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2013 IL App (3d) 121004-U

Order filed April 26, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

<i>In re</i> MARRIAGE OF) Appeal from the Circuit Court
JAMES MELCHER,) of the Ninth Judicial Circuit,
) Hancock County, Illinois,
)
Petitioner-Appellant,) Appeal No. 3-12-1004
) Circuit No. 05-D-32
and)
)
JULIE MELCHER,) Honorable
) Richard H. Gambrell,
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:* Trial court's decision denying father's petition to modify custody was not against the manifest weight of the evidence where father had spent little time with the children and had no overnight visits for a number of years. Trial court erred in ordering father to pay all of guardian *ad litem*'s fees without considering the financial resources of both parents.

¶ 2 Petitioner James Melcher and respondent Julie Melcher were married for ten years and had two sons together. At the time of their divorce, the parties entered into a joint parenting agreement,

which awarded Julie residential custody of the children. Seven years later, James filed a petition to modify custody. The court appointed a guardian *ad litem* and held a hearing on James' petition. After James presented his evidence, Julie filed a motion for a directed finding. The trial court granted Julie's motion and ordered James to pay all of the guardian *ad litem*'s fees. James appeals, arguing that the trial court erred in (1) denying his petition to modify custody, and (2) holding him solely responsible for the guardian *ad litem*'s fees. We affirm the trial court's denial of James' petition to modify custody but reverse and remand the trial court's order requiring James to pay all of the guardian *ad litem*'s fees.

¶ 3 James and Julie were married in 1994. They had two children during their marriage, Joe and Jeff. In 2005, James filed a petition for dissolution of marriage. Thereafter, the trial court entered a judgment for dissolution of marriage. Incorporated therein was a marital settlement agreement and a joint parenting agreement. The joint parenting agreement provided that James and Julie would have joint custody of the children and that Julie would have residential custody of the children subject to "frequent and liberal visitation" by James "at such times and for such duration as the parties agree from time to time." Such visitation was to include weekday, weekend, holiday and vacation visitation. The joint parenting agreement further provided that either party could petition the court to set a specific visitation schedule if the parties could not agree on one.

¶ 4 In December 2010, James filed a petition to set a visitation schedule. The petition alleged that Julie had denied James "reasonable parenting time with the children." James asserted that it would be in the best interest of the children to have a set visitation schedule that would allow him visitation on (1) alternating weekends from 6:00 p.m. on Friday to 8:00 p.m. on Sunday, (2) Tuesdays and Thursdays from 5:00 p.m. until 9:00 a.m. the next morning, (3) alternating holidays,

(4) half of the Christmas holiday, and (5) four weeks of summer vacation.

¶ 5 Eleven months later, James filed a petition to modify custody. Julie filed a motion to strike the petition, which the trial court granted. Thereafter, James filed an amended petition to modify custody, alleging that there had been a substantial change in circumstances since the judgment for dissolution was entered in that Julie was living with her boyfriend, Adam Annegers, who had threatened James and the children and placed the children in danger. James also asserted that Julie had limited visitation between James and the children "as a means of trying to collect money" from him.

¶ 6 Julie filed a response, asserting that Annegers had lived with her and the children for five-and-a-half years. She denied the remaining allegations in James' petition. James asked that the children be allowed to testify at the hearing on his petition to modify custody. The trial court denied James' request but appointed a guardian *ad litem* for the children and ordered James to pay all of the guardian *ad litem*'s fees.

¶ 7 In November 2012, the guardian *ad litem*, Kurt Dittmer, issued his first report. Before preparing the report, Dittmer met with Julie, Annegers, James, Joe, Jeff, and staff of Illini West High School, the school Joe attended.

¶ 8 Julie told Dittmer that she did not trust James to have visitation of the children for long periods of time after his criminal convictions in 2007. Since then, she has denied James overnight visits with the children.

¶ 9 According to Julie, her relationship with Joe and Jeff has been "a little difficult lately." She believes that the boys are "going through a phase" but thought that many of their problems stem from Joe's poor performance at school. Julie said that she tried to make sure that the boys did their

homework, but she was not always successful. Annegers agreed that Joe has been on a "downhill slide" in school for the past few years and described his relationship with Joe as "very poor."

¶ 10 After interviewing Joe and Jeff separately on two different occasions, Dittmer determined that Joe was performing poorly in school as a result of teenage rebellion and a "toxic" relationship between Joe and Annegers. Jeff was doing well in school and had a decent relationship with his mother and Annegers. Both children expressed a desire to live with their father. Joe believed his father would make sure that his grades improved.

¶ 11 Dittmer found James to be "high strung," noting that he was very excited and animated about things he feels passionately about, like having custody of his sons. James was very bothered by Joe's poor grades and believes that if Joe lives with him, his grades will improve in a short amount of time. When Dittmer asked James about his criminal history, which included convictions for drug possession and distribution, James became agitated but agreed to submit to random drug testing and said that he already does so through his job.

¶ 12 The principal of Illini West High School, Brad Gooding, expressed concern that Joe was hanging around the "wrong crowd" and believes that Joe is easily influenced. Gooding thinks Joe is a "good kid" and could turn his grades around with some help. Joe's earth science teacher, Connie Flesner, described Joe as a "bright student who could do so much more if he would apply himself." Flesner said that Joe's main problem was not turning in his work.

¶ 13 Dittmer ultimately recommended that James be granted custody of Joe and Jeff because the children wanted to live with James and Dittmer believed that living with James would give Joe the best chance to improve his grades. Dittmer also thought that the children living with James would give the boys, especially Joe, the best chance of healing their relationship with Julie.

¶ 14 In an addendum to his original report, Dittmer reported that Joe was arrested at school for possession of cannabis in October 2012. As a result, Joe was expelled from Illini West High School for the remainder of the school year and had to attend an alternative high school. He may apply to return to Illini West next year if he has good attendance and no major issues at the alternative school. Additionally, in October 2012, Jeff was expelled from the school bus for five days for causing a disruption on the bus. The principal and dean of students of Jeff's middle school thought that Jeff's behavior on the school bus was an attempt to gain attention from his classmates, not an attempt to harm or injure anyone.

¶ 15 A hearing on James' petition to modify custody was held in late 2012 and early 2013. At the time of the 2013 hearing, Joe was 15 years old and Jeff was 12 years old.

¶ 16 Julie testified that Joe had previously attended counseling but was not currently doing so. Julie discontinued Joe's counseling because she did not believe it was working. She would like Joe to see a male counselor and is looking into hiring one.

¶ 17 Dittmer testified that Joe once had a good relationship with Annegers but that the relationship deteriorated when Annegers began to discipline Joe for his poor grades. Dittmer agreed that James would deal with Joe's poor grades in the same way Julie and Annegers did – by taking privileges away. He also agreed that James had not done anything to help improve Joe's grades over the past two years even though the joint parenting agreement allowed James to contact Joe's teachers and school officials.

¶ 18 Dittmer testified that the allegations against Annegers in James' petition to modify custody were untrue. Annegers had never threatened or harmed the boys. Dittmer also did not find that Julie limited James' visitation with the children in an attempt to collect money from James. Dittmer

testified that in addition to James' drug conviction, James was found guilty of telephone harassment against Julie just one week before the hearing on James' petition to modify custody.

¶ 19 James testified that he did not see Jeff and Joe for several months between Christmas 2011 and Easter 2012. He testified that for the past several years, he is only able to see the children "whenever [Julie] wants it."

¶ 20 James testified that if he is granted custody of the boys, he will arrange for Joe to receive tutoring. He has investigated the schools in the school district where he lives. If there is a problem with the public school in his area, Joe can attend the private catholic school. James believes that Joe needs counseling. James believes it is in Joe's and Jeff's best interest to live with him because they hate their mother and "they don't do nothing" at her house. He believes that he could resolve Joe's marijuana problem. He would also make sure that Joe completed his homework.

¶ 21 James initially testified that he did not know the extent of Joe's school problems until recently but later said that Julie may have told him about Joe's poor grades over a year-and-a-half ago. He admitted that he had not taken any steps to correct Joe's poor performance in school. James agreed that he could have called Joe's teachers about Joe's poor performance in school, but he chose not to.

¶ 22 James testified that he was charged with possessing and delivering cocaine on two separate occasions in 2007. He pled guilty to those charges but now claims he was innocent.

¶ 23 After James presented his evidence, Julie moved for a directed finding that James had not satisfied his burden of proof on the petition to modify custody. The trial court granted the motion, finding that although James had proven that there was a substantial change in circumstances because of Julie's restrictions on visitation, it was not in the children's best interest to modify custody. The court noted that Julie was trying to address Joe's problems and that James failed to provide any

specifics about what he would do differently. The court also found that the interest of continuity would be undermined by granting James custody of the children since he had minimal visitation with the children and no overnight visits with them in six years.

¶ 24 Eleven days later, the trial court held a hearing on James' petition to set a visitation schedule. Following the hearing, the trial court concluded that it was in the children's best interest to award James visitation on alternating weekends beginning Fridays at 6:00 p.m. and ending on Sundays at 6:00 p.m. The court also awarded James four weeks of visitation in the summer, visitation on alternating holidays, and visitation during half of the children's Christmas holiday.

¶ 25 At the conclusion of the hearing, Dittmer presented his petition for guardian *ad litem* fees. There was no objection. The trial court entered an order requiring James to pay Dittmer \$1,900.50 in fees for his services as guardian *ad litem*.

¶ 26 I. Petition to Modify Custody

¶ 27 Section 610 of the Illinois Marriage and Dissolution of Marriage Act (Act) allows modification of a prior custody judgment only if the court finds, by clear and convincing evidence, that a change has occurred in the circumstances of the child or either or both parties having custody, and that modification is necessary to serve the best interests of the child. 750 ILCS 5/610 (b) (West 2010). Section 610 of the Act reflects a legislative presumption in favor of the custodial parent and is intended to provide stability and permanency in children's custodial relationships. *In re Marriage of McGillicuddy & Hare*, 315 Ill. App. 3d 939, 942 (2000); *In re Marriage of Pease*, 106 Ill. App. 3d 617, 621 (1982). A party seeking modification of custody must show that the modification is necessary to serve the best interest of the children. *In re Marriage of Knoche & Meyer*, 322 Ill. App. 3d 297, 306 (2001).

¶ 28 A trial court is vested with a significant amount of discretion in child custody matters. *In re Marriage of Valliere*, 275 Ill. App. 3d 1095, 1100 (1995). A trial court's decision to grant or deny a petition to modify custody will be reversed only if it is against the manifest weight of the evidence. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004). In determining whether a judgment is contrary to the manifest weight of the evidence, the reviewing court must view the evidence in the light most favorable to the appellee. *Id.* at 516. Where the evidence permits multiple reasonable inferences, a reviewing court will accept only those inferences that support the court order. *Id.*

¶ 29 The trial court is in the best position to review the evidence and to weigh the credibility of the witnesses. *Id.* at 515. A custody determination is afforded "great deference" because "the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child." *In re Marriage of Gustavson*, 247 Ill. App. 3d 797, 801 (1993).

¶ 30 In this case, the evidence showed that Jeff was doing well at school and home while living with Julie and Annegers. Although he had one disciplinary problem on the school bus, the administrators at Jeff's school believed that the incident was the result of Jeff trying to be a "class clown," but not a malicious act. Joe, on the other hand, was having serious problems at home and school. At school, his grades were very poor, and he was expelled from his high school for possession of marijuana. At home, Joe did not get along with Annegers and did not have a good relationship with Julie.

¶ 31 The trial court acknowledged that both Jeff and Joe expressed a desire to live with James. However, the court did not give great weight to those desires because Jeff was 12 years old, and because Joe, who was 15 years old, was a "potential delinquent who has been expelled from school and apparently got straight F's last year." It was also the court's experience that most boys want to

live with their fathers during their teen and pre-teen years. A child's preference, standing alone, is not sufficient to modify or change a custody award. *Rosenberger v. Rosenberger*, 21 Ill. App. 3d 550, 553 (1974).

¶ 32 The trial court determined that it was not in the best interest of Joe and Jeff to modify custody because Julie was attempting to address Joe's poor grades and drug use and James did not present any specifics regarding how he would address those problems. The court explained: "I can't rely on generalities when I'm determining what's in the kids' best interest." The court also found that the interest of continuity would not be achieved by modifying custody since James had such limited visitation with the children over the past several years and had no overnight visits with the children in six years.

¶ 33 Under these circumstances, we hold that it was not against the manifest weight of the evidence for the trial court to grant Julie's motion for a directed verdict and deny James' petition to modify custody. In viewing the evidence in a light most favorable to Julie, James failed to establish that modification of custody was necessary to serve Joe and Jeff's best interest. Although the evidence established that Joe was having difficulties at school and home, Julie was working to improve those issues, and there was no evidence that living with James would solve Joe's problems. Based on the facts of this case, we affirm the denial of James' petition to modify custody.

¶ 34

II. Guardian *Ad Litem* Fees

¶ 35 Section 506 of the Act provides that in any proceeding involving the custody of a child, the court may, on its own motion or that of any party, appoint an attorney to serve as a guardian *ad litem* for the child. 750 ILCS 5/506(a)(2) (West 2010). When a guardian *ad litem* is appointed, the court must enter an order for costs, fees and disbursements to be paid "by either or both parents." 750

ILCS 5/506(b) (West 2010).

¶ 36 When determining the proper allocation of guardian *ad litem* fees, the court should consider the total circumstances of the parties, including their financial resources and relative ability to pay. *McClelland v. McClelland*, 231 Ill. App. 3d 214, 228 (1992); *In re Marriage of Kennedy*, 94 Ill. App. 3d 537, 549 (1981); see also *In re McCuan*, 176 Ill. App. 3d 421, 428 (1988) (reversing trial court order requiring mother to pay half of guardian *ad litem* fees where mother was unemployed and had no assets while grandparents who filed custody petition had "substantial income"). A court may also consider which party necessitated the guardian's appointment and make that party bear the greater part, if not all, of the guardian *ad litem*'s expenses. *Gibson v. Barton*, 118 Ill. App. 3d 576, 583 (1983); *Roth v. Roth*, 52 Ill. App. 3d 220, 227 (1977). Apportionment of guardian *ad litem* fees rests within the discretion of the trial court and will only be reversed if the trial court abuses its discretion. *In re Estate of K.E.S.*, 347 Ill. App. 3d 452, 468 (2004); *McCuan*, 176 Ill. App. 3d at 428.

¶ 37 Here, the trial considered which party necessitated the guardian's appointment and assessed all of the guardian *ad litem*'s fees against James because James' request to have the children testify at the hearing on the petition to modify custody caused the court to appoint a guardian *ad litem*.

¶ 38 The other important consideration when allocating guardian *ad litem* fees is the financial resources of the parties and their relative ability to pay. *McClelland*, 231 Ill. App. 3d at 228; *Kennedy*, 94 Ill. App. 3d at 549; *McCuan*, 176 Ill. App. 3d at 428. Nothing in the record shows that the trial court considered the parties' financial resources or their relative ability to pay before requiring James to pay all of the guardian *ad litem*'s fees. Under these circumstances, we find that the trial court's order requiring James to pay all of the guardian *ad litem*'s fees to be an abuse of discretion.

¶ 39 Thus, we reverse the trial court's order holding James responsible for all of Dittmer's fees and remand for the trial court to review this issue again after considering the financial resources of both parties.

¶ 40 CONCLUSION

¶ 41 The judgment of the circuit court of Hancock County is affirmed in part and reversed in part.

¶ 42 Affirmed in part and reversed in part; cause remanded.