

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY ALBERTO MARKO, II,

Plaintiff-Appellant,

v

VALINDA MARIE MARKO, a/k/a
VALINDA MARIE WEBER,

Defendant-Appellee.

UNPUBLISHED

August 31, 1999

No. 214228

Berrien Circuit Court

LC No. 92-003435 DM

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order denying his petition for change of the domicile of the parties' minor child. We affirm.

I. Basic Facts And Procedural History

Pursuant to a 1993 divorce judgment, plaintiff shares legal custody of a minor child with defendant. Plaintiff, however, has sole physical custody of the child. Throughout their six-year marriage, the parties lived together in the Village of Stevensville. At the time of trial, the parties lived about a mile and a half from each other, still in Stevensville. Plaintiff worked in the grocery business, employed by a privately owned store in the St. Joseph area. On information that there was no possibility of further advancement in this company, plaintiff began to seek employment elsewhere. In December 1997, plaintiff was offered a position with a major chain store in Des Moines, Iowa; this position providing an opportunity for advancement and paying between \$5,000 and \$7,000 more per year than his present salary.

Plaintiff investigated the City of Des Moines and, finding the general quality of life and the school system satisfactory, attempted to reach an agreement with defendant regarding an adjustment of the physical custody arrangement that would allow him to move to Des Moines. The parties were unable to reach an agreement, however, and plaintiff consequently petitioned for modification of the divorce judgment seeking change of domicile.

The trial court's determination revolved around the so-called "*D'Onofrio* factors."¹ The trial court began by holding that neither factor two nor three had any bearing on the dispute. The trial court then considered the first factor, discussing the proposed move's "capacity to improve the quality of life for both the custodial parent and the child." The trial court concluded this discussion with the following statement:

But the Court cannot say that this prospective move at this time, considering that [the child] is going to repeat the second grade, that has--that he's really at a turning point--has the capacity to improve his quality of life. That is, in this Court's opinion, not apparent.

After also holding that factor four did not favor the move, the trial court further explained the reasoning behind its conclusion regarding factor one:

At this time, as [the child's teacher] said, [the child] is dependent on others. He needs that strong support from both of his parents.

They both had provided it up until six months ago, and I know that they will continue it, but at this time the court cannot say that it is shown by a preponderance of the evidence that the capacity to improve [the child's] quality of life--the fact that he has no family in Des Moines, that he has an extended family here that has given him support, love, affection, encouragement, and that that pattern of support in this area would be seriously impaired by [the child's] living in Des Moines at this time.

With respect to the fourth factor, which involves replacement visitation schedules, the trial court concluded that:

I also do not find that there, at this time, is a realistic opportunity for visitation by the mother in place of the weekly pattern that was established before December of last year.

II. Standard Of Review

This Court reviews factual findings in custody cases under the great weight of evidence standard. MCL 722.28; MSA 25.312(8); *Hilliard v Schmidt*, 231 Mich App 316, 321; 586 NW2d 263 (1998); *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). We review discretionary rulings in custody cases for an abuse of discretion. *Id.* We review questions of law in custody decisions for "clear legal error." *Id.*

III. The *D'Onofrio* Factors

A. Introduction

This Court has adopted the four-factor test used to determine motions for interstate change of domicile of a minor child who is the subject of a custody order that was articulated in *D'Onofrio v*

D'Onofrio, 144 NJ Super 200; 365 A2d 27 (1976). *Overall v Overall*, 203 Mich App 450, 458-459; 512 NW2d 851 (1994). The four-factor test is as follows:

(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 (citation omitted)].

The party seeking a change of domicile “must show that removal is warranted by a preponderance of the evidence.” *Id.* at 459. This Court has stated that the adoption of this test “recognizes the increasingly legitimate mobility of our society.” *Henry v Henry*, 119 Mich App 319, 324; 326 NW2d 497 (1982).

B. Improving The Quality Of Life For The Custodial Parent And The Child

Plaintiff contends that the trial court abused its discretion when, despite finding that the child would arguably enjoy an improved economic, educational and cultural environment in Des Moines, the trial court held that the prospective move did not have the capacity to improve the quality of the child's life. Plaintiff argues that the trial court abused its discretion and erred by focusing its consideration on the child's current relationships with the noncustodial parent's [defendant's] family, and the child's academic performance. Plaintiff essentially asserts that the trial court improperly considered only the best interests of the child, rather than evaluating the “best interest of the new family unit, *i.e.*, custodial parent and child.” See *Henry, supra* at 324.

In evaluating the first factor of the *D'Onofrio* test the trial court “must of necessity measure the impact of the move” on the child. *Dick v Dick*, 147 Mich App 513, 517; 383 NW2d 240 (1985). Moreover, purported improvements in the child's life in such areas as education and culture must be balanced against the “day-to-day presence and relationship” with the parent opposing the move. *Id.* at 520-521.

Plaintiff first notes that supporting the move is the economic improvement he would realize by taking a higher paying job with the chance to advance. Plaintiff asserts that his salary increase would inure to the benefit of the entire family unit. Though benefits to the family unit would surely attach were plaintiff to move and take a higher paying job, this increase in income would arguably be offset by the significant travel expenses required under the proposed visitation arrangement. In any event, considerations of financial or economic status are far from the only pertinent matter in analyzing the first factor of the *D'Onofrio* test.

Plaintiff, however, points to the potential educational improvements in Des Moines. The child's teacher, however, testified that it was not lack of resources that was hindering the child's educational growth. Rather, the child was successful in school despite his immaturity so long as he was getting daily support and assistance from both parties. The possibility of attending a better ranking school system may not improve the child's quality of life given that this change would come at the expense of defendant's significant involvement in his schooling.

Plaintiff argues that these potential economic, educational, and other cultural improvements associated with a move to Des Moines are enough to support a conclusion that he satisfied the required showing under this first factor. Plaintiff fails, however, to acknowledge the negative impact a move to Des Moines could have on the child's relationship with his extended family. Plaintiff actually seems to contend that the trial court erred by even considering these relationships. In this regard, retired Justice Riley has thoughtfully observed:

[R]elevant considerations should include, but not be limited to, what assistance is needed in caring for the children and whether the change in domicile would ease this burden more so than the present situation, including what assistance presently comes from the noncustodial parent, other family members, and friends. [*Costantini v Costantini*, 446 Mich 870, 872 (1994) (Riley, J.)².]

In this case, the testimony demonstrated that both defendant's and plaintiff's families live in the area, and that the child has good relationships with them. It is apparent that, under the current arrangements regarding custody, various family members frequently baby-sit the child. Plaintiff and his companion, by contrast, would be the only family the child would have in Des Moines.

Against this background, we are unable to conclude that the trial court abused its discretion when applying the first factor.

C. Visitation Schedule

Plaintiff essentially supports his argument that the trial court abused its discretion with respect to the fourth factor by citing the following two statements:

[O]ne must start with the premise that implicit in this factor is an acknowledgment that weekly visitation is not possible when parents are separated by state borders. 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. [*Costantini, supra* at 873 (Riley, J.) (footnote omitted).]

* * *

It is at least arguable, and the literature does not suggest otherwise, that the alternative of uninterrupted visits of a week or more in duration several times a year, where the [noncustodial parent] is in constant and exclusive parental contact with the

children and has to plan and provide for them on a daily basis, may well serve the [parental] relationship better than the typical weekly visit which involves little if any exercise of real [parental] responsibility. [*D’Onofrio, supra* at 207.]

Despite these statements, we are unable to find that the trial court abused its discretion in finding that there was no realistic opportunity for visitation by the mother in place of the previous visitation schedule. We consider a critical inquiry of the instant case to be whether the proposed plan of visitation provides “a realistic opportunity for preserving and fostering the *parental relationship previously enjoyed* by the noncustodial parent.” *Costantini, supra* at 873, n 4 (Riley, J.) (emphasis supplied).

Given the circumstances of this case, the analysis of the fourth factor is inextricably linked to the considerations accorded the first factor. Just as the child’s immaturity and dependence on defendant for educational support could reasonably be considered as indicating that a move at this time would not be beneficial to him, so too those considerations may affect the nature of his present relationship with defendant. We hold, therefore, that there was no abuse of discretion in the trial court’s denial of plaintiff’s petition for change of domicile based on its analysis of the fourth factor of the *D’Onofrio* test.

Affirmed.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck

¹ *D’Onofrio v D’Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976).

² We note that in his brief plaintiff incorrectly references parts of Justice Riley’s separate statement in *Costantini* as if it was a majority opinion of the Michigan Supreme Court.