

**Court of Appeals, State of Michigan**

**ORDER**

ROY JOSEPH AKERS V NATALIYA AKERS

Docket No. 323806

LC No. 2003-675617-DM

Pat M. Donofrio  
Presiding Judge

Michael J. Riordan

Michael F. Gadola  
Judges

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MINISTERIAL ORDER CORRECTING OPINION

IT IS HEREBY ORDERED that with respect to the opinion issued on March 17, 2015 in this matter, the two instances providing a date of December 17, 2013 are hereby corrected to show a date of December 17, 2003.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

APR 08 2015

Date

Handwritten signature of Jerome W. Zimmer Jr. in cursive script.

Chief Clerk

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

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ROY JOSEPH AKERS,  
Plaintiff-Appellee,

UNPUBLISHED  
March 17, 2015

v

No. 323806  
Oakland Circuit Court  
Family Division  
LC No. 2003-675617-DM

NATALIYA JOSEPH AKERS,  
Defendant-Appellant.

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Before: DONOFRIO, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff's motion to move the residence of plaintiff and defendant's only child outside of Michigan, in this custody dispute.<sup>1</sup> Because plaintiff had been awarded sole legal custody over the minor child, the trial court did not err in failing to consider the factors as provided in MCL 722.31, and we affirm.

**I. BASIC FACTS**

On October 9, 2003, the court entered a consent judgment of divorce granting plaintiff and defendant joint physical and legal custody of the child. Of note, the consent judgment did not delineate between legal custody and physical custody and only stated that the parties were "awarded joint custody."

After defendant apparently remarried just days after the divorce was granted and moved out of state with the child, plaintiff moved the trial court for an ex parte order to grant him temporary sole physical custody. On December 4, 2003, the trial court granted the motion and awarded plaintiff temporary sole physical custody of the child. The order also ordered defendant

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<sup>1</sup> On the eve of oral argument at this Court, which coincided with the last day to file a reply brief, defendant sought additional time to file a reply. At oral argument, in lieu of pursuing an opportunity to file a reply, defendant agreed to being afforded additional time for argument to challenge plaintiff's brief on appeal.

to appear on December 17, 2013, to show cause why she should not be held in contempt for willfully violating the terms of its orders and the consent judgment.

When defendant failed to appear at the December 17, 2013, hearing, the trial court issued a bench warrant for defendant's arrest and entered a separate order that granted plaintiff sole custody over the child as follows:

IT IS HEREBY ORDERED that the Consent Judgment of Divorce, entered on or about October 9, 2003, is hereby modified to provide that, subject to the further order of this Court, custody of the parties' minor child . . . is hereby changed, and is now awarded solely to Plaintiff, Roy Joseph Akers.

Defendant later was arrested by law enforcement personnel in Oregon. Plaintiff alleged that defendant left the child with her new husband and moved for the court to order the child's return to him in Michigan. On February 2, 2004, the trial court granted the motion and entered an ex parte order requiring that the child be "detained by civil authorities until such time as she can be expeditiously surrendered to the care and custody of [plaintiff], the legally designated custodian." The order also explicitly referred to plaintiff as the child's "[s]ole legal custodian." Eventually, the child was reunited with plaintiff, with defendant only having supervised parenting time.

Over 10 years later, on July 15, 2014, plaintiff filed a motion to move his and the child's domicile from Michigan to Georgia. Plaintiff stated that he is an elementary school teacher who was unable to find local, full-time employment in Michigan. Plaintiff argued that even though MCL 722.31 was not pertinent because he possessed sole legal custody of the child, the factors listed under MCL 722.31 favored granting his motion and that the move would be in the child's best interest.

The trial court, after determining that plaintiff had sole legal custody, granted the motion, noting that when a party has "sole legal custody," like plaintiff, "there's really very few bases where the Court can even say no." Further, the trial court noted that the arrangement would not decrease the amount of parenting time defendant received, and it even could end up giving defendant more parenting time if defendant chose to fly to Georgia to visit. Therefore, the trial court granted plaintiff's motion.

Defendant filed a motion for reconsideration of the trial court's order granting plaintiff's motion to change the child's domicile from Michigan to Georgia. Defendant contended that the trial court erred in granting plaintiff's motion without an evidentiary hearing or considering the factors provided in MCL 722.31(4). The trial court entered an opinion and order denying defendant's motion for reconsideration. The trial court found that a review of the lower court record "clearly establishe[d] that the Court granted Plaintiff sole legal custody of the minor child on or about December 17, 2003 when the parties' Judgment of Divorce was modified." Therefore, the trial court noted that it was not required to address the factors enumerated in MCL 722.31(4).

## II. STANDARDS OF REVIEW

“We review for an abuse of discretion the family court’s decision to allow a parent to remove a child from the state.” *Spires v Bergman*, 276 Mich App 432, 436; 741 NW2d 523 (2007). In this context, “[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.” *Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013) (internal quotation marks omitted). But to the extent that our review involves the proper interpretation of a court order, that is a question of law that is reviewed de novo, *Hanton v Hantz Fin Servs, Inc*, 306 Mich App 654, 660; \_\_\_ NW2d \_\_\_ (2014), and such questions of law in custody cases are reviewed for clear legal error, *Fletcher v Fletcher*, 229 Mich App 19, 23; 581 NW2d 11 (1998), citing MCL 722.28.

A trial court’s ruling regarding a motion for reconsideration is also reviewed by this Court for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). An abuse of discretion occurs when a trial court reaches a decision that falls outside the range of principled outcomes. *Luckow v Luckow*, 291 Mich App 417, 423; 805 NW2d 453 (2011).

### III. ANALYSIS

MCL 722.31 provides, in pertinent part:

(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.

(2) A parent’s change of a child’s legal residence is not restricted by subsection (1) if the other parent consents to, or if the court, after complying with subsection (4), permits, the residence change. *This section does not apply if the order governing the child’s custody grants sole legal custody to 1 of the child’s parents.*

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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.

(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. [Emphasis added.]

The factors codified in subsection (4) are often referred to as the “*D’Onofrio* factors,” see *Henry v Henry*, 119 Mich App 319, 323-324; 326 NW2d 497 (1982), quoting *D’Onofrio v D’Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976), for change-of-domicile determinations in custody cases. *Spires*, 276 Mich App at 436. Generally, trial courts must consider these factors when addressing a parent’s request to move the child’s domicile outside of Michigan. *Brecht v Hendry*, 297 Mich App 732; 825 NW2d 110 (2012). “However, when the parent seeking the change of domicile has *sole legal custody of the child*, MCL 722.31 does not apply, and the court need not consider the factors enumerated in subsection 4.” *Spires*, 276 Mich App at 437 (emphasis added), citing MCL 722.31(2) (“This section does not apply if the order governing the child’s custody grants sole legal custody to 1 of the child’s parents.”).

Defendant contends that the trial court erred in granting plaintiff’s motion to change the child’s domicile without holding an evidentiary hearing or considering the factors listed in MCL 722.31(4) because defendant claims that plaintiff only had sole *physical* custody over the child, while the parties maintained joint *legal* custody. Essentially, defendant argues that the December 17, 2003, order, stating that “custody of [the child] is now awarded solely to Plaintiff,” was only intended to grant plaintiff sole *physical* custody because defendant claims that the order was entered in response to plaintiff’s motion for temporary sole physical custody, and therefore, should properly be interpreted to grant plaintiff only exactly what he requested, i.e., sole physical custody. However, defendant ignores the fact that the trial court already granted plaintiff’s request for temporary physical custody in its December 4, 2003, order. The trial court’s December 17 order was not in direct response to plaintiff’s motion but was in direct response to defendant violating many of the court’s orders, including denying parenting time to plaintiff, relocating the child to another state without permission, and failing to appear for a show cause hearing. It is unrealistic to believe, as defendant contends, that the December 17 order was merely duplicative of the December 4 order.

Furthermore, even though the December 17, 2003, order does not expressly state that the trial court was granting plaintiff sole *legal* custody, such an intention is clear. The December 17 order made no distinction with respect to legal or physical custody. But because the original consent judgment unmistakably combined the concepts of “legal custody” and “physical custody” into the single term “custody,” the December 17 modification of that same provision likewise should be read to maintain that same combined usage. Additionally, because the court

utilized the language “sole physical custody” in its December 4 order, it is clear that the court was aware that it could differentiate between physical and legal custody if it desired. Thus, the fact that it later did not utilize that language in its December 17 order makes it apparent that the court made a conscious decision to award sole legal and physical custody to plaintiff instead of just physical custody. Moreover, at the motion hearing on plaintiff’s motion to change the child’s domicile to Georgia, when the court had to interpret its own December 17 order, it determined that it provided plaintiff with “sole legal custody.”

Therefore, the trial court’s determination that the December 17 order granted plaintiff sole physical and legal custody of the child did not constitute clear legal error. As a result, the trial court was not required to hold an evidentiary hearing or address the factors enumerated in MCL 722.31(4), *Spires*, 276 Mich App at 437, and the trial court did not abuse its discretion in granting plaintiff’s motion to change his and the child’s domicile to Georgia. Likewise, the court did not abuse its discretion in denying defendant’s motion for reconsideration.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Michael J. Riordan  
/s/ Michael F. Gadola