2015 IL App (3d) 140426-U

Order filed May 13, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

RACHEL SERRATT,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Petitioner-Appellee,	)	Kankakee County, Illinois.
	)	
v.	)	Appeal No. 3-14-0426
	)	Circuit No. 12-F-42
THOMAS KIGHER,	)	
	)	Honorable
Respondent-Appellant.	)	Ronald J. Gerts,
	)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err: (1) in denying respondent's request for a continuance where the case had been ongoing for two years, respondent hid his whereabouts, which diminished the time for notice of the removal hearing and his time to secure counsel, and removal was immediately necessary for petitioner, who was the minors' sole financial provider, to begin her new job in Wisconsin; (2) by allowing removal prior to ordering the parties to mediation where respondent forfeited mediation on the issue of removal; (3) in finding that removal was in the children's best interest where petitioner, as the sole financial provider, would be able to start a new job that would substantially enhance the quality of their life and respondent's monthly weekend visitation would not be diminished; and (4) granting removal without a written visitation schedule.

¶ 2 The respondent, Thomas Kigher, appeals from the trial court's order, which allowed the petitioner, Rachel Serratt, to remove the parties' minor children from Illinois. On appeal, Thomas argues that the trial court erred in denying his request to continue the hearing on Rachel's petition for removal, allowing the petition for removal, and failing to order visitation for him upon granting the removal petition. We affirm.

¶ 3 FACTS

¶ 4 The parties, Rachel and Thomas, were never married. On February 1, 2012, Rachel filed a "Petition to Establish the Existence of a Parent-Child Relationship, and to Establish Custody, Visitation, and Support" in regard to the parties' minor children, N.K. (age 4) and E.K. (age 2). In the petition, Rachel alleged and admitted that Thomas was the father of the children and had been named the father on their birth certificates. Rachel requested child support and sole custody of the minors subject to reasonable visitation by Thomas.

¶ 5 On March 9, 2012, Thomas appeared at the parentage hearing *pro se* and acknowledged paternity of N.K. and E.K. The trial court entered a written order decreeing Thomas as the father of N.K. and E.K. The written order also indicated, "temporary custody is awarded to petitioner, Rachel Serratt[,] subject to reasonable visitation to the father." The trial court reserved the issue of child support and continued the case to April 12, 2012.[1] On April 12 and May 10, 2012, the case was stricken from the court's docket.

¶ 6 On February 27, 2014, Rachel filed a petition to remove the minors from Illinois to La Crosse, Wisconsin, where she was to start a new job as an audiology technician on April 1, 2014. Rachel alleged that it would be in the children's best interest if she were allowed to remove the children "due to the opportunities for advancement in employment, income and [for] overall

[1] The record on appeal does not contain a report of proceedings for the parentage hearing.

support and welfare." Rachel further alleged that Thomas did not visit with N.K. and E.K. more than once per month, did not pay child support, and "refused to give information on his exact whereabouts and [his] last known address [was] his mother's residence."

¶ 7 On February 27, 2014, Rachel filed a notice of hearing on her petition for removal scheduled for March 19, 2014 at 9:00 a.m. The notice provided a proof of service to Thomas, care of Russell Kigher, at 647 Harbor Street, Grant Park, Illinois. On March 6, 2014, Rachel filed an amended notice of the hearing with a proof of service that the notice was mailed to Thomas at 347 North Forest Avenue, Unit 1, Bradley, Illinois. On March 11, 2014, Rachel filed second amended notice of hearing with a proof of service that the notice was mailed to Thomas at 647 Hayden Street, Grant Park, Illinois.

¶ 8 On March 19, 2014, Thomas appeared in court for the removal hearing. Thomas informed the court of his address in Rantoul, Illinois. Rachel's counsel informed the court Thomas' revelation of his address had been the first time Rachel was informed of his current residence and his mail had been returned with no forwarding address. Thomas indicated that he had, by chance, learned of the court date from his attorney's secretary. Thomas requested a continuance on the hearing on the petition for removal to obtain an attorney because his counsel had "backed out on Monday." Rachel's counsel indicated that the case could not be continued because he was going out of town and there was no further opportunity for a hearing before Rachel was to start her new job in Wisconsin on April 7, 2014. The trial court noted that the motion had been on filed since February 27, 2014, and denied Thomas's motion to continue.

¶ 9 Rachel testified that, during the time that she and Thomas lived together, they had two children together. N.K was born on January 26, 2008, and E.K. was born on October 18, 2009. Rachel and Thomas had broken up 2½ years ago. Rachel maintained custody of the children.

Thomas did not pay any child support, which made Rachel the children's sole financial supporter. In the last six months, Thomas had visitation with the children once per month. According to Rachel, during Thomas's weekend visitations, the children were usually in the care of Thomas's parents instead of being with Thomas.

¶ 10 Rachel testified that she was a manager of Cricket phone store earning $9 per hour, with no benefits. Rachel had become a certified audiology technician and was offered a job in La Crosse, Wisconsin. The audiology technician position would provide triple the income, a 401(k) plan, and health, dental, and vision insurance benefits. Rachel's grandmother also resided in La Crosse, Wisconsin. Thomas had not provided Rachel with his current address or his employment information. Rachel attempted to serve Thomas a notice of the hearing by mailing the notice to his parents' address. Those notices were returned.

¶ 11 On cross-examination, Rachel testified that on Thomas's weekends with the children, she was not home when Thomas's parents returned the kids because she was working. Rachel testified that she knew that Thomas only saw the kids once per month because when she asks them whether they were with him over the weekend they would say, "no, daddy was working."

¶ 12 Thomas testified that he was the sole provider for Rachel and the kids until the last year of his and Rachel's relationship. Rachel and Thomas separated on December 28, 2011. In July of 2013, Thomas gave Rachel $200 toward daycare expenses. Thomas had paid no other child support. He gave his parents money to care for the children, which they spend on the "kids or their bills or anything else." When the judge asked whether Thomas gave Rachel anything, Thomas replied, "Not a dime." Thomas indicated, "I'm so overwhelmed[,] I just don't know what to say right now."

¶ 13 The trial court allowed the petition for removal and ordered Rachel to work out a visitation schedule that allowed Thomas to see the kids as least one weekend per month in Kanakee County, Illinois. The judge indicated that the basis for his ruling was "economic" in that Rachel was the main support for the children and was not receiving regular child support. The trial court found that there would be a significant economic improvement in the lives of the children and it would be in the children's best interest if Rachel were permitted to move them to Wisconsin.

¶ 14 On March 28, 2014, Thomas, by and through his attorney, filed a motion to vacate the removal order, arguing that he did not receive notice of the hearing, his request for continuance was improperly denied, and removal was granted without visitation. On May 12, 2014, a hearing took place on the motion to vacate. Counsel for Thomas argued that the trial court erred in denying Thomas' motion to continue by granting the petition without first ordering the parties to mediation in violation of Illinois Supreme Court Rules and local circuit court rules. Counsel for Thomas acknowledged that Rachel likely would have been successful on the petition to remove the children even if Thomas had been represented but argued that the hearing should have been continued for mediation on the issue of visitation. The trial court denied the motion to vacate and ordered the parties to mediate the issue of visitation.

¶ 15 On May 22, 2014, Thomas appealed. On May 30, 2015, the trial court found disputes between the parties regarding child custody or visitation and ordered the parties to participate in good faith in mediation to amicably resolve their disputes.

¶ 16 ANALYSIS

¶ 17 On appeal, Thomas argues the trial court erred by: (1) denying his request for continuance; (2) failing to order mediation prior to ruling on the removal petition; (3) granting the petition for removal; and (4) failing to enter a specific visitation order.

¶ 18 Rachel has not filed an appellee's brief on appeal. However, we may address the merits of this appeal under the principles set forth in *First Capital Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (in the absence of an appellee's brief, a reviewing court may address the merits of an appeal where the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief).

¶ 19 I. Notice

¶ 20 First on appeal, Thomas argues that the trial court erred in denying his request for a continuance because he did not have proper notice of the hearing. He contends that Rachel failed to provide him with 30 days of notice prior to the hearing, as mandated by section 601(d) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act). We review *de novo* a question of statutory construction. *In re B.B.*, 2011 IL App (4th) 110521, ¶ 20.

¶ 21 Section 14 of the Illinois Parentage Act of 1984 (Parentage Act) provides, "In determining custody, joint custody, removal, or visitation, the court shall apply the relevant standards of the [Marriage Act]." 750 ILCS 45/14(a)(1) (West 2012). Section 601(d) of the Marriage Act provides:

> "Proceedings for modification of a previous custody order commenced more than 30 days following the entry of a previous custody order must be initiated by serving a written notice and a copy of the petition for modification upon the child's parent, guardian and custodian at least 30 days prior to the hearing on the petition. Nothing in this section shall preclude a party in custody modification

proceedings from moving for a temporary order under this section." 750 ILCS 5/601(d) (West 2012).

¶ 22 In this case, Rachel initially sent Thomas notice of the hearing on her removal petition on February 27, 2014, which was less than 30 days prior to the hearing set for March 19, 2014. However, the removal hearing was not a "[p]roceeding[] for modification of a previous custody order." The trial court had not previously entered a custody order. Rather, the court granted Rachel *temporary* custody of the children in the judgment of parentage. Therefore, the 30-day notice requirement for modification proceedings in section 601(d) of the Marriage Act pertaining to custody modifications of a previous custody order was not applicable to the removal hearing. See 750 ILCS 5/601(d) (West 2012) (providing for at least 30 days notice for modification proceedings commenced more than 30 days following a previous custody judgment; *cf.* 750 ILCS 5/601(c) (West 2012) (providing that "[n]otice of a child custody proceeding" shall be given to the child's parent with no specification as to a number of days of notice).

¶ 23 We acknowledge that pursuant to section 14(a)(2) of the Parentage Act, "If a judgment of parentage contains no explicit award of custody, the establishment of a support obligation or of visitation rights in one parent shall be considered a judgment granting custody to the other parent." 750 ILCS 45/14(a)(2) (West 2012). However, the presumption of a custody judgment contained in section 14(a)(2) of the Parentage Act does not constitute a custody judgment. *B.B.*, 2011 IL App (4th) 110521, ¶ 24. Therefore, at the time of the removal hearing, there had not been a previous custody judgment entered in this case to which the 30-day notice requirement for a modification of custody would apply.

¶ 24 A circuit court has broad discretion when deciding whether to grant or deny a motion to continue, and a reviewing court will not interfere with the trial court's decision absent a clear

abuse of discretion. *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 927 (1997). In this case, Rachel had attempted to serve Thomas with notice of the petition for removal and the hearing date multiple times. The record shows that despite acknowledging paternity of the children, Thomas concealed his whereabouts and contact information. As this court has previously stated, " 'It is a fairly simple matter to keep people and courts advised of one's whereabouts.' " *In re Marriage of Swift*, 76 Ill. App. 3d 154, 157 (1979) (quoting *Sharpe v. Sharpe*, 77 Ill. App. 2d 295, 300 (1966)). Therefore, Thomas's voluntary concealment of himself was the cause of any delay in his receipt of notice and diminishment of time to secure representation. See *In re Marriage of Swift*, 76 Ill. App. 3d 154, 157-58 (1979) (finding that notice was adequate where petitioner used every available means to provide respondent notice of her petition to change custody, including mailing notices to his last three addresses, but respondent voluntary concealed himself from the petitioner and the Illinois courts).

¶ 25 Here, Rachel, as the children's sole financial provider, had an upcoming start date on her Wisconsin employment. Based on the circumstances involved in this case, we can see no reason for the trial court to have delayed its ruling on the petition for removal. Therefore, we find that the trial court did not abuse its discretion in denying Thomas's request for a continuance.

¶ 26 II. Mediation

¶ 27 Next, Thomas contends that the trial court erred by failing to order mediation prior to ruling on the removal petition, as required by the Illinois Supreme Court and local judicial rules. Court rules are to be construed in the same manner as statutes, and our review is *de novo*. *People v. Santiago*, 236 Ill. 2d 417, 428 (2010).

¶ 28 Illinois Supreme Court Rule 905 (eff. Sept. 1, 2013) requires each judicial circuit to "establish a program to provide mediation for dissolution of marriage and paternity cases

involving the custody of a child or removal of a child or visitation issues (whether or not the parties have been married)." Kankakee County local rules provide that mediation shall be ordered for "any contested issue of parental responsibility, custody, visitation, removal or access to children in any action not otherwise determined to be ineligible," and the parties may not proceed to a judicial hearing on contested issues without leave of court or the mediation process has been concluded. 21st Judicial Cir. Ct. R. 9.02(A) (eff. Jan. 1, 2007). The designated judge shall be advised by counsel and/or the parties concerning: (1) an "impediment" of the parties; (2) other circumstances that would unreasonably interfere with mediation; or (3) ineligibility of a case for mediation based upon motion of a party supported by affidavit of facts detailing why mediation would be inappropriate. 21st Judicial Cir. Ct. R. 9.02(C) (eff. Jan. 1, 2007). An "impediment" is any condition, the existence of which, in an individual or relationship, hinders any party to negotiate safely, competently, and in good faith because only parties having a present, undiminished ability to negotiate should be directed by the court order to mediate. 21st Judicial Cir. Ct. R. 9.01(B) (eff. Jan. 1, 2007).

¶ 29 Here, Thomas argues that the trial court was obligated to order mediation prior to conducting a hearing on the removal. However, at the time of the removal hearing, Thomas had forfeited any alleged violation of the rules pertaining to mediation. See *In re Scarlett*, 2015 IL 117904, ¶ 73, n.3. (forfeiture is the failure to timely comply with procedural requirements). Thomas had not sought mediation of custody or visitation issues in the almost two years following the court's parentage order. Additionally, at the time of the removal hearing, Thomas did not base his request for a continuance on a desire for mediation but, instead, on the need to find new counsel. Although Thomas raised the issue of mandatory mediation during arguments on his motion to vacate, Thomas did not argue that the issue of removal should have been

mediated but that the issue of visitation should have been mediated. Therefore, Thomas has forfeited any error of the trial court failing to order mediation prior to allowing removal.

¶ 30 III. Removal

¶ 31 Defendant also argues that the trial court erred in granting Rachel's request for removal. We will not disturb a circuit court's removal decision unless it results in a manifest injustice or is against the manifest weight of the evidence. *In re Marriage of Eckert*, 119 Ill. 2d 316, 330 (1988).

¶ 32 As discussed above, section 14 of the Parentage Act directs the trial the court to apply the standards of the Marriage Act when determining custody, joint custody, removal, or visitation. 750 ILCS 45/14(a)(1) (West 2012). Section 609(a) of the Marriage Act provides that the court may permit a custodial parent to remove a child from Illinois if such removal is in the best interest of the child. 750 ILCS 5/609(a) (West 2012). The burden of proving that removal is in the best interest of a child is on the party seeking the removal. 750 ILCS 5/609(a) (West 2012).

¶ 33 "A determination of the best interests of the child cannot be reduced to a simple bright-line test, but rather must be made on a case-by-case basis, depending, to a great extent, upon the circumstances of each case." *Eckert*, 119 Ill. 2d at 326. When hearing the relevant evidence on the issue of removal, the court should consider: (1) whether the move would enhance the quality of life of the parent and the child; (2) whether the custodial parent's motivation to move is intended to defeat or frustrate the noncustodial parent's visitation rights; (3) the motives of the noncustodial parent for challenging removal; (4) the noncustodial parent's rights of visitation and the best interest of the child in having a healthy and close relationship with both parents and other family members; (5) the potential harm to the child that may result from the move; and (6) whether a realistic and reasonable visitation schedule can exist if the court allows the move.

Eckert, 119 Ill. 2d 316. The factors set forth in *Eckert* are not exclusive. *Shinall v. Carter*, 2012 IL App (3d) 110302, ¶ 46. The *Eckert* factors are to be considered and balanced in making a best interest determination, and the weight given to each factor will vary according to the facts of each case. *Id.*

¶ 34 Here, the move to Wisconsin would enhance the quality of life for Rachel and the children. The new job would not only triple Rachel's salary from that of a minimum wage but would also provide retirement and insurance benefits. There is no indication Rachel's motivation for removal was for any other reason than to create more financial stability for her and the children. There is no indication that the children would be harmed by the removal. Thomas's motivation for challenging removal is a possible diminishment in visitation with the children. However, Thomas exercised his visitation with the children once per month, and the removal was subject to Thomas having visitation with the children in Kankakee County at least one weekend per month. Based on this record, the trial court's finding that removal was in the children's best interest was not against the manifest weight of the evidence.

¶ 35 IV. Visitation

¶ 36 Finally on appeal, Thomas argues that the trial court erred in allowing Rachel to remove the children from Illinois without entering a specific visitation schedule. The trial court orally pronounced that Rachel was to provide Thomas visitation, at least one weekend per month, in Kankakee County. However, the written order, which was prepared by Rachel's attorney, did not provide for visitation. Where there is a conflict between a court's oral pronouncement and its written order, the oral pronouncement controls. *In re William H.*, 407 Ill. App. 3d 858, 866 (2011). As the court's oral pronouncement controls, Thomas's contention that the trial court granted removal without providing for visitation is meritless.

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Kankakee County is affirmed.

¶ 39 Affirmed.