2015 IL App (4th) 140740-U

NO. 4-14-0740

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 15, 2015
Carla Bender
4th District Appellate
Court, IL

In re: MARRIAGE OF	)	Appeal from
CHRISTEL M. CARTER, n/k/a CHRISTEL M.	)	Circuit Court of
SLAUGHTER,	)	Coles County
Petitioner-Appellee,	)	No. 10D155
and	)	
ALAN W. CARTER,	)	Honorable
Respondent-Appellant.	)	Brien O'Brien,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Pope and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in determining *res judicata* did not bar the litigation of petitioner's successive petition to remove the minor children.

¶ 2 Respondent, Alan W. Carter, appeals from the trial court's order granting the petition to remove the minor children to Indiana filed by petitioner, Christel M. Carter, n/k/a Christel Slaughter. Respondent claims the issue was barred by the doctrine of *res judicata* since an almost identical petition was earlier denied and no new facts were presented. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In April 2012, the trial court entered a judgment of dissolution of marriage, awarding the parties joint custody of their three minor children: Christian, age 10; Alaina, age 5; and Jillian, age 3, with petitioner as the primary custodial parent. Respondent was awarded scheduled custodial time.

¶ 5 On August 1, 2012, petitioner filed both a petition to modify custody and a petition for temporary and permanent removal. In her petition for removal, petitioner stated she had been offered a full-time teaching position at Eastern High School in Pekin, Indiana. As grounds for removal, petitioner claimed (1) respondent had "shown a great inability to work reasonably as co-parents," citing several examples of respondent's negative behavior; (2) the children would have a larger family support structure in Indiana; (3) the children would have a wide range of extracurricular activities from which to choose in Indiana; and (4) the distance was "still adequate to facilitate alternating weekend and summer visitation."

¶ 6 On September 14, 2012, the trial court conducted a hearing on the pending pleadings. After considering the testimony from various witnesses, including petitioner and respondent, the court, the Honorable Teresa K. Righter presiding, denied petitioner's requests to modify custody and remove the children to Indiana. The court noted petitioner had violated the court's order from the original custody judgment by moving to the State of Indiana without first obtaining the court's permission to do so. The court stated: "I find her behavior to be in blatant conflict with what she knew was required of her and what needed to be done." Further, the court found petitioner had not demonstrated the move was in the children's best interests. The court ordered petitioner to move with the children back to the Charleston area within 60 days or the court would change the custody order, making respondent the primary custodial parent. Petitioner and the children moved to Robinson, Illinois, to live with petitioner's parents.

¶ 7 In June 2013, petitioner filed a second petition to remove the children to Indiana, alleging (1) respondent was not complying with his court-ordered child-support payments or providing health insurance for the children as ordered; (2) petitioner had been offered a full-time teaching position, which would pay more money than she was currently making as a substitute

teacher and would offer health-insurance benefits for the entire family; (3) the quality of the children's lives would be "enhance[d]" with the move; (4) the school district in Indiana was superior to that of the school district in Illinois; and (5) petitioner would continue to foster and encourage a close relationship between the children and respondent. Respondent filed a motion to dismiss on the grounds the trial court had "already ruled on this matter."

¶ 8 In July 2013, the trial court, the Honorable Brien J. O'Brien presiding, conducted a hearing on respondent's motion to dismiss. The court denied respondent's motion, noting petitioner was not precluded from filing a successive petition to remove. The court stated: "I think, from comparing the petitions, that the allegations are, while similar, are not the same." Rather than scheduling the matter for an evidentiary hearing, the court ordered the parties to mediation. However, because they were unable to obtain an early date for mediation, the court vacated the mediation order and appointed a guardian *ad litem*.

¶ 9 In September 2013, petitioner filed a motion for leave to file an amended petition to remove. In this proposed pleading, petitioner alleged a substantial change of circumstances had occurred since the September 14, 2012, order denying her prior petition to remove, stating, *inter alia*: (1) she has since remarried; (2) her living arrangements with her parents and the minor children in Robinson, Illinois, are inferior to those in Indiana; (3) her job in Indiana (which she already accepted) paid "significantly" more than her substitute-teaching position in Robinson, Illinois; (4) she was not receiving regular child support from respondent; (5) she was commuting between her employment and Robinson, Illinois, with "excessive" transportation expenses; (6) the school in Indiana is superior to that in Illinois; and (7) the children's best interests would be served by moving to Indiana.

¶ 10 On October 8, 2013, respondent filed a motion to dismiss the June 2013 petition and the September 2013 amended petition on the basis of *res judicata*. Two weeks later, on October 25, 2013, respondent filed a second amended petition to remove. She alleged the identical allegations, adding only that the children would be attending the school district in Indiana at which she was employed and that the guardian *ad litem* had filed a report on September 11, 2013.

¶ 11 On November 25, 2013, the trial court conducted a hearing. At this hearing, respondent informed the court he would be filing a motion to dismiss the second amended petition to remove filed on October 25, 2013. A briefing scheduled was established.

¶ 12 Also on November 25, 2013, the parties entered an agreed order, which provided as follows: "That the parties hereto agree that the motion to dismiss [filed October 8, 2013,] shall be confessed by the *** petitioner. The parties further agree that the amended petition to remove minor children filed on September 11, 2013, shall be dismissed without prejudice. The parties further agree that [petitioner] shall be granted leave to file a second amended petition to remove minor children." This language indicated the parties intended the agreed order to apply retroactively, as petitioner had already filed her second amended petition to remove on October 25, 2013.

¶ 13 On January 3, 2014, petitioner filed a response to respondent's motion to dismiss, arguing *res judicata* did not apply due to the alleged substantial change in circumstances since the last order was entered on the issue of removal on September 14, 2012. On February 6, 2014, the trial court entered an order denying respondent's motion to dismiss, finding petitioner's second amended petition to remove was not barred by *res judicata*. After three days of the presentation of evidence, beginning in May 2014 and concluding in July 2014, the trial court

allowed petitioner's second amended petition to remove, vacated the award of joint custody, and awarded petitioner sole custody, subject to respondent's reasonable visitation. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Respondent appeals, claiming the trial court erred when it determined *res judicata* did not apply to petitioner's second amended petition to remove the children to Indiana. "Whether a claim is barred by *res judicata* is a question of law that we review *de novo*." *Curtis v. Lofy*, 394 Ill. App. 3d 170, 177 (2009).

¶ 16 When addressing the effect of *res judicata* on the possibility of a change in child custody after a final divorce decree was entered, our supreme court stated: "The decree is *res judicata* as to the facts which existed at the time it was entered but not as to facts arising thereafter. [Citation.] In proceedings involving child custody the order of the court or judge having competent jurisdiction is a final order, and is binding upon the parties under the same facts and so long as the same conditions exist as did at the time of the hearing and order." *Nye v. Nye*, 411 Ill. 408, 416 (1952). This court has cautioned trial courts regarding the application of the doctrine of *res judicata* in child-custody cases. We feared if the doctrine was strictly applied in such cases, important evidence could be barred that would otherwise be relevant and necessary in considering the best interests of a child. See *In re Marriage of Weaver*, 228 Ill. App. 3d 609, 616 (1992). The paramount question in a removal action is whether the move is in the best interests of the child. *In re Marriage of Eckert*, 119 Ill. 2d 316, 325 (1988). However, in this appeal, we do not address whether the trial court's decision to allow removal was in the children's best interests because respondent's sole argument is that the court erred in denying his motion to dismiss on *res judicata* grounds.

¶ 17 Petitioner filed a total of four petitions to remove between August 1, 2012, and October 25, 2013. Of those four petitions, only the first (filed August 1, 2012) and last (filed October 25, 2013) were decided on the merits. Judge Righter conducted an evidentiary hearing on September 14, 2012, and denied petitioner's request to remove. The second petition (filed June 28, 2013) was filed *pro se*. The court ordered the parties to mediation. Although mediation never occurred, the court appointed a guardian *ad litem*. On September 10, 2013, the guardian *ad litem* filed his report. The June 28, 2013, petition remained pending. One day after the guardian *ad litem*'s report was filed, petitioner requested and was granted leave to file an amended petition, the third petition (filed September 11, 2013). Respondent filed a motion to dismiss the amended petition filed September 11, 2013, claiming it was barred by the doctrine of *res judicata*. Prior to any judicial action on respondent's motion to dismiss, petitioner filed a second amended petition to remove on October 25, 2013.

¶ 18 On November 25, 2013, the trial court entered an agreed order. This order indicated both parties were represented by counsel. It further indicated petitioner filed her petition on June 28, 2013, and an amended petition on September 11, 2013. The agreed order also indicated respondent filed a motion to dismiss on October 8, 2013. The order then stated:

> "3. That the parties hereto agree that the motion to dismiss shall be confessed by the original petitioner, Christel M. Carter now known as Christel M. Slaughter.
>
> 4. The parties further agree that the amended petition to remove minor children filed on September 11, 2013[,] shall be dismissed without prejudice.

> 5. The parties further agree that Christel M. Carter now known as Christel M. Slaughter shall be granted leave to file a second amended petition to remove minor children [(the petition had already been filed on October 25, 2013 (the fourth petition))]."

¶ 19 In his appeal, respondent argues petitioner agreed to the application of the doctrine of *res judicata* as it related to her petition filed June 28, 2013, and amended on September 11, 2013. He claims no new facts sufficient to support a changed set of circumstances occurred by the time she filed her second amended petition on October 25, 2013. Therefore, he argues, the court should have granted his motion to dismiss filed January 7, 2014, alleging her second amended petition to remove (filed October 25, 2013) was barred by *res judicata*. We disagree.

¶ 20 Because the agreed order was not an adjudication on the merits, we need only compare the first petition (filed August 1, 2012) and the fourth petition (October 25, 2013) to determine whether the doctrine of *res judicata* bars the trial court's August 13, 2014, decision on the merits. See *In re Marriage of Tutor*, 2011 IL App (2d) 100187, ¶¶ 13, 23 (an agreed order is not a judicial determination of the parties' rights and is not a final judgment for purposes of *res judicata*).

¶ 21 The doctrine of *res judicata* applies when three criteria are met: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). It is clear the first and third elements are met in this case. There is no question regarding the jurisdiction of the court as it relates to Judge Righter's initial decision on September 14, 2012. Neither party disputes Judge Righter's order

was a final decision on the merits. Likewise, there is no question the same parties who were involved in the initial proceedings were also involved in the subsequent proceedings. The second element, however, requires a bit more analysis.

¶ 22 In determining the identity of causes of action, our supreme court has adopted the transactional test. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998). Under that test, "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park*, 184 Ill. 2d at 311. Moreover, "the transactional test permits claims to be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *River Park*, 184 Ill. 2d at 311. In other words, the question is whether the two proceedings involve the same group of operative facts.

¶ 23 In petitioner's October 25, 2013, second amended petition, petitioner alleged facts different than those that supported her August 1, 2012, initial petition. For example, since the denial of her initial petition to remove, petitioner has married her then boyfriend, who lives in Indiana. Second, the guardian *ad litem* was appointed and had since filed his reports. Third, the children's living arrangements after the entry of Judge Righter's September 14, 2012, order had changed and had become untenable. Fourth, petitioner was offered employment in Indiana in the same school district the children would attend. Finally, respondent lost his job and therefore no longer had stable employment, causing him to be in default on his child-support and health-insurance obligations. These changes meant the trial court was operating under a completely different set of facts than was presented to Judge Righter in September 2012.

¶ 24 With the difference in the factual situation, we determine there can be no identity of cause of action between the two proceedings and therefore, *res judicata* does not apply. We find the trial court did not err in denying respondent's motion to dismiss on *res judicata* grounds.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court's judgment.

¶ 27 Affirmed.