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2013 IL App (3d) 120748-U

Order filed February 26, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

<i>In re</i> M.E.D.,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Minor)	Will County, Illinois,
)	
James D.,)	
)	
Petitioner-Appellant,)	Appeal No. 3-12-0748
)	Circuit No. 06-F-799
v.)	
)	
Mary Ann H.,)	Honorable
)	Matthew G. Bertani,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright and Justice McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* Joint parenting agreement that provided for a change in residential custody when child entered first grade was not against public policy. Trial court properly denied father's petition to modify custody where there was not clear and convincing evidence that it was in child's best interest to reside with father.
- ¶ 2 James D. and Mary Ann H. are the parents of M.E.D. In 2006, they entered into a joint parenting agreement, which gave residential custody of M.E.D. to James until M.E.D. entered first

grade and to Mary Ann thereafter. Before M.E.D. began first grade, James filed a petition to modify custody, seeking permanent residential custody of M.E.D. The trial court denied James' petition. James appeals, arguing that (1) the joint parenting agreement is void as against public policy, and (2) the trial court erred in denying his petition to modify custody. We affirm.

¶ 3 M.E.D. was born in March 2003, to James D. and Mary Ann H. James and Mary Ann were never married but began dating in 2001. Mary Ann had a daughter, Hannah, from a prior relationship. Hannah was four years old when she and Mary Ann moved into James' house in Romeoville in 2003, shortly before M.E.D. was born. In September 2006, Mary Ann and James separated. In October 2006, James filed a petition to establish paternity of M.E.D. Thereafter, James and Mary Ann entered into a joint parenting agreement.

¶ 4 The joint parenting agreement provided that James would be M.E.D.'s residential custodian until M.E.D. entered first grade. The relevant portion of the joint parenting agreement states:

"JAMES and MARY ANN agree that it is in the minor child's best interests that her residence be with JAMES and that JAMES be designated as residential custodian of the child until the child attends first grade. That on that date, MARY ANN, shall be residential custodian and JAMES shall be non-residential custodian."

The joint parenting agreement also provided that Mary Ann would watch M.E.D. weekdays from 8:00 a.m. to 4:00 p.m. and that James would pay Mary Ann \$1,000 per month in child support. When the joint parenting agreement was entered, Mary Ann lived two to three miles from James' home in Romeoville.

¶ 5 In April 2009, approximately four months before M.E.D. was to enter first grade, James filed a petition to modify the residential custody provision of the joint parenting agreement, seeking an

order declaring him the permanent residential custodian of M.E.D. The parties attended mediation to resolve the custody dispute, but mediation was unsuccessful.

¶ 6 In July 2009, James filed a motion to stay the transfer of residential custody set forth in the joint parenting agreement. He also filed a motion to appoint a guardian *ad litem*. Shannon Zelazny was appointed as the G.A.L. In September 2009, Zelazny recommended that James maintain residential custody of M.E.D. Thereafter, the court stayed enforcement of the transfer provision in the joint parenting agreement.

¶ 7 A hearing was held on James' petition to modify custody in February and March 2012. The court heard nine days of testimony.

¶ 8 James testified that he lives in a single-family home in Romeoville with M.E.D. Mary Ann and Hannah also lived in that home from 2003 to 2007. In the fall of 2007, when M.E.D. was three-and-a-half years old, Mary Ann and Hannah moved out of the home to an apartment in Romeoville.

¶ 9 James is self-employed as a landscaper and has owned his own business for 22 years. He works from 9:00 a.m. to 3:00 p.m., and is able to get M.E.D. to the school bus before school and meet her when she gets off the bus after school.

¶ 10 James believes that he should retain residential custody of M.E.D. because he has and will provide her with stability. He believes that M.E.D.'s interests would be best served by remaining in Romeoville and at her current school. M.E.D. has friends in her neighborhood and at her school.

¶ 11 On cross-examination James admitted that he moved to Chicago with M.E.D. from May to November 2009, intending to live there and establish a rap music career. He initially drove M.E.D. to and from school in Romeoville but as time progressed, he started picking her up later and later due to traffic.

¶ 12 James admitted that his Myspace page from May 28, 2009, contained a posting from April 2009, entitled "DJChop," that states: "Happy 4:20!!!, Smoke Sum Good Sh*t." James testified that he did not know what that post meant and did not know how to remove the post from his Myspace page.

¶ 13 James admitted that he described Mary Ann as a caring and affectionate mother in 2003. However, since then, his opinion of Mary Ann's parenting skills has changed for the worse. James was especially critical of Mary Ann's lack of concern for M.E.D.'s pet allergies. He complained that Mary Ann has several dogs and cats in her home. James bought M.E.D. a dog in 2011, which he keeps in his home.

¶ 14 James testified that he would foster an appropriate relationship between Mary Ann and M.E.D. and would give Mary Ann her complete access to M.E.D.'s school and other records. He admits that he has not always done so. On one occasion, James refused to allow the school to release M.E.D.'s bookbag to Mary Ann's husband when M.E.D. left school early due to illness. On another occasion, James called the police because Mary Ann arrived 30 minutes early for visitation with M.E.D.

¶ 15 Mary Ann testified that she married her husband, Brandon, in 2007. Brandon has three children, ages 12 to 14, from a previous marriage. The children visit Brandon regularly. Brandon is a police officer and works the night shift so that he can take care of Hannah and the other kids when Mary Ann is working.

¶ 16 Mary Ann has lived in Plainfield for five years with Brandon and Hannah. Her home is approximately 30 minutes from James' home in Romeoville. Hannah is on the honor roll, has participated in gymnastics and dance and plays basketball. Hannah serves as a role model to M.E.D.

and helps M.E.D. with her hair and clothes. M.E.D. has friends in Mary Ann's neighborhood and could attend school three blocks from Mary Ann's home.

¶ 17 Mary Ann has four dogs and two cats. She testified that Zelazny was the first person to inform her about M.E.D.'s allergies. When Mary Ann learned that M.E.D. was allergic to cats and dogs, she immediately put the cats out of the house, bought a whole house air purifier, took out the carpeting and put in wood floors and vacuumed and washed the sheets. Mary Ann's husband testified that they did not change the flooring until two years later.

¶ 18 Mary Ann testified that she felt betrayed when James filed the petition to modify custody before M.E.D. started first grade because he promised there would be no custody battle. Prior to James filing that petition, communication was good between her and James. After that, their communication diminished. Mary Ann admits that she is partially to blame for the deterioration in her and James' relationship.

¶ 19 Mary Ann believes that M.E.D.'s hygiene is not properly attended to at James' house and says that M.E.D. smells like cigarette smoke after she is with James. Mary Ann believes that there is a lack of structure at James' house. She also believes that James has an unhealthy attachment to M.E.D., as evidenced by a song he recorded with M.E.D. that contains the following lyrics:

"Could you love me any more? I just love to hear you say, even more than yesterday,
my heart is all yours, you are all that I need. I can't love you more. I can't love you
less. My heart is yours. I have to confess, just to be with you is all I need."

James recorded the song after he filed his petition to modify custody.

¶ 20 Mary Ann admits that M.E.D. has done well living with James but believes that M.E.D. will thrive more living with her, Brandon and Hannah.

¶ 21 At the hearing, Zelazny, the guardian *ad litem*, presented her report and testimony. Zelazny believes that due to her young age, M.E.D. is "unable to form a credible opinion about where she should reside or the consequences of the same." Nevertheless, Zelazny thought that M.E.D. would prefer to live with James because M.E.D. told Zelazny that she wanted to live with her mother and sister "because they need me more" but wanted "Papa to be the one that is responsible for me and take care of me." Zelazny noted that M.E.D. is very comfortable with both James and Mary Ann and "enjoys a loving relationship with both of her parents."

¶ 22 Zelazny described M.E.D. as a "bright, articulate young girl." She had no concerns about her adjustment to school or her community. Zelazny noted that both parents made allegations about the other's home being unfit, but she found no evidence of that during her visits.

¶ 23 Zelazny was concerned with Mary Ann's ambivalence regarding M.E.D.'s allergies to cats and dogs, noting that a cat was in Mary Ann's home when she visited. Zelazny also did not believe that Mary Ann was as diligent as James in assisting M.E.D. with her schoolwork and was not nearly as involved with M.E.D.'s school and extra-curricular activities as James was. On the other hand, Zelazny found that James had "a tendency to be somewhat controlling when it comes to [M.E.D.'s] homework."

¶ 24 Zelazny found that both James and Mary Ann are guilty of speaking negatively about each other to M.E.D. and both struggle to list a single good quality about the other. Zelazny ultimately recommended that James remain M.E.D.'s residential custodian and that Mary Ann enjoy generous visitation time with M.E.D.

¶ 25 In August 2012, the trial court entered a 16-page order and judgment. First, the court found that a substantial change in circumstances had occurred because (1) Mary Ann switched from part-

time to full-time employment, (2) the parties' ability to communicate had deteriorated, (3) Mary Ann became married and moved to a new city, and (4) James believed Mary Ann's parenting skills had changed. The court then analyzed the appropriate best interest factors. In doing so, the court considered the testimony of James, Mary Ann, Brandon and Zelazny, as well as various exhibits, including Zelazny's report.

¶ 26 The court determined that two factors weighed in favor of Mary Ann because (1) M.E.D. would benefit from living with Hannah, and (2) Mary Ann would be more likely to foster a positive relationship between M.E.D. and James based on James' behavior in the past. The court found that one factor weighed "slightly" in favor of James in that M.E.D. is well-adjusted to her home, school and community and James is more involved in M.E.D.'s school and extracurricular activities. The court further found that, although impeached at times, Mary Ann was more credible than James.

¶ 27 The court concluded that James failed to produce clear and convincing evidence that it is in M.E.D.'s best interest to modify the residential custody set forth in the joint parenting agreement. Thus, the court denied James' petition to modify custody.

¶ 28 I. Marital Settlement Agreement

¶ 29 James first argues that the joint parenting agreement that he and Mary Ann entered into is void as against public policy because it requires an "automatic" transfer of custody from one parent to the other without consideration of M.E.D.'s best interests.

¶ 30 A joint parenting agreement is a contract between the parties. *In re Marriage of Coulter & Trinidad*, 2012 IL 113474, ¶ 19. A court's primary objective is to give effect to the intent of the parties, which must be determined by the language of the agreement. *Id.* The terms of a joint parenting agreement are binding on the parties unless they violate public policy. See *In re Marriage*

of Rife, 376 Ill. App. 3d 1050, 1062 (2007).

¶ 31 Courts should exercise their power to declare contracts void as against public policy "sparingly" so as not to violate the freedom of parties to make their own agreements. *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 129 (2005). An agreement will not be invalidated on public policy grounds unless it is clearly contrary to what the constitutions, the statutes or the decisions of the courts have declared to be the public policy or unless it is manifestly injurious to the public welfare. *Id.* at 129-30. Whether an agreement is against public policy depends on the facts and circumstances of the case. *Id.* at 130. Whether an agreement is against public policy is an issue of law that we review *de novo*. *Rife*, 376 Ill. App. 3d at 1063.

¶ 32 The "strong public policy of Illinois" is "to encourage parties to resolve as many issues as possible by agreement before resorting to litigation." *Coulter & Trinidad*, 2012 IL 113474, ¶ 29. This policy is even stronger in the context of disputes between parents regarding custody and visitation of their children. See *id.* at ¶ 30.

¶ 33 The Illinois Marriage and Dissolution of Marriage Act (Act) states that among its purposes are to: "promote the amicable settlement of disputes"; and "secure the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children." 750 ILCS 5/102(3), (7) (West 2008). Section 502 of the Act provides: "To promote amicable settlement of disputes between parties ***, the parties may enter into a written or oral agreement containing provisions for *** custody and visitation of their children." 750 ILCS 5/502(a) (West 2008).

¶ 34 The public policy set forth in section 502 of the Act is fulfilled when joint parenting

agreements are enforced. See *Coulter & Trinidad*, 2012 IL 113474, ¶ 32. To allow one party to set aside a joint parenting agreement merely because he has had a change of heart would undermine the public policy set forth in section 502 of the Act. *Id.*

¶ 35 "[T]he right of fit parents to decide what is in their children's best interests is of constitutional magnitude." *Coulter & Trinidad*, 2012 IL 113474, ¶ 25. Parents may resolve the question of the best interests of a child in a joint parenting agreement. See *id.* at ¶ 28. "Their considered opinion regarding the best interests of their children, as reflected by their agreements regarding custody, visitation and removal, is entitled to great deference by the court." *Id.*

¶ 36 A joint parenting agreement violates public policy only if it precludes or limits modification of terms concerning child support, custody or visitation. *Rife*, 376 Ill. App. 3d at 1062-64. A joint parenting agreement does not violate public policy simply because one parent waives a right he would have had in the absence of the agreement. See *Coulter & Trinidad*, 2012 IL 113474 (non-residential parent waived right to contest removal); *In re Marriage of McGillicuddy & Hare*, 315 Ill. App. 3d 939, 943 (2000) (residential parent waived presumption in favor of physical custodian).

¶ 37 Here, the joint parenting agreement that James and Mary Ann entered into evinces their agreement that it is in M.E.D.'s best interests to reside with James until first grade and with Mary Ann thereafter. It is not against public policy for parties to resolve the question of best interests of a child in a joint parenting agreement. See *Coulter & Trinidad*, 2012 IL 113474, ¶ 28.

¶ 38 James argues that the "automatic" change-in-custody provision violates the public policy set forth in section 610 of the Act. Section 610 of the Act provides that a change in custody should be granted only when the nonresidential parent establishes by clear and convincing evidence that a change in circumstances has occurred and that modification is necessary to serve the best interests

of the child. 750 ILCS 5/610(b) (West 2008). Section 610 of the Act creates a presumption in favor of the custodial parent. *In re Marriage of Pease*, 106 Ill. App. 3d 617 (1982). The public policy behind section 610 of the Act is to promote stability and continuity in a child's custodial and environmental relationships. See *McGillicuddy & Hare*, 315 Ill. App. 3d at 942.

¶ 39 While the policy of section 610 to promote stability in child custody cases is important, it cannot trump the "strong public policy" of this state to encourage litigants, particularly those in custody disputes, "to resolve as many issues as possible by agreement." See *Coulter & Trinidad*, 2012 IL 113474, ¶ 29. Here, both Mary Ann and James agreed that residential custody of M.E.D. would change when she entered first grade. By so agreeing, James waived the presumption in favor of the physical custodian implied in section 610 of the Act. Such a waiver is permissible in a joint parenting agreement and does not make the agreement unenforceable. See *McGillicuddy & Hare*, 315 Ill. App. 3d at 943. To set aside the agreement now, merely because James has experienced a change of heart and does not want to transfer custody of M.E.D. to Mary Ann, would violate the public policy of sections 102 and 502 of the Act to "promote the amicable settlement of disputes." 750 ILCS 5/102(3), 502(a) (West 2008); see also *Coulter & Trinidad*, 2012 IL 113474, ¶ 32.

¶ 40 Nothing in the joint parenting agreement entered into between James and Mary Ann prevented or limited either party from seeking a modification of custody, visitation or child support. In fact, even before the change-in-custody provision came into effect, James sought a modification of custody. Because the joint parenting agreement did not preclude such an action, it is not against public policy and was properly enforced by the trial court.

¶ 41 II. Petition to Modify Custody

¶ 42 James argues that the trial court's order denying his petition to modify custody was against

the manifest weight of the evidence because the trial court (1) improperly weighed the best interest factors, (2) ignored the guardian *ad litem's* report and recommendation, and (3) found Mary Ann more credible.

¶ 43 Custody proceedings are guided by the overriding consideration of the best interests of the child involved. *In re A.W.J.*, 197 Ill. 2d 492, 497-98 (2001). When deciding issues pertaining to custody, the trial court has broad discretion, and its judgment is afforded great deference because the trial court is in the best position to judge the credibility of the witnesses and determine the best interests of the child. *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004). Accordingly, a reviewing court will not disturb a trial court's decision to modify the terms of a custody agreement unless its decision is against the manifest weight of the evidence and constitutes an abuse of discretion. *Id.* at 515.

¶ 44 Section 610(b) of the Act allows for the modification of a child custody order only if there has been (1) a change of circumstances, and (2) modification is necessary to serve the best interests of the child. 750 ILCS 5/610(b) (West 2008). Section 602 of the Act provides the following mandatory factors that a court must consider in determining the custodial arrangement that is in the best interest of the child:

- "(1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school and community;

- (5) the mental and physical health of all individuals involved;
- (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
- (7) the occurrence of ongoing or reputed abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;
- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
- (9) whether one of the parents is a sex offender; and
- (10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed." 750 ILCS 5/602 (West 2008).

¶ 45 Section 506(a)(2) of the Act authorizes a trial court, on its own motion or that of any party, to appoint a guardian *ad litem* in custody proceedings. 750 ILCS 5/506(a)(2) (West 2008). The guardian *ad litem* is required to investigate the facts of the case, interview the child and the parties and testify or submit a written report regarding her recommendations in accordance with the best interests of the child. *Id.*

¶ 46 In making a custody decision, a court should consider and give some weight to the guardian *ad litem*'s recommendations. *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 414 (1994). However, a court is not bound by such recommendations. *Taylor v. Starkey*, 20 Ill. App. 3d 630, 634 (1974). The trial court is the ultimate fact finder in a child custody case. *In re Marriage of Saheb & Khazal*, 377 Ill. App. 3d 615, 628 (2007). A trial court's decision is not against the manifest weight of the

evidence or an abuse of discretion simply because it is contrary to the recommendations of the guardian *ad litem*. See *In re R.R.*, 409 Ill. App. 3d 1041 (2011); *In re Barber*, 55 Ill. App. 3d 587 (1977); *Roth v. Roth*, 52 Ill. App. 3d 220 (1977); *Taylor*, 20 Ill. App. 3d at 634.

¶ 47

A

¶ 48 James first argues that the trial court's custody determination was against the manifest weight of the evidence because the court improperly weighed the best interest factors. He argues that four of the best interest factors favor him: "the wishes of the child as to his custodian;" "the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;" "the child's adjustment to his home, school and community;" and "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child[.]"

¶ 49 After hearing nine days of testimony, the court issued a comprehensive 16-page order in which it summarized the testimony of the witnesses and many of the exhibits admitted into evidence. The court carefully considered each of the best interest factors set forth in section 602 of the Act.

¶ 50 With respect to the "wishes of the child as to his custodian," the trial court found this factor to be neutral, explaining that M.E.D.'s statement to Zelazny that she would like to live with her mother but have her father be "responsible" for her was ambiguous. Additionally, Zelazny ultimately concluded that because of her age, M.E.D. "was unable to form a credible opinion about where she should reside."

¶ 51 Next, the court found that the "[t]he interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest" weighed in favor of Mary Ann. The court noted that while M.E.D.'s relationship with

Hannah has flourished, it would likely grow even more if the girls were living "under the same roof."

¶ 52 The trial court determined that "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and child" also favored Mary Ann. The court based this finding in large part on James' past bad behavior, including his refusal to allow Mary Ann access to M.E.D.'s belongings, such as her backpack, and James calling the police on Mary Ann for arriving early for visitation. The court also found that the song that James recorded with M.E.D. was an attempt to influence M.E.D. to stay with him. Such behavior did not convince the court that James would foster an appropriate relationship between M.E.D. and Mary Ann.

¶ 53 The court found that only one factor weighed "slightly" in favor of James: "[t]he child's adjustment to his home, school and community." The court found this factor favored James because he is more involved with M.E.D.'s school and extracurricular activities. However, both the court and Zelazny found that M.E.D. was comfortable and well-adjusted in both homes and with both parents.

¶ 54 The trial court is in the best position to determine a child's best interests. *Bates*, 212 Ill. 2d at 516. Based on the evidence presented and the trial court's thorough analysis of the relevant best interest factors, the court's determination that it was in M.E.D.'s best interest to reside with Mary Ann was not against the weight of the evidence.

¶ 55 B

¶ 56 James next argues that the trial court's custody decision was against the manifest weight of the evidence because the court did not follow Zelazny's recommendation that James be given residential custody of M.E.D. He contends that the court's "near complete dismissal of the G.A.L.'s report and recommendation was inappropriate and an abuse of discretion."

¶ 57 While a court is authorized to seek advice and recommendations from a guardian *ad litem*,

a court is not bound by the guardian *ad litem*'s recommendations. See *Taylor*, 20 Ill. App. 3d at 634. The fact that the trial court's custody determination did not correspond with Zelazny's recommendation does not make the trial court's decision an abuse of discretion or against the manifest weight of the evidence. See *R.R.*, 409 Ill. App. 3d 1041; *Barber*, 55 Ill. App. 3d 587; *Roth*, 52 Ill. App. 3d 220; *Taylor*, 20 Ill. App. 3d at 634.

¶ 58 Despite James' contention to the contrary, the court did not ignore or dismiss the guardian *ad litem*'s report and recommendation. Throughout its order, the trial court discussed Zelazny's findings and opinions. The court acknowledged that Zelazny recommended awarding custody of M.E.D. to James but also noted that Zelazny found that both parents have a close and loving relationship with M.E.D. and that M.E.D. would thrive in either home. Based on the record, including Zelazny's report and testimony, the trial court's denial of James' petition to modify custody was not against the manifest weight of the evidence.

¶ 59

C

¶ 60 Finally, James argues that the trial court's decision was against the manifest weight of the evidence because the trial court improperly weighed the credibility of the parties. He contends that Mary Ann was impeached several times, making him the more credible party.

¶ 61 We give great deference to a trial court's credibility determinations because the trial court is in the best position to observe the temperaments and personalities of the parties and assess their credibility. See *In re B.B.*, 2011 IL App (4th) 110521, ¶ 32.

¶ 62 Here, the trial court found Mary Ann to be more credible than James. In making that determination, the trial court noted that both parties "had credibility issues" and that Mary Ann was "impeached at times." Nevertheless, the court concluded that May Ann was more credible than

James for several reasons. First, the court found that James was disingenuous in his alleged concern about M.E.D.'s pet allergies because he repeatedly complained that Mary Ann's dogs and cats negatively affected M.E.D.'s health but then bought a dog to live in his own home. Second, the court questioned James' assertion that M.E.D. needs the stability that he offers since James moved to Chicago for several months and intended to stay there permanently to pursue a rap music career. Finally, the trial court did not believe James' testimony that he did not understand the post on his Myspace page to be a reference to marijuana nor that he did not know how to remove the post.

¶ 63 Because the trial court was in the best position to view the witnesses and had reasons supporting its credibility determination, that determination as well as the court's best interest determination were not against the manifest weight of the evidence.

¶ 64

CONCLUSION

¶ 65 The judgment of the circuit court of Will County is affirmed.

¶ 66 Affirmed.