

NOTICE

Decision filed 05/03/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-10-0622

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
LISA AHLE,)	St. Clair County.
)	
Petitioner-Appellee,)	
)	
and)	No. 05-D-959
)	
DAVID AHLE,)	Honorable
)	Randall W. Kelley,
Respondent-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Donovan and Wexstten concurred in the judgment.

RULE 23 ORDER

Held: The record supports the finding of the court that the interests of B.A. were best served by the custody arrangement.

Petitioner, Lisa Ahle, and respondent, David Ahle, each filed a petition to modify the custody arrangements for their minor child, B.A., in the circuit court of St. Clair County. After conducting a hearing on the petitions to modify, the circuit court entered an order for joint child custody that required the parties to exchange B.A. on alternating Sunday evenings. On appeal, respondent contends that the court erred by ordering joint custody. We affirm.

FACTS

Petitioner and respondent were betrothed on July 26, 1997. The product of their union was one child, B.A., born on March 5, 1999. On November 1, 2005, petitioner filed a petition for a dissolution of the marriage. On December 2, 2005, the trial court entered a temporary order calling for joint custody.

On March 23, 2007, the court entered a judgment for the dissolution of the marriage. A marital settlement agreement incorporated into the judgment provided for the joint custody of B.A., with the parties exchanging B.A. on alternating weeks on Sunday evening. A joint-parenting agreement outlined the responsibilities of each parent toward the other.

After the divorce, the pleadings continued. Each party filed multiple petitions for an order of protection against the other. For instance, respondent points out that on April 24, 2007, he filed for and obtained an emergency order of protection against petitioner based on an altercation that had occurred at the exchange of B.A. This order was vacated on May 11, 2007. Likewise, petitioner has filed for protection against respondent. For instance, on August 23, 2007, petitioner filed for an order of protection, attaching transcripts of insulting telephone messages left by respondent. On August 29, 2007, the court heard testimony on this petition for an order of protection. The court found that continued physical custody with respondent would cause severe emotional harm to B.A., and respondent agreed that he would undergo an evaluation by Dr. Cuneo or, alternatively, Dr. Clipper.

The filing for orders of protection continued throughout the dispute for the modification of custody. For instance, on May 14, 2008, the court found that both parties had presented substantive evidence to support separate written petitions for orders of protection. The court ordered that the parties should alternate physical custody from week to week, but they were not allowed to have any other contact with the child or other parent when not in physical custody, including attending school activities. The court specifically limited contact, other than the exchange, to instances of medical emergency.

Directly leading to the present appeal, each party filed a petition for the modification of custody. On May 8, 2007, petitioner filed a petition to modify visitation asking that respondent's custody time be suspended until he submitted to mental health counseling. On January 15, 2008, respondent filed a petition for a modification seeking primary physical

custody. On the same date, respondent filed a petition asking for petitioner to undergo hair-follicle drug-testing.

On March 14, 2008, the court called the case for a hearing on pending matters. The court found that the requirements for a modification had been met, and the court granted each party leave to file custody modification pleadings (750 ILCS 5/610(a) (West 2008)). The court also ordered that Dr. Cuneo conduct a custody evaluation of the parties. On that date, petitioner filed an amended petition to modify, asking for sole custody.

On November 10, 2008, the court began hearings on the countering petitions to modify, along with other pending pleadings. On several days during the ensuing months, the court entertained testimony on the countering petitions. Both parties testified. Respondent also presented testimony from O'Fallon police department officers describing disruptive behavior by petitioner and her boyfriend, Jeffrey Tindall, during both the dropoff and the pickup of B.A. in April 2008 that formed the basis for an order of protection that had been sought by respondent. The substance of the dispute, however, is best illustrated by the conflicting testimony of the experts.

Dr. Cuneo had been initially ordered to evaluate respondent and later to examine the custody arrangement. Dr. Cuneo testified that his initial diagnosis of respondent was adjustment disorder with mixed disturbance of emotions and obsessive compulsive personality traits. Dr. Cuneo's testimony continued as follows:

"Q. [Petitioner:] Can you tell me about your findings from your meetings with him this year?

A. I have no doubt [respondent] loves his child. I have no doubt that [B.A.] loves [respondent]. The difficulty here is that [respondent] continues to manipulate the situation. I find both parents have difficulties here. I find in this particular case both parents could be good parents. I feel both parents love [B.A.] I believe both

parents are involved. I believe at this particular case the difficulty lies in [respondent's] hatred of you and therefore [B.A.] should hate you and there is no—and therefore [B.A.] should have no contact with you.

Q. When I brought [B.A.] in to see you at your request what type of meeting did you have with [B.A.]?

A. Attempted to see him twice—I saw him twice. [B.A.] was sullen both times, did not want to be there. Stated that he did not want to be there because he didn't—he felt that this was all a waste of time because he wanted to live with [respondent].

Q. Do you feel it would be in [B.A.'s] best interest to live with [respondent] at this time?

A. I believe it's in [B.A.'s] best interest to have as much contact with [respondent]. I believe it's in [B.A.'s] best interest to have an ongoing relationship with [respondent]. I also think, but I'm afraid if [B.A.]—my fears are if [B.A.] lives with [respondent] as a residential parent[,] you will be cut completely out of this situation. And you will have no—and will have no relationship with [B.A.]"

Dr. Cuneo commented that the parents do not work with each other, but he recommended that the parties share custody with the court specifying in detail the obligations of both parents.

On cross-examination, Dr. Cuneo stated that each parent had attempted to alienate B.A. from the other, though petitioner's attempts were less severe. Dr. Cuneo clarified his recommendation:

"Q. [Attorney for respondent:] Now, your recommendation to the court[,] if I understand[,] is a joint parenting order, not agreement?

A. That is correct.

Q. That would specify every day that would be—we know where [B.A.] would

be each day?

A. I would make this so black and white. [B.A.] is nine. I would give him a calendar so that he knows where he's going to be. And you know, I know there is—I would make it as chiseled in stone. I would make it as black and white as possible with very little ambiguity, that way neither one could end up manipulating the other."

Dr. Robert Clipper testified that respondent had been referred to him by the guardian *ad litem* in the fall of 2007. Dr. Clipper stated that he had seen respondent more than 30 times. Dr. Clipper originally assessed respondent with anger specifically related to petitioner's treatment of B.A., but he believed that respondent had since progressed. Dr. Clipper had no concerns about respondent being the custodial parent. Dr. Clipper testified that respondent had never led him to believe that he would alienate B.A.'s relationship with petitioner. Dr. Clipper opined that it was not possible to have joint custody, he criticized Dr. Cuneo's investigations, and he disagreed with Dr. Cuneo's recommendation.

Dr. Clipper concluded his direct testimony by stating that he believed that respondent should have residential custody of B.A. On cross-examination, Dr. Clipper stated that his role did not include making a recommendation for custody, because he was "not the evaluator in this case." Dr. Clipper admitted that he had only met with petitioner twice and that he had no opinion on her parenting abilities, because that was not his job.

Sherri Miller of Counseling Associates of Southern Illinois testified that she first saw B.A. on August 6, 2007, on the referral of the guardian *ad litem*, Patricia Kievlan. After about six to eight weeks, B.A. became more revealing. Miller testified that B.A. stated that he does not respect petitioner and that his relationship with her has worsened.

The guardian *ad litem*, Patricia Kievlan, testified that although respondent's behavior has improved, respondent has manipulated B.A. to the point where B.A. knows how he is "supposed to feel about [petitioner] in his [respondent's] eyes." Kievlan testified that she

thought the parties should have equal time with B.A., alternating between weeks. Kievlan cautioned that awarding sole custody to one of the parents would result in that parent using the court order to defeat the other parent's relationship with B.A.

On August 2, 2010, the court entered an order finding that the best interests of B.A. would be served by joint custody with respondent being the primary physical custodian. The parties were ordered to exchange B.A. on alternating Sunday evenings. The orders of protection against each party were terminated, and they were ordered to attend joint counseling. The court denied motions to reconsider filed by the parties.

Respondent timely appeals.

ANALYSIS

Section 610 of the Illinois Marriage and Dissolution of Marriage Act (Act) governs the procedure for the modification of a child custody order. Section 610 provides, in part, as follows:

"§610. Modification.

(a) Unless by stipulation of the parties or except as provided in subsection (a-5), no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.

(b) The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances

of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child. The existence of facts requiring notice to be given under Section 609.5 of this Act shall be considered a change in circumstance. In the case of joint custody, if the parties agree to a termination of a joint custody arrangement, the court shall so terminate the joint custody and make any modification which is in the child's best interest. The court shall state in its decision specific findings of fact in support of its modification or termination of joint custody if either parent opposes the modification or termination." 750 ILCS 5/610(a), (b) (West 2008).

The trial court found that the prerequisites for avoiding the two-year waiting period as set forth in paragraph (a) had been met. In the order of March 14, 2008, the court granted leave to file custody modification pleadings. The plain language of paragraph (a) of section 610 does not entail a decision that the joint custody is unworkable, nor does the waiver of the two-year waiting period mandate a substantial change in the custody arrangement. *Department of Public Aid ex rel. Davis v. Brewer*, 183 Ill. 2d 540, 554, 702 N.E.2d 563, 569 (1998).

In the final order on the petitions to modify, the court essentially retained the same custodial schedule. Regardless of whether or not the trial court is seen as modifying the previous arrangement, the order was supported by the record. Pursuant to paragraph (b) of the Act, a prior joint custody arrangement should not be modified unless a change has occurred in the circumstances and a modification is necessary to serve the best interest of the child. The section requires clear and convincing evidence to support a modification unless the parties have agreed to terminate joint custody. The section provides, "[I]f the parties agree to a termination of a joint custody arrangement, the court shall so terminate the joint custody and make any modification which is in the child's best interest." 750 ILCS 5/610(b)

(West 2008).

The parties never reached such an agreement. Respondent points to precedent stating that joint custody requires an unusual level of cooperation and should be granted only in narrow situations. *In re Marriage of Swanson*, 275 Ill. App. 3d 519, 524, 656 N.E.2d 215, 219 (1995). Respondent asserts that by filing countering petitions to modify custody, the parties had effectively consented to the termination of the joint custody. *In re Marriage of Spent*, 342 Ill. App. 3d 643, 651, 796 N.E.2d 191, 198 (2003). This interpretation of section 610 runs contrary to the plain language excusing the need for clear and convincing evidence only in instances where the parties "agree" and operatively exempts the court from making findings of fact even when a party may "oppose" the result reached by the court. 750 ILCS 5/610(b) (West 2010). In any event, section 610 calls for a modification that is in the best interest of the minor. Whether the trial court is seen as modifying the original agreement or not, the record supports its finding that the arrangement is in the best interest of the minor.

In the end, the trial court's determination of the best interest of B.A. is supported by the record. Although both want sole custody, each parent has expressed their desire to be involved in B.A.'s life to the maximum extent possible. See 750 ILCS 5/602(a)(1) (West 2008). B.A.'s counselor, Miller, suggested that B.A. desired to stay with respondent, but elsewhere in the record the guardian *ad litem* and Dr. Cuneo attributed these expressions to respondent's manipulation. See 750 ILCS 5/602(a)(2) (West 2008). Furthermore, the record suggests that under the current arrangement B.A. is well adjusted to his larger community and is a fine student. See 750 ILCS 5/602(a)(4) (West 2008).

At the forefront of the hearings was concern about B.A.'s relationship with each parent. The best interests of B.A. called for an examination of the willingness of each parent to facilitate a close relationship with the other parent. See 750 ILCS 5/602(a)(8) (West 2008). The record suggests that any alternative arrangement would have undermined this

goal. Although Dr. Clipper testified that respondent gave no indication he would alienate B.A. from petitioner, Dr. Cuneo testified that respondent was the worse offender. Poignantly, the guardian *ad litem* stated that any result different than that reached by the trial court would be used by a party to alienate B.A. from the other parent.

Respondent contends that it is the inability of each of the parents to cooperate that undermines any attempt at joint custody. Illinois courts have long recognized the need for parents to cooperate in instances of joint custody. *In re Marriage of Swanson*, 275 Ill. App. 3d 519, 524, 656 N.E.2d 215, 219 (1995). The Act mandates consider the ability of parents to cooperate before joint custody, but the Act limits the inquiry to the ability to comply with the arrangement:

"(c) The court may enter an order of joint custody if it determines that joint custody would be in the best interests of the child, taking into account the following:

(1) the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child. 'Ability of the parents to cooperate' means the parents' capacity to substantially comply with a Joint Parenting Order. The court shall not consider the inability of the parents to cooperate effectively and consistently in matters that do not directly affect the joint parenting of the child[.]"
750 ILCS 5/602.1(c)(1) (West 2008).

The trial court was in the best position to evaluate the feasibility of the arrangement and did so after reviewing the history of shared custody.

Although disheartening, the failure of the parties to realize the vital role of the other parent in the life of their child does not preclude the arrangement instituted by the court. In fashioning an arrangement, the trial court was aware of the history of the parties and the ongoing custody arrangements. The lengthy and detailed hearings also informed the court. Dr. Cuneo best addressed the pragmatics of cooperation. Respondent points out that Dr.

Cuneo testified that "joint custody is not going to work here at all," calling it "farcical." Dr. Cuneo, however, continued as follows:

"A. Ideally what I would say is there should be joint custody. I've got a child that needs both parents, that loves both parents. But joint custody is not going to work here at all. That's farcical, both parents cannot–

Q. [Petitioner:] We found out before.

A. Yeah, both parents aren't going to work together. What I would recommend is that there would be a joint parenting agreement drawn up just as detailed as possible specifying what has to happen. That neither party can vary from that.

Q. THE COURT: Make it an order, not an agreement?

A. Yes, Your Honor."

Similarly, the guardian *ad litem* recommended that the parents alternate weeks with limited contact otherwise. The record as a whole supports these recommendations and the order of the trial court.

Accordingly, the order of the trial court is hereby affirmed.

Affirmed.