STATE OF MICHIGAN

COURT OF APPEALS

RODNEY M. HUNT,

Plaintiff-Appellee,

v

SANDRA J. REED a/k/a/ SANDRA J. HUNT,

Defendant-Appellant.

UNPUBLISHED
June 27, 1997

No. 193101
Ingham Circuit Court
LC No. 91-073083-DM

Before: Michael J. Kelly, P.J., Wahls, and Gage, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying her motion for change of domicile and modifying plaintiff's right of visitation. We reverse and remand for further proceedings.

Plaintiff and defendant were previously divorced and physical custody of their minor child was awarded to defendant. After disagreement arose between the parties regarding plaintiff's right of visitation, plaintiff moved the trial court to modify its visitation order. Defendant then moved the trial court for a change of domicile. Plaintiff immediately thereafter moved for a change of custody. The trial court denied defendant's change of domicile motion as well as plaintiff's change of custody motion, but modified its formal visitation order to permit plaintiff additional visitation over that of the previously-entered order.

Defendant argues that the trial court abused its discretion when it denied her change of domicile motion. We agree.

This Court has adopted the *D'Onofrio* test for determining whether to grant a request to remove a child from the state. *Overall v Overall*, 203 Mich App 450, 458; 512 NW2d 851 (1994); see *D'Onofrio v D'Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976). Under this test, the 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*, pp 458-459.]

To support a removal petition, the moving party must show that removal is warranted by a preponderance of the evidence. *Id.*, p 459. Once the trial court utilizes the *D'Onofrio* test, and makes its decision, this Court reviews that decision for an abuse of discretion. *Overall, supra*, p 458.

With regard to the first *D'Onofrio* factor, the trial court found that the job opportunity in Seattle for defendant's new husband weighed in favor of defendant insofar as it offered a "better financial situation" for her family. In addition, the court acknowledged that the cultural advantages of the Seattle area militated in defendant's favor. However, the court went on to determine that the resulting severance of the many close personal relationships established between the parties' daughter and various relatives and friends in Michigan outweighed the advantages to defendant and her family.

Rather than focusing solely on the best interests of the child, the *D'Onofrio* test focuses on what is in the best interest of the new family unit, i.e. the custodial parent and child. *Henry v Henry*, 119 Mich App 319, 324; 326 NW2d 497 (1982); *D'Onofrio, supra*, 365 A2d 29-30; see *Dehring v Dehring*, 220 Mich App 163, 165; ___ NW2d __ (1996). This test recognizes the increasingly legitimate mobility of our society, and comports with the legislative intent. *Henry, supra*, p 324. Of course, the test is not intended to consider only the interests of the custodial parent's spouse to the exclusion of the child. See *Anderson v Anderson*, 170 Mich App 305, 310; 427 NW2d 627 (1988). However, the test recognizes that an improvement of a family's financial situation inures to the benefit of the entire family unit. *Constantini v Constantini*, 446 Mich 870, 872; 521 NW2d 1 (1994) (Riley, J., concurring); *Anderson, supra*, p 110.

Here, we believe that the trial court improperly focused primarily on the noncustodial family when it considered this factor. A trial court should not insist that the advantages of a change in domicile be sacrificed and "the opportunity for a better and more comfortable life style for the mother and child[] be forfeited solely to maintain weekly visitation by the father where reasonable alternative visitation is available and where the advantages of the move are substantial." *D'Onofrio, supra*, 365 A2d 30. As defendant correctly argues, the establishment of a close relationship between the child and the noncustodial parent should not eliminate the possibility of a change in domicile. Such a position would only encourage the custodial parent to thwart the development of such a relationship. Although the fourth *D'Onofrio* factor requires the trial court to determine the effect of a proposed move on the noncustodial parent, the focus of the test is on the custodial parent's family unit. *Henry, supra*, p 324; *D'Onofrio, supra*, 365 A2d 29-30.

The trial court specifically found that the proposed move to Seattle had "the capacity to improve the quality of life" of the custodial family. Because a moving party under this factor "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*, *supra*, p 872 (Riley, J., concurring) (emphasis in original), the trial court erred in concluding that defendant had not satisfied her burden of proof as to the first *D'Onofrio* factor. *Overall*, *supra*, p 458; *D'Onofrio*, *supra*, 365 A2d 30.

With regard to the second *D'Onofrio* factor, the trial court did not find that the prospective move was intended to frustrate visitation. This finding comported with the undisputed evidence that the firm in Seattle which offered defendant's husband a job initiated the contact. Accordingly, the great weight of the evidence suggested that a change in domicile was not inspired primarily "by the custodial parent's desire to defeat or frustrate visitation by the noncustodial parent." *Overall*, *supra*, pp 458-459.

In addition, the trial court explicitly found that defendant *would comply* with any substitute visitation order despite the fact that she would be out of the jurisdiction of the court. However, the court expressed its doubt regarding how "enthusiastic" defendant would be in complying with a substitute visitation order. In doing so, the trial court improperly penalized defendant for not agreeing to demands beyond those required by its previous order. The trial court did not find that defendant had failed to comply with its previous orders. Moreover, there was undisputed testimony that the child's visitation with plaintiff's parents and sister over the past two years had been solely arranged by defendant. Such visitation was not required under the trial court's previous order. Under these circumstances, the great weight of the evidence supported a finding that defendant satisfied her burden of proof under the second *D'Onofrio* factor.

The trial court's finding that the third *D'Onofrio* factor did not favor either party has not been disputed.

With regard to the fourth *D'Onofrio* factor, the trial court simply stated that it had "already spoken to" this factor in its discussion of the first *D'Onofrio* factor, and that it was not in the best interests of the parties' daughter to leave behind the strong relationships she enjoyed with various relatives and friends in Michigan. The trial court's comment that no proposed visitation plan would satisfy its concerns was contrary to Michigan law. As Justice Riley stated in her concurring opinion in *Constantini*, *supra*, p 873:

> Implicit in this factor is an acknowledgment that weekly visitation is not possible when parents are separated by state border. Therefore, this consideration, if given any meaning, clearly rejects any bar against a change of domicile per se. Instead, this factor recognizes that a change in domicile is often reasonable under the circumstances.

Rather than facing a bar against a change of domicile, the custodial parent who is seeking the change in domicile must have "an opportunity to offer a realistic plan which, when considered from a practical or financial viewpoint, would foster, preserve or protect [the noncustodial parent's] visitation

rights and relationship with the child[]." *Constantini, supra,* p 870. Here, defendant presented a plan under which the child would visit with plaintiff for two of the three breaks from school (Thanksgiving, Christmas, and Easter), and for four weeks during the summer. In addition, defendant's proposed visitation plan allowed for plaintiff to have visitation in plaintiff's hotel if plaintiff were to travel to Washington. Finally, defendant proposed to assume all the costs of transportation to fly the child between Washington and Michigan. An alternative visitation arrangement of uninterrupted visits of a week or more in duration several times a year arguably serves the paternal relationship better than the typical weekly visit arrangement. *Constantini, supra*, p 873 n 4 (Riley, J., concurring); *Anderson, supra*, p 311; *D'Onofrio, supra,* 365 A2d 30. Accordingly, the great weight of the evidence supported a finding that defendant sustained her burden of proof as to the fourth *D'Onofrio* factor.

In considering a motion to change domicile, it must be recognized that a noncustodial parent is free to remove himself from the jurisdiction in order to seek a better or different life style for himself. *D'Onofrio, supra*, 365 A2d 30. Where a change in domicile appears to be advantageous to the family unit of the custodial parent, and where the paternal interest in visitation can be accommodated, the custodial parent is clearly entitled to the same option to seek a better life for herself and her child. *Id.* Under the facts of this case, the trial court abused its discretion in denying defendant's motion for a change of domicile.

Because the portion of the trial court's order modifying the visitation schedule is inconsistent with this disposition, we vacate that portion of the trial court's order as well.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Myron H. Wahls
/s/ Hilda R. Gage