In re Marriage Hurst

2004 | Cited 0 times | California Court of Appeal | September 29, 2004

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OPINION

Appellant Steven Hurst appeals from an order allowing his ex-wife Dawn Hurst to move to Florida with their two children. Although the trial court did not have the benefit of the Supreme Court's subsequent opinion in In re Marriage of LaMusga (2004) 32 Cal.4th 1072, we will conclude that, under the standards set forth in LaMusga and other "move-away" cases, it did not abuse its discretion. Hence, we will affirm.

I. PROCEDURAL BACKGROUND

Dawn and Steven have two children -- a boy, Steven, Jr. (now age 7), and a girl, Cassidy (now age 5).

A stipulated judgment dissolving the marriage was entered. It awarded Dawn "[p]rimary physical custody"; it awarded Steven "periods of physical custody" every other weekend, every other Monday, and every other holiday.

About a year and a half later, Steven filed an order to show cause, seeking (among other things) equally shared physical custody, primarily on the grounds that the children were now older and that he had moved closer to them.

Dawn filed a responsive declaration, accompanied by her own order to show cause, seeking leave to move to Florida, on the grounds that better jobs were available there and she had many relatives there.

The trial court held an evidentiary hearing at which Dawn, Steven, and two other witnesses testified. Before ruling, it ordered the parties to attend mediation. They complied, but no agreement resulted.

The trial court then granted Dawn's request to move away. It allowed Steven visitation during spring vacation, all but one week of summer vacation, half of winter vacation and for a week every other

Thanksgiving.

It explained: "I . . . reread Burgess[[1]] last night and I reread the case of Edlund and Hales,[[2]] which all deal with the move-away issue. And I'll just tell everyone, I think the Burgess case is a horrible case, but unfortunately it's our Supreme Court speaking and I'm required to follow it. And I think the way I read the cases . . . essentially, there's a presumption the custodial parent has a right to live with the children wherever he or she chooses to live. If I find that the move is whimsical or in bad faith, that mother's intent . . . is for the purpose of frustrating the other parent's contact with the child, that also might lead me to a best interests test, besides where we have a joint custodial situation.

"I think it's clear from the evidence in this case that mother's been the primary custodial parent and that's not to denigrate dad's involvement in these children's lives. . . .

" . . . I don't think mother's reasons are so crazy that I can find that they're whimsical or in bad faith per se, but I think they're very bad for the children.

"I think this is a terrible thing that you're doing, mom, because I think those children are going to lose contact with a big part of the people that love them in their life. And even if I could find it was whimsical or in bad faith, then I have to go on [to] the second issue, and that is, would it be in the children's best interests to change custody, and I'm not sure I could do that.

"[T]hese are little kids . . . . If the kids were 10 or 12 I think the contacts with the community, their friends, and all those kinds of things are probably more important . . . th[a]n the contact with the parents, but I think even if I could find that her move was whimsical or in bad faith, I don't think I could justify changing custody to dad at this point in time.

"I just think it's really unfortunate, mom, that you don't reconsider your decision. I just can't imagine putting these kids on planes to fly back and forth between Florida and California. I think it's going to be as hard on them in the summers when they're spending time with dad as it's going to be for them to be away from dad for long periods of time. But the law, being what it is, and the evidence what it is, I don't really have a choice . . . ."

II. DISCUSSION

Steven contends the trial court erred by allowing Dawn to move to Florida with the children. He argues that it applied an erroneous legal standard; alternatively, he challenges its findings.

"`The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test.' [Citation.]" (Montenegro v. Diaz (2001) 26 Cal.4th 249, 255, quoting In re Marriage of Burgess, supra, 13 Cal.4th at p. 32.) "Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds

of reason, all of the circumstances before it being considered." (In re Marriage of Connolly (1979) 23 Cal.3d 590, 598.)

The trial court found that the parties did not have joint custody; rather, Dawn was the sole custodial parent. Steven does not challenge this finding. In any event, we agree with it. The stipulated judgment gave Dawn "[p]rimary physical custody." The fact that it also purported to give Steven "periods of physical custody" is not dispositive. "[T]he trial court looks at the existing de facto arrangement between the parties to decide whether physical custody is truly joint or whether one parent has sole physical custody with visitation rights accorded the other parent." (In re Marriage of Biallas (1998) 65 Cal.App.4th 755, 759-760 [Fourth Dist., Div. Two].) Steven's "periods of physical custody" -- every other weekend, every other Monday and every other holiday -- were, in substance, "generous visitation rights." (Id. at p. 760.)

Family Code section 7501, subdivision (a) provides: "A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." This has been described as giving the custodial parent a "presumptive right" to take the children when he or she moves. (In re Marriage of Burgess, supra, 13 Cal.4th at p. 32.)

In practice, in most cases, such a move will impair the non-custodial parent's visitation rights. Thus, the non-custodial parent may respond by seeking custody. "Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child." (Montenegro v. Diaz, supra, 26 Cal.4th at p. 255.) "[T]he non-custodial parent bears the initial burden of showing that the proposed relocation of the children's residence would cause detriment to the children, requiring a reevaluation of the children's custody. The likely impact of the proposed move on the non-custodial parent's relationship with the children is a relevant factor in determining whether the move would cause detriment to the children and, when considered in light of all of the relevant factors, may be sufficient to justify a change in custody. If the non-custodial parent makes such an initial showing of detriment, the court must perform the delicate and difficult task of determining whether a change in custody is in the best interests of the children." (In re Marriage of LaMusga, supra, 32 Cal.4th at p. 1078.)

One thing the trial court must consider is whether the custodial parent is moving "to frustrate the non-custodial parent's contact with the minor children. `Conduct by a custodial parent designed to frustrate visitation and communication may be grounds for changing custody.' [Citations.] [S]uch bad faith conduct may be relevant to a determination of what permanent custody arrangement is in the minor children's best interest. [Citations.]" (In re Marriage of Burgess, supra, 13 Cal.4th at p. 36, fn. 6, quoting Burchard v. Garay (1986) 42 Cal.3d 531, 540, fn. 11.) "Even if the custodial parent has legitimate reasons . . . and is not acting simply to frustrate the non-custodial parent's contact with the child, the court still may consider whether one reason for the move is to lessen the child's contact with the non-custodial parent and whether that indicates, when considered in light of all the relevant

factors, that a change in custody would be in the child's best interests." (In re Marriage of LaMusga, supra, 32 Cal.4th at p. 1100, fn. omitted.)

When the trial court ruled, the leading move-away case was In re Marriage of Burgess, supra, 13 Cal.4th 25. There, the Supreme Court held: "[A] parent seeking to relocate does not bear a burden of establishing that the move is `necessary' as a condition of custody." (Id. at pp. 28-29.) The Supreme Court upheld the trial court's finding that it was in the best interest of the children to remain with the custodial parent even if she moved (id. at p. 28), because it was supported by substantial evidence: "[T]he minor children had been in the sole physical custody of the mother for over a year . . . . Although they saw their father regularly, their mother was . . . their primary caretaker. As we have repeatedly emphasized, the paramount need for continuity and stability in custody arrangements -- and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker -- weigh heavily in favor of maintaining ongoing custody arrangements. [Citations.]" (Id. at pp. 32-33.)

The court added: "[A] change of custody is not justified simply because the custodial parent has chosen, for any sound good faith reason, to reside in a different location, but only if, as a result of relocation with that parent, the child will suffer detriment rendering it `"essential or expedient for the welfare of the child that there be a change."' [Citation.]" (In re Marriage of Burgess, supra, 13 Cal.4th at p. 38, quoting In re Marriage of Carney (1979) 24 Cal.3d 725, 730.) Although it acknowledged that "each case must be evaluated on its own unique facts," the court observed that "the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail . . . ." (Id. at p. 39.)

In re Marriage of Campos (2003) 108 Cal.App.4th 839 illustrates one possible misreading of Burgess. There, the trial court opined that " . . . Burgess requires nothing further than a look into whether there's an allegation of bad faith in the move." (Campos, at p. 842.) Thus, it refused to hold an evidentiary hearing on whether the mother's move would be detrimental to the children, because the father was not claiming it was in bad faith. (Ibid.) The appellate court disagreed, holding that this was "too narrow a reading of Burgess." (Ibid.) "[A] non-custodial parent opposing a `move away' order has the right to present evidence on both of the relevant issues: bad faith and detriment to the child. Here, the trial court erred because it refused to consider the second issue, concluding instead that wife's good faith was the only relevant consideration. It is not. As Burgess expressly holds, a change of custody may be ordered in a `move away' case where, as a result of the move, the children will suffer detriment rendering a change of custody essential or expedient for their welfare. [Citations.]" (Id. at p. 843.)

Even Campos, as well as other cases, understood Burgess to mean that a non-custodial parent seeking custody must show that moving with the custodial parent would be so detrimental that a change of custody is "essential" for the welfare of the child. (In re Marriage of Campos, supra, 108 Cal.App.4th at p. 843; see also In re Marriage of Abrams (2003) 105 Cal.App.4th 979, 987-988; In re

Marriage of Lasich (2002) 99 Cal.App.4th 702, 711.)

While this appeal was pending, however, the Supreme Court rejected that as another misreading of Burgess. It held: "[J]ust as a custodial parent does not have to establish that a planned move is `necessary,' neither does the non-custodial parent have to establish that a change of custody is `essential' . . . . " (In re Marriage of LaMusga, supra, 32 Cal.4th at p. 1078.) Rather, the non-custodial parent need only show that a change of custody is in the child's best interest. (Ibid.) Although the child's natural attachment to the custodial parent will still "`weigh heavily in favor of maintaining ongoing custody arrangements'" (id. at p. 1092, quoting In re Marriage of Burgess, supra, 13 Cal.4th at p. 33), the trial court likewise may consider " . . . the detriment to the child's relationship with the non-custodial parent that will be caused by the proposed move . . . ." (Id. at p. 1097.) "The weight to be accorded to such factors must be left to the court's sound discretion." (Id. at p. 1093.)

Steven argues that the trial court here committed virtually the same error as in Campos. As he notes, it found that Dawn's proposed move was "a terrible thing" because it would cause the children "to lose contact with a big part of the people that love them in their life." He concludes that the trial court mistakenly believed that it had to let Dawn move with the children, absent bad faith, even though it found that move was not in their best interest. At a minimum, Steven would argue, it committed the same error as in LaMusga; that is, it mistakenly believed that it had to let Dawn move with the children unless Steven could show it was "essential" that they remain with him.

Actually, the trial court made two distinct best-interest findings. It rank-ordered three possible scenarios: (1) Dawn and the children staying in California, (2) Dawn moving to Florida with the children, and (3) Dawn moving to Florida without the children, who would be placed in Steven's custody. Based on the children's best interest, it found that (1) was better than (2), but (2) was better than (3).

The first finding was irrelevant. The trial court had not been asked to enjoin Dawn from moving to Florida, nor did it have the power to do so. In re Marriage of Fingert (1990) 221 Cal.App.3d 1575 indicated that ordering a parent to move or not to move would violate the constitutional right to travel. (Id. at p. 1581.) Thereafter, in In re Marriage of McGinnis (1992) 7 Cal.App.4th 473, overruled on other grounds in In re Marriage of Burgess, supra, 13 Cal.4th at p. 38, fn. 10, the same court distinguished ordering a parent not to move with a child: "Mother is free to travel inter- or intrastate. The issue is whether she can take the children with her. . . . A trial court's order denying her request to remove the children may `chill' her constitutional right to travel, but only indirectly. [Citation.]" (McGinnis, at p. 480.) Thus, Fingert is now considered to stand for the proposition that, in a move-away case, the issue is not whether the custodial parent will be allowed to move; rather it is whether, if he or she chooses to move, the non-custodial parent should be given custody. (E.g., Ruisi v. Thieriot (1997) 53 Cal.App.4th 1197, 1203; accord, In re Marriage of Edlund & Hales, supra, 66 Cal.App.4th at p. 1473.)

Here, the trial court tried its best -- and for the best of reasons -- to jawbone Dawn into staying in California. That is why it made its irrelevant finding that this would be in the best interest of the children. Nevertheless, its only relevant finding was that, if Dawn did insist on moving to Florida, it would be in the best interest of the children to keep them in her custody, rather than to transfer custody of them to Steven.

Steven argues that the trial court erroneously stated that it had no discretion to consider the children's best interest unless it found that Dawn was acting in bad faith. Assuming, without deciding, that this is a fair interpretation of the trial court's remarks, the error was plainly harmless, because the trial court went on to find, alternatively, that a change of custody would not be in the children's best interest.

As a corollary to his argument that the trial court failed to consider the children's best interest, Steven also argues that it failed to consider any of the factors relevant to the best-interest analysis. "Among the factors that the court ordinarily should consider when deciding whether to modify a custody order in light of the custodial parent's proposal to change the residence of the child are the following: the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody." (In re Marriage of LaMusga, supra, 32 Cal.4th at p. 1101; see also Fam. Code, § 3011.)

Basically, the trial court recognized that "th[e] children are going to lose contact with a big part of the people that love them in their life." It also acknowledged that "putting these kids on planes to fly back and forth between Florida and California" was "going to be . . . hard on them . . . ." It reasoned, however, that Dawn was their "primary custodial parent" and, at their age, their contacts with her were more important than their "contacts with the community, their friends, and all those kinds of things . . . ." Also, it found that Dawn's reasons for moving were not "whimsical or in bad faith . . . ." Thus, it did consider the children's interest in stability and continuity, the distance of the move, the ages of the children, the children's relationship with both parents, the reasons for the move, and the degree of shared custody. The parties had not presented any evidence regarding the wishes of the children; hence, the trial court did not err by failing to consider this.

Steven claims the trial court did not consider the likely detriment to the children's relationship with him. Although it did not cite this factor when it explained its ruling, it clearly did consider it, as shown by this exchange:

"THE COURT: [¶] . . . [¶] [N]either one of you talked about . . . Campos. And I just had this from like a week ago. It basically said that the Court also can consider . . . whether the move would be

detrimental to the children. [¶] . . . [¶]

"[DAWN'S COUNSEL]: I don't think that's a change in law, [y]our Honor."

Steven's counsel agreed, and later added: "[T]he Campos case requires that the Court make findings both with regard to the good faith basis for the move and with regard to whether the move will be detrimental to the children."

To the extent that the trial court failed to state, on the record, that it had considered any other factors, this "does not constitute error and does not indicate that the court failed to properly discharge its duties. [Citation.]" (In re Marriage of LaMusga, supra, 32 Cal.4th at p. 1093.) Although the specific list of factors in LaMusga had not yet been published, they are largely a matter of common sense. The trial court adverted to most of them on its own. There is no reason to suppose it ignored any of them.

Next, Steven argues that, if the trial court did find that the move was in the children's best interest, that finding was an abuse of discretion. To succeed, Steven would have to show that this finding was not supported by substantial evidence. (In re Marriage of Burgess, supra, 13 Cal.4th at p. 32.) He has waived that argument, however, by failing to set forth all of the relevant evidence, as opposed to the evidence favorable to him. (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881.)

Even if not waived, this argument lacks merit. Under Burgess, the trial court could properly rely on the children's attachment to Dawn as their primary custodial parent. Steven vaguely claims to have shown that the move would cause "detriment to the children's relationship with [him] . . . ." Although " . . . the detriment to the child's relationship with the non-custodial parent that will be caused by the proposed move, when considered in light of all the relevant factors, may warrant denying a request to change the child's residence or changing custody[,] . . . [w]e will generally leave it to the superior court to assess that impact in light of the other relevant factors in determining what is in the best interests of the child." (In re Marriage of LaMusga, supra, 32 Cal.4th at p. 1097.) In any event, the trial court dealt with this reasonably by allowing Steven visitation during school vacations, including practically the entire summer.

Finding himself at the last ditch, Steven argues that Dawn's move was, in fact, in bad faith. He claims there was "substantial evidence" that it was intended to frustrate his relationship with the children. This stands the applicable standard of review on its head. The proper test is whether the finding that it was not in bad faith was supported by substantial evidence. Moreover, Steven had the burden of proof; accordingly, "[a]bsent indisputable evidence [of bad faith] -- evidence no reasonable trier of fact could have rejected -- we must . . . affirm the [trial] court's determination." (In re Sheila B. (1993) 19 Cal.App.4th 187, 200.)

Once again, Steven has waived this argument by failing to set forth all of the relevant evidence. And,

once again, it lacks merit. First, Dawn had recently earned a bachelor's degree in management; until then, she had worked as a mammographer. She had been unable to find a medical management job in the Inland Empire, but she had been offered such jobs in Florida. Second, most of her family members lived in Florida; they could act as a support group for her and the children. Third, the Victorville area lacked cultural activities for the children. Finally, Dawn affirmatively testified that she was not trying to deprive Steven of time with the children. This added up to substantial evidence that she was acting in good faith.

We conclude that the trial court did not abuse its discretion by letting Dawn move to Florida with the children.

III. DISPOSITION

The order appealed from is affirmed.

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We concur:

GAUT, J.

KING, J.

1. In re Marriage of Burgess (1996) 13 Cal.4th 25.

2. In re Marriage of Edlund & Hales (1998) 66 Cal.App.4th 1454.