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2013 IL App (3d) 120926-U

Order filed March 29, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

In re MARRIAGE OF PAULA S. MAIER,) Appeal from the Circuit Court
) of the 13th Judicial Circuit,
) La Salle County, Illinois,
)
) Appeal No. 3-12-0926
) Circuit No. 11-D-321
)
)
)
) Honorable
) Karen C. Eiten,
) Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order granting sole custody of the minor children to their father in a dissolution of marriage proceeding was upheld on appeal where the trial court did not abuse its discretion in determining custody and its factual findings were not against the manifest weight of the evidence.

¶ 2 The petitioner, Paula S. Maier, filed a petition for dissolution of her marriage to the respondent, Thomas H. Maier. Both parties sought sole custody of the parties' two minor

children. Following a full hearing on the matter, the trial court awarded sole custody of the children to Thomas. On appeal, Paula maintains that the trial court erred in its custody determination. For the following reasons, we affirm the judgment of the circuit court.

¶ 3

FACTS

¶ 4 Paula and Thomas were married in February 1999. Their son, Kobe, was born that same year. Kobe, 12 years of age at the time of the dissolution proceedings, was diagnosed with autism and cognitive delay and has been in special classes since kindergarten. A daughter, Madison, was born in 2004.

¶ 5 The record contains extensive testimony regarding the employment history of the two parties. Paula completed a bachelor's degree at Northern Illinois University in May 2003. She was employed the following September as a sixth grade special education teacher. In September 2004, Paula started teaching sixth grade special education at Sandwich Middle School, a position she continued to hold at the time of the hearing on the matter of custody. During the same period of time, Thomas held a number of different jobs, usually working less than 40 hours per week and rarely remaining at any job for long. The record also established that there were several periods of time during the marriage when Thomas was unemployed. In addition, Paula presented evidence showing that Thomas did not always tell her that he had lost his job, that he led her to believe that he was employed when, in fact, he was not, and, on at least one occasion, he let her think that he was traveling for employment when he was, in fact, visiting his brother in Wisconsin. She also believed that when he told her he was working nights at the local PetSmart, he was actually unemployed and going to late movies. The record established that Thomas was continuously unemployed between March 2009 and November 2010.

¶ 6 The parties testified to an incident that occurred sometime in 2005. The parties were arguing when Paula walked away from Thomas. He followed her as she went into the bathroom. She tried to shut the door, but Thomas stuck his foot in the door to prevent it from shutting. She tried to shove or kick him away from the door, and he shoved the door against her. She fell backwards into the wall. Thomas walked away.

¶ 7 The parties separated in June 2011, when Thomas moved out of the marital residence. Since the parties separated, the children continued to live in the marital residence with Paula. The daily routine during the school was for Thomas to pick up the two children at Paula's residence every morning at 6:45 a.m. He would then take the children to his apartment and feed them breakfast. After breakfast, he would make sure the children got on the school bus. After school, on Monday and Tuesday and the Friday of his scheduled visitation, Thomas would meet the school bus and take the children back to his apartment. On Wednesday, Paula's mother would pick up the children and, on Thursday, Thomas's mother would pick them up. On alternate weekends, Thomas would have the children with him from Friday after school until the following Tuesday. In addition to this schedule, Thomas testified that he would "watch" the children "and provide care" for them at Paula's request. Thomas estimated that during the one year that the parties had been separated he has watched and cared for the children on 247 days and 93 nights. Tom also testified that he helps both children with their homework almost every night they are at his residence. Paula acknowledged that Thomas helped the children with homework after the separation and that, even before the separation, helping with homework was "mostly" his responsibility.

¶ 8 Thomas testified that since the parties separated he lives in a two bedroom apartment in Ottawa, Illinois. When the children stay with him, each has a bedroom and he sleeps in the living room.

¶ 9 Julie Rolando, Kobe's primary special education teacher for the previous two years, testified that, although both parents attended parent-teacher conferences, Thomas was much more involved in Kobe's education. She testified that Thomas signed most of Kobe's homework sheets and that Thomas communicated with her extensively by writing questions and comments for her in Kobe's planner. Paula testified that, as a special education teacher herself, she found Rolando's course of action regarding Kobe to be completely satisfactory, so she had no need to engage in extensive communications with Rolando regarding Kobe's education. Rolando also testified that it was her observation that Kobe seemed to talk much more about Thomas than he did about Paula and with much more excitement and enthusiasm.

¶ 10 There was extensive testimony from both Paula and Thomas regarding whether Paula packed appropriate lunches for the children, including a photograph that Thomas took of a bag of crushed potato chips. Thomas presented evidence that, on one occasion, there may have been mouse droppings in Kobe's lunch box. Paula denied seeing any mouse droppings but placed mousetraps in the kitchen area after the incident. She also denied sending crushed potato chips in Kobe's lunch.

¶ 11 Thomas testified that, on one occasion, Paula would not let him see the children unless he paid child support. Paula acknowledged making that statement, but she did not follow through on that statement. She also admitted that, on one occasion, she wrote "I want my money" in the dust on the rear window of Thomas's car. Both parties also testified regarding an incident a few

months after their separation when Paula picked up the children at Thomas's apartment. The children were in Paula's car, and Thomas was leaning in to kiss Madison. Paula announced that she had to go and proceeded to back the car up while Thomas was still leaning in the car. She put the car in motion while Thomas was still leaning in the car, forcing Thomas to spin out of the car. Paula testified that she had announced to Thomas that she had to leave and only started the car in motion when Thomas refused to get out of the way.

¶ 12 Paula testified that, on another occasion, Thomas approached her while she was sitting in her car and demanded to know why she was discussing the divorce with Madison. Paula told Thomas that she was just giving Madison "the basics" regarding the pending divorce. Thomas became agitated and would not back away from the car until Paula made several requests for him to do so.

¶ 13 Both parties also testified to an incident involving Kobe's iPad. Paula maintained that Thomas kept the iPad and was viewing sites that were inappropriate for Kobe. One day, after arguing about the iPad, Paula followed Thomas as he drove the children on an errand in town. He became concerned and drove to the police station. He took the children with him into the police station. Paula sat in her car outside the police station. A few minutes later, a police officer came out to talk to Paula. She told the officer that she wanted Thomas to return Kobe's iPad. Shortly thereafter, Thomas returned the iPad.

¶ 14 Paula testified to an incident involving a Nintendo game system that she intended to give to Madison for Christmas. She told Thomas in October that she intended to get the Nintendo for Madison for Christmas. She testified that she was quite upset when Madison returned from staying with Thomas on Christmas Eve with a new Nintendo that Thomas had given her.

Thomas testified that he bought the device for both children and that he had intended it to remain at his house for the children.

¶ 15 The record also contained extensive testimony from family members of both parties indicating that each party engaged in family activities such as trips to museums, parks, and the zoo. Those testifying for Paula testified that she interacted with each child in a loving and caring manner. Those testifying for Thomas testified that they observed Paula's attitude toward the children as somewhat cold and "standoffish."

¶ 16 Approximately one month after the close of proofs, the court announced its decision, granting sole custody of the children to Thomas. The court indicated that it had considered all the relevant statutory factors and found that it was in the best interest of the children that Thomas be awarded custody. The court observed that three of the statutory factors, existence of ongoing abuse, whether a parent was a registered sex offender, and whether a parent was in the active military, were not relevant. The court also determined that violence or the threat of violence was not relevant. The court also determined that factors addressing the wishes of the parties, the wishes of the children, the children's adjustment to home, school, and community, and the interactions of the children with parents, siblings, and other significant persons were "equal" or "not compelling" in reaching its custody determination. The court commented that Rolando's testimony regarding Kobe's positive relationship with Thomas was "particularly compelling." The court further noted that Thomas had been "more effective in addressing the special needs of Kobe" but that neither parent had lacked appropriate care or affection for the children. Regarding the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the children, the court noted with some concern that

Paula has threatened that Thomas would not be able to see the children if he fell behind in child support. Regarding that same factor, the court observed that Thomas should not have given Madison the Nintendo, knowing that Paula planned to do so; however, it believed that the incident was not significant toward the custody determination.

¶ 17 Following Paula's motion to reconsider, the court reiterated its custody determination, observing further that the evidence established that Thomas had, in fact, been the primary caregiver for both children since approximately January 2005. Paula filed this timely appeal.

¶ 18 ANALYSIS

¶ 19 Paula maintains that the trial court erred in awarding sole custody of the children to Thomas. She contends that the court misapplied some of the factors and generally failed to properly weigh Thomas's credibility. Specifically, she maintains that the court erred in finding Thomas did not present a threat of violence given the incident in 2005 and the confrontation regarding Madison in 2011. She also maintains that the court misread Kobe's relationship with Thomas and Rolando's observations regarding Kobe's attitude toward Thomas. Paula maintains that Kobe would be much better off if he remains in her home since stability and structure are key to the success of children with his condition. Moreover, Paula maintains that the trial court was taken in by Thomas's portrayal of himself as a model "stay-at-home" father. She points out that his credibility should be highly suspect given his lack of honesty toward her regarding his employment during the marriage. Lastly, she maintains that she would be better at facilitating and encouraging a close and continuing relationship between Thomas and the children than he would be toward her. She minimizes the incident where she threatened to prevent Thomas from seeing the children until his child support was current and points out that it is Thomas who has

tried to drive a wedge between her and the children by doing things such as giving Madison the Nintendo game. Paula also maintains that the trial court failed to consider certain other evidence, not encompassed in the statutory factors for custody determinations in reaching its determination.

¶ 20 In determining custody, the paramount issue is the best interest of the children, and the trial court is required to consider all relevant factors, including, but not limited to, those listed in section 602 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602 (West 2008)). *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103 (2002). Since the trial court is in a better position than a reviewing court to observe the parties and assess the credibility of the parties and other witnesses, the reviewing court must afford great deference to the trial court's best interest findings. *Seitzinger*, 333 Ill. App. 3d at 106. Thus, the trial court's factual findings will not be disturbed on appeal unless they are against the manifest weight of the evidence or constitute a clear abuse of discretion. *Id.*

¶ 21 In the instant matter, the trial court weighed the statutory factors and determined that it was in the best interest of the children that Thomas have sole custody. The court noted that most of the statutory factors had no relevance or were balanced in favor of neither party. Both parties loved and cared about the children. Both were committed to meeting their needs, including the special needs of Kobe. Both interacted appropriately with the children and both provided appropriate family contact and relationships. The trial court found only two of the statutory factors to be significant: (1) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the children; and (2) the interaction and interrelationships of the children with a parent or parents.

¶ 22 On the first factor, the court found that Thomas would better facilitate and encourage a close and continuing relationship with Paula than she would toward him. The court based this conclusion primarily on her threat to prevent Thomas from seeing the children if he did not pay his child support to her. Paula disputes this conclusion, noting that it was an isolated event and that she did not go through with the threat. She also points to the Nintendo incident as evidence that Thomas would not facilitate or encourage a close relationship between her and the children. Viewing the record before us, we cannot say that the trial court abused its discretion or made factual determinations contrary to the manifest weight of the evidence. A threat to withhold a parent's interaction with his children over a dispute involving child support could be viewed by a trial court as a serious indication of an unwillingness to facilitate and encourage a close and continuing relationship. Similarly, the Nintendo incident could be viewed as a less serious indication of Thomas's ability to thwart Paula's relationship with the children. Thus, we cannot say that the trial court's factual determination regarding this factor was against the manifest weight of the evidence.

¶ 23 The second factor which the trial court found to be significant was the interrelationship between Thomas and the children, particularly Kobe. The trial court noted Kobe's teacher's observations that he seemed to thrive more with Thomas than with Paula. While this observation was disputed by Paula, we cannot say that the conclusion was contrary to the evidence. During rehearing, the trial court added that Thomas had been the primary caregiver for both children, even prior to the separation. Given the totality of the evidence, it cannot be said that the trial court's finding that the children, particularly Kobe, related better to Thomas than to Paula was against the manifest weight of the evidence.

¶ 24 Paula maintained that the trial court failed to properly weigh Thomas's propensity toward violence. She cited the 2005 and 2011 incidents as evidence of his violent tendencies. The trial court did not specifically comment on those incidents, but instead noted generally that it did not find that propensity toward violence was a relevant factor. It is apparent from the trial court's determination that it did not assign any significance to these two incidents, once of which occurred six years prior to the parties separating and the other did not establish any propensity toward violence. We cannot say that the trial court's factual determination regarding the propensity toward violence by either party was against the manifest weight of the evidence.

¶ 25 Paula also maintains that the trial court did not properly weigh Thomas's credibility. If it had, she maintains, it would not have found any of his testimony credible and would have awarded custody of the children to her. It is, however, axiomatic that credibility determinations are best left to the trial court which has the ability to observe the demeanor of the individual. *Seitzinger*, 333 Ill. App. 3d at 106. We find nothing in the record to invalidate the trial court's determination regarding Thomas's credibility.

¶ 26 Paula also maintains that certain other factors, such as the financial and educational backgrounds of the parties, should have been considered by the trial court and, if it had done so, the court would have found that it was in the best interest of the children that she be granted sole custody. To the extent that these factors were relevant, it is clear that the trial court took these facts into account when considering each of the statutory factors. Reviewing the entirety of the record, we find nothing to indicate that the trial court failed to consider these facts when making its custody determination. We therefore find that the trial court's custody determination was not against the manifest weight of the evidence, nor did it constitute an abuse of discretion.

¶ 27

CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of La Salle County, granting sole custody of the parties' minor children to the appellee, is affirmed.

¶ 29 Affirmed.