2016 IL App (3d) 160145-U

Order filed August 12, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

T.T.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Petitioner-Appellee,	)	Tazewell County, Illinois.
	)	
v.	)	Appeal No. 3-16-0145
	)	Circuit No. 14-F-73
T.R.,	)	
	)	Honorable Kim L. Kelley,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in modifying the parties' prior child custody agreement where the petitioner failed to prove there had been a substantial change in circumstances.

¶ 2 Respondent, T.R., appeals from the trial court's February 2016 order modifying the parties' prior child custody agreement and awarding petitioner, T.T., sole custody of the parties' minor child. On appeal, respondent argues: (1) petitioner failed to present clear and convincing evidence of a substantial change in circumstances; and (2) modification of the previous custody

agreement was not in the minor child's best interest. In the alternative, respondent asserts the court abused its discretion in reducing her visitation with the minor child. We reverse.

¶ 3 BACKGROUND

¶ 4 The relationship between petitioner and respondent produced one minor child, S.R., born April 5, 2005. In November 2007, when S.R. was two years old, the parties entered into a parenting agreement, whereby respondent retained sole custody of S.R., and petitioner received visitation every other weekend.

¶ 5 On May 15, 2014, petitioner filed a petition with the circuit court of Tazewell County to modify custody pursuant to section 610(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610(b) (West 2014)). In the petition, he requested joint legal and physical custody of S.R. Petitioner alleged that a substantial change in circumstances had occurred—he had completed chiropractic school and had returned to the Peoria area where he would be able to be a more active custodial parent.

¶ 6 On January 30, 2015, petitioner filed an amended motion to modify child custody pursuant to section 610(b) of the Act (750 ILCS 5/610(b) (West 2014)). In the amended petition, he requested sole custody of S.R. In support of his claim, petitioner alleged that: (1) since May 2014, the relationship between the parties had seriously deteriorated to the point where there was no ability to effectively communicate when it comes to issues involving S.R.; (2) respondent routinely denies petitioner any requests outside the prior agreement and S.R. reports that if she asks respondent to spend time with petitioner, she will be grounded; (3) respondent has enrolled S.R. in activities on Tuesday, Wednesday, and Thursday in an attempt to deny petitioner his visitation time; (4) S.R. continually asks petitioner why he does not want to spend more time with her, evidencing her clear desire to be in petitioner's care; (5) S.R. is well adjusted to

petitioner's home and community; and (6) respondent has engaged in a course of conduct that interferes with the relationship between petitioner and S.R.

¶ 7 On August 14, 2015, at petitioner's request, the trial court entered a temporary custody order. Pursuant to the order, the parties alternated physical custody of S.R. each week for the duration of the litigation.

¶ 8 On August 31, 2015, the court-appointed guardian *ad litem* (GAL) submitted her report. The report identified that S.R. has a good relationship with her mother, siblings, and grandmother. She is very connected to the Morton community and school district. S.R. also has a good relationship with petitioner and his parents. The GAL believed it was crucial that S.R. spend equal time with each parent.

¶ 9 The GAL met with S.R. on two occasions—once at respondent's home, and once at petitioner's home. When she met with S.R. at respondent's home, S.R. seemed very nervous. Although she met with her in a separate room, S.R. seemed reluctant to answer questions and did not volunteer information. This was in stark contrast to what she observed when she visited with S.R. at petitioner's home. In petitioner's home, S.R. seemed "very relaxed and carefree." The GAL acknowledged that some of the difference in S.R.'s behavior may be attributed to the fact that the mother's home visit was the first time she met with S.R. However, she did not believe that was the only contributing factor.

¶ 10 The report next evinced concerns she had about the parties' ability to cooperate and make joint decisions regarding S.R. As such, she recommended an order that allocated parental responsibility rather than designated custody. If the parents could not agree as to which areas they would each have responsibility, she recommended that petitioner be responsible for S.R.'s education and medical needs, and respondent be responsible for religious beliefs and

extracurricular activities. In doing so, she acknowledged that such an order would be fashioned after the changes made to the Act, which would not go into effect until January 1, 2016. Thus, if the parties could not agree to her recommendation, she recommended that the trial court award petitioner sole custody, with respondent receiving liberal visitation.

¶ 11 On December 8, 2015, the GAL updated her report to conform to the requirements of section 602 of the Act (750 ILCS 5/602 (West 2014)), which was the version of the statute in effect at that time.

¶ 12 Addressing each best interest factor listed in section 602, the GAL first stated that both parents desired sole custody of S.R. She then opined that the current schedule (50% time with each parent) gives S.R. the time she needs with both parents. However, she was concerned that at respondent's house, S.R. shares a room with her older sister and her older sister's infant child. Particularly when school is in session, she was concerned that S.R. may not get enough sleep if she continued to reside in her mother's home. As a result, she felt this factor favored petitioner.

¶ 13 With regard to S.R.'s adjustment to home, school, and the community, she believed that this factor slightly favored respondent. S.R. has lived in Morton her entire life and has always gone to school there.

¶ 14 With respect to the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and S.R., the GAL felt that this factor overwhelmingly favored petitioner. Instead of improving since the entry of the August temporary custody order, the communication between the parties had deteriorated even further to the point that respondent refuses to communicate with petitioner whatsoever. Respondent made it clear in her deposition, text messages, and answers to interrogatories that she does not believe petitioner is an important person in S.R.'s life. She does not believe petitioner has an equal right

to information regarding S.R.'s education and medical needs. Petitioner, on the other hand, has consistently expressed his commitment to fostering the relationship between S.R. and respondent. Petitioner has stated that he has no desire to take S.R. away from her mother.

¶ 15 As a result of the foregoing, the GAL recommended that the trial court award petitioner sole custody of S.R. However, neither of the GAL's reports made any reference to there being a change of circumstances with regard to S.R.'s needs.

¶ 16 That same day, the trial court conducted a full hearing on petitioner's motion to modify custody. At the hearing, respondent testified that she is 38 years old and works as a crossing guard for the Morton School District. She also works a small paper route with her son. Respondent is not currently looking for full-time employment, as she hopes to enroll in a health degree program at the local community college. Respondent lives in a three bedroom apartment in Morton with her mother, her two minor sons, ages 14 and 2, and S.R. Respondent testified that S.R. has her own room; her oldest daughter does not live with them.

¶ 17 At the time of the hearing, S.R. was in the fifth grade at an elementary school, which was six blocks away from their apartment. Respondent testified that S.R. has continually struggled with school and attended summer school following her kindergarten, first grade, and third grade years. To address S.R.'s educational needs, respondent had enrolled S.R. in "homework club" on Tuesdays and Thursdays, which is an extra hour of homework help from S.R.'s school teachers. During the previous school year, respondent also employed her neighbor to help S.R. with math and reading twice a week for 30 minutes. Although petitioner had offered to pay to send S.R. to Sylvan Learning Center, respondent declined because of all the extra assistance S.R. was already receiving.

¶ 18 In addition to homework club, S.R. has choir practice after school on Mondays and Wednesdays until 3:40 p.m., and dance classes on Tuesdays from 4:00 to 4:45 p.m. and 5:30 to 6:00 p.m., and on Thursdays from 5:30 to 6 p.m. Respondent does not believe these activities are too much for S.R., and testified that S.R. is never tired or overwhelmed on the nights she has dance class. Respondent's mother also testified to this effect.

¶ 19 On cross-examination, respondent acknowledged that she took S.R. to a concert in Lexington, Kentucky, which required S.R. to miss two days of schools. Although she did not make arrangements for S.R.'s homework during that time, the court had approved the concert, and respondent did not believe the concert had a negative impact on S.R.'s grades. S.R. only missed 2.5 days of school that quarter.

¶ 20 During respondent's testimony, S.R.'s report card dated December 18, 2015, was read into the record and submitted as an exhibit. The report card contained S.R.'s grades for both the first and second quarter of her fifth grade year. During the first quarter, S.R. received a B in English, B+ in Literature, B+ in Spelling, D in Math, D+ in Science, and a B+ in Social Studies. During the second quarter, her Literature grade improved to an A-, her Math grade improved to a C-, and her Science grade improved to a B. However, S.R.'s Social Studies grade decreased to a B-, and her English and Spelling grades remained the same. No other evidence of S.R.'s prior grades was admitted into evidence or otherwise made a part of the record.

¶ 21 Respondent acknowledged that since the litigation began, communication between she and petitioner had been strained. Most communications were by text message, and respondent admitted she would either not return petitioner's texts in a timely manner or not respond to his messages at all. When questioned about a time where she had not informed petitioner about an ankle injury, respondent stated it was not a major incident, and that historically, she had never

discussed minor physical ailments with petitioner. When asked why she waited 18 months to include petitioner as S.R.'s father on S.R.'s school records, respondent stated she did not feel that she was required to do so. She claimed that petitioner had never taken an interest in S.R.'s school records or doctor's appointments until the beginning of litigation. Respondent felt that she was not doing anything wrong by keeping things the way they had always been.

¶ 22 Petitioner testified that he is 37 years old and lives in Peoria with his parents. Petitioner graduated from Palmer Chiropractor School in October 2013. He is divorced and has a three-year-old daughter who lives in Florida with her mother. Since S.R. was born, petitioner has contributed $50 per month in child support. When the original custody agreement was entered, petitioner lived in Davenport, Iowa, which was an hour and a half away from respondent and S.R. He came back to live in Peoria for a short period, and then relocated to Overland, Kansas, which was six hours away from respondent and S.R. He moved back to Peoria in the winter of 2009, but then moved back to Davenport in July of 2010, where he stayed until his graduation. While he was away at school, petitioner testified he "tried" to make visitation happen, but he would sometimes only come back to Peoria once a month.

¶ 23 Petitioner testified that he believes S.R.'s extracurricular schedule is burdensome. When he attempted to talk to respondent about how tired S.R. is after her dance classes and its potential effect on her school performance, respondent reminded him that he has no input because she is the sole custodian. Petitioner testified he has heard respondent crying on the phone while talking to S.R., telling her how much she misses her. When this happens, S.R. becomes very sad and distant.

¶ 24 When petitioner offered to pay for Sylvan Learning Center, respondent told him "It wasn't going to happen. She was not going to allow that." He also offered to assist with S.R.'s

homework, but respondent never responded. Petitioner testified that since he has had more access to S.R. during the school year, he has been able to help her with her homework, and her math grade has gone up. If granted primary placement, petitioner wanted to continue equal parenting time, but he would enroll S.R. at Peoria Christian School, where both of his parents are employed.

¶ 25 Petitioner's mother testified that it is "really hard to get [S.R.] calmed down" on Tuesdays and Thursdays. She stated that S.R. is exhausted after dance class, and referred to S.R. as being "brain dead" when she tries to get her homework done on those days. Petitioner's father testified that S.R. seems pretty tired after dance, but that she always manages to finish her homework.

¶ 26 On February 1, 2016, the trial court entered its decision. Initially, the court noted that respondent had significant credibility issues. "Her testimony in many instances was hard to pin down, her answers appeared to sway and change upon different questioning, she was regularly evasive, and she laughed at inappropriate occasions and had difficulty following the questions." In addition, the court noted it could not disregard the fact that while she was on the stand testifying, respondent was text messaging her sister. However, petitioner also had credibility issues. His recollection was often foggy, and his answers were often imprecise and uncertain.

¶ 27 The trial court then found that respondent had used poor discretion in addressing S.R.'s schooling needs. The evidence established that S.R. was struggling academically. S.R. had attended summer school for three years and required a tutor. Despite S.R.'s struggles, respondent did not elect to seek help in the summer of 2015, and had not responded to petitioner's offer to provide and pay for Sylvan Learning Center. In addition, respondent had taken S.R. out of school for two days to attend a concert without even making arrangements for

S.R.'s school work. Respondent did not see that petitioner was given access to S.R.'s schooling records for more than 18 months after petitioner had requested her to do so. The court concluded that respondent had used her position as custodial parent to dismiss petitioner's reasonable concerns. Moreover, since the alternating week placement order went into effect and petitioner had greater access to S.R. during the school year, the court found that S.R.'s grades had improved. The court stated this was a "significant factor" in its decision. In addition, respondent did not curtail S.R.'s "burdensome extracurricular activities," even though she knew S.R. was struggling in school.

¶ 28 The trial court next noted that since the litigation began, respondent had terminated all communication with petitioner. This created tension between the parties, which the court felt had not escaped S.R. However, the court acknowledged that there had been no communication issues until the case was filed and the "battle lines were drawn."

¶ 29 Finally, the trial court noted that it was "not without sympathy for [respondent's] plight." She has by and large supported S.R. by herself while petitioner was elsewhere seeking an education. Nevertheless, the court did not believe that petitioner was acting out of pecuniary interest, but rather, out of concern for his daughter.

¶ 30 Considering all of the evidence, the trial court found it to be a close case. However, given the strong recommendation of the GAL and all of the aforementioned reasons, the court found that petitioner established by a clear and convincing evidence a substantial change of circumstances.

¶ 31 Reiterating the same factors it had just discussed in its changed circumstances analysis, the trial court then found that it would be in S.R.'s best interest to award petitioner sole custody. The court also noted it had concerns about respondent's ability to place S.R.'s needs above her

own. It found the best example to be how respondent will cry and tell S.R. how much she misses her when she is at petitioner's house. The court noted this type of behavior was manipulative and tugs on S.R.'s emotions.

¶ 32 For these reasons, the trial court awarded petitioner sole care, custody, control, and education of S.R. As a final matter, the court reduced respondent's visitation with S.R. to alternate Thursdays after school until Sunday evenings.

¶ 33 Respondent appealed.

¶ 34 ANALYSIS

¶ 35 On appeal, respondent argues that the trial court erred in granting petitioner's amended motion to modify custody pursuant to section 610(b) of the Act (750 ILCS 5/610(b) (West 2014)). Specifically, respondent asserts: (1) the evidence does not support the conclusion that petitioner's increased visitation caused S.R.'s grades to improve; (2) the court's findings regarding the lack of communication and cooperation between the parties since the litigation began is not a basis to modify custody; (3) there is no evidentiary nexus between S.R.'s extracurricular activities and her grades; and (4) the GAL's reports do not support a finding of a substantial change in circumstances.

¶ 36 Section 610(b) of the Act (750 ILCS 5/610(b) (West 2014)) prescribes a two-step process, whereby a court may modify a prior custody judgment only where it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or were unknown to the court at the time of entry of the prior judgment, that: (1) a change has occurred in the circumstances of the child or his custodian; and (2) modification is necessary to serve the best interest of the child.

¶ 37 Courts of this State have long noted that changed conditions alone are insufficient to warrant modification in custody without a finding that such changes "affect the welfare of the child." *Nolte v. Nolte*, 241 Ill. App. 3d 320, 325-26 (1993). A trial court may modify an existing custody arrangement only where the petitioner has proven by clear and convincing evidence that either the custodial parent is unfit, or that there has been a change of conditions directly related to the needs of the child. *Id.; Brandt v. Brandt*, 99 Ill. App. 3d 1089, 1099 (1981).

¶ 38 "Section 610(b) reflects an underlying policy favoring finality of child custody judgments and creating a presumption in favor of the present custody so as to promote stability and continuity in the child's custodial and environmental relationships." *Nolte*, 241 Ill. App. 3d at 325. Generally speaking, the statute recognizes that stability in a child's life and finality of custodial judgments are more important than determining "which parent is truly the better custodian." *In re Marriage of Oros*, 256 Ill. App. 3d 167, 169 (1994); see also *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 410 (1994) (noting that the presumption in favor of the present custodian "is not to be lightly overturned").

¶ 39 Once a trial court has found a substantial change in circumstances, it must then determine whether a change in custody is necessary to protect the child's best interest. Factors the court must consider include: (1) the parents' wishes; (2) the child's wishes; (3) the child's interactions with parents, siblings, and others who may affect the child's best interest; (4) the child's adjustment to home, school, and community; (5) the mental and physical health of all individuals involved; (6) physical violence, or the threat of physical violence, by the child's custodian, whether directed against the child or another person; (7) ongoing or repeated abuse, whether directed against the child or another person; (8) the willingness of each parent to facilitate the relationship between the other parent and the child; (9) whether one parent is a sex offender; and

(10) the terms of a parent's military family-care plan if a parent is a member of the United States Armed Forces who is being deployed. 750 ILCS 5/602(a) (West 2014).

¶ 40 The party seeking to modify custody bears the burden of proof with regard to both steps of the analysis. *In re Marriage of Wechselberger*, 115 Ill. App. 3d 779, 785-86 (1983). We will not disturb the trial court's decision regarding a petition to modify custody unless that decision was contrary to the manifest weight of the evidence. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004).

¶ 41 At the onset, we note that the record leaves us unclear as to what the change in circumstances in this case exactly was. While the GAL recommended that the trial court award petitioner sole custody of S.R., neither of the reports addressed whether there had been a change of circumstances sufficient to warrant modification of the original custody agreement. In petitioner's initial motion to modify custody, he claimed the change was that he had finally moved back to Peoria and was able to be a more active custodial parent. This certainly cannot be true, as petitioner moving back to Peoria has no bearing on S.R.'s needs, or on respondent's fitness as custodial parent.

¶ 42 In his amended motion to modify custody, petitioner claimed the change in circumstances was the breakdown of communication since the filing of his first petition and respondent's recent unwillingness to facilitate a relationship between him and his daughter. However, this argument completely ignores petitioner's role in creating the hostile situation. In truth, we would be more concerned if respondent were not upset—she has provided for S.R. since the day she was born, with very little help from petitioner. Petitioner has been absent, both physically and financially, for the majority of S.R.'s life. He has paid only $50 per month in child support and has rarely exercised the minimal visitation he was entitled to pursuant to the original custody agreement.

¶ 43 Now, petitioner seeks sole custody of S.R., and he seeks to use the tension his litigation caused as the basis for a finding of a substantial change in circumstances. We reject such an argument. The record is clear that there were no communication issues between the parties prior to the commencement of the litigation. Even the trial court acknowledged there had been no problems until petitioner filed his petition and the "battle lines were drawn."

¶ 44 Moving on to the trial court's order and trying to discern what it felt the substantial change in circumstances was, we come first to the issue of respondent's credibility as a witness. Certainly, we recognize that a trial court's custody determination is afforded great deference because it is in a superior position to judge the credibility of witnesses. *Bates*, 212 Ill. 2d at 516. Indeed, respondent's evasive behavior while answering questions and text messaging while testifying as a witness was completely unacceptable. Nevertheless, respondent's credibility in and of itself is not a change of circumstances sufficient to warrant the drastic change of custody that occurred in this case. As stated above, petitioner bore the burden of proof on this matter, and the court's order makes it clear that he also had significant credibility issues. *Wechselberger*, 115 Ill. App. 3d 785-86 (1983).

¶ 45 Which brings us to the final possible option—the court's belief that respondent had exercised poor discretion in addressing S.R.'s educational needs. In arriving at its determination, the court placed significant weight on the fact that S.R.'s grades had improved since the court had implemented the week-on, week-off visitation schedule in August of 2015. Nothing in the record supports this conclusion. The only evidence presented of S.R.'s grades is her report card dated December 18, 2015. While the report card does demonstrate improvement in a few subjects between the first and second quarter of her fifth grade year, the visitation schedule went

into effect before S.R. ever began fifth grade. Petitioner presented no evidence of S.R.'s current grades in relation to her grades before the temporary visitation schedule went into effect.

¶ 46 Moreover, while respondent did not enroll S.R. in Sylvan Learning Center as petitioner had requested, such was respondent's right as sole custodian of S.R. for the past nine years. Evidence in the record supports respondent's argument that she has taken several alternative steps to address S.R.'s educational needs. S.R. attended summer school for three years, and respondent had enrolled S.R. in homework club and had even procured a tutor.

¶ 47 Nor does the evidence establish any correlation between S.R.'s involvement in dance classes two nights a week and her educational performance. While petitioner and his parents testified that S.R. is exhausted after dance, they also testified she manages to finish her homework on those nights. Nothing in the record establishes that if S.R. were taken out of dance classes, her grades would improve. Being involved in activities two nights a week hardly qualifies as an "incredibly burdensome" extracurricular schedule.

¶ 48 With respect to the final matter, the concert, we find this occurrence to be isolated, and not sufficient to warrant a finding of a substantial change in circumstances. As respondent correctly testified, the trial court approved S.R.'s attendance at the concert. While respondent should have made arrangements beforehand to get S.R.'s schoolwork, nothing in the record suggests S.R's grades decreased as a result of her attending the concert.

¶ 49 Analyzing the evidence presented below in conjunction with the strong legislative presumption in favor of the present custodian and the finality of child custody agreements, we conclude that the trial court's judgment in this case was against the manifest weight of the evidence. Petitioner failed to present clear and convincing evidence of a substantial change in circumstances, and modification of the original custody agreement was unwarranted.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, we reverse the judgment of the circuit court of Tazewell County.

¶ 52 Reversed.