

Third District Court of Appeal

State of Florida, July Term, A.D. 2011

Opinion filed August 22, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D11-2063
Lower Tribunal No. 03-15908

Abraham Israel Valqui,
Appellant,

vs.

Lily Marie Rodriguez,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

Brenda Bernstein Shapiro, for appellant.

Manuel R. Lopez, for appellee.

Before WELLS, C.J., SHEPHERD, J., and SCHWARTZ, Senior Judge.

SCHWARTZ, Senior Judge.

The father of a ten-year old appeals from an order granting her mother's petition to relocate her from Miami, where the father lives, to California. Far from

embodying the abuse of discretion which would be required for reversal of an order like this one entered pursuant to Section 61.13001, Florida Statutes (2010), see Muller v. Muller, 964 So. 2d 732 (Fla. 3d DCA 2007) (abuse of discretion standard applies to orders of relocation); Dorta-Duque v. Dorta-Duque, 791 So. 2d 1148 (Fla. 3d DCA 2001) (same), we find the order below, which is attached, a model of form, content, and judicial conscientiousness. It is, therefore

Affirmed.

APPENDIX

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA
FAMILY DIVISION

IN RE:

Abraham Israel Valqui,

Case No. 2003-15908 FC 33

Petitioner/Father,
and

Lily Marie Rodriguez,

Respondent/Mother.

ORDER ON MOTHER'S REQUEST TO RELOCATE WITH THE MINOR CHILD

THIS MATTER was heard by the Court on August 3, 2011. After considering the credible evidence and testimony and argument of counsel, it is hereby ORDERED as follows:

This is a paternity action. There is one minor child: Desiree Marie Valqui, born June 6, 2001. A Final Judgment of Paternity was entered on August 5, 2005. The Judgment sets forth a time sharing plan.

The Mother has filed a Petition to Relocate to Concord, California, and the father objects.

The Court has conducted a final hearing on this date on the issue of relocation and heard from the Guardian ad Litem Patrick Vilar, who testified that he opposes relocation but admits that the parents are excellent caring parents who are both very involved in the child's upbringing. He also points out that Dr. Cristina Grand recommends that it would be better for the minor child to remain in Miami, Florida. The Doctor, however, was not called as a witness as it is not clear what the recommendation is based on. The child has expressed no preference with regards to relocating.

The Court also heard from the Lily Marie Rodriguez and Barry Bena Jr., who presently reside in Concord California, pursuant to his assignment in the Coast Guard. They reside in a nice two story home with plenty of accommodations for the entire family. The mother is not employed at this time and the parties have agreed that she will be a stay at home mother.

The relocation statute makes clear what steps a parent must take in order facilitate the relocation process. The parent with whom the child maintains a residence with has the duty to inform all other parties who are entitled to timesharing of his or her intentions to move if the move is more than 50 miles away from the other parent's home residence and if the move will be for more than 60 consecutive days (permanent in nature). The statute also states that no presumption will arise in favor of or against a request to relocate with the child when the move will materially affect the current schedule of contact, access and timesharing with the non-relocating parent.

The initial burden of proof is on the parent wishing to relocate to prove 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 non-relocating parent to show by a preponderance of the evidence that the proposed relocation is not in the best interest of the child.

In reaching a decision regarding a proposed temporary or permanent relocation, the court shall evaluate all of the following factors:"

(a) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate with the child and with the

non-relocating parent, other persons, siblings, half-siblings, and other significant persons in the child's life.

The child has an excellent and extremely close relationship with the Mother. The child has shared the vast majority of time with the Mother since birth.^[1] The Mother has been the primary caretaker of the child since birth and has been involved in the day to day care and attention of the child, including doing homework and meeting her needs. The Mother will be the parent that takes the child to school and picks up after school every day. She will be the parent that takes the child to her medical checkups or any other social activity.

(b) The age and developmental stage of the child, the needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

The child is ten (10) years of age and it appears that she is developing appropriately for her age. The child will be physically cared for by her Mother and will be living with her two siblings. Due to the child's age and the family ties, the child will easily adjust to the new environment relatively quickly. The Father can communicate with the child via internet, webcam and telephone. The child does have special needs but these needs can be addressed in the new environment.

(c) The feasibility of preserving the relationship between the non-relocating parent or other person and the child through substitute arrangements that take into consideration the logistics of contact, access, and time-sharing, as well as the financial circumstances of the parties; whether those factors are sufficient to foster a continuing meaningful

¹Inasmuch as the record shows almost completely equal parental timesharing with the child, this statement is incorrect. We do not consider the error material to our decision.

relationship between the child and the non-relocating parent or other person; and the likelihood of compliance with the substitute arrangements by the relocating parent once he or she is out of the jurisdiction of the court.

The Mother believes that it is in the child's best interest that Desiree maintain a good relationship with the Father. Although California is a far distance away from South Florida, the Mother believes that the child can spend extended periods of time with the Father during the Summer Winter breaks and holidays. The Mother does not believe that the relocation will sever the relationship because the child will be in contact with the Father telephonically, via the Web-Internet and available to visit with the Father during the Summer time and Winter breaks.

The Mother has offered to pay for all travel expenses for the child to visit the father in South Florida. The likelihood that the Mother will comply with the substitute arrangement is very high. The Mother has never denied the Father time sharing and understands that it is in the child's best interest to have a good relationship with the Father.

(d) The child's preference, taking into consideration the age and maturity of the child.

The child has expressed no preference with regards to relocation.

(e) Whether the relocation will enhance the general quality of life for both the parent seeking the relocation and the child, including, but not limited to, financial or emotional benefits or educational opportunities.

The relocation will enhance the general quality of life for the Mother in that if she will be able to be a stay at home mother and care for her children on a full time basis. She will not have to worry about living expenses .Her husband is capable of supporting the family with his income from the Coast Guard.

As to the Father, the relocation will not significantly affect his general quality of life beyond the loss of his time sharing with the child.

(f) The reasons of each parent or other person for seeking or opposing the relocation.

The Mother has a legitimate and well founded need to relocate.

The Father is opposing the relocation because he believes it would significantly reduce his time with the child, would interfere with Desiree's relationship with his family.

He also believes that the lengthy travel times (8-10 hours) for the flights and the time difference would make travel more onerous for Desiree.

- (g) The current employment and economic circumstances of each parent or other person and whether or not the proposed relocation is necessary to improve the economic circumstances of the parent or other person seeking relocation of the child.**

The parties need to relocate in order for the family to maintain gainful employment with the United States Coast Guard.

- (h) That the relocation is sought in good faith and the extent to which the objecting parent has fulfilled his or her financial obligations to the parent or other person seeking relocation, including child support, spousal support, and marital property and marital property and marital debt obligations.**

The Mother is seeking the relocation in good faith to enhance the quality of life for herself and her family.

- (i) The career and other opportunities available to the obligating parent or objecting other person if the relocation occurs.**

The Mother claims she will have a better life with the children in California and be available to the children on a full time basis while her husband works in the Coast Guard. The Father has worked for the same company for the past several years and his future prospects with the company are good.

- (j) A history of substance abuse or domestic violence as defined in s. 741.28 or which meets the criteria of § 39.806 (1) (d) by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.**

None.

- (k) Any other factor affecting the best interest of the child or as set forth in s. 61.13.**

All relevant factors have already been discussed, supra.

CONCLUSIONS

This is an extremely difficult decision for the Court and an extremely close call. Both parents clearly love the child and want to maintain a close relationship with the child. On balance, however, the court believes that the Mother has met her burden of establishing that the best interests of the child would be served by the relocation.

The motion for relocation is granted.

The Mother may relocate to California and the child must be enrolled in school there. The Mother must meet the following conditions:

1. Ensure that Desiree has a computer with an internet connection and a webcam and any necessary software to allow the child to communicate by webcam with the Father and her half-siblings set up in the home where she will be living.

If the Mother does not comply with this condition, the court will find such to be a substantial change in circumstances warranting a reconsideration of this relocation and will enter an order requiring her to return to Florida with the child.

The Father may also share time with the child in California at any other time as long as he gives the Mother one week notice and his time sharing does not cause her to miss school.

The Mother shall ensure that the internet and webcam continue to allow virtual contact between the child and Father on a daily basis. The child shall also have her own email address.

At least one time per week, at a day and time designated by the Father in writing, the Mother shall initiate a telephone call from the child to the Father at the Mother's expense. The Father shall be able to telephone the child at least one time per day at his own expense.

The Mother shall be responsible for physically transporting the child to Florida for the Father's time sharing. The Mother shall make the flight arrangements since she expressed the ability to get better fares through her family connections.

Each side will pay their respective attorney's fees. The Court orders the Father to pay any outstanding fees due to the Guardian ad Litem.

DONE AND ORDERED in Miami-Dade County, Florida, this 4th day of August, 2011.

/signed/

Reemberto Diaz
Circuit Court Judge

SHEPHERD, J., concurring.

I write only to state that one could not imagine a closer case on the facts. It is undisputed the child's mother and father both are excellent parents. They are cooperative with each other and caring of the child. Although the mother is the primary residential parent under the August 2005 paternity order, the mother and father have exercised what appears to be a near seamless fifty-fifty time sharing arrangement, despite the fact each parent has married since they had the child together and each has a new family—the father another daughter, who is five-years old, and the mother two other children, ages ten months and three-years old. The child has a mild case of attention deficit hyperactivity disorder (ADHD), which affects her ability to study. The child's stepmother spends early evenings helping or tutoring the child when she is at her father's home. The child's stepfather is equally accepting and supportive of the child when she is at the mother's home. The child gets along well with her half-siblings. The mother and father both have extended families in South Florida, and both are involved in the child's life. The child does well in school despite her ADHD, for which the school also provides some assistance.

All was going well in the child's ten-year old idyllic South Florida life until the United States Coast Guard issued standard travel orders last spring to the

stepfather, an eight-year enlisted member of the Guard, transferring him from his station here in Miami-Dade County to the Alameda Naval Weapons Station near Concord, California. Having already extended his Miami-Dade County assignment once to remain in South Florida, the stepfather was required to honor the most recent orders. The child's mother, the stepfather, and their two children are presently residing in a two-story home on the Alameda naval base. The family has a room awaiting the child in the house. The mother has moved for permission for the child to join them in Alameda. The mother has promised to fly the child back to Florida at her family's expense for summer and other extended visitation with the father.

It is agreed that the homes—actually two homes—in which the child has resided in Miami-Dade County are equally commodious and comfortable. The child has had her own room in each house, and would continue to do so in the father's home if the child does not relocate. The child has attended an "A" school in Miami-Dade County and will attend an "A" School a short distance from home in Concord. The ADHD, mild as it is, presumably is as treatable in California as it is in Florida. As the mother's counsel conceded at oral argument, the only substantial distinguishing factor between the life the child will have in California as compared to Miami-Dade County, is that the mother and her husband have decided she will not be working in California. According to the mother, she,

therefore, will be more available to the child, including working with the child on homework issues related to her ADHD.

Neither we nor the father have located a case in which an appellate court has reversed a relocation order on facts nearly this close. Vivian v. Schembari, 966 So. 2d 492 (Fla. 4th DCA 2007), cited by the father, was an affirmance of an order denying a primary residential parent's efforts to relocate when her new husband's job was relocated. In Chapman v. Prevatt, 845 So. 2d 976 (Fla. 4th DCA 2003), a case like the present one involving two equally good and devoted parents, both remarried and a military stepfather ordered to Colorado, the court of appeal reversed and remanded the relocation order, not because one location was better than the other, but rather because there was no evidence supporting the annual rotation of custody between both parents that had been ordered by the trial court. All other cases cited by the father, or which we have located, are cases involving clearly unequal parents. See, e.g., Orta v. Suarez, 36 Fla. L. Weekly D1393 (Fla. 3d DCA June 29, 2011); Cecemski v. Cecemski, 954 So. 2d 1227 (Fla. 2d DCA 2007).

On the standard of review we must apply, we are not at liberty to reverse the decision of the trial court unless the decision of the court was "arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court."

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). Applying this standard of review, I believe we would be required to affirm the decision of the trial court whether the trial court had granted or denied the relocation. Only time will tell whether the decision of the trial court actually was in the best interests of the child. That is probably as good a definition of lack of abuse of discretion as is available to us in this case.