2017 IL App (4th) 160656-U

NO. 4-16-0656

FILED
July 25, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| In re: MARRIAGE OF SMITH, | ) | Appeal from |
| NEAL SMITH, | ) | Circuit Court of |
| Petitioner-Appellee, | ) | McLean County |
| v. | ) | No. 14D518 |
| CASIE SMITH, | ) | |
| Respondent-Appellant. | ) | Honorable |
| | ) | Pablo A. Eves, |
| | ) | Charles G. Reynard, |
| | ) | Judges Presiding. |

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

**ORDER**

¶ 1 *Held*: The appellate court affirmed, finding the trial court's award of joint custody was not against the manifest weight of the evidence and did not constitute a clear abuse of discretion.

¶ 2 In December 2015, the trial court entered a judgment for dissolution of marriage between petitioner, Neal Smith, and respondent, Casie Smith. The court also entered an award of joint custody of the parties' four children.

¶ 3 On appeal, Casie argues the trial court abused its direction in ordering joint custody. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In September 1999, Neal and Casie were married, and four children were born during the marriage, including E.S. (born in 2002); D.S. (born in 2002); M.S. (born in 2005); and

A.S. (born in 2007).

¶ 6 In October 2014, Neal filed a petition for dissolution of marriage. Also in October 2014, Casie filed petitions for temporary and permanent maintenance and for exclusive possession of the marital home. In March 2015, the trial court entered an order as to temporary relief, ordering the placement of temporary joint custody of the children with both parties and the primary residence with Casie.

¶ 7 In June 2015, the parties filed their proposals on the remaining issues. Neal proposed the parties have joint custody of the children, with the children alternating between each parent on a weekly basis. Casie proposed she be awarded sole custody of the children, with Neal having visitation every other weekend and two to three hours on one night during the week.

¶ 8 In June 2015, Judge Charles G. Reynard conducted a hearing on the remaining issues. Neal testified he was 37 years old. E.S. and D.S., twin boys, were in the sixth grade in Heyworth, and both boys competed in track and played basketball. M.S. was in the fourth grade and played basketball. A.S. attended Clinton Christian Academy in Clinton, Illinois, before returning to Heyworth for the second grade. A.S. attended the smaller school in Clinton because she "would shut down in large groups." She participated in dance and softball.

¶ 9 Neal stated he was employed as the general manager of Prairieland Golf and Utility Carts, which offered him a flexible schedule. During the marriage, Casie took care of the children during the day and Neal would "take over" when he returned home from work. Neal resided in the marital residence, and the children have friends in the neighborhood.

¶ 10 In October 2014, the parties attended marital counseling, and Neal decided to leave the marital residence for a few days before returning to live in the basement. When Neal returned, however, Casie had left with the children. Neal called the police, who found Casie and

the children safe at a hotel. After a week of the children living in and out of the house, "the boys were starting to get pretty mad" and the "girls were flat out scared." Casie refused to allow Neal to sleep in the basement. Eventually, the parties and the children returned to living under the same roof. Neal stated the three oldest children started to "calm down," but A.S. "was messed up emotionally" and having "severe tantrums." Between December 2014 and February 2015, the parties attended mediation, but "there was no real talking between [them] about stuff anymore because it had come to a standstill." Since that time, Casie allowed Neal to see the children every other weekend and one Thursday night per week. In May 2015, Neal received a letter from Casie's attorney, stating she was moving to another house in Heyworth.

¶ 11 Neal testified he had never been physically violent toward Casie, and he did not think he had been physically inappropriate toward the children. He stated he never hit any of the children on the back of the head. He believed Casie made inappropriate comments to the children, including telling A.S. in November 2014 that Casie was "going to make the one who hits go away." Although Neal stated Casie "can get stressed out," he believed she had been a "very good mother."

¶ 12 Jeffrey Blizzard, the parties' former neighbor, testified Neal was "completely involved" as a father. Blizzard never witnessed Neal hitting any of the children. He stated "Casie loves her children," although she would yell at them when she wanted them to do things.

¶ 13 Pamela Blizzard, Jeffrey's wife, testified Neal was an "attentive, playful, quiet, kind, [and] loving" parent. She stated Casie "yelled a lot at the children to instruct them, to inform them, to round them up." She never saw Neal being physically inappropriate toward his children.

¶ 14 Jennifer Verbarg testified she lived in the Smiths' neighborhood. She stated Neal

was "pretty hands on" as a father and "very active with the kids." She never saw Neal acting inappropriately toward the children.

¶ 15 Casie testified she was 34 years old. She lives in a home in Heyworth that is within walking distance of the children's school. Since August 2014, Casie worked as a day care provider for another family. She was taking online classes and hoped to become a certified nursing assistant. She also volunteered as a Sunday school teacher, scout leader, and as a coach for cheerleading, softball, and basketball.

¶ 16 In October 2014, the parties' counselor recommended Neal move out of the house. Casie thought it best to leave the house with the children because Neal "had hit [D.S.] again in the back of the head" and she feared "it would get worse." She and the children stayed at a hotel for two days and then went to Neville House, a domestic-violence shelter, for several nights.

¶ 17 In January 2015, A.S. was "throwing a tantrum" because she did not want to go to school. Casie stated Neal screamed at A.S., squeezed and shook her, and "pulled her down the stairs by her ankles." Casie stated the children attend counseling, and A.S.'s tantrums are "pretty much gone now."

¶ 18 Prior to the litigation, Casie testified she would get the children ready for school, feed them, pick them up, help with homework, fix dinner, and clean up the house. In contrast to Neal's characterization, she stated she rarely took a break when he arrived home from work. She also did the laundry, the bulk of the cooking, and the transporting of the children.

¶ 19 At the conclusion of the hearing, the trial court directed the parties, through a mediator, to reach an agreement involving "equal parenting time" during the summer break. The court stated "this case is very close to being a portrait high conflict case," but it found the parties

to be "very well educated, very well devoted, very well responsible parents whose principal default in their obligations to their children is that they don't get along with each other." The court found the parties "have the capacity to grow up, learn how to communicate, and implement the joint parenting agreement on a temporary basis" and ordered them to "start communicating and making a more equalized sharing of parenting time a reality, a workable reality, a reality that allows these children to optimize their contact with both parents." The court suggested a parenting coordinator could be appointed if either party so desired. The court then continued the hearing.

¶ 20 In July 2015, the hearing resumed, and Casie testified on cross-examination the parties had adhered to a parenting schedule, whereby Neal had the children on Monday and Tuesday, she had the children on Wednesday and Thursday, and then they alternated the weekends.

¶ 21 In October 2015, Casie filed a petition for the appointment of a parenting coordinator. The parties also entered into a partial memorandum of agreement. Therein, the parties noted they were unable to agree on a parenting schedule for the school year but did agree on a summer schedule of two days each per week and alternating weekends.

¶ 22 In December 2015, the trial court entered the judgment of dissolution of marriage and an order on custody, stating, in part, as follows:

> "The Court finds that the most significant detriment to the best interests of the children has been the power and control struggle between the parents. Essentially, they are both competent and devoted parents who have permitted their disagreements with each other to prevail over their children's need for them to reach

> agreement (even when they are not court-ordered to do so). The Court finds that the parents are *capable* of joint parenting of their children, though they also require assistance in improving their communications in order to prevent their fairly well-developed instincts for 'pushing each other's buttons.' To award parenting responsibility to one parent, essentially a win-lose determination, in these circumstances where neither parent has produced significant evidence of the incapacity of the other to carry such responsibility, would *enable* the parties' dysfunction to endure. Accordingly, the parties are awarded joint custody, which (in the new statutory linguistics) contemplates joint decision-making as to all major matters, including extracurricular activities, medical care (including counseling), and educational decisions. Each parent shall be responsible for day-to-day decisions (e.g. discipline, bedtime, homework) while the children are in each parent's possession, but consistency and collaboration are encouraged as highly desirable parental management objectives." (Emphases in original.)

The court also ordered the appointment of a parenting coordinator to be in the children's best interests, finding the parties "failed to adequately cooperate and communicate with regard to issues involving their children, or have been unable to implement a parenting plan or parenting schedule." The court left in place the temporary physical custody order.

¶ 23 In August 2016, Judge Pablo A. Eves, following the retirement of Judge Reynard,

entered an order on all remaining issues and noted the custody arrangement set forth in December 2015. In September 2016, Neal filed a motion to reconsider issues not pertinent to this appeal. In February 2017, the trial court entered its order on the motion to reconsider. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Casie argues the trial court's award of joint custody was not in the children's best interests and constituted an abuse of discretion. We disagree.

¶ 26 Section 602.7 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602.7 (West 2016)), effective January 1, 2016, reflects the revisions of the Act to replace "custody" and "visitation" with more neutral language concerning parental responsibilities and parenting time. Here, however, the trial court entered the custody order at issue in December 2015, and both parties agree the former statute applies. See 750 ILCS 5/801(b) (West 2016) (stating the current "Act applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered").

¶ 27 Under the prior statute, section 602.1(c) of the Act applied to matters of joint custody and stated, in part, as follows:

> "The court may enter an order of joint custody if it determines that joint custody would be in the best interests of the child, taking into account the following:
>
> (1) the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child. 'Ability of the parents to cooperate' means the parents'

> capacity to substantially comply with a Joint Parenting Order. The court shall not consider the inability of the parents to cooperate effectively and consistently in matters that do not directly affect the joint parenting of the child;
>
> (2) The residential circumstances of each parent; and
>
> (3) all other factors which may be relevant to the best interest of the child." 750 ILCS 5/602.1(c) (West 2014).

"Thus, the standards for an award of joint custody are the best interests of the child, the agreement of the parents and their mutual ability to cooperate, the geographic distance between the parents, the desires of the child if he/she is of suitable age, and the relationships previously established between child and parents." *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103, 108, 775 N.E.2d 282, 286-87 (2002).

¶ 28 This court has noted joint custody is "a tool to maximize the involvement of both parents in the life of a child." *Seitzinger*, 333 Ill. App. 3d at 109, 775 N.E.2d at 287. Courts have upheld awards of joint custody "where each party desired to maintain maximum involvement with their child and the evidence demonstrated that the parties were able to cooperate." *Shinall v. Carter*, 2012 IL App (3d) 110302, ¶ 35, 964 N.E.2d 619 (citing cases); see also *Seitzinger*, 333 Ill. App. 3d at 108, 775 N.E.2d at 287 (stating "where the evidence showed the parents were loving and capable and were sufficiently able to cooperate, an award of joint custody may be affirmed even if neither party requested it").

¶ 29 However, courts have also set aside joint custody awards "where the evidence showed hostility and a lack of cooperation between the parties." *Shinall*, 2012 IL App (3d) 110302, ¶ 35, 964 N.E.2d 619. In expressing disfavor for joint custody awards, some of our decisions have found such arrangements often "engender dissension between the parties and instability in the child's environment." *In re Marriage of Oros*, 256 Ill. App. 3d 167, 169, 627 N.E.2d 1246, 1249 (1994); see also *In re Marriage of Swanson*, 275 Ill. App. 3d 519, 524, 656 N.E.2d 215, 219 (1995) (stating "[j]oint custody requires an unusual level of cooperation and communication from both parents"); *In re Marriage of Drummond*, 156 Ill. App. 3d 672, 679, 509 N.E.2d 707, 712-13 (1987) (noting joint custody "cannot work between belligerent parents").

¶ 30 "A trial court's determination regarding custody is given great deference because that court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child." *In re Marriage of Iqbal*, 2014 IL App (2d) 131306, ¶ 55, 11 N.E.3d 1; see also *In re Marriage of D.T.W.*, 2011 IL App (1st) 111225, ¶ 81, 964 N.E.2d 573 (noting the trial court's custody determination "rests on temperaments, personalities and capabilities of the parties, and the trial judge is in the best position to evaluate these factors"). Accordingly, the court's custody decision will not be set aside unless it is "against the manifest weight of the evidence, manifestly unjust, or resulted from a clear abuse of discretion." *In re Marriage of Deem*, 328 Ill. App. 3d 453, 455, 766 N.E.2d 661, 663 (2002). "A decision is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based on any of the evidence." *In re Marriage of Matchen*, 372 Ill. App. 3d 937, 946, 866 N.E.2d 683, 691 (2007).

¶ 31 In the case *sub judice*, the evidence showed both Neal and Casie are competent

and loving parents. Both parties have been actively involved in their children's lives and desire to continue being so. Moreover, each party resides in or near the small town of Heyworth. In terms of joint custody, the big question centers on whether Neal and Casie can cooperate effectively and consistently in matters affecting their children.

¶ 32 We find the evidence indicates Neal and Casie can sufficiently cooperate on matters regarding the parenting of their children. The parties entered into a partial memorandum of agreement, wherein they agreed the children may participate in counseling and would continue to participate in the Lutheran faith. Along with a summer parenting schedule, both Neal and Casie agreed "to confer on a regular basis concerning the needs, growth, and care of the children" and would promote in the children "respect and affection for the other parent." It also now appears the parties agreed the children would attend Heyworth schools for the foreseeable future.

¶ 33 Casie argues the trial court's appointment of a parenting coordinator illustrates the parties' inability to cooperate. It is not surprising for dissolution proceedings to involve various levels of contention and acrimony. However, much of the evidence of conflict between the parties in this case took place when the marriage was disintegrating. The evidence does not indicate the parties are unable to cooperate at this time for the good of their children, and the court could have rationally concluded a parenting coordinator would offer the helping hand necessary to bring the parties to agreement on the more contentious issues. Thus, that a parenting coordinator was appointed did not foreclose a finding that the parties could cooperate on matters involving the well-being of their children.

¶ 34 Along with the need for the parents to cooperate, an award of joint custody must still be in the best interests of the children. 750 ILCS 5/602.1 (West 2014). Section 602(a) of

the Act lists factors the court is to consider, including the wishes of the parents and the children; the children's adjustment to their home, school, and community; the mental and physical health of all the individuals involved; and the willingness and ability of the parents to facilitate and encourage a close and continuing relationship between the other parent and the children. 750 ILCS 5/602(a) (West 2014).

¶ 35 Here, the evidence indicated both parties sought custody of their children and had positive relationships with them. Given that the parties resided in and near Heyworth, the children would not need to adjust to different schools, communities, or churches. The children were undergoing counseling, and no evidence indicated they suffered any mental or physical abuse at the hands of either parent. Further, now that parenting parameters have been delineated, the parties have shown their ability to cooperate with each other for the good of their children.

¶ 36 Casie, however, argues the trial court's award of equal parenting time during the school year was not in the children's best interests. This court has noted the rotation of custody can have a detrimental impact on children, as they must undergo "a merry-go-round of changing [schools], doctors, playmates, households and environments." *Oros*, 256 Ill. App. 3d at 170, 627 N.E.2d at 1249. While section 602.1(d) of the Act states joint custody does not "necessarily mean equal parenting time" (750 ILCS 5/602.1(d) (West 2014)), courts have also upheld a shared or alternating parenting schedule. *In re Marriage of Perez*, 2015 IL App (3d) 140876, ¶ 33, 29 N.E.3d 1217 (upholding a 50/50 parenting schedule); *In re Marriage of Divelbiss*, 308 Ill. App. 3d 198, 210, 719 N.E.2d 375, 383 (1999); but see *In re Marriage of Hacker*, 239 Ill. App. 3d 658, 661, 606 N.E.2d 648, 651 (1992) (finding error in children shifting between homes on a weekly basis).

¶ 37 The evidence in this case indicates the parties have been exercising the existing

parenting schedule for some time and have abided by it. Nothing indicated the schedule was not working or was preventing the children from flourishing in either household. Moreover, given that both parties live in and near Heyworth, the concerns of shifting schools, doctors, communities, and playmates are not present. Accordingly, we find the trial court's award of joint custody in this case was not against the manifest weight of the evidence and did not constitute a clear abuse its discretion.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment.

¶ 40 Affirmed.