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2013 IL App (3d) 130316-U

Order filed September 17, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

IN RE THE MARRIAGE OF:)	Appeal from the Circuit Court
)	of the 21 st Judicial Circuit,
KYLE SOUCIE,)	Kankakee County, Illinois,
)	
Petitioner-Appellee,)	Appeal No. 3-13-0316
)	Circuit No. 11-D-485
v.)	
)	
JESSICA SOUCIE,)	Honorable
)	Michael D. Kramer,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court did not err in granting sole custody in favor of father where the father's employment offered a regular schedule and the parents were not able to cooperate with each other regarding their child.
- ¶ 2 Petitioner Kyle Soucie filed a petition for dissolution of his marriage to respondent Jessica Soucie and a trial took place to determine the custody of the parties' son, who was born April 15, 2009. The trial court granted sole custody to Kyle and awarded visitation to Jessica. We affirm.

¶ 3

FACTS

¶ 4 Petitioner Kyle Soucie and respondent Jessica Soucie were married in August 2008. Their son, Z., was born in April 2009. In September 2011, Jessica moved out of the marital residence in Kankakee and leased an apartment for herself and her son in Evanston. Per an informal agreement, Kyle and Jessica shared custody of their son, with Z. spending part of the week with each parent. Kyle would have custody Saturday overnight into Sunday and on Tuesday, and Jessica having custody of Z. the remainder of the time. On December 9, 2011, Kyle filed a petition for dissolution of the marriage. On January 10, 2012, Jessica sought and was granted an *ex parte* plenary order of protection which limited Kyle's visitation to one day per week. On the eve of the proceedings on the order of protection, Kyle and Jessica reached an agreement on a temporary visitation schedule, which granted Kyle custody from 9 a.m. Sunday to 9 p.m. Tuesday and the second Saturday each month. Jessica was awarded custody for the rest of the time. The custody agreement included a "first right of refusal" clause, requiring the custodial parent, when working on Saturday, to offer custody to the other parent before relying on other childcare. The agreement required the working parent to "promptly contact" the other parent regarding his or her Saturday work schedule.

¶ 5 A trial took place on the dissolution petition, where the following evidence was presented. Kyle, who was 37 years old at the time of the trial, resided in Kankakee with Z. and a roommate and his roommate's 9-year-old son. His son from a previous relationship lives in Arizona and visits during school and summer vacations. Kyle pays child support and exercises his visitation privileges with his older son. Both boys like each other and enjoy spending time together. Kyle worked at Aaron's Sales and Lease in Bradley as a management trainee and had been there for 18 months. His usual work days were Monday, and Wednesday through Saturday, with Sunday and Tuesday as his

days off. His work hours extend from 8 a.m. to 9 p.m., depending on the shift. He was an hourly employee earning \$10.52 per hour and eligible to earn overtime when available. Kyle used PlayPalz daycare one day each week while Z. was in his care on Mondays. Kyle's sister picked up Z. from PlayPalz and took him home with her until Kyle got off work.

¶ 6 Jessica, 29 years old at the time of trial, was an audio engineer and tap dance instructor. Beginning in April or May 2010, she worked for Kobotech, earning between \$40 and \$47.50 per hour. Jessica also held a number of part-time positions at various entertainment venues throughout Chicagoland. The nature of Jessica's work results in a busy period from April to September or October, with the summer months being her busiest period. During the winter, she worked only a few days per month. Jessica had no set schedule for her jobs. Jessica did not comply with the first refusal provision in the parties' custody agreement and sometimes took Z. to work with her on Saturdays so that the provision would not be triggered. Jessica used approximately 13 babysitters to care for Z. while she worked, including her mother and grandmother, who live in the New Jersey area. She enrolled Z. in preschool two days per week from 9 a.m. to noon at a local community center.

¶ 7 Jessica sought an order of protection after a December 11, 2011, incident which she alleged Kyle would not return Z. to her and concealed him from her for several days by enrolling and taking him to daycare without notifying her. Jessica worked until 9 p.m. on December 11 and arrived in Kankakee to pick up Z. around 10:30 p.m. Kyle had earlier requested she not attempt to get Z. because of the late hour. When Jessica arrived despite Kyle's request, he noted that she had been drinking. He asked her not to take Z., and Jessica left. The following morning, a Monday, Kyle enrolled Z. in PlayPalz daycare. He returned Z. to Jessica the following evening after her dance class as per their usual schedule. The following three Mondays Kyle took Z. to daycare and kept him

through Tuesday night. After the plenary order of protection was entered, Kyle's visitation with Z. was limited to Monday overnight to Tuesday night.

¶ 8 Kyle testified that Z. was returned to him in an unclean condition on occasion and recounted that Jessica had Z. get a "buzz" cut after Kyle had taken him to the barber in preparation of Kyle's sister's wedding, where Z. served as ring bearer. He was aware Jessica would work Saturday without first offering Kyle the chance to be with Z. He signed Z. up for PlayPalz daycare on a Monday when he was not expecting to have Z. after he refused to allow Jessica to take him to Evanston at 11 p.m. Kyle stated that he and Jessica were able to effectively work out a custody schedule and changes early in their separation. He believed they had the ability to jointly parent Z.

¶ 9 Jessica testified that she researched Evanston schools for Z. and that they engaged in numerous cultural and other activities when together, including visiting Lincoln Park Zoo and Millennium Park and attending a Broadway play in New York. Jessica admitted she did not comply with the first right of refusal provision, that she would often notify Kyle on Saturday morning that she was scheduled to work that day, and that she lied to him about using a babysitter on Saturdays. Jessica interpreted the agreement as not requiring her to contact Kyle when she knew he had to work Saturday too. She also admitted that she returned Z. to Kyle without having bathed him. According to Jessica, Kyle concealed Z. from her for three Mondays while he was enrolled in PlayPalz without her knowledge. She acknowledged she was listed on the daycare documents as a "safe person" and that she dropped Z. off there on occasion. Jessica stated she would be supportive of Kyle's role in Z.'s life.

¶ 10 Several witnesses testified that they observed Kyle and Jessica interact with Z. and that both parents displayed positive parenting skills. The witnesses opined that Kyle was a nurturing parent

who kept a “constant eye” on his son. Kyle’s mother provided daycare for Z. prior to the parties’ separation and continued to do so. Kyle’s sister, who picked Z. up from daycare on Mondays, spent regular time with Z. Videotapes of Z.’s first words and steps taken by Kyle were introduced into evidence. Other admitted exhibits included copies of text message communication between Kyle and Jessica, bank statements, tax returns, the registration materials for PlayPalz daycare, and pictures of Z. when he suffered from a rash.

¶ 11 Following the trial, the court issued a memorandum of decision. It stated that two of the statutory best interest factors favored an award of custody to Kyle and that the other factors did not favor either parent. It emphasized that Z.’s best interest would be served by “establishing a permanent home base.” It also considered that Kyle and Jessica’s inability to “make these basic [child-rearing] decisions makes an award of joint custody inappropriate.” The trial court found Kyle a more credible witness than Jessica, noting that she “made no attempt to hide her disdain for the Father and appeared taken aback when her self-perceived status as ‘Super Mom’ was challenged.” The trial court awarded sole custody to Kyle and parenting time to Jessica. Jessica filed a motion for a new trial, arguing that the proceeding was confusing and disorderly. The trial court denied the motion. She followed with this appeal.

¶ 12 ANALYSIS

¶ 13 Before discussing the merits of this case, we must address Kyle's motion to strike and redact portions of Jessica's brief taken was taken with the case. Kyle argues that Jessica filed answers and responses to discovery without leave of the trial court or under local rule in violation of Illinois Supreme Court 201(m) (Ill. S. Ct. R. 201(m) (eff. Aug. 1, 1989)) and that those documents should not be considered on appeal. The record establishes that Jessica filed requests for and answers and

responses to discovery with the trial court, and served Kyle with notice of the filings. Kyle did not object to the filings in the trial court and thus has waived the issue on appeal. *Urnoneit v. Purves*, 33 Ill. App. 3d 939, 942 (1975) (cannot challenge discovery deficiencies for the first time on appeal). Moreover, the record on appeal consists of “the entire common law record,” including all documents filed in the trial court. Ill. S. Ct. R. 321 (eff. Feb. 1, 1994). Accordingly, we deny Kyle's motion to strike and redact.

¶ 14 The issue on appeal is whether the trial court’s grant of sole custody to Kyle was in Z.’s best interest. Jessica argues that the custody award was not supported by the evidence, the trial was contaminated by chaos and counsel’s improper conduct, she and Kyle demonstrated they could share joint custody, and the trial court discriminated against her because she was a working mother.

¶ 15 The trial court determines custody in consideration of the best interest of the child, using the best interest factors enumerated in section 602 of the Illinois Marriage and Dissolution of Marriage Act (Act). 750 ILCS 5/602 (West 2012); *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 413 (2005). The best interest factors include, in relevant part: “(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; [and] (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.” 750 ILCS 5/602(a)(3), (8) (West 2012). An award of joint custody is appropriate where the parents have the ability “to cooperate effectively and consistently in matters that directly affect the joint parenting of the child.” 750 ILCS 5/2-602.1(c)(1) (West 2012). A strong presumption favors the custody determination reached by the trial court. *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103, 108 (2002). We afford great deference to a trial court’s best interest findings in deciding custody because the trial court is in a better position

to observe the witnesses and assess their credibility. *In re Marriage of Stopher*, 328 Ill. App. 3d 1037, 1041 (2002). We will not disturb a trial court's custody ruling unless it is against the manifest weight of the evidence or an abuse of discretion. *Seitzinger*, 333 Ill. App. 3d at 108.

¶ 16 The trial court found that the interaction and interrelationship of Z. with his parents and other significant persons most favored Kyle. It expressly noted that Kyle's mother and sister had been consistently involved in Z.'s life since his birth and each provided daycare and other assistance to Kyle. The trial court's finding is supported by the evidence. Kyle's mother and sister each testified to their relationship with Z. and their continuing support to Kyle. Z also enjoyed a developing and positive relationship with his half-brother, who regularly visited Kyle during summers and school vacations. In contrast, Jessica presented no witnesses or family members to demonstrate their or her interaction and interrelationship with Z. Jessica's mother and grandmother have provided daycare when they visit from the east coast but are not constants in Z's life as are Kyle's family members. In addition to Kyle's mom and sister, Kyle's roommate also testified to Z's interactions with his parents. Each witness spoke of observing Z. positively interact with both parents, but each witness identified Kyle as the more vigilant and child-centered parent.

¶ 17 The trial court also found the willingness and ability of each parent to foster a relationship with the other parent to weigh in Kyle's favor. This finding is supported by the evidence. Jessica admitted that she failed to comply with the first right of refusal provision in the parties' visitation agreement, that she lied to Kyle about her use of babysitters on Saturdays, and that she took Kyle to work with her on Saturdays to avoid the first right of refusal provision. As found by the trial court, there was no factual basis for the order of protection Jessica obtained against Kyle, which substantially limited his parenting time with Z. The parties' text messages, in addition to testimony,

demonstrated that Jessica and Kyle each behaved badly toward each other, but Jessica’s animosity toward Kyle was overt. For example, after Kyle took Z. for a haircut in preparation of his sister’s wedding, Jessica took Z. for a “buzz cut” prior to the wedding. She regularly made it difficult for Kyle to exercise his first right of refusal by failing to timely notify him of her work status or to notify him at all. On some Saturdays, she would hire a babysitter and bring the sitter and Z. to work with her so as not to trigger the first refusal provisions. Jessica did not present any evidence that Kyle interfered with her parenting and the record indicates his willingness to seek solutions that benefitted Z.

¶ 18 The trial court relied on the parents’ inability to cooperate and make “basic decisions” regarding Z. to find that an award of joint custody would be inappropriate. We agree. The record establishes that difficulties arose in many aspects of the parties’ parenting responsibilities. From transporting Z. between Jessica’s and Kyle’s homes to coordinating his potty training, the parties had difficulty reaching an agreement. The trial court assessed the credibility of Jessica and Kyle and found that Jessica “made no attempt to hide her disdain” for Kyle. This discord seems unlikely to resolve itself as the parties are already in disagreement about where Z. will attend elementary school. The trial court had the opportunity to observe both parents and it concluded that “the father’s world revolves totally around the child.” We will not disturb its conclusion.

¶ 19 In arguing that the trial court used her working status against her, Jessica looks to *Witmayer v. Witmayer*, 467 A.2d 371 (1983) and *Ireland v. Smith*, 542 N.W.2d 344 (1995). In *Witmayer*, the reviewing court affirmed the trial court’s award of custody to the mother, rejecting the father’s claim that he would be a better custodial parent because he was at home full-time and noting that a parent’s need to work is not a factor to be considered in custody determinations. *Witmayer*, 467 A.2d at 375.

In *Ireland*, the reviewing court rejected the trial court's change of custody to the father and its finding that the mother could not go to college and raise a child at the same time. *Ireland*, 542 N.W.2d at 349. As foreign decisions, these cases are not binding. *Condominium Ass'n of Commonwealth Plaza v. City of Chicago*, 399 Ill. App. 3d 32, 50 (2010). Moreover, the cases are factually inapplicable. The trial court did not base its custody determination on Jessica's need to work. It did consider both parents' work schedules but did not consider either parent's need to work a determinative factor in favor of or against custody. Jessica's argument is without merit.

¶ 20 In considering Z.'s best interest, the trial court emphasized the need for permanence and determined that the need would best be met by giving Kyle sole custody. We agree with its determination. As stated above, both Kyle and Jessica need to work and will have to use childcare resources for Z.'s care during their work hours. When in Kyle's custody, Z. attends PlayPalz daycare and has done so since December 2011. Kyle's sister picks Z. up from daycare on Mondays and brings Z. to her house until Kyle picks him up after work. Kyle's mother has also provided childcare since Z. was born and continues to be available. Kyle works a schedule set in advance, with regular hours and shifts. In contrast, Jessica's work is mainly seasonal, with the bulk of her work in April through October. The nature of her work also requires long days, late nights, and weekend work. She has no set schedule or advance notice of jobs. When in Jessica's custody, Z. has been cared for by approximately 13 different babysitters, sometimes two in one day. She admitted that her late hours affected her parenting ability, acknowledging that she did not always bathe Z. because they got home too late and that she attempted to pick up Z. after work at approximately 10:30 p.m., past his 9 p.m. bedtime. Jessica herself testified to the importance of a schedule for a child. The nature of Jessica's employment limits her ability to parent Z. on a regular schedule. The trial court considered this fact,

along with the regularity of schedule when Z. was in Kyle's care, and the other best interest factors, in granting Kyle sole custody. The evidence supports the trial court's findings and we find its determination was not against the manifest weight of the evidence or an abuse of discretion.

¶ 21 Lastly, we address Jessica's claim that the trial was confusing, chaotic and disorderly. We have read the report of proceedings and are familiar with the adversarial manner of the proceedings below. We find nothing arose to a level that would hinder the fairness of the proceedings or prevent the trial court from issuing an opinion based on the evidence presented. The trial court's decision was supported by the evidence. We thus reject Jessica's request for a remand in order to clarify the record. The proceedings were not so disorderly or chaotic as to require clarification.

¶ 22 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 23 Affirmed.