

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

BUEHLER V. GIBB

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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EMILY BUEHLER, APPELLEE,

v.

QUENTIN GIBB, APPELLANT.

Filed August 4, 2015. No. A-14-1117.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge.
Affirmed.

Leonard G. Tabor for appellant.

Lori Browning, of Sorensen, Hahn, Browning & Stott, P.C., for appellee.

MOORE, Chief Judge, and PIRTLE and BISHOP, Judges.

MOORE, Chief Judge.

I. INTRODUCTION

Quentin Gibb appeals from the order of the district court for Scotts Bluff County, which granted the request of Emily Neeck, formerly Emily Olenick and Emily Buehler, to remove the parties' minor child to California and denied Quentin's request to modify the prior custody order and place the child in his custody. Because we find no abuse of discretion by the district court, we affirm.

II. BACKGROUND

Quentin and Emily are the parents of Phoenix Jolee Gibb born in September 2009. Quentin and Emily were never married. Emily has been married three times with her third marriage occurring during the course of the removal proceedings at issue in this appeal. Emily's second

marriage, which was to Nathaniel Olenick, also produced a child, Saphira, whom we discuss briefly below. Emily and Quentin permanently separated in February 2010.

In April 2011, the district court entered an order, awarding custody of Phoenix to Emily subject to Quentin's visitation rights as specified in the order. The court also ordered Quentin to pay child support of \$406.69 per month and determined that, starting with the 2011 tax year, Emily could claim Phoenix as a dependent for income tax purposes. At that time, Emily resided in Scotts Bluff County, Nebraska, and Quentin resided in Weld County, Colorado.

On June 17, 2014, Emily filed a complaint to modify, seeking permission to remove Phoenix from Scottsbluff to Twentynine Palms Marine Base, California, because she was marrying an individual who was being stationed at the base. Quentin answered and filed a cross-complaint, seeking custody of Phoenix.

Trial was held before the district court on October 27, 2014. The court heard testimony from the parties, Emily's mother, Nathaniel, Quentin's wife, and Quentin's sister-in-law. Various exhibits were also received, including Phoenix's Nebraska immunization record, a notification of Emily's acceptance to a community college in California, information about certain elementary schools in California, screenshots of various postings on Emily's Facebook page, and paystubs and tax records for Quentin.

Since 2012, Emily has lived in four different places. At the time of the relocation hearing, she resided in Gering, Nebraska. There are no details about her first marriage in our record other than her mother's testimony that Emily and her first husband were very young and "too immature to know how to deal with marriage." After her relationship with Quentin, Emily married Nathaniel and Saphira was born in 2011. Emily and Nathaniel's divorce was finalized in October 2013, resulting in a "50-50 custody" arrangement. At the time of the relocation hearing in the present case, Nathaniel resided in Scotts Bluff County and worked for the Department of Corrections in Wyoming. We note that Emily sought permission, in a separate case, to remove Saphira to California. Those proceedings resulted in a change of custody to Nathaniel, who was awarded sole legal and physical custody of Saphira. Emily's appeal of that decision was dismissed pursuant to the parties' stipulation in *Olenick v. Olenick*, case No. A-15-0214. However, because the decision in the *Olenick* proceeding had not been entered at the time the district court made its decision in the instant case, such evidence of the *Olenick* outcome was not before the district court in our case and we do not consider it in our de novo review of the district court's order.

The record shows that in addition to her marriages and her relationship with Quentin, Emily has also had relationships with two additional individuals, the exact timing of which are not clear from the record on appeal. On July 18, 2014, Emily married Brandon Neeck, who is a sergeant in the U.S. Marine Corps. At the time of their marriage, Brandon was a Marine recruiter in Scottsbluff. He was subsequently transferred to Twentynine Palms Marine Base where he will be stationed for at least three years. According to Emily, she has become more focused and confident since her marriage to Brandon, and he has a positive relationship with Phoenix.

From October 2011 to June 2014, Emily worked at Carmike Cinemas, where she was at some point promoted to assistant manager. At the time of the relocation hearing, Emily was unemployed in anticipation of her move to California. She testified that she did not plan to work her first year in California as Brandon's income was sufficient to allow her to stay home and help

with any anxiety Phoenix might experience from the transition. Emily had been accepted to a local community college in California, where she planned to pursue an associate's degree in business administration. She expressed her intent to take on-line classes which would not interfere with her ability to parent Phoenix.

Emily felt that moving to California would enhance life for her and Phoenix as they would be able to stay together as a family with Brandon and because there were many opportunities for family activities, entertainment, and cultural enrichment in or near the area where they would be living. Emily's research showed that the school Phoenix would attend was highly rated within the California school system. Emily testified that her proposed move to California was not an attempt to limit Quentin's time with Phoenix, that she wanted Quentin involved in Phoenix's life, and that she felt it was important for children to have relationships with their fathers. Emily did feel that any change in custody would negatively impact Phoenix as she had always been Phoenix's primary caregiver.

Quentin has resided in Colorado since the parties' separation. He married his wife in May 2012 and at the time of the relocation hearing, he resided in Northglenn, Colorado with his wife, his 7-year-old stepson, and he and his wife's 19-month-old son. Quentin was employed full-time as an assistant manager for Yum Brands Corporation, specifically working for Taco Bell, making close to \$38,000 per year.

Quentin has regularly exercised his visitation with Phoenix. The 2011 order provided for visitation every other week on a Tuesday to Wednesday basis and two weeks in the summer as well as specified holiday visitation. At some point, the parties mutually agreed to alter the non-holiday schedule so that Quentin had visitation on alternating weekends and two weeks each summer.

Both parties expressed concerns about visitation. Quentin, his wife, and his sister-in-law agreed that it was typical for Phoenix to be poorly groomed and in inappropriate clothing when she arrived for visits. Quentin and his wife testified that Emily is consistently late both in dropping off and picking up Phoenix. Emily's mother, who frequently attends the visitation exchanges, disagreed with Quentin's assertion that Emily drops Phoenix off in inappropriate or dirty clothing. Emily expressed concern about Phoenix's emotional state prior to visits, testifying that Phoenix would often cry and "just be sad that she has to go" when they were driving to the visitation exchange point and that she would sometimes become quite upset when placed in Quentin's car.

Quentin expressed concerns about Emily's attention to Phoenix's health care. Emily testified that she has always taken Phoenix to the doctor when she was sick as well as for yearly checkups and required immunizations. Emily disagreed with Quentin's assertion that she had failed to provide all of Phoenix's immunizations. Quentin took Phoenix for one of her immunizations in Colorado in 2013, testifying that he told Emily he had done so. Emily took Phoenix in for the same immunization in Nebraska later in the year. She testified that she did not know Quentin had already taken Phoenix and that she would not have duplicated the immunization if she had known Phoenix had already received the shot in Colorado. The parties have also disagreed over whether Phoenix needs to have flu shots, which are not required by Nebraska. Although Emily prefers not to have flu shots given, Quentin has taken Phoenix for a flu shot on several occasions without Emily's consent. Quentin also alleged that Emily failed to properly take

care of a cavity in one of Phoenix's teeth. Quentin alerted Emily to the cavity in March 2013 and the affected tooth was removed in July after Emily scheduled an appointment with a pediatric dentist. Emily testified that the delay in removing the tooth was due to scheduling issues and conflicting reports from dentists as to the immediacy of the need to remove the tooth.

Another allegation made by Quentin was that Emily fails to provide nutritious meals for Phoenix. Emily disagreed and testified about her normal meal plan for Phoenix, which showed a reasonably varied diet. Emily denied giving Phoenix fast food on a regular basis and testified that her cooking skills had improved considerably in the previous year. Emily's mother testified that she had observed positive changes in Emily's maturity level and cleaning and cooking skills in the previous year and a half.

Emily was questioned about her alcohol and drug use. She denied having a drinking problem and testified that she had never been intoxicated while Phoenix and Saphira were with her. She initially denied ever using any illegal drugs but later testified she used marijuana once, two years prior to trial. Screen shots taken from Emily's Facebook page were admitted into evidence. Some of these reflect posts related to drinking, but do not reflect any effect on her ability to care for Phoenix.

Emily has family both in Scottsbluff and California. Her parents and several other family members live in the Scottsbluff area. Emily's parents plan to visit her regularly in California. She has an aunt and multiple cousins living in San Diego and a sister living in Las Vegas, all of which Emily testified are within about a 2-hour driving distance of where she will be living. Phoenix is not old enough to have a set group of friends that she spends time with. Quentin has a "pretty large family base" living both in Nebraska and Colorado.

In his testimony, Nathaniel expressed some similar concerns to those expressed by Quentin. He testified that during the time they were together, Emily's emotional state was volatile and she would easily become frustrated and depressed. He also did much of the food preparation for the family during their marriage and questioned some of the nutritional choices Emily made for Phoenix and Saphira. He also noted a serious negative comment Emily made on one occasion about Quentin in Phoenix's presence.

On November 25, 2014, the district court entered an order granting Emily permission to permanently remove Phoenix to California and denying Quentin's request for custody. In analyzing Emily's request for removal, the court found that Emily's desire to reside with her husband in California constituted a legitimate reason to leave Nebraska and found no evidence of improper agendas or motives by Emily or Quentin in either seeking or opposing removal. The court found that the various "quality of life" factors weighed more in favor of removal than against. With respect to the effect removal would have on Quentin's ability to maintain a meaningful parent-child relationship with Phoenix, the court observed that Quentin currently had visitation on alternating weekends (Saturday to Sunday) and two weeks in the summer, or approximately 66 days/40 overnights per year. The court found that extended holiday and summer visitation would reasonably compensate Quentin for lost weekend visitation. The court concluded that the totality of the evidence weighed in favor of removal and that it was in Phoenix's best interest to continue to reside with Emily. The court granted Quentin visitation every year during Thanksgiving break and spring break and during winter break, alternating every year between the first half and the

second half of that school break period. The court granted Quentin six consecutive weeks of summer break visitation. The court also set forth who was to provide transportation for the various visitation periods and awarded both parties reasonable telephone, e-mail, texting, or other electronic visitation while Phoenix was with the other parent. The court ordered that starting in 2015, Quentin's child support payments would abate for the months of June and July. Quentin subsequently perfected his appeal to this court.

III. ASSIGNMENTS OF ERROR

Quentin asserts that the district court erred in (1) granting Emily permission to move to California and (2) failing to modify the previous custody order to place custody with him.

IV. STANDARD OF REVIEW

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.* A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.* In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

V. ANALYSIS

1. REMOVAL FROM STATE

Quentin asserts that the district court erred in granting Emily permission to move to California with Phoenix. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. *Schrag v. Spear*, *supra*. After clearing that threshold, the custodial parent must also demonstrate that it is in the child's best interests to continue living with him or her in the new location. *Id.* The paramount consideration is whether the proposed move is in the best interests of the child. *Id.*

(a) Legitimate Reason to Leave State

The district court found that Emily had a legitimate reason for leaving Nebraska, namely her remarriage to Brandon who now resides in California. We agree. Absent evidence of an ulterior motive, a custodial parent's desire to live with his or her current spouse, who is located outside of the custodial jurisdiction, is a legitimate reason to remove the minor child. *Daniels v. Maldonado-Morin*, 288 Neb. 240, 847 N.W.2d 79 (2014). There is nothing in the record to show that Emily has an ulterior motive in seeking removal. We conclude that she established a legitimate reason for leaving Nebraska. Next, we consider whether removal is in Phoenix's best interests.

(b) Child's Best Interests

In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

(i) Each Parent's Motives

The first consideration is each parent's motive for seeking or opposing the move. Emily's motive in seeking removal is to live with her husband Brandon, who has been stationed in California. Quentin's motive for opposing the move is the effect it will have on his visitation with Phoenix. We conclude, as did the district court, that there is no evidence of improper motives or agendas by either party.

(ii) Quality of Life

With respect to the second consideration, quality of life, there are a number of factors for courts to consider. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the relocating parent because the best interests of the children are interwoven with the well-being of the custodial parent. *Colling v. Colling*, 20 Neb. App. 98, 818 N.W.2d 637 (2012). This list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of factors. *McLaughlin v. McLaughlin*, *supra*. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

a. Emotional, Physical, and Developmental Needs

Emily testified that she had always been Phoenix's primary caregiver, that Phoenix had a very close relationship with Saphira, and that being away from Emily and Saphira would negatively impact Phoenix. Emily testified that with Brandon's income, she will be able to stay home with Phoenix for the first year after the move to address any transitional issues she might have; while in Nebraska, she would have to work and take Phoenix to a daycare provider. Emily also testified about several family activity groups available on the base in California and other

cultural and entertainment opportunities available within driving distance. There is no evidence in the record about such opportunities available in Nebraska and how those might compare to the opportunities available in California. We agree with the district court's conclusion that there was no evidence that Phoenix's emotional, physical, and developmental needs could not be met in California or Nebraska. This factor does not weigh either for or against the move.

b. Child's Preference

As Phoenix did not testify at the removal hearing, this factor is neutral.

c. Enhancement of Income and Employment

A custodial parent's income can be enhanced because of a new spouse's career opportunities, for purposes of determining the potential that removal of children to another jurisdiction holds for enhancing the quality of life of the parent seeking removal of the children. *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). See, also, *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). Emily was not employed at the time of the hearing, as she was preparing for the move to California, but she had previously been employed as an assistant manager at a cinema company. She testified that she planned to stay home the first year in California to help Phoenix with any transitional issues and that Brandon's income was sufficient to allow her to stay home and also to further her education so she would be able to obtain a job paying higher than minimum wage. This factor weighs in favor of removal.

d. Housing and Living Conditions

There was no evidence presented with respect to this factor other than the fact that Emily planned to move to Twentynine Palms to live on the base with Brandon, who was stationed there. While the district court observed, in connection with both this factor and the previous factor, that Emily and Phoenix would benefit from free medical care, housing allowances, and other benefits related to Brandon's military career, there was no evidence of this in our record. The court found that this factor weighs in favor of removal. Quentin argues that there was insufficient evidence with respect to this factor and points out that he was already providing health insurance, including vision and dental coverage, for Phoenix. We conclude that the evidence was insufficient to establish this factor as supporting removal, as there was no evidence how the housing and living conditions in California compared to those in Nebraska.

e. Educational Advantages

Emily presented evidence that the elementary school Phoenix would attend on the base was rated a 9 out of 10 under the California state ratings system. There was no information presented about the relevant school or schools in Nebraska. The district court found there was no evidence that Phoenix would not receive a proper education in either Nebraska or California and that this factor was neutral. We agree. This factor weighs neither for nor against removal.

f. Quality of Relationship Between Child and Parents

Phoenix appears to have a quality relationship with both Quentin and Emily and their extended families. The district court observed that Emily has been Phoenix's primary caregiver, especially since the parties separated in 2010, and found this factor favored removal. We agree.

g. Ties to Community and Extended Family

Phoenix's maternal grandparents, former stepfather Nathaniel, and other extended family reside in Nebraska. She also has extended family in Colorado and California. The district court found that removal would affect Phoenix's time with extended family and determined this factor weighed against removal. Certainly, Phoenix will have less time with family in Nebraska, while gaining more time with family in California. Her time with extended family in Colorado will also change, although she will have parenting time with Quentin during holidays and increased time during the summer months. We agree that this factor does not favor removal.

h. Hostilities Among Parents

The district court determined that although Emily and Quentin disagree on parenting styles, they are reasonably civil toward one another. The court found no indication that removal would enhance or antagonize the current relationship between the parties. We agree. This factor is neutral.

i. Well-Being of Custodial Parent

We agree with the district court's observation that maintaining two households would place a financial strain on Emily and Brandon, that there would be an emotional toll from the impact of spouses living apart, and that this strain might in turn affect Phoenix. This quality of life factor weighs in favor of removal.

(iii) Impact on Noncustodial Parent's Visitation

The final consideration is the impact a move to another jurisdiction will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. Consideration of the impact of removal of children to another jurisdiction on the noncustodial parent's visitation focuses on the ability of the court to fashion a reasonable visitation schedule that will allow the noncustodial parent to maintain a meaningful parent-child relationship. *Colling v. Colling*, 20 Neb. App. 98, 818 N.W.2d 637 (2012). Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Id.* The frequency and the total number of days of visitation and the distance traveled and expense incurred go into the calculus of determining the reasonableness of a visitation schedule. *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008).

At the time of the removal hearing, Quentin had visitation with Phoenix on alternating weekends (Saturday to Sunday) and two weeks in the summer, approximately 66 days/40 overnights yearly. The court determined that extended holiday and summer visitations would reasonably compensate Quentin for lost weekend visitations. The court awarded Quentin visitation during every Thanksgiving break and spring break from the time children are released from school for break and concluding the day before children return to school; during winter break, alternating

on a yearly basis between the first half and second half of winter break as defined in the order; and for 6 consecutive weeks during the school summer break, starting 7 days after children are released from school and concluding 6 weeks later. The court ordered Emily to provide all transportation for Phoenix both ways between California and Denver for the Thanksgiving and spring break visitations. For the winter and summer break visitations, the court ordered Quentin to provide transportation for Phoenix at the start of visits and Emily to provide transportation at the end of visits. The court also awarded both parents reasonable telephone, e-mail, texting, or other electronic visitation with Phoenix when she is with the other parent. We conclude that the court fashioned a reasonable visitation schedule that will allow Quentin to maintain a meaningful parent-child relationship with Phoenix. Although his visits will not occur as frequently, he will have more total visitation time for longer consecutive periods. The court also fairly and reasonably distributed the travel costs associated with visitation between the parties. This factor weighs in favor of removal.

(c) Summary

As stated above, the evidence establishes a legitimate reason for the move to California. In considering Phoenix's best interests, we have reviewed the three relevant considerations: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). We agree with the district court's determination that there is no evidence of improper agendas or motives by Emily in wanting to move or by Quentin in opposing the move, making this consideration neutral. As to the quality of life consideration, with its nine factors, our de novo review shows that in total, this factor supports removal. Finally, in considering the impact of the move on contact between Quentin and Phoenix when viewed in the light of reasonable parenting time, we agree with the district court that this consideration favors removal.

Accordingly, we affirm the decision of the district court which granted Emily's application to move Phoenix to California.

2. MODIFICATION OF CUSTODY

Quentin asserts that the district court erred in failing to modify the previous custody order to place custody with him. Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

(a) Material Change in Circumstances

A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Schrag v. Spear, supra*. The party seeking modification of child custody bears the burden of showing a change in circumstances. *Id.* In determining whether the custody of a

minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. *Id.*

In his arguments in support of this assignment of error, Quentin relies on evidence of Emily's alleged instability, focusing in particular on evidence with respect to Phoenix's health, hygiene, and nutrition. Most of the evidence Quentin relies on was disputed, and none of the evidence shows the occurrence of something which, had it been known to the court at the time of the initial custody order, would have persuaded the court to decree differently. There is evidence supporting a conclusion that since entering into a relationship with and marrying Brandon, Emily has gained more focus and stability in her life. The district court clearly resolved the conflicting evidence in Emily's favor, and we consider and give weight to the fact that the trial judge heard and observed the witnesses and accepted Emily's version of the facts rather than Quentin's. See *Schrag v. Spear, supra*. Upon our de novo review, we conclude that Quentin failed to establish a material change in circumstances supporting a change in custody.

(b) Best Interests

Before custody may be modified based upon a material change in circumstances, it must be shown that the modification is in the best interests of the child. *Schrag v. Spear, supra*. Quentin has not shown a material change in circumstances supporting a change in custody. Accordingly, we do not address this assignment of error further. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015).

(c) Summary

The district court did not abuse its discretion in finding it in Phoenix's best interests to continue to reside with Emily.

VI. CONCLUSION

The district court did not abuse its discretion in granting Emily permission to remove Phoenix to California and in denying Quentin's complaint to modify custody.

AFFIRMED.