

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT HENRY HUTTUNEN,
Plaintiff-Appellant,

UNPUBLISHED
January 15, 2008

v

ALYSE RENEE HUTTUNEN,
Defendant-Appellee.

No. 275706
Saginaw Circuit Court
LC No. 01-040442-DM

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's January 16, 2007 order granting defendant's motion to change the domicile of the parties' three minor children from Michigan to Wisconsin. We reverse and remand for further proceedings.

Pursuant to statute, a trial court's resolution of a 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." *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003), aff'd and clarified 470 Mich 186; 680 NW2d 835 (2004), quoting MCL 722.28.

Plaintiff claims that the trial court committed clear legal error in failing to analyze whether the children had an established custodial environment with their father before granting defendant's motion to move the children to Wisconsin, where she is now living with her new husband. We agree. "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003).

Generally, the change of a child's domicile following a judgment of divorce is governed by the *D'Onofrio*¹ factors, which are codified at MCL 722.31(4). When a parent who lacks sole

¹ *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976), adopted by the courts of this state in *Dick v Dick*, 147 Mich App 513, 517; 383 NW2d 240 (1985). The New Jersey courts have since modified the test for determining whether a change in domicile should be granted. See *Holder v Polanski*, 111 NJ 344, 349-354; 544 A2d 852 (1988).

legal custody wishes to move with a minor child to a location more than 100 miles away, the trial court must consider the following factors while keeping the child as its primary focus:

- (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.
- (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).]

In this case, the trial court considered the *D'Onofrio* factors when deciding defendant's motion to change the children's domicile.

However, the trial court apparently 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."

In general, "[w]here 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 finding by de novo review." *Thames v Thames*, 191 Mich App 299, 304; 477 NW2d 496 (1991). A "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." MCL 722.27(1)(c). "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." *Id.*

Pursuant to the judgment of divorce, the parties shared joint legal and physical custody of the children pursuant to a unique arrangement by which plaintiff had physical custody of the children from 10:30 p.m. to 12:00 noon, and defendant had physical custody of the children from 12:00 noon to 10:30 p.m. seven days per week. This arrangement effectively split the parties' parenting time fifty-fifty. Nevertheless, defendant conceded at the hearing on her motion that

she had moved to Lansing while the divorce was pending, and that she did not exercise her right to parenting time every day. Additionally, defendant testified that between September or October 2005, when she moved to Wisconsin, and September 2006, she spent only approximately 12 extended weekends with the children. Thus, the custodial environment consisted of plaintiff as the primary caregiver for the children almost all day every day.

Because an established custodial environment existed in this case, defendant bore the burden of proving by clear and convincing evidence that a change of domicile to Wisconsin was in the children's best interests. *Rittershaus v Rittershaus*, 273 Mich App 462, 472; 730 NW2d 262 (2007).

Here, the record does not reflect that the trial court required defendant prove by clear and convincing evidence that a change of domicile to Wisconsin was in the children's best interests. Although the trial court indicated that "it's clear, not just a preponderance that this [move to Wisconsin] would benefit the children," we cannot conclude that the trial court held defendant to the standard of proof required to change domicile when an established custodial environment clearly existed with plaintiff. Accordingly, we remand for further proceedings. On remand, the trial court shall determine, in light of the minor children's established custodial environment with plaintiff at that time the final order was entered, whether defendant showed by clear and convincing evidence that a change of domicile to Wisconsin was in the children's best interests. If the trial court finds clear and convincing evidence that change of domicile to Wisconsin was in the children's best interests regardless of the established custodial environment, the trial court's January 16, 2007 order granting defendant's motion to change the domicile of the parties' three minor children from Michigan to Wisconsin shall remain undisturbed. However, if the trial court does not find clear and convincing evidence that change of domicile to Wisconsin was in the children's best interests given the established custodial environment, the trial court shall consider defendant's motion to change domicile anew.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens