2014 IL App (1st) 133117-U

THIRD DIVISION
July 16, 2014

No. 1-13-3117

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELISSA HADAC,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Cook County
	)	
v.	)	No. 09 D 3279
	)	
DAVID HADAC,	)	Honorable
	)	Daniel Miranda,
Respondent-Appellee.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: Petitioner failed to establish that the trial court abused its discretion in refusing to modify an agreed parenting schedule based on changed circumstances and, therefore, the trial court's order denying the petition in part was affirmed.

¶ 2 BACKGROUND

¶ 3 Petitioner-appellant, Elissa Hadac, seeks review of an order of the circuit court of Cook County denying in part her post-decree petition to alter the custody and visitation terms of a December 20, 2010 joint parenting agreement entered into with her former husband, David Hadac. Elissa's petition sought to enroll the parties' minor son in a different school beginning in

the fall of 2013 and to modify the custody and visitation arrangements the parties had agreed upon. We find that the trial court did not abuse its discretion in denying the modification requested by Elissa and affirm.

¶ 4 Pursuant to the joint parenting agreement, Elissa and David agreed that their then nine-year-old son would reside with both parents, spending Mondays and Tuesdays at his father's home, Wednesdays and Thursdays with his mother and alternate weekends with each parent. Elissa resides in Brookfield and David resides in Westchester, neighboring communities in Chicago's western suburbs. For purposes of school, Elissa is deemed the residential parent.

¶ 5 In her petition filed on November 21, 2012, Elissa claimed that the parties' son had expressed an interest in attending a public school instead of the private school where he was enrolled. At the outset of the hearing on Elissa's petition on August 6, 2013, the minor expressed to the court his school preference and the court granted that portion of Elissa's petition.

¶ 6 Elissa further claimed that modification of the custody and visitation schedule was warranted by "changed circumstances," including the minor's preference to live with Elissa "most of the week," his deteriorating academic performance and her son's desire to spend more time with his half-sister who also lives with Elissa. Elissa sought to modify the joint parenting agreement to allow her son to reside with her during the week and afford David one night per week and every other weekend for visitation, reducing the David's parenting time from 15 days per month to eight days per month.

¶ 7 With respect to the requested modification of custody and visitation, the trial court heard testimony from Elissa and David as well as a former teacher at the son's school, the school principal and the parties' son. David testified that he currently resides with his parents. On days when David has his son, either he or his parents pick his son up from school. Both David's

parents and David assist his son with homework when necessary. David's mother is a nurse and his father is a mathematician. Both David and Elissa testified to a decline in their son's grades, but each attributed the decline to the other.

¶ 8 Elissa is a special education teacher in the Chicago public school system. She attributes the decline in her son's grades to the need to switch between homes during the week and to certain behavior by her former husband.

¶ 9 The son's former teacher testified to her concern over the number of times he had been absent in 7th grade, but there was no evidence to correlate the absences to days on which David was responsible for getting him to school. On one occasion, the child showed up at school in his pajamas and informed the teacher that he needed to return home to get clothes. The teacher did not want him to miss class and so required him to stay. The teacher spoke to the child's grandmother who agreed with the decision to have him stay in school. The teacher could not recall whether it was the child's maternal or paternal grandmother. After the first period, another student called that student's mother to bring clothes he could wear.

¶ 10 The school principal testified that David was a former employee of his son's school, who had been dismissed from his employment for cause. On one occasion, the principal called police when David became upset when discussing delinquent tuition with another employee. The trial court struck the principal's testimony finding that it had no bearing on whether the custody and visitation terms of the joint parenting agreement should be changed.

¶ 11 The parties' son testified that his mother and sister help him with his homework when he is at his mother's home and that his grandparents and sometimes his father help him when he is with his father. He thought it would be a "healthier living style" to live at "one home" during the week because he would not have to bring equipment necessary for sports activities and his

homework from one home to the other and expressed a preference to live with his mother "most of the time." When he forgets his homework assignments at one parent's house, he does not contact that parent to arrange to get the homework because "sometimes they could be busy," but instead just turns in the assignments late.

¶ 12 At the conclusion of the hearing, the trial court denied Elissa's request to modify the custody and visitation schedule concluding that Elissa had not met her burden in establishing changed circumstances warranting such relief. Although the court acknowledged that it would certainly be "easier" for the parties' son to reside in one place during the week, it was up the Elissa and David to make sure that their son had clothes, homework and other items necessary for school or after-school activities. The inconvenience involved in switching between households during the week was, in the court's view, an insufficient basis upon which to cut David's parenting time in half. Elissa timely appealed.

¶ 13 ANALYSIS

¶ 14 David has not filed an appellee's brief on appeal. Nevertheless, we are able to review the record in this case to determine whether the trial court abused its discretion in denying Elissa's request to modify the custody and parenting schedule.

¶ 15 A party seeking modification of a child custody order following a final order of dissolution is required to show by clear and convincing evidence a change in circumstances and that modification is in the best interests of the child. *In re Custody of Sussenbach*, 108 Ill. 2d 489, 498-99 (1985). This standard is embodied in section 610(b) of the Illinois Marriage and Dissolution of Marriage Act, which provides:

> "The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen

> since the prior judgment, or that were unknown to the court at the time of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child." 735 ILCS 5/610(b) (West 2012).

As recognized by our supreme court in *Sussenbach*, "'[s]ection 610(b) reflects an underlying policy favoring the finality of child-custody judgments and making their modification more difficult. Its effect is to create a legislative presumption in favor of the present custodian, thereby promoting the stability and continuity of the child's custodial and environmental relationship which is not to be overturned lightly.' " *Sussenbach*, 108 Ill. 2d at 499, quoting *In re Marriage of Wechselberger,* 115 Ill. App. 3d 779, 786 (1983). This court has recognized that "[c]ustody of children is the most important aspect of divorce, and this matter should not be subject to frequent modifications where the order was not conditional with respect to such changes. [citation]" *Valliere v. Valliere*, 275 Ill. App. 3d 1095, 1101 (1995). A child's preference to live with one parent, while a relevant factor, is not alone a sufficient change in circumstances to warrant modification of a custody order. *Carroll v. Carroll*, 64 Ill. App. 3d 925, 930 (1978). We review the trial court's decision on Elissa's petition to determine whether it is contrary to the manifest weight of the evidence presented at the hearing or whether it otherwise constitutes an abuse of discretion. *Sussenbach*, 108 Ill. 2d at 498-99.

¶ 16 Here the parties wisely entered into a joint parenting agreement that sets forth in detail agreed custody and visitation arrangements. As part of their agreement, the parties recited that that each of them was "a fit and proper person" to have custody of their son and acknowledged

that the joint parenting agreement required them to cooperate in assuring the "physical, mental, moral and emotional well-being" of their son. Yet, two years later, Elissa, without alleging, much less demonstrating that David is not a fit and proper parent, seeks to cut his visitation and custody time with his son in half.

¶ 17 After reviewing the record in this case, it is clear that Elissa failed to sustain her burden to demonstrate by clear and convincing evidence that in the period since the joint parenting agreement was entered into there has been a change in circumstances warranting a modification of the agreed upon custody and visitation schedule. The evidence at the hearing failed to call into question David's fitness as a parent or demonstrate that the environment at David's parents' home is not suitable to meet their son's needs. While a decline in a child's academic performance is certainly problematic and should be of concern to both parents, the evidence at the hearing did not clearly and convincingly establish that the decline was due to the joint custody arrangement.

¶ 18 Further, the potential inconvenience of having a child split his time between two homes was or should have been apparent at the time the joint parenting agreement was entered into. Such agreements are extraordinarily difficult to implement and require heightened dedication and cooperation between the parties involved. It may be that in the future, if David and Elissa do not possess the ability to work together for the benefit of their son, modification of the joint parenting agreement will be unavoidable. But any modification must be based on clear and convincing evidence that changed circumstances warrant such relief. As the parties' son approaches his teen years, it is up to David and Elissa to ensure that the transition between homes runs smoothly and to instill in their son the sense of responsibility that will enable him to attend to his schoolwork and turn in his assignments on time.

¶ 19 Because Elissa did not adduce clear and convincing evidence warranting a modification of the custody and visitation terms of the joint parenting agreement, the trial court properly declined to award her that relief.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the order of the circuit court of Cook County appealed from is affirmed.

¶ 22 AFFIRMED.