STATE OF MICHIGAN

COURT OF APPEALS

TIA MARIE CRATER, Plaintiff-Appellant,	UNPUBLISHED July 19, 2016
v	No. 327250 Grand Traverse Circuit Court
DAVID WILLIAM CRATER, Defendant-Appellee.	LC No. 2013-010719-DM

Before: STEPHENS, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

As part of her complaint for divorce from her husband David Crater, Tia Crater sought "primary custody" of their four-year-old daughter, SC, and to change the child's domicile to New York City. The trial court denied these requests, awarding the parties approximately equal parenting time and ordering that the child remain in the Traverse City area. The court also ordered Tia to pay her husband's attorney fees.

We discern no error in the trial court's conclusion that a change of domicile was not supportable in this case. As Tia failed to establish grounds to move the child as required by MCL 722.31(4), the court was not required to reach her motion to take primary physical custody of the child or to analyze the best-interest factors underlying a custody decision. However, the trial court erred in awarding attorney fees without the benefit of invoices or other evidence to determine the actual hours expended and whether those hours were reasonable. Accordingly, we affirm the trial court's orders related to child custody and domicile, but vacate the order regarding attorney fees and remand for further proceedings.

I. BACKGROUND

The Craters were married in 2003, and Tia gave birth to SC on July 25, 2009. During the early years of their marriage, David did very well financially in the subprime mortgage industry and the family lived in a home valued at more than $500,000. Tia, on the other hand, earned $40,000 annually as a special education teacher. When the housing market took a turn for the worse, David lost his job and the family home went into foreclosure. Finances and personal disputes eventually took their toll and the parties separated on September 1, 2013. Tia moved into a rented home. David engaged in several business ventures in an attempt to recapture his success, but had trouble meeting his financial responsibilities and filed for bankruptcy.

Tia filed for divorce on December 23, 2013. In the complaint, Tia asserted that she was "fit and proper to have the primary custody and care of their minor child" and sought "primary physical custody" of SC. Tia asserted "that she will be moving to New York, and wishes to change the minor child's domicile to same." Tia had become romantically involved with a wealthy man, Marcos Rodriguez, who wanted Tia and SC to move to Manhattan to live with him. On January 17, 2014, the trial court entered a temporary order awarding the parties joint legal custody and approximately equal parenting time.

In April, Tia filed a brief in support of her request for primary custody and to change SC's domicile. Tia emphasized that she had been SC's primary caregiver since birth despite David's reduced work hours following his layoff. The parties did not have extended family in the Traverse City area, but Tia's sister lived in Long Island, she noted. Further, Tia asserted that she could find employment as a teacher in New York earning double her Michigan salary. She promised that she would offer David generous parenting time on all long weekends and school holidays and would pay the travel expenses. Tia was cognizant that her request would necessarily result in a change of custody and therefore contended that her request was in SC's best interests pursuant to the factors of MCL 722.23.

David fought Tia's request to move SC out of state. David noted that his parenting time would be greatly reduced if SC moved to New York. The benefit of the move was all to Tia, David continued, as it was based completely on her romantic aspirations and not truly for better employment or opportunities for SC. Although Tia asserted that teachers earn more in New York City, the cost of living would be exponentially greater than in Traverse City, negating any financial benefit. David further emphasized that contrary to Tia's claimed lack of extended family in Michigan, both sets of grandparents live in the Lansing area, are retired, and are available "at a moment's notice" to assist with childcare. He claimed that he had actually been SC's primary caregiver during her second and third years, as he stayed home and provided childcare.

Despite that she had requested a change of domicile in her complaint, Tia filed a change of domicile motion as well on July 22, 2014. In her motion, Tia noted that David had been allotted 132 overnights since the date of their separation but exercised only 107. She asserted that when she and David had met with an attorney in October 2013, David agreed to allow her to move to New York with their child. In reliance on that promise, Tia found a job and an apartment, but David subsequently changed his mind. The move was in SC's best interests, Tia contended, because Tia would make $60,000 annually in an insurance-industry position she had accepted with a starting date in August 2014. Tia also touted the academic excellence of the school SC would attend.

A two-day hearing was conducted before Friend of the Court (FOC) Referee Cynthia Conlon in August 2014. The parties presented extensive evidence regarding their employment histories and finances, each other's infidelities during their marriage, parenting styles, and SC's educational needs. Tia accused David of abusing marijuana and employing improper discipline on one occasion. David accused Tia of drinking to excess during social events, leaving friends to care for their child. In their closing arguments, the parties analyzed the statutory best-interest factors affecting the trial court's custody decision and the common-law factors underlying the court's change of domicile decision.

In the FOC's subsequent recommendation and order, the referee denied Tia's change of domicile motion and indicated that neither party filed a motion specifically requesting a change of custody or objecting to the temporary custody order. In any event, the referee discerned no change in circumstances or proper cause sufficient to modify the custody arrangement. Accordingly, the referee recommended continuing the current arrangement if Tia decided to remain in Michigan and "continu[ing] to share custody . . . to the extent possible given [Tia's] relocation."

In relation to the denial of domicile change, the referee analyzed the factors of MCL 722.31(4):

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
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> (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.
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> (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.
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> (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.
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> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

In relation to factor (a), the referee stated her belief that the move would improve Tia's quality of life, but not necessarily SC's. Tia's suggested career move was lateral, given the higher cost of living in New York City. Although Tia's boyfriend is very wealthy and offered an advantageous lifestyle in New York, there was no guarantee regarding the permanence of this relationship. And the benefits of SC living closer to her aunt and cousins in New York did not outweigh the advantages of maintaining a close father-child relationship, in the referee's estimation.

In relation to factor (b), the referee considered the amount of time each parent had spent with SC since their separation. The referee found Tia credible in her desire to move to New York to be closer to her sister and boyfriend and not to frustrate David's parenting time. The referee then concluded that this factor slightly favored the mother.

Factor (c) weighed in David's favor, however, the referee found. The parties had shared custody of SC since the separation and David's parenting time would be greatly reduced as a

result of the move. Tia claimed she was willing to pay all travel expenses, but she could only afford to do so if she remained with her boyfriend. While Rodriguez had funded a $200,000 irrevocable trust for Tia in the event their relationship ended, those funds would not last long in the expensive neighborhood Tia had chosen for her residence, the referee concluded.

The referee also found that factor (d) weighed in David's favor as there was no evidence that David opposed the move to secure a financial advantage. And domestic violence was not a factor in this case.

Tia objected to the referee's findings and recommendations. Tia specifically contended that the referee erred in giving only cursory attention to her plea to change the child's custodial arrangement. She requested that the trial court conduct a de novo hearing and grant her motions for primary custody and to change domicile. The parties later stipulated to the de novo hearing being conducted on the existing evidence.

Ultimately, the trial court upheld the referee's recommendation. The court instructed the parties that it need only reach the change of custody motion if Tia met the statutory factors for a change of domicile. The court agreed with the FOC referee, however, that Tia had not established grounds to change the child's domicile by a preponderance of the evidence.

In relation to factor (a), the court determined that the move would improve Tia's quality of life, but that this was "not so clear with regard to the party's child." The educational programs selected by both parents were "highly regarded." While the New York school came with many cultural partnerships, the "pace of life in New York City is certainly radically different than it would be here in Traverse City" and was not necessarily the best choice for a young child. Moreover, although Traverse City is not a large city, it has more community and cultural attractions than other northern Michigan locales. The court further took judicial notice that "there are more murders in New York City in any given month than there are in Grand Traverse County in any given decade."

The court expressed concern with Tia's projected salary of $60,000, describing this as "chump change in New York." Tia's $200,000 trust account was also insignificant given the cost of living. Without the ongoing financial support of her boyfriend, the court found that Tia would be unable to support SC and send her to her selected school. Although David's income had been uncertain in the past few years, SC's needs always had been met.

In relation to factor (b), the court found no ill motive on Tia's part in desiring to move to New York. Rather, both parties had demonstrated willingness and ability to work together and share custody of their child.

The court found factor (c)—ability to support a continuing parent-child relationship—weighed in David's favor. So far, the court noted, Tia's move to New York had not impacted her ability to exercise parenting time and she and the child had travelled back and forth several times. The success of this arrangement, however, was wholly dependent on the financial support of a third party with no legal duty—Mr. Rodriguez. If Tia's relationship with Mr. Rodriguez ended, she would be unable to meet her $17,000 monthly rent obligation and continue her travel habits for very long.

The court folded its consideration of factor (d) into its factor (a) analysis. It also found "moot" the issue of domestic violence.

Ultimately, the court ordered that SC's residence remain in Traverse City. If Tia chose to return to Traverse City, the parenting time schedule of the temporary custody order would remain in place. If she chose to remain in New York, however, the court awarded her parenting time on alternating weekends, half of each winter break, the entirety of spring break, and alternating Thanksgiving holidays. Tia now appeals.

II. STANDARD OF REVIEW

> Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error. [*Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014).]

When faced with a request to change custody, the court must first determine whether the proponent has "established a change of circumstances or proper cause for a custodial change under MCL 722.27(1)(c)." *Id.* at 540, citing *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). Only if this threshold is met will the court consider whether the requested change in custody would alter the child's established custodial environment and whether such change would be in the child's best interests. *Kubicki*, 306 Mich App at 540.

Tia proposed to change custody by moving SC's domicile to New York City. MCL 722.31(1) prohibits "a parent of a child whose custody is governed by court order [from changing] 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."

> A motion for a change of domicile essentially requires a four-step approach. 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) . . . support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must . . . 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).]

The best-interest analysis called for in motions to change domicile is identical to that required for motions to change a child's custody. In both circumstances, the

> touchstone is the child's best interest. In reviewing [the proponent's] best-interest arguments, we remain mindful that a trial court's findings on each factor should be affirmed unless the evidence clearly preponderates in the opposite direction. [*Kubicki*, 306 Mich App at 542 (first alteration in original, some quotation marks and citations omitted.]

III. ANALYSIS

A. CHANGE OF CUSTODY

Tia contends that the FOC referee and the trial court gave inadequate consideration to her request to change the custodial arrangement and take primary physical custody of SC. This petition should have been considered separately from the motion to change SC's domicile, Tia urges, giving due consideration to each best-interest factor of MCL 722.23.

Tia does not seem to appreciate that her motion to change custody was inextricably linked to her domicile motion. Tia never sought to limit David's access to SC while both were living in Traverse City. Tia's desire for primary physical custody only arose as a result of her move. It then became more convenient for Tia to have primary physical custody so she could keep SC out of state during the school week.

However, the law is clear that a court need only reach the best-interest factors of MCL 722.23 if the proponent first "establishe[s] a change of circumstances or proper cause" to effectuate a custodial change. *Kubicki*, 306 Mich App at 540; *Vodvarka*, 259 Mich App at 508-509. And when a requested custodial change is occasioned by a requested domicile change, the proponent must also meet the threshold showing that a change is warranted under MCL 722.31(4). *Kubicki*, 306 Mich App at 542; *Rains*, 301 Mich App at 325.

The court found that Tia had not met her burdens in these regards. Unless Tia demonstrates on appeal that this was error, she cannot support her request to remand for further consideration. Tia makes no argument that she established proper cause or a change in circumstances warranting reconsideration of the temporary custody order. Instead, she focuses on the court's analysis under MCL 722.31(4). As this challenge lacks merit, Tia is not entitled to relief.

B. CHANGE OF DOMICILE

As noted, a motion for change of domicile consists of four steps. The trial court must first determine whether the moving party has established by a preponderance of the evidence that the MCL 722.31(4) factors support a motion for a change of domicile. *Kubicki*, 306 Mich App at 542; *Rains*, 301 Mich App at 325. The trial court determined that Tia did not meet her burden in this regard.[1]

[1] We review only the *trial court's* findings, not the referee's. The trial court conducted a de novo review of the testimony presented at the hearing before the referee and the parties ultimately

MCL 722.31(4)(a) requires a court faced with a change of domicile motion to consider: "Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent." The trial court's factual findings in this regard were not against the great weight of the evidence. Accordingly, we discern no ground to upset the court's conclusion that this factor weighed in David's favor.

The trial court acknowledged that certain benefits would flow to SC from moving to New York City. The public school Tia selected was ranked very highly academically and enjoyed partnerships with several local cultural institutions that provided enrichment opportunities for the students. SC would live in an Upper East Side apartment with a $17,000 monthly rent bill and could visit museums, parks, and other attractions with her mother. However, the court found that Glen Loomis elementary in Traverse City was also scored highly. Although Tia did not believe the Montessori model employed by the school was right for SC, David presented a letter from SC's teacher expressing that the child was performing wonderfully. The court further took judicial notice of the cultural and recreational opportunities available in Traverse City. The court described his familiarity with life in New York City and compared it with that in Traverse City. Overall, the court found that the fast-paced lifestyle of New York was not better suited for a young child's needs than the slower pace of northern Michigan.

In concluding that this factor weighed in David's favor, the court also emphasized the potentially ephemeral nature of the financial benefits Tia and SC would enjoy in New York City. Tia resided in an expensive apartment in a ritzy neighborhood. Her ability to remain in that apartment depended on her continued romantic relationship with Mr. Rodriguez. The two were neither married nor engaged and Mr. Rodriguez had no legal duty to continue his financial support. Although Mr. Rodriguez had funded a $200,000 trust for Tia, this was insufficient to guaranty SC's future security. SC's attendance at Tia's selected school depended upon her residence. Yet, the trust proceeds would cover less than a year's rent for the apartment. While a relocating parent's increased earning potential may improve a child's quality of life, as may additional resources available in the new location, *Rittershaus v Rittershaus*, 273 Mich App 462, 466-467; 730 NW2d 262 (2007), it is common knowledge that the cost of living in New York City is significantly higher than in Traverse City. And Tia's anticipated salary of $60,000 would make it impossible to find housing in the well-to-do neighborhood. The court also acknowledged that David had been unemployed and moving from job to job for several years. While this was not an optimal financial setting in which to raise a child, the court found that David had never permitted SC to go without and would continue to provide for her.

MCL 722.31(4)(b) involves an analysis of

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agreed that no further evidence would be presented before that review. The trial court did not adopt the referee's findings and conclusions as its own but rather independently reviewed the hearing testimony and court record before reaching a final conclusion. See MCL 552.507(6)(a) (emphasis added) (stating that a de novo hearing includes "[a] *new decision* based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee").

> 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.

We discern no error in the trial court's conclusion that this factor weighed slightly in favor of Tia. David admitted that he had not exercised all of his allotted parenting time, but when backed into a corner, Tia agreed that she had requested additional days to travel with SC to New York and to visit her parents. The days missed were not so significant in number that greater weight should have been attributed. Moreover, we agree with the court's assessment that Tia did not desire to move to New York City to "defeat or frustrate the parenting time schedule." Rather, the evidence established that Tia desired to live near her sister and with her boyfriend. She had cooperated with David in scheduling and rearranging parenting time since the onset of the proceedings.

MCL 722.31(4)(c) takes into consideration

> 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.

The court found that this factor weighed in David's favor. To date, Tia had covered the costs of travel and had transported SC back and forth for parenting time. As aptly noted by the court, however, the ease of this arrangement was wholly dependent on Mr. Rodriguez. Mr. Rodriguez paid for Tia's and SC's plane tickets and sometimes travelled with them by private jet. Should the relationship end, the court determined, Tia would be financially unable to continue this pattern. We discern no error in this regard. The court correctly found that Tia's $200,000 trust and $60,000 salary would not stretch far in New York City's economy, leaving her without the financial means to cover SC's travel expenses. Absent such frequent visits, David's enjoyment of nearly equal parenting time would be greatly reduced.

MCL 722.31(4)(d) requires a court to consider "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." The court found that although David had filed for bankruptcy and apparently lacked sufficient funds to meet his monthly financial obligations, there was no evidence that he desired to keep SC in Michigan to avoid supporting her financially or paying child support. Tia has not challenged this finding.

Finally, MCL 722.31(4)(e) pertains to "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." The court found this factor "moot." Tia contends that the court should have considered her mother's testimony that she once observed David use improper discipline with SC. Specifically, Tia's mother testified that David once became frustrated when SC fought getting dressed. David allegedly hurled the child onto the bed and threw her clothes at her. David testified that he had no memory of the alleged

incident. We discern no error in the trial court's finding, although it employed imprecise language. Even if the incident occurred, Tia's mother did not describe circumstances rising to the level of child abuse. And there simply was no evidence that any other abuse, violence, or even overly stringent discipline had ever taken place.

Overall, the court found that the factors of MCL 722.31(4) weighed against changing SC's domicile. As Tia failed to meet her statutory burden, the court was not required to proceed to the three remaining steps in a change-of-domicile analysis. See *Kubicki*, 306 Mich App at 542, citing *Rains*, 301 Mich App at 325. As we discern no error in the trial court's factual findings, we cannot conclude that the trial court's judgment was against the great weight of the evidence. We therefore affirm in this regard.

C. ATTORNEY FEES

Tia takes issue with the trial court's decision to award David attorney fees at her expense. "We review for an abuse of discretion a trial court's award of attorney fees in a divorce action," and for clear error its underlying factual findings. *Richards v Richards*, 310 Mich App 683, 699; 874 NW2d 704 (2015).

As described in *Richards*, 310 Mich App at 700:

> "Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit" but are also "authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation." *Hanaway[v Hanaway*], 208 Mich App [278, 298; 527 NW2d 792 (1995)]. Specifically, MCR 3.206(C) provides:
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> > (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
> >
> > (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
> >
> > (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
> >
> > (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply. [Emphasis omitted.]

The court found no wrongdoing on Tia's part, but concluded that David was unable to bear his legal expenses given his bankruptcy and inability to achieve a profit at his various business ventures. While David had adequate income to support SC, the court found he was struggling to do so. The financial burden of litigating the divorce and custody action increased that struggle. Tia, on the other hand, was capable of paying David's legal expenses as Mr. Rodriguez and possibly other family members had covered her litigation costs.

We discern no error in this regard. The evidence more than adequately established David's financial difficulties. He testified regarding the loss of his position in the mortgage industry, his musical endeavors and their meager financial recompense, and his attempts to support himself in various start-up companies. David had filed for bankruptcy as well. After filing for bankruptcy, David learned that his stepfather held Apple stock in David's name. David had thus far used the proceeds from that stock to pay his attorney fees and overcome any shortfalls in his financial obligations. However, the bankruptcy trustee had instituted proceedings to retake the Apple stock and those funds would no longer be available to him. Testimony also established that Tia was the beneficiary of an irrevocable $200,000 trust and that Mr. Rodriguez had paid the bulk of her legal bills. Mr. Rodriguez was also covering all of Tia's living expenses.

However, the trial court did not fulfill its duty in calculating the amount of attorney fees to be awarded. "The party requesting attorney fees must show that the attorney fees were incurred and that they were reasonable." *McIntosh v McIntosh*, 282 Mich App 471, 483; 768 NW2d 325 (2009). A trial court awarding attorney fees must conduct a hearing and make findings of fact regarding what services were actually rendered and the reasonableness of those services. *Souden v Souden*, 303 Mich App 406, 415; 844 NW2d 151 (2013); *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005).

In regard to its calculation and award of attorney fees, a trial court

> should begin its analysis by determining the fee customarily charged in the locality for similar legal services. . . . In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case . . . . The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. [*Smith v Khouri*, 481 Mich 519, 531; 751 NW2d 472 (2008).]

In arriving at its decision, the court must consider the eight factors listed in the Michigan Rules of Professional Conduct 1.5(a), as well as the six overlapping factors set forth in *Wood v Detroit Auto-Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982). *Khouri*, 481 Mich 529-530.

At the motion hearing in this case, Tia's counsel conceded that the hourly rate charged by David's attorney was reasonable and that the attorney was experienced in domestic relations cases. Given Tia's concessions, the court was not required to address the factors outlined in MRPC 1.5(a) and *Wood*. Tia contended, however, that David failed to meet his burden of proof regarding the amount of hours expended and the reasonableness of those hours because he failed to present invoices or affidavits supporting his claim. The trial court never addressed whether the hours billed by David since Tia filed her objections to the referee's opinion and order were reasonable. Moreover, David never supported the actual hours he claimed were expended. David's counsel also represented him in the bankruptcy proceedings, and David never presented invoices or other evidence clearly separating the hours spent on the divorce matter. Given these shortcomings, we vacate the trial court's attorney fee award and remand for further proceedings.

We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher