2014 IL App (3d) 140599-U

Order filed December 30, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

In re MARRIAGE OF JENNIFER J. GRASSE, Petitioner-Appellee, and DAVID J. GRASSE, Respondent-Appellant.	)))))))))))	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois Appeal No. 3-14-0599 Circuit No. 13-D-243 Honorable Michael D. Kramer, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred by granting custodial parent's petition to remove her minor children out of state without first determining whether removal would be in the best interests of the children.

¶ 2 The respondent, David Grasse (David), appeals from a judgment of the circuit court of Kankakee County granting his ex-wife Jennifer Grasse's (Jennifer) petition for leave to remove the couple's children from the State of Illinois.

¶ 3 FACTS

¶ 4 On July 8, 2013, Jennifer filed a petition for the dissolution of her marriage to David. At that time, David was incarcerated in the Florida Department of Corrections and Jennifer was living in Illinois with the couple's three children, Bryson, Olivia and Cody. On October 29, 2013, the trial court entered a Judgment Order for dissolution of marriage which awarded Jennifer sole custody of the children subject to David's right to reasonable visitation upon his release from prison.

¶ 5 On April 4, 2014, Jennifer filed a petition for leave to remove the children from the State of Illinois to Texas. During the hearing on her petition, Jennifer testified that she and the children moved from Florida to Illinois "[a[bout two-and-a-half years ago," after David was sentenced to six years' imprisonment in the Florida Department of Corrections. Jennifer stated that she relocated to Illinois to be near her family because she needed financial assistance. At the time of the hearing, Jennifer was renting a house her parents owned in Kankakee County for about $565 per month. She testified that her rent payments would be increased by $100 every six months (beginning the month after the hearing) until they reached $1,000 per month. Jennifer became certified to teach in the State of Illinois and obtained a teaching position in the Bradley School District earning just under $34,000 per year. Jennifer testified that she was the sole breadwinner for her children and that she received no financial support from David or his family. She stated that, while in Illinois, her monthly expenses totaled approximately $500 more than her monthly take home pay, and that she had picked up an additional part-time job in an attempt to meet her financial obligations.

¶ 6 Jennifer testified that her children currently attended Grace Baptist Academy in Kankakee, Illinois. For the past two years, the children had received scholarships. However, Jennifer stated that the scholarships had expired and the children were not approved for

additional scholarships. The tuition at Grace Baptist Academy was approximately $2,400 to $2,500 per year, per child. Jennifer stated that it was not feasible for her to pay that amount of tuition.

¶ 7 Jennifer testified that she had obtained a teaching position in the Sunray School District in Sunray, Texas, a town near Amarillo. Jennifer stated that she would earn approximately $4,000 more per year in this new teaching position than she currently earned teaching in the Bradley School district. Jennifer also testified that she had secured a three-bedroom home 10 miles outside of Sunray which was bigger than the home she was currently renting from her parents in Illinois. Jennifer stated that her living expenses would decrease substantially in Texas and that she would have a surplus of approximately $800 per month that she would use to improve the children's lifestyles. Moreover, she would not have to pay tuition to send her children to the Sunray School District.

¶ 8 Jennifer testified that the move to Texas would have a positive impact on the children because, among other things: (1) the children would attend school in the same district where Jennifer teaches and would be able to ride with Jennifer to school every day; (2) two of the children would be in the same building as Jennifer; (3) the school district has a new basketball and gym facility for the children; (4) riding horses is Olivia's "passion," and although Jennifer was no longer able to afford to pay for Olivia's riding lessons in Illinois, there are two locations near Sunray, Texas that would allow Olivia to ride, practice, and train horses for free.

¶ 9 Jennifer noted that her current boyfriend, Jeff Ford (Jeff), also resides in Texas. Jennifer stated that she and Jeff have been in an exclusive dating relationship for approximately one year and they have plans to marry, although they were not formally engaged and had no plans to cohabitate. Jeff is the brother of Jennifer's sister-in-law. Jennifer stated that her sister-in-law and her entire family reside in Texas and that the Ford family had built a basketball court inside a

nearby barn for Jennifer's children. Jennifer testified that her youngest son, Cody, who was 9 years old at the time of the hearing, "adores" Jeff because Jeff is a "male figure in [Cody's] life." However, Jennifer stated that she did not want Jeff to replace the children's father and she wanted to encourage a close relationship between the children and their father.

¶ 10 Jennifer stated that she arranged for the children to visit David in prison during their fall, spring, Thanksgiving, and Christmas breaks. She further testified that, if she moved to Texas, she would encourage her children's relationship with her parents, who continue to reside in Illinois, and that she would nurture the children's relationship with David's parents, who reside in Florida.

¶ 11 All three of the children testified *in camera*. Bryson, who was 15 years old at the time of the hearing, testified that he would "prefer not to move" to Texas and he did not feel that it was best for he and his siblings to move at this time in their lives. Bryson stated that he had "a set of grandparents, an uncle and an aunt, and very many cousins" in the Kankakee County area. His grandparents only lived 10 minutes away and they saw the children at least three times per week. Bryon's grandfather assisted Jennifer in driving the children to school every day. Bryson testified that he also had support from teachers and friends in Illinois. He stated that it would be harder for him in Texas because he had no family or friends there.

¶ 12 Bryson also testified that his nine-year-old brother Cody had emotional problems and sometimes experienced "meltdowns" at school. When Cody had a "meltdown," the teachers at Grace Baptist Academy would allow Bryson to spend time with Cody. Bryson would ask Cody what was wrong, "talk to him a little bit," and "tell him that everything's going to be all right." According to Bryon, Cody would then "feel better the rest of the day."

¶ 13 Olivia, who was 13 years old at the time of the hearing, and her brother Cody also testified *in camera*. Olivia testified that she preferred to stay in Illinois because of her close

relationship with her grandparents, aunts, and uncles in Illinois. Cody testified that he felt "[g]ood and bad" about moving to Texas. One the one hand, Cody testified that he would have "a lot of fun" in Texas because there were "a lot of people" he knew there and they were "really nice." He also suggested that he was looking forward to "farming" at his "Papa Ford's" farm in Texas. (Cody described "Papa Ford" as his mother's "friend" whom Cody had met twice. Cody stated that "Papa Ford" was a "really good man" who was "very nice.") On the other hand, Cody testified that he would "miss" "a lot of people" in Illinois, including his friends from school, his cousins, and his grandmother and grandfather.

¶ 14 Carol Gross, Cody's teacher at Grace Baptist Academy, was called to testify about Cody's behavior and performance at school. She testified that Cody did well academically and fit in well socially with the other students. However, Gross stated that Cody had "crying spells" on a weekly or biweekly basis. She noted that the other children in Cody's class were "caring and compassionate" towards Cody and never teased him or belittled him for crying in class. During each of Cody's crying spells, Gross would "hold [Cody] and let him cry," pray with him, and ask him if he wanted her to call someone, such as his brother Bryson or his grandfather, John Schimmel. When asked to describe the environment at Grace Baptist Academy, Gross responded, "[w]e're a very loving, caring school, very compassionate and very gentle."

¶ 15 John and Cindy Schimmel, Jennifer's parents and the children's maternal grandparents, each testified in opposition to Jennifer's petition to remove the children. John Schimmel testified that he had a close relationship with his grandchildren and drove them to school every day. He also testified that he volunteered as athletic director at Grace Baptist Academy to "help the school offset the *** free Christian education" they were providing his grandchildren. Cindy Schimmel testified that she and her husband saw the children frequently and were "on call" to help drive them to doctor's appointments, dentist's appointments, and various activities.

¶ 16 Moreover, the Schimmels each testified that they had helped Jennifer financially after she moved to Illinois from Florida. John Schimmel testified that Jennifer and the children had lived with the Schimmels rent-free for approximately "a year and a half" during which time the Schimmels paid almost all the household expenses and "basically supplied all the [family's] needs." On two occasions, Cindy Schimmel paid Jennifer the $800 to $900 commissions Cindy had earned on a rental property as a realtor. Moreover, when Jennifer began renting a house from the Schimmels, the Schimmels charged her substantially less in rent than they had charged the previous tenant. Jennifer's current rent payments covered only the cost of the Schimmels' mortgage on the rental property; it did not include insurance or taxes.

¶ 17 John Schimmel also testified that the children's free tuition at Grace Baptist Academy would continue into the following school year.

¶ 18 After hearing arguments from the parties' counsel, the trial court granted Jennifer's petition to remove the children. In announcing its oral ruling from the bench, the trial court began by noting that, under section 5/609 of the Illinois Marriage and Dissolution of Marriage Act (the Act), Jennifer could move the children "more than 250, 260 miles away" without having to file a petition so long as she stayed within the State of Illinois. However, the court acknowledged that Jennifer was required to file a petition in this case because she was asking to move the children out of state. The court granted the petition because it found that the removal of the children to Texas would not interfere with David's visitation rights. The court stated that, in *In re Marriage of Eckert*, 119 Ill. 2d 316 (1988) (a leading case applying section 5/609 of the Act), our supreme court "was concerned about a disruption of the relationship between the children and the other parent." The court found that there could be no such disruption here because there was "no parenting schedule" for David. As the trial court put it, "[u]nder these

circumstances there's no argument that can be made that this is in any way a disruption of a relationship that doesn't exist."

¶ 19 The trial court granted Jennifer's removal petition on this basis even though it expressed doubts as to whether removal was in the children's best interests. Specifically, the court noted that "[w]hat's happening here may very well not be the best thing for the children, but it is the mother's right as custodial parent to move. And for that reason the petition will be allowed." In so ruling, the trial court suggested that the law required that the petition be granted regardless of whether removal was in the children's best interests:

> "Is it a mistake to move the children from a school where they are very, very comfortable, that they enjoy, where they have good friends, where they have frequent contact with their grandparents and other relatives? Is it being done for a selfish reason? *The law says it doesn't really matter*. Mom can move these kids, like I said, four hours away without even filing a petition. And if I sound frustrated it's because I am." (Emphasis added.)

At the conclusion of its remarks, the trial court said to Jennifer, "[m]a'am, I truly and sincerely hope you know what you're doing." This appeal followed.

¶ 20 ANALYSIS

¶ 21 On appeal, David argues that the trial court erred when it granted Jennifer's petition for removal because removal is not in the best interests of the children.

¶ 22 Section 609(a) of the Act provides:

> "The court may grant leave, before or after judgment, 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." 750 ILCS 5/609(a) (West 2014).

¶ 23 "[T]he best interests of the child is the 'paramount question' which must be considered in removal actions." *In re Marriage of Collingbourne*, 204 Ill. 2d 498, 521 (2003) (quoting *Eckert*, 119 Ill. 2d at 325). A best interests determination " 'cannot be reduced to a simple bright-line test,' " and " 'must be made on a case-by-case basis, depending, to a great extent, upon the circumstances of each case.' " *Collingbourne*, 204 Ill. 2d at 521 (quoting *Eckert*, 119 Ill. 2d at 326). We will not disturb the trial court's best interests determination "unless it is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred." *Eckert*, 119 Ill. 2d at 328; *In re Marriage of Coulter*, 2012 IL App (3d) 10097, ¶ 25.

¶ 24 Our supreme court has identified several factors that the trial court should consider in assessing the child's best interests: (1) whether the move will "enhance[e] the general quality of life for both the custodial parent and the children"; (2) "the motives of the custodial parent in seeking the move," (*i.e.*, "whether the removal is merely a ruse intended to defeat or frustrate visitation"); (3) the noncustodial parent's motives for challenging removal; (4) the effect the move would have on the noncustodial parent's visitation rights (because "[i]t is *** in the best interests of a child to have a healthy and close relationship with both parents, *as well as other family members*"); and (5) whether the move would still allow for a reasonable and realistic visitation schedule for the noncustodial parent. (Emphasis added.) *Collingbourne*, 204 Ill. 2d at 522–23. These factors are "not exclusive," and "no one factor is controlling." *Id.* at 523. In reaching its decision, the trial court should consider all relevant evidence and any other factors that are warranted by the context of the particular case. *Id.* at 522–23; *Coulter*, 2012 IL App (3d) 100973, ¶ 26. The court should balance all the relevant factors and weigh them according to the facts of each case. *Collingbourne*, 204 Ill. 2d at 523.

¶ 25 The trial court failed to apply these standards in granting the removal petition at issue in this case. The trial court did not find that removal was in the children's best interests. In fact, the trial court expressly noted that removal "may very well not be the best thing for the children." Nevertheless, the trial court granted the petition solely because it found that removal would not interfere with any visitation rights on David's part (because David had no such rights while he was incarcerated). Accordingly, the trial court based its ruling entirely on one factor (the effect of removal on the non-custodial parent's visitation rights) to the exclusion of all other relevant factors, such as the effect that removal would have on the children's relationship with their grandparents, other relatives, and friends, their educational environment, and their overall quality of life. That was error. As noted above, in determining whether to grant a removal petition, no one factor is controlling and a trial court should consider all relevant evidence and weigh all relevant factors according to the particular facts of the case. *Collingbourne*, 204 Ill. 2d at 522–23; *Coulter*, 2012 IL App (3d) 100973, ¶ 26.

¶ 26 More significantly, the trial court did not decide the "paramount question" presented in any removal action, *i.e.*, whether removal is in the best interests of the children. See *Collingbourne*, 204 Ill. 2d at 521; *Eckert*, 119 Ill. 2d at 325. Instead, the trial court suggested that, because removal would not interfere with David's visitation rights, Jennifer had an absolute right to remove the children from Illinois, regardless of whether removal was in the children's best interest. The court concluded that, so long as removal would not interfere with David's visitation rights, "the law says it doesn't really matter" whether it would be a "mistake" to move the children or whether Jennifer's motives for the move were "selfish." Although the court was "frustrated" by this (and expressed grave doubts as to whether removal was in the children's best interests), it found that its hands were tied because the law required that the petition be granted. However, contrary to the trial court's suggestion, the law does not require that a removal petition

be granted merely because removal would not interfere with the noncustodial parent's visitation rights. As noted, a removal petition may be granted only when removal is in the children's best interests, and the custodial parent bears the burden of proof on this issue. 750 ILCS 5/609(a) (West 2014); see also *Collingbourne*, 204 Ill. 2d at 521; *Eckert*, 119 Ill. 2d at 325. In determining whether a custodial parent has established that removal would be in a child's best interests, the law requires a trial court to consider and balance *all* relevant factors, including the motives of the custodial parent in seeking the move and the impact of the move upon the child's quality of life. By its own admission, the trial court failed to consider and balance these factors.

¶ 27 The trial court is in a superior position to determine whether removal would be in the best interests of the children because "[t]he trier of fact ha[s] significant opportunity to observe both parents and the child and, thus, is able to assess and evaluate their temperaments, personalities, and capabilities." *Eckert*, 119 Ill. 2d at 330 (internal quotation marks omitted); see also *Collingbourne*, 204 Ill. 2d at 522. We therefore reverse and remand this matter to the trial court so that the trial court may apply the proper legal standards and determine, in the first instance, whether removal would be in the children's best interests.

¶ 28 CONCLUSION

¶ 29 For the reasons sets forth above, we reverse the judgment of the circuit court of Kankakee County and remand for further proceedings.

¶ 30 Reversed; cause remanded.