2019 IL App (4th) 190078-U

NO. 4-19-0078

FILED
June 20, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
(Shane Long,	)	Livingston County
Petitioner-Appellee,	)	No. 15D53
and	)	
Lisa Long, n/k/a Lisa Draper,	)	Honorable
Respondent-Appellant).	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigmann and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in dismissing respondent's motion to modify the parenting order.

¶ 2 In June 2015, petitioner, Shane Long, filed a petition for the dissolution of his marriage with respondent, Lisa Long, now known as Lisa Draper. The petition was granted by the trial court in July 2015. In June 2017, respondent filed a motion to modify the agreed joint parenting order which she had entered into with petitioner involving their only child during the marriage, N.L., born in 2007. At the conclusion of respondent's case-in-chief, petitioner moved for a directed finding, which the court granted.

¶ 3 On appeal, respondent argues the trial court erred in granting the motion for a directed finding. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2015, petitioner filed a petition for the dissolution of his marriage with respondent, citing irreconcilable differences. The petition also stated the parties had only one child, N.L., during their marriage. The parties filed a marriage settlement agreement and an agreed joint parenting order that was incorporated into the trial court's judgment. The agreement stated, "The parties have differing work schedules so they shall work together to insure each has approximately 50% of the time with the minor child." The agreement also listed times N.L. would be with his father and times when he would be with his mother. The schedule also included holidays and school vacations to be spent with each parent. The agreement contained a right-of-first-refusal provision, which allowed each parent to "have the first option to care for the minor child in the event that the other parent is unavailable to care for him for any time period in excess" of four hours.

¶ 6 In June 2017, respondent filed a motion to modify the agreed joint parenting order, alleging a change of circumstances. Respondent contended the changes in circumstances warranting modification included: (a) the parties have deviated from the parenting order, resulting in mother having the majority of parenting time; (b) father only has one or two overnights per week; (c) mother has moved to Pontiac; (d) it is more convenient for the minor to attend Pontiac schools; (e) father is making substantially more money than mother; and (f) father has brought "several women" into his relationship with the minor child, causing the child confusion. In July 2018, petitioner filed a petition to terminate the right of first refusal, alleging changed circumstances such as respondent's marriage and his engagement. In November 2018, the trial court conducted a hearing on the motion to modify the agreed joint parenting order.

¶ 7 A. Angela Walker

¶ 8 Angela Walker is a substance-abuse counselor, has been friends with respondent since 2010, and has been friends with respondent's current husband since 2006. She regularly visited respondent's home on alternating weekends along with her husband, who was employed by the same sheriff's department as respondent's current husband. She did not know petitioner or anything about N.L.'s relationship with him, but she stated respondent and N.L. have a loving and close relationship. Walker described N.L.'s relationship with respondent's current husband as "good," saying he interacts with N.L. the same way "he does with his own children." She testified that before June 2017, when respondent filed her motion to modify, whenever she visited respondent, N.L. was always there. After June 2017, there were times when she would visit that N.L. was not present. When asked to describe her observations of N.L. since June 2017, she said he seemed "more reserved," "less talkative," or "sullen." On cross-examination, she acknowledged her observations of N.L., respondent, and respondent's current husband were strictly personal and not in a professional capacity.

¶ 9 B. Jason Draper

¶ 10 Jason Draper has worked for the Livingston County Sheriff's Department as a road deputy for 15 years and is married to respondent. He has two children from a previous relationship, a boy, 15, and a girl, 13, who also reside in the home on alternating weekends. He described his relationship with N.L. and the activities they do together, saying he felt they had a "pretty good relationship" where they engage in a number of activities together and "[h]e's kind of like my little buddy." Draper moved in with respondent in early 2016, and at that time, they seemed to have N.L. more than 50% of the time. Petitioner seemed to have N.L. once a week, did not do many overnights, and normally only had him over the weekend if they were going on a trip. The schedule remained that way from the time he moved in with respondent in January

2016 until June 2017 when respondent filed her petition to modify. Draper said N.L.'s transition from school in Odell, where respondent lived before, to Pontiac, where they live now, had been "a little tough" for him. N.L. had a lot of friends in Odell, and it had been more difficult for N.L. to make the various sports teams in Pontiac. Acknowledging he and petitioner do not communicate with each other, Draper said that once respondent filed her motion to modify, petitioner seemed to become much more concerned about following the agreed parenting schedule. He also said the schedule is hard on N.L. because the changes in pick-up and return times do not coordinate with his "normal" schedule. This is coupled with the fact that Draper and respondent work opposite schedules, where he works at night and she works during the day, although they do share the same seven days off. Draper also contended petitioner frequently makes last-minute changes to the visitation schedules, resulting in disagreements between the parties.

¶ 11 Draper admitted he has seen petitioner attending some of N.L.'s basketball and football games. Petitioner would also take N.L. to school in the morning and respondent would pick him up. When respondent was working, petitioner would have N.L. unless he was in school.

¶ 12 C. Respondent

¶ 13 Respondent works at the Livingston County Sheriff's Department as a correctional officer. She indicated since the agreed joint parenting order was entered in July 2015, she and petitioner have never followed it. The schedule they first started following in July 2015 involved petitioner having N.L. one overnight per week when he was off work. N.L. would be with petitioner from the time N.L. left school until respondent was able to pick him up after work around 7:30 p.m. That schedule was followed until the petition to modify the agreed joint parenting order was filed in June 2017. On cross-examination, respondent admitted that at a

temporary relief hearing occurring after she filed for modification, the court ordered the parties to follow the default schedule since they were no longer able to agree. Respondent also acknowledged what she had been characterizing as changes in the schedule based on petitioner now exercising a "right of first refusal" provision in the original parenting agreement was actually the result of her desire to exercise the "right of first refusal" on those nights when petitioner worked. As a result, she was expecting petitioner to return N.L. to her when he went to work and then pick him back up again when he got off work in the morning. The overnight visits she described petitioner as giving up in the original schedule were in fact those occasions when she demanded the right of first refusal and required petitioner to return the child to her if he was going to be working his overnight shift.

¶ 14 In September 2016, respondent started keeping a record of the times she had N.L. and the times petitioner had him because they were arguing over who was going to get N.L. and when. That record revealed in most months, N.L. was with respondent about twice as much time as petitioner. She admitted, however, the record counted total hours with each parent and was not broken down by awake versus sleeping hours. She stated this schedule followed the court's original order if the right of first refusal was taken into consideration, which granted her custody overnight because petitioner works nights. Respondent admitted she knew petitioner's schedule was the same now as it was at the time of the agreed parenting order, 11 p.m. to 7 a.m. On the weekends petitioner works but is supposed to have N.L. according to the agreed parenting order, N.L. does not go home with respondent until 10:30 p.m. because respondent started exercising her right of first refusal. After a while, respondent did not think it was good for N.L. because he had to wake up at 7 a.m. for petitioner to pick him up, so instead she let N.L. spend the night at petitioner's home. She admitted the dispute boiled down to her having custody of N.L. on the

nights petitioner is working, despite the fact that since the agreed joint parenting order was made, the parties have made no change to their work schedules. She acknowledged the agreed plan never anticipated the 50% split of parenting time would mean 50% of overnight time.

¶ 15 Respondent stated there was no issue about N.L. attending Pontiac schools because petitioner has moved to Pontiac as well. She also acknowledged petitioner has always attended parent-teacher meetings for N.L. with respondent, is active in N.L.'s extracurricular activities, and has consistently expressed an interest in seeing N.L. N.L. has expressed an interest in spending time with petitioner.

¶ 16 Respondent rested her case. The trial court inquired about the right of first refusal, found it was intended to address a situation which no longer existed, and was no longer working in the best interests of N.L. The court struck the provision of the original order that allowed the right of first refusal to be used for times when the parties were at work. Other than that, the order remained unchanged, and the court continued the hearing to January 2019. In November 2018, petitioner filed a motion for a directed finding, arguing that even if a change in circumstances had been shown, it did not warrant modification of the parenting agreement.

¶ 17 After a hearing, the trial court in a written order granted petitioner's motion for a directed finding. Noting the court previously modified the parenting schedule to exempt work hours from the "right of first refusal" language, it discussed the testimony of each witness and found that while respondent spends the majority of the time with N.L., the parties spend about equal amounts of "awake" time with him. The court stated the joint parenting schedule from its inception accounted for that reality because petitioner worked nights—a situation which has continued since. The court discussed the applicable law under section 610.5(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/610.5(a) (West 2016)) and found the

facts constituting a change of circumstances were essentially that both parties remarried, both parties moved to Pontiac, and the parties deviated from the original schedule because petitioner did not have anyone to watch N.L. overnight while he worked. The court concluded, based on the respondent's evidence, "respondent failed to show that a modification to the current parenting schedule is necessary to serve the best interest of the minor."

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Respondent argues the trial court's grant of the motion for a directed finding was against the manifest weight of the evidence. We disagree.

¶ 21 Section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2016)) states as follows:

> "Motion in non-jury case to find for defendant at close of plaintiff's evidence. In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered. If the ruling on the motion is adverse to the defendant, the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived."

"[I]f the defendant moves for judgment at the close of the plaintiff's evidence in a bench trial, the trial court must perform an analysis consisting of two phases." *Barnes v. Michalski*, 399 Ill. App. 3d 254, 263, 925 N.E.2d 323, 333 (2010). The first phase asks the court to deduce whether the plaintiff has produced at least some evidence to support each element of the *prima facie* case or cause of action. *Michalski*, 399 Ill. App. 3d at 263. If the plaintiff has failed to do that, the court should grant the defendant's motion. *Michalski*, 399 Ill. App. 3d at 263. However, if the plaintiff has made a *prima facie* case, the court proceeds to the second phase and "weighs all the evidence." *Michalski*, 399 Ill. App. 3d at 264. "If the court already knows, at the close of the plaintiff's case, that it will not find in the plaintiff's favor on the basis of the evidence the plaintiff has presented, because the quality and credibility of the evidence, in the court's view, fail to satisfy the ultimate burden of proof, there is no point in going on," and the court should grant the defendant's motion. *Michalski*, 399 Ill. App. 3d at 264. "On the other hand, if the weighing process does not negate any element of the *prima facie* case, the court should deny the defendant's motion and continue with the trial." *Michalski*, 399 Ill. App. 3d at 264. If the trial court dismisses the action after the second phase, we review whether the decision was against the manifest weight of the evidence. *Michalski*, 399 Ill. App. 3d at 264.

¶ 22 Section 610.5(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/610.5(a) (West 2016)) states "[p]arenting time may be modified at any time *** upon a showing of changed circumstances that necessitates modification to serve the best interests of the child." Section 610.5(e)(1) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/610.5(e)(1) (West 2016)) allows the court to modify a parenting plan without a showing of changed circumstances if the modification is in the best interests of the child and "the modification reflects the actual arrangement under which the child has been receiving care,

without parental objection, for the 6 months preceding the filing of the petition for modification, provided that the arrangement is not the result of a parent's acquiescence resulting from circumstances that negated the parent's ability to give meaningful consent." "The circuit court may modify parenting time if the court finds, by a preponderance of the evidence, that the modification is in the children's best interests." *Williams v. Williams*, 2018 IL App (5th) 170228, ¶ 89, 120 N.E.3d 167.

¶ 23 Respondent argues she made a *prima facie* showing sufficient to avoid a directed finding. Although noting the two-phase approach to deciding such motions, petitioner does not directly address the issue of whether the trial court made such a finding before proceeding to weigh the evidence. Regardless, the outcome is the same since the only issue here was whether there was a change in circumstances. If so, then the remaining question was whether it served the best interests of the minor. It was the duty of respondent to prove, by a preponderance of the evidence, the modification was in N.L.'s best interests by the end of her case-in-chief. *Williams*, 2018 IL App (5th) 170228, ¶ 89.

¶ 24 Here, respondent presented evidence N.L. was reserved and less talkative after the filing of the petition and respondent's alleged move back to the original parenting plan. Walker also stated N.L. was sullen but would not go so far as to say he was sad. The trial court accepted this testimony as the personal observations of the witness and not her professional opinion. The court noted the move and change of schools had been "tough" on N.L. but it appeared he had adjusted well.

¶ 25 Respondent also presented evidence N.L. was returning around 10:30 p.m. from petitioner's home, which was much later than his 9 p.m. bedtime. On cross-examination, she admitted this was due to respondent's own use of the right of first refusal at times when

petitioner was at work during the night shift. As the trial court stated, both parties are now married and have a spouse capable of caring for N.L. even when they are working. No evidence came out during respondent's case alleging it was not in N.L.'s best interests to stay with petitioner's wife or that petitioner's wife's and N.L.'s interactions were detrimental.

¶ 26 The only modification the trial court made to the parenting plan was to remove the right-of-first-refusal provision from applying when one of the parties was working. It found the provision was not in N.L.'s best interests because it led to the back-and-forth traveling and late hours for his return. The court found respondent failed to prove it was in the minor's best interests to modify the parenting plan. We agree with the court's assessment. It was clear the right-of-first-refusal provision was not in N.L.'s best interests. Nothing respondent presented showed how modifying the plan to one where petitioner would have less parenting time would be in N.L.'s best interests by a preponderance of the evidence. In fact, the court noted respondent even agreed petitioner attends N.L.'s extracurricular activities, is involved in his schooling, and has consistently expressed an interest in seeing him. The court further found N.L. enjoys a good relationship with both parents. Therefore, based on this record, we cannot say the court's ruling was against the manifest weight of the evidence and in error.

¶ 27 III. CONCLUSION

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

¶ 29 Affirmed.