STATE OF MICHIGAN

COURT OF APPEALS

THOMAS A. LECHNER, Plaintiff-Appellee,	UNPUBLISHED October 16, 2018
v	No. 343164 Washtenaw Circuit Court
NOELLE SUNYU LECHNER, Defendant-Appellant.	LC No. 12-002133-DM

Before: CAVANAGH, P.J., and MARKEY and LETICA, JJ.

PER CURIAM.

Defendant, Noelle Sunyu Lechner, appeals as of right the trial court's order granting plaintiff, Thomas A. Lechner's, motion to change the domicile of the parties' son from Michigan to Tennessee. We affirm in part, reverse in part, and remand for further proceedings.

Since their divorce in 2013, the parties have shared joint legal and physical custody of their minor child, HL. Plaintiff accepted an associate professor position at Tennessee State University (the University) in August 2015. While still residing in Ann Arbor, Michigan, plaintiff commutes to Nashville to teach classes Tuesdays through Thursdays, and returns to Michigan Fridays through Mondays. At the time plaintiff filed his motion to change HL's domicile, the parties had an arrangement that allowed equal parenting time. During the school year, plaintiff exercised parenting time Mondays, Fridays, and every other weekend, and defendant exercised parenting time Tuesdays through Thursdays and every other weekend. During the summer, HL spends 12 days with plaintiff, followed by 9 days with defendant, and then returns to plaintiff to repeat the same pattern.

Plaintiff moved for leave to change HL's domicile in June 2017. He explained that he was a leading candidate for a promotion to chair of the University's accounting department, which would provide him with a significant pay raise. However, he could only accept the promotion if he lived in Nashville because the position would require him to work five days a week with occasional weekend responsibility. Thus, he sought to change HL's domicile from Ann Arbor, Michigan, to Nashville, Tennessee. Following an evidentiary hearing, the trial court granted plaintiff's motion and adopted his proposed parenting-time schedule. This appeal followed.

We first consider defendant's argument that the trial court's findings as to the factors listed in MCL 722.31(4)—also known as the *D'Onofrio*[1] factors—were against the great weight of the evidence. We disagree.

"This Court reviews for an abuse of discretion a trial court's ultimate decision whether to grant a motion for change of domicile." *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014). In matters involving child custody, "[a]n abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183 (2000). We review questions of law for clear legal error, which occurs when the trial court "incorrectly chooses, interprets, or applies the law." *Sulaica*, 308 Mich App at 577. The trial court's factual findings in this context are reviewed under the great weight of the evidence standard. *Rains v Rains*, 301 Mich App 313, 324-325; 836 NW2d 709 (2013); *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). Under that standard, this Court "may not substitute [its] judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *Rains*, 301 Mich App at 324 (quotation marks and citation omitted; alteration in original).

Pursuant to MCR 3.211(C)(3), "a parent whose custody or parenting time of a child is governed by [a custody order] shall not change the legal residence of the child except in compliance with . . . MCL 722.31." In pertinent part, MCL 722.31 states:

> (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.
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> (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.

[1] *D'Onofrio v D'Onofrio*, 144 NJ Super 200; A 2d 27 (1976).

(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.

When a parent moves for leave to change a child's domicile, the trial court must consider the request using the following four-part analysis:

> 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), the so-called *D'Onofrio* factors, 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. [*Rains*, 301 Mich App at 325 (citation omitted).]

With respect to the first step of this analytical framework, "this Court has held that a substantial increase in income that will elevate the quality of life of the relocating parent and child supports a finding that a party has met its burden of proof under the first *D'Onofrio* factor." *Brown*, 260 Mich App at 601. "Moreover, the burden of proof by a preponderance of the evidence recognizes the increasingly legitimate mobility of our society." *Id*. at 601-602 (quotation marks and citation omitted).

Under the first *D'Onofrio* factor, MCL 722.31(4)(a), the trial court found that the proposed relocation had the capacity to improve the quality of life for HL and plaintiff. In particular, the trial court determined that the educational opportunities for HL in Nashville were comparable to the educational opportunities in the Ann Arbor area, and the trial court believed that plaintiff would remain committed to HL's cultural education. Furthermore, if plaintiff was offered and accepted the promotion to chair of the accounting department, the trial court opined that it would significantly increase the household disposable income, and thus substantially increase the resources available to improve HL's life. Finally, the trial court concluded that

HL's growth and development in education would be enhanced by relocating to Nashville because he would have the ability to enjoy activities associated with the University that would provide him with a broad spectrum of cultural diversity, educational experiences, and positive growth.

These findings were not against the great weight of the evidence. It was clear from plaintiff's testimony that the relocation would improve plaintiff's quality of life because he would no longer have to commute between Nashville and Ann Arbor on a weekly basis. Further, although the testimony suggested that HL would have access to many of the same activities and opportunities in Nashville as he did in Ann Arbor, there is nothing in the record to indicate that HL's life could not be enhanced by the move to Nashville, especially if plaintiff accepted the chair position and received a substantial raise. See *Brown*, 260 Mich App at 601. Even if this factor was close, the evidence did not clearly preponderate in the opposite direction. See *Rains*, 301 Mich App at 324.

Next, under the second *D'Onofrio* factor, MCL 722.31(4)(b), the trial court simply found that plaintiff's request to change domicile was not an attempt to defeat or frustrate the parenting-time schedule that the parties were exercising at the time because plaintiff would continue to facilitate defendant's parenting time with HL to ensure that their relationship was strong. We agree. Plaintiff offered to pay up to $20,000 of defendant's relocation expenses and continue the parties' equal parenting time arrangement if she agreed to move to Nashville. In the event defendant declined to relocate, plaintiff proposed a new parenting time schedule that would still allow defendant to exercise substantial parenting time. Plaintiff's concessions in this regard demonstrate that he was not attempting to frustrate the parties existing parenting-time schedule. Accordingly, the trial court's finding was not against the great weight of the evidence.

For the third *D'Onofrio* factor, MCL 722.31(4)(c), the trial court opined that it was possible to modify the parenting-time schedule and other arrangements governing HL's schedule in a manner that could provide an adequate basis for preserving and fostering HL's parental relationship with both parents. Again, this finding was not against the great weight of the evidence. Plaintiff proposed, and the trial court ultimately adopted, a schedule that granted defendant parenting time during each major school break, including the summer break, as well as two to three weekends per month. Recognizing the travel expenses that would be incurred under that arrangement, plaintiff agreed to pay for HL's airfare for traveling to Michigan over school breaks and "up to $1,500 total expenses" for five weekend visits during the school year. Although the modified parenting-time schedule did not call for a perfectly even division of parenting time, a balanced schedule is adequate as long as it "provide[s] a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the noncustodial parent." *Mogle v Scriver*, 241 Mich App 192, 204; 614 NW2d 696 (2000).

In regard to the fourth *D'Onofrio* factor, MCL 722.31(4)(d), the trial court found that the motion was not motivated to secure a financial advantage with respect to a support obligation. Neither party disputes this finding on appeal. Therefore, we will not further address it.

Lastly, under the fifth *D'Onofrio* factor, MCL 722.31(4)(e), the trial court found that there were no allegations of domestic violence. This conclusion was not against the great weight of the evidence. Although defendant alleged that plaintiff was financially controlling during their marriage, she conceded that that there had never been domestic violence between the parties. Based on the foregoing, the trial court's findings concerning the *D'Onofrio* factors as set forth in MCL 722.31(4) were not against the great weight of the evidence.

Next, defendant argues that the trial court erred in not analyzing whether the move was in HL's best interests by clear and convincing evidence. We agree.

As noted earlier, when the trial court determines that the *D'Onofrio* factors support a requested change of domicile, the next step is for the court to determine whether an established custodial environment exists. *Rains*, 301 Mich App at 325. "Whether an established custodial environment exists is a question of fact." *Sulaica*, 308 Mich App at 584. In pertinent part, MCL 722.27(1)(c) states:

> 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.

Interpreting this language, this Court has explained that "[a]n established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). "It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Id*.

In this case, it was undisputed that the HL had an established custodial environment with both parents. Thus, the trial court was obligated to consider if the proposed change of domicile would modify or alter the dual established custodial environment. *Rains*, 301 Mich App at 325. Here, in finding that the parties' parenting time schedule could be modified in a manner that would provide an adequate basis for preserving and fostering the parental relationship between HL and both parties for purposes of the third *D'Onofrio* factor, MCL 722.31(4)(c), the trial court noted that the schedule could be modified without changing the established custodial environment, but did not otherwise rationalize that conclusion. Defendant argues that the trial court erred by finding that HL's change of domicile would not alter the established custodial environment and by failing to analyze whether plaintiff demonstrated, by clear and convincing evidence, that the relocation would be in HL's best interests. We agree.

This Court addressed a similar factual scenario in *Brown*, 260 Mich App 576. In that case, the parties shared "physical custody" of their child until the defendant sought leave to move out of state with the child to pursue a job opportunity. *Id*. at 578-579. Although the precise

details of the parties' parenting-time schedule is not apparent, it was agreed that they exercised equal parenting time and that an established custodial environment existed with both parents. *Id.* at 595-596. After the trial court granted the defendant's motion for a change of domicile, the defendant proposed, and the trial court adopted, a parenting-time schedule nearly identical to the modified schedule approved by the trial court in this case. *Id.* at 592.[2] This Court held that "the modification from equal parenting time to defendant having parenting time during the school year and plaintiff having parenting time in the summer necessarily would amount to a change in the established custodial environment, requiring analysis under the best interest factor framework." *Id.* at 596.

We believe the same holds true in this case. Plaintiff and defendant previously enjoyed perfectly equal parenting time under a schedule that did not require prolonged absences by either parent. Given the proximity of their residences, the parties were both able to participate in several of HL's extracurricular activities and they both assisted HL with certain areas of his academic performance. Defendant also fostered HL's cultural studies, while plaintiff encouraged his religious development. Under the modified parenting-time schedule, defendant would receive less parenting time, the vast majority of which would occur over the course of HL's two to three month summer vacation. During the school year, HL's time with defendant would be divided by periods of separation of much greater length than he is accustomed to, which could result in a decreased sense of stability and permanence while in defendant's care. In addition, because HL would spend most of his time in Nashville, his schooling would necessarily take place in that location and it is probable that his extracurricular activities would be based there as well. This would effectively limit defendant's involvement in these aspects of HL's life and, in all likelihood, decrease HL's ability to rely on defendant for guidance and attention in these areas. In light of the foregoing, the trial court's conclusion that the change of domicile and resulting change in parenting time would not alter HL's established custodial environment was contrary to the great weight of the evidence. The court therefore erred by failing to engage in the fourth step of the analysis outlined in *Rains*, i.e., whether clear and convincing evidence demonstrated that the change in domicile would be in HL's best interests, considering the best interest factors identified in MCL 722.23. *Rains*, 301 Mich App at 325.

Accordingly, although we affirm the trial court's analysis of the *D'Onofrio* factors and its conclusion that they supported plaintiff's motion for a change of domicile, we reverse the portion of the trial court's order concluding that the modified parenting-time schedule would not alter the

[2] In *Brown*, the modified parenting-time schedule provided that "defendant would have parenting time during the school year and one weekend a month during the summer, and that plaintiff would have parenting time during the summer, as well as over winter break, mid-winter break, spring break, and two weekends a month during the school year." *Brown*, 260 Mich App at 592.

established custodial environment, and remand for consideration of whether the change of domicile would be in HL's best interests.[3] We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Anica Letica

[3] Having found that the trial court committed error requiring reversal by failing to conduct a best interest analysis, we need not address defendant's allegation that the trial court erred by failing to grant her motion for reconsideration.