

2012 IL App (2d) 120350-U  
No. 2-12-0350  
Order filed August 1, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> BRANDON S., a Minor	)	Appeal from the Circuit Court
	)	of Du Page County.
	)	
	)	No. 03-F-147
	)	
	)	Honorable
	)	Mary E. O'Connor and
(Melissa P., Petitioner-Appellant, v.	)	Linda E. Davenport,
Diven V.S., Respondent-Appellee).	)	Judges, Presiding.

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JUSTICE McLAREN delivered the judgment of the court.  
Justices Zenoff and Birkett concurred in the judgment.

**ORDER**

*Held:* The section of the Marriage and Dissolution of Marriage Act (750 ILCS 5/610(b) (West 2008)) governing modification of custody requires the trial court to state in its decision specific findings of fact in support of its modification of custody if either parent opposes the modification; because the trial court's order recited the appropriate standard of proof, and then merely stated that it found "a change in circumstances in the parties necessary to serve a modification" and "that modification is necessary to serve the best interest," but made no findings of fact, the cause is remanded for the trial court to make specific findings consistent with the mandate of the statute.

¶ 1 Petitioner, Melissa P., appeals from the trial court's order entered on March 1, 2012, modifying custody of her son, Brandon S., and granting residential custody to respondent, Diven

V.S. Petitioner seeks reversal of the order and reinstatement of the original joint custody order, arguing that the trial court's decision was against the manifest weight of the evidence and that the trial court erred when it did not make specific findings of fact in support of its order modifying custody. For the reasons that follow, we vacate the trial court's order and remand the cause for specific findings of fact consistent with the mandate of the Marriage and Dissolution of Marriage Act (750 ILCS 5/610(b) (West 2008)).

¶ 2

## I. BACKGROUND

¶ 3 Melissa and Diven are the biological parents of Brandon, who was born on April 20, 2002. Melissa and Diven were never married. Diven signed an acknowledgement of paternity on April 20, 2002. On April 11, 2003, Melissa filed *pro se* a petition seeking child support, visitation, family counseling and alcohol abuse counseling for Diven. Several court dates followed. On January 12, 2004, Melissa and Diven entered into a Joint Parenting Agreement (JPA), in which they agreed to share joint custody of Brandon, with Melissa as the primary residential custodial parent. The JPA also addressed the issues of visitation with Diven, health insurance for Brandon, and post-high school educational expenses.

¶ 4 On September 24, 2010, Melissa petitioned the trial court, pursuant to section 5/609 of the Act (750 ILCS 5/609 (West 2008)), for leave to remove Brandon from Illinois to Georgia, because her "fiancé," Jeffrey S., with whom she had been living for eight years, was offered a position there with his current employer. On March 16, 2011, Diven filed a response to Melissa's petition and a motion to appoint a guardian *ad litem*, pursuant to section 5/506 of the Act (750 ILCS 5/506 (West 2008)). On May 17, 2011, Diven filed a "Motion to Modify Custody," asking the trial court to modify the JPA and award him sole custody of Brandon. Thereafter, the cause was continued for

“status review” five times, until Diven filed an “Emergency Motion for Temporary Custody and Other Relief” on September 27, alleging that Brandon’s situation in Melissa’s home was deteriorating, causing Brandon stress and leading to depression. On October 3, 2011, the trial court, Judge Mary E. O’Connor presiding, granted Melissa seven days to respond and set the matter for a bench trial on November 16, 2011. On November 19, Melissa’s attorney filed an emergency motion to extend the trial date, citing personal matters and asserting that “providing his client with adequate representation at trial on November 16, 2011, is simply not feasible.” An agreed order was entered on November 14, setting the matter for a bench trial on December 5 and 6. On December 1, Melissa’s attorney filed another emergency motion asserting that the GAL had not filed her final report, and that his “ability to offer a vigorous representation on behalf of his client will be severely and negatively impacted.” Over objection, the trial court ordered that the cause be set for status and setting for trial on December 16. On that date, the cause was re-assigned to Judge Linda E. Davenport. The cause was set for trial on February 29, 2012.

¶ 5 After a series of miscommunications and delays on the morning of February 29, the trial commenced in the afternoon. The trial court heard testimony from Diven, Melissa and Jeffrey S. Additionally, Robert Hurst, Brandon’s school psychologist, testified on Diven’s behalf. The GAL’s report was admitted into evidence.

¶ 6 On March 1, 2012, Melissa voluntarily withdrew her Petition for Removal. On the same day, after hearing arguments of counsel, the trial court found as follows:

“[The petition for modification of custody is] governed under Section 610 of the Illinois Marriage and Dissolution of Marriage Act found at 750 ILCS, Section 5.

\*\*\* [S]ince we're more than two years past a custody judgment, the standard [is] clear and convincing evidence \*\*\*. And I have to find two things[:] that a change has occurred in the circumstances of the child or[,] in the case of joint custody[,] of the parties[,] and that the modification is necessary to serve the best interest of the child. That's the standard that I'm required to follow.

The Court makes the following findings. The testimony that I heard was dramatically different than the GAL's investigation. It didn't come into play and a number of things that she raised in her report were not examined or cross-examined by anybody purporting to disagree with her. So I'm giving that some weight, not a great deal of weight.

As to the first circumstance, I do find that there's been a change in circumstances in the parties necessary to serve a modification and I do find that modification is necessary to serve the best interest of Brandon.

I didn't hear any evidence that terminating joint custody is in this child's best interest. I, in fact, believe that the parties are, in fact, jointly parenting this child, but I believe it is appropriate to change residential custody from you, Ms. [P.], to Mr. [S.], and that will be effective today.”

The trial court then went on to matters involving child support.

¶ 7 The court's written order, entered March 2, read, in pertinent part:

“2) [Diven's] Motion to Modify Custody is granted and the residential custody of Brandon [S.] is transferred to [Diven] effective immediately.

3) [Diven's] Child Support obligation is terminated effective immediately.”

The other provisions in the order addressed visitation with Melissa.

¶ 8 Melissa timely filed this appeal.

¶ 9 II. ANALYSIS

¶ 10 Melissa seeks reversal of the trial court's order granting residential custody to Diven, and "reinstatement of the original joint custody order." She argues that the trial court's decision was against the manifest weight of the evidence and that the trial court erred when it did not make specific findings of fact in support of its order modifying custody. We address these arguments in reverse order.

¶ 11 When modifying a prior custody judgment, section 5/610(b) of the Act requires "clear and convincing evidence" that "a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child." 750 ILCS 5/610 (West 2010). The Act further requires that "[t]he court shall state in its decision specific findings of fact in support of its modification or termination of joint custody *if either parent opposes the modification or termination.*" (Emphasis added.) *Id.* Thus, the statute is clear that, unless the custodial parents agree to modify or terminate their joint custody, the trial court must state "specific findings of fact in support" thereof. *Id.* Moreover, "[a] mere recitation by the court that it is in the best interest of the child to award custody [one of the parents] is not sufficient to satisfy the requirement of the act that specific findings of fact must be made in support of a modification." *In re Marriage of Weber*, 249 Ill.App.3d 892, 897 (1993).

¶ 12 We find *In re Marriage of Oliver*, 155 Ill. App. 3d 181 (1987), instructive. In *Oliver*, the trial court entered an order changing the custody of the child from the father to the mother. *Id.* at 182. The order recited that the trial court had considered "all relevant factors in determining child custody, including those enumerated in [the statute]." *Id.* at 184. However, there were no findings

based upon clear and convincing evidence that a change has occurred in the circumstances of the child or his custodian. *Id.* Moreover, there were no “specific findings of fact in support of its modification.” *Id.* The *Oliver* court found that, while a reference to the factors enumerated in the statute “would not be inappropriate, they may not, in the absence of a consideration of a change of circumstances as provided in section 610(b), serve as a justification for a change in custody.” *Id.*

¶ 13 In reaching its conclusion, the *Oliver* court discussed the holdings in *Vollmer v. Mattox*, 137 Ill. App. 3d 1 (1985), and *In re Custody of Sussenbach*, 108 Ill. 2d 489 (1985), which was decided three months after *Vollmer*. *Oliver*, 155 Ill. App. 3d at 182. The *Oliver* court observed that, in *Vollmer*,

“the trial court found a transfer of custody to be in the best interest of the child but ‘the court did not elaborate upon the reasons for the court's decision to change the custody [of the minor].’ The order in the *Vollmer* case did not even recite the conclusionary statement from the statute that ‘a change has occurred in the circumstances of the child or his custodian.’ ” *Id.* at 184.

Therefore, in *Oliver*, the Fifth District appellate court remanded the cause for the trial court to make explicit findings to support the change in custody it had made. Conversely, in *Sussenbach*, the trial court made extensive written findings to show the change in circumstances that required a change in custody, but did not recite the statutory language in its conclusion from those facts. The supreme court stated that “[t]hese findings, we believe, when taken together, are sufficient to show that a change in circumstances had occurred.” *Sussenbach*, 108 Ill. 2d at 498.

¶ 14 In this case, the trial court did not enunciate specific findings in its written order, nor did it do so in its oral pronouncements. See *In re Custody of Pfaff*, 250 Ill. App. 3d 265, 267 (1993)

(Specific findings need not be contained in the written order when they are mentioned orally by the trial court at the time of its decision). Instead, the trial court recited the appropriate standard of proof, and then stated that it found “a change in circumstances in the parties necessary to serve a modification and I do find that modification is necessary to serve the best interest of Brandon.” While this recitation provides a more substantial basis for the transfer of custody than was provided by the trial court in *Vollmer*, where even a conclusion was absent, specific findings of fact, such as those enumerated in *Sussenbach*, are lacking here. Therefore, the requirement of the statute is unfulfilled.

¶ 15 It follows, then, that we are unable to review the trial court’s decision under a manifest weight of the evidence standard of review, as we are required. See *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177 (2002) (On appeal, a decision regarding child custody modification will not be disturbed unless it is against the manifest weight of the evidence).

¶ 16 For the foregoing reasons, we vacate the order entered March 2, 2012, that modified Brandon’s custody from mother to father and remand the case to the trial court for the purpose of making specific findings of fact in conformance with section 610(b). Pending such findings, custody of Brandon will remain with Diven.

¶ 17 **III. CONCLUSION**

¶ 18 For the reasons stated, we vacate the judgment of the circuit court of Du Page County and remand for specific findings consistent with the mandate of the statute.

¶ 19 Order vacated; cause remanded with directions.