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2012 IL App (4th) 120405-U

Filed 8/24/12

NO. 4-12-0405

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of)	Appeal from
ROXANNE S. SANCKEN, n/k/a ROXANNE S.)	Circuit Court of
KELLEY,)	Champaign County
)	No. 09D653
Petitioner-Appellant,)	
and)	
CHRISTOPHER A. SANCKEN,)	Honorable
Respondent-Appellee.)	Arnold F. Blockman,
)	Judge Presiding

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order denying removal of children to Georgia was not against the manifest weight of the evidence.

¶ 2 On October 27, 2011, petitioner, Roxanne S. Kelley (Roxanne), filed a petition for removal of her two children from her marriage with respondent, Christopher A. Sancken (Christopher), to the State of Georgia. The children were ages six and eight at the time. The trial court heard testimony in March 2012 and denied Roxanne's petition for removal. Roxanne appeals, contending the court's denial was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Because the parties are familiar with the evidence, we summarize the testimony at the removal hearing only as necessary to support this court's decision. Roxanne and Christopher

married on May 10, 2003, and divorced on February 19, 2010. Two children were born to the parties: a daughter J.S. (born December 16, 2003) and a son, A.S. (born November 3, 2005). The parties entered into a marital settlement agreement which provided for Roxanne to have custody of the minors and for Christopher to have reasonable visitation.

¶ 5 In October 2010, Roxanne married Sean Kelley, who is on active duty with the United States Army. At the time of the hearing, Sean was stationed in Urbana, Illinois, but had received orders to transfer to Ft. Gillem, Georgia, which is about one hour south of Atlanta, Georgia. Roxanne and Sean have a child of their marriage who is one year old.

¶ 6 Following the parties' divorce, Roxanne bought a house in Elliott, Illinois, next door to her mother. Roxanne has a large extended family residing in and around Elliott and the children attend school with many of their cousins. Roxanne's mother babysat the children for the last three years and sees the children daily. She described her house as "grand central," with lots of family gathering for holidays and birthdays and often just dropping by. The children are very close to Roxanne's extended family.

¶ 7 Roxanne works for Heartland in Urbana, Illinois, and can transfer to a position with Heartland in Georgia.

¶ 8 Christopher lives in Champaign, about 30 minutes from Elliott, in the home the children grew up in. He works for Speed Lube in Champaign. He generally has one Saturday off each month.

¶ 9 Christopher has exercised visitation with the children nearly every weekend since the divorce. Roxanne drops the children off at Speed Lube on Fridays around 3:30-4 p.m. and Christopher returns them to Elliott on Sundays at 7 p.m. He employs a babysitter during the day

on Saturdays when he is working. On a handful of months since the divorce, he saw the children on three weekends rather than four, by agreement with Roxanne, but for the majority of months since the divorce, he has had the children at his home every weekend.

¶ 10 It is undisputed both parties are capable, loving parents, and neither has suspect motives for their positions. On the one hand, Roxanne has remarried, her husband is in the Army, has been transferred to Georgia, and she wants to move with him and their child to Georgia. She wants to take J.S. and A.S. with them and believes it is in the children's best interest to move. All indications are Sean is a capable, loving stepfather.

¶ 11 On the other hand, Christopher has had a close relationship with his children, seeing them nearly every weekend following the divorce. He fears at their young ages he would miss many of their changes as they grow up. He also believes their close ties to family in Elliott are important to their well-being and there would be no family support system in Georgia. The likelihood of subsequent moves exists because Sean plans an Army career. He is also subject to deployment overseas.

¶ 12 Following the arguments of the parties, the trial court took the matter under advisement and issued its 14-page decision approximately six days later. For reasons explained below, the court found Roxanne failed to meet her burden of proof by showing removal of the children to Georgia was in the children's best interest and denied the motions for removal.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 The trial court issued its ruling on April 3, 2012. A notice of appeal was filed on May 1, 2012, and thus, this court has jurisdiction over this matter.

¶ 16 The best interests of the child are controlling in removal actions. *In re Marriage of Collingbourne*, 204 Ill. 2d 498, 535, 791 N.E.2d 532, 552 (2003). "[A] trial court's determination of what is in the best interests of the child should not be reversed unless it is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred." *Id.*

¶ 17 Section 609 of the Illinois Marriage and Dissolution of Marriage Act (Act) provides as follows:

"The court may grant leave, before or after judgment, to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children. The burden of proving that such removal is in the best interests of such child or children is on the party seeking the removal. When such removal is permitted, the court may require the party removing such child or children from Illinois to give reasonable security guaranteeing the return of such children." 750 ILCS 5/609(a) (West 2010).

Further, the Act provides:

"The court may not use the availability of electronic communication as a factor in support of removal of a child by the custodial parent from Illinois." 750 ILCS 5/609(c) (West 2010).

¶ 18 Our supreme court has issued two seminal decisions on removal. *In re Marriage of Eckert*, 119 Ill. 2d 316, 518 N.E.2d 1041 (1988), and *Collingbourne*, 204 Ill. 2d 498, 791

N.E.2d 532. In *Eckert*, several factors were outlined for courts to consider when deciding removal cases. While recognizing there is no simple bright-line test, our supreme court noted the decision concerning removal is fact intensive and must be decided on the circumstances of each case. *Eckert*, 119 Ill. 2d at 326, 518 N.E.2d at 1045. Factors guiding the trial court's decision in these cases include (1) whether the proposed move will likely improve the quality of life for the custodial parent and the child, (2) the motives of the custodial parent in seeking to leave the state with the child, (3) the motives of the noncustodial parent in opposing the move, (4) the effect of the move on the noncustodial parent's visitation rights and relationship with the child, and (5) whether a reasonable and realistic visitation schedule can be arranged if removal is allowed. *Eckert*, 119 Ill. 2d at 326-27, 518 N.E.2d at 1045-46.

¶ 19 Following *Eckert*, the court in *Collingbourne* made clear the *Eckert* factors are not exclusive nor is one factor controlling. *Collingbourne*, 204 Ill. 2d at 523, 791 N.E.2d at 545-46. Trial courts must balance the factors in arriving at a best-interest determination. *Id.*, 791 N.E.2d at 546. The trial court should consider both direct and indirect benefits resulting from a move, while keeping in mind in the context of a removal petition, a trial court must " 'consider the proposed move in terms of likelihood for enhancing the general quality of life for *both* the custodial parent *and* the children.' " *Id.* at 525, 791 N.E.2d at 547 (adding emphases in quoting *Eckert*, 119 Ill. 2d at 326-27, 518 N.E.2d at 1045). Adhering to its decision in *Eckert*, the court noted a "trial court's examination of a removal petition should be guided by the policies of the Act, one of which is to 'secure the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children during and after the litigation.' " (Citations omitted.) *Id.* at 534-35, 791 N.E.2d at 552.

¶ 20 Turning now to the trial court's application of these factors to the evidence, we note the court discussed and weighed all of the relevant factors in a thorough and lengthy written decision. The court found "sincere and appropriate" motives for both parents. This factor was essentially undisputed by the parties. Roxanne's sincere motives strongly favored removal, while Christopher's sincere motives militated against removal.

¶ 21 In looking at the enhancement to the general quality of life for both Roxanne and the children, the trial court found Roxanne would be happier living with her husband in a stable, caring relationship, and the children would benefit from their mother's happiness. The court also found indirect benefits to Roxanne and the children from the additional financial security provided by Sean's promotion upon his transfer and from the recreational and quality of life activities offered by the Atlanta area.

¶ 22 However, the trial court also found the children would be negatively impacted by the loss of frequent contact with their father. Christopher had the children with him almost every weekend. With the young ages of these children, six and eight, the court found they were not mature enough to intelligently understand and deal with long periods of separation from their father.

¶ 23 In addition, the trial court found the loss of regular, continuous contact with Roxanne's large extended family an obvious indirect detriment to the children. It noted the extremely close relationship between Roxanne's mother and the children, as the grandmother babysat the children for the last three years and lives next door to them, seeing them daily. In addition, Roxanne's close extended family included at least eight cousins who attend the same school as J.S. and A.S.

¶ 24 Further, neither Roxanne nor Sean had any family in the Atlanta area. Last, the trial court noted the children have only known two homes their whole lives, their father's home (the former marital residence) and the mother's home in Elliott, following the divorce, which, as already noted, is next door to their grandmother's house.

¶ 25 Balancing the indirect benefits against the indirect detriments of allowing removal, the court found the detriments slightly outweighed the benefits and thus the detriments to the general quality of life militated against allowing removal.

¶ 26 The trial court found the loss of consistent and frequent parenting time, including the inability of Christopher to attend school and extracurricular activities, would negatively impact the children's relationship with their father. This factor militated against removal.

¶ 27 The trial court found a reasonable and realistic visitation schedule could be achieved in light of the direct air transportation available between Atlanta and central Illinois. Further, the court noted the one-day drive between Atlanta and Champaign, and recognized the parties could meet halfway. We note, however, the children would have to ride the full way each way. In any event, the court found the availability of a reasonable and realistic visitation schedule (extended summer and Christmas time visitation) weighed in favor of removal.

¶ 28 The trial court turned next to non-*Eckert* factors. Finding Sean to be an active and involved father and a tremendous asset for Roxanne and the children, the court felt this weighed in favor of removal. However, the possibility Sean could be deployed to a war zone, leaving Roxanne and the children alone in the Atlanta area without extended family, was detrimental to allowing removal, as was the possibility of reassignment every three years to an unknown location.

¶ 29 Last, the trial court noted it received no evidence concerning the school the children would attend in Georgia or the area where they would be living. This weighed slightly against removal in the court's opinion. Weighing all of the specific facts of this case, the court found Roxanne failed to prove the move was in the best interests of the children.

¶ 30 We noted above the scope of our review is whether the trial court's decision was clearly against the manifest weight of the evidence, and whether it appears a manifest injustice has occurred. The court here was faced with a very tough decision. It had before it two loving, involved and capable parents, both wanting what they believed to be best for their children. When the evidence is clearly weighted one way or the other, these decisions are much easier. When the evidence is closely balanced, as here, these decisions are extremely difficult.

¶ 31 This court has reviewed the evidence received by the trial court and finds the evidence to be fairly represented and fairly weighed in the court's written decision. Although the evidence is closely balanced, Roxanne, as the person seeking removal, bore the burden of proof. To find the trial court's denial of removal to be against the manifest weight of the evidence, we would have to find the opposite conclusion clearly evident, or the court's findings to be unreasonable, arbitrary, not based on the evidence, and resulting in manifest injustice. *In re Shauntae P.*, 2012 IL App (1st) 112280, ¶ 89, 967 N.E.2d 968; *Collingbourne*, 204 Ill. 2d at 535, 791 N.E.2d at 552. Stated another way, fact-based determinations are against the manifest weight of the evidence only when, after viewing the evidence in a light most favorable to the determination at issue, the reviewing court concludes no rational trier of fact could have made the same finding. *Price v. Industrial Comm'n*, 278 Ill. App. 3d 848, 852-53, 663 N.E.2d 1057, 1060 (1996). The mere fact an opposite conclusion is also reasonable or that the reviewing court

might, as the trier of fact, have reached a different conclusion does not justify reversing factual determinations made by the trial court. *Chicago Investment Corp. v. Dolins*, 107 Ill. 2d 120, 129, 481 N.E.2d 712, 716 (1985). We do not reweigh the evidence or substitute our judgment for that of the trial court. *Kalata v. Anheuser-Busch Cos., Inc.*, 144 Ill. 2d 425, 434, 581 N.E.2d 656, 661 (1991).

¶ 32 Because the trial court's findings were based on the evidence and are clearly not arbitrary or unreasonable, and do not result in manifest injustice, we affirm the court's decision denying the petition for removal.

¶ 33 In closing, we found the trial judge's thorough explanation of the reasons for his decision and his discussion of the various factors entering into his decision-making process most helpful.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the trial court's judgment.

¶ 36 Affirmed.