No. 3–10–0676

Order filed January 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

A.D., 2011

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
LYNN WEIR,	)	Will County, Illinois,
Petitioner-Appellee,	)	
	)	
and	)	No. 08–D–1837
	)	
RANDY WEIR,	)	Honorable
Respondent-Appellant.	)	Robert P. Brumund,
	)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Holdridge specially concurred.
Presiding Justice Carter dissented.

ORDER

Held: The trial court's decision granting petitioner's petition to remove the parties' minor child from Illinois to the State of Alabama was against the manifest weight of the evidence. Accordingly, the trial court's order granting removal of the minor child is reversed and vacated.

The trial court granted a judgment for dissolution of marriage to the parties on May 15, 2009. Six months later, on November 10, 2009, mother filed a petition to remove the minor child to the State of Alabama. Following a contested hearing, the trial court granted mother's

petition on August 9, 2010, and entered a modified visitation order on September 13, 2010. On appeal, respondent seeks reversal of the trial court's order granting removal of the minor child to the State of Alabama. Alternatively, if this court finds removal appropriate, respondent then requests that this court reverse the trial court's modified visitation order and remand the cause for further proceedings.

We reverse and vacate the trial court's order granting petitioner leave to remove the minor child to the State of Alabama.

FACTS

On May 15, 2009, the trial court entered a judgment for dissolution of marriage in this cause. At the time of entry of the judgment, petitioner was 39 years of age and employed as an executive assistant, and respondent was 47 years of age and employed with United Parcel Service. According to the judgment, the parties had one child in common born July 31, 2003.

By agreement, the judgment for dissolution of marriage incorporated a joint parenting agreement resolving all issues of custody and visitation pursuant to the agreement of the parties. The parties agreed that they would share joint custody of the minor child with physical residence being with petitioner. The joint parenting agreement, dated February 18, 2009, provided that respondent would have visitation with the minor every other weekend from 12 p.m. on Saturday until 5:30 p.m. on Sunday, alternating holidays from year-to-year, spring break, a portion of Thanksgiving weekend, and two weeks during summer vacation from school. In addition, respondent could receive visitation as agreed on additional weekends and other agreed weekday visits. The joint parenting agreement stated that the parties would resolve any disputes pertaining to the joint parenting agreement through mediation prior to litigating the issues in court.

Approximately two weeks after entry of the judgment for dissolution of marriage, petitioner married Daniel Wulsch on May 30, 2009. On November 10, 2009, petitioner filed a petition for removal of the minor child with the court. In the petition, petitioner stated that on May 30, 2009, she married Daniel Wulsch who was a nuclear reactor engineer laid off from his employment in Illinois. According to the petition, filed November 10, 2009, petitioner, the minor and Wulsch lived off of petitioner's salary of $32,000 per year.

The petition stated that Wulsch had received an offer of employment in Huntsville, Alabama at a pay rate of $87,000 per year with a starting bonus of $10,000. The petitioner claimed if removal was not granted, petitioner would be forced to continue to work full time in Illinois, and the minor child would not receive the benefit of Wulsch's increased potential income.

Respondent objected to removal and filed a petition to increase visitation which sought additional weekday visitation in Illinois and longer hours of visitation on the weekends during the summer months. On July 26, 2010, the trial court began a hearing on petitioner's petition for removal.

Petitioner's counsel called respondent as an adverse witness who testified that he lived in Chicago, Illinois in a one bedroom apartment. He testified that he visited the minor's school during the previous school year, spoke to the minor's teacher and attended a field trip. Respondent stated that he received six weeks vacation in 2009 and would receive seven weeks vacation in 2010.

Respondent explained his current weekend visitation occurred from noon on Saturday until Sunday because respondent worked on Friday nights. He acknowledged that he took the

minor for part of one week instead of the full two weeks vacation in 2009 because the minor was not adjusted to the new situation created by the divorce. Respondent told the judge that shortly after the divorce, the minor did not want to go with him for visitation but that visitation had since improved due to counseling.

Petitioner called Daniel Wulsch. He testified that he married petitioner on May 30, 2009, when he was employed with the Nuclear Regulatory Commission in Lisle, Illinois, but was terminated from that position in July 2009 after one year of employment. Prior to his position at Lisle, Illinois, Wulsch said he worked for the Nuclear Field Services in Tennessee for one year and before that, he worked for the Nuclear Weapons Facility in Texas for two and one-half or three years. According to Wulsch, he left his jobs in Texas and Tennessee because he did not like the jobs. Wulsch testified that he had worked at four different jobs in four different states during the last five years. However, he believed his job in Alabama was long term, and he had "no intention of leaving."

Wulsch testified that he began working for the Tennessee Valley Authority as a senior reactor engineer in January 2010. Wulsch testified that he had been living in a two bedroom, two bath apartment with access to an apartment complex pool in Madison, Alabama, for the previous seven months. Wulsch said that he noticed children in the complex. Wulsch told the court that if petitioner moved to Alabama, he planned to purchase a house in the area.

Wulsch described his relationship with the minor as "very good" but acknowledged that it was difficult because he lived in Alabama. When asked to explain how the move would enhance the minor's life, he stated "where she lives now, there aren't a lot of children so she would be around a lot more kids and Lynn [petitioner] would be able to spend a lot more time with her

daughter so it would make things easier on both of them." Further, he stated that his extended family and petitioner's extended family lived in Illinois, so Wulsch and petitioner would visit Illinois regularly for the holidays and during the summer. Wulsch did not "see how it would" impact respondent's relationship if the minor moved to Alabama.

Wulsch testified that if petitioner and the minor would not be able to move to Alabama, he "would continue looking for other jobs up here in the Illinois area." Wulsch noted that there were two plants located two and one-half hours beyond the Illinois/Wisconsin border, and Wulsch acknowledged that the plants were hiring in his field of engineering.

Petitioner testified that when she married Wulsch in May 2009, they intended to live together "[a]t some point," but did not know where they were going to live because Wulsch "was still finishing his training with the NRC [Nuclear Regulatory Commission]." She testified that in June 2009, petitioner and Wulsch discussed living together at either her home or her mother's home.

Petitioner testified that after the divorce, she sold her house in Frankfort, Illinois, and began living with her mother and minor daughter in her mother's two bedroom town home located in Mokena, Illinois. According to petitioner, she moved in with her mother in April 2010 because she was "not quite sure" what she was doing at that point. She explained that she currently shared a bedroom with the minor.

Petitioner said that the minor had a wonderful relationship with her maternal grandmother, and the minor would miss her grandmother "most definitely." When asked if she thought missing her grandmother was more important than a life in Alabama, petitioner stated, "I think they are both equally as important but I believe me spending more time with her and not

having to work is also very important." Petitioner said the minor's maternal grandfather, uncles and cousins lived in the Mokena, Illinois, area. In addition, the minor's paternal grandmother, cousins and nieces lived in the Mokena, Illinois, area.

She said that she discussed the move to Alabama with the minor, and the minor did not seem upset about the discussion. Petitioner acknowledged that both her family and respondent's family were involved in the minor's life in Illinois and that the minor had close relationships with several of the relatives. She also acknowledged that she did not have any family or friends in Alabama. Petitioner testified that the minor had visited Wulsch's apartment in Alabama on one occasion in April 2010 for four days.

Petitioner told the court that if the court did not allow her to move, she would "stay here" with the minor, and Wulsch would "continue working in Alabama until he finds a job here." If she moved to Alabama, she did not intend to work but would stay home and take care of the minor. Petitioner testified that if she did not work, then the minor would not have to attend daycare. At this point, the minor went to daycare from 7:15 a.m. to 8:20 a.m. and from 3:15 p.m. to 4:15 p.m. during the school year. During the summer, the minor attended daycare from 7:15 a.m. until 4:15 p.m.

Petitioner testified that she worked at the Illinois Collection Service for the past eight years and earned approximately $35,000 per year. Petitioner's income/expense affidavit, filed with the court on October 28, 2010, listed her total monthly expenses as $2,775 and total monthly net income as $7,424.99. Petitioner testified that the affidavit was based upon Wulsch's income, not her current income.

Petitioner said the minor's relationship with respondent was "good now." However, just

prior to the divorce and during the several months after the divorce, the minor had trouble talking to respondent on the telephone every day and visiting every other weekend. Petitioner believed that the move to Alabama would "be a big adjustment" for the minor because she would be farther away from respondent, but she did not believe it would be detrimental to the minor.

Petitioner agreed that pursuant to her proposed visitation schedule, it was "probably possible" that the minor would not see respondent for five or six months during the school year. She testified that this schedule "wouldn't be good" for the minor and "[p]robably not in her best interest but with the phones and the web cams and me not working, I can get her back to see him."

Petitioner said that the flight time from Alabama to Chicago was only one and one-half hours. Petitioner said that children can fly alone, but she did not know the airline terms and conditions for children. Further, she found airline tickets cost $350 round trip, and there were numerous hotels in the Madison and Huntsville area with the least expensive being $93 per night.

Petitioner did not anticipate any problems with the minor changing schools because the minor attended kindergarten in Frankfort but attended a different school for first grade after she moved to Mokena. Petitioner stated that she gave respondent the minor's school schedule and calendar for the year 2009/2010 in December 2009. Petitioner said that she knew of the school which the minor would attend in Alabama but had not visited the school. At the conclusion of petitioner's testimony, the trial court denied respondent's motion for a directed finding.

Respondent's counsel then called Michelle Weir, respondent's sister, to testify. She stated that she and her mother lived across the street from respondent's residence and saw the minor every time she visited with respondent. She described respondent's relationship with the

minor as "great" because she could "see it," and the minor always wanted to stay and did not want to go home. Weir said that she enjoyed many activities with the minor and that they had "girl time together." Weir described the entire family as very close. She said respondent's family goes to church together on Saturdays and had family dinner on Sundays. Weir explained that the minor is part of these family events. Weir told the court that three of the cousins lived across the street and the minor loved to be with them. Weir said her relationship with the minor would be "devastated" if she moved to Alabama. She also said that respondent would be "devastated" and "lost" if the minor moved to Alabama. Weir stated, "[s]he's [minor] the only daughter that he has. That's his life."

Josephine Weir, respondent's mother, testified that she lived with her daughter, Michelle, across the street from respondent. Josephine said that the minor was one of three grandchildren and that she saw the minor every time she visited with respondent. She described respondent as a good father who spent time with the minor doing different activities, including going to the park, going for ice cream, and going to church. Josephine told the court that she cannot travel due to health reasons and that she would be devastated if the court allowed the minor to move to Alabama.

Respondent testified that after the minor was born, petitioner stayed at home for the first three months, and he worked beginning at 12:30 p.m. When petitioner returned to work, he would watch the minor from 7 a.m. until noon daily and take the minor to her maternal grandmother's house before going to work. Respondent said that he and petitioner maintained that schedule for approximately two years. At that point, they put the minor in daycare. He took the minor to daycare in the morning, and petitioner would pick up the minor from daycare in the

evening. After the minor started preschool, he would take the minor to preschool in the morning. When the minor started school, he made sure she boarded the school bus in the morning and would primarily pick her up from the school. Respondent left the marital residence in November 2008 due to the dissolution proceedings.

Respondent testified that the minor just finished first grade. He stated that between the second quarter and third quarter of the past school year, the minor's grades "started to go down." In response to the minor's decline in grades, he contacted the minor's teacher and began studying with the minor to work on her reading, spelling and math. During the fourth quarter of the school year, the minor's grades "went up." Respondent described the minor as being "back on track" and winning an award as most improved in mathematics.

Respondent acknowledged that from the time of the divorce until August 2009, there were times that the minor did not want to visit with him. Respondent estimated the minor missed three visits before he and the minor engaged in counseling. Since that time, there had not been any issues. He explained that he only exercised part of his two week visitation during the summer of 2009 because he did not believe that the minor was ready for an extended visit. Respondent wanted to "let the situation just settle down because this was all new to all of us." However, the minor regularly visited with him on weekends.

Respondent also stated that when he and petitioner were married, he went to the minor's summer dance classes. Since the dissolution, he stated that he attended both of the minor's recitals at her current dance studio. However, he had not attended dance practices because they occurred at 9 a.m. on Saturdays, and then petitioner would bring the minor to visitation after practice.

Respondent stated that he researched the possibility of visiting with the minor on weekends in Alabama and found the flights took between three and six hours and cost anywhere between $156.45 and $719.90. Considering hotel, food and entertainment, an extended weekend visit would cost approximately $1,400. He estimated that a 10-day trip to visit his daughter in Alabama would cost $2,569, after considering the cost of flights, hotels, rental car and meals, and was not economically feasible for him. Respondent believed that he would not be able to travel to Alabama to visit the minor on a regular basis. Respondent's income and expense affidavit showed that he earned $60,000 per year and had approximately $200 disposable income per month.

Respondent testified that the minor told him "that she would rather stay here because everyone she knows lives here." Respondent said he would "be crushed" if the court allowed the minor to move to Alabama. He went on to say, "She's all I have after everything that's gone with this. *** She is my daughter and she's part of my life, and I love her with my whole heart."

When asked if he believed petitioner's visitation proposal, testified in court, was reasonable, respondent stated, "[n]o." He explained that during the proposed summer visitation, he would be working from 7 p.m. until 4 a.m. and that taking into account the time he would sleep, respondent would only see the minor from 11 a.m. until 6:30 p.m. each day. In addition, based upon the proposed visitation, he would not see his daughter for six months during the year.

Petitioner's counsel called Wulsch to testify in rebuttal. Wulsch testified that his current income was $87,000 per year. He stated that he looked at housing in Alabama, and the houses were priced between $200,000 and $300,000. Petitioner's counsel asked Wulsch how he would be able to afford to fly the minor to Illinois from Alabama without petitioner working. Wulsch

said that the Huntsville airport was located five minutes from his apartment and that flights from the airport cost between $600 and $700 round trip. Alternatively, flights from Nashville to Chicago would cost only $400 round trip. Wulsch said that he had "no doubt at all" that he could afford to pay those costs to transport the minor on a regular basis to Illinois, along with transporting her on holidays and during the summer.

Petitioner also testified in rebuttal. Petitioner said that in November 2009, she spoke with the minor about moving to another location. Petitioner said that the minor asked when they were leaving. Petitioner explained that she had other conversations with the minor about moving during the months following November 2009. She said that the minor asked questions about where they would live; would she have her own room; would she have a pool; where she would go to school; and would there be other children around. During the conversations, the minor did not tell petitioner that she did not want to move.

After taking the matter under advisement, the parties appeared before the court for the court's ruling on August 9, 2010. The trial court said that it considered all of the evidence presented, the credibility of the witnesses, the exhibits, the parties' stipulations, the arguments of counsel and the relevant case law and statutory authority. The court said that according to the controlling statutory provision and relevant case law, it must consider certain factors in reaching its decision and that the burden of proof remained with petitioner to prove that removal was in the best interest of the minor child.

With regard to the first factor, the enhancement of the custodial parent's and child's quality of life, the court said that it was abundantly clear that petitioner's life would be greatly enhanced by the move because petitioner would not have to work any longer and could stay at

home. As a result, there would be no further need for before and after school day care, and petitioner would have more time to spend with the minor. The court believed that this would also enhance the general quality of the child's life.

In regard to motive, the court petitioner did not intend to frustrate respondent's visitation rights by removing the minor child. As to respondent's motive for resisting removal, the court said that there was "absolutely no evidence" that respondent's opposition to removal was based upon anything other than respondent's desire to maintain his current ability to see his child.

As to the factor of visitation, the court found that respondent's weekend visitations and visitation between the minor and respondent's family would be affected by the removal. The court observed that respondent actively exercised his visitation but "was troubled with the fact that he was not actually involved in the child's school, school activities or anything until after the petition to remove was filed." The court went on to say:

> "I found it interesting that he [respondent] went on – he made a phone call, had some contact with a teacher, and then went on a field trip. I didn't hear any evidence of him participating with the child in any of her extracurricular activities, specifically dance, either going to watch her practice or going to recitals."

The court believed that respondent could continue to maintain a healthy relationship with the child after removal. The court noted that respondent did not have a computer, but he had a telephone. Further, the court thought that "something called Skype" would allow him to maintain a close relationship with the child.

The court said that it was not presented with any evidence of potential harm to the child

as a result of the removal other than a reduced amount of frequent visitation. Finally, the court said that "[w]ithout saying more," it believed that a reasonable visitation schedule could be reached upon removal. The trial court granted the petition for removal.

The court decided that respondent would be allowed to have seven weeks visitation with the minor which included summer visitation and extended school breaks at petitioner's expense. Further, respondent could have visitation on other occasions at his own expense. The trial court requested the parties to prepare a visitation order consistent with this directive and continued the cause for entry of an order regarding visitation.

On August 31, 2010, respondent filed a notice of appeal. On September 2, 2010, respondent filed an emergency motion to stay the order of August 9, 2010, pending the outcome of the appeal. Ultimately, the court denied the request to stay the ruling.

On September 13, 2010, the parties appeared before the court for entry of the visitation order. The order provided that respondent would have the following visitation after removal: every spring break, two weeks during the month of June, two weeks during the month of July during even numbered years and one week during the month of July during odd numbered years, one week in August, fall break during even numbered years, Thanksgiving break during odd numbered years, a portion of the Christmas break, and visits during any time the minor child is in the State of Illinois. The court ordered that petitioner shall be responsible for the cost of these visitation expenses. The court also ordered that respondent could visit at other times, upon notice, with the child in the State of Alabama but ordered that respondent would be responsible for the costs of these visits in Alabama.

On September 21, 2010, respondent filed an amended notice of appeal with the trial court

challenging the court's orders of August 9, 2010, and September 13, 2010.

ANALYSIS

On appeal, respondent argues that the trial court erroneously found that it was in the best interest of the minor to grant petitioner's petition for removal and asks this court to reverse and vacate the trial court's ruling and order that the minor return to the State of Illinois. Alternatively, if this court affirms the trial court's granting of the petition for removal, respondent requests that this court reverse the trial court's visitation order and remand the cause to the trial court for entry of an order granting respondent additional visitation. Petitioner responds that the trial court properly allowed the petition for removal and entered a reasonable and realistic visitation schedule.

A reviewing court should reverse a trial court's decision to grant removal of a minor child when that decision is against the manifest weight of the evidence. *In re Marriage of Eckert*, 119 Ill. 2d 316, 328 (1988). A decision is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based upon the evidence. *In re Marriage of Main*, 361 Ill. App. 3d 983, 989 (2005). In this case, we determine that the opposite conclusion was clearly evident because petitioner failed to meet her burden of proving, by a preponderance of the evidence, that it was in the best interest of the minor to allow removal.

Clearly, the burden of proof lies with the party seeking removal to show that such removal is in the best interests of the child by a preponderance of the evidence. 750 ILCS 5/105, 609 (West 2008). If petitioner does not sustain this burden of proof, the *status quo* prevails, and the minor must continue to reside within the State of Illinois. When deciding whether

petitioner's evidence proves that removal is in the best interest of the minor, the case law provides that a trial court should consider the following factors: 1) the 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; 3) the motives of the noncustodial parent in resisting the removal; 4) the visitation rights of the noncustodial parent; 5) whether a realistic and reasonable visitation schedule can be reached if the move is allowed; and 6) the potential harm to the child which may result from the move and the resulting substantial impairment of the noncustodial parent's involvement with the minor child. *In re Marriage of Collingbourne*, 204 Ill. 2d 498, 522-23 (2003); *In re Marriage of Eckert,* 119 Ill. 2d at 326-27. Our supreme court has defined a "reasonable visitation schedule" as one that "will preserve and foster the child's relationship with the noncustodial parent." *In re Marriage of Eckert,* 119 Ill. 2d at 327.

Although our supreme court has delineated these factors, the court has noted that there is no bright line test, and each decision must be made on a case-by-case basis. *In re Marriage of Eckert*, 119 Ill. 2d at 326. Our supreme court has held that "a child has an important interest in 'maintaining significant contact with both parents following the divorce.' " *In re Marriage of Collingbourne*, 204 Ill. 2d at 522, quoting *In re Marriage of Eckert*, 119 Ill. 2d at 325. Thus, the " 'mere desire of the custodial parent to move to another State, without more, is insufficient to show that the move would be in the child[ ]'s best interest.' " *In re Marriage of Collingbourne*, 204 Ill. 2d at 522, quoting *In re Marriage of Eckert*, 119 Ill. 2d at 325.

Here, of the six factors to be considered, the potential enhancement of the quality of life resulting from petitioner's ability to become a stay-at-home parent after joining her husband in Alabama was the only factor which the court determined would enhance the minor's quality of

life. Yet, the case law provides that a custodial parent must prove more than a desire to live with a new spouse in order to prove that a child's best interests will be served by removal. *In re Marriage of Davis*, 229 Ill. App. 3d 653, 661 (1992). " 'If the obvious happiness the spouse would receive from being able to live with a new spouse were sufficient to prove removal in the child's best interests, court supervision of the proceedings would be unnecessary, and at best, ceremonial.' " *In re Marriage of Davis*, 229 Ill. App. 3d at 661 (quoting *In re Marriage of Berk,* 215 Ill. App. 3d 459, 466 (1991)).

The petition filed by mother in November 2009 claimed that if removal did not occur, the petitioner would be forced to continue to work full time in Illinois, and the minor child would not receive the benefit of Wulsch's increased potential income from his employment opportunity in Alabama. However, at the time of the hearing on this petition, petitioner's new spouse had accepted employment in Alabama and was receiving his salary. This evidence reveals the trial court was not presented with a situation where petitioner was required to relocate to Alabama for the family's financial situation to improve or to maintain her new marriage. According to petitioner's financial affidavit, the current monthly income for the marriage exceeded the marital expenses by several thousand dollars each month. There was simply no showing that the minor would not benefit from Wulsch's increased salary unless petitioner moved to Alabama or that petitioner could not stay at home with the minor in Illinois as a benefit of her new husband's employment.

In fact, Wulsch testified that if petitioner and the minor would not be able to move to Alabama, he "would continue looking for other jobs up here in the Illinois area." In addition, petitioner said that she would "stay here" with the minor, and Wulsch would "continue working

in Alabama until he finds a job here," if the court denied her request for removal.

As a negative consideration, the trial court found that respondent's bi-weekly regular weekend visitation would be unavoidably affected by a long distance move. This finding is well supported by the evidence. However, after acknowledging that respondent's visitation would be affected, the court viewed respondent's decision to contact the minor's school, speak to a teacher, and join his daughter on a school field trip in a negative light by determining his involvement was motivated by the petition for removal. The court seemed to conclude respondent had only developed a recent interest in his daughter's scheduled activities, and therefore his relationship with his daughter would not be dramatically impacted by removal.

This finding was contrary to the evidence which established that during the marriage, respondent and petitioner shared day-to-day responsibilities for the care of the minor, as well as arrangements for her to attend daycare and school. Following the dissolution, respondent continued to be an active parent involved in the minor's life, including school and daycare, and respondent's extended family actively participated in the child's upbringing. Further, the trial court erroneously found that respondent did not attend the minor's dance recitals, contrary to the evidence.

The court minimized the negative consequence resulting from modifying respondent's visitation schedule after finding respondent would be able to maintain the existing relationship with his young daughter through technology, including "Skype." This finding is not supported by the evidence because the court acknowledged that respondent did not have a computer. Thus, there was no evidence that respondent had any "Skype" technology in place. In contrast, the record reveals the parties anticipated that the minor's only contact with respondent would be via

the telephone between court ordered visitations.

The court overlooked the undisputed evidence which showed that Wulsch, respondent and petitioner did not have any extended family or friends in Alabama. By moving to Alabama, the evidence showed that the minor could no longer enjoy her well established, daily relationship with her maternal grandmother and the bi-weekly visits she shared with respondent and his extended family. The court also failed to balance the indirect benefit of a stay-at-home parent against the necessity of long distance travel for the young minor, less frequent visits with respondent, who maintained an active role in her life, and more sporadic contact with both maternal and paternal grandparents. As a result of the removal, the minor would be separated from respondent and his family for up to three months at a time.

We conclude that the evidence presented to the trial court did not support the court's decision that petitioner had met her burden of proof and demonstrated it was in the best interest of the minor child to grant petitioner's petition for removal based only on her desire to join her husband in Alabama and become a stay at home parent. Accordingly, the trial court's order of August 9, 2010, granting removal of the minor child to the State of Alabama, and the September 13, 2010 order declaring a new visitation schedule, are reversed and vacated.

Since we have vacated the order allowing the petition for removal, we need not address respondent's alternative challenge to the court's visitation schedule based upon removal.

CONCLUSION

The judgment of the circuit court of Will County granting removal of the minor child from the State of Illinois is reversed and vacated.

Reversed and vacated.

JUSTICE HOLDRIDGE, specially concurring:

I concur with the decision to reverse the trial court's judgment granting the petition to remove the child from Illinois. I write separately to raise two additional points. First, the trial court's finding that the best interest of the child would be served by relocation to Alabama so that the child would not have to attend daycare before and after school is not supported by the record. The respondent testified that once her new husband found work in Alabama, she would no longer have to work and would be able to stay at home with the child. However, there is nothing in the record to indicate that the respondent would quit her job to spend more time with her daughter only if her new husband found work in Alabama. The record established that the new husband had other job opportunities he could have explored which would have allowed the petitioner to remain in the general area of northeast Illinois. In other words, the fact that the petitioner would decide to quit her job when her new husband found the relatively high-paying job that he could expect as a nuclear engineer did not establish that the child would be better off with a move to Alabama. Clearly, the record established that the petitioner intended to quit her job once her new husband found employment, even if that new employment did not necessitate a move out of Illinois. Once the new husband found employment anywhere as a nuclear engineer, the petitioner would be able, if she wished, to quit her job to stay at home with the child. Therefore, the finding that the best interest of the child would be served by a move to Alabama so that the child could spend more time with the petitioner is not supported by the manifest weight of the evidence. The record only established that the petitioner would be able to quit her job and stay at home with the child, when her new husband found work wherever that work was located.

Additionally, the record does not support the trial court's acceptance as a given that the child would necessarily be better off with a stay-at-home mother in Alabama than she would with weekly visitation by her father. The evidence adduced at the hearing established that the child was in school from approximately 8:30 a.m. until approximately 3:00 p.m. The only additional time that would be available for the petitioner to spend with the child if the relocation to Alabama was approved would be the one hour before and one hour after school that the child would have been in daycare. The trial court appears to take judicial notice of the "fact" that a child is always better off avoiding daycare. While this may or may not be true, it is not something which a court may simply accept as true without supporting evidence. Judicial notice is only appropriate where the fact to be taken as true is one which is generally well known and is not the subject of any reasonable dispute. See *Bossler v. Countryside Gardens, Inc.*, 44 Ill. App. 3d 423, 426 (1976) (court could properly take judicial notice that water will not run uphill). To the extent that our courts have accepted as given that a child's best interest is not served by being in daycare, this practice is not supported by a proper evidentiary basis.

In the instant matter, there was nothing in the record to indicate that the child was unhappy or otherwise ill-served during the short time before and after school when she was in daycare. Without some evidence in the record to establish that the child was adversely impacted by daycare, the trial court's assumption that the child would be better off moving to Alabama to avoid daycare is against the manifest weight of the evidence. See *In re Marriage of Collingbourne*, 204 Ill. 2d 498, 529-30 (2003) (relocation would allow the petitioner to withdraw the child from a daycare environment "in which he was unhappy").

My second reason for finding the trial court's ruling to be against the manifest weight of

the evidence is the court's improper reliance upon electronic communication to support its finding that the negative consequences of removal upon the father's visitation and the resulting substantial impairment of his involvement with the minor was not significant. Although not raised by the parties before the trial court, nor raised before this court, the Illinois Marriage and Dissolution of Marriage Act was amended effective January 1, 2010, by adding the following provision to section 609 - Leave to Remove Children:

> "(c) The 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." 750 ILCS 5/609(c) (West 2010) (P.A. 96-331 eff. January 1, 2010).

In this matter, the trial court relied upon the respondent's potential use of computer technology to overcome the fourth and fifth *Eckert* factors concerning the respondent's visitation and the substantial impairment the move to Alabama would have on his involvement with his daughter. The provision against considering electronic communication technology in removal decisions became effective January 1, 2010. The evidentiary hearing in this matter was held on July 26, 2010, and the court issued its finding on August 9, 2010. I see no problem with the fact that the effective date of the amendment was after the date the petition was originally filed since it is well settled that statutory amendments addressing matters of procedure or rules of evidence have immediate effect in all matters pending before the trial courts. See *Schantz v. Hodge-VonDeBur*, 131 Ill. App. 3d 950, 953 (1983). The court has a duty to follow the law in effect at the time the decision is made, and the fact that the parties did not bring the statutory requirement to the attention of the circuit court does not prevent this court from considering only the evidence properly before the trial court when deciding whether the trial court's finding was against the

manifest weight of the evidence. When only the proper evidence of record is considered, there is no basis in the record upon which the trial court could have found that the respondent's visitation would not have been negatively impacted by the move to Alabama, nor that his involvement in the life of the child would not have been substantially impaired.

The trial court's finding that the best interest of the child would be served by removal to Alabama was based upon facts not in evidence before the court, and the finding that the respondent's visitation would not be negatively impacted, nor his involvement in the child's life significantly impaired, was based primarily upon statutorily impermissible evidence. I find, therefore, it is clearly evident from the record that the trial court should have reached the opposite conclusion. See *Best v. Best*, 223 Ill. 2d 342, 350 (2006).

For the foregoing reasons, along with those articulated in the judgment of the court, the judgment of the circuit court of Will County granting removal of the minor child from the State of Illinois should be reversed and vacated.

PRESIDING JUSTICE CARTER, dissenting:

I respectfully dissent from the majority's order in the present case. The trial court is given a high level of discretion on removal petitions because as trier of fact, the trial court has a significant opportunity to observe both parents and the minor child and is able to assess and evaluate their temperaments, personalities, and capabilities. See *In re Marriage of Collingbourne*, 204 Ill. 2d 498, 522 (2003). Thus, a trial court's ruling on a petition for removal of a minor child from the state will not be reversed on appeal unless the ruling is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred.

Collingbourne, 204 Ill. 2d at 521-22; *In re Marriage of Eckert*, 119 Ill. 2d 316, 328 (1988). A trial court's ruling is against the manifest weight of the evidence only if it is clearly evident from the record that the trial court should have reached the opposite conclusion. See *Best v. Best*, 223 Ill. 2d 342, 350 (2006). In addition, a trial court's ruling may be found to be against the manifest weight of the evidence if the trial court's ruling itself is unreasonable, arbitrary, or not based upon the evidence presented. See *Best*, 223 Ill. 2d at 350. When the applicable standard of review is the manifest weight standard, a reviewing court will not substitute its judgment for that of the trial court on such matters as the credibility of the witnesses, the weight to be given to the evidence, or the inferences to be drawn from the evidence. See *Best*, 223 Ill. 2d at 350-51.

In the present case, it is clear from the record that the trial court was thoroughly familiar with the law in this area and the factors that should be considered in ruling upon a petition for removal. The trial court stated the factors, considered the factors, and balanced the factors in reaching its ruling granting the petition for removal. The trial court ultimately found that removal was in the child's best interest because it would allow the mother to be a stay-at-home mom, which would provide more time for the mother to spend with the child and would allow the child to avoid having to go to daycare during the school year or the summer. A similar benefit was recognized by our supreme court in *Collingbourne*. See *Collingbourne*, 204 Ill. 2d at 529-30. While the majority in this case may have reached a different conclusion if it had been the trier of fact, that does not in any way make the trial court's ruling against the manifest weight of the evidence. The presumption in favor of the result reached by the trial court in a removal case is always strong and compelling. *Collingbourne*, 204 Ill. 2d at 522; *Eckert*, 119 Ill. 2d at 330. The majority in this appeal correctly states the appropriate standard of review but then fails to

apply it. Viewing the evidence in this case and the trial court's ruling under the appropriate standard of review, I would affirm the trial court's grant of the petition for removal.

For the reasons stated, I respectfully dissent from the majority's order in the present case.