

STATE OF MICHIGAN
COURT OF APPEALS

JEAN ANNE NOONEY SMITH, a/k/a/ JEAN
ANNE NOONEY,

UNPUBLISHED
October 21, 2008

Plaintiff-Appellant,

v

ANDREW JAMES NOONEY,

No. 281744
Kent Circuit Court
LC No. 05-004809-DM

Defendant-Appellee.

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

In this divorce action, plaintiff appeals by leave granted the October 25, 2007, order, which vacated a January 30, 2007, stipulation and order giving plaintiff the ability to change the domicile of the parties' minor child to Maryland, and denied plaintiff's subsequent petition to change the domicile of the parties' minor child to Arkansas.¹ We reverse in part and affirm in part.

Change of a child's domicile following a judgment of divorce is governed by the *D'Onofrio [v D'Onofrio]*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976)] factors, which are codified at MCL 772.31(4). When a parent wishes to move with a minor child to a location more than 100 miles away, and the parent does not have sole legal custody, the trial court must consider the following factors, keeping the child as its primary focus:

(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

¹ The October 26, 2007, order also granted defendant's motion to reconsider the January 30, 2007, stipulation and order.

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. [*Rittershaus v Rittershaus*, 273 Mich App 462, 465; 730 NW2d 262 (2007); MCL 772.31(4).]

We review a trial court's factual findings under the great weight of the evidence standard. *Id.* at 464. We review a trial court's decision whether to allow a parent to remove a child from the state for an abuse of discretion, *id.*, and we find such an abuse on the facts of this case.

Plaintiff first argues that the trial court erroneously evaluated factor MCL 772.31(4)(a) by considering the move relative to Maryland versus Arkansas instead of Michigan versus Arkansas. We disagree. The trial court appeared to be cognizant that the underlying comparison should involve Michigan and Arkansas. The majority of the trial court's analysis compared Michigan and Arkansas, and that comparison was appropriate under the circumstances presented here.

Plaintiff next argues that the trial court's ruling on factor MCL 772.31(4)(a) was erroneous because the evidence fully supported that prohibiting the change of domicile to Arkansas would worsen the quality of life for plaintiff and the child. Prohibiting the move would sever their nuclear family and force plaintiff and her new husband, Staff Sergeant Robert Lee Smith, to maintain separate households in different states, which would place a significant financial burden on plaintiff and her lifestyle with the minor child. We agree.

In evaluating factor (a), the trial court indicated that no additional funds would result from the move, because Smith is just being relocated from one location to another. MCL 772.31(4)(a). The trial court's focus in making that determination was misplaced, looking at a move by plaintiff from Maryland to Arkansas, instead of Michigan to Arkansas. Smith provides the sole income for the family's living expenses and was required to move to Arkansas. Plaintiff is a stay-at-home mom. Therefore, if plaintiff were allowed to move to Arkansas with the minor child, Smith would only be financially supporting one household. On the other hand, if plaintiff were forced to return to Michigan with the minor child, as advocated by defendant and ordered by the trial court, two households would have to be maintained. Maintaining two households on one income cannot be interpreted as being beneficial for the minor child or plaintiff. A substantial financial burden would be placed on the family as a whole. The *D'Onofrio* test recognizes that an improvement of a family's financial situation benefits the entire family unit,

which consists of the custodial parent and child. See *Costantini v Costantini*, 446 Mich 870, 872; 521 NW2d 1 (1994) (opinion of Riley, J.). Therefore, there will be an improvement in the financial situation of the entire family unit if the parent and the minor child move to Arkansas, as opposed to living in Michigan. Consequently, changing plaintiff and the minor child's legal residence to Arkansas has the capacity to substantially improve the quality of life for both the minor child and the custodial parent.

The trial court also noted that there was no extended family in Arkansas, as opposed to Michigan, where plaintiff, defendant and Smith's extended family live. While this is true, the trial court did not consider the alternate inference to be drawn from the presence of extended family in Michigan. Such family provides plaintiff and the child with the desire to frequently return to Michigan to visit their extended family. And, the record supports that plaintiff and the child regularly visit Michigan. Further, plaintiff indicated at the motion hearing that she absolutely thought that that involvement with her extended family would continue.

In addition, the trial court noted that the school where Edward would be going in Arkansas would not necessarily improve his quality of life because there was no testimony presented that indicated that a school in Arkansas would be better than a school in Michigan. The trial court's finding on this specific subject was not against the great weight of the evidence.

However, in evaluating factor (a), the trial court did not address the issue that the minor child's nuclear family would be severed by requiring the minor child and plaintiff to return to Michigan, other than by recognizing that plaintiff had made that argument. MCL 772.31(4)(a). The trial court should have carefully considered this fact as one of great weight when deciding whether a change in residence would improve the quality of life for plaintiff and the child. As noted by the Court in *D'Onofrio, supra* at 30, in considering a motion for a change of domicile, it should be recognized that the noncustodial parent has the ability to move himself to another jurisdiction at his will in order to seek a better or different lifestyle for himself. Therefore, the custodial parent is clearly entitled to the same option to seek a better life for herself and her child if it would be advantageous to the family unit and the noncustodial parent can be accommodated by being provided visitation. *Id.*

In *Mogle v Scriver*, 241 Mich App 192; 614 NW2d 696 (2000), the facts were similar to the facts in this case. In *Mogle*, the stepfather was in the military and about to be stationed in Virginia. *Id.* at 195. The mother filed a petition for change of domicile of the minor child to Virginia. *Id.* The trial court found that it was in the best interest of the child and the mother to live in a traditional nuclear family. *Id.* at 203. Further, if the plaintiff moved to Virginia, she could be a stay-at-home mom, as opposed to if plaintiff stayed in Michigan with her minor child, she would be forced to work and plan the child's care around her work schedule. *Id.* This Court agreed with the trial court and found that the prospective move would result in the capacity to improve the quality of life of the minor child and the custodial parent. *Id.* at 203-204.

We find that the opportunity for plaintiff and the child to live in a traditional, nuclear family with Smith and the minor child's infant stepsister in Arkansas should not be minimized. In Arkansas, the child's mother would be a stay-at-home mom, who would have the ability to be available to care for his little sister and him when he was not in school. In Michigan, plaintiff would, in essence, be living as a single parent on a limited income with her husband, the father of the minor child's stepsister living in another state. And, even though the minor child would

have a visitation schedule with defendant and periodically see his stepfather, the minor child would not have an adult male figure living in his home. Thus, he would be robbed of a traditional, two-parent, nuclear family environment. Similar to the Court's finding in *Mogle*, *supra*, we find that it is in the best interest of the plaintiff and minor child to grant the request for a change of domicile to Arkansas because the move has the capacity to improve the quality of life of the minor child and the custodial parent. On the record, the contrary finding of the trial court on factor MCL 772.31(4)(a) is against the great weight of the evidence.

On factor (c), the trial court noted that defendant indicated that the promises of stability relied on by defendant when he entered the stipulation and order, were not fulfilled. MCL 772.31(4)(c). Defendant asserts that he stipulated to plaintiff's move to Maryland with the minor child because he was told by Smith and plaintiff that the move was to be for at least four years and that this assurance was important to him because he did not want the child to be subjected to the peripatetic lifestyle of a service man's child. Plaintiff asserts that he was concerned about there being a lack of permanency and structure. However, whether the frequency of moving would result in a lack of structure and permanency is not a part of the criteria that should be considered in evaluating factor MCL 772.31(4)(c). Rather, the factor focuses on whether an adequate basis for preserving and fostering the parental relationship between the child and each parent can be met and whether each parent is likely to comply with the modification.

In ruling on factor (c), the trial court indicated that defendant testified that he would like to be a more active and involved father, seeing his son more frequently like he did when the child resided in Michigan. In articulating its conclusion, the trial court noted that, based on defendant's testimony, the requested arrangement was not satisfactory to maintain defendant's prior child/parent bond and thus the trial court found in favor of defendant on this factor. The trial court further noted that plaintiff's lack of support led the court to conclude that plaintiff's compliance in providing defendant with adequate time with the minor child was moderate to low. The trial court expressed concern with plaintiff's minimization of defendant's role in the minor child's life and its concern about the difficulties in coordinating defendant's time with the minor child even over the weekend that plaintiff and the minor child were in Michigan for the September 28, 2007, hearing.

As noted by the Court in *Mogle*, "the new visitation plan need not be equal to the prior visitation plan in all respects. It only need provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the noncustodial parent." *Id.* at 204. We find that where plaintiff and the minor child did not live in Michigan at the time of the motion hearing, the requested move would not alter the opportunity for plaintiff to preserve and foster the parental relationship previously enjoyed by plaintiff. As evidenced by plaintiff's repeated trips to Michigan with the minor child in order to facilitate visitation with defendant and the fact that plaintiff, defendant and Smith's extended families live in Michigan, there is a realistic opportunity for visitation just like that which was available under the prior situation. There would be an adequate basis for preserving and fostering the minor's relationship with defendant. Based on the foregoing, we find that the trial court's finding on factor MCL 772.31(4)(c) is against the great weight of the evidence.

In evaluating factors (b), (d) and (e), the trial court's findings were either neutral or that it did not apply. MCL 772.31(4)(b), (d) and (e). These findings do not appear to be against the great weight of the evidence, and arguments to the contrary are not made.

In conclusion, because the trial court's findings on factor (a) and (c) are against the great weight of the evidence, the trial court's ultimate conclusion that the *D'Onofrio* factors were not met is against the great weight of the evidence. MCL 772.31(4)(a) and (c). And, we find that the trial court abused its discretion in denying plaintiff's motion for a change of domicile.

We reverse the part of the trial court's October 25, 2007, order, which denied plaintiff's motion to relocate the minor child to Arkansas and affirm the order in all other respects.

/s/ Jane E. Markey

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly