2018 IL App (3d) 170861-U

Order filed May 18, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

FRANK J. PAYTON, III,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Petitioner-Appellee,	)	Will County, Illinois.
	)	
	)	Appeal No. 3-17-0861
v.	)	Circuit No. 14-F-215
	)	
DOBANNEY N. WESLEY,	)	The Honorable
	)	Jessica Colon-Sayre
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Wright specially concurred.

ORDER

¶ 1 *Held*: Trial court's order granting father's petition to modify allocation of parental responsibilities of two minor children solely to him was improper where trial court never held hearing to determine if modification was in best interests of children.

¶ 2 In March 2014, petitioner Frank J. Payton, III filed a petition for visitation, child support and joint custody of his two sons, F.P. and J.P. Approximately two years later, the trial court granted visitation to Payton, but the visitation never took place. Soon thereafter, a court-

appointed evaluator was appointed. Wesley initially refused to pay her portion of the evaluator's retainer or meet with her. After meeting with the evaluator on two occasions, Wesley fled from Illinois to Oklahoma with F.P. and J.P. After learning of Wesley's relocation, Payton filed an emergency petition to modify allocation of parental responsibilities. The trial court granted the petition on the same day, giving custody of the children to Payton. Wesley appeals. We reverse and remand.

¶ 3 FACTS

¶ 4 Payton and Wesley were never married but had two children together, F.P., who was born in 2001, and J.P., who was born in 2005. The parties lived together for several years but separated in 2011. Following the separation, F.P. and J.P. lived exclusively with Wesley.

¶ 5 In March 2014, Payton filed a petition for visitation, child support and joint custody of F.P. and J.P. In that petition, Payton alleged that he "has maliciously been denied the right to see his children by [Wesley]." He further alleged that he attempted to negotiate a visitation agreement with Wesley but she "completely refused to negotiate a visitation agreement" with him and "deliberately withholds the children" from him. In his petition, Payton sought "liberal visitation privileges in addition to joint custody."

¶ 6 In her response, Wesley stated that F.P. and J.P. have always been in her custody and that she strongly believes that it is in their best interest and welfare to remain in her custody. Wesley claimed that Payton had not spent time with F.P. and J.P. in three years and that they do not want to see him because they feel intimidated and threatened by him. She admitted that she has refused to leave F.P. and J.P. alone with Wesley "due to his aggressive behavior."

¶ 7 At a hearing on July 22, 2014, both parties agreed that a guardian *ad litem* (GAL) should be appointed for the children. On the same date, the trial court entered an order appointing a

GAL on behalf of the minors. After receiving the oral report of the guardian *ad litem*, in January 2015, the court ordered that all contact between Payton and the children take place in a therapeutic setting by a licensed counselor. The court ordered Wesley to select a counselor by the next hearing date, which she did.

¶ 8 On August 20, 2015, Payton filed a petition for visitation, alleging that he had not seen F.P. and J.P. "for months." He requested that the court enter an order allowing him temporary visitation. On that same date, the court ordered the children's counselor to provide a reunification plan within 14 days. On September 24, 2015, the children's counselor was directed to set up a face-to-face session between Payton and his children "as soon as practicable."

¶ 9 In October 2015, the GAL filed a motion for an *in camera* interview with the children at the courthouse because of concerns that F.P. and J.P. would run away if forced to meet with Payton in the counselor's office. The GAL requested that the court advise the children that they must meet Payton and allow the counseling session to take place in the courthouse following the *in camera* meeting. The court conducted an *in camera* meeting with the children on November 2, 2015, and ordered the parties to meet in court on December 2, 2015, for a counseling session with Payton. Monthly therapy sessions were to be held with Payton and the children in January and February 2016.

¶ 10 On February 18, 2016, the trial court ordered that the children and Payton have a therapy session together by March 17, 2016, and also granted Payton a four-hour visit with F.P. and J.P. in a public place on March 12, 2016. On March 21, 2016, the court ordered that a therapy session take place between Payton and his children "as soon as possible" followed by visitation in a public place. On April 21, 2016, the court ordered a four-hour visitation between Payton and the

children on April 23, 2016. None of the visitations ordered by the court from February to April 2016 took place.

¶ 11 On May 3, 2016, Payton filed a petition for rule to show cause against Wesley for failing to comply with the trial court's orders entered in February, March and April 2016. The court ordered Wesley to appear and bring the children to court on June 10, 2016, for an *in camera* inspection. On the same date, the trial court released the counselor from his duties to the parties.

¶ 12 On June 10, 2016, both parties appeared in court. Payton requested the appointment of an independent evaluator, Dr. Mary Gardner, pursuant to section 604(b) of the Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/604(b) (West 2016)). The court granted that request, ordering that Dr. Gardner's retainer be split equally by the parties. The court also ordered the parties to contact Dr. Gardner within 14 days. Payton withdrew his petition for rule to show cause. On July 21, 2016, both parties were ordered to contact Dr. Gardner within 14 days. Wesley failed to appear in court at hearings scheduled in July, August, and October 2016.

¶ 13 On October 11, 2016, Payton filed a petition for rule to show cause against Wesley for failing to comply with the court's June and July 2016 orders, requiring her to contact Dr. Gardner and pay half of her retainer. On October 14, 2016, the trial court entered a rule to show cause against Wesley and ordered her to appear in court on November 15, 2016 for a hearing.

¶ 14 On December 2, 2016, the court found Wesley to be in indirect civil contempt of its June 10 and July 21, 2016 orders and set the purge at $2,500 to be paid to Dr. Gardner and also ordered Wesley to make an appointment with Dr. Gardner. The court ordered that the purge be satisfied by March 3, 2017.

¶ 15 When Wesley failed to appear in court on March 3, 2017, the trial court issued a warrant for her arrest and set bond at $2,500. On May 4, 2017 Wesley filed an emergency motion to

quash the warrant, which the trial court denied. The next day, Wesley was arrested. Within 24 hours, Wesley had paid the $2,500 bond, which was tendered to Dr. Gardner. The court also ordered that both parties contact and attend meetings with Dr. Gardner before the next court date, scheduled for June 21, 2017. Wesley filed a motion objecting to the appointment of Dr. Gardner and seeking a stay. The trial court denied Wesley's motion and ordered Wesley to appear in person on the next court date of July 12, 2017. Wesley failed to appear at the next scheduled court hearing, and Payton filed a petition for rule to show cause. Again, on July 12, 2017, the court ordered the parties to contact Dr. Gardner and schedule an initial consultation with her prior to the next court date, on August 1, 2017.

¶ 16 On August 1, 2017, Wesley failed to appear in court. The court ordered that all parties, as well as the children, be present in court the next day. On August 2, 2017, Wesley did not appear in court, but her attorney was present. The court entered an order stating that if Wesley did not appear on August 10, 2017, custody of F.P. and J.P. would be transferred to Payton *instanter*.

¶ 17 Wesley appeared in court on August 10, 2017. The court ordered Wesley to do the following by the next scheduled court date of August 17, 2017: (1) schedule an initial meeting with Dr. Gardner, (2) provide the GAL with the children's address and the names of their schools, and (3) authorize the children's schools to give the GAL information about the children. On August 17, 2017, Wesley appeared in court and stated that she scheduled her initial meeting with Dr. Gardner for August 22, 2017. At the next status hearing, on August 24, 2017, Wesley was ordered to meet with Dr. Gardner on September 2, 2017, for her second visit. In September and October 2017, the court ordered the parties to continue cooperating with Dr. Gardner.

¶ 18 On November 9, 2017, Payton filed an emergency petition for rule to show cause, alleging that Wesley removed F.P. and J.P. from Illinois to Oklahoma without the court's

permission. On November 13, 2017, the court entered an order requiring Wesley to return the children to Illinois within 72 hours and present the children in court on November 16, 2017. Wesley did not appear in court on November 16, 2017, and, on that date, Wesley's attorney filed a motion to withdraw as counsel, asserting that she and Wesley "have been unable to agree on substantial aspects of how *** [the] case should proceed." The trial court granted Wesley's counsel's motion to withdraw and issued a warrant for Wesley's arrest "upon discovery of Wesley's current address."

¶ 19 On December 1, 2017, Payton filed an emergency petition to modify allocation of parental responsibilities, seeking custody of F.P. and J.P. On that same day, without holding a hearing or receiving evidence from either party, the trial court granted Payton's petition, finding that the matter constituted an emergency, and allocated Payton sole parenting responsibilities of F.P. and J.P.

¶ 20 ANALYSIS

¶ 21 In disputes involving custody, the foremost consideration is the best interests of the minor child. In re *S.L.*, 327 Ill. App. 3d 1035, 1037 (2002). To modify custody, the moving party must show (1) a change in the circumstances of the minor child, and (2) that modification is necessary to serve the minor child's best interests. *Id.*; 750 ILCS 5/610.5(a) &(c) (West 2016).

¶ 22 A determination of the best interests of the minor child requires the court to hold a best-interests hearing. *S.L.*, 327 Ill. App. 3d at 1038. Such a hearing is necessary even if the parents were never married (see *id.* at 1039) and even if the petition is brought because of an alleged emergency (see *In re Marriage of Manhoff*, 377 Ill. App. 3d 671, 672-73 (2007); *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 409 (1994)).

¶ 23 The removal of a child from the jurisdiction, even if wrongful, is not sufficient grounds for a change of custody. *In re Marriage of Godwin*, 104 Ill. App. 3d 790, 793 (1982); *In re Custody of Potts*, 83 Ill. App. 3d 518, 522 (1980); *Norris v. Norris*, 121 Ill. App. 2d 226, 231 (1970); *Richton v. Richton*, 45 Ill. App. 2d 128, 138-39 (1963). To change custody solely on the grounds of wrongful removal would not only punish the parent for her misconduct but would punish the children by denying them their parent's care and guidance. *Norris*, 121 Ill. App. 2d at 231. It is not the intent of any court to punish an innocent child. *Id*. "The guiding star is and must be, at all times, the best interest of the child." *Id*.

¶ 24 "Any proposed modification of custody must be in the best interests of the child." *Ayala*, 344 Ill. App. 3d at 586. Where a trial court modifies custody solely on the basis of a parent's removal of a child from the jurisdiction, it is improper. *Norris*, 121 Ill. App. 2d at 231. A court order changing custody only on that basis should be vacated and the cause remanded for further proceedings consistent with the Act to determine if the custody arrangement would serve the best interests of the children. See *Potts*, 83 Ill. App. 3d at 523; see also *In re Marriage of Fox*, 191 Ill. App. 3d 514, 521-22 (1989) (where no evidence was presented about best interests of children, order granting change of custody reversed). We have found nothing that allows a waiver of a best interest finding when an emergency petition is filed.

¶ 25 While we understand the trial court's frustration with Wesley's actions, it granted Payton's petition seeking custody of F.P. and J.P. solely on the basis of Wesley's removal of F.S. and J.S. from Illinois. The court did not hold a hearing or hear any evidence to determine if a change of custody would be in the best interests of F.P. and J.P. This was error. See *Norris*, 121 Ill. App. 2d at 231. We reverse the trial court's order and remand for further proceedings

consistent with the Act to determine if granting Payton's petition is in the best interests of F.P. and J.P. See *Potts*, 83 Ill. App. 3d at 523.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Will County is reversed, and the cause remanded.

¶ 28 Reversed and remanded.

¶ 29 JUSTICE WRIGHT, specially concurring:

¶ 30 I agree the trial court's order dated December 1, 2017, must be set aside. However, I write separately to discuss the relevant portions of the record on appeal that appears to have escaped the attention of the trial court in 2017.

¶ 31 Here, petitioner sought court-ordered visitation with an ex-girlfriend's minor children. It is undisputed the parties were not married in 2001 and 2005 when mother gave birth to these children. The 2014 petition does not contain any alleged facts revealing the source of petitioner's purported parental rights. Simply stated, I see no indication that petitioner's paternity has been established by statutory presumption, consent, or judicial adjudication. Although petitioner refers to "joint custody" in the pleadings, the record on appeal does not contain any order granting joint custodial rights or any custodial rights at all to someone other than mother, prior to December 1, 2017.

¶ 32 In this case, the trial court effectively terminated mother's custodial rights by giving petitioner "sole allocation of parenting responsibilities" without any consideration afforded to the minors' best interests. The court did so without any showing that mother's parental rights should be truncated in the absence of any claims that she was an unfit parent. In fact, the record suggests the court placed the minors in petitioner's custody in spite of troubling allegations in the pleadings.

¶ 33 For example, mother's response, filed on July 18, 2014, alleges petitioner engaged in "sexual relations" with mother's minor daughter, L.D. In addition, mother's 2014 response alleges petitioner exhibited aggressive behavior towards the minors, F.P. and J.P. Further, the response advises the trial court that mother initiated a previous request for an emergency order of protection against petitioner in Will County case No. 00-P-00187. Finally, the court appointed GAL filed a motion on October 28, 2015, alleging the minors' counselor believed a face-to-face meeting with petitioner, as ordered by the court, could result in harm to the children.

¶ 34 Like the majority, I respectfully conclude the trial court abused the power of judicial discretion by entering an order, dated December 1, 2017.