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2017 IL App (3d) 160538-U

Order filed February 2, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

DUSTIN F.,)	Appeal from the Circuit Court
Petitioner-Appellee,)	of the 10th Judicial Circuit,
)	Tazewell County, Illinois,
)	
v.)	Appeal No. 3-16-0538
)	Circuit Nos. 00-F-24 & 03-F-144
)	
DENISE C.,)	Honorable
Respondent-Appellant.)	James Mack,
)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in modifying the allocation judgment and designating the father as the parent with the majority of parenting time under section 610.5 of the Illinois Marriage and Dissolution of Marriage Act.

¶ 2 Respondent, Denise C., appeals from the trial court's parenting order reallocating parental decision-making responsibilities and designating a majority of the parenting time of her son to petitioner, Dustin F. On appeal, she claims that trial court's findings that there had been a substantial change in circumstances and that modification of parental responsibilities was

necessary to serve the best interests of the child were against the manifest weight of the evidence. We affirm.

¶ 3

FACTS

¶ 4

Dustin and Denise have two children together: S.F., born on June 8, 1999, and A.F., born on August 16, 2002. They never married. In November of 2000 and again in August of 2002, Dustin filed petitions to establish a parent-child relationship. In response, the court entered agreed parenting orders granting Dustin parental rights with visitation and awarding Denise sole care, custody, control and education of the children.

¶ 5

Both parties agree that they were able to communicate and cooperate well until the summer of 2013. Their relationship continued to deteriorate until October of 2014, at which time Dustin sent an email to Denise requesting a set visitation schedule. When Denise arrived at Dustin's house the next evening to pick up A.F., a verbal altercation occurred between Dustin and Denise in the driveway. Denise left with A.F., and A.F. was visibly upset.

¶ 6

On February 23, 2015, Dustin filed a petition to modify custody and an emergency petition for temporary custody, citing the October incident, reduced visitation, A.F.'s failing grades and inappropriate behavior, lack of structure in Denise's home, and a breakdown in communication between the parties. Dustin requested that a guardian *ad litem* (GAL) be appointed, and the court subsequently appointed Debbie Harper. On October 15, 2015, an agreed temporary parenting time order was entered allowing Dustin more parenting time with both S.F. and A.F. On March 10, 2016, the GAL filed a report with the trial court, and the court set a modification hearing for March 20, 2016.

¶ 7

At the hearing, Denise testified that A.F. went to Dustin's house before school and after school in 2014. She dropped him off by 7 a.m. and picked him up around 4:30 in the afternoon. Dustin worked with A.F. on homework and helped him do math problems in the morning. All

through sixth grade, A.F. was on the honor roll. In the fall of 2014, A.F. started seventh grade and moved to the junior high building. In October, his grades started dropping, and by the spring of 2015, he was in danger of being held back. Denise stated that while the parties communicated regularly before October 16, 2014, there was no communication between them after that date.

¶ 8 On October 15, 2016, Denise received an email from Dustin asking her to set a schedule for dropping off and picking up A.F. The next day, she pulled into Dustin's driveway to pick up A.F. after school, and Dustin was waiting outside. A.F. put his bag in the back of the car and jumped inside. Denise got out of the car, and she asked Dustin if they could talk about the email. Denise admitted that she "went off" on Dustin. She called him a "stupid mother F over and over and over again." Dustin's wife, Bridget, was standing on the porch nearby. Bridget began yelling at Denise and telling her to leave. Denise testified that she called Bridget "a fucking cunt" at least two times and told her to stay out of it. As a result of the incident, Denise decided to stop taking A.F. over to Dustin's house before and after school to work on math. Denise sent a text to Dustin informing him of her decision. She testified that she had not spoken to him since the incident.

¶ 9 Sometime in November or late October of 2014, A.F.'s grades started to decline. Denise testified that in the first quarter his grades were good, but in the second, third and fourth quarters they were bad. Denise admitted that she received an email from Dustin in November of 2014 stating that he had attended A.F.'s parent-teacher conference and that A.F. was failing several classes. Dustin attached a copy of his grades and stated:

"We have a very serious problem on our hands. And all of his teachers agree to the point they rearranged his schedule four weeks ago. [A.F.] is digging a hole he may not be able to get out of. Repeating the seventh grade is a reality if something doesn't change now.

You are the custodial parent. What is going on with him? Clearly homework and studying has to become of first importance. Dustin.”

Denise testified that she responded to the email a few days later. She simply stated, “Do not email me at my work address.” She did not respond to Dustin raising concerns about A.F.’s academic performance.

¶ 10 In March of 2015, Denise received a letter informing her that A.F. had been suspended for two days for making a sexual gesture to girls in school. Denise believed that A.F. “got a raw deal” and did not do anything inappropriate.

¶ 11 In his seventh grade year, A.F. received several in-school suspensions, was caught with cigarette rolling paper and lighter at school, and was involved in a shoplifting incident in the mall. Denise admitted that A.F. had no history of any significant discipline problems before his seventh grade year. Denise also testified that S.F. had been involved in a sexual encounter with a boy in the spring of 2014. As a result, Denise sent S.F. to live with Dustin for about six weeks.

¶ 12 Ty Gross, the principal at the junior high, testified that he gave A.F. a test at the end of his seventh grade year to see if he had sufficient knowledge to be promoted to eighth grade. A.F. passed the test so the administration made the decision that he would be promoted. He testified that Dustin had been in contact with the teachers regarding A.F.’s grades, but he did not have any knowledge as to Denise’s involvement.

¶ 13 Dustin’s father, Robert F., testified that both Denise and Dustin were good parents. He stated that Dustin had abused cocaine in 2000 or 2001. He had been treated successfully for his addiction in 2003 and had not used cocaine since that time. He testified that in the spring of 2014, A.F. told him that Bridget’s son, Jacob, hit him and punched him. He told A.F. that if that ever happened again, he would come and pick him up and A.F. could stay at his house.

¶ 14 Dustin testified that he had A.F. in the mornings and most days after school “off and on” since 2009. A.F. was in third grade when he started keeping him in the mornings. He is a member of a local church, and he is a youth group instructor. Both S.F and A.F. attend youth events. In the summer of 2012, he took S.F. and A.F. on a mission trip to Haiti.

¶ 15 In June of 2013, he married Bridget. Bridget has five children from a previous relationship. Three of her children are minors and live with Dustin and Bridget in their three-bedroom home. The two girls share a bedroom, and his step-son, Jacob, has his own room.

¶ 16 Dustin testified that on October 16, 2014, Denise showed up at his house and “completely lost it.” The incident really upset A.F. As Denise pulled away, Dustin saw A.F. “bawling his eyes out” in the back seat. From that point forward, A.F. no longer came over to his house. He did not turn in his homework, and he started failing his classes. Dustin met regularly with him in fifth and sixth grade, and they worked on homework together. A.F. made the honor roll in fifth grade and sixth grade. Dustin testified that after the October 16 incident, Denise refused to communicate with him. Denise would not respond to his emails and any attempt at a conversation was “nasty.”

¶ 17 Dustin admitted that A.F. had a school incident in fifth grade involving a knife. A.F. took a pocket knife to school that Jacob gave him. One of the students saw the knife, and A.F. told him not to report it to the teacher. A.F. said, “I’m going to kill you, if you tell.” The school disciplined A.F., and no other incidents were reported. Dustin also acknowledged that he spanked A.F. and that he used a belt once when A.F. misbehaved at school. He told A.F. to pull his pants down and he struck him with a belt five times.

¶ 18 Dustin further testified that in October of 2015, he received more parenting time with A.F. He was given parenting time from Friday after school until Tuesday at 7 p.m. He also had

A.F. on Wednesday night and Thursday night after school until 7:30 p.m. and every other week from Wednesday night until Thursday morning.

¶ 19 In her GAL reports, Harper stated that the parties were able to communicate and cooperate well until Dustin married Bridget in June of 2013. She stated that the relationship completely deteriorated in October of 2014, following the October 16, 2014, incident. Harper reported that both Dustin and Denise maintain homes in Pekin and that the children would go to the same school regardless of where they lived. She also stated that the children loved both parents and wanted to spend time with them but that both children had expressed a desire to remain living with their mother. Harper reported that, given their ages, she was not surprised the children wished to live with the more lenient parent. She noted that S.F. did express a strong belief that A.F. should be with her father because he was doing poorly in school and was allowed a great deal of freedom with Denise. She reported that as the case progressed S.F. changed her position and began expressing a desire for both herself and A.F. to remain with Denise. Harper further stated that both parents loved the children “very much” and wanted to do what was best for them.

¶ 20 Harper noted that numerous changes had recently occurred in the children’s lives, including (1) Denise lost her job but had since found new employment, (2) S.F. started high school (2013-2014 school year), (3) A.F. started junior high (2014-2015 school year), and (4) the communication and cooperation between Dustin and Denise deteriorated. She stated that parental communication was “practically non-existent at this time.” She noted that Dustin and Denise did not speak to each other and were forcing the children to communicate messages between them because they refused to talk.

¶ 21 The reports also stated that the parents had different parenting styles and both parents had strengths and weaknesses; Denise tended to be too lenient, and Dustin had trouble dealing

appropriately with his anger at times. Harper reported that Dustin spanked the children with a belt and slapped A.F. in the face with his hand.

¶ 22 As to the level of each parent's participation in decision-making, Harper stated that Denise had sole custody and made all significant decisions regarding the children. Although Dustin would communicate with the teacher, he was content to allow Denise to make the decisions until A.F. started struggling academically. When Dustin attempted to become more involved, Denise resisted. In February of 2016, Denise sent an email to the school advising the staff that they could make information available to Dustin but that according to the parenting order she made all decisions regarding A.F.'s education. Harper noted that while Denise's statement was accurate, her tone and demeanor was disappointing. Harper also noted that Dustin had continued to take initiative in working with the school to try to improve A.F.'s grades. Harper spoke with A.F.'s math teacher and she informed Harper that she had communication with both parents but that she had more contact with Dustin. He was emailing her frequently, as well as other teachers in the building, regarding A.F.'s work. Although A.F.'s performance had fluctuated, the teacher noticed immediate results in A.F.'s work after contact with Dustin.

¶ 23 In her report, Harper concluded that it was in the children's best interests that Dustin have decision-making responsibilities for their education and religion and that Denise have decision-making responsibilities for their health and extra-curricular activities. She also concluded that Dustin should have the majority of parenting time with A.F. during the school week because A.F. should be "with a parent that is willing to put in the time to be in constant communication with the teachers and push A.F. to work to his full potential."

¶ 24 The trial court reviewed the best interest factors and granted Dustin's request to modify the original parenting orders. The court found that a change in circumstances had occurred in that the children were significantly older than when the parenting orders were entered, academic

performance had declined, and communication between the parents had deteriorated. The court also found that reallocation of decision-making responsibilities and parenting time was in the children's best interests. Regarding A.F., the court found that the wishes of the parents, the location of the home and the mental and physical health of the individuals were not significant factors. The court found that A.F.'s needs were critical to its decision. It noted that A.F. needed a sense of structure and control and that he needed direction regarding his academic performance. It also directed Dustin to refrain from corporal punishment.

¶ 25 In its written order, the court found that a substantial change of circumstances had occurred warranting allocation of parental responsibilities and parenting time and that modification of the prior parenting orders was in the best interests of both children. The court followed the GAL's recommendation and allocated education and religion decision-making responsibilities to Dustin and health and extra-curricular activities to Denise. The court also designated primary parenting time of A.F. to Dustin during the school year, with visitation to Denise, and equal parenting time during the summer. The court allocated primary parenting time of S.F. to Denise. Denise filed a motion to reconsider, which the trial court denied.

¶ 26 ANALYSIS

¶ 27 On appeal, Denise argues that the trial court erred in reallocating parental decision-making responsibilities and awarding primary parenting time of A.F. to Dustin. She claims the trial court's findings that (1) a substantial change had occurred in the circumstances of A.F. and (2) a modification of the allocation of parental responsibilities was necessary to serve A.F.'s best interests were against the manifest weight of the evidence.

¶ 28 A parent who has established parentage and was not granted significant decision-making responsibilities may seek modification of a parenting order pursuant to section 610.5(c) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq.* (West 2016)).

750 ILCS 5/602.8 (West 2016); 750 ILCS 5/610.5(c) (West 2016).¹ Section 610.5(c) of the Act provides that the trial court has the authority to modify a parenting plan or allocation judgment (formerly known as a custody order) “if the court finds, by a preponderance of the evidence, that on the basis of facts that have arisen since the entry of the existing parenting plan or allocation judgment ***, a substantial change has occurred in the circumstances of the child or of either parent and that a modification is necessary to serve the child’s best interests.” 750 ILCS 5/610.5(c) (West 2016).

¶ 29 In determining the best interests of the child for purposes of allocating parental decision-making responsibilities and parenting time, the trial court should consider all relevant factors, including (1) the wishes of each parent seeking parenting time; (2) the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to parenting time; (3) the amount of time each parent spent performing caretaking functions with respect to the child in the 24 months preceding the filing of any petition for allocation of parental responsibilities; (4) any prior agreement or course of conduct between the parents relating to caretaking functions with respect to the child; (5) the interaction and interrelationship of the child with parents and siblings and other significant persons; (6) the child's adjustment to home, school, and community; (7) the mental and physical health of all individuals involved; (8) the child's needs; (9) the distance between the parents' residences, the difficulty of transporting the child, and the ability of the parents to cooperate in the arrangement; (10) whether a restriction on decision-making or parenting time is appropriate; (11) the physical violence or threat of physical violence by the child's parent directed against the child or other members of the household; (12)

¹ Former sections 610 and 602 of the Act have been repealed. As of January 1, 2016, provisions regarding modification of an order “allocating parental responsibilities” appear in section 610.5 of the Act and the best interest factors for allocating decision-making responsibilities and parenting time appear in sections 602.5 and 602.7 of the Act. Pub. Act 99-90 (eff. Jan. 1, 2016). The revised provisions apply to “all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered.” 750 ILCS 5/801(b) (West 2016).

the willingness and ability of each parent to place the needs of the child ahead of his or her own needs; (13) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; (14) the occurrence of abuse against the child or other members of the household; (15) whether one parent is a convicted sex offender or lives with a convicted sex offender; (16) the terms of a parent's military family-care plan; and (17) any other factor the court expressly finds to be relevant. See 750 ILCS 5/602.5(c) (West 2016); 750 ILCS 5/602.7(b) (West 2016).

¶ 30 Determining custody is a matter within the sound discretion of the trial court. *Department of Public Aid ex rel. Davis v. Brewer*, 183 Ill. 2d 540, 557 (1998). Accordingly, we apply a deferential standard of review. *In re Marriage of Dowd*, 2016 IL App (1st) 160098, ¶ 76. The standard of review of custody modification judgments is whether the modification is against the manifest weight of the evidence. *Id.* In determining whether a judgment is contrary to the manifest weight of the evidence, the reviewing court views the evidence in the light most favorable to the appellee. *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004). A custody determination, in particular, is afforded great deference because the trial court is in the best position to judge the credibility of the witnesses and determine the best interests of the child. *In re Marriage of Sussenbach*, 108 Ill. 2d 489, 499 (1985). Where the evidence permits multiple inferences, we will accept those inferences that support the trial court's order. *In re Marriage of Bates*, 212 Ill. 2d at 516.

¶ 31 As we have noted, effective January 1, 2016, the terms “allocation of parental responsibilities: decision-making” and “allocation of parental responsibilities: parenting time” have replaced the phrase “custody” throughout the Act. See P.A. 99-90, §§ 5-15 (eff. Jan. 1, 2016). Neither party suggests that the standards applicable to reviewing modification decisions have been altered by the change in nomenclature.

¶ 32 Here, viewing the evidence in the light most favorable to Dustin, we cannot say the court's decision to reallocate parental decision-making responsibilities and parenting time was against the manifest weight of the evidence. The first prong of section 610.5 requires the petitioner to show by a preponderance of the evidence that a change in circumstances has occurred. The record shows that the initial parenting orders were entered when S.F. and A.F. were born. At the time of the hearing, S.F. was 17 years old and in high school; A.F. was 14 years old and attending junior high. Thus, the ages of the children, alone, was a substantial change in circumstances. However, the trial court also found that A.F.'s academic performance and the parties' inability to communicate were changes in circumstances that warranted modification. Evidence at the hearing and the GAL reports support these findings. A.F.'s grades in fifth and sixth grade were high enough to garner honor roll recognition but that he was failing most of his classes by the second quarter of seventh grade. Both parties agree that his academic performance had declined significantly. Moreover, Dustin and Denise testified that they could no longer communicate or cooperate regarding parental decision-making responsibilities following their dispute on October 16, 2014. Thus, the trial court's finding that a substantial change had occurred in the circumstances of A.F. was not against the manifest weight of the evidence.

¶ 33 The trial court's finding under the second prong of section 610.5(c), the best interests of the child, is also supported by the evidence. The GAL reviewed the statutory factors and noted that A.F. wished to live with Denise. She also noted that, given his age, A.F.'s desire to live with the more lenient parent was not surprising. The GAL found that the child's needs and the willingness of each parent to facilitate and encourage a continuing relationship with the other parent favored Dustin. The trial court heard all the evidence and agreed with the GAL's assessment. The court considered the father's active participation in A.F.'s academic

performance, including his attendance of parent-teacher conferences, his consistent communication with A.F.'s teachers, and his attempts to communicate with Denise regarding A.F.'s grades and behavior, and found that those facts weighed heavily in Dustin's favor. The court also found that the decline in A.F.'s grades and behavior indicated a need for parental intervention. The court noted that Dustin had exhibited the capability to positively influence A.F.'s academic ability and was willing to provide direction and control. The court also noted that parental guidance is important for adolescent children. Evidence in support of these findings shows that A.F.'s grades improved and his homework assignments were completed when Dustin worked with A.F. Evidence also demonstrates that Dustin was committed to helping A.F. achieve academic success. In light of the standards of review and the evidence presented, we find that the trial court did not err in reallocating decision-making responsibilities and parenting time of A.F. to Dustin.

¶ 34

CONCLUSION

¶ 35

The judgment of the circuit court of Tazewell County is affirmed.

¶ 36

Affirmed.