

2008 A-07-1142; HENDERSON v. HENDERSON;

**LINDA M. HENDERSON, NOW KNOWN AS LINDA M. SWEETING,
APPELLANT,**

v.

RANDALL S. HENDERSON, APPELLEE.

No. A-07-1142.

Court of Appeals of Nebraska.

July 29, 2008

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

I. INTRODUCTION

Prior to the current appeal, in *Henderson v. Henderson*, case No. A-04-1318, a memorandum opinion filed October 12, 2005 (*Henderson I*), we were presented with the appeal of Linda M. Henderson, now known as Linda M. Sweeting, from an order of the district court which denied her petition to remove the parties' minor children to Florida. In that appeal, we affirmed the decision of the district court, finding that removing the children from Nebraska would not be in their best interests. Further proceedings were initiated in 2006, which culminated in the district court's order entered on August 28, 2007, denying both Randall S. Henderson's complaint for modification of custody and Linda's cross-complaint seeking permission to remove the minor children to Florida. Linda appeals the denial of her cross-complaint. Because we find no abuse of discretion by the district court, we affirm.

II. BACKGROUND

1. HENDERSON I BACKGROUND

Much of the background of this case is set forth in our previous decision in *Henderson I*. We will discuss the pertinent history of that case as necessary to the resolution of this appeal. Linda and Randall were married on January 6, 1990, and two children were born: Jonathan, born November 21, 1994, and Elisabeth, born April 25, 1997. The parties' marriage was dissolved on May 13, 1998. Custody of the children was granted to Linda, subject to Randall's rights of reasonable and liberal visitation. On June 23, 2004, Linda filed an application to modify the decree, asserting that she had remarried, that both she and her spouse had obtained employment in Florida, and that it would be in the best interests of the children to move to Florida with Linda. In his answer and cross-petition, Randall denied that a move to Florida would be in the children's best interests and, alternatively, sought custody of the children.

On September 2, 2004, a hearing was held before the district court, at which hearing Linda, Randall, and Linda's husband, Mark Sweeting, testified. The evidence showed that Mark had been employed by Binswanger Glass in Omaha as an area manager, earning \$58,000 annually, and in approximately June 2004, he accepted a transfer with Binswanger Glass to Pensacola, Florida. Mark testified that the Binswanger Glass business in the western region (his region in the Omaha position) was suffering from store closures and reduction in staff and that his position in Florida was more stable, with opportunities for advancement and bonuses. Mark's salary in Florida was \$48,000 per year, with a car allowance of \$330 per month, and he expected to earn additional bonuses of up to 33 percent of his salary. Mark and Linda had purchased a home in a nice neighborhood of Pensacola with 2,400 square feet of living space and a built-in pool.

Linda testified that she had talked to Randall about the possible move in May 2004 and that she believed Randall did not object. In June 2004, Randall notified Linda that he had doubts about the move and he requested mediation, which the parties did attempt but which was unsuccessful. At the time of the hearing, Linda and Mark had sold their house in Omaha, Linda and the children were living with Linda's parents in Omaha, and Linda was home schooling the children. Linda testified that she would possibly obtain a teaching position in Pensacola or be a stay-at-home mother. Linda said that Mark's job and their financial situation would allow her to stay home. Linda and Mark both thought that the cost of living in Pensacola would be lower than the cost of living in Omaha and that their financial situation would be more stable. Linda indicated that the home they sold in Omaha and the one they purchased in Pensacola were comparable as were the schools in each location, although she indicated that the curriculum in Florida is stronger.

Linda acknowledged that Randall had regular visitation with the children in Omaha and that their relationship was good. Linda testified that she was willing to do whatever it takes to make sure the children spend as much time as possible with Randall if the children were allowed to move to Florida. Linda indicated that she would foster the children's relationship with Randall and the grandparents in Omaha through e-mails, pictures, telephone calls, and visits many times throughout the year. Linda felt that the move would be good for the family because she could be a full-time, stay-at-home mother, cooking dinner and being available to the children.

The evidence presented by Randall indicated that he was living in his parents' home at the time of trial and was teaching with the Omaha Public School District. Randall opposed having the children move to Florida and testified that he felt the schools in Omaha were better and that the children have good friends in Omaha, as well as both sets of grandparents, with whom the children have a good relationship and regular contact. Randall believed that his relationship with his son was stronger than his relationship with his daughter, as she was a little bit more independent. Randall believed that his relationship and visitation with the children would suffer if they moved to Florida.

On September 30, 2004, the district court entered its order denying Linda's petition. The court found that Linda failed to meet her burden to establish a legitimate reason for the move to Florida and also that the move would not be in the children's best interests. In

our opinion in Henderson I, we affirmed the district court's denial of the request to move the children to Florida. We concluded that Linda did meet her burden of showing a legitimate reason to leave the state because of Mark's career advancement and that the district court abused its discretion in finding to the contrary. However, after analyzing in detail the factors regarding the best interests of the children, we concluded that the district court did not abuse its discretion in finding that Linda had failed to demonstrate that removing the children from the state was in their best interests. Linda's petition for further review was overruled by the Supreme Court.

2. POST-HENDERSON I BACKGROUND

On January 10, 2006, Randall filed a complaint for modification, in which he alleged that a material change in circumstances had occurred such that he should be awarded custody of the children. On January 30, Linda filed an answer denying that custody should be changed, and in a cross-complaint, Linda again alleged that a material change in circumstances had occurred, namely Mark's employment in Florida, and that it would be in the children's best interests to move to Florida with her. In his answer to the cross-complaint, Randall denied that a change in circumstances had occurred since the previous ruling on the issue of removal and asserted that the previous determination is *res judicata*. The parties attempted mediation to develop a parenting plan, pursuant to court order. The court ordered that both parties were prohibited from discussing the pending legal action with the minor children or attempting to influence the children with promises or bribes in regard to the pending action. The court also ordered, pursuant to the stipulation of the parties, that Glenda L. Cottam, Ph.D., be appointed as an independent expert pursuant to Rule 706 to perform a parental assessment and make recommendations to assist the court in determining the best interests of the children. On February 16, 2007, Randall filed a motion to dismiss the cross-complaint on the basis that our previous decision in Henderson I on the issue of removal is *res judicata*. This motion was argued prior to the commencement of the trial and taken under advisement. Trial was held on 4 nonconsecutive days, beginning on March 2 and concluding on May 23.

The evidence at trial consisted of testimony from Randall, Linda, and Mark, as well as from Cottam; Kevin Cahill, Ph.D., a licensed psychologist and certified professional counselor; Frank Black, Linda's father; Marilyn and Donald Henderson, Randall's parents; and Ronald Schmidt, a vocational rehabilitation counselor. Numerous exhibits were offered and received in evidence. The court also examined the children privately in chambers. We will summarize the evidence as it relates to the issue of removal only, as Randall has not asserted any error with respect to the custody determination. And, we will focus only on the time period following the previous trial in September 2004.

Since September 2004, Linda and the children have continued to reside in her parent's home. The children began attending a Catholic school in Bellevue following the previous trial and decision, where they continue to be enrolled; Jonathan is in the sixth grade and Elisabeth is in the fourth grade. Linda has returned to work as a teacher at the same school, where she earns approximately \$24,000 per year. Randall has continued to reside in his parent's home and to teach at a junior high in Omaha. Randall also performs on occasion with the Omaha Symphony Orchestra. The children each have their own rooms

at the respective grandparents' homes, and the children continue to enjoy a close relationship with each set of grandparents. The children have continued to visit with Randall every other weekend, together with each Wednesday evening, additional time in the summer, and alternating holidays. Mark has continued to reside and work in Florida. Mark's 2006 earnings documents showed his regular salary of approximately \$60,000, together with a \$3,300 annual car allowance and a bonus of \$13,500.

The evidence shows the children to be healthy, well-adjusted children. Jonathan is a bright child, earning very good grades and honors at school. His activities include, at various times, martial arts, Boy Scouts, soccer, basketball, and drum lessons. There is some indication that Elisabeth previously experienced problems in reading and comprehension which Linda has addressed through the assistance of Sylvan Learning Center. Elisabeth is currently receiving very good grades in school, has not been identified with a learning disability, and has scored over the 50th percentile in the areas of reading and language on national standardized tests. Elisabeth is interested in dance, singing, and art. Both parents participate in the children's various activities and help them with their homework as needed. The children have a close relationship with both sets of grandparents and enjoy various activities with them. The children have friends both in Omaha and in Florida.

With regard to visitation with Randall, the record shows that the children enjoy spending time with him and that they have a very close relationship. Randall's relationship with Elisabeth has become stronger since the last proceeding. Randall does many things with the children when they are with him, including bike riding, going to movies, playing board and video games, and musical activities. There is much physical affection between Randall and the children. The record does not indicate any real problems in the transition between parents for visitation purposes. Randall testified that if the children are allowed to move to Florida, his ability to have regular contact with the children would be eliminated and he would not be able to attend the normal, daily activities of the children. Randall fears that he would not be able to maintain the physical closeness he has to the children now and that this would cause their relationship to suffer.

The record indicates that the parties have negotiated various parenting plans contingent upon the court's ruling regarding custody and removal. The plan in the event the children are allowed to move to Florida includes Linda's agreement to pay for transportation for the children to visit in Nebraska four times a year and for Randall to visit the children in Florida twice a year. The children would spend all but 3 weeks in the summer with Randall, every Thanksgiving, and part of each Christmas holiday. While Randall acknowledges that this time could add up to more days overall than the visitation he now has, he believes that the lack of regular contact during the school year would be detrimental to his relationship with the children.

Cahill testified that he was initially contacted by Linda to provide therapy to Jonathan as a result of his anxiety over issues relating to relocation. Cahill had several visits with both children, and he talked to both Linda and Randall. Cahill testified that Jonathan has a strong and loving bond with his father but is more emotionally attached to his mother.

Cahill described both children as healthy and observed that the children have a warm, caring, relaxed relationship with each parent. Cahill agreed that the qualitative aspect of visitation is of greater importance than the quantity and that children benefit from frequent, regular, face-to-face contact.

Cottam did psychological assessments on both parents and both children. We need not discuss these assessments in detail, since custody is not at issue at this juncture. Cottam described both Linda and Randall as being very nice people, with above average parenting abilities, and she described the children as being "great kids." Cottam indicated that the children love both parents and are very closely bonded to both parents. Cottam expresses concern over what she described as the "disturbing" amount of information the children have shared with her regarding the current litigation and financial issues. Cottam believes that Jonathan feels pressured to move in order to please his mother. Cottam believes that Jonathan's ongoing relationship with his father is extremely important to Jonathan's mental health. Cottam testified that moving to Florida would be detrimental to the children's relationships with their father and their grandparents due to the loss of day-to-day contact. Cottam opined that it would be in the children's best interests to continue to reside with Linda in Nebraska. The best case scenario, according to Cottam, would be for Mark to return and find a "decent" job in Omaha. Although Cottam indicated that the next best option would be to have as much contact with Randall as possible if the children moved to Florida, Cottam did not support removal from Nebraska. Cottam acknowledged that it is stressful for Linda and Mark to live separately, which stress could "trickle down" to the children. However, Cottam indicated that she was surprised and disappointed that Mark had not made any attempts to find work in Omaha since the last court proceeding.

Schmidt evaluated Mark's employability in Omaha. Schmidt considered the history provided by Mark concerning his involvement in the glass industry and Mark's educational background and age. Schmidt conducted labor market research. Schmidt concluded that Mark could expect to earn between \$20,000 to \$25,000 in the Omaha market. Schmidt indicated that it was not vocationally reasonable for Mark to expect to find employment in Omaha with comparable salary and benefits to his present position.

The record reveals that Linda and Mark did not view Mark's return to Omaha as an option and that if the court denied Linda's request for removal, they would continue to live separately, with Linda possibly finding an apartment for her and the children.

On August 28, 2007, the district court entered its order, holding that Randall's complaint to modify custody should be denied, Randall's motion to dismiss Linda's cross-complaint should be "affirmed," and Linda's motion for removal should be denied. The court then recited the applicable law concerning removal cases. The district court noted this court previously found that Linda had a legitimate reason to request removal of the children to Florida and that this factor has been previously adjudicated and weighed in Linda's favor. With regard to the best interests factors, the court found that there had been no material change in circumstances since the previous removal litigation in the following factors: each parent's motives for seeking or opposing the move; the emotional,

physical, and developmental needs of the children; the degree to which housing or living conditions will be improved; the existence of educational advantages; the quality of the relationship between the children and each parent; the strength of the children's ties to the present community and extended family; the likelihood that allowing or denying the move would antagonize hostilities between the parties; and the impact of the move on contact between Randall and the children.

III. ASSIGNMENT OF ERROR

Linda assigns error to the district court's denial of her request to relocate with the children to Florida and in finding that relocation would not be in their best interests.

IV. STANDARD OF REVIEW

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. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *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.*

V. ANALYSIS

The relevant test to be applied in cases where a custodial parent seeks court permission to remove minor children from the state has been set forth by the Nebraska Supreme Court on numerous occasions. See, *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *McLaughlin*, *supra*; *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). 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. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Id.* Against this backdrop is the requirement in this case that Linda must prove that a material change in circumstances has occurred since the entry of the last order concerning removal. See *Gartner v. Hume*, 12 Neb. App. 741, 686 N.W.2d 58 (2004).

1. LEGITIMATE REASON TO LEAVE STATE

As we recognized in *Henderson I*, "a career enhancement for a custodial parent's spouse is a legitimate reason for removal when the career change occurred after a remarriage." *McLaughlin*, 264 Neb. at 240, 647 N.W.2d at 586. The evidence in the present proceeding confirms that Mark's employment in Florida is stable and more lucrative than was his position in Nebraska. The district court's finding that no change in circumstances relative to this factor had occurred and that this factor weighs in favor of the removal is not an abuse of discretion.

2. BEST INTERESTS

Linda alleges that the district court abused its discretion when it found that removing the children to Florida would not be in their 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, supra*.

(a) Each Parent's Motives

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 a removal in an effort to frustrate or manipulate the other party. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). The evidence in the present case indicates that Randall is an involved noncustodial father who has regularly exercised his visitation. Linda seeks removal in order to live with her husband in Florida where he has experienced career enhancement. These are the same facts which we found to be legitimate motives on the part of each parent in *Henderson I* wherein we concluded that this factor did not favor either parent's position. The district court's finding that neither party is seeking to frustrate the rights of the other party or otherwise acting in bad faith and that there has been no material change in circumstances with respect to this factor is not an abuse of discretion.

(b) 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 child and custodial parent. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child 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. *McLaughlin, supra*. This list should not be misconstrued as setting out a hierarchy of factors. *Id.* Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id.*

(i) Emotional, Physical, and Developmental Needs

The district court found that there is no material change of circumstances since entry of the prior order as both parties are capable of providing for the emotional, physical, and developmental needs of the minor children. The court found that this factor did not weigh in favor of either Linda or Randall. Linda argues that the prolonged separation from Mark has a negative impact on her which, in turn, negatively affects the emotional health of the children. Our review of the record indicates that both children are healthy, well-adjusted

children, who have perhaps experienced the stress which normally attends this type of prolonged litigation. The evidence, including the opinions and testimony of the expert witnesses, shows that both parents are genuinely concerned about the children's needs and that there is no evidence to suggest either party is incapable of or deficient in any way in providing for the children's emotional, physical, and developmental needs. As such, this consideration is equally balanced and does not weigh in favor of removal, and the district court did not abuse its discretion in so finding.

(ii) Children's Opinion or Preference

The district court found that this factor weighs in favor of allowing the move as Jonathan, age 12, indicates a preference to live in Florida. In custody determinations, the desires and wishes of the minor child if of an age of comprehension are entitled to consideration, although they are not controlling. See *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). While our review of the record reveals that some of Jonathan's comments suggest information derived from Linda regarding Mark's employment and budget concerns, we cannot say that the district court abused its discretion in its finding concerning this factor.

(iii) Enhancement of Income or Employment

The district court found that Mark has a more stable and lucrative position in Florida than he had in Nebraska, as we determined in *Henderson I*. The court found that Mark's income is greater such as to allow Linda to be a stay-at-home mother. The court concluded that this factor weighs in favor of Linda's request for removal. As noted by Randall, however, this increase in Mark's income was contemplated by Mark and Linda at the time of the previous removal request. Nevertheless, Mark's income at the present time is greater than his previous income in Nebraska, which was not true at the time of our previous decision in *Henderson I*. The district court did not abuse its discretion in finding that this factor weighed in favor of removal.

(iv) Housing or Living Conditions

The district court found that there has been no material change in circumstances in the housing situations for Linda, Mark, or Randall and that this factor weighs against removal. Each of these parties were residing in the same house as at the time of *Henderson I*. Although Linda testified that if she is not allowed to move the children to Florida, she will need to find a residence away from her parent's home, she had not done so since our ruling in *Henderson I*. The district court did not abuse its discretion in its finding on this factor.

(v) Educational Advantages

The district court found that there has been no material change in circumstances because the children attend a Catholic school in Nebraska and would attend a Catholic school in Florida and that this factor weighs against Linda's request for removal. Our de novo review reveals that while Linda presented evidence to suggest that Elisabeth would receive greater services for a reading disability in Florida, Randall presented evidence to suggest that Elisabeth is not presently suffering from any reading disability and that the schools and services in Omaha are more than adequate. The evidence shows that both

children are performing very well in school. We conclude that the district court did not abuse its discretion in finding that this factor weighs against removal.

(vi) Quality of Relationship Between Children and Parents

The district court found that there has been no material change in circumstances, that Linda has been the children's primary caregiver, and that both parents have a good relationship with the children and are fit and proper persons to have custody. The court found that this factor is neutral as to Linda's request for removal. While the children clearly have a strong bond with Linda as the primary custodial parent, it is equally clear that they have a very positive relationship with Randall which will suffer, at least to the extent of the frequency and type of contact with each other. We cannot say that the district court abused its discretion in finding that this factor is neutral.

(vii) Ties to Community and Extended Family

The district court found that there has been no material change in circumstances as the children continue to have significant ties to the Omaha community through family, extended family, friends, and activities. The court again found that this factor weighs against Linda's request for removal. The record confirms these findings, and the district court did not abuse its discretion in this regard.

(viii) Hostilities Between Parties

The district court found that there has been no material change in circumstances and no new evidence to suggest that the parties would be unable to continue to work together for the good of the children. The court concluded that this factor does not weigh in favor of either party. Our review of the record shows that while the parties have experienced some infrequent disagreements and communication problems, they have been generally successful in working together for the benefit of the children, which has held true even during these proceedings. We cannot say that the district court abused its discretion in finding that this factor does not weigh in favor of either party.

(c) Conclusion on Quality of Life

Our de novo review of the record leads us to conclude that the quality of life considerations do not weigh in favor of allowing Linda to remove the children from Nebraska.

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

The district court found that there has been no material change in circumstances and, as had been previously found, removal would have a serious negative impact on Randall's relationship with the children as he would be unable to exercise weekly parenting and parenting would have to be scheduled in advance. The court found that this factor weighs against removal. Despite Linda's evidence that she would shoulder financial responsibility for most of the visitation transportation and would provide technology for video camera computer messaging capabilities, as well as regular telephone communication, it is clear that Randall believes that these "substitutes" for regular contact are not sufficient to provide satisfactory contact with his children. This conclusion is also

supported by the expert testimony. We cannot say that the district court abused its discretion in finding that this factor weighs against removal.

(e) Conclusion on Best Interests

The record demonstrates sufficient support for the district court's conclusion that it is not in the children's best interests to be removed from Nebraska to Florida. None of the factors to be considered in evaluating the children's best interests weighs in favor of allowing removal except Jonathan's preference and Mark's increase in income, as noted above. The district court's finding on best interests did not constitute an abuse of discretion.

VI. CONCLUSION

We find that the district court did not abuse its discretion in denying Linda's request to remove the children from Nebraska to Florida. We recognize the difficulty inherent in removal cases, and this case is no exception. However, because Linda and Randall are both excellent parents who care deeply for their children, we are confident that they will continue to work together to provide for the best interests of the children. Randall does not challenge the district court's denial of his request for custody. Therefore, the district court's order is affirmed in all respects.

AFFIRMED.