

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MCO, : NO. 05-21,158
Appellee :
 : CIVIL ACTION - LAW
vs. :
 :
KJO, :
Appellant :

OPINION IN SUPPORT OF ORDER OF OCTOBER 24, 2008,
IN COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

Appellant appeals from this Court’s Order of October 24, 2008, which denied her request to remove the parties’ children from the jurisdiction. In her Statement of Matters Complained of on Appeal, Appellant challenges the Court’s decision for several reasons.

First, Appellant contends the Court failed to properly apply the analysis required under Gruber v. Gruber, 583 A.2d 434 (Pa. Super. 1990).¹ That analysis is as follows:

In order to decide whether a custodial parent and children shall be permitted to relocate at a geographical distance from a non-custodial parent, a trial court must consider the following factors. First, the court must assess the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the custodial parent. In considering the prospective advantages to the move, a court shall not limit itself solely to enhanced economic opportunities for the custodial parent but must also assess other possible benefits of the relocation. For instance, relocation may be motivated by a desire to return to a network of family or friends, or to pursue educational opportunities, or to seek an improved physical environment in which to live and raise children. Clearly, these examples are not intended to be exhaustive nor will each be applicable in every case. We emphasize, however, that courts are not free to ignore or discount non-economic factors which are likely to contribute to the well-being and general happiness of the custodial parent and the children. Ordinarily, when the move will significantly improve the general quality of life for the custodial parent, indirect benefits flow to the children with whom they reside.

1 Appellant raises this issue in both No. 1 and No. 2 of her Statement of Reasons Complained of on Appeal, as No. 2 is simply a more specific allegation than is No. 1.

Next, the court must establish the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it. The court must assure itself that the move is not motivated simply by a desire to frustrate the visitation rights of the non-custodial parent or to impede the development of a healthy, loving relationship between the child and the non-custodial parent. An aspect of this determination is the degree to which the court can be confident that the custodial spouse will comply cooperatively with alternate visitation arrangements which the move may necessitate. Likewise, the court must consider the motives of the non-custodial parent in resisting relocation and decide whether the resistance is inspired by motives other than a legitimate desire to continue and deepen the parent-child relationship.

Finally, the court must consider the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent. We recognize that, in many cases, former weekly visitation may have to give way to an altered schedule which allows for less frequent but more extended contact between parent and child. However, the necessity of shifting visitation arrangements to account for geographical distances will not defeat a move which has been shown to offer real advantages to the custodial parent and the children. We agree with the court in *D'Onofrio*, which stressed:

The court should not insist that the advantages of the move be sacrificed and the opportunity for a better and more comfortable life style for the [custodial parent] and children be forfeited solely to maintain weekly visitation by the [non-custodial parent] where reasonable alternative visitation is available and where the advantages of the move are substantial.

D'Onofrio, 144 N.J.Super. at 207, 365 A.2d at 30. *See also DeCamp v. Hein*, 541 So.2d 708, 712 (Fla.App. 4 Dist.1989); *Auge v. Auge*, 334 N.W.2d 393, 398 (Minn.1983) (relocation should not be disallowed solely to maintain the existing visitation patterns).

When a custodial parent seeks to relocate at a geographical distance and the non-custodial parent challenges the move, the custodial parent has the initial burden of showing that the move is likely to significantly improve the quality of life for that parent and the children. In addition, each parent has the burden of establishing the integrity of his or her motives in either desiring to move or seeking to prevent it. The custodial parent must convince the court that the move is not sought for whimsical or vindictive reasons. Likewise, the non-custodial parent must show that resistance to the move stems from concern for the children and his or her relationship to them. The court must then consider the third factor discussed above, namely the feasibility of creating substitute visitation arrangements to

ensure a continuing, meaningful relationship between the children and the non-custodial parent. Once again, we reiterate that a move sought to secure substantial advantage for the custodial parent and children will not be disallowed simply because visitation cannot continue in the existing pattern. Sensitive case-by-case balancing is required to ensure that all interests are treated as equitably as possible.

Gruber, *supra*, at 439-440.

With respect to the likelihood that the move would substantially improve the quality of life for the custodial parent and the children, the Court found that it most likely would not. Appellant gave as reasons for wanting to move that she would be able to pursue an opportunity to take over her father's owner/operator (of several McDonald's restaurants) status, that she and the children would be closer to her family and that there are more opportunities for the children not available in the Williamsport area, such as dance studios, art classes and ice skating. While the career pursuit may be legitimate,² the Court had overriding doubts about the remaining reasons. The evidence showed that Appellant has had a troubled relationship with her family for many years, and it appears quite likely that she is simply using her family as a means to her end: to return to the Hershey area. The Court questions the likelihood that any meaningful relationships between the children and Appellant's family would be fostered or continued. Further, it is highly unlikely that the availability of a dance studio,³ art classes and ice skating could substantially improve the children's lives inasmuch as all of those things are available in the Williamsport area. Against Appellant's purported advantages the Court weighed the disadvantage of imposing a significant distance between the children and their father who has taken an active role in their lives and who the Court finds to be as important to them as is their mother. Not only would the separation have a negative psychological impact on the children, but as was pointed out by several witnesses, it would force the children to choose between spending time with their father and participating in school and community activities. The Court cannot see how such would substantially improve the quality of their

2 In a previous relocation petition, Appellant indicated a desire to return to the Hershey area to pursue nursing school, but she did not pursue that in the Williamsport area when her request to relocate the children was denied. Further, although there are McDonald's restaurants closer to the Williamsport area where Appellant might be able to begin her training, she did not seek to do so.

3 The Court notes that Leah discontinued her dance lessons because she no longer wished to go.

lives.

With respect to Appellant's motive for wanting to relocate, while the Court does not find that she wishes to impede the children's relationship with their father or frustrate his custody rights, the Court does find that her motive is based entirely on her own personal desire to return to the Hershey area and does not take into consideration the effect it would have on the children to be removed from their father and home community. The Court also finds that Appellee's motive for opposing Appellant's request to relocate the children is based on his desire to continue his close relationship with his children.

Finally, with respect to the issue of substitute visitation, the Court finds it unnecessary to address that issue in light of its determination that the move would not "secure substantial advantage" for these children. In any event, as Appellee has been actively involved with the children and their activities, it cannot be said that Appellant's proposal for substitute visitation would be adequate.

Appellant also contends the Court abused its discretion in "giving undue weight and consideration to [Appellant's] efforts to find alternative employment in Williamsport or other vicinities in closer proximity to Williamsport". The Court does not believe the weight it gave to Appellant's lack of effort to begin her training in the Williamsport area was "undue". The testimony disclosed that Appellant's father owns several McDonald's restaurants that extend north to Shamokin Dam, Pennsylvania, a town thirty miles south of Williamsport. It was obvious from the testimony that Appellant's training could be completed at this facility rather than the Hershey restaurant one hundred miles south of Williamsport, but no thought or consideration was given to this alternative. The Court firmly believes that the reason it was not considered is due to the fact that it does not meet Appellant's primary objective: relocating to the Hershey area.

In conclusion, the Court believes that the quality of life for the children would be diminished rather than improved by the proposed relocation, and therefore denied Appellant's request.

Dated: February 17, 2009

Respectfully Submitted,

Dudley N. Anderson, Judge

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