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2012 IL App (3d) 110513-U

Order filed July 10, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

In re A. E. B.-K.,	)	Appeal from the Circuit Court
	)	of the 9 <sup>th</sup> Judicial Circuit,
a Minor.,	)	McDonough County, Illinois,
	)	
(Tania L. B.	)	
Petitioner Appellee,	)	Appeal No. 3-11-0513
	)	Circuit No. 04-F-40
v.	)	
	)	
Keith T. K.,	)	Honorable
	)	Patricia Walton,
Respondent-Appellant.)	)	Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Justice Wright and Justice Holdridge concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court's determination to grant the mother's petition for removal was against the manifest weight of the evidence because the trial court did not consider that the father had custodial time with the minor on multiple days of the week, and the mother did not meet her burden of showing that the *Eckert* factors, and the other relevant considerations, weighed in favor of removal.

¶ 2 Tania B., the petitioner, filed a petition to remove her minor daughter, Alexis E. B.-K., to California, and the trial court granted this petition. Keith K., the respondent and Alexis' father, appeals, contending that the trial court: (1) erred when it granted Tania's petition for removal because it did not properly consider the *Eckert* factors, and also improperly considered that neither Tania nor Keith had a career in Macomb, Illinois; (2) abused its discretion when it tied Keith's obligation to provide one-half of Alexis' transportation expenses to whether he continued to live in McDonough County; (3) abused its discretion when it declined to abate Keith's child support obligation during the times he had extended visitation with Alexis; and (4) abused its discretion when it denied Keith's motion to stay enforcement of the judgment allowing removal pending the instant appeal. We reverse.

¶ 3 **FACTS**

¶ 4 Tania B. gave birth to a daughter, Alexis E. B.-K., on December 7, 2003. At that time, Tania and the child's father, Keith K., were not married. The parties subsequently ended their romantic relationship, and never married.

¶ 5 On April 16, 2004, the parties entered into an Agreed Order and a Joint Parenting Agreement. The Agreed Order provided, among other things, that the parties would share joint custody of Alexis, and that Tania was the residential custodian. This order also provided Keith with the following visitation: alternating weekends from Friday evening until Sunday evening; every Monday; every Thursday morning; one half of the day for every major holiday and Alexis' birthday; and one-half of Alexis' summer vacation from school. This agreement also prohibited either party from moving Alexis' permanent residence outside of Illinois without first securing written permission from the other parent or court approval.

¶ 6 On December 8, 2010, Tania filed a *pro se* petition for a change in custody, and asked the court to permit her to move Alexis to California, where Tania's husband, Joe Hui, resided. Tania subsequently retained counsel, who filed an amended petition for removal. In this petition, counsel contended that Tania wanted to relocate to Culver City, California, so that she could reside with her husband, and pursue better educational, cultural, and financial opportunities. In the amended petition, Tania acknowledged she and Keith had "varied substantially" from the visitation schedule set forth in the Agreed Order.

¶ 7 Tania included printed web pages with her petition that showed a variety of museums and other activities available in Culver City, and she also attached information regarding a grade school in Culver City. Furthermore, in a supporting memorandum, Tania noted that a popular website gave the school she chose for Alexis in Culver City a "9 out of 10 rating," while Alexis' current school in Macomb received a "6 out of 10." Keith filed a response opposing removal and noting, among other things, that the parties' ability to cooperate concerning Alexis' visitation resulted in the "substantial presence of both parents in the life of [Alexis.]"

#### ¶ 8 TANIA'S TESTIMONY

¶ 9 The court conducted a hearing on Tania's removal petition on May 17, 2011. Tania testified as follows. She and Keith, who were both originally from the Chicago area, moved to Macomb, Illinois, to attend school at Western Illinois University (WIU). Tania's family was dispersed outside of Illinois, but Keith's family resided in the Chicago area. Alexis was born in Macomb and, except for one year of her life, has always lived in Macomb.

¶ 10 Keith graduated from WIU with a bachelor's degree in psychology. Tania, however, only completed two semesters of school at WIU, and enrolled in a semester at Spoon River College,

but did not finish that semester. Tania was currently employed at Mosiac, a home for physically and mentally disabled adults, where she worked 70 hours every two weeks and earned \$10.09 per hour. This job was stressful, and was not Tania's career. Tania's long-term goal was to finish school, and she wanted to enroll at the University of California, Los Angeles (UCLA), if the court granted her petition for removal. Tania had received information about an online writing program through UCLA. She acknowledged that she never considered re-enrolling at WIU.

¶ 11 Tania also expressed an interest in taking a three-week Emergency Medical Technician (EMT) course, and after which she could be hired for an EMT job in California that paid a salary of \$35,000-\$45,000 per year. Tania did not plan to go to school full-time and also work full-time, but she planned to work so that she could establish residency for tuition purposes at UCLA, and then return to school and possibly work part-time. Tania believed that her financial position would be better if the court granted her petition, and in turn, Alexis would then be able to participate in more extracurricular activities in California. She acknowledged that Alexis had recently participated in soccer and ballet in Macomb.

¶ 12 Tania married Joe in October 2010. She and Joe had attended junior and senior high school together, and recently reconnected over the internet. She had seen Joe in person five times before they got married. Joe worked in the television industry, and before she married him, Tania knew that he was not willing to move to Illinois. Joe earned approximately \$43,000 last year. He was not part of his professional union, and while there were "no true guarantees" that Joe would have work at any given time, the same company kept hiring him to work on projects.

¶ 13 Joe currently resided in a one-bedroom apartment, but Tania believed that a two-bedroom unit was set to open in his building in August. She conceded that the cost of living was higher in

Culver City, California, than in Macomb, Illinois, but was "surprise[d]" when Keith's counsel asked if she knew that \$43,000 in Culver City was the equivalent of \$21,000 in Macomb. Both she and Joe had student loans, and Joe also had a car payment.

¶ 14 Tania introduced Joe to Alexis after they had been dating for seven months. Joe and Alexis had a good relationship, and currently spoke over the phone. Alexis and Joe liked food, and they planned to cook together and visit restaurants if the court granted the petition for removal. Joe also planned to take Alexis to the premiers of the movies on which he worked. Tania contended that the school that Alexis would attend in California was rated several points higher than Alexis' current school in Macomb, Illinois, but admitted that the scores were based on standardized testing that differed from state to state. She believed that the school in California was safer because it was gated, and identification was required to gain admittance. Tania acknowledged, however, that Alexis' school in Macomb also required visitors to sign in before they entered the school. She also alleged that a pedophile was walking around the playground at Alexis' school in Macomb last year. Alexis had some friends at her school in Macomb, but they were moving away from the area.

¶ 15 Alexis had hearing and speech problems. More specifically, Alexis had trouble spelling because she heard words differently than how they actually sounded. Tania testified to the following differences between the schools in California and Illinois: the Culver City school had a program that integrated Alexis' speech therapy into her main classroom, while her speech and main classrooms were separate in Macomb; the Culver City school integrated Spanish lessons into the main classroom, but in Macomb, 20-minute Spanish classes were offered twice per week after school; the Culver City school had more after-school activities than did the school in

Macomb, including on-site tutoring, and while Alexis participated in an after-school program in Macomb, it was more for activity time and not homework, unless Alexis requested help with it. Tania also believed that the California school was more diverse than the Macomb school, and in general, California was more diverse, and offered more cultural events and museums, than Macomb.

¶ 16 Tania had Raynouds, a vein disorder that led to restrictions on the blood flow to her extremities. She believed that moving to a warmer climate would help this condition, but admitted that she had not sought a move of this sort until after she married Joe. She also acknowledged that she had previously considered moving to Alaska to be with a different boyfriend, but Keith would not agree to her taking Alexis. Tania admitted that the parties subsequently entered the Joint Parenting Agreement, and this agreement included the restriction on either parent's ability to permanently remove Alexis from Illinois.

¶ 17 Tania and Keith had cooperated with visitation for the duration of Alexis' life, and Keith had even crafted his work schedule around her work schedule so that he could have custody of Alexis while she was at work. Keith was "involved frequently" with Alexis, spent as much time with Alexis as he could, and occasionally stopped by to see Alexis when Tania had custodial time with her. Tania considered Keith a "very active father[.]" and Alexis enjoyed spending time with him. Tania proposed that if the court granted her petition for removal, that Keith could have custodial time with Alexis during her summer, Christmas, and spring breaks from school, and also during her Thanksgiving break if Alexis had sufficient time off. According to Tania, this amount of time would be equivalent to the time provided to Keith in the original Agreed Order.

¶ 18 Tania believed that "there[ was] nothing really [in Macomb] for [Keith,]" and that Keith

should move to California if the court granted her removal petition. Tania contended that Keith stayed in Macomb because it was "easy" for him to do so, explaining that Keith worked at the Ponderosa restaurant, he paid only \$100 to \$150 per month in rent, and had no lease, so he could move whenever he wanted. She also stated, however, that Keith had applied for a job in or near Chicago at the company where his mother worked, but was not able to secure employment there.

¶ 19 Overall, Tania believed that her life would improve by moving to California because she would get to reside with her husband; the job market was better and she could potentially live with two incomes, and thus, Alexis would be able to participate in more after-school activities; the cultural opportunities were superior in California to Macomb; she could be at home during the times Alexis was not in school because she would not have to work, and if she did work, she could work only day hours. Tania was "not trying to destroy" Keith's relationship with Alexis by moving, but the move "was for [her]."

#### ¶ 20 KEITH'S TESTIMONY

¶ 21 Keith testified as follows. He, Tania, and Alexis had planned to move back to the Chicago area prior to Tania's request for removal. The parties had "gone above" the visiting time that he was provided in the Agreed Order, and currently, Alexis spent three or four nights per week with him. During these times, Alexis sometimes slept at his residence, while other times she returned to Tania's residence. Keith participated in Alexis' parent-teacher conferences, doctors' appointments, and extra-curricular activities.

¶ 22 Keith currently lived with a friend named Jeff Brown, and Alexis did not have her own room at his home. However, during the time that Alexis spent the night with Keith, she would sleep in his bed. There was a computer room in the home, and his roommate offered to let

Alexis have the room, but Keith had yet to accept this offer because Alexis had been returning to sleep at Tania's home recently. Alexis kept her toys and other belongings in this room though. Keith acknowledged that Dave Miller, another friend, often spent the weekends with him and Jeff, and that this friend would sleep in Jeff's bed, while Jeff would sleep at his girlfriend's residence or elsewhere in their residence. Keith and Alexis spent their time together by going shopping, going out for pizza and seeing a movie; going to the park and for walks; and otherwise playing. On school nights, Keith's routine with Alexis was to assist with her homework, review her spelling words, and give her a bath.

¶ 23 Keith twice stated that his "daughter [was his] life[.]" and that he and Alexis had a very close relationship. His relationship with Alexis was important because he did not have a relationship with his own father. He believed that if the court permitted Tania to move to California, their relationship would be harmed, and he also feared having to pick up his life and move, only to have Tania meet a man in another part of the country and then want to move again.

¶ 24 Keith also presented the testimony of three friends and his mother. In general, they opined that Keith and Alexis shared a close relationship, that Keith was a very active father and put Alexis first in his life, and that it would not be in Alexis' best interest to move to California.

¶ 25 The court issued an oral ruling at the conclusion of the one-day hearing, and made the following findings. The court commended Tania and Keith for cooperating with each other in the rearing of Alexis. Neither Keith nor Tania had "what [it] would consider to be a career whereby that influence[d] where [they] can live or not live based upon a career [they] might have, which looking from the Court's perspective, that eliminate[d] a potential tie at least to this community that [they], one parent has, should remain here because of career obligations."

¶ 26 The court considered the factors articulated in *In re Marriage of Eckert*, 119 Ill. 2d 316 (1988). First, concerning the likelihood that Tania's and Alexis' lives would be enhanced by moving to California, the court noted that Tania reported that the school in Culver City rated higher than the school in Macomb, and that California presented cultural and other opportunities. Also, Tania had Raynouds, which was affected by the cold and climate. Tania's life would be enhanced because she would be able to live with her husband, and there was no evidence that Tania planned to move anywhere other than California. Next, Tania's motive for moving was not a ruse intended to defeat or frustrate visitation, and while the court "underst[oo]d" Keith's motives for wanting Alexis to remain in Illinois, he was likely frustrated that his plan to move Tania and Alexis back to Chicago did not work.

¶ 27 Concerning Keith's visitation rights, and whether a realistic and reasonable visitation schedule could be reached, and the court concluded that "visitation [could] still take place in a meaningful manner." The court believed that the instant case had certain correlations with *In re Marriage of Collingbourne*, 204 Ill. 2d 498 (2003), a case that discussed indirect benefits to the child upon removal. In *Collingbourne*, the court considered that the mother would be able to remarry and live with her husband in the other state, which would create a new family and social environment for the minor; an improvement in the family's financial situation; a more flexible work schedule and hours for the mother; and academic and cultural amenities.

¶ 28 The court granted Tania's petition for removal. It ordered a visitation schedule for Keith that included all but the first and last weeks of Alexis' summer vacation, a portion of Alexis' Christmas break with Alexis spending Christmas with each parent in alternating years, and Alexis' spring break. Also, as long as Keith remained in Macomb, Tania would be responsible

for paying for Alexis' airfare to Illinois, but if Keith relocated to Chicago or anywhere else, the airfare was to be equally divided. If the parties arranged for additional visitation, Keith must pay for it. Further, Tania must make arrangements for "Skyping to occur so that [Alexis] could have frequent contact with her father."

¶ 29 At that point, counsel for Keith asked if the court would "be inclined to grant an abatement of child support during the summer" while he had Alexis in his custody because Keith would have to pay for child care during the times he was working. Tania responded that she could "send the card with [Alexis] during her trips[.]" and that "she did not mind if [the card was] used for [Alexis]." The court responded that it ordered Tania to pay for the airfare because it did not abate Keith's support obligation, but then stated that it would reduce Keith's child support payment by one-half during the summer. The trial court asked Tania's attorney to prepare a written order. A single docket entry in the record corresponds to the date of the removal hearing and indicated that a "[r]uling [was] on record."

¶ 30 On July 8, 2011, Keith filed a notice of appeal and a motion for stay of enforcement of the judgment pending appeal. On July 11, 2011, Anne B., Tania's counsel, wrote the court a letter. She informed the court that she submitted a draft order to Lisa S., Keith's counsel, on June 7, 2011. Lisa replied with comments. On June 21, 2011, Anne sent a second draft order to Lisa, which incorporated some, but not all, of Lisa's comments. Because Lisa did not respond to the second draft, Anne contacted her by email on June 29 and July 5, and also by telephone on July 5, to determine whether she approved of the draft order. Anne then referenced the July 8 notice of appeal, and stated that Lisa had contacted her and requested that she "change the 'effective date of the order' to the date of entry," and not the date of the oral pronouncement, "which would

make [Lisa's] notice of appeal somehow timely." Anne then "urg[ed] the Court to enter to effective date of the Order as May 17, 2011, and not July 2011." Anne continued that she was "loathe to re-write an order that would favor [Lisa's] untimely appeal."

¶ 31 On July 21, 2011, the court entered a written order, which essentially mirrored its oral findings. The court specifically found that neither party had a career or salaried position that was "location-dependent[,]" and neither party had any family ties to Macomb. The court also noted that visitation would be altered, but that it could occur especially with the use of "virtual visitation," and that it was satisfied that the parties would continue to cooperate with respect to Alexis' rearing in the future. This order also clarified that Keith would have to pay one-half of the transportation expenses were he to move out of McDonough county. The court hand wrote on this order that "the effective date of th[e] order [was] May 17, 2011."

¶ 32 Tania subsequently filed a response to Keith's motion for a stay. On August 22, 2011, the court conducted a hearing on Keith's motion, and denied it. The court specifically found that "[it had] considered the best interests factors in making its determination[,]" and that it appeared to the court that the motion was a motion for reconsideration of its prior ruling. The court did not see anything in Keith's motion that would change its determination of Alexis' best interests.

¶ 33 Keith appealed.

¶ 34 ANALYSIS

¶ 35 I. Jurisdiction

¶ 36 Before we may address the issues raised by Keith on appeal, we first consider whether we have proper jurisdiction over the instant appeal. See *People v. Aldama*, 366 Ill. App. 3d 724 (2006) (an appellate court has an independent duty to ensure that it has proper jurisdiction, even

if the parties have not raised a jurisdictional issue).

¶ 37 Pursuant to Illinois Supreme Court Rule 272 (eff. Nov. 1, 1990), if the trial court requires the prevailing party to submit a draft order after it announces its final judgment, "the judgment becomes final only when the signed judgment is filed." A notice of appeal filed prior to the time when the written judgment is signed and filed is premature, and it will not confer jurisdiction on a reviewing court. *Stoermer v. Edgar*, 104 Ill. 2d 287 (1984).

¶ 38 Under Illinois Supreme Court Rule 303(a)(1) (eff. June 4, 2008), a party must file a notice of appeal or any posttrial motions challenging the judgment in the trial court within 30 days of the entry of the judgment, or the order disposing of the final pending posttrial motion, respectively. Rule 303(a)(1) further states that "[a] notice of appeal filed after the court announces a decision, but before the entry of the judgment or order, is treated as filed on the date of and after the entry of the judgment or order." See *Eclipse Mfg. Co. v. United States Compliance Co.*, 381 Ill App. 3d 127, 133 (2007) (where a court issued an oral ruling on July 25, 2006, the appellant filed a notice of appeal on August 22, 2006, and the court entered a written order on August 25, 2006, court found that under Rule 303(a)(1) "the August 22, 2006, 'protective' notice of appeal [was] treated as filed on August 25, 2006, the date on which the final judgment was entered"). Furthermore, pursuant to Rule 303(a)(2), when a trial court renders a decision on a timely filed postjudgment motion, a premature notice of appeal takes effect when the trial court enters the order disposing of the matter raised in the posttrial motion. See *Yunker v. Farmer's Auto. Mgmt. Corp.*, 404 Ill. App. 3d 816 (2010). A motion to reconsider is considered to be a posttrial motion for purposes of Rule 303, but a motion to stay is not. *First Indiana Bank v. Goldman*, 279 Ill. App. 3d 133 (1996). Although we make no comment on the

propriety of the trial court's decision, we too will treat Keith July 8, 2011, motion to stay as a motion to reconsider, if only to maintain uniformity and fairness in this appeal.

¶ 39 In this case, Keith's counsel filed a notice of appeal on July 8, 2011. This notice of appeal came after the trial court issued its oral ruling on May 17, 2011, but before the court entered its written order on July 21, 2011. Thus, we must consider the interplay between Rules 272 and 303 to determine whether we have jurisdiction over the instant appeal. We believe the better course is to apply Rule 303(a)(1) for two reasons.

¶ 40 First, our research has revealed that the supreme court last amended Rule 272 in 1990, and last amended Rule 303 in 2007. Furthermore, Rule 272 concerns the timing of a final judgment in an instance where a court issues both an oral and written ruling, while Rule 303(a)(1) addresses the specific instance of an appeal filed between the time the court announces an oral ruling and then issues a written judgment. Thus, borrowing from the rules of statutory construction, we note that when one provision generally concerns a subject, and another more specifically concerns the subject, the more particular provision must prevail, especially when it was enacted later in time than the more general provision. See *Bowes v. Chicago*, 3 Ill. 2d 175 (1954). Consequently, it is logical to apply Rule 303(a)(1) in this instance.

¶ 41 Second, by backdating the effective date of the written order, the trial court effectively deprived Keith of his right to appeal. Specifically, the court granted the request of Tania's counsel to date the written order as of May 17, 2011, and not July 2011, because Tania's counsel was "loathe to re-write an order that would favor [Keith's] untimely appeal." Thus, by back dating the written order to May 17, 2011, Keith would have had to file a notice of appeal before June 17, 2011. However, we have found no authority to permit a court to deviate from a supreme

court rule and back date an order so as to frustrate a party's right to due process by effectively removing the opportunity for an appeal. Because we do not believe that justice will be served by enforcing the May 17, 2011, effective date of the order, it is logical to apply Rule 303(a)(1) and deem Keith's notice of appeal timely filed as of the day the trial court entered the written order.

¶ 42 We finally note that Keith filed what the trial court construed was a motion to reconsider with his notice of appeal. In line with our determination to apply Rule 303, we note that under Rule 303(a)(2), his notice of appeal effectively conferred jurisdiction on this court on August 22, 2011, the date on which the court ruled on this motion. Therefore, under Supreme Court Rule 303(a)(1) and (2), we conclude that we have proper jurisdiction over the instant appeal.

¶ 43 II. Removal

¶ 44 Moving to the merits, Keith argues that the trial court erred when it granted Tania's petition for removal. Specifically, Keith argues that the trial court erred when it found that a realistic and reasonable visitation schedule could be reached, that it failed to properly consider Keith's visitation rights, that Alexis' life would not be enhanced with the removal, that Tania did not have sincere motives in seeking to remove Alexis to California, and that the court improperly considered that Keith did not have a career in Macomb as a basis for granting the petition for removal.

¶ 45 Section 609(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/609(a) (West 2010)) provides, in relevant part, that "[t]he court may grant leave \*\*\* to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children. The burden of proving that such removal is in the best interests of such child or children is on the party seeking the

removal." The Act further states that its purpose is to "secure the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children during and after the litigation." 750 ILCS 5/102(7) (West 2010). Although Tania and Keith were never married, the Act is applicable to them by virtue of section 45/14(a)(1) of the Illinois Parentage Act of 1984, which provides that section 609 of the Act is applicable in removal cases. 750 ILCS 45/14(a)(1) (West 2010).

¶ 46 In *Eckert*, 119 Ill. 2d 316, the supreme court held that a ruling on the best interests of the child in a removal action necessarily involved a careful consideration of the specific circumstances of each individual case. Thus, each case should be determined according to its own facts and circumstances. *In re Marriage of Berk*, 215 Ill. App. 3d 459 (1991). A trial court has discretion in removal cases, but this discretion is not unlimited. *In re Marriage of Krivi*, 283 Ill. App. 3d 772 (1996). Thus, we will not reverse a trial court's ruling on a petition for removal unless it is contrary to the manifest weight of the evidence. *Guthrie*, 392 Ill. App. 3d 169. A judgment is against the manifest weight of the evidence when the opposite conclusion is clearly apparent or when the trial court's findings are unreasonable, arbitrary or not based on the evidence. *In re Custody of K.P.L.*, 304 Ill. App. 3d 481 (1999).

¶ 47 The *Eckert* court set forth five factors for courts to consider when deciding a removal petition: (1) "the proposed move in terms of likelihood for enhancing the general quality of life for both the custodial parent and the children"; (2) "the motives of the custodial parent in seeking the move to determine whether the removal is merely a ruse intended to defeat or frustrate visitation"; (3) "the motives of the noncustodial parent in resisting the removal"; (4) "the visitation rights of the noncustodial parent"; and (5) "whether \*\*\* a realistic and reasonable

visitation schedule can be reached if the move is allowed." *Eckert*, 119 Ill. 2d at 326-27. In instances where the parents share joint custody of a child, the parent with physical custody of the minor is deemed to be the custodial parent under the *Eckert* factors. See *In re Marriage of Johnson*, 277 Ill. App. 3d 675 (1996); see also *In re Marriage of Branham*, 248 Ill. App. 3d 898 (1993).

¶ 48 Simply because a custodial parent would be happier living outside of Illinois with her new spouse, as opposed to living in Illinois without her new spouse, is not enough to establish that the child's quality of life would be enhanced by removal. *In re Marriage of Sale*, 347 Ill. App. 3d 1083 (2004). Rather, a child has a significant interest in maintaining contact with both parents, and a custodial parent must prove more than her own desire to live with a new spouse to show that a child's best interests will be served by removal. *Eckert*, 119 Ill. 2d 316.

¶ 49 Regarding visitation, a child has an interest in maintaining contact with both parents following a separation or divorce. *Eckert*, 119 Ill. 2d 316. "It is in the best interests of children to have a healthy and close relationship with both parents \*\*\*, and thus, the visitation rights of the noncustodial parent should be carefully considered." *In re Marriage of Stone*, 201 Ill. App. 3d 238, 243 (1990). When a noncustodial parent has diligently exercised his visitation rights, a court should be reluctant to interfere with these rights by permitting removal of the child for frivolous or inadequate reasons. *Eckert*, 119 Ill. 2d 316. When the removal of a child to a distant jurisdiction will substantially impair the noncustodial parents' involvement with his children, the court should examine the harm which may result to the child. *In re Marriage of Eaton*, 269 Ill. App. 3d 507 (1995) (court concluded, among other things, that a reasonable visitation schedule could be achieved if the mother was permitted to move the children to Florida

because the mother had previously cooperated with visitation, she had relatives in Illinois and planned to return to visit them, and also because the paternal grandparents spent the winter in Florida). However, while a non-custodial parent may prefer frequent, day-to-day contact with his child, some courts have considered this desire insufficient to "chain" the custodial parent to Illinois. *In re Marriage of Zamarripa-Gesundheit*, 175 Ill. App. 3d 184, 190 (1988).

¶ 50 The *Eckert* factors are not exclusive, however, and the trial court should consider any and all relevant evidence in arriving at its decision. *In re Marriage of Collingbourne*, 204 Ill. 2d 498 (2003). No single fact or factor is controlling, and the weight to be given to each varies from case to case. *Collingbourne*, 204 Ill. 2d 498. The trial court may further consider the potential of the relocation to increase the general quality of life for both the custodial parent and the children, including any indirect benefit the children may receive from enhancement of the custodial parent's well-being. *Ford v. Marteness*, 368 Ill. App. 3d 172 (2006); see also *Collingbourne*, 204 Ill. 2d 498.

¶ 51 (A) *Eckert* Factors

¶ 52 Considering the *Eckert* factors, specifically the second and third factors, our review of the record does not reveal that either Tania or Keith acted in bad faith in seeking, or challenging, respectively, the removal of Alexis to California. Specifically, Keith testified that he opposed removal because he spent time with Alexis on multiple days per week; that they had a close relationship; and that his relationship with Alexis was important to him, especially in light of the fact he did not have a relationship with his own father. The record supports this assertion, and we find no evidence of bad faith in Keith's opposition to Tania's request for removal.

¶ 53 Tania, on the other hand, sought to relocate to California to be with her husband, and to pursue what she believed would be better employment and education opportunities for her and better educational, cultural and extra-circular activities for Alexis. The record supports that Tania was not seeking to move to California as a ruse to frustrate or defeat Keith's visitation.

¶ 54 We next examine the first *Eckert* factor, specifically, the likelihood that the move will enhance the general quality of life for the custodial parent and the child. Here, the record indicates that Tania's life will be enhanced if removal were granted because she would be free to reside with her new husband. We also note that although Tania did not seek to leave to move to a warmer climate until after she married Joe, she presented her own non-medical belief as evidence that a warmer climate will help with her Reynouid's.

¶ 55 Furthermore, according to Tania, she would also be able to pursue another line of employment that she believes will be less stressful than her job in Macomb, she plans to go back to school, and she also believes that she will be able to spend more time with Alexis. While the record supports Tania's assertion that California will offer new educational and employment opportunities for her, we note that Tania has not provided any evidence that she has been offered a job in California, or that she has been accepted into a school in California. Additionally, Tania did not pursue re-enrolling in WIU or the availability of any of the other alleged benefits while she lived in Macomb.

¶ 56 We further note that Joe did not have a stable line of employment at the time of the hearing because he was not part of a union and, as Tania acknowledged, had "no true guarantees" of work. Additionally, although this allegation does not factor into our decision, we note that Keith's counsel pointed out that Joe's \$43,000 salary was approximately equivalent to a \$21,000

income in Macomb, and the record indicates that Tania earned approximately \$18,300 in the year before the trial.<sup>1</sup> If this allegation were indeed accurate, Tania and Joe's actual combined income in California was not much higher than Tania's income in Illinois. Still, at the time of the removal hearing, Tania did not have a job and Joe had a job that did not necessarily guarantee continued employment.

¶ 57 Overall, many of the benefits that Tania believes that she will receive are speculative. Nonetheless, she will benefit by moving to California because she will be living with her new husband, and the warmer climate may possibly help her health. Accordingly, Alexis may indirectly benefit from Tania's ability to live with her husband and from any improved health that results from living in a warmer climate. Alexis also has the potential to benefit if Tania is able to either return to school or find a less stressful job, and may also potentially incur a benefit if Joe is able to remain employed by experiencing the benefits of his income as well.

¶ 58 We are less convinced, however, that the evidence established Alexis will benefit directly from the move. According to Tania, the school in Culver City was superior to the school in Macomb because it rated higher, was safer, offered Spanish class during the school day and also offered a program that integrated Alexis' speech therapy into her mainstream classroom. However, Tania presented no evidence supporting these assertions, or why they were beneficial to Alexis.

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<sup>1</sup> Tania testified that she earned \$10.09 per hour and works 70 hours every two weeks, making her biweekly pay \$706.30. There are 26 biweekly pay periods in a year and thus, 26 pay periods times \$706.30 per period equals annual earnings of \$18,363.80.

¶ 59 Specifically, Tania attached information regarding the school in Culver City to her amended petition for removal, but she provided no evidence of how this school was superior to Alexis' school in Macomb other than her own testimony and an allegation in a supporting memorandum that a popular website gave the school in Culver City a "9 out of 10 rating," while the school in Macomb received a "6 out of 10." Tania did acknowledge that these rankings were based on standardized tests that differed from state to state.

¶ 60 Additionally, Tania did not substantiate her claim that the school in Culver City was safer than the school in Macomb, other than testifying that it was gated. She further did not indicate why it was better for Alexis to have her speech lessons integrated into her classroom as opposed to having them in a separate classroom. In the absence of clear evidence, the trial court simply speculated on which school is safer, or whether it would be better for Alexis to have speech therapy on its own or as part of her mainstream curriculum. The burden was on Tania to show that removal was in Alexis' best interests, and she has not shown that Alexis will benefit by going to the school in Culver City.

¶ 61 Tania further alleged that Alexis would have more cultural opportunities in Culver City than in Macomb. In support of this contention, Tania advances her own testimony and printed web pages attached to her petition for removal indicating the museums and other opportunities available to Alexis in Culver City. This court acknowledges that there are numerous cultural and other activities in the Culver City area. However, other than Tania's own testimony and allegations in her petition for removal, she has not established that Macomb lacked any cultural opportunities for Alexis, or that the opportunities in Culver City are superior to those in Macomb. Again, the burden was on her to establish that removal was in Alexis' best interest.

¶ 62 We also note that the record indicates that at the time of the hearing, Joe resided in a one-bedroom apartment, and that Tania believed that a two-bedroom apartment may soon open in the building. Thus, as of the time of the hearing on the removal petition, either Tania and Joe, or Alexis, would not have a personal room if the removal petition were granted. Also, although Tania testified that Alexis' friends were moving away from Macomb, Alexis did not have friends or family in the California area.

¶ 63 Overall, on this record, we are unable to conclude with certainty that Alexis will directly benefit from the move to California. Rather, the evidence of any direct benefit for Alexis stems only from Tania's testimony and filings and is scant at best. Consequently, the manifest weight of the evidence does not support the trial court's finding that Tania met her burden of showing removal was in Alexis' best interests with respect to the first *Eckert* factor.

¶ 64 We now consider the fourth and fifth *Eckert* factors, that is, the effect on Keith's visitation rights and whether a reasonable visitation schedule could be reached if the move were allowed. We note that a reasonable visitation schedule is "one that will preserve and foster the child's relationship with the noncustodial parent. This decision is determined in part on the extent to which the noncustodial parent has exercised his visitation rights." *In re Marriage of Gibbs*, 268 Ill. App. 3d 962, 968 (1994). Distance is a proper factor to consider when determining whether a visitation schedule is feasible. *Gibbs*, 268 Ill. App. 3d 962. Also, under section 609© of the Act, a "court may not use the availability of electronic communication as a factor in support of a removal of a child by the custodial parent from Illinois."

¶ 65 Here, the trial court wholly failed to acknowledge the effect that a move would have on Keith's visitation rights. Specifically, the trial court made no comment on the evidence that

Keith saw Alexis three or four times per week, and that he fashioned his work schedule around Tania's so that he could spend time with Alexis while Tania was at work. Based on this evidence, at the very least, removal would have a significant impact on Keith's visitation rights, as he would be deprived of his ability to have near-daily contact with his daughter.

¶ 66 Additionally, the record indicates that Keith diligently exercised his visitation rights with Alexis. He has gone above the visitation provided in the Agreed Order, and spends time with Alexis on multiple days of the week. On occasion, she spends the night at his home. Keith attends Alexis' doctors' appointments, parent-teacher conferences, and extra-curricular activities. Thus, in light of Keith's extensive involvement in Alexis' life, we conclude that the visitation schedule proposed by Tania, and adopted by the trial court, is unreasonable for four reasons.

¶ 67 First, the trial court did not acknowledge the actual amount of time that Keith spent with Alexis. Consequently, we cannot reasonably conclude that the court even considered the effect a move would have on Keith's visitation rights, and thus, we cannot conclude that it properly set a reasonable visitation schedule. Second, Tania stated that the proposed schedule would provide Keith with the same amount of time with Alexis that he was provided under the Agreed Order. However, Tania readily acknowledged that the parties never followed the Agreed Order, and that Keith always exercised visitation above what was provided in that order. Third, the court improperly relied on the use of electronic communication (specifically Skyping) in finding that a reasonable visitation schedule could be achieved. In its written order, the court stated that visitation would be altered, but that it could occur especially with the use of "virtual visitation[.]" However, while a trial court may consider the availability of electronic communication in a

removal case, it may not rely on the use of electronic communication in granting a petition for removal. One cannot hug, kiss, tickle, soothe, etc. a virtual image.

¶ 68 Fourth, the visitation proposed by Tania, and adopted by the court, provided Keith time with Alexis during the majority of her summer break, a portion of her Christmas break, and spring break. This schedule not only took many of Keith's actual visitation days with Alexis away from him, but it also deprived Keith of his ability to see Alexis on a weekly basis and to participate, as he had always done, in every facet of her life.

¶ 69 Specifically, under the visitation actually exercised by Keith, he saw Alexis three or four times per week. Thus, over the course of one year, or 52 weeks, Keith would spend approximately 182 days of the year with Alexis. Under the schedule set by the trial court, Keith would see Alexis for approximately two to three months in the summer, approximately one or two weeks during her Christmas break and about a week for her spring break. Thus, Keith's visitation with Alexis was reduced from approximately 182 days, or 6 months, to approximately 3 or 3¼ months. Even in light of this substantial quantitative reduction, the trial court did not investigate any harm to Alexis that might accompany spending less time with her father. Nor did the court consider any negative impact of eliminating the extensive *daily* interaction and the degree of daily interpersonal involvement that father and daughter enjoyed. We cannot find that a 40-50% reduction in Keith's visitation is reasonable for him, or beneficial to Alexis, especially given the scant evidence of whether the move would actually enhance Alexis' quality of life. We also note that as Alexis gets older and develops deeper ties to California, it would be increasingly difficult for her to leave for all of her school breaks to come to Illinois to visit with Keith. Thus, on balance, the *Eckert* factors do not favor removal.

¶ 70 We acknowledge that our society is indeed a mobile one. However, a custodial parent must make decisions that comport with the best interest of her child. Here, although we believe that Tania might experience an increased quality of life with removal, we are less convinced that she came close to meeting her burden of proving that Alexis' life will be enhanced. We are also troubled by the extent to which Keith's visitation will diminish.

¶ 71 (B) Consideration of Keith and Tania's Employment Status

¶ 72 Keith further contends that the trial court improperly considered that he and Tania did not have careers in Macomb as support for its decision to grant Tania's permission for removal. Tania, conversely, points out that "[i]nertia appears to have kept [Keith] in Macomb[.]" and that Keith even contemplated moving from Macomb to Chicago.

¶ 73 As we have stated, the *Eckert* factors are not the only factors a court may consider when faced with a petition for removal, and a court is to consider all relevant evidence when determining whether to grant the petition for removal. *Collingbourne*, 204 Ill. 2d 498. In this case, however, we cannot ascertain why Keith's and Tania's employment status was relevant to the court's removal determination. Specifically, the court stated that because neither Tania nor Keith had what the court would consider a "career," they had insufficient ties to Macomb to require either to remain there because of a job. We acknowledge that Tania testified that she did not consider her job at Mosiac as a career. Keith did not offer similar testimony about his employment. Instead, the only testimony about Keith's work was that he fashioned his work schedule around Tania's so that he could spend additional time with Alexis. Thus, there was no basis for the court to conclude that restaurant work was not Keith's career, especially in light of

the fact that it offered such a flexible schedule that he could spend significant time with his daughter.

¶ 74 Furthermore, we are greatly troubled by the trial court's finding on another level. Specifically, we suspect that if Keith were a professor at WIU, this employment would be deemed a career by the trial court that would tie him to Macomb. However, Keith's work in a restaurant would not. It appears that the trial court drew an economic line whereby a parent with a salaried job would have a basis for opposing removal, but one without such a salaried position could not offer a valid employment-related reason to oppose removal. We do not believe that such a distinction is relevant, nor should it be drawn in a removal case. Hence, the trial court erred by considering Keith's non-career employment status as a reason for granting Tania's petition for removal.

¶ 75 The trial court erred when it granted Tania's petition for removal. In sum, the record indicates that the trial court considered the improper factor of Keith's employment, and also failed to consider the extent to which Keith was involved in Alexis' daily life and that a schedule could not be reached that would reasonably correlate with his current exercise of visitation with Alexis. While the record indicates that Tania's life might improve in some ways, and Alexis might receive some indirect benefit, the court did not consider the lack of evidence supporting Tania's assertions of an improved quality of life for Alexis and Keith and Alexis' need for daily interaction. Therefore, the decision to grant Tania's petition for removal was unreasonable, arbitrary, and contrary to the manifest weight of the evidence.

¶ 76

#### CONCLUSION

¶ 77 Because we find removal was improper, we do not consider the issues of the partial abatement of support and the relative responsibility of the parents for airfare. We reverse the judgment of the circuit court of McDonough County.

¶ 78 Reversed.