2016 IL App (5th) 150492-U

NO. 5-15-0492

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NICHOLAUS T. LIRELY,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Jackson County.
	)	
v.	)	No. 06-F-69
	)	
KRISTIN THETFORD,	)	Honorable
	)	Kimberly L. Dahlen,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Schwarm and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's decision to modify custody must be reversed where there was no clear and convincing evidence that modification of custody was in the best interests of the child.

¶ 2 Petitioner-Appellee, Nicholaus T. Lirely (Father), filed a petition to modify custody, or, in the alternative, to modify visitation. Respondent-Appellant, Kristin Thetford (Mother), filed both a response to the petition, as well as a counterpetition to modify child support and visitation. The circuit court of Jackson County ruled in favor of Father granting him sole custody of the parties' minor child. Mother appeals the order granting custody to Father, as well as the denial of her motion to reconsider. We reverse.

¶ 3 The parties herein were never married. Father filed a proceeding in 2006 acknowledging paternity of their son, K.M.L., and requested visitation with him. In conjunction with these early court proceedings, the parties were ordered to mediate the issues raised by Father's pleadings. That mediation resulted in an agreed-to order (Agreed Order) entered by the circuit court of Jackson County on March 23, 2007, wherein Mother was granted sole custody of the minor. The Agreed Order also prescribed a visitation schedule and child support obligation to Father. As to Mother, the Agreed Order contained a miscellaneous provision that read as follows: "[Mother] will reside in either Jackson, Williamson, or Union County. If [Mother] should move live [*sic*] outside any of these counties, that shall constitute a change in circumstance and [Father] may petition the court for modification of custody, so long as it is outside the two-year waiting period."

¶ 4 In May of 2014, Mother moved to Morton, Illinois, located in Tazewell County. For the previous five years, Mother had lived in Herrin, Illinois, located in Williamson County. She had lived there in a stable relationship with her then fiancé, Cullen Dace. Mother claimed she was forced to move as a result of her no longer being able to reside with Mr. Dace. The testimony was disputed with regard to the timing of her move to Morton, Illinois. Nevertheless, Mother claimed that she chose to move to Morton because the school district was considered one of the best in the state.

¶ 5 Within several days after learning that Mother had relocated to Morton, Illinois, Father filed, on May 16, 2014, a two-count petition to modify custody or, alternatively, to amend the visitation schedule. Count I of the petition alleged that Mother had failed to

reside in either Jackson, Williamson or Union County, as required by paragraph 7 of the Agreed Order, and requested the court grant him sole custody of the minor. Count II of the Father's petition alleged that he had been denied visitation as set forth in paragraph 4.a. of the Agreed Order because the visitation schedule no longer accommodated his work schedule, and that Mother was unwilling to "trade time or make-up visitation." Therefore, Father sought a change in the visitation schedule.

¶ 6 Mother filed a counterpetition, claiming in count I, that since the entry of the Agreed Order entered in March, 2007, there had been a change in circumstances with regard to K.M.L. in that he had increased financial needs. Count II of Mother's counterpetition also prayed for a change in the 2007 visitation schedule set forth in the Agreed Order. Mother's counterpetition described the circumstances, stating that the "Agreed Order is unwieldy and is not regularly followed" by Father. Father filed a response to Mother's counterpetition wherein he denied that he should be required to pay the statutory amount of child support, but did admit that the visitation schedule from 2007 was "unwieldy." Thus, both parties acknowledged that the visitation schedule set forth in the Agreed Order was no longer working for either of them, or their son.

¶ 7 On August 17, 2015, following a hearing on the parties' petitions, the court entered an order, granting sole custody of the parties' minor son to Father, and crafted a new visitation schedule for Mother. Mother filed a motion to reconsider, which was denied on October 15, 2015. Mother filed this timely notice of appeal.

¶ 8 In her appeal, Mother argues that modification of custody was not in the best interest of the child, and that the presumption in favor of Mother as the current custodial

parent was not overcome by clear and convincing evidence. Mother also takes issue with the trial court's denial of her motion to strike the report of the guardian *ad litem* appointed in this case.

¶ 9 Custody and visitation for children born out of wedlock is controlled by the Illinois Parentage Act of 1984 (Act) (750 ILCS 45/1 *et seq.* (West 2014)). The Act provides that in matters of determining custody and visitation, the relevant standards of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) shall apply. 750 ILCS 45/14(a)(1) (West 2014). Section 610 of the IMDMA (750 ILCS 5/610 (West 2014)) is the relevant statutory provision that offers preliminary guidance in this matter. Section 610(b) provides a statutory mechanism by which a parent may petition the court to modify a child custody provision. It provides in relevant part:

> "(b) The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child." 750 ILCS 5/610(b) (West 2014).

¶ 10 "This section reflects an underlying policy favoring the finality of child custody judgments and creating a presumption in favor of the present custody so as to promote stability and continuity in the child's custodial and environmental relationships. (*Gunter*

v. Gunter (1981), 93 Ill. App. 3d 1043, 1048, 418 N.E.2d 149, 153.) The paramount issue in all matters concerning custody of a child is his or her welfare. Changed conditions, in itself, is not sufficient to warrant a modification in custody without a finding that such changed conditions affect the welfare of the child. (*Brandt v. Brandt* (1981), 99 Ill. App. 3d 1089, 1099, 425 N.E.2d 1251, 1259.)" *In re Marriage of Fuesting*, 228 Ill. App. 3d 339, 344, 591 N.E.2d 960, 963 (1992).

¶ 11 Therefore, if, as in this case, the modification is sought more than two years after the entry of the initial award of custody, the statute requires the petitioner to prove, by clear and convincing evidence, that (i) a change has occurred in the circumstances of the child or the party having custody and (ii) a modification is necessary to serve the best interest of the child. 750 ILCS 5/610(b) (West 2014). In other words, the statute describes a two-step process. First, whether a change has occurred in the circumstances of the parent having custody, and second, whether a change in custody is necessary to serve the best interests of the child. Only if both of these evidentiary burdens are satisfied by clear and convincing evidence may the court modify the prior custody judgment. 750 ILCS 5/610(b) (West 2014). The burden of proof is on the party seeking modification of custody. *In re Marriage of Valliere*, 275 Ill. App. 3d 1095, 1099, 657 N.E.2d 1041, 1044 (1995).

¶ 12 The standard of clear and convincing evidence requires a high level of certainty. Clear and convincing evidence is considered to be more than a preponderance of evidence while not quite approaching the degree of proof necessary to convict a person of a criminal offense. *In re Marriage of Wechselberger*, 115 Ill. App. 3d 779, 785, 450

N.E.2d 1385, 1389 (1983). As previously noted, "[c]hanged conditions alone do not warrant modification in custody without a finding that such changes affect the welfare of the child. [Citation.] Custody cannot be modified unless there is a material change in the circumstances of the child related to the child's best interests and unless the evidence establishes either that the custodial parent is unfit or that the change in conditions is directly related to the child's needs." *In re Marriage of Nolte*, 241 Ill. App. 3d 320, 325-26, 609 N.E.2d 381, 385 (1993). See also *In re Marriage of Andersen*, 236 Ill. App. 3d 679, 681, 603 N.E.2d 70, 71 (1992).

¶ 13 We turn first to the determination of whether there has been a showing of a change in circumstances as to Mother. Sole custody of the minor was awarded to Mother in 2007 by agreement of the parties. At the time the Agreed Order was entered into, it contained a contingency provision that if Mother moved out of one of three identified counties–Jackson, Williamson or Union–the move, in and of itself, triggered that provision of the IMDMA denoting a change in circumstances that allowed for a reconsideration of custody. Therefore, the terms of the Agreed Order bypassed the requirement that Father prove that a change in circumstances had occurred. Indeed, Mother concedes this issue.

¶ 14 Father argues, however, that the move to Tazewell County, even though it was short-lived, was the equivalent of proving that sole custody should be awarded to him. There is no indication, however, that the Agreed Order was meant to make such a determination, and if it was so intended, the court could not have enforced such a mechanical, geographic limitation in lieu of a consideration of the best interest of the

minor. Moreover, section 610(b) "raises a presumption in favor of the present custodian" (*In re Marriage of Andersen*, 236 Ill. App. 3d 679, 681, 603 N.E.2d 70 (1992)), and there is no indication in the record that there was ever an agreement to bypass this statutory presumption. Finally, it is the court's responsibility to determine what constitutes the best interests of the child, and the parties could not abolish this obligation through contract, nor is it an obligation that the court could abdicate.

¶ 15 We next address the second prong of section 610(b), namely the best interests of the child. Here, Father was required to prove, by clear and convincing evidence, that there was a material change in the circumstances of the child related to the child's best interests, and that the evidence established that the Mother was either unfit or that her change in conditions materially affected the child. *In re Marriage of Nolte*, 241 Ill. App. 3d 320, 325-26, 609 N.E.2d 381, 385 (1993).

¶ 16 We recognize that the trial court is vested with significant discretion in child custody matters, and we, sitting as a reviewing court, should be reluctant to interfere in the exercise of that discretion. *In re Marriage of Valliere*, 275 Ill. App. 3d at 1100, 657 N.E.2d at 1044. In doing so, however, we must be careful to ensure that the court follows the strict, two-step evidentiary requirements set forth in the IMDMA, as well as the legislative presumption in favor of the present custodian, and the policy favoring the finality of child custody judgments. "The evidence must establish that the parent to whom custody of the children was originally awarded is unfit to retain custody or that a change of conditions, directly related to the needs of the children, makes a change of custody in their best interests. *Stickler v. Stickler* (1962), 38 Ill.App.2d 191, 186 N.E.2d

542." *Brandt v. Brandt*, 99 Ill. App. 3d 1089, 1099, 425 N.E.2d 1251, 1259 (1981). Mother argues that transferring custody of the parties' son to Father was in error. She argues that the evidence presented by Father did not support a finding, by clear and convincing evidence that modification of custody was in the best interests of the child. We agree.

¶ 17 Preliminarily, we note that section 602(b) provides: "The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." 750 ILCS 5/602(b) (West 2014). Additionally, section 602(a) lists the 10, nonexclusive factors that must be considered by the trial court in assisting in determining the best interests of the child. The statute mandates that the court consider the following:

> "The court shall consider all relevant factors including: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (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; (4) the child's adjustment to his home, school and community; (5) the mental and physical health of all individuals involved; (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person; (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person; (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; (9) whether one of

the parents is a sex offender; and (10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed." 750 ILCS 5/602(a) (West 2014).

¶ 18 Preliminarily, there is no dispute that factors (6), (7), (9), and (10) were inapplicable to the proofs submitted before the court. Therefore, we look first to whether there was any evidence regarding factor (1), the wishes of the child's parent or parents as to his custody. Obviously, this factor did not favor Father and the court found that "both parents want custody." The court drew no further conclusions.

¶ 19 With regard to the wishes of the child, the court chose not to interview the child *in camera*. The court found that "[t]here has not been a showing that [K.M.L.] has as stronger attachment to [Mother] than to [Father]." The court also acknowledged that the minor had lived with Mother his entire life. The court made no other comments regarding this factor, although Jennifer Martin, a counselor with Caring Counseling Ministries in Marion, Illinois, testified in this regard. Ms. Martin has a master's degree in educational psychology and works with children and adults. She was produced as a witness by Mother, and testified that she had had the opportunity to see the minor four times prior to the hearing. According to her testimony, the minor was well-adjusted. "He was relaxed," and was able to share information about Mother's household and Father's household in a "light-hearted, easy fashion." Ms. Martin further testified that the minor "knows his Mother to be a reliable constant in his life," and rendered the opinion that because of this relationship, the minor "is so well adjusted." During cross-examination,

she testified that the minor had never indicated to her which parent he preferred to reside with. Father called no witness to rebut the testimony of Ms. Martin, nor did he offer his own expert witness.

¶ 20 In its discussion of factor (3), the interaction and relationship of the child with his parents, his siblings and any other person who may affect the child's best interests, the court found the testimony showed that the minor had a good relationship with Mother, Father, his stepmother and his siblings. Again, Ms. Martin testified that she had seen the minor, K.M.L., interact with his little sister. Ms. Martin testified that K.M.L. "is a very loving big brother." Ms. Martin indicated, in fact, that K.M.L. loved both of his little sisters, which included the child Father has had since his remarriage. Ms. Martin's testimony indicated that K.M.L. had "fun at both households," and that he includes all of his extended family in his conversations with her. Jennifer Thompson was the guardian *ad litem* appointed by the court. She had the opportunity to visit with the minor while he was at Father's house. She did not visit with the minor while he was at Mother's home. Nevertheless, after observing the child and allowing him to interact with her, Ms. Thompson concluded that the minor is "a very sweet, articulate, and compassionate young man. He is proud of his mom, dad, and both of his sisters (although they get on his nerves sometime)."

¶ 21 Despite all of this evidence, the court's order regarding this factor went on to indicate that Mother did not seek leave to move out of one of the three counties identified in the Agreed Order. As noted previously, there is no indication that the parties intended

to confine one another to one of these three counties until the minor turned 18 years of age.

¶ 22 The fourth factor relates to the minor's adjustment to his home, school, and community. Mother offered the testimony of Miss Bullock, who had two children, one of whom was nine years old. She testified that her son and K.M.L. were friends and had been friends for several years, when they both attended school in Herrin, Illinois. While in Herrin, the boys were on sports teams together, and played at one another's house. Miss Bullock indicated that the minor had slept-over as recently as a month prior to the hearing, as the boys remained friends. She also testified that in the years that she had been in Herrin, she and Mother took the boys to movies, bowling and birthday parties. When she visited with Mother, Bullock described the house as "immaculate." When asked about the minor's hygiene, Miss Bullock said she never noticed that the minor had any hygienic problems, like failing to bathe, brush his teeth, or having messy clothes. The court also found that the record indicated the minor had "good grades," although in his second semester at Morton, they had slipped "slightly." Mother testified he had been accepted to a "gifted program" in Morton. Additionally, the child had several unexcused absences from school. Mother testified that she had suffered from mononucleosis. Father offered no rebuttal testimony, as, as previously indicated, the minor's grades at school were good.

¶ 23 All of the parties agreed, and the testimony so indicated, that Mother and Father attended the minor's extracurricular activities. Father complained that Mother enrolled the minor in these activities, and, in some cases, did not inform Father until after the

minor had been enrolled. There was no testimony that Father had any right to decide whether or not the minor could play extracurricular activities, and whatever occurred, Father acknowledged that he attended his son's games when he could.

¶ 24 Ms. Martin also testified regarding this factor. She indicated that she asked the minor "what he thought about possibly moving. And his statement was: 'I've lived at my mom's all my life.' He really didn't feel like he was able to say what it would be like, because he has lived with his mom all his life." She further explained that the child is unsettled because he does not know who he will be living with, or where he will be going to school, but is a very well-adjusted child. But when further questioned, Ms. Martin indicated that because Mother had been the constant in K.M.L.'s life, it was her opinion that this was the reason the minor was so well-adjusted. She believed he "was doing well at this point." Father offered no evidence to contradict this testimony.

¶ 25 With regard to factor (5), the mental and emotional health of the parties, the court reached no conclusion regarding the evidence presented. The unrebutted evidence was that Mother had contracted mononucleosis in May or June 2015. Otherwise, despite Father's allegations and Mother's counterallegations, there was simply no evidence that the minor was negatively impacted by any conduct of either parent. Ms. Martin also testified that the minor never had discussed negative allegations made by either Mother or Father. When asked by the court why Mother had taken the minor to Ms. Martin if "there's nothing wrong," Martin responded, "To make sure that there wasn't. In a sense, *** it's beneficial for a professional to meet with a child to find out if there's something that he's not sharing with Mom or Dad."

¶ 26 In regards to factor (8), the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, the best evidence is that the minor, himself, reported a loving relationship with both Mother and Father. The parties engaged in lengthy testimony regarding the difficulties encountered by the terms of the Agreed Order. Accusations about who was at fault regarding the visitation schedule issues and extracurricular activity notifications were traded back and forth in the testimony. The reality is, however, that the unrebutted testimony of the only professional before the court was that K.M.L. loved his Mother and his Father, and his siblings and extended family. The minor never spoke badly about any of his family. He was a well-adjusted child. In its order, the court was "extremely concerned" that Mother took the minor to Ms. Martin, and asked several questions about her evaluation. Preliminarily, Ms. Martin explained that the reason for Mother bringing the minor to counseling was to make sure that there was nothing bothering the minor, which is "beneficial for a professional to meet with the child to find out if there's something he's not sharing with Mom or Dad." The court also inquired about an intake form, which had some disparaging remarks made by Mother about Father. Here, Ms. Martin explained that the relevant portion of the intake form at issue was completed by her. It contained information given to her by Mother, and reflected Mother's concerns regarding the overall situation. There is no evidence that the minor was present when the form was filled out by Ms. Martin. The concerns raised by Mother, as reflected on this form, were deemed by Ms. Martin, as a result of her evaluation of the minor, as unfounded. The evidence was clear that the minor truly enjoyed a close and loving

relationship with Father, and the cryptic notes on the intake form did not reveal an unwillingness by Mother to continue this relationship with Father. Indeed, despite the court's concerns, the court made no findings that because of the statements made by Mother to Ms. Martin, that Mother had an inability to facilitate, encourage and maintain a close and continuing relationship between the Father and his son. The court also made a reference to the 2010 visitation issue which was irrelevant, as both parties agreed the visitation schedule in the Agreed Order was unwieldy. As regards the minor, it is clear from the testimony that both Mother and Father had succeeded in facilitating a good relationship with the child, that the minor loved his siblings, that the parents attended the minors' extracurricular activities, and that the minor knew and loved his extended family. The court made no findings to the contrary.

¶ 27 The court, after considering the foregoing factors, found that it was in the best interest of the minor that sole custody be changed from the Mother to the Father. The court did not find Mother unfit, nor did it find that the minor had been materially affected. We believe this is because Father did not prove, by clear and convincing evidence, that any of the actions by Mother adversely affected the child. By all accounts, the minor is a normally functioning, well-adjusted young child who loves his siblings and extended family. Father offered no evidence to the contrary. We therefore must reverse the trial court's decision transferring sole custody to Father.

¶ 28 Because of the foregoing, we need not address Mother's other contentions on appeal. In light of our disposition, however, the circuit court will need to address the

remaining issues raised by the parties' pleadings, namely visitation and child support. Therefore, remand is necessary.

¶ 29 We further note that pursuant to Supreme Court Rule 311(a)(5) (eff. Feb. 26, 2010) our decision in this case was to be filed on or before April 11, 2016, absent good cause shown. The briefing schedule was delayed, however, by both parties seeking and receiving numerous extensions of time in which to file briefs, resulting in oral argument being delayed until after the filing date. Consequently, we find that good cause exists for issuing our decision after April 11, 2016.

¶ 30 For the aforementioned reasons, we reverse the judgment of the circuit court of Jackson County and remand this cause for further proceedings with regard to visitation and child support.

¶ 31 Reversed and remanded.