

STATE OF MICHIGAN
COURT OF APPEALS

ALISON KRISTAL,

Plaintiff-Appellee,

v

DAVID ALLEN KRISTAL,

Defendant-Appellant.

UNPUBLISHED

January 31, 1997

No. 195186

Midland Circuit Court

LC No. 95-003659-DM

Before: Griffin, P.J., and McDonald and C. W. Johnson*, JJ.

PER CURIAM.

Defendant appeals by right from a judgment of divorce, challenging the award of physical custody of the parties' minor child to plaintiff and the grant of a change of domicile to plaintiff. We affirm.

Defendant first argues that the trial court abused its discretion in awarding plaintiff physical custody of the minor child, claiming that the trial court erred in finding that plaintiff was favored by a preponderance of the evidence with regard to factors (a) (the love, affection, and emotional ties existing between parent and child), (d) (the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining it), and (j) (the willingness and ability of the parties to facilitate a close and continuing parent-child relationship between the child and the other parent) of the "best interests" factors in the Child Custody Act. MCL 722.23; MSA 25.312(3).

Specifically, defendant argues that a stronger tie exists between defendant and the minor child, that the trial court was making an unwarranted assumption when it concluded that, because the child initially spent more time with plaintiff, theirs was the greater bond where the evidence actually showed that plaintiff frequently entrusted the child to the care of others, and that the parties were equal with respect to their willingness to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. Defendant also claims that the trial court committed legal error by attributing to defendant the behavior and statements of defendant's brother in assessing factor (j),

* Circuit judge, sitting on the Court of Appeals by assignment.

although he cites no authority for the proposition that the role of close family members may not be considered in assessing this factor. We review findings of fact in custody determinations under the great weight of the evidence standard of review. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994). The trial court's findings that plaintiff was favored with respect to custody factors (a), (d) and (j) were not against the great weight of the evidence.

Regarding factors (a) and (d), the evidence supported the trial court's conclusion that there was a more significant bond between plaintiff and the minor child and that plaintiff had provided the child with the greatest amount of continuity since birth. Plaintiff had been the primary caretaker of the child for the first three years of his life, during which defendant traveled extensively on business. Defendant had begun to play a more significant role in the child's life within the six to eight months preceding trial, owing to an employment change that allowed him to work out of the house. While a more substantial bond may have developed between defendant and the child during this time, it did not change the fact that plaintiff and the child had had a substantial bond for the child's entire life. We find no basis for concluding that the need for child care outside of the home during the first three years of the child's life in any way undermined the bond between plaintiff and the child.

Regarding factor (j), the evidence supported the trial court's finding that plaintiff had a greater understanding of the importance of facilitating a continuing parent-child relationship between the child and the other parent. Although it was not clear that defendant condoned a relative's exclusion of plaintiff from his home or a relative's interception of a confidential facsimile from plaintiff to her mother, we note that defendant used the facsimile to impeach the mother, which was some evidence of complicity. Moreover, where defendant raised the issue of the desirability of the child remaining in Michigan so that he could experience the influence of defendant's family and where defendant testified to having available an extensive child care support network provided by his relatives, it was appropriate for the trial court to consider the attitudes of those family members in assessing factor (j). Thus, this finding was not against the great weight of the evidence.

Defendant next argues that the trial court abused its discretion in granting plaintiff a change of domicile to permit her to establish employment and find suitable housing in Roseville, California. In awarding plaintiff a change of domicile, the trial court followed the test set forth in *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976). See also *Overall v Overall*, 203 Mich App 450, 458; 512 NW2d 851 (1994), citing *Anderson v Anderson*, 170 Mich App 305, 309; 427 NW2d 627 (1988). Under this test, a trial court must consider:

- (1) whether the prospective move has the capacity to improve the quality of life for both the custodial parent and the child;
- (2) whether the move is inspired by the custodial parent's desire to defeat or frustrate visitation by the noncustodial parent and whether the custodial parent is likely to comply with the substitute visitation orders where he or she is no longer subject to the jurisdiction of the courts of this state;
- (3) the extent to which the noncustodial parent, in resisting the move, is motivated by the desire to secure a financial advantage in respect of a continuing support obligation;
- and (4) the degree to

which the court is satisfied that there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed. [*Overall, supra* at 458-459.]

We review the trial court's findings in applying this test under the great weight of the evidence standard. *Dick v Dick*, 147 Mich App 513, 516; 383 NW2d 240 (1985).

Defendant challenges the court's findings on factors (1) and (4) of the *D'Onofrio* test. However, the trial court's findings were not against the great weight of the evidence.

With respect to factor (1) "the moving party need only demonstrate that the change in domicile would have the capacity to improve the quality of life for both the custodial parent and the child." *Constantini v Constantini*, 446 Mich 870, 872-874; 521 NW2d 1 (1994) (Riley, J.). The trial court found that moving to California would likely provide for improvement in the general quality of plaintiff's life. The court based this determination on testimony that plaintiff had employment opportunities waiting for her in the family business in California, that plaintiff's mother would be available to provide some assistance in caring for the minor child, that plaintiff believed she could rent a house in her old neighborhood for \$500 to \$800, that there was a preschool, school, and church nearby and that Roseville, California, was "an All American city." The court also relied on "extensive" testimony about plaintiff's less than successful efforts to secure higher paying employment in Michigan and concluded that the economic benefits would be more advantageous to plaintiff and the minor child than anything she had been able to do thus far in Michigan. Because there was substantial evidence to support this finding, we will not disturb it.

With regard to factor (4), the rule requires the moving parent to demonstrate a realistic plan of visitation, but "implicit in this factor is an acknowledgment that weekly visitation is not possible when parents are separated by state borders." *Id.*, 873. The court should specifically address how the financial aspects of the travel will be handled. *Id.* Here, the judgment of divorce specifies periods of visitation that are longer than normal and also specifies that the costs of visitation will not fall entirely on defendant but are to be shared equally by the parties. Although defendant no longer travels to California on business as he did in his previous job and visitation will therefore not be as extensive, we find no error in the trial court's implicit ruling that this visitation arrangement provided a reasonable opportunity to defendant.

Affirmed.

/s/ Richard Allen Griffin

/s/ Gary R. McDonald

/s/ Charles W. Johnson