court found that this environment would be more secure than the children's current living arrangement, where the parties alternated custody on a daily basis. While defendant contends that the trial court gave undue weight to the fact that plaintiff's new husband would provide a higher income, it appears from the lower court record that the trial court was more concerned with the stability in the new home. The trial court's findings were not against the great weight of the evidence, and its determination regarding the potential benefit factor was not clearly erroneous.

Defendant also argues that the trial court erred in its failure to determine whether the parties' new parenting time schedule would provide "an adequate basis for preserving and fostering the parental relationship between the child and each parent." MCL 722.31(4)(c). We disagree. As this Court stated in *Mogle*, *supra* at 204, "the new visitation plan need not be equal to the prior visitation plan in all respects." Here, we are satisfied that the parenting time schedule provides a "realistic opportunity" for defendant to preserve and foster his parental relationship with his daughters, albeit in a different manner than previously. *Anderson v Anderson*, 170 Mich App 305, 310-311; 427 NW2d 627 (1988). The trial court's findings of fact were supported by the great weight of the evidence, and we find that the trial court's grant of plaintiff's petition for a change of domicile did not amount to an abuse of discretion.

Defendant next argues that the trial court erred in granting plaintiff's petition for a change in domicile, which effectively changed the established custodial environment of the children, without first holding an evidentiary hearing to determine if plaintiff proved, by clear and convincing evidence, that the change in domicile and consequent change in parenting time, was in the children's best interest pursuant to MCL 722.23. We agree.

In support of his argument on this issue, defendant relies on this Court's holding in *Brown*, *supra* at 582-583:

> We find that the trial court did not err in applying the *D'Onofrio* factors when considering defendant's petition to change the minor child's residence. However, once the trial court granted defendant permission to remove the minor from the state, and it became clear that defendant's proposed parenting time schedule would effectively result in a change in the child's established custodial environment with both parties, it should have engaged in an analysis of the best interest factors, MCL 722.23, to determine whether defendant could prove, by clear and convincing evidence, that the removal and consequent change in established custodial environment and parenting time was in the child's best interest.

MCL 722.27(1)(c) provides that 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.

Here, the lower court record supports a finding that an established custodial environment existed with both parents. See *Jack v Jack*, 239 Mich App 668, 670-671; 610 NW2d 231 (2000). Like the parenting time schedule here, the parenting time schedule in *Brown* was changed from both parties having equal parenting time to one party having parenting time during the school year while the other party had parenting time during the summer. In *Brown*, we held that this "necessarily would amount to a change in the established custodial environment, requiring analysis under the best interest factor framework." *Brown*, *supra* at 596.

As this Court reasoned in *Brown*, *supra* at 594:

> It would be illogical and against the intent of the Legislature to apply MCL 722.31 without considering the best interests of the minor child, if the change in legal residence would effectively change the established custodial environment of the minor. . . . Otherwise, where parents have joint physical custody and one party seeks to change the legal residence of the child (which would effectively change the established custodial environment), the party would only be subject to the lesser preponderance of the evidence burden required by MCL 722.31.

This reasoning applies here as well, where the trial court's grant of plaintiff's petition for a change in domicile effectively amounted to a change in the children's established custodial environment.

We affirm in part, reverse in part, and remand for an evidentiary hearing to determine whether plaintiff can prove by clear and convincing evidence that the change in domicile and consequent change in parenting time, which effectively amounted to a change in the children's

established custodial environment, is in their best interest pursuant to MCL 722.23. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra