

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (3d) 140607-U

Order filed December 11, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
A.D., 2014

| | | |
|-----------------------------------|---|--------------------------------|
| <i>In re</i> Parentage of C.W.S., |) | Appeal from the Circuit Court |
| |) | of the 9th Judicial Circuit, |
| Minor, |) | McDonough County, Illinois, |
| |) | |
| (Brandon S., |) | |
| |) | |
| Petitioner-Appellee, |) | Appeal No. 3-14-0607 |
| |) | Circuit Nos. 08-F-69 & 09-F-80 |
| v. |) | |
| |) | |
| Courtney W., |) | |
| |) | Honorable Patricia Walton |
| Respondent-Appellant). |) | Judge Presiding. |

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and O’Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court’s decision to modify the 2010 visitation order was not against the manifest weight of the evidence.

- ¶ 2 In 2010, the trial court entered a custody order awarding sole legal custody to respondent Courtney W. (mother) and granted alternate full week visitation to petitioner Brandon S. (father) until the minor started kindergarten. Since father and the minor lived in separate towns and

school districts, the 2010 custody order contained a provision that the visitation schedule would change when the minor enrolled in school by allowing father only alternate weekend and holiday visitation.

¶ 3 In 2013, father filed a motion to modify custody asking the court to award him sole legal custody of the minor and award mother reasonable visitation. Father alleged a substantial change of circumstances had occurred since the 2010 custody in that father now resided in the same town as the minor. This motion also alleged shortcomings in mother's parenting skills. The court denied father's request for a change in custody, but found a substantial change of circumstances occurred based on father's changed residency. The court determined it was now in the minor's best interest to continue the alternate full week visitation schedule rather than changing to alternate weekend and holiday visitation. The court modified only the visitation provision of the 2010 custody order accordingly. Mother appeals the court's decision to modify that visitation provision of the 2010 custody order after the minor started school. We affirm.

¶ 4

BACKGROUND

¶ 5 The minor, C.W.S., was born February 5, 2008. On December 29, 2008, father filed a petition to establish paternity of the minor and, on January 19, 2010, father and mother entered into an agreed order establishing father's paternity of the minor. After a two-day contested custody hearing in September 2010, the court issued an opinion letter, followed by a written order entered on October 20, 2010, finding both parents were able and capable of caring for the minor. The court granted sole legal custody of the minor to mother and set a visitation schedule whereby father would have visitation with the minor for a full week at a time, alternating weekly with mother having the care of the minor for a full week. At the time this custody order was entered, father and mother lived in two different towns and two different school districts.

Therefore, in this same order of October 20, 2010, the court established a different visitation schedule to begin once the minor became enrolled in school reducing father's visitation to alternate weekends and holidays, and every Wednesday night.

¶ 6 On May 29, 2013, father filed a motion to modify custody alleging a substantial change of circumstances had occurred since the October 20, 2010, order in that father now resided in the same town as the minor. Both parents also filed pleadings expressing shortcomings in the other's parenting skills. Father asked that he be granted sole custody of the minor and mother be awarded reasonable visitation with the minor. The court ordered the parties to attend mediation and mother failed to comply with this order. Consequently, on July 24, 2013, the court granted father's request to maintain the *status quo* and continue with alternating weekly visitation, even after the minor started school, until the motion to modify custody could be decided.

¶ 7 The court held a contested hearing on father's motion to modify custody on March 7 and March 14, 2014. The court found the issues raised by mother regarding father's care of the minor were nothing that "rises to the level of concern." The court also found there was insufficient evidence presented by father regarding mother's inadequate care of the minor.

¶ 8 The trial judge noted that she was the judge who entered the custody order in 2010 and stated, on the record, that she ordered the change in the visitation schedule when the minor started school because "at the time the parents lived in different towns and in different school districts whereby it would be extremely difficult to keep the one week alternation where father previously resided." The court then found that father proved a substantial change of circumstances had occurred regarding the "change of residency of the father to the same town as the minor." The court further found "that change [of residence] has affected the best interest of

the minor in a positive manner in that the alternating weeks to which the child has been accustomed to [*sic*] can continue.”

¶ 9 The court denied father’s motion to change custody and ordered that sole legal custody of the minor remain with mother, with the continued requirement that mother maintain communication with father about important issues concerning the minor, as previously ordered in the order of October 20, 2010. Further, the court found the minor had been enjoying alternating weekly visits with each parent until the time of this hearing and, now that father lived in the same town as the minor, it was in the minor’s best interest for those alternate weekly visits to continue. The court modified its prior 2010 custody order that reduced father’s visitation to alternate weekends and holidays once the minor started school and ordered the alternate weekly visitation to continue.

¶ 10 The final written order on the motion to modify custody was filed on July 8, 2014. Mother filed a timely appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, mother contends father did not prove a sufficient change in circumstances occurred since the entry of the 2010 custody judgment and, further, that it was not in the best interest of the minor to modify the prior custody judgment. Additionally, mother submits the trial court erred by shifting the burden of proof to her, the non-moving party, to prove the shortcomings in father’s parenting skills after the court found father proved the occurrence of a substantial change in circumstances since the 2010 custody order. Father argues the trial court did not err in its decision.

¶ 13 Initially, we note both parties argued the standards necessary for a modification of custody, however, the trial judge did not modify custody in this case, but only modified the 2010

visitation provision which was to occur after the minor started school due to father's change in residency. The court's 2014 order continued mother's sole legal custody of the minor and neither mother nor father are contesting that portion of the trial court's ruling on appeal. On appeal, mother is challenging the court's modification of the visitation provision in the original 2010 custody order that provided for visitation to be changed to alternate weekend visitation once the minor became enrolled in school. Thus, the court's denial of the change in custody is not before this court.

¶ 14 Both parties, in their appellate briefs, argue the standard of proof required to modify custody under section 610(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610(b) (West 2012)), which differs greatly from the standard of proof required to modify a visitation provision under the Act (750 ILCS 5/607 (West 2012)). Section 610(b) 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 entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, * * * and that the modification is necessary to serve the best interest of the child.” 750 ILCS 5/610(b) (West 2012).

Since the court did not modify the legal custody of minor in the case at bar and the parties do not challenge the judge's decision denying modification of custody, many of the parties' cited cases regarding the custody modification statute are inapplicable to resolve the issues before this court.

¶ 15 However, mother challenges the trial court's modification of its 2010 custody order provision requiring the visitation schedule to change once the minor enrolled in school. In the interests of justice, we address the issue regarding the modification of visitation.

¶ 16 Section 607 of the Act addresses issues regarding requests to modify a pre-existing visitation order. 750 ILCS 5/607 (West 2012). Specifically, section 607(c) provides: “The court may modify an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child.” *Id.* The visitation provision does not require proof by clear and convincing evidence of a substantial change of circumstance, but only requires the court to consider whether a modification of a visitation order would be in the minor’s best interest. It is well established that a trial court has broad discretion in determining the visitation rights of a noncustodial parent and a visitation plan should not be reversed absent a finding that the ordered visitation is manifestly unjust. *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103, 112 (2002). The best interest of the child is normally fostered by continuing a healthy and close relationship with the noncustodial parent. *Id.*

¶ 17 Here, the trial judge noted on the record that she was the presiding judge who entered the original custody judgment in 2010. The trial judge expressly stated she ordered the changed visitation schedule to begin when the minor started school because “at the time[,] the parents lived in different towns and in different school districts whereby it would be extremely difficult to keep the one week alternation where father previously resided.” The court then found a substantial change of circumstances had occurred based on father’s change of residency to the same town as the minor. Although we have concluded that the change of circumstances requirement does not apply to a request to modify visitation, the court found father’s change of residence affected the best interest of the minor in a positive manner, and ordered that the previously-ordered alternating full-week visitation schedule to which the minor had been accustomed could continue. Based on these facts, we conclude the court’s decision to modify its 2010 visitation order, allowing alternate weekly visitation to continue rather than changing visits

to alternate weekends when the minor started school, was not against the manifest weight of the evidence.

¶ 18

CONCLUSION

¶ 19

For the foregoing reasons, we affirm the trial court's order modifying the parties' visitation schedule.

¶ 20

Affirmed.