NO. 5-10-0368

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re PARENTAGE OF PAYTON RENE MARSHALL	)	Appeal from the
	)	Circuit Court of
(Jenifer Carr,	)	St. Clair County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 08-F-895
	)	
Paul Marshall,	)	Honorable
	)	Randall W. Kelley,
Respondent-Appellant).	)	Judge, presiding.

PRESIDING JUSTICE CHAPMAN delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

R U L E 2 3 O R D E R

Held: The order allowing the removal of the minor child to the State of Arizona was not against the manifest weight of the evidence. The trial judge need not expressly discuss the *Eckert* factors as long as the judge considers them.

The respondent, Paul Marshall, appeals an order allowing his former girlfriend, Jenifer Carr, to move from the State of Illinois with their daughter, Payton Rene Marshall. He argues that (1) the court failed to take into account factors outlined by the supreme court in *In re Marriage of Eckert*, 119 Ill. 2d 316, 518 N.E.2d 1041 (1988), and (2) the court's ruling was against the manifest weight of the evidence. We affirm.

The parties to this appeal lived together for four years but never married. Their daughter, Payton, was born in February 2004. When Payton was six months old, the parties broke up. Payton continued to live with her mother, Jenifer. Neither party filed a petition to establish a parent-child relationship until Payton was four years old. Prior to that time, they signed a voluntary acknowledgment of paternity and informally agreed to visitation

schedules.

In August 2008, Jenifer filed a petition to establish a parent-child relationship between Paul and Payton. In it, she requested that she be given custody of Payton. In January 2010, with the parentage petition still pending, Jenifer filed a petition to remove Payton from the State of Illinois. Paul filed a motion to dismiss Jenifer's petition for removal, arguing that Jenifer did not plead any factual allegations in support of her petition. The court denied the motion to dismiss but granted Jenifer 21 days' leave to file an amended petition for removal. Jenifer's amended petition alleged, in relevant part, that (1) Jenifer intended to move with Payton to the State of Arizona, where she would reside with her family, (2) this move would be in Payton's best interests because Jenifer's parents would provide support and child care until Jenifer was financially able to manage on her own, (3) Paul did not live in Illinois, and (4) Paul spent minimal time with Payton, so his relationship with her would not be adversely impacted by the proposed move.

On July 9, 2010, the court held a hearing in the matter. Paul testified that he had been living with his parents in Wentzville, Missouri, on and off for the previous four years. At various times during this period, however, he had moved out and lived in shared apartments in St. Charles, St. Louis, and Swansea. Each of these living arrangements had been temporary, lasting six months or less. He further testified that while Payton has her own bedroom at his parents' home in Wentzville, he did not have a separate bedroom for her in any of his apartments. Thus, when she spent weekends with him, it was nearly always at his parents' home.

Paul explained that, although the parties had always acknowledged that he was Payton's father, he never filed a petition to establish paternity because Jenifer asked him not to do so. She was afraid she would lose grant money if he were legally declared to be Payton's father. We note that neither party was asked to clarify what the grant money was

for or the reasons for this.

Paul further testified that when he and Jenifer first broke up, they did not have a regular visitation schedule. Instead, they arranged visits whenever both of their schedules permitted. He stated that this arrangement worked "for the most part." He then testified that he and Jenifer eventually agreed to a visitation schedule under which Payton stayed with Paul every other weekend. Although Paul worked weekends, he was able to spend time with Payton before going to work, and his parents took care of her while he worked. Asked whether he ever asked to spend additional time with Payton on Wednesdays or Thursdays, which are his days off from work, Paul replied, "Not [for] the most part, but I had occasionally." Paul admitted that he did not know the names of Payton's doctor, dentist, teacher, or daycare worker. He further admitted that he had never thought to ask Jenifer for this information. Although Paul admitted that he did not often call to speak to Payton while she was in Jenifer's care, he also testified that on at least one occasion, Jenifer had refused to return his calls because she was angry at him.

Paul testified that he had many relatives, most of whom lived in the vicinity. He testified that he often took Payton to family events, such as reunions or birthday parties. He feared that, because it would be difficult for him to afford plane tickets for Payton to visit from Arizona, the move would adversely impact Payton's relationship with both him and his extended family.

Jenifer testified that she and Payton had lived with her long-term boyfriend and his daughter in a house owned by her boyfriend. Shortly before Jenifer filed the petition for removal, she ended her relationship. After that, she lived at the home of some friends for several months while both she and Payton finished school for the year. She then went to stay with her parents in Arizona for the three weeks preceding the hearing because she had no place to live locally.

Jenifer testified that for the first two to three years after she and Paul broke up, Paul frequently canceled planned visits with Payton. She stated that he would cancel if he had friends visiting from out of town or a party to go to or when someone in his family was sick. She acknowledged that Paul became much more regular in his visits with Payton after that and that he even began to request additional visits on Wednesday afternoons. Jenifer testified that she had always encouraged Paul to spend time with Payton and be involved in her life. She testified that she had never refused to allow Paul to visit with Payton or speak to her on the phone, although she also stated that she never suggested to Payton that she call her father either. Jenifer admitted that she did not list Paul as Payton's father with her school or any of her health care providers. She further admitted that she did not provide Paul with any information on Payton's school or doctors. She explained that he had never asked and that it had never occurred to her to offer the information on her own.

Jenifer then testified about her own education plans. Prior to filing the petition for removal, she had been taking classes towards a nursing degree. She testified that before deciding to move, she had looked into a nursing program at Barnes-Jewish Hospital in St. Louis but did not pursue it because it was too expensive. She did not look into any other local programs. Once she decided to move to Arizona, she looked into completing her degree at Yavapai Community College. At the time of the hearing in this matter, she had already enrolled in the school, but in order to enroll in the nursing program, she would have to take an entrance exam and apply for admission. The entrance exam was scheduled for mid-July, shortly after the hearing.

Jenifer's mother, Melissa Carr, testified that she and her husband, Martin Carr, owned a three-bedroom home in Arizona. They had already made one of the bedrooms into a room for Payton so that she had a place to stay when she visited them. She had her own bed, toys, desk, books, and toy box in her room. Melissa also testified that there was a playhouse for

Payton in their one-acre yard and several children close to Payton's age in the neighborhood. She further testified that she had always helped Jenifer financially and that if the court denied the petition to remove, she would continue to do so. She testified, however, that the amount of support she could give would be limited. Finally, Melissa testified that she is a registered nurse and would be able to help Jenifer find work once she completed her nursing program.

Tony Garavalia, who was appointed the guardian *ad litem* for Payton, also testified. He opined that the quality of life of both Jenifer and Payton would be enhanced by the move, in large part because their financial position was likely to improve. He explained that although both Paul and Jenifer were trying to improve their financial circumstances, both still required a "tremendous amount of help" from their families. Realistically, Jenifer's family could not provide the kind of support to Jenifer that she needs if she is not permitted to leave the state to live with them. Garavalia testified that he found the motives of both parties to be pure. He expressed concerns about the impact that allowing the move would have on Paul's visitation rights in light of the limited financial resources of the parties. However, Garavalia concluded that, on balance, the move would be in Payton's best interests. He recommended awarding sole custody to Jenifer, allowing the petition for removal, and granting Paul a lengthy period of uninterrupted visitation during the summer.

The court took the matter under advisement, telling the parties that this would not be an easy decision. Although the court did not make any formal findings of fact at this time, the judge did address both parties and explain some of his concerns. He told Paul that he felt that Paul had begun to actively involve himself in Payton's care later in her life than he should have. He told Jenifer that she needed to provide Paul with more information on Payton's education, medical care, and activities even if he did not ask for it.

Four days later, the court entered a written order establishing Paul as Payton's father. The order also awarded Jenifer sole legal custody and primary physical custody of Payton,

allowed the petition for removal, set up a visitation schedule for Paul, and ordered child support. In addition, Jenifer was ordered to inform Payton's school and all her doctors that Paul is Payton's father, and each party was ordered to allow the other party daily phone calls with Payton while she was in their care. The order did not contain any express findings of fact. Paul filed the instant appeal, challenging only the portion of the order allowing the petition to remove.

A custodial parent seeking to move out of state with the child bears the burden of proving that the move is in the best interests of the child. 750 ILCS 5/609 (West Supp. 2009); *Fisher v. Waldrop*, 221 Ill. 2d 102, 115, 849 N.E.2d 334, 341 (2006). Determining whether a move is in the best interests of the child depends on the circumstances of the case. *In re Marriage of Eckert*, 119 Ill. 2d 316, 326, 518 N.E.2d 1041, 1045 (1988). Although this determination "cannot be reduced to a simple bright-line test," the supreme court has identified five factors that trial courts should take into account. *In re Marriage of Eckert*, 119 Ill. 2d at 326, 518 N.E.2d at 1045. These factors–commonly called the *Eckert* factors–include the following: (1) whether the proposed move is likely to enhance the quality of life of both the child and the custodial parent, (2) the motives of the custodial parent in seeking to move, (3) the motives of the noncustodial parent in opposing the move, (4) the visitation rights of the noncustodial parent, and (5) whether it is realistically possible to set up a reasonable visitation schedule that will preserve and foster the child's relationship with the noncustodial parent if the move is allowed. *In re Marriage of Eckert*, 119 Ill. 2d at 326-27, 518 N.E.2d at 1045-46.

We note that these standards apply equally to removal petitions brought under the Illinois Parentage Act of 1984 or the Illinois Marriage and Dissolution of Marriage Act. *Fisher*, 221 Ill. 2d at 116-17, 849 N.E.2d at 342. On appeal, we will reverse a trial court's ruling on a petition for removal only if its decision was against the manifest weight of the

evidence or resulted in manifest injustice. *In re Marriage of Eckert*, 119 Ill. 2d at 328, 518 N.E.2d at 1046.

Paul argues that (1) the trial court failed to consider the *Eckert* factors and (2) its decision was against the manifest weight of the evidence. We disagree.

In contending that the court erred by failing to consider the *Eckert* factors, Paul points to the fact that the court's order contains no express findings of fact related to any of the factors. As previously noted, the court's order simply states that Jenifer's petition for removal is granted and then goes on to outline a visitation schedule for Paul. Although it certainly would have been helpful for the court to have made some express findings, we cannot agree with Paul that this means the court failed to consider the relevant factors. While the trial court must *consider* the factors outlined by the supreme court in *In re Marriage of Eckert*, there is no requirement that the court make specific findings regarding the factors. *In re Marriage of Branham*, 248 Ill. App. 3d 898, 902, 617 N.E.2d 1317, 1320-21 (1993). Here, the evidence before the court related to the *Eckert* factors, and the guardian *ad litem* testified directly about each factor. In addition, we note that the court granted Jenifer leave to file an amended petition for removal addressing the *Eckert* factors. In light of this, we need only consider whether the court's conclusion is supported by this evidence. See *In re Marriage of Branham*, 248 Ill. App. 3d at 902, 617 N.E.2d at 1320-21.

Paul argues that the court's decision was against the manifest weight of the evidence because the evidence related to each factor weighed against the move. The first factor we consider is the likelihood that the move will improve the quality of life of both the custodial parent and the child. The evidence at the trial showed that both Paul and Jenifer had limited financial resources and moved frequently. Both relied on their parents for assistance, and Paul had moved in with his parents due to financial constraints, just as Jenifer sought to do. The evidence also showed that Payton had her own room at Jenifer's parents' home in

Arizona. They had furnished the room with toys, a bed, a desk, and a toy box for Payton. It does not appear that either Paul or Jenifer would be able to provide Payton as stable a living arrangement on their own. Although Jenifer's mother, Melissa Carr, testified that she would continue to help Jenifer financially if the court denied the petition to remove, she also testified that the amount of help she could afford to provide was limited.

The record also contains evidence that Jenifer would be able to pursue her education and improve her earning potential if allowed to move to Arizona with Payton. In addition to the obvious benefit of having a place to stay, both Jenifer and her mother testified that Jenifer's parents would be available to take care of Payton while Jenifer was at work or at school. Paul, however, argues that the evidence does not support the conclusion that Jenifer is likely to be able to pursue her education and improve her financial standing if the move is allowed. More specifically, he points out that Jenifer admitted that she had not considered any schools in Illinois (other than the nursing program at Barnes-Jewish) and had not been admitted to the nursing program in Arizona.

We find this argument unpersuasive. As discussed, the primary advantage for Jenifer in moving to Arizona is that her parents can provide her and Payton with a place to live and help to care for Payton. The fact that there are nursing programs available locally does not negate this advantage. We also note that Paul's argument mischaracterizes Jenifer's testimony about the status of her education plans. She testified that in order to apply for the nursing program, she first had to take an entrance exam that would be administered shortly after the hearing in this matter. The fact that she had not yet been accepted into the program under these circumstances does not lead to the implicit conclusion that she is unlikely to follow through with her plans. We find the evidence sufficient to support the conclusion that Payton and Jenifer's quality of life would likely be improved by the move.

The next two factors we focus on are the motives of the custodial parent in seeking

to move and the motives of the noncustodial parent in opposing the move. In considering the custodial parent's motives, we determine whether it appears to be a ruse designed to frustrate the noncustodial parent's visitation rights. See *In re Marriage of Eckert*, 119 Ill. 2d at 327, 518 N.E.2d at 1045. Here, the guardian *ad litem* testified that he believed that the motives of both parents were pure. Jenifer does not contest this conclusion or question Paul's motives in opposing the move. Paul, on the other hand, argues that the record demonstrates that Jenifer's motive for seeking to move is to frustrate his visitation rights.

In support of this argument, Paul points to the evidence that Jenifer had not looked into any local nursing programs after deciding that the program at Barnes was too costly. He essentially rehashes his argument that the move would be unlikely to enhance Payton and Jenifer's quality of life. He then argues that, because he does not believe the move will enhance their quality of life in the ways Jenifer predicts, her "claim that the move was motivated by a desire to enhance her education is questionable." We have already rejected Paul's argument that Jenifer and Payton's quality of life would not likely be enhanced by the proposed move. Thus, we reject this related argument as well.

Finally, we consider the visitation rights of the noncustodial parent and whether a reasonable visitation schedule can be ordered that will realistically foster the relationship between the child and the noncustodial parent. These factors are related, so we will discuss them together.

We first note that in a removal case, the noncustodial parent's visitation will almost always be impacted. Thus, as Paul acknowledges, this fact, while relevant, is not dispositive. See *In re Marriage of Deckard*, 246 Ill. App. 3d 427, 434, 615 N.E.2d 1327 (1993). Where a noncustodial parent has diligently exercised his or her visitation rights all along, courts are particularly reluctant to unreasonably restrict the amount of visitation that parent will have unless the reasons for doing so are persuasive and compelling. See *In re Marriage of Eckert*,

119 Ill. 2d at 327, 518 N.E.2d at 1046. Here, we have already found Jenifer's reasons for petitioning for removal to be persuasive. In addition, although there was no custody or visitation order prior to July 2010, the parties did have informal agreements that allowed Paul to have visitation with Payton. The testimony differed on how diligently Paul took advantage of the opportunity this gave him to spend time with Payton; however, both parties agreed that he became far more diligent and involved in Payton's life after the first few years. The court's statement to Paul at the end of the hearing indicates that the court found that Paul had not always been as diligent as he should have been in exercising his right to visitation with Payton. We recognize that Paul did not technically have an enforceable right to visitation with Payton prior to July 2010. However, he could have filed a petition to establish a parent-child relationship at any time. Had he done so, he could have requested visitation or even custody. In addition, Paul does not allege that Jenifer ever refused to allow him to spend time with Payton. Thus we, like the trial court, find this early lack of involvement to be relevant.

More importantly, we find that the court's visitation schedule can adequately serve to foster Paul's relationship with Payton. The schedule calls for Payton to live with Paul for one month during her summer vacation and to spend two separate weeks with him during the year while she is on school vacations. Prior to the move, Payton spent alternating weekends with Paul. Due to the fact that Paul had moved out of Illinois, it was not realistic for him to spend additional time with her. Indeed, he testified that the distance between his various residences in Missouri and Jenifer's home in Illinois adversely impacted his ability to spend time with Payton. Although the new visitation schedule will result in less time together overall, it will also result in longer uninterrupted visits, all of which will be when Payton is on vacation from school. If he chooses to do so, Paul can now register Payton for summer activities that take place near his parents' home in Wentzville, Missouri. This will make it easier for him

to be involved with her activities than he was in the past, at least for a part of the year. In addition, the order requires Jenifer to allow Paul to have daily telephone contact with Payton if he wishes to do so. Considering Paul's historic level of involvement in Payton's care, the limitations already imposed on Paul's visitation by his own move to Missouri, and Jenifer's valid reasons for seeking to move to Arizona, we find this to be a reasonable visitation schedule.

For the foregoing reasons, we find that the trial court's decision was supported by the evidence. We therefore affirm its order granting Jenifer's petition to remove.

Affirmed.