

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

DOLL V. DOLL

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HEATHER D. DOLL, APPELLANT AND CROSS-APPELLEE,
V.
JASON L. DOLL, APPELLEE AND CROSS-APPELLANT.

Filed December 31, 2012. No. A-12-175.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge.
Affirmed.

John A. Kinney and Jill M. Mason, of Kinney Law, P.C., L.L.O., for appellant.

Kelly T. Shattuck, of Vacanti Shattuck, for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Heather D. Doll appeals an order of the district court for Douglas County, Nebraska, denying her application to remove the parties' minor children to Florida so that she could move and live with her new husband. Jason L. Doll cross-appeals, asserting that the district court erred in not modifying custody and child support. Upon our de novo review of the record, we find no abuse of discretion and we affirm the district court's denial of Heather's application for removal and the district court's denial of Jason's request to modify custody and support.

II. BACKGROUND

The parties' marriage was dissolved by a decree entered on March 25, 2009. Pursuant to that decree, the parties were awarded joint legal and physical custody of the parties' twins, who were 8 years of age at the time of the present proceedings. The parenting plan incorporated into the decree provided for Heather to have custody of the twins on Mondays and Tuesdays, for Jason to have custody of the twins on Wednesdays and Thursdays, and for the parties to alternate

weekends. Heather also has a 14-year-old daughter from a previous relationship, of whom she has custody.

In November 2009, Heather married Dr. William Toth, a pediatrician in the U.S. Air Force. Toth has two minor children from a previous relationship, both of whom Toth has custody.

The record indicates that Toth joined the military in 2000, prior to beginning medical school. Pursuant to his initial commitment, he was obligated to serve a minimum of 11 years. By November 2009, he had served 9 years and had a minimum of 2 more years of service remaining to fulfill his commitment. In May 2010, he entered an incentive program, obligating him to an additional 4 years of service.

In January 2011, Toth learned that the Air Force was reassigning him to a position in Florida. In January and February, Heather and Jason spoke on several occasions in an attempt to reach an agreeable arrangement concerning custody and parenting time of the twins. When they were unable to reach an agreement, Heather filed an application to modify the dissolution decree, requesting permission to remove the twins to Florida so she could move with Toth. Jason filed a cross-application, seeking a modification of custody and support.

On February 17, 2012, after a trial at which substantial testimony and evidence was adduced, the district court entered an order denying Heather's application to remove the children to Florida. The court's order is in excess of 50 pages, includes the court's findings concerning the testimony of a number of the individual witnesses, and includes the court's step-by-step analysis of the analytical framework set forth by the Nebraska appellate courts in removal cases. Pursuant to that analysis, the district court concluded that Heather had demonstrated a legitimate reason for seeking removal, but that she had failed to demonstrate that removal of the 8-year-old twins to Florida and away from Jason, their father, was in the children's best interests. The court also found that Jason had failed to meet his burden to demonstrate a material change of circumstances warranting a modification of custody and support. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Heather's sole assignment of error is that the district court erred in finding that removal was not in the best interests of the children. On cross-appeal, Jason's sole assignment of error is that the court erred in not modifying custody and support.

IV. ANALYSIS

1. REMOVAL OF CHILDREN TO FLORIDA

Heather challenges the district court's finding that she failed to demonstrate that removal of the children to Florida was in their best interests. The parties presented substantial conflicting evidence concerning the various factors that are relevant to the best interests analysis, and we cannot find that the court abused its discretion in finding that Heather failed to meet her burden of proof.

Child custody determinations and visitation 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. *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). A judicial abuse of discretion exists when a judge, within the

effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

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. *Id.* After clearing that threshold, the parent seeking removal must next demonstrate that it is in the child's best interests to continue living with him or her. See *id.* Under Nebraska law, the burden is on the party requesting removal to satisfy this test. *Id.*

(a) Legitimate Reason to
Remove From State

Heather sought permission to remove the twins to Florida because her husband, Toth, had been reassigned to Florida by the Air Force. The record reflects that Heather and Toth had been married for over a year before the Air Force notified Toth of his reassignment. The district court found that Heather had demonstrated a legitimate reason for seeking permission to remove the twins, and there has been no cross-appeal on that finding. As such, there was a legitimate reason for removal in this case.

(b) Best Interests of Child

After clearing the threshold of demonstrating a legitimate reason for leaving the state and removing minor children to another state, the party seeking removal must demonstrate that it is in the best interests of the children to continue living with him or her. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Wild v. Wild*, *supra*. In determining whether removal to another jurisdiction is in the best interests of the child, 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 light of reasonable visitation. *Id.*

(i) Each Parent's Motives

The first factor that must be considered is each parent's motives for seeking or opposing the removal of the minor children from the jurisdiction. The district court found in the present case that there was no bad faith by either parent involved in his or her motives in this case. We agree.

The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted removal in an effort to frustrate or manipulate the other party. *McLaughlin v. McLaughlin*, *supra*; *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). See, also, *Vogel v. Vogel*, *supra*; *Brown v. Brown*, *supra*; *Jack v. Clinton*, *supra*; *Farnsworth v. Farnsworth*, *supra*.

The record indicates that Heather was seeking removal because she had remarried and her new husband's employment required him to be reassigned to Florida; she was motivated by wanting to move with the twins to be with her new husband and his children.

The record indicates that Jason was opposing removal because of his concern for how the distance between Florida and Nebraska would impact his relationship with the twins, who were only 8 years of age at the time of trial. The record does not indicate that he opposed the move for any improper or vindictive reasons.

As a result, it appears that both parties had good faith and proper motives for seeking or opposing removal. We conclude that at most, the evidence demonstrates that the parties' motives are balanced. As a result, this consideration does not weigh in favor of finding that removal is in the best interests of the children.

*(ii) Potential for Enhanced
Quality of Life*

The second factor that must be considered is the potential that the move holds for enhancing the quality of life for the minor children and the custodial parent. This factor requires an analysis of a number of other considerations which bear upon the potential enhancement of the children's quality of life. Upon our review of the record, we cannot say that the trial court erred in concluding that the evidence adduced failed to demonstrate that the proposed removal would significantly enhance the twins' quality of life and that Heather failed to adduce sufficient evidence to demonstrate that this factor should weigh in favor of removal.

In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the children and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child'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 child and each parent; (7) the strength of the child's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties. *Wild v. Wild, supra*. See, *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). This list should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted. *Id.*

In the present case, the district court's order includes a step-by-step analysis of each of these considerations. The court ultimately found that several weighed against removal, that some did not particularly weigh either in favor of or against removal, but did not find that any weighed in favor of removal.

Specifically, the court found that the emotional, physical, and developmental needs of the twins weighed against removal. The court found that there was no issue concerning the parental fitness of either Heather or Jason, but that the support system for the twins was stronger in

Nebraska and that the testimony of the experts supported a finding that their emotional, physical, and developmental needs were better served in Nebraska. The parties presented conflicting expert testimony, but we cannot find that the district court erred in concluding that the evidence on this consideration did not weigh in favor of removal.

The court also found that the opportunity for enhancement of income or employment weighed against removal. The court found that the evidence adduced at trial suggested that the move to Florida, while not voluntary, was a lateral move for Toth and that Heather had no intentions of seeking employment in Florida. Heather had stopped working while the two lived in Nebraska. While it is not clear that this consideration actively weighs against removal, we cannot find that the district court erred in concluding that it does not weigh in favor of removal.

The court also found that the quality of the relationship between the twins and the parents weighed against removal. The court based its conclusion in this regard largely on testimony from the experts concerning the bonding relationship the twins have with each parent. The evidence adduced at trial demonstrates that the twins have a positive relationship with both parents. Again, while it is not clear that this consideration actively weighs against removal, we cannot find that the district court erred in concluding that it does not weigh in favor of removal.

The court found that the ties to community and extended family consideration weighed strongly against removal. The evidence adduced at trial demonstrates that there are strong community ties and substantial extended family in Nebraska, while there are currently neither in Florida. Heather adduced evidence suggesting that the twins' maternal grandparents might move to Florida in the near future, but they are not currently there, and the evidence further suggested that Toth will likely be reassigned again in the next couple of years. We cannot find any error by the court in concluding that this consideration weighed against removal.

We also find no error in the district court's conclusions that the considerations related to housing and educational opportunities did not weigh in favor of removal. The parties presented significant evidence about the quality of housing and schools in both locations. That evidence essentially demonstrated that the housing opportunities in both locations are more than sufficient and that the educational opportunities in both locations are of high quality. The housing and educational opportunities do not weigh against removal, but they also do not weigh in favor of removal.

In sum, there was substantial testimony and evidence adduced by each party concerning all of the relevant considerations. Based upon that substantial evidence, the district court concluded that Heather had not demonstrated that the considerations weigh in favor of allowing removal. We find no error in that conclusion.

*(iii) Impact of Move on Contact Between
Children and Noncustodial Parent*

In this case, as is usually the case with a requested removal of this distance, there can be no doubt that removal will impact the amount of contact that Jason can have with the twins. Although Heather proposed various alternatives to minimize the negative impact and proposed to shoulder the majority of the expenses related to travel, the record fails to demonstrate that the move will not have a negative impact on Jason's contact with the twins. As such, we find no error by the district court in failing to conclude that this factor weighs in favor of removal.

(iv) *Conclusion on Best Interests*

On our de novo review, we do not find that the district court abused its discretion in concluding that the twins' best interests would not be served by allowing removal to Florida. The factors and considerations in this case fail to weigh in favor of removal. Although this is a difficult case where it appears that nobody has bad motives or ill will, and the resulting outcome of allowing or denying removal is certain to cause difficulties for the parties, the district court did not abuse its discretion, and we conclude that it did not err in finding that the best interests of the twins would not be served by allowing removal.

(c) *Conclusion on Removal*

Removal cases are always difficult, especially when it is not apparent that there are bad motives on the part of either parent. We find no abuse of discretion in the district court's conclusion that Heather, despite presenting a legitimate reason to seek relocation, failed to demonstrate that it would be in the best interests of the twins to be removed to Florida. We find no merit to her appeal.

2. CROSS-APPEAL ON CUSTODY AND SUPPORT

On cross-appeal, Jason asserts that the district court erred in denying his request for a change of custody and support. Jason bases his assertions primarily on Heather's refusal to commit to an intention to either move to Florida without the twins or remain in Nebraska without her husband and his children. We find no abuse of discretion by the district court in its conclusion that Jason failed to demonstrate a material change of circumstances.

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although on appeal the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Adams v. Adams*, 13 Neb. App. 276, 691 N.W.2d 541 (2005). 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. *Id.* The party seeking modification of child custody bears the burden of demonstrating such a material change in circumstances, which requires a showing of 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. See *id.*

In this case, Heather's new husband, Toth, was reassigned by the Air Force to a position that required him to move to Florida, along with his two children. Heather's 14-year-old daughter, not directly at issue in the present case, had also moved to Florida with Toth. Thus, Heather sought permission to take the twins and remove them from Nebraska to Florida so that she could maintain her new family together. The district court denied this request, and we concluded above that such denial was not an abuse of discretion.

At the time of trial, Jason's counsel attempted to make Heather commit to what she intended to do if the court denied her application for removal. Heather refused to commit to whether she intended to leave the twins in Nebraska and move to Florida or whether she intended to remain in Nebraska with the twins, separated from her new husband, Toth.

At the time of trial and the time of the district court's order, the evidence indicates only that Heather sought permission to remove the twins. There was no evidence to indicate that she

had moved or that she would move regardless of the outcome of the trial. As a result, the court's ruling denying removal has simply left a situation where each party has joint physical and legal custody of the twins. Unless Heather actually moves and leaves the twins behind, there has not been a material change of circumstances.

We note that Jason's counsel asserts in the brief on cross-appeal that he "sought permission from the Court to re-open the case on this one issue to present evidence that Heather had in fact moved to Florida; however the trial court refused this request" and that "the trial court has left the parties with an untenable custody and child support order" because "[t]here is no physical way for Heather to exercise her parenting time . . . as intended by the original [decree] every Monday and Tuesday and every other weekend." Brief for appellee at 24. Jason's counsel appears to be asserting that Heather has actually moved and that as a result, there has been a material change of circumstances. However, this assertion is based on information that is not in the record and that, by counsel's own assertion, has not been demonstrated with any evidence.

On a de novo review of the record presented, there was no material change of circumstances demonstrated. The only thing demonstrated was that Heather's husband had moved and that she was seeking permission to remove the children and join him. Regardless of what her ultimate decision or intentions might be, until such time as some event has occurred which actually constitutes a material change of circumstances justifying an application for modification, the district court's denial of Jason's request to modify custody and support was not erroneous. We find this assignment of error to be meritless.

V. CONCLUSION

We find no merit to the assertions on appeal or on cross-appeal. Accordingly, we affirm the district court's order.

AFFIRMED.