NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CU 1434

JPP by

GEORGE WILLIAM WOLFE, II

VERSUS

JESSICA ROSE HANSON

Judgment Rendered: JAN 17 2007

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On Appeal from the 23rd Judicial District Court
In and For the Parish of Ascension
Trial Court No. 77,998, Division "B"

Honorable Thomas J. Kliebert, Jr., Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing, J. concurs and assigns reasons.

HUGHES, J.

This appeal by Defendant, Jessica Rose Hanson, alleges error by the trial court in a judgment signed on January 10, 2006. The judgment altered Ms. Hanson's custody arrangement with Plaintiff, her former husband George William Wolfe, II, as to their son, Nathan Wolfe, by (1) rescinding Ms. Hanson's status as domiciliary parent and (2) increasing Mr. Wolfe's time for physical custody of Nathan. For the reasons that follow, we amend and affirm as amended.

I. FACTS AND PROCEDURAL HISTORY

Nathan Wolfe was born on September 10, 2003. His parents, Jessica Rose Hanson and George William Wolfe, II, lived together but were not married. As of May 2004 the parties had separated and Mr. Wolfe filed a petition to acknowledge his paternity and establish a joint custody arrangement with Ms. Hanson as the domiciliary parent.[1] On July 2, 2004 Ms. Hanson and Mr. Wolfe entered into a consent judgment providing for joint custody of Nathan. Ms. Hanson was named domiciliary parent and Mr. Wolfe received physical custody of Nathan "every other four (4) days that he is off" according to his set work schedule. Mr. Wolfe would thus receive Nathan every eighth day for a four-day period.

The parties briefly reconciled and married on January 27, 2005 before separating for good in April 2005 when Ms. Hanson moved with Nathan from the marital residence in Ascension Parish to St. Landry Parish, where her mother lives. The parties' relationship deteriorated to the point where Ms. Hanson sought a protective order against Mr. Wolfe; this matter came before a hearing officer in St. Landry Parish on May 27, 2005.[2] The hearing

[1] Civil Docket No. 77,998, 23rd Judicial District Court, Parish of Ascension.
[2] Civil Docket No. 05-C-2292-D.

officer granted the order for a three-month period and maintained the terms of the July 2004 consent judgment.

On June 2, 2005 Mr. Wolfe filed a motion in the original Ascension Parish action seeking to modify the custody arrangement. He argued that Ms. Hanson's relocation to St. Landry Parish and Nathan's older age constituted material changes in circumstances that justified modification to a more equally shared physical custody arrangement.[3]

The matter was set for hearing on July 29, 2005, then continued pending evaluation and a report by a court-appointed licensed clinical social worker. The report was completed on October 24, 2005. In a thorough and detailed report, Al Robelot and Jamie LeBourgeois, licensed clinical social workers, both recommended that the mother be named as domiciliary parent. The matter was heard on October 28, 2005. In a judgment signed on January 10, 2006 the trial court modified the custody arrangement such that Mr. Wolfe and Ms. Hanson are now to have "joint custody of the child, but neither parent shall be named domiciliary parent." The trial court also increased Mr. Wolfe's physical custody of Nathan from every other four-day period off from his work schedule to every four-day period off from his work schedule. Ms. Hanson appeals from this judgment. She alleges that the trial court erred in (1) removing her as Nathan's domiciliary parent and (2) in ordering the parties to exchange Nathan every four days.

II. LAW AND DISCUSSION

As an introductory matter, it is paramount and beyond question that custody conflicts are to be determined in accordance with the court's

[3] To clarify this point, the original consent decree granted Mr. Wolfe physical custody of Nathan on "every other four days that he is off" work [17, 18]. We understand this to mean that Mr. Wolfe received Nathan every eight days for a period lasting four days. Mr. Wolfe's motion to modify custody [21] requested that his physical custody be increased to "a 50/50 visitation schedule"; this would change the previous arrangement from every eighth day to every fourth day, still in accordance with Mr. Wolfe's permanent "four-on-four-off" work schedule but obviously, more time than he had previously consented to.

judgment as to the best interest of the child, which is the "fundamental principle" and "overriding test" of all such disputes. LSA-C.C. art. 131; *see also* cmt. a to art. 131.[4] Additionally, "the decision of the trial court is to be given great weight and overturned only where there is a clear abuse of discretion." **Thompson v. Thompson**, 532 So.2d 101 (La. 1988). These principles govern our consideration of Ms. Hanson's assignments of error.

A. Designation of Joint Custody without a Domiciliary Parent

Louisiana Revised Statutes 9:335, which guides courts in determining joint custody arrangements, provides the following:

> A. (1) In a proceeding in which joint custody is decreed, the court shall render a joint custody implementation order except for good cause shown.
>
> (2)(a) The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.
>
> (b) To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.
>
> (3) The implementation order shall allocate the legal authority and responsibility of the parents.
>
> B. (1) In a decree of joint custody the court shall designate a domiciliary parent except when there is an implementation order to the contrary or for other good cause shown.
>
> (2) The domiciliary parent is the parent with whom the child shall primarily reside, but the other parent shall have physical custody during time periods that assure that the child has frequent and continuing contact with both parents.
>
> (3) The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise. All major decisions made by the domiciliary parent concerning the child shall be subject to review by the court upon motion of the other parent. It shall be presumed that all major decisions made by the domiciliary parent are in the best interest of the child.

[4] "In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child." We note that no divorce proceedings have yet begun in this case, but the principle of Article 131 extends to all custody proceedings.

> C. If a domiciliary parent is not designated in the joint custody decree and an implementation order does not provide otherwise, joint custody confers upon the parents the same rights and responsibilities as are conferred on them by the provisions of Title VII of Book I of the Civil Code.
>
> LSA-R.S. 9:335

To decide this matter, we must consider the inner workings and relations among the three sections of this statute. Section (B) clearly expresses a legislative preference and intent that courts deciding joint custody matters select a parent with whom the child is to primarily reside: "In a decree of joint custody the court shall designate a domiciliary parent[.]" The domiciliary parent has legal authority "to make all decisions affecting the child" subject to judicial review "upon motion of the other parent." The statute also provides for two exceptional circumstances in which a court may decline to name a domiciliary parent in a joint custody context: when (1) "there is an implementation order to the contrary" or (2) "for other good cause shown." As the court in this matter declined to name a domiciliary parent, we must inquire whether the facts of this case support either of the statutory exceptions.

An "implementation order to the contrary" must meet the requirements set forth in LSA-R.S. 9:335(A) by specifically allocating (1) physical custody times for each parent and (2) "the legal authority and responsibility of the parents." For example, one parent might be the better choice to assume primary responsibility for the child's education and the other parent might be the better choice to assume primary responsibility for the child's healthcare. Thus, a court's joint custody decree that does not designate a domiciliary parent yet does "allocate the legal authority and responsibility of the parents" as suggested above would be a joint

implementation order sufficient to overcome the failure to name a domiciliary parent.

If, however, the joint custody decree *neither* designates a domiciliary parent *nor* provides otherwise in an implementation order that allocates the legal authority and responsibility of the parents, the second potential exception of section (B)(1) must be met: "good cause" must be shown for the court's decision not to assign a domiciliary parent. This is echoed by section (A)(1), which requires the court to render a joint custody implementation order "except for good cause shown."

The statute does not define "good cause" but some guidance is provided in **Walker v. Walker**, 38,982, p. 8 (La. App. 2 Cir. 8/18/04), 880 So.2d 956, 961-62. There, a trial court's given reasons for not naming a domiciliary parent amounted to an "open-ended conclusion" based on the trial court's "comfort level" that did not reach the standard of "good cause shown." **Id.** Good cause should be shown by the presence of facts or by a clear statement on the part of the trial court that requires little interpretation or extrapolation. If good cause is shown, then section (C) of the statute applies and the custody arrangement will operate under "the provisions of Title VII of Book I of the Civil Code."

After a thorough review of the record in this matter, we conclude that the facts herein do not present a joint custody arrangement conforming to the requirements of Louisiana Revised Statutes 9:335. First, it is clear that the trial court opted not to assign a domiciliary parent: "neither parent shall be named domiciliary parent." Thus, one of the two exceptions must apply: either a valid "implementation order to the contrary" must have been provided by the trial court or "good cause" not to name a domiciliary parent must have been shown.

A valid implementation order has not been provided in this case. While we note that a previous joint custody arrangement with Ms. Hanson as domiciliary parent had been arranged by consent decree in 2004, we recognize the possibility that the couple's marriage in 2005, however brief, rendered that earlier arrangement inoperative as a pre-existing "implementation order to the contrary."[5] We have also closely considered the order on appeal and conclude that it does not "allocate the legal authority and responsibility of the parents" as required by LSA-R.S. 9:335(A)(3). Thus there is neither an allocation of "the legal authority and responsibility of the parents" nor a designation of a domiciliary parent, nor has "good cause" been shown for the failure to name a domiciliary parent.

The order on appeal does not express that the court found "good cause" for its decision and the trial court gave no oral reasons for its decision. Our review of the record does reveal that, in its attempts to guide the attorneys' questioning at the hearing, the trial court expressed concern over the communication problems between Mr. Wolfe and Mr. Hanson as well as the potential that the parent given domiciliary status might use that status against Nathan's relationship with the other parent. But without more, those concerns voiced in that context cannot be raised to the standard of good cause as required by the statute.

Along these lines, the second circuit has found that "a court's determination that the parties are unable to communicate effectively with each other regarding issues concerning the child may constitute good cause

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[5] In most custody disputes, of course, an implementation order would not be followed by the parties' marriage and then yet another custody implementation order. Typically, the first custody implementation order follows the demise of the parties' relationship. This "first" order would most likely re-appear in court when one party moves to alter its terms. In such cases, the statute might be understood as referring to a pre-existing, original, or prior implementation order. *See* **Brewer v. Brewer**, 39,647, pp. 12-13 (La. App. 2 Cir. 3/2/05), 895 So.2d 745, 752; **Ketchum v. Ketchum**, 39,082, p. 11 (La. App. 2 Cir. 9/1/04), 882 So.2d 631, 639.

for refusing to designate a domiciliary parent. **Brewer v. Brewer**, 39,647, pp. 12-13 (La. App. 2 Cir. 3/2/05), 895 So.2d 745, 752 (citing **Walker**, 880 So.2d 956). But the contrary may also be true, in which case dissention between the parents dictates adherence to the statutory norm: "where it is clear that the parents will likely disagree on important decisions about the children, such as recreational activity, school issues and discipline...a domiciliary parent should have been named. **Miller v. Miller**, 01-0356, p. 9 (La. App. 3 Cir.10/31/01), 799 So.2d 753, 759.

We are inclined in the circumstances before us to follow the reasoning of the third circuit rather than that of the second circuit. Disagreement and conflict between Nathan's parents will lead more likely to deadlock and further strife than to a relatively stable environment for Nathan as he prepares to begin school. We do not believe that either the record or the order on appeal in this matter contain evidence that "good cause" has been shown to justify the trial court's unexplained decision to depart from the statutory norm by not designating a domiciliary parent. Thus, we conclude that neither exception to the statute's required norm of a joint custody decree naming a domiciliary parent has been met in this case: there is no "implementation order to the contrary" and "good cause" has not been shown. We find in the record, however, that Nathan has spent most of his young life in his mother's care and continues to do so. Mr. Wolfe does not dispute that Ms. Hanson is a fit and loving parent. Practically speaking, once Nathan enters the school system, he will almost certainly require the relative unity, stability, and authority of a domiciliary parent. The statute expressly prefers such an arrangement and since there is "no implementation order to the contrary" nor "good cause shown" not to have a domiciliary parent, we will amend the judgment to name Ms. Hanson domiciliary parent.

B. Change in Physical Custody Time

Ms. Hanson's second assignment of error concerns the trial court's decision to award Mr. Wolfe physical custody of Nathan every four days for a four-day period, which is in accordance with Mr. Wolfe's work schedule. It appears that after the parties separated in 2005, they defaulted to the July 2004 arrangement that called for Mr. Wolfe to have physical custody of Nathan every eight days for a four-day period. As we noted above, the parties' brief marriage appears to have rendered the previous consent decree arrangement no longer legally binding. Thus, Louisiana Civil Code Article 131, the best interest of the child, governs our inquiry.

In his June 2005 motion, Mr. Wolfe requested a "50/50 equal sharing schedule" pursuant to Louisiana Revised Statutes 9:335(A), which guides courts to arrange equal physical custody "to the extent it is feasible and in the best interest of the child." The trial court granted Mr. Wolfe's motion [107]. Ms. Hanson argues that this arrangement is neither feasible nor in Nathan's best interests, primarily because it disrupts his routine and results in too much traveling for him.

While Ms. Hanson's points have merit, we note that the trial court has great discretion in custody matters and its decisions will not be disturbed unless legal error or abuse of that discretion is shown. **Thompson,** 532 So.2d at 101. Our review of the record reveals that testimony given by Ms. Hanson at the hearing of this matter did not establish that increased time with Mr. Wolfe had resulted in any significant negative impact on Nathan. [203-05, 214] Additionally, while the logistics involved in the new exchange arrangement may be inconvenient, the record does not reflect that the arrangement is in any way unfeasible. We conclude that nearly equal time with his father is in Nathan's best interests and also that the trial court did

not abuse its discretion in increasing Mr. Wolfe's physical custody of Nathan. This portion of the judgment below is affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the trial court ordering that neither Mr. Wolfe nor Ms. Hanson be Nathan's designated domiciliary parent is amended to reflect that Ms. Hanson will be Nathan's designated domiciliary parent. Also for the foregoing reasons, the trial court's judgment ordering Mr. Wolfe's physical custody of Nathan to be every four days for a four-day period is affirmed.

AMENDED AND, AS AMENDED, AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

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2006 CU 1434

GEORGE WOLFE, II

VERSUS

JESSICA HANSON

DOWNING, J., concurring

Respectfully, the trial court judgment should be affirmed in its totality. In its enigmatic analysis of "good cause," the majority opinion usurps the trial court's discretion while recognizing the trial court's stated concerns in declining to name a domiciliary parent. Further, the judgment under appeal contains an adequate joint custody implementation order pursuant to La. R.S. 9:335B(1); therefore, designation of a domiciliary parent is not required. Accordingly, under the appropriate standards, the judgment of the trial court should be affirmed. Barring that, we should order the trial court to provide us with a *per curiam* to explain its decision in this regard before we decide this matter. Alternatively, we should remand this matter to the trial court for an evidentiary hearing on domiciliary status. But this not an appropriate case for us to substitute our judgment for the trial court's where the trial court pointedly declined to name either parent as domiciliary parent.

Effect of Marriage on Custody Decree

It is undisputed that Ms. Hanson and Mr. Wolfe were married on January 27, 2005, after the birth of their child, Nathan. While it appears that the effect of a marriage on an existing custody decree affecting a child of

both parents has never been specifically reported in Louisiana, no one could seriously argue that such custody order could continue to control during the marriage.

First, La. C.C. art. 99, entitled "Family Authority," states: "**Spouses mutually assume the moral and material direction of the family, exercise parental authority, and assume the moral and material obligations resulting therefrom.**" This article is found in Book 1, Title IV, Chapter 3 of the Civil Code, which chapter is entitled, "Incidents and Effects of Marriage." Thus, by operation of law, marriage between parents of a child gives both parents equal rights to parental authority. Once parents marry, they no longer have separate rights to the incidents of custody. Rather, La. C.C. art. 216 provides: "A child remains under the authority of his father and mother until his majority or emancipation. [par.] In case of difference between the parents, the authority of the father prevails." This article is found in Book 1, Title IV, Chapter 5 of the Civil Code, which chapter is entitled, "Of the Duties of Parents Towards Their Legitimate Children, and of the Duties of Legitimate Children Towards Their Parents."[1]

Second, spouses generally may not maintain lawsuits against one another. La. R.S. 9:291 provides: "Spouses may not sue each other except for causes of action pertaining to contracts or arising out of the provisions of Book III, Title VI of the Civil Code [fn omitted]; for restitution of separate property; for divorce or declaration of nullity of the marriage; and for causes of action pertaining to spousal support or the support or custody of a child

[1] At the time Ms. Hanson and Mr. Wolfe married, La. C.C. art. 198 provided that illegitimate children were legitimated by the subsequent marriage of their father and mother when they formally acknowledged their children, either before or after the marriage. Art. 199 provided that children legitimated by subsequent marriage are legitimate. La. Acts 2005, No. 192, effective June 29, 2005, removed these provisions from the law. But under these provisions, Nathan is the legitimate child of Ms. Hanson and Mr. Wolfe.

while the spouses are living separate and apart."[2] Thus, our law does not contemplate granting parental control to one or the other parent while they are domiciled together and the family is intact.

Third, it would be absurd to suggest that a pre-marital custody order survived a marriage such that a named custodial parent could make decisions regarding the child to the exclusion of the other parent or to suggest that while a family is domiciled together that one parent could control physical custody of the child to the exclusion of the other. Such arrangement would be a constant source for marital disharmony and contention.

These circumstances are analogous to a reconciliation between divorcing parents. La. C.C. art. 104 provides that the "cause of action for divorce is extinguished by the reconciliation of the parties." Custody determination in this context is an action incidental to divorce. La. C.C. art. 105. Thus, the court in **Walkowiak v. Walkowiak**, 32,615, p. 4 n.2 (La.App. 2 Cir. 12/8/99), 749 So.2d 855, 858 n.2, observed that the legal effect of reconciliation is to terminate the cause of action for divorce, including any child custody orders. In explaining this principle, the Louisiana Supreme Court in **D'Antoni v. Geraci**, 224 La. 818, 824, 70 So.2d 883, 885 (La. 1954), noted that once a divorce action is abated by reconciliation, there is no appropriate proceeding pending between the litigants in which a district court could legally entertain a rule for custody.

Under these principles, when Ms. Hanson and Mr. Wolfe married on January 27, 2005, the stipulated judgment between them entered on July 2, 2004 was extinguished. The majority recognizes that the marriage rendered the prior custody decree "no longer legally binding."

Physical Custody

[2] Note that the current action falls within the last stated exception – an action pertaining to custody of a

The appropriate standard for initial determinations of custody is the best interest of the child. La. C.C. art. 131. As the majority recites, the decision of the trial court is to be given great weight and overturned only where there is a clear abuse of discretion. **Thompson v. Thompson**, 532 So.2d 101 (La. 1988).

Here, the majority concluded that the trial court did not abuse its discretion in affirming the sharing of physical custody on a four-day rotating basis. I would also affirm on this basis. Accordingly, I agree with the majority in this regard.

Domiciliary Status

Louisiana Revised Statutes 9:335 provides as follows regarding the designation of a domiciliary parent, in pertinent part:

> B. (1) In a decree of joint custody the court shall designate a domiciliary parent except when there is an implementation order to the contrary or for other good cause shown.

First, the judgment under appeal contains a joint custody implementation order as required by La. R.S. 9:335A. This paragraph provides:

> (1) In a proceeding in which joint custody is decreed, the court shall render a joint custody implementation order except for good cause shown.
>
> (2)(a) The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.
> (b) To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.
>
> (3) The implementation order shall allocate the legal authority and responsibility of the parents.

The judgment on appeal contains extensive provisions regarding implementation of the exercise of physical custody, child support and cost

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child while the spouses are living separate and apart.

allocations, and the custodial authority of the parties. Further, while the order granting joint custody is short on detail, the status itself confers the authority and responsibility of the parents. One definintion of legal custody found in La.Ch.C. art. 116(12) provides the following:

> "Legal custody" means the right to have physical custody of the child and to determine where and with whom the child shall reside; to exercise the rights and duty to protect, train, and discipline the child; the authority to consent to major medical, psychiatric, and surgical treatment; and to provide the child with food, shelter, education, and ordinary medical care, all subject to any residual rights possessed by the child's parents.

Ms. Hanson did not request a more precise deliniation of her rights as a custodial parent, nor does one appear necessary. Further, La.R.S. 9:336 requires as follows:

> Joint custody obligates the parents to exchange information concerning the health, education, and welfare of the child and to confer with one another in exercising decision-making authority.

Therefore, the order before us appears to adequately comply with the requirements of La. R.S. 9:355A. *See* **Caro v. Caro**, 95-0173, pp. 2-3 (La.App. 1 Cir. 10/6/95), 671 So.2d 516, 518. Thus, naming a domiciliary parent is not required by La. R.S. 9:355B(1).

Second, we are reviewing an initial determination in which the trial court clearly, specifically, and directly ordered that neither parent be named domiciliary parent. Assuming arguendo that the joint custody implementation order outlined in the judgment under appeal is legally inadequate, then under La. R.S. 9:355B(1), our review is limited to whether "good cause" existed such that the trial did or did not abuse its discretion in specifically making no designation of domiciliary parent. *See* **Thompson,** 532 So.2d at 101. As the majority notes, "the decision of the trial court is to be given great weight and overturned only where there is a clear abuse of

discretion." **Id.** Yet, nowhere in its report does the majority discuss how the trial court abused its discretion.

On *de novo* review, the record reveals that while both Ms. Hanson and Mr. Wolfe are fit parents, they maintain a contentious relationship and that they did not communicate effectively. From the record, it is questionable that Ms. Hanson is willing to facilitate a relationship between Nathan and his father. The majority opinion even notes the trial court's valid concerns over communication problems and that Ms. Hanson may use her domiciliary status to interfere with Mr. Wolfe's relationship with Nathan. Further, an award of domiciliary status may foster an impression that one parent is the winner and one is the loser. *See* **Remson v.** Remson, 95-1951, pp. 5-6 (La.App. 1 Cir 04/04/96), 672 So.2d 409, 412-13. Also, Ms. Hanson has moved to St. Landry Parish, which affects the relationships between the parties.

I suggest that these concerns rise to more than a "comfort level." They meet the majority's newly created standard that "good cause" be shown by the presence of facts that require little interpretation or extrapolation. Therefore, the trial court did not abuse its discretion in specifically declining to name a domiciliary parent.

Further, the majority dismisses the trial court's reasonable determinations and replaces them with its own. It notes two possible interpretations to parents' inability to communicate. In **Brewer v. Brewer**, 39,647, pp. 12-13 (La. App. 2 Cir. 3/2/05), 895 So.2d 745, 752, the court concluded that an inability to communicate effectively may constitute good cause for refusing to designate a domiciliary parent. In **Miller v. Miller**, 01-0356, p. 9 (La. App. 3 Cir.10/31/01), 799 So.2d 753, 759, the court stated

that where parents are likely to disagree on important decisions, a domiciliary parent should be named.

Rather than accepting the trial court's reasonably supported inferences, the majority then becomes factfinder. How does the majority know that disagreement and conflict between Nathan's parents will lead more likely to deadlock and further strife? The trial court apparently found the principles underlying **Brewer** more comparable to the matter at hand than those in **Miller.** The trial court saw the demeanor of the witnesses and made credibility and factual determinations. This is its function, not the majority's. We may disagree, but the trial court did not abuse its discretion in deciding how to promote Nathan's best interest. This decision may ameliorate the dissension between Ms. Hanson and Mr. Wolfe. They may communicate and cooperate better and keep Nathan's best interest in mind knowing they share fully equal control. This determination is within the trial court's discretion.

Accordingly, while the trial court did not favor us with reasons for its explicit decision to name neither parent as domiciliary parent, good cause existed for this ruling. Absent an abuse of discretion, the trial court's decision in this regard should not be overturned, **Thompson,** 532 So.2d at 101. Therefore, its decision in this regard should be affirmed.

Barring an affirmance based on the fact that the trial court did not abuse its discretion in this regard, we should order the trial court to provide us with a *per curiam* to explain its decision before we decide this matter. Alternatively, we should remand this matter to the trial court for an evidentiary hearing on domiciliary status.

Conclusion

While this not an appropriate case for us to substitute our judgment for the trial court's since the trial court pointedly and with good cause declined to name either parent as domiciliary parent, I am concurring so as not to cause further delay in this matter.