Arnhold v. McLean

Appeals Court of Massachusetts

June 12, 2012, Entered

11-P-2151

Reporter
2012 Mass. App. Unpub. LEXIS 764 *; 81 Mass. App. Ct. 1141; 968 N.E.2d 942

CRYSTAL LEE ARNHOLD vs. DANIEL ERNEST MCLEAN.

Disposition: [*1] Judgment affirmed.

Judges: Mills, Fecteau & Hanlon, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Daniel Ernest McLean (father), appeals from a judgment of the Probate and Family Court granting a modification in favor of the plaintiff Crystal Lee Arnhold (mother) that, as primarily relevant here, allowed the mother to relocate to Florida with their two minor ***children***. He also avers error in the judge's decision to deny him joint legal custody and in management of the trial. We affirm.

The parties have never married but they have two minor ***children***, a daughter with special needs and a son.[1] The special needs of the daughter were addressed, at relevant times, by special schooling and therapy. The mother has always been the ***children***'s primary caretaker, and is frequently assisted by her mother (grandmother).[2] Prior to the ***removal***, the grandmother assisted the father in exercising his visitation privileges, often bringing the ***children*** to a neutral site for transfer to the father. According to findings made by the judge, the father has missed visitation opportunities on a number of occasions. The judge also found that, until the father filed the modification complaint

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[1] In 2007, a paternity judgment issued that declared McLean as the ***children***'s father, granted the mother legal and physical custody of both ***children***, established father's ***child*** support obligations, and established a liberal visitation schedule for the father.

[2] The maternal grandmother was primarily responsible for caring for the ***children***, throughout the mother's parenting time, during those periods in which the mother was at work and the ***children*** were out of school. The grandmother, who owned and lived in the multi-family house where the mother and ***children*** resided, provided care at no cost to the mother. While the mother does not pay the grandmother for these services, she does pay rent on a monthly basis to her mother.

at bar, he did [*2] not participate to any meaningful extent with the ***children***'s medical or schooling matters, nor in other similar parenting decisions, which the father attributes to the mother's failing to keep him informed of appointments and other parenting issues. At the heart of this relationship, the judge found that the mother and father are unable to communicate or coparent effectively.[3]

The status quo was disrupted when it became necessary for the grandmother, and secondary caregiver, to announce her intention to relocate to rural Florida to assist her ailing mother, the ***children***'s great-grandmother, where other maternal relatives also reside nearby.[4] Prior to filing a complaint for modification, the mother learned from her present employer that it was possible for her to obtain a managerial position with the same company at its Florida location, which is located in the same town as the grandmother's proposed destination. The reported position would be roughly full-time with a greater salary and full medical and other benefits, all of which she does not presently receive under her current employment. The mother and grandmother planned to purchase a residence in Florida together and share living expenses and mortgage, which would, in turn, result in a considerable savings in the mother's housing costs. There are several public schools available in Florida for the ***children***. However, no findings in the record [*4] address precisely how the special needs of the older ***child*** would be met in Florida, or whether such services would be more or less equivalent to those the ***child*** receives in Massachusetts.

When the mother initially announced that she intended to move to Florida with the ***children***, the father had apparently agreed, and the parties worked out a rough visitation schedule and reduction in the father's ***child*** support obligation. However, the father reconsidered and withdrew his consent, thereafter filing a complaint for modification seeking joint legal and physical custody, modification of the current visitation schedule such that his ***child*** support obligation would be "calculated using the new ***Child*** Support Guidelines."[5] The mother, in turn, filed a counterclaim in which she requested leave to remove the ***children*** to Florida. After a trial, the judge found that the mother had demonstrated a "real advantage" in the proposed move -- essentially, lower living costs, higher income and benefits, continued quality ***child*** care by the grandmother at no cost, a closer proximity to the mother's [*5] mother and other relatives -- that ***removal*** was in the ***children***'s best interests and that, because of the parties' inability to communicate or coparent, joint legal custody was not appropriate, placing sole legal and physical custody following relocation with the mother. Finally, the judge established a visitation schedule which approximated that to which the parties had previously and tentatively agreed.

Discussion. The father contends that: (i) the judge failed to make "contemporaneous factual and legal findings"; (ii) failed to make adequate factual findings, particularly with respect to the "***children***'s best interests"; (iii) the judge "ignored" "large swaths" of the evidence; (iv) the judge did not properly determine that the mother carried her burden to demonstrate that the move represented a "real advantage"; (v) the judge did not adequately or properly consider the adverse consequences to the ***children*** with respect to the disruption that the move would have on their relationship with the father; (vi) [*6] the judge improperly "truncated" his cross-examination of the mother;[6] and (vii) the judge erred by not awarding the father joint custody, apparently because, in the father's view at least, the father "plays . . . a crucial and active role in his ***children***'s lives."

It is the responsibility of the Probate Court judge, not this court, to create a parenting arrangement that advances the best interests of the ***children***. See Bak v. Bak, 24 Mass. App. Ct. 608, 616, 511 N.E.2d 625 (1987). The judge's findings of fact will be left undisturbed unless clearly not in consideration of the ***child***'s best interest. "It is important

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[3] Indeed, the mother has obtained a series of G. L. c. 209A abuse prevention orders against the [*3] father, generally alleging that he has both physically and verbally abused her, sometimes in front of the ***children***, most of which were vacated on the return date.

[4] The probate judge noted that the father and his relatives are mainly located in north-central Massachusetts.

[5] For reasons not readily apparent in the record, but implicit in the judge's findings, the request was the result of the father's engagement to a veterinarian who owned her own home.

[6] It has not been shown that the judge abused her discretion with respect to the management of the trial, especially given a predetermined duration of trial and that the father's portion of the trial well exceeded that of the mother.

to emphasize that consideration of the advantages to the custodial parent does not disappear, but instead remains a significant factor in the equation." Pizzino v. Miller, 67 Mass. App. Ct. 865, 870, 858 N.E.2d 1112 (2006). "[B]ecause the best interests of a ***child*** are so interwoven with the well-being of the custodial parent, the determination of the ***child***'s best interest requires [*7] that the interests of the custodial parent be taken into account." Yannas v. Frondistou-Yannas, 395 Mass. 704, 710, 481 N.E.2d 1153 (1985), quoting from Cooper v. Cooper, 99 N.J. 42, 54, 491 A.2d 606 (1984). "Common sense demonstrates that there is a benefit to a ***child*** in being cared for by a custodial parent who is fulfilled and happy rather than by one who is frustrated and angry." Pizzino v. Miller, supra at 870. "Absent clear error, we review the judge's determination of the ***child***'s best interests only for abuse of discretion." Smith v. McDonald, 458 Mass. 540, 547, 941 N.E.2d 1 (2010).

Where the ***child*** has two legal parents and one parent has sole custody and seeks to relocate with the ***child*** outside the ***Commonwealth***, ***removal*** requires "the permission of the other parent or the court." Id. at 546. The court may conclude ***removal*** to be proper when the circumstances of the requested move meet both prongs of the analysis articulated in Yannas v. Frondistou-Yannas, 395 Mass. 704, 710-712, 481 N.E.2d 1153 (1985). The Yannas test will apply "whether the parents are separated, divorced or were never married." Smith v. McDonald, supra at 547.

In general, "[t]he Yannas analysis recognizes that the best interests of a ***child*** are . . . interwoven with the [*8] well-being of the custodial parent, and that moving may afford benefits to the custodial parent that, in turn, benefit the ***child***. Accordingly, the court should first consider whether the custodial parent can establish[ ] a good, sincere reason for the move, demonstrating that the move offers a real advantage. If so, the judge must balance the relative advantages to the custodial parent from the move, the potential impacts on the ***child***'s development and quality of life, and any effects on the relationship between the noncustodial parent and the ***child***. No single factor is determinative and the best interests of the ***child***[ ] always remain the paramount concern" (internal quotations and citations omitted). Ibid. "The advantage may be economic; it may be support of family residing in another jurisdiction; or it may be any other good, sincere reason for wanting to remove. [T]he presence or absence of a motive to deprive the noncustodial parent of reasonable visitation is also a relevant consideration" (internal quotations and citations omitted). Pizzino v. Miller, 67 Mass. App. Ct. at 870, quoting from Yannas, supra at 711.

Here, the judge's findings that support her conclusion as to "real [*9] advantage" and her denial of the father's request for joint legal custody are sufficient and are sufficiently supported in the trial record. See G. L. c. 209C, § 9(a). The judge specifically found that ***child*** care, household income, and family support would all be increased by the relocation to Florida, and expenses most likely decreased. We disagree with the father's contention that the absence of an actualized home, school or job (i.e., one that has already been secured prior to requesting permission for ***removal***), renders the mother's plans "mere speculation," and that such testimony was inadequate to support the mother's claim that ***removal*** from the ***Commonwealth*** provides a real advantage. Such an argument appears to seek advantage from the mother's reticence in risking costly preparations, such as the purchase of a home and termination of employment, in advance of obtaining court permission, steps that her financial circumstances would not permit doing without such permission. Moreover, the mother ought not be penalized for not yet having arranged for the ***child***'s enrollment in a school that would not likely be permitted until they actually resided in a receiving municipality. While [*10] the father generally appears to disagree with the judge's weighing of the evidence and credibility determinations on the element of "real advantage," it has not been shown that the findings of fact supporting this conclusion were clearly erroneous. As such, we move to the second prong of the Yannas test.

"'If the custodial parent establishes a good, sincere reason for wanting to remove to another jurisdiction, none of the relevant factors becomes controlling in deciding the best interests of the ***child***, but rather they must be considered collectively.' . . . At this second stage '[e]very person, parent and ***child***, has an interest to be considered.'" Wakefield v. Hegarty, 67 Mass. App. Ct. 772, 776, 857 N.E.2d 32 (2006), quoting from Yannas, supra at 711, 712. We look to factors including, but not limited to, changes to the quality of the ***child***'s life, adverse effects resulting from the elimination or curtailment of the ***child***'s relationship with the noncustodial parent, as well as the effect of relocation on the emotional, physical, and developmental needs of the ***child***. Yannas, supra at 711.

While we conclude the judge did not err in finding that relocation would sincerely benefit the mother, we recognize [*11] that findings of fact which support the judge's conclusion that such a move would be in the best interest of the ***children*** are less fully developed. For example, few findings refer to the educational benefits, if any, the ***children*** may obtain in the Ocala, Florida, school system beyond assignment of a special needs advocate working one-on-one with the daughter, and none find there is real advantage in that school system, or in Florida in general, over the current special needs attention provided in Massachusetts. Additionally, no findings speak to the disruption in the ***children***'s relationship with their father; we recognize that that would inevitably be disrupted. However, the judge implicitly found that the father's participation in parenting while the ***children*** were in Massachusetts was sporadic prior to litigation and opportunistic thereafter. Moreover, the father's postremoval visits would be roughly equivalent to those with which he had tentatively agreed after the initial announcement of the mother's intent to relocate and the judge's decision includes a reduction in ***child*** support payments to accommodate his need to travel to Florida. Nevertheless, the responsibility of a trial [*12] judge to determine those living and parenting arrangements that will best benefit the ***child*** are "a classic example of a discretionary decision" (citation omitted). Youmans v. Ramos, 429 Mass. 774, 787, 711 N.E.2d 165 (1999). Furthermore, as several of the judge's findings as to the parties' respective parenting of the ***children*** and their ability to cooperate are clearly based on the judge's crediting the mother's testimony and discrediting the father's, such determinations are entitled to deference on review.

Thus, on our review, the father has not shown the judge to have abused her discretion in deciding to allow the mother to relocate with the ***children*** to Florida and to deny legal custody to the father; the correct standards have been applied and the decision is adequately supported by the evidence and findings.[7]

Judgment affirmed.

By [*14] the Court (Mills, Fecteau & Hanlon, JJ.),

Entered: June 12, 2012.

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[7] The father complains also that the judge's factual findings, filed eight months following issuance of the judgment on the modification permitting the ***removal*** of the ***children***, appear to have been taken verbatim from the mother's proposed findings without any significant change. See Cormier v. Carty, 381 Mass. 234, 237, 408 N.E.2d 860 (1980) ("findings which fail to evidence a 'badge of personal analysis' [*13] by the trial judge must be subjected to stricter scrutiny by an appellate court"). As the mother points out, however, without a motion for findings made prior to final argument, such findings are not required. See Mass.R.Dom.Rel.P. 52(a). This rule does not immunize a judge's findings, once issued, however, and they are subject to review as in any other case. See Rutanen v. Ballard, 424 Mass. 723, 726-727, 678 N.E.2d 133 (1997). While adopting verbatim findings proposed by one party is discouraged, such an occurrence neither renders the findings void nor displaces the "clearly erroneous" standard of appellate review of findings of fact. Abbott v. John Hancock Mut. Life Ins. Co., 18 Mass. App. Ct. 508, 522, 468 N.E.2d 632 (1984), citing Markell v. Sidney B. Pfeifer Foundation, Inc., 9 Mass. App. Ct. 412, 402 N.E.2d 76 (1980).

As concerns the claim of an unreasonable delay between the end of trial and the issuance of judgment, on one hand, and the issuance of findings of fact on the other, the record shows no attempt by the father to bring that issue to the attention of the trial judge nor has prejudice on account of the delay been demonstrated. Compare Adoption of Rhona, 57 Mass. App. Ct. 479, 485-487, 784 N.E.2d 22 (2003).