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2011 IL App (3d) 100134–U

Order filed August 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

RICHARD P. LAUGHNER-FRANKZ,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Petitioner-Appellant,	)	Rock Island County, Illinois
	)	
v.	)	Appeal No. 3–10–0134
	)	Circuit No. 08–MR–754
WENDEEN JOY RIVAS LAUGHNER,	)	
	)	Honorable
Respondent-Appellee.	)	Alan G. Blackwood,
	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err when it denied petitioner's motion to modify custody. Despite the trial court's finding that there was a change in circumstances, it properly found that it was not in the child's best interest to modify custody.

¶ 2 Petitioner Richard Laughner-Frankz sought to a modify a custody order giving his former wife, respondent Wendeen Laughner, residential custody of their son, Franke Laughner, and to determine the amount of child support he owed for past support. The trial court denied Richard's request for modification, finding that although there had been a change of circumstances,

modification of custody was not in Franke's best interests. The trial court also calculated that Richard was in arrears in child support payments in the amount of $5,400. We affirm.

¶ 3 **FACTS**

¶ 4 Petitioner Richard Laughner-Frankz and respondent Wendeen Laughner were married in Georgia in 1997, and their son, Franke Laughner, was born on July 9, 1999. At some point the couple moved to Alabama, where they lived together until April 2004. In August 2004, Wendeen and Franke moved to Henry County. Richard moved to Rock Island County in 2005 and was living there in October 2005 when the parties were granted a dissolution of marriage by the state of Alabama. The parties were granted joint custody of their son, with physical custody awarded to Wendeen. Richard was provided liberal visitation and ordered to pay child support in the amount of $600 per month beginning July 1, 2005, and to maintain health insurance for Franke.

¶ 5 The Alabama dissolution order was registered in Henry County in September 2008 on Richard's motion and transferred to Rock Island County by agreement of the parties. In October 2008, Richard sought, and was granted, an emergency order of protection (OP) against Wendeen and obtained temporary physical custody of Franke. The order issued based on an incident where Wendeen slapped Franke, grabbed his arm, and threatened him with a belt in response to inappropriate comments Franke made to her. An investigation into the incident by the Illinois Department of Child and Family Services (DCFS) resulted in an "unfounded" finding. A plenary order of protection did not issue and Franke was returned to Wendeen's physical custody. In November 2008, Wendeen filed a rule to show cause, claiming that Richard had failed to pay child support. In December 2008, Richard filed a petition seeking, *inter alia*, a custody modification and a determination of child support owed.

¶ 6 A hearing ensued at which the following evidence was presented. Richard testified that he began dating his current wife, Renae, in December 2005, and sought at that time to increase his involvement in Franke's life. He and Renae began sharing a home in November 2006 and were married in August 2008. Richard had worked as a recording artist but after having surgery for lip cancer in 2007, he primarily worked in the construction industry. During a weekly visitation in October 2009, Franke told him that his arm hurt because Wendeen had slapped him, bruised his arm, and threatened him with a belt when he told her "screw you." Richard took Franke to the emergency room and started him in counseling. In his view, the house in which Wendeen and Franke lived was not suitable and Franke was not properly fed. He contacted the county which inspected the house and determined it was safe. He also notified DCFS regarding Wendeen's care of Franke; his claims were determined to be unfounded. Richard set up a bank account for Wendeen into which he deposited child support payments. Based on his calculations, he had overpaid more than $5,000. He last paid child support in July 2009. Richard had pending a lawsuit against Wendeen to recover $36,000 he claims he had loaned her. Examples of the loans included money for a larger cage for Franke's rabbit, for Franke's school lunches, and for an evening at *Medieval Times* for Wendeen and Franke. Contrary to the dissolution decree, he did not consistently maintain health insurance for Franke and stated that Wendeen offered to insure Franke instead. He currently carried health insurance for Franke.

¶ 7 Renae testified and described her relationship with Franke as "absolutely fabulous." She spends time alone with him, and she and Richard also spend time together with Franke. Franke calls her "mom" but she distinguishes herself from Franke's "real mom." She fosters Franke's relationship with Wendeen and would continue to do so. She volunteers at Franke's school and at the bowling

alley where Franke bowls. Several witnesses from Franke's school stated that Renae was involved there as a volunteer and displayed a good relationship with Franke. They also stated that Franke was a quiet, well-behaved student and that his behavior had not substantially changed as a result of the conflict between Richard and Wendeen. The school witnesses also testified that Wendeen was an involved parent.

¶ 8 Franke's treating psychologist, who began seeing Franke in October 2009 at Richard's request, testified. He opined that Franke was fearful of his mother, did not want to see her, and wanted to live with Richard. Franke suffered from an adjustment disorder related to fear of his mother resulting from the October 2009 episode when she slapped him. Wendeen would not foster a good relationship between Richard and Franke because she degrades Richard in front of Franke. In his opinion, it would be better for Franke to live with Richard and that continuing to live with Wendeen put Franke at risk for "serious permanent injury" to his physical and emotional well-being. He consulted with another psychologist to whom Wendeen had taken Franke who agreed that Franke was afraid of Wendeen and wanted to live with Richard.

¶ 9 Wendeen testified that she worked at a local medical clinic owned by Carrie and Maxhn McCaw, and rented a house from the McCaws. Her monthly rent payment of $450 was subtracted from her paycheck. At the time of the hearing, she had not been paying rent with the acquiescence of the McCaws because she had insufficient funds to meet her expenses. Wendeen had met the McCaws through Franke's school, which their son also attended. The boys were friends. She and Carrie performed administrative work at the clinic and traded child care duties. Wendeen testified that Richard became more involved with Franke after he began his relationship with Renae. Richard called her consistently at work and at home when Franke was in his care. Richard would also come

to her house without Franke during his visitation periods. She had been flexible with visitation until Richard started custody proceedings. Although she was currently working full time at the clinic, she generally worked three days per week, earning $11 per hour. Richard had not paid child support since June 2009 and she had limited financial resources. She maintained a bank account with her brother which he substantially funded for her as an emergency fund.

¶ 10 Carrie McCaw testified that she met Wendeen at their children's school and knew her to be a wonderful mother, and loyal and hardworking employee. Carrie trusted her son to be in Wendeen's care. She had spent considerable time with Wendeen and Franke and observed that Franke had become disrespectful to his mother since Richard obtained the order of protection against her. Richard threatened her as Wendeen's landlord and threatened Wendeen with various legal actions but said he would stop if Wendeen cooperated with him concerning custody of Franke. She heard his threats personally or as messages on Wendeen's answering machine. Maxhn McCaw testified that after Wendeen began working at the medical clinic, he received an unsolicited call from Richard during which Richard informed him that Wendeen lacked adequate knowledge or ability to work at the medical clinic. He also noticed that Franke had become disrespectful of his mother and her friends, especially after spending time with Richard.

¶ 11 Following the hearing, the trial court denied Richard's petition for modification of custody, finding that a change of circumstances had occurred but that a custody modification was not in Franke's best interests. The trial court also found that Richard was in arrears in child support and ordered him to pay back support in the amount of $5,400. Richard appealed.

¶ 12 **ANALYSIS**

¶ 13 On appeal, Richard argues that the trial court erred in denying his request for primary custody

and in failing to credit him for various child support payments.

¶ 14 We begin with Richard's argument that the trial court should have modified custody and awarded him physical custody of Franke. He argues that the evidence established that a change of circumstances occurred when Wendeen slapped and threatened Franke which justified a custody modification. Richard maintains that the trial court's refusal to modify custody was an abuse of discretion.

¶ 15 Section 610 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) governs custody modifications and provides in pertinent part:

> "[t]he 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 ***, in the cases of a joint custody arrangement, that a change has occurred in the circumstances of the child or either or both of parties having custody, and that the modification is necessary to serve the best interest of the child." 750 ILCS 5/610(b) (West 2008).

¶ 16 Section 610(b) reflects a policy that favors finality of custody judgments and creates a presumption in favor of the present custody to promote stability in the child's home and custodial relationships. *In re Marriage of Nolte*, 241 Ill. App. 3d 320, 325 (1993). Once the trial court determines that there has been a change in circumstances, it shall consider whether a modification in custody will serve the best interest of the child. *In re Marriage of R.S.,* 286 Ill. App. 3d 1046, 1051 (1997). It is guided by the following applicable factors as set forth in section 602 of the Marriage Act:

"(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;

***

(8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child[.] 750 ILCS 5/602 (West 2008).

A court will not modify custody unless there is a material change in circumstances of the child that is related to the child's best interest. *Nolte*, 241 Ill. App. 3d at 326. Changed conditions alone do not support a custody modification unless the court also finds that the changed circumstances affect the child's welfare and unless the evidence demonstrates the change is directly related to the child's needs. *R.S.*, 286 Ill. App. 3d at 1051. We will not reverse a trial court's determination of a request to modify custody unless it is against the manifest weight of the evidence or constitutes an abuse of discretion. *R.S.*, 286 Ill. App. 3d at 1051.

¶ 17 Here, the trial court determined that a change in circumstances occurred in that "the child reports he is afraid of his mother and desires to live with his father." The trial court noted the changed circumstances were "sparked" by the incident which resulted in the emergency order of protection against Wendeen. The trial court also considered that Richard's remarriage and ability to spend more time with Franke constituted changes in circumstances. The trial court further determined that although circumstances had changed, Richard did not establish that a custody modification was necessary for Franke's best interests.

¶ 18 We disagree with the trial court's finding that a change in circumstances occurred as a result of the slapping incident. It attributed the slapping incident as a reason for Franke's fear of his mother. The testimony of Richard and Franke's treating psychologist supported the trial court's finding that Franke was fearful and desired to live with his father. However, Franke was not interviewed by the court and his attitude and living preference were not confirmed. In addition, a child's preference is not in his best interest. *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 414 (1994) ("preference for a parent because he lets the child watch television or skip homework should not be given much weight"). Moreover, we do not consider that Wendeen's one-time act of physical discipline reasonably warrants Franke's fear. Wendeen has a right to discipline Franke using corporal punishment as long as she exercises her right in a reasonable manner. *In the Interest of J.P.*, 294 Ill. App. 3d 991, 1002 (1998). A plenary order of protection was not issued as a result of the slapping incident and DCFS considered the abuse allegations unfounded. There is nothing in this record to substantiate that Wendeen behaved unreasonably in disciplining Franke, in spite of Richard's, and apparently Franke's, claims to the contrary.

¶ 19 The instant facts are distinguished from those in *In re Marriage of Eleopoulos*, 186 Ill. App.

3d 374, 381-82 (1989), where the reviewing court upheld the trial court's modification of custody. The trial court had determined that the custodial parent's beating of the child resulting in the child becoming fearful of the parent constituted a change in circumstances. *Eleopoulos*, 186 Ill. App. 3d at 381. The *Eleopoulos* court found significant that the beating resulted in an order of protection that remained in effect pending the decision on custody modification. *Eleopoulos*, 186 Ill. App. 3d at 381. As discussed above, the court here did not find that the situation warranted a plenary order of protection and returned Franke to Wendeen's custody. The instant facts are more aligned with *In re Marriage of Poston*, 77 Ill. App. 3d 689, 690 (1979), where the father sought a custody modification based in part on his allegations that the children were physically abused and emotionally neglected. The trial court found that the best interests of one of the children required a change in custody. *Poston*, 77 Ill. App. 3d at 690. The basis for the custody modification was based on the trial court's concern with the " 'excessive punishment' " of the child and the " 'excessive chores' " assigned to him. *Poston*, 77 Ill. App. 3d at 693. The appellate court reversed, concluding that the discipline administered to the child by his stepfather, which consisted of spankings with a stick or a belt, did not cause serious physical or emotional harm to the child and was not "outside the bounds of normal, albeit strict, parental discipline." *Poston*, 77 Ill. App. 3d at 693-94. Like the *Poston* court, we consider that Wendeen's conduct was not beyond the bounds of parental discipline. Therefore we find that the trial court's ruling that the slapping incident was a change in circumstances was against the manifest weight of the evidence.

¶ 20 We do agree with the trial court's finding that a change of circumstances occurred as a result of Richard's remarriage and employment situation. Despite these changes in circumstances, we find that the trial court properly determined that a custody modification was not in Franke's best interest.

The record establishes that Richard and Renae are attentive to and involved in Franke's life and provide him a safe and nurturing environment during visitation. However, like the trial court, we are mindful that Franke's increasing defiant and disrespectful behavior and attitude toward Wendeen coincided with Richard's desire for a closer relationship with Franke and his attempt to be awarded custody. The evidence presented leads us to question Richard's motives, particularly in light of his persistent phone calls and visits to Wendeen during his visitation periods. Moreover, aside from Richard's disapproval of Wendeen's housing conditions and employment, the record demonstrates that Wendeen is an attentive, responsible and caring mother who provides for Franke to the best of her abilities. The trial court stated that it had considered the best interest factors set forth in section 602 of the Marriage Act and our review of those factors supports the trial court's refusal to modify custody. The trial court properly found that it was not in Franke's best interests to modify custody.

¶ 21 We next consider whether the trial court erred when it determined that Richard owed back child support. Richard argues that the trial court failed to credit him for cash child support payments he made into a bank account set up for child support payments. He contends that pursuant to applicable Alabama law, payments made directly to Wendeen through the account should be credited to him.

¶ 22 Alabama law allows an obligor parent to pay child support directly to the custodial parent. *Teichmann v. Teichmann*, 772 So. 2d 1196, 1198 (2000) ("trial court may allow a credit to the obligated parent upon proof that monetary support was actually provided"). Under Illinois law, credit is not given for voluntary overpayments of child support even if made under the mistaken belief that they are legally required. *In re Marriage of Rogers*, 283 Ill. App. 3d 719, 721 (1996). Moreover, the obligor parent has the burden of proving sufficient payment once the obligee has

established the existence of an obligation. *In re Marriage of Jorczak*, 315 Ill. App. 3d 954, 957 (2000). The trial court may find an obligor parent in arrears in child support payments but not hold him or her in contempt for failure to pay. *Bartlett v. Bartlett*, 70 Ill. App. 3d 661, 663-64 (1979). A trial court's factual determinations regarding child support payments will not be reversed unless they are against the manifest weight of the evidence. *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 233 (2008).

¶ 23 It is undisputed that Richard unilaterally stopped paying child support in July 2008, with one payment of $1,200 in March 2009. He provided exhibits which he argued documented cash payments of support he made in 2005, 2006 and 2007, which amounted to overpayments for which he is entitled to credit. As noted by the trial court, Richard's exhibits establish that he deposited various sums of money into the bank account, ranging in amounts of $100 to $2,000. Deposits of $600 or less generally included a notation indicating they were child support. The trial court reasonably concluded that the amount and timing of the deposits dictated the conclusion that they were child support payments. Based on the information in Richard's exhibits, the trial court did not credit Richard for other deposits or payments, and calculated his arrearage at $5,400. It was Richard's burden to establish that he complied with his child support obligations. The record demonstrates that he did not carry his burden. We find the trial court did not err in failing to credit Richard for what he claims are child support payments and in ordering him to pay back support in the amount of $5,400.

¶ 24 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 25 Affirmed.