

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RANDI GAGNON,

Plaintiff-Appellee,

v

GARY GLOWACKI,

Defendant-Appellant.

FOR PUBLICATION

March 6, 2012

9:05 a.m.

No. 303449

Wayne Circuit Court

Family Division

LC No. 06-660387-DP

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Before: JANSEN, P.J., and WILDER and K.F. KELLY, JJ.

WILDER, J.

Defendant appeals as of right the trial court's order granting plaintiff's request to change the domicile of their minor child from Michigan to Windsor, Ontario. We affirm.

**I. BASIC FACTS**

Plaintiff and defendant never married and had a child (a son) together, who was born on September 19, 2005. At around the time that the child was born, plaintiff and defendant stopped dating. Since birth, the child has lived with plaintiff in her grandmother's home in Plymouth. Defendant lives approximately 11½ miles away in Farmington Hills and is married. He and his wife have a child of their own, who was born in June 2010.

A court order awarded plaintiff and defendant each joint legal and joint physical custody of their child. The order provided that the child would primarily reside with plaintiff with defendant having parenting time every Tuesday and Thursday evening and alternate weekends. Additionally, defendant received an overnight with the child every other Thursday night.

Plaintiff worked as an assistant in a latch-key program in the Plymouth-Canton School district from 2003 until 2006, when she decided to quit because she determined that the cost of providing child care for her son was almost as much as her income. Plaintiff then became a nanny for her friend's children until the end of 2009, which allowed her to take care of her son at the same time. During this time, plaintiff attempted to further her education in 2007 by attending a paramedic class on Saturdays. Defendant would watch and care for their son while plaintiff was in class. Eventually, plaintiff quit to take care of her grandmother, who was in failing

health.<sup>1</sup> Then, in August 2007, plaintiff's car was repossessed because she could not afford to keep current with the payments. In 2009, she began to attend classes at a community college to study criminal justice. However, just a few months later, plaintiff lacked the means to get to the school because her friend would no longer allow her use of the friend's car. Consequently, plaintiff stopped attending the classes.

Plaintiff has tried to find other jobs in Michigan within walking distance of her home. But, because of her desire to be home when the child was home, she limited her work availability to every other weekend and 12:30 p.m. to 3:30 p.m. Monday through Friday, when the child would be either with defendant or at preschool, and plaintiff has not received any offers or call backs.

Thus, without any employment, plaintiff was relying on child support and public assistance from the State in the form of a bridge card. As a result, she could not continue to afford to live in her grandmother's home, whose monthly mortgage payment was \$918. After plaintiff's grandmother passed away, title in the home went to plaintiff's mother, who assumed the existing mortgage. Plaintiff was paying a portion of the mortgage (\$500) each month to her mother. More recently, plaintiff has not been able to afford the \$500, so her mother has been paying the full mortgage amount. Plaintiff's mother testified that she cannot continue to afford to pay the \$918 each month for the house; thus, her intention is to sell the house.

Defendant is employed as a supervisor of the service department for an armor transport company and exercises additional parenting time as much as possible, bringing the child lunch, taking the child to McDonald's, and going on vacations. Defendant and the child talk on the phone two or three times per day, with the child initiating many of the calls. Defendant did the majority of transporting the child to preschool with his wife helping occasionally. Defendant also has been taking the child to ice skating classes on Tuesday evenings, during his parenting time. And defendant testified that he and the child have an "extremely strong" relationship and that their bond is "unbreakable." Even plaintiff testified that the child "idolizes his father like a superhero. He loves his father." Plaintiff added that the child looks to defendant for guidance and discipline in his day-to-day life when the child is with him.

Because of plaintiff's lack of access to transportation, defendant has always done all of the driving to and from Plymouth for his parenting time. It takes approximately 15 minutes to get from his home in Farmington Hills to plaintiff's home in Plymouth. Defendant also has taken the child to all of his doctor appointments and dentist appointments.

Plaintiff desires to move to Windsor, where she grew up and her entire family still resides. Plaintiff also testified that she would gain access to a car because her mother and her mother's husband<sup>2</sup> have four cars between them.<sup>3</sup> Furthermore, plaintiff has a job offer to work,

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<sup>1</sup> At some point later, not specified in the record, plaintiff's grandmother passed away.

<sup>2</sup> Plaintiff's parents are divorced but still both reside in Windsor.

where her mother works, as a waitress at The Penalty Box, which is a restaurant in Windsor. The job would be for 25 to 30 hours per week making approximately \$18 per hour, including tips. Plaintiff's mother would be available to care for the child while plaintiff was at work or school because, if necessary, she would quit her job. Plaintiff's plan was to live with her father in his three-bedroom house for a few weeks, until she could get an apartment on her own. Additionally, plaintiff plans for the child to attend St. Maria Goretti Catholic Elementary School, which is located near plaintiff's father's house.

On August 30, 2010, plaintiff filed a motion to allow her to change the domicile of the child from Plymouth to Windsor. After conducting a hearing, the trial court granted the motion. In its order dated February 8, 2011, it found that plaintiff successfully established by a preponderance of the evidence that the move was warranted. It also found that an established custodial environment existed with both parents and that the established custodial environment would not be affected with the move "if Defendant were given an additional weekend each month and were allowed to maintain his Tuesday and Thursday parenting time sessions if desired." Because it found no change in the established custodial environment, the trial court found it unnecessary to consider any best-interests factors. The trial court also ordered plaintiff to drop off and pick up the child in Detroit for parenting time with defendant.

## II. CHANGE OF DOMICILE – MCL 722.31

Defendant first contends that the trial court erred in its application of the MCL 722.31(4) factors by addressing the factors from the perspective of plaintiff, rather than the child, and improperly crediting some of plaintiff's factual claims. Defendant also suggests that other factual findings of the trial court were erroneous. We disagree.

We review a decision on a petition to change the domicile of a minor child for an abuse of discretion. *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). We review the trial court's findings in applying the MCL 722.31 factors under the great weight of the evidence standard. *Id.* "Under this standard, we may not substitute our judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *McKimmy v Melling*, 291 Mich App 577, 581; 805 NW2d 615 (2011).

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 without court approval. MCL 722.31(1). A court may permit a legal residence to change if, after considering the following factors, a change is warranted by a preponderance of the evidence, *Brown*, 260 Mich App at 600:

- (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

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<sup>3</sup> Plaintiff's mother testified that she would only allow plaintiff to have access to a vehicle if she lived in Windsor, however.

(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.

“The party requesting the change of domicile has the burden of establishing by a preponderance of the evidence that the change is warranted.” *McKimmy*, 291 Mich App at 582. MCL 722.31(4) requires the trial court to consider the factors “with the child as the primary focus in the court's deliberations.”

On its face, MCL 722.31 is only applicable when a parent attempts to change the domicile of a child to a location that is over 100 miles away. However, when a child's custody is governed by a court order that prohibits the child from moving to another state without the permission of the court, as is the case here, regardless of the distance involved, if the proposed residence change involves leaving the state, then the factors under MCL 722.31(4) are the proper criteria for the court to consider.<sup>4</sup> See *Mogle v Scriver*, 241 Mich App 192, 202-203; 614 NW2d 696 (2000).

With regard to MCL 722.31(4)(a), the trial court found that the move had the capacity to improve the quality of life of both plaintiff and the child. The trial court found that the move would provide plaintiff with immediate employment, a support system, access to transportation, and free daycare by her family. The move would also make it more likely plaintiff would “secure a steady income, return to school and pursue a brighter future. This could have positive spillover effect on [the child].” The trial court also found insufficient evidence that the child would be harmed educationally by the move.

This Court has stated that “[i]t is well established that the relocating parent's increased earning potential may improve a child's quality of life.” *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007). Thus, the trial court's finding in this case that

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<sup>4</sup> The parties do not dispute the application of MCL 722.31(4).

improvement in plaintiff's income would have a spillover effect on the child is not an improper application of the law. In addition, this finding is not against the great weight of the evidence. There was evidence that plaintiff was unemployed, did not have a vehicle, and relied on defendant's child support payments and assistance from the state of Michigan for her sources of income. In Windsor, however, she had a job offer, access to a vehicle, and free childcare available to her. While, as defendant contends, the child may not have suffered from a lack of transportation or basic necessities while in Michigan, the trial court's finding that the move had the *capacity* to improve his quality of life was not against the great weight of the evidence.

In addition, the trial court finding that the move would not detrimentally affect the child's education was not against the great weight of evidence. First and foremost, the evidence comparing the Plymouth-Canton schools with the Windsor schools was not entirely relevant because even if the motion to change domicile was denied, plaintiff stated she would be moving out of the Plymouth home and there was no guarantee that she would remain in the Plymouth-Canton School District. Additionally, because Michigan and Ontario used different "proficiency standards" in evaluating their schools, the statistics presented were of "limited use." Defendant is correct when he states that the standard is whether the move has the capacity to *improve* the plaintiff's and the child's life. However, the fact that the trial court found this particular fact neutral does not preclude a finding that the move *overall* had the capacity to improve their lives.

Finally, defendant's argument that plaintiff and her mother created the alleged crisis so that plaintiff could move to Windsor and make defendant a weekend parent ultimately involves credibility determinations, and this Court must defer to the trial court on issues of credibility. *Mogle*, 241 Mich App at 201. The trial court was free to believe the testimony of plaintiff and her mother regarding plaintiff's employment opportunities, the availability for plaintiff's use of the mother's extra vehicle, plaintiff's mother's inability to provide childcare in Michigan, and the need to sell the Plymouth residence. Therefore, when evaluating all of the above facts, we conclude that the trial court finding that the move did have the capacity to improve the quality of life of both plaintiff and the child was not against the great weight of evidence.

With regard to MCL 722.31(4)(b), the trial court found that plaintiff's move was not inspired by a desire to deny defendant parenting time. The trial court found that plaintiff has frequently given defendant more parenting time than required by the court order, consented to additional parenting time in the summer, is willing to give defendant an extra weekend or overnight per month, and is willing to transport the child across the border for parenting time.

The trial court's finding that plaintiff did not intend to frustrate defendant's parenting time also is not against the great weight of the evidence. Although weekday parenting time may, in fact, be more difficult after the move, the trial court finding that it was not plaintiff's intent to disrupt defendant's parenting time is not against the great weight of the evidence. Plaintiff offered defendant an additional weekend per month and offered to transport the child across the border for parenting time. Moreover, as noted previously, there was testimony in the record that the plaintiff's family and friends were in Windsor, plaintiff would have access to transportation in Windsor, plaintiff would have employment in Windsor, and plaintiff would have access to free childcare in Windsor. This factor also involves a credibility determination, on which we must defer to the trial court. See *id.*

With regard to MCL 722.31(4)(c), the trial court found that providing defendant with an additional weekend of parenting time per month, even if weekday parenting time is negatively affected, can provide an adequate basis for preserving and fostering the parental relationship between defendant and the child. The trial court found that this could give defendant additional extended time, which could foster an even closer parent-child relationship. In addition, the trial court found that the parties' history of cooperation regarding parenting time suggested that they would comply with the modified order. Moreover, the trial court found that plaintiff agreed to subject herself to the jurisdiction of the court while in Canada, and as such the trial court would be able to ensure compliance with its orders. See *Brausch v Brausch*, 282 Mich App 339, 354; 770 NW2d 72 (2009).

For this factor, our inquiry is "whether the proposed parenting time schedule provides 'a realistic opportunity to preserve and foster the parental relationship previously enjoyed' by the nonrelocating parent." *McKimmy*, 291 Mich App at 584, quoting *Mogle*, 241 Mich App at 204. Furthermore, "the visitation plan need not be equal to the prior visitation plan in all respects." *Brown*, 260 Mich App at 603.

The trial court finding that the new parenting time schedule can provide an adequate basis for preserving and fostering the parent-child relationship is not against the great weight of the evidence. The parenting time schedule after the move is essentially the same as the parenting time schedule before the move, with defendant given an extra weekend per month.

For factors (d) and (e), the trial court found that they were not applicable. Neither plaintiff nor defendant dispute these findings on appeal, and we do not find that the findings were against the great weight of evidence.

After evaluating all of the above factors, the trial court determined that plaintiff met her burden of establishing by a preponderance of the evidence that moving the child to Windsor was warranted. This ultimate finding is not against the great weight of evidence. In short, the capacity of the move to improve both plaintiff's and the child's life was not outweighed by any possible negative ramifications of the move.

### III. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant next contends that the trial court erred in finding that the move would not change the established custodial environment with defendant and, therefore, failed to determine whether plaintiff proved by clear and convincing evidence that the move was in the best interest of the child. We disagree.

After granting a change of domicile, the trial court must determine whether there will be a change in the established custodial environment and, if so, determine whether the relocating parent can prove, by clear and convincing evidence, the change is in the child's best interest.<sup>5</sup> See *id.* at 591.

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<sup>5</sup> MCL 722.23 provides:

According to MCL 722.27(1)(c),

[t]he 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 should also be considered.

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As used in this act, “best interests of the child” means the sum total of the following factors to be considered, evaluated, and determined by the court:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

In *Brown*, this Court noted that it is possible to have a change of domicile without changing the established custodial environment. *Id.* at 596.

The parties do not dispute that an established custodial environment existed with both plaintiff and defendant. The trial court finding that the move would not change the established custodial environment was not against the great weight of the evidence.

The trial court found that the established custodial environment with both parents would not change if defendant were given an additional weekend per month and he were allowed to maintain his current parenting time if desired. The trial court further found that, even if defendant decided to no longer exercise Thursday overnights, defendant would have the same number of overnights per month as he does now (six). In addition, if defendant were to stop weekday parenting time, the extra time that defendant would receive for the additional weekend (48 hours) is almost equivalent to the maximum number of weekday hours that defendant exercises now (58 hours). Finally, the court found that with advance planning, defendant can also continue to attend school-related events.

In this case, the new parenting time schedule was essentially the same, with defendant being given an additional weekend per month. Defendant's argument stresses how plaintiff's move is more than a mere 17-mile move because it crosses international borders. Specifically, defendant argues that because of the inherent extra time needed for him to make such crossings, his weekday parenting time will be so adversely affected that he may have to opt out of them for the benefit of the child. Defendant notes that, if the move results in him becoming a weekend-only dad, then the established custodial environment the child has with him would necessarily be affected. This argument has some merit; however, the trial court ordered plaintiff to transport the child across the border to facilitate the weekday parenting time. Thus, on the face of it, the bulk of defendant's concerns about diminished weekday parenting time are not warranted. While the move to Windsor likely means the end of spontaneous lunches during the week and Thursday overnights with defendant,<sup>6</sup> defendant still can have the Tuesday/Thursday evening parenting time. The loss of the weekday overnight and the lunches is insufficient to destroy the established custodial environment between the child and defendant. Therefore, the trial court finding that the established custodial environment would not change if defendant were given an extra weekend per month and continued to maintain his current parenting time was not against the great weight of the evidence. If the child continued to see his father on weekdays and an extra weekend per month, he would continue to look to his father for guidance, discipline, necessities, and comfort. See MCL 722.27(1)(c).

However, the trial court's finding, that the extra weekend per month of parenting time would offset the lack of any weekday parenting time if weekday visits became too impractical to continue, is erroneous. On the contrary, if the move were to render defendant a weekend-only parent, a change in the established custodial environment would result. See *Powery v Wells*, 278

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<sup>6</sup> We acknowledge that the extra time involved with morning rush hour and crossing the international border would likely require the child to wake up unreasonably early to timely arrive at school on Friday, thereby making weekday overnights impractical.



Mich App 526, 528; 752 NW2d 47 (2008). But this particular finding was not central to the trial court's ultimate conclusion. The trial court's order encompassed that defendant would maintain his weekday parenting time. At another part of the opinion, the trial court found that plaintiff and defendant were likely to comply with a modified order. Thus, defendant is not made a weekend parent by the terms of the order, and the trial court's finding that the move would not change the established custodial environment was not against the great weight of the evidence.

#### IV. CHILD'S BEST INTERESTS

Because there would be no change in the established custodial environment, the trial court was not required to determine whether plaintiff proved, by clear and convincing evidence, the move was in the best interest of the child. See *Brown*, 260 Mich App at 590-591. However, defendant contends that, even if there was no change in the established custodial environment, the trial court was required to consider whether the move was in the best interest of the child, but at the lower preponderance of the evidence standard. We disagree.

Defendant's reliance on *Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010), is misplaced. *Pierron* did not specifically address a change of domicile under MCL 722.31. Instead, the *Pierron* Court was confronted with a situation where the parents, who had joint legal custody, could not agree regarding "an important decision[] affecting the welfare of the child."<sup>7</sup> In such instances, the court is responsible for resolving the issue in the child's best interests. MCL 722.25; *Pierron*, 486 Mich at 85. In *Pierron*, the plaintiff-father, the defendant-mother, and the children lived in Grosse Pointe Woods, with the children residing with the mother. The defendant later moved to Howell, which was 60 miles away,<sup>8</sup> and tried to enroll their children in Howell schools. The plaintiff objected to the children changing school districts and filed a motion to have the courts decide on this "important decision[] affecting the welfare of the child[ren]." The Supreme Court found that, because the change would not modify the established custodial environment, the defendant did not have to prove by a clear and convincing standard that the change was in the best interests of the children. Rather, the Court stated that the "defendant is required to prove by a preponderance of the evidence that the proposed change of schools would be in the best interests of the children, using the best-interest factors identified in MCL 722.23." *Pierron*, 486 Mich at 89-90. Defendant, in the present case, invites us to extend this requirement to all change of domicile cases under MCL 722.31, where there is also no change to the established custodial environment. We decline the invitation.

This Court has repeatedly held that if a movant can establish that a relocation of domicile under MCL 722.31 is warranted by a preponderance of the evidence *and* the relocation would not alter any established custodial environment, then no best-interest analysis is necessary. E.g., *Spires v Bergman*, 276 Mich App 432, 437 n 1; 741 NW2d 523 (2007) ("Only when the parents share joint physical custody and the proposed change of domicile would also constitute a change

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<sup>7</sup> MCL 722.26a(7)(b) provides that the parents in a joint-custody setting "shall share decision-making authority as to the important decisions affecting the welfare of the child."

<sup>8</sup> Thus, not invoking MCL 722.31.

in the child’s established custodial environment is it also necessary to evaluate whether the change of domicile would be in the child’s best interest.”); *Rittershaus*, 273 Mich App at 470-471 (“We reiterate that the trial court is not required to consider the best-interest factors until it first determines that the modification actually changes the children’s established custodial environment.”); *Brown*, 260 Mich App at 598 n 7 (stating that only when “the relocation would result in a change in parenting time so great as to necessarily change the established custodial environment that an inquiry into the best interest factors is necessary.”). Nowhere in *Pierron*, did the Court explicitly overrule or modify any of this Court’s prior published opinions.

Thus, *Pierron* differed from the present case in that it did not involve a change of domicile analysis under MCL 722.31(4) but, rather, focused on the general procedure put in place to resolve an impasse when parents cannot decide on important decisions affecting the welfare of the child. *Pierron*, 486 Mich at 85, citing MCL 722.25 and *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993).<sup>9</sup> We find that the situation presented in a change of domicile case under MCL 722.31 is distinguishable from where two parents cannot agree on an important decision affecting a child’s welfare. In the former, the decision involves more than the child – it also necessarily directly impacts the relocating parent. Furthermore, there is a specific statute outlining the requirements necessary to grant a change of domicile. Conversely, the general provision of MCL 722.25 does explicitly reference the “best interests of the child.” But, as our Supreme Court has stated, “[W]here a statute contains a general provision and a specific provision, the specific provision controls.” *Duffy v Mich Dep’t of Natural Res*, 490 Mich 198, 215; 805 NW2d 399 (2011). If the Legislature intended for the best-interest factors of MCL 722.21 to be evaluated in a change of domicile case, it easily could have done so. Instead, it limited the analysis to the factors enumerated in MCL 722.31(4).

## V. CONCLUSION

We conclude that the trial court did not abuse its discretion when it granted plaintiff’s motion to change the child’s domicile to Windsor. Furthermore, the court did not err when it concluded that the established custodial environment would not be affected. As a result, the trial court was not required to determine if defendant met by a preponderance of the evidence that the move was in the best interests of the child.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Kirsten Frank Kelly

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<sup>9</sup> It is important to note that *Spires*, *Rittershaus*, and *Brown* all held that no best-interest analysis was necessary if the established custodial environment was not being altered even though they all had the benefit of this Court’s earlier opinion in *Lombardo*, which stated that “a trial court must determine the best interests of the child in resolving disputes concerning ‘important decisions affecting the welfare of the child’ that arise between joint custodial parents.” *Lombardo*, 202 Mich App at 160.