2012 IL App (4th) 120505-U

NO. 4-12-0505

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 29, 2012
Carla Bender
4th District Appellate
Court, IL

MICHELLE WAUGH,	)	Appeal from
Petitioner-Appellant,	)	Circuit Court of
v.	)	Logan County
BRENTON TIBBS,	)	No. 10F54
Respondent-Appellee.	)	
	)	Honorable
	)	Thomas W. Funk,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justice Knecht concurred in the judgment.
Justice Cook dissented.

ORDER

¶ 1 *Held:* Where a majority of the evidence was contested, requiring the trial court to make credibility determinations, and the record showed the court properly considered the *Eckert* factors and other relevant factors, the court's denial of petitioner's request to remove the parties' minor child from Illinois was not against the manifest weight of the evidence.

¶ 2 Petitioner, Michelle Waugh, appeals the May 22, 2012, order of the Logan County circuit court, which, *inter alia*, denied her request to remove from Illinois her minor child, G.T. (born in November 2007), whose father is respondent, Brenton Tibbs. Petitioner asserts the trial court's decision was erroneous because an "overwhelming" amount of evidence demonstrates it is in G.T.'s best interests to move to Texas. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Since the parties are familiar with the evidence presented at the hearing in this

case, we discuss it only to the extent necessary to put the parties' arguments in context. The parties met in 2006 when petitioner was 16 and respondent was 22 and began living together. When G.T. was born in November 2007, the parties had an apartment in Atlanta, Illinois. Shortly after G.T.'s first birthday, petitioner and G.T. moved out of the apartment, but remained in Atlanta. Since then, G.T. had resided with petitioner in several apartments in Atlanta, and respondent had the opportunity for visitation with G.T. Respondent did testify that, on one occasion, petitioner denied him visitation for a month. When G.T. turned two, respondent's father, Mark Tibbs, began providing the childcare for G.T. when petitioner was at work and other times she needed childcare. Petitioner also dropped off and picked up G.T. for visitation with respondent at Mark's residence. The evidence was disputed as to how much visitation respondent actually exercised with G.T. when G.T. was at Mark's.

¶ 5 Respondent had a close-knit family with many of his relatives on his father's side residing in Atlanta and in the nearby area. They frequently saw each other, including G.T., when he was at Mark's, and had many family gatherings. The family members testified to seeing respondent and G.T. playing together at Mark's house and that respondent and G.T. had a good relationship. The extended family had several young children that played with G.T. Mark also had a girlfriend whose children often played with G.T. Petitioner had relatives in East Peoria, Illinois, but G.T. did not see them often.

¶ 6 On December 2, 2010, petitioner married Brandon Mitchell, a 23-year-old member of the United States Army stationed at Fort Hood in Killeen, Texas. Mitchell intended to remain in the military and was scheduled to return to Afghanistan in October 2013. Mitchell helped support petitioner financially. According to petitioner, Mitchell and G.T. have a good

relationship. Mitchell was willing to help pay for G.T.'s visitation trips.

¶ 7 At the end of the summer of 2011, petitioner and G.T. moved to an apartment in Lincoln, Illinois. Petitioner had worked as a waitress at Country Aire Restaurant in Atlanta for the past five years, except for five months when she worked at a different restaurant. As a waitress, she earned approximately $550 a month, and her husband made $36,000 a year. She received $40 a week in child support from respondent. If the move were allowed, petitioner planned to stay at home and obtain her general equivalency diploma. She and her husband planned on renting a three-bedroom duplex, which was nicer than where she lived in Illinois. Petitioner was willing to share the costs of visitation travel, but only testified to how much her flights to Texas to visit Mitchell had cost.

¶ 8 At the time of the hearing in this case, respondent was unemployed and living with Mark. Before residing with Mark, he had lived with his mother, who had recently passed away after a long illness. Respondent had worked a seasonal landscaping job before the summer of 2011 and had cared for his mother during her illness. Additionally, respondent had recently spent 10 days in jail for driving on a suspended license. He expected to get his driver's license back at the end of February 2012.

¶ 9 Since birth, G.T. had been hearing impaired. In December 2010, he began attending early education classes at Olympia South school in Atlanta. His school day was from 11:30 a.m. to 2:15 p.m. When at school, a special device was used so that he could only hear the teacher talking. Due to his hearing loss, he had an individual education plan. If he were allowed to move to Texas, petitioner would send G.T. to Timber Ridge Elementary school, where he would have a full day of school. According to petitioner, the school offered more sign language

and speech therapy, and the staff was more familiar and better equipped to deal with students with hearing loss.

¶ 10 The legal proceedings in this case began in August 2010 when the Illinois Department of Healthcare and Family Services filed a complaint on petitioner's behalf, seeking to require respondent to pay child support for G.T. In November 2010, respondent filed a *pro se* petition to modify visitation rights and requested that petitioner be required to obtain permission from respondent to leave the state with G.T. The record indicates respondent also filed an order of protection against petitioner in a separate Logan County case (No. 10-OP-211). On December 2, 2010, the trial court considered in this case the petition from the order-of-protection case and entered a temporary restraining order, preventing petitioner from removing G.T. from Illinois until respondent's visitation motion was heard. Petitioner was not present at the December 2, 2010, hearing, which is the same day she married Mitchell. In June 2011, the parties entered into a memorandum of agreement, establishing a schedule for when G.T. was to be with each parent.

¶ 11 On December 7, 2011, petitioner filed a petition to vacate the temporary restraining order, requesting to permanently remove G.T. from Illinois. On December 15, 2011, respondent filed a petition seeking sole custody of G.T. On January 27, 2012, the trial court commenced the hearing on the custody and removal issues. Evidence was also heard on February 3, 2012, and March 9, 2012. Petitioner testified on her own behalf and presented the testimony of (1) Mitchell; (2) April Brian, a former roommate of respondent's; (3) Susan Inman, petitioner's mother; and (4) respondent as an adverse witness. Petitioner also presented a calender for June through December 2011 with notes about respondent's presence at Mark's house when G.T. was there and documents containing information about the school in Texas.

Respondent testified on his own behalf and presented the testimony of (1) Miranda Tibbs, respondent's sister; (2) Elizabeth Hunter, respondent's paternal aunt; (3) Wayne Tibbs, respondent's paternal uncle; (4) Hilden Tibbs, respondent's paternal grandmother; (5) Barbara Ipson, respondent's paternal aunt; (6) Mark; (7) Jennifer Shay, Mark's girlfriend; and (8) petitioner, as an adverse witness. Respondent also presented photographs of petitioner at a party where she was drinking and smoking marijuana. Mitchell was in one of the photographs, but petitioner denied he smoked marijuana. Additionally, respondent presented text messages exchanged between him and petitioner after the hearing on February 3, 2012, in which petitioner indicated G.T. would no longer be getting dropped off at Mark's home. Respondent's third exhibit was a photograph of G.T.'s room at Mark's house, and the fourth was a document from G.T.'s current school listing petitioner and Mark as G.T.'s emergency contacts and Mark's home as the place for the bus to pick up and drop off G.T.

¶ 12 In May 2012, respondent sought to reopen the case to present evidence on the stability of petitioner's marriage to Mitchell. The trial court allowed respondent's request and heard additional evidence on May 16, 2012. On that date, respondent testified on his own behalf, called petitioner as an adverse witness, and presented the testimony of Dakota Ross, an acquaintance of the parties. Respondent also presented photographs of a computer screen showing petitioner's March 19, 2012, Facebook conversation with Ross, in which petitioner stated she was married but separated. Petitioner testified on her own behalf and presented the testimony of Nicole Marie Robbins, another acquaintance of the parties.

¶ 13 On May 22, 2012, the trial court entered a written order, granting petitioner custody of G.T. but denying her request to remove G.T. from Illinois. On June 1, 2012,

petitioner filed a timely notice of appeal, and thus this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 14 On appeal, respondent filed a motion to dismiss the appeal due to petitioner being found in contempt of the May 2012 order and a motion for leave to supplement the record with the proceedings that had occurred in this case since the May 2012 order. This court allowed the motion to supplement and entered an order that the appeal would be dismissed unless petitioner filed an additional record from the trial court showing she had purged the contempt orders and was in compliance with the May 2012 order. Petitioner did so, and this court denied respondent's motion to dismiss. At a July 2012 hearing included in respondent's supplemental record, petitioner's counsel revealed petitioner was in the first trimester of a high-risk pregnancy.

¶ 15 II. ANALYSIS

¶ 16 Here, petitioner only challenges the trial court's denial of her request to remove G.T. from Illinois.

¶ 17 Since the parties were never married, the Illinois Parentage Act of 1984 (Parentage Act) (750 ILCS 45/1 *et seq.* (West 2010)) applies. Sections 14(a)(1) and 16 of the Parentage Act (750 ILCS 45/14(a)(1) (West Supp. 2011); 750 ILCS 45/16 (West 2010)) both specify a court's determination on removal must be made in accordance with section 609 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/609 (West 2010)). Under section 609(a) of the Marriage Act (750 ILCS 5/609(a) (West 2010)), a trial court may only approve a custodial parent's removal of the minor child from Illinois when the approval is in the child's best interests. The burden of proving such removal is in the child's best interests is on the party seeking removal, which in this case is the petitioner. A trial court's determination of what

is in the child's best interests should not be reversed unless it is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred. *In re Marriage of Eckert*, 119 Ill. 2d 316, 328, 518 N.E.2d 1041, 1046 (1988). "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 Marriage of Dorfman*, 2011 IL App (3d) 110099, ¶ 46, 956 N.E.2d 1040, 1048. Such deference is given to the trial court because it " 'had significant opportunity to observe both parents *** and, thus, is able to assess and evaluate their temperaments, personalities, and capabilities.' " *Eckert*, 119 Ill. 2d at 330, 518 N.E.2d at 1047 (quoting *Gallagher v. Gallagher*, 60 Ill. App. 3d 26, 31, 376 N.E.2d 279, 283 (1978)).

¶ 18 Our supreme court has recognized the determination of the child's best interests cannot be reduced to a simple bright-line test but rather must be made on a case-by-case basis, depending, to a great extent, upon the circumstances of each case. *Eckert*, 119 Ill. 2d at 326, 518 N.E.2d at 1045. While all relevant evidence should be considered, the supreme court identified five factors that should be considered in determining whether removal is in a child's best interests. *Eckert*, 119 Ill. 2d at 326-27, 518 N.E.2d at 1045-46. Those factors are (1) whether the proposed move will enhance the quality of life for both the custodial parent and the child, (2) whether the proposed move is a ruse designed to frustrate or defeat the noncustodial parent's visitation, (3) the noncustodial parent's motives in resisting removal, (4) the noncustodial parent's visitation rights, and (5) whether a reasonable visitation schedule can be worked out. *Eckert*, 119 Ill. 2d at 326-27, 518 N.E.2d at 1045-46. Since the *Eckert* decision, our supreme court has noted the five factors are not exclusive and are just factors to be considered and balanced in determin-

ing whether removal is in the child's best interests. *In re Marriage of Collingbourne*, 204 Ill. 2d 498, 523, 791 N.E.2d 532, 545-46 (2003); see also *In re Marriage of Smith*, 172 Ill. 2d 312, 321, 665 N.E.2d 1209, 1213 (1996). No individual factor is controlling, and the weight accorded each factor will depend on the case's facts. *Collingbourne*, 204 Ill. 2d at 523, 791 N.E.2d at 546; *Smith*, 172 Ill. 2d at 321, 665 N.E.2d at 1213.

¶ 19 Contrary to what petitioner would like this court to believe, this was not an easy case for the trial court to decide. The evidence favoring removal was not "overwhelming," as (1) petitioner and G.T. had a significant support system from respondent's family in Illinois, (2) petitioner made some decisions that questioned how well thought-out her plans for living in Texas were, and (3) the parties' ability to pay for travel expenses for visitation was a significant concern. Also, petitioner's pregnancy is not part of our review of the trial court's denial of removal because it was not part of the evidence on the removal issue. See *In re Marriage of Beyer*, 324 Ill. App. 3d 305, 309 n.1, 753 N.E.2d 1032, 1036 n.1 (2001) (refusing to consider material where the record did not indicate the trial court considered it).

¶ 20 In its May 2012 written order, the trial court clearly considered the five *Eckert* factors and the other relevant factors, including the move's enhancement of the quality of life of petitioner (see *Collingbourne*, 204 Ill. 2d at 525, 528, 791 N.E.2d at 547-48). The court's findings on the *Eckert* factors do not indicate the court only considered the move's direct benefits to G.T., which the supreme court has condemned because, *inter alia*, it impermissibly allows a noncustodial parent who enjoys a good relationship with the child to veto the good-faith and reasonable desire of the custodial parent to remarry and move out of state without consideration of "the 'indirect benefits' to the child" (*Collingbourne*, 204 Ill. 2d at 527, 791 N.E.2d at 548

(quoting *In re Marriage of Eaton*, 269 Ill. App. 3d 507, 514, 646 N.E.2d 635, 641 (1995))). The court heard evidence in this case over four separate hearing dates, which included the testimony of 14 witnesses. Much of petitioner's testimony was contested by respondent's evidence, which necessitated the court to make numerous credibility determinations. This court defers to the trial court's findings on such issues because the trial court which actually observed the witnesses' conduct and demeanor had the best position to assess the witnesses' credibility. *In re Marriage of Berberet*, 2012 IL App (4th) 110749, ¶ 56, 974 N.E.2d 417, 428. Accordingly, we will not substitute our judgment for that of the trial court as to credibility. *In re Marriage of Di Angelo*, 159 Ill. App. 3d 293, 298, 512 N.E.2d 783, 787 (1987).

¶ 21 On appeal, petitioner addresses each of the five *Eckert* factors and argues why the trial court's analysis of the factor was erroneous or inadequate. A majority of petitioner's arguments are basically challenges to the trial court's credibility determinations. On the *Eckert* factors of whether the proposed move would enhance the quality of life of the child and a realistic and reasonable visitation schedule could be established, petitioner essentially wants us to find her and her husband's testimony was more credible than what the trial court found it was and reweigh the evidence. Petitioner also challenges the trial court's conclusion respondent's motive for resisting the move was his desire to maintain his relationship with his son, but again this was a credibility determination. Additionally, on several of the *Eckert* factors, petitioner takes issue with the amount of time respondent exercised visitation with G.T. Although the court did not make any findings regarding that issue in analyzing removal, the court in addressing custody questioned both petitioner's testimony that respondent was rarely present for visitation and Mark's testimony respondent exercised all of his visitation. The court believed respondent did not

always exercise visitation when G.T. was at Mark's house, but it could not determine how often that occurred. Respondent's exercise of visitation was again a credibility determination. As stated, our job as the reviewing court is not to assess the witnesses' credibility, and we refuse to do so here.

¶ 22 Petitioner raises other challenges to the trial court's decision. As to whether the proposed move will enhance the quality of life for both the custodial parent and the child, petitioner asserts the trial court's conclusion about the history of instability of her marriage was unsupported by the facts. However, petitioner herself admitted experiencing marital difficulties a couple of months before the May 16, 2012, hearing. Evidence was also presented of petitioner telling Dakota Ross on Facebook she was married but separated. Accordingly, ample evidence existed for the trial court to find a history of instability in petitioner's marriage.

¶ 23 Petitioner also claims the trial court put too much emphasis on G.T.'s relationship with Mark in finding the move would not enhance the quality of G.T.'s life. Our supreme court has recognized some deference is due to the custodial parent's determination that remarriage and removal are in her and her child's best interests because a court cannot require the noncustodial parent or members of the extended family to remain in Illinois. *Collingbourne*, 204 Ill. 2d at 528, 791 N.E.2d at 548 (quoting *Eaton*, 269 Ill. App. 3d at 515-16, 646 N.E.2d at 642). However, the custodial parent's determination is not controlling. Otherwise, section 609(a) of the Marriage Act would not exist. As stated, the removal is a very fact-specific matter. See *Eckert*, 119 Ill. 2d at 326, 518 N.E.2d at 1045. Evidence was presented that Mark played a more significant role in G.T.'s life than a typical grandfather. He also played an important supporting role in petitioner's life. In fact, petitioner presented evidence indicating she treated Mark as

G.T.'s other parent by listing him at the school as the other emergency contact, keeping him informed about G.T.'s schooling, having Mark call the school when G.T. was sick, and having him watch G.T. while she worked and ran errands. Accordingly, under the facts of this case, it was proper for the court to find Mark's relationship with G.T. was a relevant and significant factor in determining removal in this case. However, we note it was not the only factor favoring the denial of removal, as the court also found a reasonable visitation schedule could not be established and voiced concerns about petitioner's plans in Texas.

¶ 24 Further, petitioner notes one of the benefits of moving to Texas was a better school for G.T. The trial court did not mention G.T.'s education in determining removal. In analyzing the custody matter, the court noted G.T. was not in school yet and little consideration should be given to his adjustment to preschool. Thus, it appears the court also found preschool did not deserve consideration in the removal issue. Moreover, the evidence could support a finding that preschool was not a factor in this case because a significant difference in the Illinois and Texas schools did not exist. Respondent presented evidence G.T.'s speech and motor skills improved quickly once he started school in Illinois, which had the same hearing device as the Texas school. Further, the court could have found petitioner did not adequately explain why G.T. would benefit from an all-day preschool with more sign language and speech therapy. As respondent's counsel pointed out, petitioner had gathered the school information shortly before the hearing in this case.

¶ 25 Petitioner also contends we must reverse the trial court's decision because "[t]he simple mechanics of carrying out the trial court's decision are staggering" and "any other result would be anomalous and frankly unworkable." As we have stated, some deference is due to the

custodial parent's determination that remarriage and removal are in her and her child's best interests (*Collingbourne*, 204 Ill. 2d at 528, 791 N.E.2d at 548), but the custodial parent's determination is not dispositive as section 609(a) of the Marriage Act (750 ILCS 5/609(a) (West 2010)) still requires judicial permission for removal and a weighing of all relevant factors. "This State's courts are in place to protect the children's interests and will not be intimidated or threatened by 'irrevocable' actions of parents." *In re Marriage of Berk*, 215 Ill. App. 3d 459, 465, 574 N.E.2d 1364, 1368 (1991); see also *In re Marriage of Deckard*, 246 Ill. App. 3d 427, 434, 615 N.E.2d 1327, 1333 (1993) (agreeing "courts should not be intimidated by 'irrevocable' actions of parents"). While petitioner is free to marry whomever she chooses and make her own decisions, the predicament that results from her decisions does not make removal automatic. In *Collingbourne*, 204 Ill. 2d at 528, 791 N.E.2d at 548, the supreme court expressly stated its decision did not stand for the proposition any enhancement in the custodial parent's quality of life automatically translated into an improvement in the child's quality of life or that such benefits would always be sufficient to warrant removal. "The burden of proof remains upon the custodial parent to establish that the move would be in the best interests of the child." *Collingbourne*, 204 Ill. 2d at 529, 791 N.E.2d at 549.

¶ 26 In this case, we find the trial court properly considered and weighed the *Eckert* factors and all relevant other factors in determining removal was not in G.T.'s best interests. The court's findings do not demonstrate it applied an incorrect legal standard. Accordingly, we find the trial court's denial of removal was not against the manifest weight of the evidence.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the Logan County circuit court's judgment.

¶ 29 Affirmed.

¶ 30 JUSTICE COOK, dissenting.

¶ 31 I disagree with the suggestion that petitioner is the cause of the problem here, that this predicament results from her decision to get married. An ex-wife who chooses to remarry and move out of state cannot be criticized for that decision, in the absence of any showing that she did so in an attempt to frustrate visitation or interfere with the relationship between the ex-husband and the child. *In re Marriage of Shaddle*, 317 Ill. App. 3d 428, 432-33, 740 N.E.2d 525, 529-30 (2000) (rejecting trial court's view that wife was "hoisted upon her own petard"). We have previously stated our disapproval of any implication a noncustodial parent is free to marry whomever he or she wants to, but a custodial parent is not. *Eaton*, 269 Ill. App. 3d at 517, 646 N.E.2d at 643. Respondent should not have the power to veto the good-faith and reasonable desire of petitioner to remarry and move out of state. See *Collingbourne*, 204 Ill. 2d at 527, 791 N.E.2d at 548.

¶ 32 Indeed, "our society is a mobile one" (*Eckert*, 119 Ill. 2d at 330, 518 N.E.2d at 1047) and

> " 'since a court has no power to require the noncustodial parent to remain in Illinois, or to require members of the extended family to remain in Illinois, some deference is due to the custodial parent who has already determined the best interest of her child[ ] *and* herself are served by remarriage and removal. The best interests of children cannot be fully understood without also considering the best interests of the custodial parent.' " (Emphasis in original.) *Collingbourne*, 204 Ill. 2d at 528, 791 N.E.2d at 548 (quoting *Eaton*, 269 Ill. App. 3d at

515-16, 646 N.E.2d at 642).

¶ 33 The burden of proof remains upon the custodial parent to establish that the move would be in the best interest of the child, but the burden should not be an unduly heavy one. *Collingbourne*, 204 Ill. 2d at 527, 791 N.E.2d at 548. There are some clear facts in this case. Respondent did not pay child support until recently, when the Illinois Department of Healthcare and Family Services brought a child support action against him. Respondent has no driver's license and is currently unemployed; he previously had some seasonal work and lived with his mother. Petitioner was forced to work at a minimal wage to support herself and G.T., leaving G.T. with respondent's father while she worked. Petitioner's husband now earns $36,000 a year, which would allow her to spend time at home with G.T., in a nicer home than where she lived in Illinois. Indirect benefits to the child must be considered. Again, "[t]he best interests of children cannot be fully understood without also considering the best interests of the custodial parent." *Eaton*, 269 Ill. App. 3d at 516, 646 N.E.2d at 642. The primary factor supporting denial of the leave to remove in this case is not G.T.'s relationship with respondent, but with respondent's father. It is not clear what weight should be given to that relationship. If respondent moved out of state, surely petitioner would not be required to remain in state to protect the relationship with respondent's father. Respondent presented testimony regarding the stability of petitioner's marriage, but the stability of any marriage would be affected by proceedings requiring the wife to live in another state, separate from her husband.

¶ 34 Applying the correct legal standard here, the trial court's decision is contrary to the manifest weight of the evidence.