

STATE OF MICHIGAN
COURT OF APPEALS

LUCJA IWANSKA,

Plaintiff-Appellee,

v

PAUL NIELSEN,

Defendant-Appellant.

UNPUBLISHED

March 23, 2004

No. 251396

Oakland Circuit Court

LC No. 98-608224-DM

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's order granting plaintiff's motion for change of domicile of the parties' minor child, Tomasz Nielsen, from Farmington Hills, Michigan, to Americus, Georgia. We conclude that the circuit court did not properly apply MCL 722.31. We also conclude that, given the change in established custodial environment that resulted from the granting of plaintiff's change of domicile motion, *Brown v Loveman*, __ Mich App __ (Docket No. 249016, issued 2/12/04), decided during the pendency of this appeal,¹ is on point and requires an evidentiary hearing on the best interest factors, at which plaintiff must "prove, by clear and convincing evidence, that the removal and consequent change in established custodial environment and parenting time was in the child's best interest." *Id.*, slip op at 3. We thus remand.

I

The parties' son, Tomasz Nielsen, was born on August 18, 1991. A consent judgment of divorce entered on December 30, 1998 granted joint physical and legal custody of Tomasz and provided that each party have physical custody of the minor child on a rotating one week basis, so long as the parties maintained residences that were less than one hour commuting distance apart. The parties agree that they have exercised parenting time on an every-other-week basis since the consent judgment was entered.

¹ Defendant filed a supplemental authority brief in this Court citing *Brown*.

At the time of the divorce, plaintiff was a tenure-track professor at Wayne State University (WSU), and defendant had left a tenure-track position at WSU to cofound a software company. In May 2000, plaintiff was denied tenure at WSU, and began a business. Plaintiff thereafter applied for teaching positions in Michigan and elsewhere, and in April 2003 was offered an associate professor position at Georgia Southwestern University, in Americus, Georgia.

In the interim, defendant remarried in August 2002, and continued living in Farmington Hills, with his current wife and her four children, who range in age from ten to sixteen.

Plaintiff filed a motion for change of domicile on June 4, 2003, in order to take Tomasz with her to Americus, Georgia. Defendant filed a motion to change custody. The circuit court rejected defendant's argument that the change of domicile would constitute a change in circumstances under the Child Custody Act, and denied defendant's motion to change custody. At the September 17, 2003 hearing, defendant objected, noting that the child had started school and should remain in Michigan during the continuing proceedings. The court granted plaintiff's motion, finding that plaintiff had established by a preponderance of the evidence that the change of domicile of the minor child is appropriate, that the domicile of the child shall be with plaintiff in Georgia, that the parties continue to have joint physical custody, that defendant shall exercise his parenting time during each of the child's school breaks and summer vacation, and that additional parenting time could be agreed on by the parties. The court ordered that the child be transported forthwith to Georgia, and the child traveled to Georgia that afternoon. Defendant filed an application for leave to appeal in this Court. This Court granted the application, ordered the appeal expedited, and stayed the circuit court's orders changing domicile pending appeal.

II

Defendant contends that the circuit court did not properly apply MCL 722.31.

The circuit court's opinion and order granting plaintiff's motion for change of domicile cited MCL 722.31(4) and set forth factual findings under each of the five sub-parts, (a) through (e). On their face, the court's factual findings do not have the child as a primary focus. Further, at subsequent hearings, the court disclaimed adherence to MCL 722.31, stating that MCL 722.31 did not apply because this was an interstate, as opposed to an intrastate, move. Defendant raised these contradictions below and sought to clarify for the record the foundation of the court's ruling. In response, the circuit court stated on the record at hearings on plaintiff's motion for entry of order and for a stay of proceedings, that MCL 722.31 did not apply, and that the *D'Onofrio*² factors were the appropriate test.

MCL 722.31 took effect January 9, 2001, and codified the *D'Onofrio* factors and added one factor (domestic violence). See *Brown, supra*, slip op at 4-6. However, the focus under MCL 722.31 differs from that under the *D'Onofrio* factors; MCL 722.31 requires that courts "[b]efore permitting a legal residence change . . . shall consider each of the following [five]

² *D'Onofrio v D'Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976).

factors, *with the child as the primary focus in the court's deliberations.*" MCL 722.31(4) (emphasis added.) The *D'Onofrio* factors focused on the prospective benefit to the custodial family unit. See *Brown, supra*, slip op at 8; *Scott v Scott*, 124 Mich App 448, 452-453; 335 NW2d 68 (1983).

The circuit court apparently applied the *D'Onofrio* factors, and did not have the child as the primary focus in its deliberations. Accordingly, we remand for the circuit court to reapply MCL 722.31, and do so with primary focus being on the child.

III

Defendant asserts that the circuit court improperly applied change of domicile law in a joint physical custody situation and in failing to consider the law applicable to joint established custodial environment.³ Defendant contends that the court's determination that changing the child's domicile to Georgia did not amount to a change of custody was error, given that his parenting time went from 180 days to fewer than 100 days a year (a 45% reduction), and that defendant previously had custody every other week, and that the court erred by failing to determine that defendant's parenting time reduction was in the child's best interest.

Brown v Loveman, supra, decided during the pendency of this appeal, is on point. The parties in *Brown* shared joint physical and legal custody of their minor child, although they never married and no custody order existed. The trial court granted the defendant-mother's petition to change domicile of the child, from Michigan to New York, and denied the father's counterclaim for custody. *Id.*, slip op at 1. As in the instant case, the plaintiff-father in *Brown* argued on appeal that the trial court erred in applying change of domicile law rather than the best interest factors, where the established custodial environment was with both parents and there was no prior custody order. *Id.*, at 2. This Court concluded that the trial court did not err in applying MCL 722.31, a statutory version of the change of domicile factors set forth in *D'Onofrio v D'Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976), but its holding did not end there:

We find that the trial court properly determined, at the outset, that the *D'Onofrio* factors, now provided in MCL 722.31, were the appropriate inquiry when ruling on defendant's petition for change of domicile, as opposed to the best interest factors that are appropriate to consider in ruling on a request for change of custody. Because 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 the trial court did not err in, solely, applying the *D'Onofrio* factors to the change of domicile issue. **However, once the trial court granted defendant permission to remove the minor child from the state, and it became clear that defendant's proposed parenting time schedule**

³ Plaintiff argues this issue is not properly before us because defendant failed to preserve it below. We do not agree. However, even if plaintiff is correct, this Court may nonetheless review the issue if it is a question of law and the facts necessary for its resolution have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

would effectively result in a change in the child's established custodial environment with both parties, it should have engaged in an analysis of the best interest factors, MCL 722.23, to determine whether defendant could prove, by clear and convincing evidence, that the removal and consequent change in established custodial environment and parenting time was in the child's best interest. . . . Because the trial court properly decided the domicile change based upon on the *D'Onofrio* factors, and the change of an established custodial environment did not arise until the defendant's proposed parenting time schedule was entered, we find that the trial court properly addressed the domicile change using the *D'Onofrio* factors.

Plaintiff's second issue on appeal is that the trial court erred in adopting the parenting time schedule proposed by defendant, which amounted to a change of custody without holding a hearing requiring that there be a showing by clear and convincing evidence ant that the change is in the child's best interest. We agree.

* * *

The trial court erred in adopting defendant's proposed parenting time schedule that effectively amounted to a change in the established custodial environment, without holding a hearing requiring that defendant prove by clear and convincing evidence that the change of domicile and consequent change in parenting time, which necessarily changed the established custodial environment, was in the minor child's best interest.

Defendant's proposed parenting time schedule provided that defendant would have parenting time during the school year, and up to one weekend per 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 up to two weekends per month during the school year. . . .

* * *

It would be illogical and against the intent of the Legislature to apply MCL 722.31 without considering the best interests of the minor child, if the change in legal residence would effectively change the established custodial environment of the minor. [citation omitted.] Otherwise, where parents have joint physical custody, and one party seeks to change the legal residence of the child (which would effectively change the established custodial environment), the party would only be subject to the lesser preponderance of the evidence burden required by MCL 722.31. The Legislature could not have intended MCL 722.27 and MCL 722.31 to be applied completely independently of each other, where the result would allow a party seeking to change domicile (and in effect change the established custodial environment) to circumvent its burden of proof by clear and convincing evidence that the change is in the child's best interest.

* * *

. . . . the trial court was required to conduct an evidentiary hearing wherein defendant would have the opportunity to prove by clear and convincing evidence that the proposed change was in Marley's best interest. Failure to do so amounted to clear error, and remand is necessary for an evidentiary hearing, at which time the trial court must articulate its findings of fact on the relevant best interest of the child factors, and determine whether defendant's proposed parenting time schedule is in the best interest of the minor child. [*Brown, supra*, slip op at 8-12. Emphasis added.]

Under *Brown*,⁴ we must remand for an evidentiary hearing at which plaintiff must show by clear and convincing evidence that the proposed change is in Tomasz' best interests. In light of our disposition, we do not address defendant's remaining claims.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio

⁴ *Brown* approves a sequence of approving a change of domicile, then deciding parenting time, then doing a best interests analysis. Because of the way *Brown* arose, the sequence was as it occurred. However, we do not read *Brown* as mandating that a particular sequence be followed where it is clear that a change in domicile will effect a change in the established custodial environment. It would not be improper for the trial court to determine that it would be more efficient to conduct one, rather than several hearings, or that the factual determinations or factors be considered jointly. What is necessary is that the court consider and address the requirements of MCL 722.31 and, where a change of domicile will effect a change in the custodial environment, that the court conduct a best interests analysis regarding the change.