2016 IL App (1st) 153386-U

SIXTH DIVISION
April 22, 2016

No. 1-15-3386

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE MARRIAGE OF:	)	Appeal from the
	)	Circuit Court of
ALKA MADAN,	)	Cook County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	13 D 8563
	)	
RAJU RAY,	)	Honorable
	)	Regina A. Scannicchio,
Respondent-Appellee.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

HELD: The circuit court's decision to modify paragraph 7.4 of the parties' joint parenting agreement to allow either parent to travel internationally with their children, provided the traveling parent met certain guidelines and gave the non-traveling parent at least 30 days advance

written notice, was not against the manifest weight of the evidence nor an abuse of the court's discretion.

¶ 1 In this post-decree dissolution of marriage action between petitioner Alka Madan and respondent Raju Ray, petitioner appeals from a circuit court order granting a motion filed by respondent to modify paragraph 7.4 of the parties' joint parenting agreement to allow him to travel internationally with the parties' two minor children, even without the petitioner's consent, provided certain guidelines and notice requirements are met. Petitioner also appeals from the circuit court's order denying her motion to reconsider the order granting the motion to modify. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 The record reveals the following relevant facts and procedural history. Petitioner and respondent were married on November 28, 1998, in Chicago, Illinois. Two children were born of the marriage, a son born March 14, 2003, and a daughter born April 21, 2005.

¶ 4 On January 23, 2012, a judgment for dissolution of marriage was entered by the circuit court of McHenry County dissolving the couple's marriage.[1] Incorporated into the judgment was a final custody judgment which in turn incorporated a joint parenting agreement (JPA). Paragraph 7.4 of the JPA, which is at issue, provided in relevant part that the "minor children may only travel internationally with a parent if agreed by both parents in writing."

¶ 5 On March 10, 2015, respondent filed a verified petition for a rule to show cause alleging that the petitioner had violated paragraph 7.4 of the JPA by refusing to renew and update their children's passports which prevented him from traveling internationally with the children. On

[1] On November 4, 2013, the circuit court of McHenry County found that both parties lived in Cook County and granted petitioner's motion to transfer the parties' post-decree litigation to the circuit court of Cook County.

the same day, respondent also filed a motion to modify the Tuesday parenting schedule and the children's travel restrictions.

¶ 6 In count II of the motion to modify, which pertained to the travel restrictions, respondent argued that the petitioner's continued refusals to agree to let their children accompany him on several international trips prevented the children from meeting their relatives living in India and other foreign countries, infringed upon his and the children's constitutional right to travel, constituted an improper restriction on his parenting time, and was not in the children's best interests. Respondent claimed that the current terms of paragraph 7.4 of the JPA violated his and the children's constitutional right to travel and created an improper restriction on his parenting time without any evidence or finding of serious endangerment. Respondent sought to modify paragraph 7.4 by eliminating any international travel restrictions after the traveling parent had given the non-traveling parent fourteen (14) days' notice.

¶ 7 On June 17, 2015, the circuit court appointed Lynn Wypych as the children's representative.

¶ 8 On August 7, 2015, the circuit court denied the petitioner's motion to strike the respondent's verified petition for a rule to show cause and also denied her motion to strike and dismiss count II of the respondent's motion to modify which sought to modify paragraph 7.4 of the JPA pertaining to international travel restrictions. The court continued the matter for status to August 26, 2015.

¶ 9 On August 26th, the parties reconvened for status on the child representative's report and to set a hearing date concerning the issue of international travel. With respect to the latter, the child representative stated that she saw no reason why respondent should not be allowed to travel outside of the United States with the children and that it would be in their best interests to allow

such travel. In regard to international travel to India, the child representative suggested that since the petitioner had concerns that India was not a signatory country to the Hague Convention, the court could require respondent to post a bond prior to taking the children to that country. [2]

¶ 10 When the court asked counsel for the parties whether they planned on conducting discovery on the limited issue of international travel, counsel for petitioner responded, "No. I see that as a purely legal argument." The parties and the court then agreed that the issue of international travel restrictions would be heard as legal argument. The court set the matter for hearing on October 22, 2015.

¶ 11 On October 22nd, after hearing argument from both parties and from the child representative, the court granted respondent's motion to modify paragraph 7.4 of the JPA. In granting the motion, the court made the following findings and observations:

¶ 12 The court noted that during the years since the parties entered into the JPA, the petitioner had denied each and every request by respondent to travel internationally with the children and had even refused to allow them to travel with him to Puerto Rico, an unincorporated territory of the United States. The court determined that these repeated refusals indicated the petitioner had not negotiated paragraph 7.4 of the JPA in good faith. The court found that the sentence in paragraph 7.4 of the JPA which stated that the "minor children may only travel internationally with a parent if agreed by both parents in writing," was not an enforceable contract provision

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[2] Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) 51 Fed. Reg. 10494 (1986). See *In re Marriage of Saheb*, 377 Ill. App. 3d 615, 621 (2007). "A fundamental purpose of the Hague Convention is to protect children from wrongful international removals or retentions by persons bent on obtaining their physical and/or legal custody." *Wipranik v. Superior Court*, 63 Cal. App. 4th 315, 321, 73 Cal. Rptr. 2d 734 (Cal. App. 1998) (quoting Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, Fed. Reg. (Mar. 26, 1986) Vol. 51, No. 58, p. 10504).

because it constituted an "agreement to agree" that might not ever be fulfilled since one party could always disagree.

¶ 13 The court also determined that paragraph 7.4 of the JPA did not account for the advancing ages of the minor children and reasoned that under the current reading of the paragraph, the petitioner could conceivably continue denying the children to travel internationally with respondent until they reached the age of majority, which the court concluded was an inappropriate restriction on the respondent's ability to travel internationally with his children. The court determined that the minor children's advancing ages and the petitioner's continued refusal to allow respondent to travel internationally with the children amounted to substantial changes in circumstances warranting the modification of paragraph 7.4 of the JPA to allow either parent to travel internationally with the children provided the traveling parent met certain guidelines and gave the non-traveling parent at least 30-days advance written notice.

¶ 14 In regard to travel to India, where both parties had family, the court indicated it would consider allowing the children to travel there after they had first taken two international trips. At the conclusion of the hearing, the court agreed to petitioner's request to include Rule 304(a) language in the order for purposes of appeal (Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Jan.1, 2006)).

¶ 15 A week later, on October 29th, the parties and the child representative appeared before the court to enter a written order based upon the court's ruling made at the October 22nd hearing. At the petitioner's request, the court allowed her to provide the children with cellular phones for their use when traveling internationally. The court's order contained language pursuant to Rule 304(a).

¶ 16 On November 12, 2015, the petitioner filed an emergency motion to reconsider the order of October 29, 2015. After hearing argument on the motion, the court denied it, stating in part:

> "The issue of travel on any parent's time is an issue of parenting time. It's what allows people to do certain things with their children on their respective parenting time. Precluding someone from traveling is a restriction on their parenting time. Stopping someone from dining at a particular location is a restriction on their parenting time.
>
> I've heard your argument. I've read your pleading, and your motion to reconsider is denied."

¶ 17 This appeal followed.

¶ 18 ANALYSIS

¶ 19 As an initial matter, we reject respondent's waiver argument. The waiver rule is a limitation on the parties and not on the courts, and a reviewing court may ignore this rule to achieve a just result, especially in a case such as this involving the welfare of minor children. See *In re Marriage of Swift*, 76 Ill. App. 3d 154, 157 (1979); *In re Marriage of Sutton*, 136 Ill. 2d 441, 446 (1990). Thus, we choose to address the merits of this appeal.

¶ 20 Petitioner first contends the circuit court abused its discretion by modifying paragraph 7.4 of the JPA "such that there is now an unfettered presumption in favor of international travel." Petitioner argues that the court's elimination of the international travel restrictions contained in the parties' JPA disregards the clear intentions of the parties with respect to their children. We must disagree.

¶ 21 Joint parenting agreements are contracts subject to the same rules applied to other contracts. *In re Marriage of Coulter*, 2012 IL 113474, ¶ 19; *In re Marriage of Kincaid*, 2012 IL App (3d) 110511, ¶ 32. The formation of a valid and enforceable contract requires an offer,

acceptance of the offer, consideration, and definite and certain terms. *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813, 823 (2005).

¶ 22 The proponent of a contract bears the burden of establishing its existence. *Reese v. Forsythe Mergers Group, Inc.*, 288 Ill. App. 3d 972, 979 (1997). The issues of whether a contract exists, the parties' intent in forming it, and its terms are generally questions of fact to be determined by the trier of fact. *Prignano v. Prignano*, 405 Ill. App. 3d 801, 810 (2010). However, where the relevant facts are not in dispute, it is appropriate for the court to consider these issues as matters of law. *Reese*, 288 Ill. App. 3d at 979.

¶ 23 "The language used in the contract generally is the best indication of the parties' intent." *K's Merchandise Mart, Inc. v. Northgate Limited Partnership*, 359 Ill. App. 3d 1137, 1142 (2005). The "formation of a binding contract is a matter of intent so that a valid contract can result only when there is a 'meeting of the minds' of the respective parties." *Allstate Insurance Company v. National Tea Co.*, 25 Ill. App. 3d 449, 461 (1975).

¶ 24 In this case, the parties never arrived at a meeting of the minds on the issue of international travel with their children. This is demonstrated in the wording of paragraph 7.4 of the JPA, which provides in relevant part that the "minor children may only travel internationally with a parent if agreed by both parents in writing." This paragraph, rather than being an enforceable contract provision, is merely an "agreement to agree" to future negotiations. Before the provision can bind the parties, they have to negotiate and enter into a subsequent written agreement granting the international travel.

¶ 25 "Under Illinois law, an 'agreement to agree' exists when the parties enter into what appears to be an enforceable contract but leave one or more terms to be fixed by later agreement." *Pearson Bros. Co., Inc. v. Pearson*, 113 B.R. 469, 475 (C.D. Ill. 1990). Such

agreements are generally unenforceable because the court is unable to fashion a remedy to carry out the intent of the parties. See, *e.g.*, *Knightsbridge Realty Partners, Ltd. v. Pace*, 101 Ill. App. 3d 49, 52 (1981) ("If by the terms of the agreement it is clear that the parties intended to make the later execution of the contract a condition precedent to the formation of a binding contract, then the prior writing is not a contract").

¶ 26 As the Seventh Circuit has noted, "parties who make their pact 'subject to' a later definitive agreement have manifested an (objective) intent not to be bound." *Empro Mfg. Co., Inc. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989). That is precisely what the parties did in this case. The parties' negotiations relating to international travel with their children that resulted in paragraph 7.4 of the JPA, constituted nothing more than an agreement to agree to future negotiations which was too indefinite to be enforced.

¶ 27 Under Illinois law, circuit courts have the discretion to eliminate or modify certain unenforceable portions of a contract so that it comports with the law. *Abbott-Interfast Corp. v. Harkabus*, 250 Ill. App. 3d 13, 21 (1993). Section 607 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/607 (West 2012)), addresses issues regarding requests to modify visitation orders. Specifically, section 607(c) provides: "The court may modify an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child;" [3]

[3] Section 607 of the Marriage Act was repealed by P.A. 99-90, § 5-20 (eff. Jan. 1, 2016). Similar provisions are now found at section 602.8(b) and section 610.5 of the Marriage Act (750 ILCS 5/602.8(b), 610.5 (West 2016)). Pursuant to section 801(e) of the Marriage Act, the relevant provisions replace the term "visitation" with the term "parenting time." 750 ILCS 5/801(e) (West 2016). Since the new laws took effect on January 1, 2016, before either party filed an appellate brief, they had the opportunity to examine the new laws and their application to the issues raised on appeal. However, neither party briefed the new laws and their arguments are framed in terms of the laws in effect at the time of the circuit court's rulings.

¶ 28 The party seeking the modification has the burden of showing that a modified visitation would be in the best interest of the child. *Sarchet v. Ziegler*, 278 Ill. App. 3d 460, 462 (1996). "A best interest determination is heavily fact dependent; it '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.' " *DeBilio v. Rogers*, 337 Ill. App. 3d 614, 618 (2002) (quoting *In re Marriage of Eckert*, 119 Ill. 2d 316, 326 (1988)).

¶ 29 A circuit court's determination on a motion for modification will not be disturbed unless it is against the manifest weight of the evidence. *Sarchet*, 278 Ill. App. 3d at 462. A court's decision is against the manifest weight of the evidence when the opposite conclusion is clearly apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 155 (2005). In proceedings to modify child visitation orders, there is a strong presumption in favor of the court's ruling because the court had the opportunity to observe the parents and thereby evaluate their temperaments, personalities, and capabilities. *DeBilio*, 337 Ill. App. 3d at 618.

¶ 30 Our review of the record shows the respondent met his burden of demonstrating that allowing his children to accompany him on international trips was in their best interests. In regard to the motion to modify, the children's representative told the court that she saw no reason why respondent should not be allowed to travel outside of the United States with the children and that it would be in their best interests to allow such travel. The court also heard evidence that the petitioner's continued refusals to agree to let the children accompany respondent on international trips prevented the children from meeting their aging relatives living not only in India, but also in other foreign countries. After confirming that both parties had relatives living in India, the court stated:

"I mean, how unfortunate for these children not to know relatives, to not know individuals that are part of their history and part of their life in a country that is part of who they are.

I mean, both of their parents are here. So both of their parents chose the United States to make their life. But it's still part of their culture and part of their history. And why – why should they be denied an opportunity with both parents to explore that part of their life and their heritage?"

¶ 31 In light of the evidence before the court, we find that the court's decision to modify paragraph 7.4 of the JPA to allow either parent to travel internationally with the children, provided the traveling parent met certain guidelines and gave the non-traveling parent at least 30-days advance written notice, was not against the manifest weight of the evidence nor an abuse of discretion.

¶ 32 Before leaving this issue we address one additional point raised by petitioner. Petitioner argues that even if the circuit court possessed the authority under section 607(c) of the Marriage Act to modify the JPA, the court nevertheless abused its discretion by modifying paragraph 7.4 of the JPA to the degree it did. Petitioner contends that rather than modifying the paragraph to allow the parties the unrestricted right to travel internationally with their children, the circuit court should have limited the modification to allow international travel only after the traveling parent posted a bond to guarantee the children's return or to provide that the court could impose penalties on the party who was found to have unreasonably withheld his or her consent to the proposed travel.

¶ 33 Petitioner claims that these limited modifications would have respected the parties' intentions and maintained the integrity of the originally negotiated agreement while permitting

the parties to seek international travel. Citing *In re Marriage of Coulter*, 2012 IL 113474, for support, petitioner claims that the parties enshrined their agreements regarding the best interests of their children in the JPA and that court's modification of paragraph 7.4 of the JPA, ignored their negotiated agreement on the issue of international travel with their children. These arguments are not persuasive.

¶ 34 Visitation rights should be designed to promote the best interests of the child rather than the interests of the parents. *In re Marriage of Schmidt*, 242 Ill. App. 3d 961, 973 (1993); *In re Marriage of Eckersall*, 2014 IL App (1st) 132223, ¶ 27; *Crichton v. Crichton*, 75 Ill. App. 3d 326, 329 (1979) ("The trial court has broad discretion in adjusting child visitation rights of parties to a dissolved marriage and such discretion should only be exercised with the interest of the child primarily in mind").

¶ 35 In this case, the circuit court had the relevant evidence before it to fashion visitation in the best interests of the parties' children. The court properly applied the best-interests-of-the-child standard and its rulings were within the sound discretion of the court, and therefore we will not presume to second-guess its orders. See *In re Marriage of Schmidt*, 242 Ill. App. 3d at 973-74.

¶ 36 Petitioner finally contends the circuit court abused its discretion and acted contrary to the best interests of the children by failing to provide the parties with a mechanism where the non-traveling parent could object to the traveling parent's proposed international travel destination. Petitioner suggests we should either remand the matter to the circuit court with instructions to provide the non-traveling parent with a meaningful and defined right to object to the proposed international travel or, alternatively, we should exercise our authority under Illinois Supreme

Court Rule 366(a)(5) (155 Ill. 2d R. 366(a)(5)) and modify the circuit court's order of October 29, 2015 to provide the following:

> "Within seven days of either party's receipt of written notice of proposed international travel, the non-traveling party may submit his or her good-faith objections to the other party's proposed international travel to a court of competent jurisdiction for determination."

¶ 37 After reviewing the record, relevant statutes and case law, we find no merit to the petitioner's contentions and we decline her invitation to modify the circuit court's order of October 29, 2015 as requested. Newly-enacted section 602.7(b) and newly-enacted section 603.10(a) of the Marriage Act already provide sufficient safeguards and mechanisms for a parent seeking to restrict their child from traveling internationally with the traveling parent.

¶ 38 Section 602.7(b) of the Marriage Act provides that a court can restrict a parent's visitation or parenting time if it finds that the visitation would seriously endanger the child's physical, mental, moral, or emotional health. 750 ILCS 5/602.7(b) (West 2016). Section 603.10(a) of the Marriage Act provides in relevant part:

> "(a) After a hearing, if the court finds by a preponderance of the evidence that a parent engaged in any conduct that seriously endangered the child's mental, moral, or physical health or that significantly impaired the child's emotional development, the court shall enter orders necessary to protect the child. Such orders may include, but are not limited to, orders for one or more of the following:
>
> (1) a reduction, elimination, or other adjustment of the parent's decision-making responsibilities or parenting time, or both decision-making responsibilities and parenting time;

* * *

(7) requiring a parent to post a bond to secure the return of the child following the parent's exercise of parenting time or to secure other performance required by the court;

* * *

(9) any other constraints or conditions that the court deems necessary to provide for the child's safety or welfare." 750 ILCS 5/603.10(a) (West 2016).

¶ 39 In this case, if either parent has just cause for concern regarding an international trip that the other parent has proposed taking with the children, then that parent can seek relief under section 602.7(b) and section 603.10(a) of the Marriage Act. Consequently, there is no merit to the claim that the circuit court abused its discretion by not providing the parties with their own, unique means of objecting to a parent's proposed international travel with the children.

¶ 40 For the foregoing reasons, we affirm the orders of the circuit court of Cook County.

¶ 41 Affirmed.