2012 IL App (3d) 110927-U

Order filed December 20, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

KIMBERLY SUE CLARK.	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellant,	)	Rock Island County, Illinois,
	)	
v.	)	Appeal No. 3-11-0927
	)	Circuit No. 05-F-49
	)	
AJAY LABROO,	)	Honorable
	)	Lori Lefstein,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice O'Brien and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err when it denied the petition to remove the minor to California because the evidence indicated that the custodial parent sought to move primarily to place greater distance between her and the non-custodial parent, as the custodial parent did not have a job or housing in California, the move would impair the non-custodial parent's visitation rights, and there were little, if any, direct or indirect benefits to the minor from the move.

¶ 2 FACTS

¶ 3 BACKGROUND

¶ 4 On October 28, 2005, Kimberly Sue Clark, the petitioner, filed a petition to establish paternity of the minor child at issue, Benjamin Nelson, born July 30, 2004. The trial court found that Ajay Labroo, the respondent, was the biological father of the minor, and awarded Kimberly temporary custody and Labroo temporary visitation. Since this time, the parties have had a difficult time getting along and exchanging Benjamin for his visits with Labroo.

¶ 5 Thereafter, on April 2, 2008, the parties reached an Agreed Order concerning custody and visitation. Pursuant to the terms of this agreement, Clark was awarded custody of Benjamin and Labroo was granted visitation. The order also prohibited the parties from disparaging one another in front of Benjamin and limited communication between the parties to email or text message. A subsequent order also indicated that exchanges of Benjamin would occur at his school, or at Safe Connections, due to Labroo's "undesirable conduct."

¶ 6 On July 19, 2011, Kimberly filed a petition seeking to remove Benjamin from Illinois to California. In this petition, Kimberly alleged that Labroo now worked in Florida and had not visited Benjamin in approximately two months. Two days later, Labroo filed a petition to find Kimberly in contempt, alleging that Kimberly did not permit him to visit Benjamin on June 7, 2011, and that he subsequently lost eight days of visitation because of Kimberly's continued refusal to allow him to see Benjamin.

¶ 7 REMOVAL HEARING

¶ 8 The court conducted a hearing on Kimberly's removal petition. Kimberly testified that she wanted to move the California to improve her financial situation. Currently, she worked for

Genesis as a visiting nurse, where she earned $29.43 per hour and worked 32 hours per week. Kimberly had interviewed for jobs in California that would pay $38.50, $42, and $50 per hour, and she would work full-time in some of these positions; however, she would not have an employment contract and could be let go at any time. Kimberly did not have a job offer in California at the time of the hearing. Kimberly believed that by making a higher salary in California, she could better provide for her family. She acknowledged that she had not looked for a new employment position in the Quad Cities area.

¶ 9 Kimberly lived in a rural farmhouse in Port Byron, Illinois, that needed extensive repair and renovation work. She found someone to purchase her home and planned to use the money from the sale to purchase a home in California. She acknowledged that homes were more expensive in California than in Illinois. She did not consider the real estate taxes that would be imposed on her if she purchased a home in California. Kimberly also owns horses that she would take to California, and acknowledged that the cost to feed her horses and other animals would be higher in California than in Illinois. Overall, Kimberly did not have any final arrangement concerning employment or housing in California.

¶ 10 Kimberly testified to some of the difficulties surrounding Labroo's visitation. According to her, Labroo often wanted to pick up Benjamin early, return him late, and would not permit Kimberly to speak with Benjamin while he was in Labroo's care. Kimberly specifically testified to an event where Labroo did not retrieve Benjamin from school, but instead telephoned the school and asked if school personnel would bring Benjamin to meet someone in the parking lot of a local grocery store to exchange Benjamin. Kimberly indicated that she did not know the individual who was set to retrieve Benjamin from the store, and thus, the school did not take

Benjamin to meet this person. Kimberly also testified that on another occasion, Labroo sent his former fiancée to pick up Benjamin, but she was not informed of the change and would not release Benjamin to this person. Kimberly asserted that the turmoil and her contact with Labroo has caused her to be unhappy.

¶ 11 If the court granted her petition for removal, Kimberly suggested that Labroo could have visitation with Benjamin for portions of Benjamin's Christmas and spring breaks, and for one month in the summer. She acknowledged that Labroo had exercised about 75% of the visitation provided in the May 2009 court order, but that after January 2011, when Labroo began working in Florida, he had only seen Benjamin on six Tuesday nights and two weekends. She also explained that she permitted Labroo to visit with Benjamin on one occasion that was not provided in the court's prior visitation order, but on the other two occasions that Labroo requested to do so, she declined because she already had plans to be out of town.

¶ 12 Kimberly's daughter Jessica was studying osteopathic medicine at Des Moines University, and was interested in doing a residency in Colorado or California. Jessica currently had one more year of residency in Detroit. Kimberly believed that she would help care for Benjamin if she came to California. Kimberly's other family in California consisted of distant cousins who Kimberly last saw three years earlier. Kimberly acknowledged that she had more relatives in Illinois than she did in California.

¶ 13 Overall, the turmoil and her contact with Labroo caused Kimberly to be unhappy. Kimberly thus believed that it was in Benjamin's best interest for the court to grant the removal petition because moving to California would improve her financial condition, provide her more

family support, and because she would be happier in California which would make Benjamin happy.

¶ 14 Erin Clark testified that she was Kimberly's 22-year-old daughter and currently resided with Kimberly in Port Byron, Illinois. Erin graduated from Western Illinois University in May 2011 with a degree in theater acting. She has not performed any acting roles in the Quad Cities, but wanted to move to California to pursue a career in this field. Erin did not have a job in California, and could not move there on her own if Kimberly was not permitted to also move there. She planned to live with Kimberly and Benjamin if the court granted the petition for removal.

¶ 15 According to Erin, Benjamin was carefree before a visit with Labroo, but would get nervous as the visit approached. When Benjamin returned from visits with Labroo, his demeanor was different in that Benjamin seemed more nervous or sensitive and would get upset about small things. Benjamin seemed to believe that he was in trouble or had done something wrong when he returned from a visit. Labroo had not exercised all of his visitation days with Benjamin from January through May 2011, and in May, Labroo did not exercise any visitation.

¶ 16 Erin opined that it was in Benjamin's best interest for the court to grant Kimberly's petition for removal. She explained that she would be there and Jessica anticipated moving to California or somewhere close to California. Erin believed that Benjamin would have a better support system in California with his mother and sisters there.

¶ 17 Labroo testified that he worked as a cardiologist and lived in Port Byron, Illinois. He also had an apartment in Mirimar Beach, Florida, which he has used for an additional medical practice as a cardiologist. Labroo explained that he worked the first 20 days of each month in

Florida, and the last 10 days of the month in the Quad Cities area. The record indicates that Labroo had difficulty meeting his child support obligations in this case and in an unrelated case in another county and thus, the courts in both counties had admonished him to find more lucrative employment and to expand the geographic radius of his prior job search to ensure that meets these obligations. Labroo appeared to be current on his child support obligations as of the time of the hearing.

¶ 18 Labroo opposed the petition for removal. Labroo noted that Benjamin participated in football, basketball, music lessons and church in Illinois, and he believed that these activities engendered a positive father and son relationship. Benjamin was one of the most important people Labroo's his life, and he would miss Benjamin if he moved across the country. Also, Benjamin currently saw Labroo's three other children regularly, and Benjamin had a close relationship with his older half-siblings and they were a positive influence in Benjamin's life. Labroo's mother, who lived approximately 90 minutes from the Quad Cities, would also lose the ability to see Benjamin if he moved across the country. Labroo believed that he would lose 60% to 70% of his visitation time with Benjamin if the court granted Clark's petition for removal. Benjamin informed Labroo that he did not want to move to California, and Labroo believed that Benjamin was nervous about the proposed move. Benjamin also wondered if moving to California would make him closer to Florida.

¶ 19 Labroo stated that the cost of living in California was higher than the cost of living in Illinois, and he did not believe that Kimberly had considered this increase in expenses in her request for removal. Also, in light of Kimberly's assertion that she could improve her financial condition by moving the California, Labroo noted that there were many open nursing jobs in the

Quad Cities area, and Kimberly did not consider these openings in the filing of her petition for removal.

¶ 20 Tina Hans is a registered nurse and works for four different employers in the Quad Cities area. As part of her employment, she performed general management and accounting for Labroo's office. She was aware that there were nursing jobs available in the community and in the last three to five years, she has had offers for other positions. She has never gone without work as a nurse in the community.

¶ 21 Hans knew that Labroo exercised visitation with Benjamin on Tuesdays and some weekends. According to her, Benjamin and his father had positive interactions, and Benjamin was excited to see his cousins, aunts, uncles, and grandmother. Hans had a good relationship with Benjamin, including when she helped care for him.

¶ 22 The court denied Kimberly's petition for removal. It made the following findings: Kimberly's quality of life would be enhanced because she would live further from Labroo, who has caused her stress. She would also reside in a part of the country that she enjoyed. However, she had not considered the increased expenses of living in California, which may offset any increase in Kimberly's salary. The court was "not convinced" that Kimberly's increased happiness would result in an enhanced quality of life for Benjamin, as the move would take him many miles from Labroo and Labroo's family members in Illinois.

¶ 23 Labroo's motives for opposing the move were sincere, and while Kimberly sincerely wanted to move to California, the court was "troubled" that Kimberly did not look for work in a part of the country that was closer to Labroo in either the Midwest or Southeast.

¶ 24 Labroo and Benjamin had a close relationship. Although Labroo has not exercised all of his court-specified visitation since January 2011, it was because the current visitation schedule was not conducive to Labroo's work schedule. Kimberly "rarely agreed" to permit Labroo to visit Benjamin outside the terms of the court's prior order.

¶ 25 The court questioned whether Benjamin would be with members of Kimberly's family in California, as Erin did not have a job there, Jessica had not been offered a residency there, and there was no evidence indicating that Benjamin had a close relationship with Kimberly's distant relatives in California. Due to the "lengthy distance" between Illinois and California, Benjamin's move to California would substantially impair Labroo's and his family's involvement with him. Thus, the court found that overall, Kimberly did not establish by a preponderance of the evidence that the move to California was in Benjamin's best interest.

¶ 26 The court also entered an order on a previously filed motion from Labroo requesting to modify his visitation with Benjamin. The court denied Labroo's request to have custody of Benjamin for the last 10 days of the month, but modified his visitation schedule so that his visits would occur during the period of time that Labroo was in Illinois.

¶ 27 Kimberly appeals.

¶ 28 ANALYSIS

¶ 29 Kimberly contends that the court abused its discretion when it denied her petition for removal because Benjamin would benefit from fewer, but longer, visits with Labroo and because it was in Benjamin's best interest to "place a healthy distance between [his parents]." She also asserts that moving to California would permit Benjamin to maintain the core family unit that he has known for his entire life, and that it would remove Benjamin from any stress caused by

Kimberly and Labroo's poor relationship. Labroo maintains that the trial court properly denied Kimberly petition because she did not meet her burden of showing that a move to California was in Benjamin's best interests.

¶ 30 Section 609(a) of the Illinois Marriage and Dissolution of Marriage Act (the 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 Kimberly and Labroo 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).

¶ 31 In *In re Marriage of Eckert*, 119 Ill. 2d 316 (1988), 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. Therefore, each case should be determined according to its own facts and circumstances. *In re Marriage of Berk*, 215 Ill. App. 3d 459 (1991). "The presumption in favor of the result reached by the trial court is always strong and compelling" (*Eckert*, 119 Ill. 2d at 330); 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 (*In re Marriage of Guthrie*, 392 Ill. App. 3d 169 (2009)). 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).

¶ 32 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.
A child has a significant interest in maintaining contact with both parents, and a custodial parent must prove more than her own desire to move to show that a child's best interests will be served by removal. *Eckert*, 119 Ill. 2d 316.

¶ 33 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). Additionally, 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).

¶ 34 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.

¶ 35 In this case, the trial court's determination to deny Kimberly's petition for removal was not against the manifest weight of the evidence.

¶ 36 We begin by considering the first *Eckert* factor, whether Kimberly and Benjamin would experience an enhanced quality of life by moving to California. At the outset, we agree with the trial court that the move would increase the distance between Kimberly and Labroo, which would cause Kimberly less stress, and that she would be living in a part of the country that she liked.

¶ 37 However, the evidence also indicates that Kimberly does not have a job in California, nor does she have housing. Although Kimberly contends that she could make more money by working in California, the record indicates that the corresponding costs of living would be higher. Thus, the record does not support Kimberly's assertion that moving to California would improve her financial condition.

¶ 38 We also question whether moving to California would keep together Benjamin's core family unit. Here, the record indicates that Erin would not move to California if Kimberly did not also live there because Erin could not afford to do so without her mother's assistance. Thus,

if Kimberly remained in Illinois, so would Erin. Also, there is no evidence that Jessica would have a residency in California. Therefore, notwithstanding whether the trial court granted Kimberly's petition, both Kimberly and Erin would continue to live with Benjamin in either Illinois or California, and Jessica may or may not live near them after she finishes her residency in Detroit. This evidence does not indicate that a move to California is warranted so as to keep Benjamin's core family unit together. Additionally, we note that Kimberly does not have close family in California, but only "distant cousins" whom she has not seen in years.

¶ 39 Thus, while we acknowledge Kimberly's desire to move to California, many of the benefits that Kimberly believes will accompany a move to California are speculative. As a result, there is no evidence to support the contention that moving to California would directly or indirectly benefit Benjamin, especially in light of the distance it would place between him, Labroo and Labroo's family.

¶ 40 Considering the second and third *Eckert* factors, the record does not show that Labroo acted in bad faith in challenging the removal of Benjamin to California, but that he loved his son and did not want him to move across the country. Kimberly has acknowledged on appeal that Labroo would have less visitation time with Benjamin if the court granted her petition for removal. She also asserts that she wanted to put distance between her and Labroo. While this court understands the difficulties that may accompany visitation by parents who do not get along, given Kimberly's admissions, we cannot necessarily conclude that Kimberly's proposed plan to move and decrease Labroo's visitation time with Benjamin is not intended to frustrate Labroo's visitation. Nonetheless, we agree with the trial court's finding that Kimberly genuinely wanted to move to California and that she would enjoy living in that part of the country.

¶ 41 We now consider the fourth and fifth *Eckert* factors – the effect on Labroo's visitation rights and whether a reasonable visitation schedule can be reached if the move were to be allowed. A reasonable visitation schedule is "one that will preserve and foster the child's relationship with the noncustodial parent." *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.

¶ 42 In this case, the visitation schedule proposed by Kimberly was not reasonable or realistic. Specifically, the proposed visitation schedule would deprive Labroo of many of his visitation days with Benjamin. Given their close relationship, as well as the interactions that Benjamin has with Labroo's family, including his half-siblings and grandmother, such a deprivation would not only harm the relationship between Labroo and Benjamin, but it would also harm Benjamin's relationship with his father's family. This conclusion is only magnified in light of the great distance between Illinois and California, as it would be difficult, if not impossible, for Labroo to see Benjamin outside of his court-ordered visitation times.

¶ 43 We acknowledge that after Labroo began working in Florida in January 2011, he had missed visits with Benjamin. Nonetheless, we agree with the trial court that the visitation schedule in place at that time prevented Labroo from doing so. Since then, the court has changed the visitation schedule, and Labroo exercises more frequent visitation with Benjamin during his time in Illinois. This schedule better corresponds with the goal of the Act 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).

¶ 44 Overall, the trial court's determination that the *Eckert* factors did not weigh in favor of removal is well-supported by the record. Consequently, the trial court's denial of Kimberly's petition for removal is not against the manifest weight of the evidence.

¶ 45 CONCLUSION

¶ 46 The judgment of the circuit court of Rock Island County is affirmed.

¶ 47 Affirmed.