NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

C.G.,

Appellant,

v.

M.M.,

Appellee.

Case No. 2D19-857

Opinion filed May 20, 2020.

Appeal from the Circuit Court for Pinellas County; Jack Helinger, Judge.

Erica J. Busch of Magnolia Law, PLLC, Ft. Lauderdale, for Appellant.

M.M., pro se.

SLEET, Judge.

C.G., the mother, challenges the trial court's final order of paternity as to the minor child she shares with M.M., the father. Because the trial court's paternity order established a timesharing schedule and parenting plan based upon an event that was not objectively certain to occur, we must reverse.

According to the trial court's order, the parties never married and separated in 2010, when the child was about a year old. After their separation, the parties had no formal agreement but divided timesharing equally and used the mother's

address for school designation purposes. However, neither a formal timesharing schedule nor a child support order was ever entered by the trial court. The mother began dating someone else and eventually moved in and had a daughter with her new boyfriend. Over time, coparenting issues arose between the mother and the father, and the mother filed a paternity petition seeking a parenting plan and a child support order. Although the mother's paternity petition did not raise the issue of her desire to relocate, the mother testified at the hearing on the petition that she planned to move her family to Riverview in Hillsborough County at some point in the future.

Following the hearing, the trial court entered its order designating the father as the majority timesharing parent and giving the mother and the father shared parental responsibility on all "significant matters" and "close to equal parenting time" "as long as the [m]other stays in Pinellas County." However, the trial court also ordered that "[c]ommencing when the Mother moves out of Pinellas County, the Father shall continue to be the majority time sharing parent, but [the child] shall reside more with the Father during the school year," with the mother having every other weekend and equally divided holidays. The trial court explicitly based this ruling on the mother's future move with the minor child to Hillsborough County.

The mother argues on appeal that the trial court erred in fashioning a prospective parenting plan because any move by her to Hillsborough County was speculative rather than imminent. She further maintains that if and when she does move, she would have to file a petition to relocate and the trial court would be required to conduct an analysis of the best interest of the child at that time. We agree.

Section 61.13001, Florida Statues (2017), establishes the procedures involved in the relocation of a child. Pursuant to section 61.13001(3), unless the parties

have agreed to the relocation of the child, the "parent . . . seeking relocation must file a petition to relocate." Furthermore, "[a] presumption in favor of or against a request to relocate with the child does not arise if a parent or other person seeks to relocate and the move will materially affect the current schedule of contact, access, and time-sharing with the nonrelocating parent or other person." § 61.13001(7). However,

> [t]he parent . . . wishing to relocate has the burden of proving by a preponderance of the evidence that relocation is in the best interest of the child. If that burden of proof is met, the burden shifts to the nonrelocating parent . . . to show by a preponderance of the evidence that the proposed relocation is not in the best interest of the child.

§ 61.13001(8). With regard to the best interest of the child, "the statute outlines several factors a trial court must consider before reaching a decision on a parent's request for permanent relocation." Arthur v. Arthur, 54 So. 3d 454, 456 (Fla. 2010) (citing § 61.13001(7)). But the determination of the child's best interest "must be made at the time of the final hearing [on the petition for relocation] and must be supported by competent, substantial evidence." Arthur, 54 So. 3d at 459.

In the instant case, the mother has never even filed a petition for relocation, and as such, the issue of relocation was not properly before the trial court at the hearing on the paternity petition. Nevertheless, it is clear from the trial court's order that the mother's plan to eventually move to Hillsborough County was the basis for making the father the majority timesharing parent. While the trial court's order includes detailed factual findings on each of section 61.13's best interest factors, those findings are made from the perspective of what the child's life would be like after the mother moves him out of Pinellas County.

In making these findings, the trial court relied on Rivera v. Purtell, 252 So. 3d 283 (Fla. 5th DCA 2018), for the proposition that the court may address reasonably certain

future events and prospectively modify timesharing. In Rivera, the Fifth District "conclude[d] that [the Florida Supreme Court's opinion in] Arthur does not prohibit a timesharing plan which, as here, applies the child's best interests as determined *at the time of the final hearing* to an event that is reasonably and objectively certain to occur at an identifiable time in the future." 252 So. 3d at 284, 286, 287 (reversing timesharing plan where trial court incorrectly "determined that it could not prospectively determine a change in timesharing based upon the child starting kindergarten" and concluding that "[t]here was nothing speculative or uncertain about the child . . . starting kindergarten").

Here, the mother disputes the trial court's depiction of her plan for a future move as being "reasonably certain." Even accepting the trial court's factual findings as true,[1] we must agree with the mother. The trial court found that "[t]he Mother and [her boyfriend] are now in a two-year relationship. They currently live in St. Petersburg. . . . [The boyfriend] is from Riverview/Tampa. . . . [He] has baseball coaching opportunities in Riverview and wants to live closer to them. So the Mother and [her boyfriend] plan on moving to Riverview, probably in early 2019." (Emphasis added.)

By the trial court's own findings, the mother's "plan" to move to Hillsborough County at some time "soon," "probably in early 2019," cannot be said to be "objectively certain to occur at an identifiable time in the future." See Rivera, 252 So. 3d at 286. Based on the trial court's findings, a date has not been set for the move and any plans to leave Pinellas County are no more concrete than wanting to look for employment in eastern Hillsborough County. The fact that the trial court's order directs that the

---

[1]The lack of a transcript of the proceedings below requires us to accept the trial court's factual findings as true. See O'Connor v. O'Connor, 184 So. 3d 1149, 1149 (Fla. 2d DCA 2015) ("In the absence of a transcript, the trial court's factual findings are presumed correct, and our review is limited to errors apparent on the face of the judgment.").

prospective timesharing goes into effect if the mother "moves out of Pinellas County"—without specifying to where she would be moving—illustrates just how uncertain the pending move is. This is clearly distinguishable from the reasonable and objective certainty of a child in the State of Florida starting kindergarten at the age of five that was at issue in Rivera.

We conclude that the trial court erred in addressing the best interest of the child and fashioning a prospective timesharing schedule and parenting plan based on a future event that is not "objectively certain to occur at an identifiable time in the future." See Rivera, 252 So. 3d at 286. In coming to this conclusion, we must reiterate that the mother has never filed a petition to relocate with the child. The issue was not before the trial court, and the mother was not on notice that at the paternity hearing she would have the burden, under section 61.13001(8), of establishing that relocation would be in the best interest of the child.

We also agree with the mother's second argument on appeal that the trial court's order is too broad in that it allows for an automatic change to the timesharing schedule and parenting plan if the mother "moves out of Pinellas County" and fails to include a timeframe for any such move. Ostensibly, under this order, if the mother remained in Pinellas County for five years but then moved anywhere outside of Pinellas County, the prospective timesharing schedule and parenting plan would go into effect without the trial court having to reconsider the best interest of the child at the time of the actual relocation in violation of chapter 61 and Arthur, 54 So. 3d at 459.

For the reasons discussed, we reverse the trial court's final judgment of paternity and remand for the trial court to fashion a timesharing schedule and parenting plan based on the best interests of the child as determined pursuant to the parties'

circumstances at the time of the final hearing without consideration of any prospective move by the mother. The trial court shall also reconsider the issue of child support in light of the new timesharing schedule and parenting plan.

Reversed and remanded.

SALARIO and ATKINSON, JJ., Concur.