2013 IL App (4th) 121130-U

NO. 4-12-1130

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 3, 2013
Carla Bender
4th District Appellate
Court, IL

In re: MARRIAGE OF	)	Appeal from
ROBERT L. NOTTER,	)	Circuit Court of
Petitioner-Appellant,	)	Macoupin County
and	)	No. 09D16
APRIL D. NOTTER,	)	
Respondent-Appellee.	)	Honorable
	)	Kenneth R. Deihl,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's grant of respondent's petition to remove the parties' minor child to Texas was not against the manifest weight of the evidence.

¶ 2 Petitioner, Robert L. Notter, appeals the Macoupin County circuit court's December 12, 2012, order that granted the petition of respondent, April D. Notter, to remove the parties' minor child to Texas. On appeal, petitioner asserts the trial court's decision is erroneous because the factors established in *In re Marriage of Eckert*, 119 Ill. 2d 316, 326-27, 518 N.E.2d 1041,1045-46 (1988), do not favor the child's removal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties married in May 2000 and had one child, Evan (born in 2007). Petitioner filed his petition for the marriage's dissolution in January 2009. In February 2009, the trial court entered an agreed order, (1) enjoining respondent from removing Evan from the

Macoupin County area, (2) granting respondent temporary possession of the marital residence and custody of Evan, and (3) providing petitioner a visitation schedule. The order did not mention supervision of petitioner's visitation with Evan. While the dissolution proceedings were pending, respondent filed an August 2009 petition to remove Evan to Texas so she could obtain a teaching degree. In late 2009 and early 2010, the trial court held an evidentiary hearing on respondent's initial removal petition. A report of proceedings for that evidentiary hearing is not included in the record on appeal. In July 2010, the court entered a written order denying respondent's petition. The written order also stated petitioner was being treated for psychosis, and his visitation with Evan must be supervised by a responsible adult until further order of the court. Respondent filed a motion to reconsider, which the court denied.

¶ 5 In November 2011, the trial court entered a judgment of dissolution, awarding respondent sole custody of Evan. Petitioner was granted supervised visitation of every other weekend (Friday at 7 p.m. to Sunday at 7 p.m.) and for a period of time every Wednesday (9 a.m. to 6 p.m.). The order also provided the supervised visitation requirement would be lifted upon the receipt of documentation from petitioner's counselor or doctor that petitioner did not present an endangerment to Evan. The judgment also set child support at $124 per week.

¶ 6 In February 2012, respondent filed a second petition to remove Evan to Texas, which is the one at issue in this appeal. In October 2012, the trial court (same trial judge as the one that decided the first removal petition) held a hearing on respondent's second removal petition. Respondent testified on her own behalf, and petitioner testified on his. Since the parties are familiar with the evidence presented at the hearing in this case, we provide only a brief summary of the evidence to put the parties' arguments in context. At the time of the hearing,

Evan was five years old; had lived in Staunton, Illinois, his entire life; and was currently enrolled in the Staunton Head Start program. Evan had his own room in the former marital home where he lived with respondent. Since July 2010, respondent's mother had been staying with respondent and Evan. Evan had many paternal relatives in the Staunton area, including his grandparents and many cousins.

¶ 7 Petitioner was 42 years old and lived with his parents in Staunton. He planned on moving out of his parents' house and had saved $9,000 toward that goal. Petitioner was employed at Ready-Mix and had earned $37,710 through September 19, 2012. Every year, he received two weeks of paid vacation. In addition to child support, petitioner paid around $800 per month in expenses for the former marital home. Petitioner had not seen his counselor or psychiatrist for over two years. He had recently scheduled appointments with both of them. Petitioner testified he had made one attempt to get the supervision restriction on his visitation lifted. His psychiatrist had stated petitioner did not need any more medication or treatments but would not give a "guarantee." According to petitioner, that was not good enough for respondent's attorney. At the time of the hearing on respondent's second removal petition, petitioner's visitation was still supervised. He exercised all of his visitation, except for Wednesdays. On Wednesdays, he usually had Evan for three to four hours and not the full nine hours allotted. Petitioner loved his son and wanted to be a regular part of his life. He did not own a computer and did not believe Skype would make up for a lack of regular face-to-face visitation.

¶ 8 Respondent was 37 years old and had been unemployed since 2008. Her mother and brother lived in a large home in Bonham, Texas, on an acre of land. Respondent's mother had been staying with her but was returning to Texas after the completion of these proceedings,

regardless of the outcome. Respondent's biological father and an aunt also lived in Texas. Bonham is about 630 miles from Staunton, which is around a 10-hour drive. Joplin, Missouri, is the halfway point between the two towns.

¶ 9 Since the dissolution judgment, respondent had submitted 22 employment applications for employment in Staunton. She had not applied anywhere outside Staunton because her car was not reliable. Respondent had two associate degrees and had attended Southern Illinois University for an additional three semesters studying elementary education. According to respondent, if she went back to Southern Illinois University, she would still be a sophomore due to the passage of time. Her credits at Southern Illinois University were also not transferable. Respondent currently wanted to be an ultrasound technician. Depending on the program, it would take her 18 to 24 months to complete the program and get her certificate. Respondent testified starting salaries for ultrasound technicians were $60,000 per year. The closest ultrasound program to Staunton was in St. Louis, Missouri, which was an 80-mile round-trip commute from Staunton. Respondent testified St. Louis University had a two-year waiting list for its program. Ultrasound programs were also available in Illinois in the following cities: Carbondale (two-hour drive), Carterville (two-hour drive), and Chicago (four-hour drive). Respondent did not apply to any school in St. Louis or Illinois.

¶ 10 Respondent sought to remove Evan to Texas because she could live with her mother and attend an ultrasound program there. Her mother would pay for all of her and Evan's living expenses. Financial aid would cover all of her educational costs, and she had been accepted into two different schools in Texas. In Texas, she could focus on her education. If she attended a school somewhere else, she would have to work to pay her living expenses, which

would prolong her education. At her mother's home, respondent and Evan would have to share a bedroom. Evan had been accepted into the Head Start program in Bonham.

¶ 11 On cross-examination, respondent answered yes to the following question: "The reason you don't want to get a job here, you don't want to go to school here; you want to move to Texas, so you will do anything you can to make it seem necessary to move to Texas; yes or no?" Respondent also admitted the visitation schedule she proposed would not be enough for her.

¶ 12 Since October 2011, the former marital home had been listed for sale. The parties had lowered the price once and were working on lowering it again. If respondent moved to Texas, petitioner would move back into the former marital home. Respondent proposed a visitation schedule for Evan living in Texas that consisted of six weeks in the summer and half of Evan's Christmas and Easter breaks. She was willing to facilitate Skype and telephone conversations between petitioner and Evan. Respondent also offered petitioner a yearly $500 travel allowance.

¶ 13 On December 12, 2012, the trial court filed its written order, granting respondent's second motion to remove the parties' minor child from Illinois. The order required respondent to post a $100,000 surety that required her to follow the terms of the court's removal order. She also had to file written proof of her enrollment in one of Texas ultrasound-technician programs and continue to file written proof every 60 days. Further, the order granted petitioner leave to request a review hearing upon respondent's graduation or cessation of full-time enrollment. Under the order, petitioner received a $500 travel allowance and the following supervised visitation: not less than 6 continuous weeks during the summer, 10 days during Evan's Christmas vacation, and 3 days during his Easter-spring break. That same day, petitioner filed his timely

notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008), and thus this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 14 II. ANALYSIS

¶ 15 In this case, petitioner challenges the trial court's granting of respondent's second petition to remove Evan from Illinois. We initially note that, on appeal, the parties make some references to facts that were presented during the hearing on respondent's first removal petition. However, the transcripts of the first removal hearing are not part of the record in this appeal, and thus we do not consider any facts that were presented only in the hearing on the first removal petition. See *Kildeer-Countryside School Dist. No. 96 v. Board of Trustees of Teachers' Retirement System*, 2012 IL App (4th) 110843, ¶ 21, 972 N.E.2d 1286 (noting that, "generally, a party may not rely on matters outside the appellate record to support his or her position on appeal").

¶ 16 Under section 609(a) of the Illinois Marriage and Dissolution of 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 respondent. 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. *Eckert*, 119 Ill. 2d at 328, 518 N.E.2d at 1046. "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. 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)).

¶ 17 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 determining 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. Additionally, the supreme court has noted the

custodial parent's mere desire to move to another State alone is insufficient to show the move would be in the child's best interest because of the child's interest in maintaining significant contact with both parents after a divorce. *Eckert*, 119 Ill. 2d at 325, 518 N.E.2d at 1044.

¶ 18 On appeal, petitioner addresses each of the five *Eckert* factors and asserts the evidence favors Evan remaining in Illinois. As to the first factor, petitioner notes Evan's quality of life would not be enhanced by the move because Evan would have to change Head Start programs, share a bedroom with respondent, move away from his paternal family, and see petitioner less frequently. However, in addition to spending time with his maternal relatives, Evan will experience benefits with the increase in respondent's quality of life. " 'The best interests of children cannot be fully understood without also considering the best interests of the custodial parent.' " *Collingbourne*, 204 Ill. 2d at 528, 791 N.E.2d at 548 (quoting *In re Marriage of Eaton*, 269 Ill. App. 3d 507, 516, 646 N.E.2d 635, 642 (1995)).

¶ 19 Respondent presented evidence she had been unable to get a job in Staunton, she was still living in the former marital home that could be sold at anytime, her mother could no longer remain in Illinois to help her, and she lacked a reliable car to commute out of Staunton. As the trial court stated, respondent was "somewhat trapped in Staunton," even with petitioner paying the marital home expenses. If she moved somewhere else in Illinois to obtain her education, respondent would have to work and go to school, which would delay the completion of her education, and she would have no family to care for Evan when he was not in school. Evan would also have to change schools and may not have his own bedroom as would be the case in Texas. On the other hand, in Texas, respondent's mother would provide for respondent's living expenses and care for Evan when necessary, which would allow respondent to complete an

ultrasound technician program in 18 months to 2 years. According to respondent, once she completed the program, she would be able to get a job with a starting salary of $60,000. Such an improvement in respondent's financial security would clearly benefit Evan.

¶ 20 Neither the removal statute nor *Eckert* requires the custodial parent seeking removal to exhaust all employment opportunities in Illinois prior to seeking employment out of state. *In re Marriage of Ludwinski*, 312 Ill. App. 3d 495, 500, 727 N.E.2d 419, 424 (2000). Here, respondent presented evidence she attempted to obtain employment in Staunton and looked into educational opportunities in Illinois and St. Louis. Petitioner insists she should have applied to the nearby schools and learned their financial aid packages. However, respondent explained the financial aid form was a national one and why she did not apply to the local schools. "Custodial parents should not be expected to give up careers for the sake of remaining in the same geographic location." *In re Marriage of Shaddle*, 317 Ill. App. 3d 428, 434, 740 N.E.2d 525, 530 (2000). Respondent desires to be an ultrasound technician, and the evidence showed respondent's obtaining her education in Texas would be the fastest manner and the least stressful on her, which in turn benefits Evan.

¶ 21 Regarding the second and third factors, the trial court found both parties' reasons behind their respective positions on removal were legitimate. On appeal, petitioner continues to question respondent's motive for moving to Texas and claims it is for selfish reasons only. However, respondent explained how she tried to get employment in Staunton, why she could not drive out-of-town for work, why completing her bachelors degree in education at Southern Illinois University would not shorten her period of education, why the schools in Illinois and Missouri were not feasible or were more disruptive to Evan. The trial court found respondent's

testimony credible. The court also concluded petitioner's fears that respondent would prevent him from having contact with Evan if she moved to Texas were unfounded. This court defers to the trial court's findings on credibility determinations 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. 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).

¶ 22 As to petitioner's visitation rights, petitioner notes he religiously exercised his visitation rights, which were alternate weekends, Wednesdays, and alternate holidays. However, the trial court noted that, while petitioner had been diligent in exercising his visitation, he could have exercised more visitation with Evan if he had gotten the supervision requirement lifted. Petitioner could have Evan for nine hours on Wednesdays but usually only had him three or four hours. At the time of the October 2012 hearing, petitioner had not seen his counselor or psychiatrist for over two years, despite having insurance that paid for the visits. Thus, the trial court had evidence from which it could have found petitioner's handling of his visitation weighed in favor of removal.

¶ 23 Last, regarding whether a reasonable visitation schedule can be worked out, petitioner asserts visitation three times a year and Skype conversations cannot make up for his alternate-weekend visitation schedule. However, if removal was denied because the noncustodial parent's visitation would be modified to less frequent but longer periods, then removal would likely only be granted in two unique situations, where (1) both parents live on the Illinois border and the custodial parent seeks removal to move across the border and (2) the parents possess

significant wealth and few time restraints that would allow for frequent travel. *Ford v. Marteness*, 368 Ill. App. 3d 172, 178, 857 N.E.2d 355, 360-61 (2006). Removal will almost always have some effect on visitation. "[T]he real question is whether a schedule can be created that is both reasonable and realistic. It need not be perfect." *Shaddle*, 317 Ill. App. 3d at 434, 740 N.E.2d at 531.

¶ 24 Here, respondent proposed exchanging Evan in Joplin, Missouri, which was a little more than five hours from petitioner's home. Respondent was also willing to give petitioner a $500 travel allowance. Petitioner also had some savings and vacation time that could be used for travel. The three long visitation periods proposed by respondent actually gave petitioner more overnights with Evan. Accordingly, respondent's evidence was sufficient to find a reasonable and realistic visitation schedule could be established.

¶ 25 Removal cases are often difficult ones as no easy bright-line rules exist. See *Ford*, 368 Ill. App. 3d at 176, 857 N.E.2d at 359; *Eaton*, 269 Ill. App. 3d at 516, 646 N.E.2d at 642. It was the trial court that had to judge respondent's sincerity in wanting to be an ultrasound technician and how she could best obtain that goal in accordance with Evan's best interests. The mere fact a different trier of fact could have reasonably reached an opposite conclusion does not warrant reversal of the trial court's judgment. Here, respondent presented sufficient evidence from which a reasonable trier of fact could have concluded the *Eckert* factors favored Evan's removal to Texas. Accordingly, we find the trial court's judgment was not against the manifest weight of the evidence.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the Macoupin County circuit court's judgment.

¶ 28 Affirmed.