STATE OF MICHIGAN

COURT OF APPEALS

TYRA LYNAE GRAYER,

Plaintiff-Appellee,

v

CURTIS GRAYER III,

Defendant-Appellant.

UNPUBLISHED
January 21, 2020

No. 349783
Jackson Circuit Court
LC No. 15-000686-DM

Before: CAMERON, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

In this custody dispute, defendant-father appeals the trial court's order on remand denying his motion to change the two minor children's domicile from Michigan to Indiana. Defendant also challenges the trial court's modification of the parties' parenting-time schedule. We vacate and remand for additional proceedings consistent with this opinion.

I. BACKGROUND

In September 2015, a judgment of divorce was entered granting the parties joint legal and physical custody of the two minor children. The parties received equal parenting time. In March 2018, defendant filed a motion to change the children's domicile from Jackson, Michigan to Mishawaka, Indiana, a town approximately 140 miles away. Defendant had been accepted to Notre Dame Law School and planned to move to that area by September 2018. Defendant also sought sole legal custody of the children.

At the April 2018 evidentiary hearing, defendant proposed a parenting time schedule whereby the children would live primarily with him and plaintiff would have the children on weekends, most school breaks, and throughout the week in the summer. This proposal would have reduced plaintiff's parenting time by 26 overnights and resulted in a "43/57" split. Plaintiff opposed defendant's motion for change of domicile and requested that his proposed schedule be "flip flopped" when defendant moved to Indiana.

In August 2018, the trial court issued a written order and opinion denying defendant's motion. The trial court analyzed the factors enumerated in MCL 722.31(4), also known as the

D'Onofrio[1] factors, to determine whether defendant's motion for a change of domicile was warranted. The court recognized that the proposed move had the capacity to improve the quality of life for defendant and the children, including a better school district and the prospect of new opportunities. However, the trial court concluded that the children had an established custodial environment with both parents that would be significantly altered by the move. The trial court proceeded to evaluate the best-interests factors and determined that defendant had not proven by clear and convincing evidence that a change in custody was in the children's best interests. The court also granted plaintiff primary physical custody of the children and reduced defendant's parenting time by nearly 100 overnights.

Defendant appealed. In an unpublished opinion, we vacated the trial court's order and remanded for further proceedings. *Grayer v Grayer*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 2019 (Docket No. 345322). We held that the trial court erred when applying MCL 722.31(4)(c) because it did not consider "whether the proposed parenting-time schedule provides a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the nonmoving parent." *Id*. at 3 (quotation marks and citation omitted). Rather, the trial court "only considered whether, after defendant moved, plaintiff would be able to continue her current parenting-time arrangement." *Id*.

On remand, the trial court did not permit any additional testimony or argument, but rather limited itself to clarifying its decision. The court explained that it did not have any concerns that the parents would be able to maintain a relationship with the children no matter how far away they were. The court also clarified that defendant had established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4) supported a motion for a change of domicile. Nevertheless, the trial court once again denied defendant's motion after concluding that defendant had not established by clear and convincing evidence that modifying the children's established custodial environment with plaintiff was in the children's best interests. Defendant now appeals for the second time.

II. ANALYSIS

A. CHANGE IN DOMICILE

Defendant argues that the trial court abused its discretion in denying his motion to change domicile. We agree with defendant that the trial court did not sufficiently address whether the proposed change in domicile would have altered the children's established custodial environment.[2]

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[1] A reference to *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976), first cited by this Court in *Waters v Waters*, 112 Mich App 1; 314 NW2d 778 (1981). The factors were codified in 422 PA 2000, immediate effect given January 9, 2001.

[2] A circuit court's order resolving a child custody dispute "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 722.28. We review a trial

Deciding a motion for a change of domicile is a four-step process:

> 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 v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013).]

On remand, the trial court satisfied the first step when it determined that defendant established by a preponderance of the evidence that the factors in MCL 722.31(4) supported a change in domicile. Next, the trial court correctly found that an established custodial environment existed with both parents. However, the trial court failed to adequately address the third step, i.e., whether the proposed change in domicile would alter the established custodial environment. The trial court seemed to assume that defendant's relocation would necessarily result in such a change. However, it is not apparent from the trial court's decision or the transcripts from the lower court proceedings that the court fully appreciated that "it is possible to have a domicile change that is more than one hundred miles away from the original residence without having a change in the established custodial environment . . . ." *Brown v Loveman*, 260 Mich App 576, 590; 680 NW2d 432 (2004). Whether a change in domicile would modify or alter an established custodial environment is significant because it determines the burden of proof. If the established custodial environment would not be altered, defendant need only prove by a preponderance of evidence that the change of domicile is warranted under MCL 722.31, as opposed to showing by clear and convincing evidence that the change is in the children's best interests. See *Gagnon v Glowacki*, 295 Mich App 557, 575; 815 NW2d 141 (2012) ("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.").

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court's decision regarding a motion for a change of domicile for an abuse of discretion. *Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013). "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "A trial court commits legal error when it incorrectly chooses, interprets, or applies the law." *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014).

In this case, we do not believe it necessarily true that the proposed change of domicile would have altered the children's established custodial environment with either parent. On the existing record, we think it is at least plausible that defendant's proposed parenting-time schedule could have avoided modification the children's established custodial environment with both parents. Accordingly, we vacate the trial court's order denying defendant's motion to change domicile and remand so that the trial court can expressly determine whether defendant's proposed change in domicile would have altered the children's established custodial environment. Given our ruling, we decline to address at this time defendant's argument that the trial court erred in weighing some of the best-interests factors.

We also note that the parents appeared to agree that the proposed schedule was appropriate and disputed only who should receive primary custody of the children under that schedule. If the trial court believes that both versions of this proposed schedule are unfeasible, it should state so on the record and give reasons supporting that conclusion. The trial court should also address if there is a possible parenting-time schedule that would not modify or alter the children's established custodial environment with either parent.

B. PARENTING TIME

Defendant also argues that the trial court erred by significantly reducing his parenting time. Because defendant had moved to Indiana, a change in parenting time was required regardless of whether his motion was granted. However, the trial court offered no explanation for the imposed parenting-time schedule, which effectively reduced defendant's parenting time by 100 overnights. Nor did the court address whether the modified schedule altered the established custodial environment or whether the schedule was in the children's best interests. Accordingly, we again vacate the trial court's order modifying the parenting-time schedule and direct the trial court to address those matters on remand.[3]

Parenting time is governed by MCL 722.27a, which provides in part as follows:

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time. [MCL 722.27a(1).]

If a modification to the parenting-time schedule would alter the established custodial environment, then it must be shown by clear and convincing evidence that the change is in the child's best interests. See *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010); MCL

[3] "Discretionary rulings, including the ultimate award of custody and the award of parenting time, are reviewed for an abuse of discretion." *Diez v Davey*, 307 Mich App 366, 389; 861 NW2d 323 (2014). A trial court must provide "a reasoned basis" for a discretionary decision. See *Michigan Dep't of Transp v Randolph*, 461 Mich 757, 767-768; 610 NW2d 893 (2000).

722.27(1)(c). And a trial court is required to consider the best-interests factors "even in cases when [the] change in custody is prompted by a situation in which a parent, whose motion for a change in legal residence was denied, still decides to move, or remain, a significant distance away." *Yachcik v Yachcik*, 319 Mich App 24, 50; 900 NW2d 113 (2017).

This case is similar to *Yachcik*, in which the trial court denied the plaintiff-mother's motion to change domicile from Michigan to Pennsylvania, and ruled that if the plaintiff proceeded with the move that she would receive the same parenting time that she had proposed for defendant-father. *Id*. at 29-30. "This schedule significantly reduced plaintiff's parenting time from caring for the child on an alternating weekly basis to caring for the child only during his summer vacation and other extended breaks from school." *Id*. at 47. On appeal, we affirmed the trial court's decision to deny plaintiff's motion to change domicile but held that the trial court erred by not considering whether the new parenting time arrangement was in the child's best interests. *Id*. at 47-48. Because it was "apparent that this amended parenting-time schedule would result in a change in the established custodial environment," *id*. at 48, the trial court was required to address "whether the particular modification of the parenting-time schedule was in the child's best interests by expressly considering and making findings regarding each factor set forth in MCL 722.23," *id*. at 51.

In this case, the trial court concluded that defendant did not prove by clear and convincing evidence that a change of custody was in the child's best interests. However, the trial did not evaluate whether the modified parenting-time schedule would alter an established custodial environment, and if so, whether the schedule was in the children's best interests. It seems clear that altering equal parenting to a 25/75 split amounts to a change in the established custodial environment. See *id*. at 47-48. However, we believe it more appropriate for the trial court to revisit the issue of parenting time in the first instance. As previously discussed, the parties apparently agreed that a 57/43 parenting-time split was an appropriate modification, regardless if defendant's motion was granted. Before addressing whether the imposed schedule altered the established custodial environment, the trial court should explain why this schedule, rather defendant's proposed schedule, was in the children's best interests.

Vacated and remanded for additional proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle