

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

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KIMBERLY BERGERON,

Plaintiff-Appellee,

v

ANDRE D. BERGERON,

Defendant-Appellant.

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UNPUBLISHED

April 11, 2013

No. 312258

Gratiot Circuit Court

LC No. 05-009204-DM

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff's motion for a change in domicile regarding their three minor children. We affirm.

The parties were married in 2000 and had three children. Although defendant moved out of their house in 2005, a Judgment of Divorce was entered in 2007 which granted plaintiff legal and physical custody of the minor children.<sup>1</sup> Defendant, a carpenter, was ordered to pay \$111.40 for child support. However, because of defendant's long-term unemployment, from September 2008 to May 2012 his child support obligation for his three minor children was reduced to \$47.00 a month. Despite this exceptionally nominal support obligation, in February 2011, defendant's arrearage totaled \$6,474.65. It appears from the record evidence that defendant was subject to at least 25 enforcement hearings related to his failure to pay child support. Because of financial hardship plaintiff, a self-employed hair stylist who owned her own business, was forced to seek financial assistance from the state, as well as her parents, and the children were placed on Medicaid. Subsequently, plaintiff had to file bankruptcy, her house and business went into foreclosure, and she lost her vehicle.

In April 2012, plaintiff filed a motion for a change in domicile, requesting permission to move to Alabama. Plaintiff averred that her parents, who lived in Alabama, purchased a house in Alabama in which she and the children could live for less than \$500 a month. The home was located in a beautiful subdivision, in a cul-de-sac, had four bedrooms, three full bathrooms, and a large yard. There were lots of children in the neighborhood and the school was located two

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<sup>1</sup> In 2010, defendant acquired joint legal custody of the three children.

miles from the home. Plaintiff's parents, as well as other relatives and friends, lived nearby. Defendant objected to the motion. Following a proceeding, the Friend of the Court issued a recommendation to deny the motion. Plaintiff filed objections to the recommendation and requested an evidentiary hearing. Coincidentally, defendant became employed full-time and, in May 2012, his child support obligation was modified to \$349.00 a month.

On July 31, 2012, a two-day evidentiary hearing began. Plaintiff testified that her annual income had been between \$12,000 and \$18,000. Because of significant financial problems, she had to file bankruptcy. She lost her vehicle. Her house and the attached building where she practiced cosmetology were in foreclosure and she expected to be evicted. The house was about 100 years old, was in poor condition, and needed several expensive repairs. It had three bedrooms and one bathroom. It was on a dirt road, not located in a neighborhood, and there were not a lot of children in the area. Plaintiff testified that she had been unable to locate a rental house that she could afford in the same general location. Her parents, who lived in Alabama, purchased a house where she and the children could live for \$400 a month with the option to buy. That house was five-years-old, all brick, and had been renovated by her parents. It was on a cul-de-sac, sat on two acres, and was in a neighborhood with lots of children. It had four bedrooms and three full bathrooms. Besides her parents, plaintiff had other relatives and friends in Alabama. She also got her license to practice cosmetology in Alabama and was already offered the opportunity to rent a salon chair at a nearby hair salon. Plaintiff researched the schools that the children would attend and they were very nice, were ranked very high, and offered several extracurricular activities. Before filing this motion, she thoroughly considered, researched, and made the necessary preparations so that she could present a reasonable, organized plan of action for the court's consideration.

Plaintiff testified that her primary reason for wanting to move to Alabama was because she "pretty much lost everything as of right now," and her parents would be willing to help her and the children make a new start. Defendant had been ordered to pay only \$47 a month in child support for several years but it "is pretty hard" to raise three children on \$47 a month. And defendant did not even consistently pay that amount; his arrearage was \$1,972.45. Plaintiff opined that defendant's primary motivation for objecting to her move to Alabama was control. She recounted defendant's behavior toward her which included "lots of domestic violence," intimidation, manipulation, and scare tactics. Before and after the divorce she had called the police regarding defendant's behavior. At one time she had a personal protection order against defendant. Defendant was even contesting her bankruptcy, claiming that he should have been listed as a creditor.

Plaintiff testified that if she were permitted to move to Alabama, defendant would still have reasonable parenting time. The children could spend most of the summer with him and long weekends, and they would continue to rotate holidays. They could also maintain contact through Skype and telephone calls. She understood that defendant loved their children and their children loved him; she was not trying to change those feelings. But she had always been the person who had to provide for the three children, with the help of her parents and the State of Michigan, and the move to Alabama would provide her with the financial and emotional support she needed and would be beneficial to the children.

Plaintiff's mother, Karen Anderson, also testified at the hearing. She and her husband bought and renovated the home in Alabama with the hope that plaintiff and the children could live there. If they cannot move to Alabama, they would sell the house. Plaintiff would pay rent on the home at the rate of \$405 a month for the first year and then \$369 a month thereafter. And if plaintiff was unable to pay the rent, Anderson and her husband would pay the rent; her daughter and grandchildren would always have that home. Anderson and her husband live 25 minutes from that home and were willing to help plaintiff and the children in any way they could help. The home is in a beautiful subdivision with homes ranging in price from \$170,000 to \$1,000,000. It is on a paved road and there is a lake within walking distance.

Defendant testified that he opposed the change in domicile. He lived three to four miles from plaintiff's house in a rental home. He admitted that he was unemployed for an extended period of time and that he had an arrearage at one time of \$6,000 to \$7,000. While unemployed and in arrears, in 2009, defendant took the children to Disney World. Over the years, several enforcement actions had been filed regarding his nonpayment of child support. Currently he was employed full-time as a carpenter and his child support obligation was \$349 a month, plus \$200 a month for arrearages. He had the children for about 140 overnights a year, including every other weekend, as well as one day a week for three hours. Holidays were alternating. He was involved in their extracurricular activities, helped with their homework, and was involved in their hobbies. Because of the parties' difficulties in communicating with each other, the Friend of the Court ordered communication through the court's Family Wizard network.

Following the evidentiary hearing, the court rendered its opinion granting plaintiff's motion for a change in domicile. The court first concluded that the established custodial environment was with plaintiff, who had been a constant in the children's lives during the parties' separation, during the divorce, and after the divorce action. Plaintiff was responsible for the children's day-to-day living and their needs, including doctor visits. Defendant offered no testimony refuting that the established custodial environment was with plaintiff. The court next noted that defendant's support obligations had fluctuated and that there was approximately 25 show cause hearings related to his failure to pay child support. Two of those times, defendant was found to be in contempt. Plaintiff had never been found in contempt.

The court then considered the factors set forth at MCL 722.31(4), which govern a request for a change in domicile.<sup>2</sup> First, the court held that plaintiff had sustained her burden of establishing that the move had the capacity to improve the general quality of her life and the children's lives. In Michigan, plaintiff was "wallowing in financial ruin." Plaintiff was involved in a bankruptcy proceeding, had been on state financial assistance and the children were on Medicaid, her business and home had been foreclosed on, and she was facing imminent eviction and homelessness. In Alabama, plaintiff would have a beautiful home, as well the financial and

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<sup>2</sup> These factors are often referred to as the *D'Onofrio* factors, derived from *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976). In *Rittershaus v Rittershaus*, 273 Mich App 462, 465; 730 NW2d 262 (2007), this Court acknowledged that the "*D'Onofrio* factors" have been codified at MCL 722.31(4).

emotional support of her parents. As demonstrated by the 25 child support enforcement hearings, plaintiff could not rely on defendant for financial support. When his child support for three children was \$47 a month, he was still in arrears. Further, in light of plaintiff's eviction and unknown future housing in Michigan, a school-to-school comparison was difficult. However, considering plaintiff's evidence regarding the schools in Alabama, they appeared appropriate. Further, plaintiff's future job prospect in Alabama as a contractor proved a definite advantage over owning her own salon with all the associated expenses and uncompensated, extended hours away from the children.

Second, the court concluded that plaintiff sustained her burden of establishing that the move to Alabama was not motivated by a desire to frustrate defendant's visitation and that she would make the necessary arrangements to promote visitation. The court concluded that, in light of all of the allegations against defendant over the course of several years, including domestic violence, alcohol and drug consumption, as well as mental abuse, plaintiff still bent over backwards in an attempt to make a good situation out of the circumstances.

Third, the court concluded that defendant's motives in resisting the change of domicile presented a hybrid situation. Although defendant appeared to love, care, and enjoy his children, he also appeared motivated by his desire to control plaintiff as evidenced by his several actions. For example, during the evidentiary hearing he claimed that plaintiff was committing a fraud on the bankruptcy court, as well as the trial court, but when asked for an offer of proof, defendant provided no such proof.

Fourth, the court concluded that plaintiff sustained her burden that there would be a realistic opportunity for visitation sufficient to preserve and foster the parent-child relationship defendant had with the children. Plaintiff agreed to transportation arrangements and sufficient technology was available to facilitate a realistic parenting time schedule. Accordingly, plaintiff's motion for a change in domicile was granted and the court then detailed a parenting time schedule on the record.

On August 23, 2012, the order granting plaintiff's motion for a change in domicile was entered. Thereafter, plaintiff moved to Alabama. On September 10, 2012, this appeal was filed. On November 7, 2012, because of defendant's unemployment, his child support obligation was reduced to \$58.50 a month. As of October 31, 2012, defendant had an arrearage of \$4,402.87.

On appeal, defendant first argues that the trial court erred in finding that the established custodial environment existed only with plaintiff and not with him as well. We disagree.

Because the issue whether an established custodial environment exists presents a question of fact, we will not reverse the trial court's decision unless it was against the great weight of the evidence, i.e., the evidence clearly preponderated in the opposite direction. *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008); *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

Pursuant to MCL 722.27(1)(c):

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.

As further explained in *Berger*, 277 Mich App at 706:

An 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. It is both a physical and psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence.

Here, defendant argues that an established custodial environment existed with him because the undisputed testimony was that he loved his children and they loved him. He was involved in their lives and had always taken advantage of his visitation rights with the children.

However, as the trial court noted, the children have always lived with plaintiff and she had always been their primary caregiver. Plaintiff, for the most part, solely provided for all of the children's basic and extensive needs. She provided food, clothing, and shelter throughout their entire lives with very little assistance, if any, from defendant. Plaintiff took the children to doctor's appointments and oversaw their day-to-day activities, including attendance at school and other activities. The test for an established custodial environment does not merely depend upon the contact between a parent and his children. Other than the fact that defendant took advantage of his parenting time and attended some of their recreational activities, he presented no evidence in support of a claim that the children naturally looked to him for guidance, discipline, comfort or, in particular, for the necessities of life. In fact, defendant has been perpetually in arrearage on his child support obligation, even when it was only \$47 a month. Accordingly, the trial court's finding that an established custodial environment existed only with plaintiff was not against the great weight of the evidence.

Next, defendant argues that the trial court erred by granting plaintiff's motion for a change in domicile. We disagree.

The trial court's ultimate decision on a motion for a change in domicile is reviewed for an abuse of discretion. *McKimmy v Melling*, 291 Mich App 577, 581; 805 NW2d 615 (2011). However, the trial court's findings of fact regarding the change of domicile factors set forth in MCL 722.31(4) will not be reversed unless they are against the great weight of the evidence. *Id.*

Because plaintiff requested the change of domicile, and the relocation would not alter an established custodial environment, she had to establish by a preponderance of the evidence that the change was warranted. *McKimmy*, 291 Mich App at 582; *Spires v Bergman*, 276 Mich App 432, 437 n 1; 741 NW2d 523 (2007). In that regard, MCL 722.31(4) sets forth the following factors that the trial court is to consider when a change in domicile is requested:

(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.

After review of the record evidence, we agree with the trial court that plaintiff established by a preponderance of the evidence that a change in domicile was warranted; therefore, the trial court did not abuse its discretion when it granted plaintiff's motion.

First, it is clear from the record evidence that the move to Alabama had the capacity to improve the quality of life for both plaintiff and the three children. In brief and as set forth above, plaintiff had severe financial problems that extended over the course of several years. She had to seek Medicaid for the children and rely on financial assistance from her parents, as well as this state to survive. Defendant provided almost no financial support with regard to these three children. Consequently, plaintiff's financial situation was bleak. She filed bankruptcy and, because her home was in foreclosure, she was facing imminent eviction. Plaintiff's parents purchased and renovated a home for her and the children. Plaintiff's mother testified that plaintiff and the children would always be able to live in that home. Plaintiff had significant emotional and financial support in Alabama. And she had a job that would allow her to spend more quality time with the children and still make a reasonable income. The children would greatly benefit from having a stable housing situation, as well as from plaintiff's financial solvency and availability. Further, the schools that the children would be attending were comparable to those they had been attending. And they would be close to their grandparents, and extended family. As the trial court noted, in light of defendant's significant arrearage history, plaintiff could not count on receiving any financial support from defendant in the future. This prediction proved accurate. In November 2012, shortly after these proceedings, defendant again became unemployed and his child support obligation was reduced to \$58.50 a month. As of October 31, 2012, he had an arrearage of \$4,402.87. In summary, the trial court's finding was not against the great weight of the evidence.

Second, it is clear from the record evidence that defendant has taken advantage of his parenting time schedule. However, it is also clear that defendant is selective as to which court orders he will respect and obey. Although he is quite diligent in his efforts to enforce his

parenting time rights as evidenced by his numerous motions and petitions, he ignores his court-ordered and obvious significant parental obligation to consistently and adequately provide financial support for his three children. Nevertheless, as the trial court noted, plaintiff has never attempted to defeat or frustrate defendant's parenting time schedule. And despite claims of domestic violence, mental abuse, intimidation, manipulation, scare tactics, and other harassment, plaintiff has never attempted to interfere with defendant's parenting time rights. Consequently, there is no evidence that the move to Alabama was motivated by a desire to frustrate defendant's visitations. Accordingly, we affirm the trial court's finding.

Third, the trial court's finding that a modified parenting time schedule would provide an adequate basis for preserving and fostering the parental relationship between defendant and the children was not against the great weight of the evidence. The trial court set forth a detailed parenting time schedule which included that defendant would have the children for most of the summer, extended weekends, and rotating holidays, as well as frequent contact by Skype and telephone. This new visitation plan, even if not equal with the old plan, provided a realistic opportunity to preserve and foster defendant's relationship with the children. See *McKimmy*, 291 Mich App at 583. And, in light of plaintiff's consistent adherence to defendant's parenting time schedule, it is likely that she will comply with the modification.

Fourth, we agree with the trial court that it does not appear that defendant opposed the change in domicile because of a desire to secure a financial advantage with respect to his support obligation. His support obligation is so nominal that it is unlikely to have motivated his opposition. However, we likewise agree with the trial court that defendant's motivation was rooted in more antagonistic reasoning. In any case, the trial court's finding was not against the great weight of the evidence.

Finally, defendant does not address the issue of domestic violence on appeal. Nevertheless, we note the trial court's findings in that regard, although it does not appear that the trial court separately considered the matter. In conclusion, plaintiff established by a preponderance of the evidence that a change in domicile was warranted; thus, the trial court did not abuse its discretion when it granted plaintiff's motion for a change in domicile.

Affirmed. Plaintiff is entitled to costs. See MCR 7.219.

/s/ Michael J. Kelly  
/s/ Mark J. Cavanagh  
/s/ Christopher M. Murray