STATE OF MICHIGAN

COURT OF APPEALS

ELISHA LEAVERTON, Plaintiff-Appellee,	UNPUBLISHED December 7, 2010
v	No. 297680 Macomb Circuit Court Family Division
MICHAEL MAC MILEWSKI, Defendant-Appellant.	LC No. 2009-006740-DC

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff's motion for a change of domicile of the parties' minor children. We affirm in part and remand.

The parties began residing together in defendant's house in the fall of 2006, but never married. They are the parents of two children, one of whom was born in 2007 and one of whom was born in 2009. The parties separated and reconciled a few times, but then separated for good in October or November of 2009.

On November 16, 2009, plaintiff filed a complaint seeking custody of the children. On November 30, 2009, a temporary custody order was entered by which defendant acknowledged paternity of the children and which gave defendant "temporary parenting time" every Wednesday at noon through Thursday at noon and every other weekend.

On January 28, 2010, plaintiff petitioned for a change of domicile to Tennessee. She had been laid off from her job at a hospital on October 1, 2009. Despite an extensive job search, she was unable to secure employment in Michigan. She expanded her job search to include Tennessee, where her father lived. She received a full-time job offer with benefits in Nashville, Tennessee, approximately 19 miles from her father's home. Plaintiff's father offered to let plaintiff and the children reside in his home indefinitely for free and to provide daycare for the children. The job offer was contingent upon plaintiff accepting the offer and commencing work on April 5, 2010.

On January 11, 2010, the trial court sent the parties to facilitate with a Friend of the Court (FOC) referee for a recommendation before the evidentiary hearing.[1] Additionally, a consent order was entered that provided, in part, that defendant was to pay $400 per month for child support and to submit to weekly drug testing, and expanded defendant's parenting time on alternate weekends to Monday at 5:00 p.m.

An evidentiary hearing was held on plaintiff's motion for a change of domicile on March 30, 2010. At the beginning of the hearing, the parties placed on the record a stipulation that plaintiff would have physical custody and that the parties would have joint legal custody. After the hearing, the trial court granted plaintiff's motion for a chance of domicile after determining that plaintiff had met her burden under MCL 722.31 by a preponderance of the evidence that the change of domicile was warranted. The court also established a new parenting time schedule for defendant.[2]

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*[3] factors 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

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[1] In its initial report, the FOC found no established custodial environment with either party and, after an analysis of the best interest factors in MCL 722.23(3), recommended that plaintiff have custody of the children. The FOC also recommended that plaintiff's motion for change in domicile be denied. However, the FOC changed its recommendation in its subsequent report and recommended that plaintiff's motion for change in domicile be granted.

[2] The order provided that, until the oldest child started kindergarten, defendant would have one week of parenting time each month, except for June and July, when he would get two weeks. Once the oldest child stated kindergarten, defendant's parenting time would consist of one week in December, every spring/Easter break, one weekend a month, a ten-day block in each of June and July, every Thansgiving weekend for 5 days, and up to five additional overnights per month whenever defendant was in Tennessee.

[3] 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 by the Michigan Legislature at MCL 722.31(4).

> 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. [MCL 722.31(4).]

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 v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). 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 263 (2001) and MCL 722.28.

We conclude that the trial court's factual determinations were not against the great weight of the evidence. Regarding the first factor, the trial court found that the move to Tennessee would most likely improve the quality of life for the children and definitely improve the quality of life for plaintiff. At the time of the hearing, plaintiff was unemployed, had only unemployment and child support as sources of income, and was living rent-free in defendant's house that was in foreclosure. Plaintiff stated that, with her current financial situation, she would be unable to meet her monthly expenses and provide for housing after the six-month redemption period lapsed for the foreclosed home. Moreover, she had zero job offers, even though she had applied to approximately 150 employers. Plaintiff's father offered to provide free housing in a three-bedroom home in Hendersonville, Tennessee. Furthermore, plaintiff had a job offer in nearby Nashville, Tennessee, where she would make approximately $32,000 per year, which would be the highest paying job she ever had. Clearly, with a well-paying job and no housing expense, plaintiff's financial situation would improve greatly, which would correlate to an improvement of the quality of the children's lives. See *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007) ("It is well established that the relocating parent's increased earning capacity may improve a child's quality of life . . . ."). Additionally, the lower court heard evidence that Hendersonville was recognized as a "top ten place" to raise a family according to Family Circle magazine. And, consistent with that assessment, the trial court also heard that the quality of education in the Hendersonville school district was very highly

regarded, with the children's proposed elementary school winning a National Blue Ribbon Award for excellence.

Defendant argues that the trial court gave too much emphasis on plaintiff's improved financial situation. However, there was no evidence that the trial court gave this fact undue importance. In fact, the trial court specifically addressed how the move would benefit the children by providing a stable living environment within an "outstanding" school district. The trial court also noted that defendant never suggested where or how plaintiff and the children were to live after the redemption period expired on the foreclosed home. Therefore, the court's finding that the children's quality of life likely would improve was not contrary to the great weight of evidence.

Regarding the second factor, the court found that plaintiff's decision to request a change in legal residence was not based on her desire to frustrate or defeat the parenting time of defendant. This finding is not against the great weight of evidence. As noted earlier, plaintiff had no job prospects and was about to be evicted from the foreclosed home. The move to Tennessee allowed her to gain full-time employment with benefits, free housing, and to be able to place the children in a top-tier school district. Thus, the court's finding that plaintiff's desire to move was not based on a motive to frustrate defendant's parenting time was not against the great weight of evidence.

For the third factor, the court implicitly found that it was satisfied that, if the residence change were approved, a parenting time schedule could be implemented that would provide an adequate basis for preserving and fostering the parental relationship with defendant. Given the relative proximity between the Detroit area and the Nashville area (approximately 8 or 9 hours by car), the proximity of airports to each location, and the ability to communicate by telephone, computer, or text message, the trial court's finding was not against the great weight of evidence. In fact, defendant does not challenge this finding. Instead, defendant focuses his argument on the *particular* parenting time schedule that was implemented.

We note that, in any event, the test is not whether an *ideal* parenting-time schedule can be implemented. The statute merely requires that the court consider the feasibility of crafting a schedule that provides an *adequate* basis for preserving and fostering the parental relationship with each parent. Thus, the court's finding was not against the great weight of evidence.

The fourth factor a court must consider is the extent to which the parent opposing the relocation is motivated by a desire to secure a financial advantage with respect to a support obligation. Here, defendant does not dispute the court's finding that there was no financial motivation in defendant opposing the move.

Finally, the court must consider whether there was any history of domestic violence. Here, the court found that there was no evidence of any domestic violence at all. Since there was no evidence to suggest that any violence was present, this finding is not against the great weight of evidence.

After considering all of the required factors, the court then found that plaintiff established by a preponderance of the evidence that a move to Tennessee was warranted. Given how all of

the factors were either neutral or in plaintiff's favor, this finding was not against the great weight of evidence and will not be disturbed.

Although the trial court properly considered the *D'Onofrio* factors and did not abuse its discretion in granting plaintiff's motion for a change of domicile, the trial court did not consider, whether granting the motion would also result in a change of an established custodial environment. MCL 722.27(1)(c) provides in part that, "[t]he 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." Thus, once a court determines that a change in residence is warranted, it *must* determine whether such a move would result in a change of an established custodial environment. *Id.* at 470. If the move would change an established custodial environment, then the party seeking the move must prove by clear and convincing evidence that the move is in the children's best interests.[4] *Id.* at 470-472. An established custodial environment exists 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. [MCL 722.27(1)(c); *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).]

In this case, the trial court failed to make any determination regarding the establishment of any custodial environment. "Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review." *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000).

Plaintiff argues that, because defendant stipulated at the beginning of the hearing to vest physical custody with plaintiff, any analysis regarding an established custodial environment was not necessary. However, there are two flaws with plaintiff's theory. First, the stipulation did not address the existence of any current custodial environment – it only addressed prospective legal and physical custody. Second, to the extent that the stipulation could be considered relevant with respect to the issue of the existence of an established custodial environment, parties "cannot by their mere agreement supercede procedures and conditions set forth in statutes and court rules." *Phillips v Jordan*, 241 Mich App 17, 23; 614 NW2d 183 (2000).

On the record before us, we decline to determine whether an established custodial environment existed with respect to defendant, and we remand for the trial court to make a determination with respect to the existence of an established custodial environment with respect to defendant. If the trial court determines that the existing record is sufficient to permit it to make a determination regarding the existence of an established custodial environment with respect to defendant, it shall make a decision based on the existing record. If the record is not

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[4] See MCL 722.23.

sufficient, however, the trial court shall hold an evidentiary hearing. If the trial court determines that an established custodial environment existed with respect to defendant, then the evidentiary standard will be higher, requiring plaintiff to prove by clear and convincing evidence that a change of domicile . . . is in the children's best interests. MCL 722.23; *Rittershaus*, 273 Mich App at 472. If the trial court determines that an established custodial environment does not exist with respect to defendant, however, the trial court need not apply the higher evidentiary standard or conduct an analysis of the best interest factors when ruling on plaintiff's motion.

Defendant also raises two issues regarding terms in the trial court's order granting plaintiff's motion for change of domicile. He maintains that the trial court failed to incorporate two stipulations between the parties with regard to plaintiff's residing with her brother and electronic communication time between defendant and the children. Given our decision to remand this matter to the trial court, we need not address these issues that are specific to the order as previously entered. Defendant is free to raise these issues on remand before the trial court.

Affirmed in part and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering