2015 IL App (4th) 150064-U

NO. 4-15-0064

FILED
June 19, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: E.C., a Minor,	)	Appeal from
REBECCA RODGERS,	)	Circuit Court of
Petitioner-Appellee,	)	DeWitt County
v.	)	No. 14F12
MATTHEW CHAPMAN,	)	
Respondent-Appellant.	)	Honorable
	)	William Hugh Finson,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in awarding petitioner custody of the parties' minor child and setting the visitation schedule for respondent, and any error resulting from the court's admission of the parties' conduct during a settlement meeting was harmless.

¶ 2 In April 2014, petitioner, Rebecca Rodgers, filed a petition to confirm a father/child relationship between her daughter, E.C. (born in 2013), and respondent, Matthew Chapman, and to establish child support, custody, and visitation. In December 2014, the DeWitt County circuit court entered its judgment, awarding petitioner sole custody of E.C., establishing respondent's visitation schedule, and ordering respondent to pay weekly child support of $75.

¶ 3 Respondent appeals, asserting the trial court erred by (1) awarding custody of E.C. to petitioner, (2) allowing evidence of respondent's and petitioner's conduct during settlement negotiations, and (3) not providing enough parenting time between respondent and

E.C. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The parties were never married. They lived together during petitioner's pregnancy with E.C. and separated in early April 2014, when E.C. was around four months old. In her April 2014 petition to establish a parent/child relationship, petitioner sought custody of E.C. Respondent filed an answer to the petition, acknowledging he was the father of E.C. and seeking custody of her. Respondent also filed a petition for temporary custody of E.C. Thereafter, petitioner filed her petition for temporary custody of E.C.

¶ 6 On April 16, 2014, the trial court appointed a mediator for this case. The parties were ordered to contact the mediator to arrange a meeting. The court's May 14, 2014, docket entry notes the parties agreed an impediment to mediation existed. Thus, the court vacated the mediator's appointment and appointed a guardian *ad litem*.

¶ 7 On June 19, 2014, the guardian *ad litem* filed his first report. The report noted petitioner resided with her father, worked part-time as a hairdresser, loved the child, and provided excellent care for her. As to respondent, he owned his own home, was an apprentice plumber, loved the child, and provided excellent care for her. Respondent acknowledged having a prior court supervision for driving under the influence but noted he had not been drunk since petitioner became pregnant with E.C. because he realized his alcohol abuse was not conducive to being a good parent. The parties agreed on having respondent's cousin babysit E.C. when needed, and they had both spent considerable time with E.C. The guardian *ad litem* noted both parents were "decent parents," who were angry at each other at the moment. He emphasized both parties needed to work on lessening their anger and distrust of the other party.

¶ 8 On June 20, 2014, the parties presented an agreement as to temporary matters, and the court found the agreement was in E.C.'s best interest. Under the temporary order, petitioner received temporary custody of E.C., with respondent having visitation every other weekend (Friday at 5 p.m. to Sunday at 5 p.m.); every Wednesday from 5 p.m. until Thursday evening (pick-up time depended on whether respondent had weekend visitation the coming weekend); and 5 p.m. on Monday until 6 p.m. on Tuesday for the weeks he did not have weekend visitation. The order also gave respondent visitation from "8:30 a.m. until 12:30 a.m. [*sic*] on the Saturdays" petitioner worked. "In the event that the petitioner no longer works Saturday mornings, this four hour time period shall be granted during some other day upon further negotiation of the parties." On September 16, 2014, respondent filed a petition for indirect civil contempt, asserting petitioner had stopped working and then failed to negotiate in good faith another parenting time instead of Saturday mornings.

¶ 9 The November 12, 2014, docket entry states the following: "[Guardian *ad litem*] ordered to have updated [guardian *ad litem*] report on file by Nov. 18th. Parties ordered to meet personally with [guardian *ad litem*] to assist him in the preparation of the updated report." On November 15, 2014, the guardian *ad litem* conducted settlement negotiations with the parties. On November 18, 2014, the guardian *ad litem* filed his second report. This report noted changes that had occurred since the first report, which included the following: petitioner was no longer working; petitioner's anger had subsided; and respondent continued to exhibit anger at petitioner, stating petitioner was keeping E.C. from him. The second report also described the guardian *ad litem*'s two-hour settlement meeting with the parties. He noted the parties' discussion at first was very tense and too broad. When they broke things down, they came to an agreement on weekends, holidays, vacation time, and that the other parent should have the child if a parent

could not exercise their time with the child. The meeting ended when they could not reach an agreement about weeknights. The guardian *ad litem* noted respondent said more than once, " 'See, she doesn't want me to see my child.' " Additionally, he noted that, at the meeting, petitioner was seeking a long-term resolution with the understanding respondent should have significant time with E.C. and respondent's demeanor was not conducive to effectuating a resolution.

¶ 10 On November 24, 2014, the trial court commenced a two-day hearing on custody, visitation, and the contempt petition. The parties, the guardian *ad litem*, and respondent's mother, Sherry Chapman, testified. The petitioner also presented E.C.'s doctor's reports. Respondent presented (1) numerous photographs of E.C. with him and his family; (2) photographs of a Mother's Day card respondent gave petitioner from E.C.; (3) a health insurance card for E.C.; (4) a missed appointment card from the Women, Infants, and Children program; (5) text messages between the parties; (6) an invoice for flowers respondent sent petitioner; and (7) a page from petitioner's deposition. Additionally, the court admitted the guardian *ad litem*'s two reports.

¶ 11 Petitioner testified she lived with her father in Clinton, Illinois, and her mother lived in Maroa, Illinois. She is very close to her sister Audra, who lives in Tennessee, and her half-sister, Candace. Petitioner had other half-siblings to whom she was not close due to a disagreement in lifestyle. Petitioner was a cosmetologist and had worked part-time. Shortly after the temporary order in this case, respondent's cousin could no longer babysit E.C. Petitioner thought about day care, but after talking with her father, she decided not to work and allowed her father to support her until she had a firm schedule for her time with E.C.

¶ 12 Petitioner admitted she was very upset and hurt after the parties' relationship terminated. She apologized for doing and saying things she should not have done and said. Petitioner said she was a changed person after talking to her father and Candace about their lack of a relationship when Candace was young. She heard the pain in Candace's voice as she talked about wondering where her father was, wondering if he wanted her, and wishing he could help her learn to ride a bicycle. Petitioner realized E.C. needed her father and his extended family. She loves E.C. unconditionally and wants to be a better person because of her.

¶ 13 Petitioner also testified E.C. was a healthy child but was still not sleeping through the night. Sometimes, she got up four or five times a night. Petitioner had talked to E.C.'s pediatrician about it, and it was not normal. Petitioner opined it was due to E.C. not having a consistent schedule. She explained it was the weeknight visitation that was creating the issue because respondent dropped E.C. off at her house around 6 a.m., which meant E.C. was getting up between 5 and 5:30 a.m. Petitioner put E.C. to bed at 8 p.m., and she usually awoke around 7 a.m. Petitioner felt it is very important for E.C. to stay on a schedule, regardless of where she stays.

¶ 14 Petitioner's counsel asked petitioner about the visitation schedules discussed at the meeting with the guardian *ad litem*. Respondent's counsel objected, arguing settlement negotiations were not admissible. The trial court overruled the objection, noting respondent's contempt petition was based in part on the allegation petitioner was not negotiating in good faith. Petitioner stated she would have agreed to respondent having visitation every other weekend and, in a two-week schedule, having E.C. overnight twice during the first week and once during the second week.

¶ 15 On cross-examination, petitioner admitted throwing respondent's cellular telephone when she found him talking to another girl. She acknowledged she and respondent often could not agree on visitation times. Petitioner also admitted sending respondent text messages using foul language. Petitioner denied still being emotional about the parties' relationship ending. She also denied every being physically aggressive toward respondent.

¶ 16 Additionally, petitioner testified more than one of the parties' visitation exchanges had been confrontational. However, they had calmed down in the recent past. For a month or two, petitioner had been recording the exchanges.

¶ 17 The guardian *ad litem* testified both parties were emotional at times but both wanted to resolve the situation. The parties did make movement toward an agreement but were not able to reach an agreement on everything. When petitioner's counsel asked about what petitioner was doing to try to reach an agreement at the settlement meeting, respondent's counsel again objected. The trial court overruled the objection but confined the testimony to the parties' demeanor and behavior. The guardian *ad litem* testified petitioner was seeking an agreement. He described respondent's behavior as immature. Several times during the settlement meeting, respondent stated, " 'see Dick, she doesn't want me to see my child.' " The guardian *ad litem* described respondent as having "a chip on his shoulder." The guardian *ad litem* opined that, at the time of the hearing, he would favor petitioner having custody of E.C., with respondent having very liberal visitation, which he rephrased as "really significant visitation." He also found at that time, petitioner was the best person to foster a relationship between the parties based on his observations and reviewing the evidence in the case.

¶ 18 Respondent testified that, in 2006, he received his certificate in plumbing and had been working in that field ever since. He had owned the home he lives in for five or six years.

Respondent was very close to his mother, who was with him during all visitation exchanges. E.C. was close to respondent's mother and had a good relationship with his father. E.C. also spent time with respondent's grandparents, sister, and nieces. From January 5, 2014, through early March 2014, respondent was laid off and cared for E.C. while petitioner worked. During that time, he developed a "very good bond" with E.C.

¶ 19 After the parties' relationship ended, petitioner first said respondent could only see E.C. at her father's house and under supervision. He also testified to her frequently calling him disgusting and not wanting to give him more visitation time. Petitioner did not allow him to see E.C. on Easter and did not give him any visitation time on Memorial Day. Respondent also noted petitioner initially denied him visitation on Father's Day. He wanted E.C. from 9 a.m. to 5 p.m. that day, but petitioner eventually let him have E.C. from 1 to 5 p.m. He did get visitation on July 4 but was not allowed to see E.C. on Halloween. Respondent testified that, in general, petitioner was not cooperative in setting up visitation times with him. According to respondent, she frequently threatened to call the police on him about returning E.C. on time.

¶ 20 Respondent further testified about him switching visitation weekends so petitioner could have E.C. at petitioner's sister's baby shower. He also noted he allowed petitioner to have E.C. on Mother's Day when it was his weekend. Additionally, respondent got petitioner a card for Mother's Day from E.C. He also noted he offered to pay petitioner's father for some of petitioner's and E.C.'s expenses, but her father never took respondent up on his offer. Respondent also lets petitioner know when E.C. says new words for him and sends petitioner pictures of E.C. Additionally, respondent offered numerous times to apologize and to try to work out the parties' differences, and petitioner would refuse.

¶ 21 Respondent also testified about the May 25, 2014, visitation exchange. Petitioner marched straight toward him and tried to reach across him to grab E.C.'s carrier. Respondent blocked her arm with his left hand. Respondent described petitioner's demeanor as "very angry" and her reach as "very aggressive." Another issue arose during the July 21, 2014, visitation exchange. Petitioner was angry because she had to pick up E.C. at respondent's home. When petitioner arrived, she tried to reach into his house and grab E.C.'s carrier. While petitioner was putting E.C. into her car, she noticed a piece of E.C.'s clothing in the carrier that belonged to respondent. Petitioner threw the piece of clothing on the ground. According to respondent, petitioner was cursing at him during the entire incident.

¶ 22 Respondent further testified the parties share responsibility for caring for E.C. when she is sick or needs to go to the doctor. Respondent testified he took E.C. to her nine-month check up, and when he brought E.C. to petitioner's home, he tried to talk to her about the appointment, and she refused. Respondent also mentioned petitioner did not show up for the mediation appointment early on in this case. Respondent requested the parties share parenting time equally.

¶ 23 Sherry testified she is with respondent on visitation exchanges. She was present at the July 21 exchange and heard petitioner say, "give me the f***king kid," and curse at respondent. Sherry also witnessed petitioner throw the piece of clothing. Sherry further testified petitioner often does not respond to respondent's greeting and refuses to talk to him. According to Sherry, petitioner also either shuts the door or walks away when respondent is giving her an update on E.C.'s activities. At a November 2014 visitation exchange, petitioner did not allow respondent to say goodbye to E.C. Sherry also testified she gets along with petitioner and petitioner's demeanor is totally different when Sherry picks up E.C. without respondent.

Visitation exchanges between her and petitioner have been okay. Additionally, Sherry testified she had never observed any physical altercations between the parties. The parties' verbal altercations were "fairly quick."

¶ 24 In rebuttal, petitioner testified that, during the May 2014 visitation exchange, respondent slapped her hand away, and she filed a police report. She limited her verbal communication with respondent to avoid fighting or arguing in front of E.C.

¶ 25 At the conclusion of the hearing, the trial court first denied and discharged respondent's contempt petition. It also made oral findings and awarded custody of E.C. to petitioner, with respondent having visitation every other weekend and overnight every Wednesday. During its oral findings, the trial court did note it did not believe the problems that petitioner had would continue and pointed out an example of that was the guardian *ad litem*'s testimony about the settlement meeting. Respondent also received holiday visitation and two one-week periods over the summer. The court noted a written order would follow, and petitioner's attorney volunteered to draft it.

¶ 26 On December 18, 2014, respondent filed a premature motion to reconsider. See *Archer Daniels Midland Co. v. Barth*, 103 Ill. 2d 536, 538-39, 470 N.E.2d 290, 291-92 (1984) (finding that, when a court requires a signed written judgment when pronouncing its judgment, the judgment is not final and cannot by attacked by a motion to reconsider until a signed judgment is filed). On December 29, 2014, the trial court filed its written judgment. On January 13, 2015, the trial court did hear and deny respondent's premature motion to reconsider. Additionally, docket entries for both December 23, 2014, and January 13, 2015, note the pending matter of the income-tax exemption for the child.

¶ 27 On January 22, 2015, respondent filed his notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015) and within 30 days of the court's December 29, 2014, order. See *Barth*, 103 Ill. 2d at 539, 470 N.E.2d at 292 (noting an untimely postjudgment motion does not extend the time for filing a notice of appeal). Accordingly, we have jurisdiction under Illinois Supreme Court Rule 304(b)(6) (eff. Feb. 26, 2010).

¶ 28 II. ANALYSIS

¶ 29 A. Custody

¶ 30 Respondent first asserts the trial court's award of custody to petitioner was against the manifest weight of the evidence. Petitioner disagrees.

¶ 31 In determining custody under the Illinois Parentage Act of 1984 (Parentage Act) (750 ILCS 45/1 *et seq.* (West 2012)), courts are to apply the relevant provisions contained in the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/101 *et seq.* (West 2012)). See 750 ILCS 45/14(a)(1) (West 2012). Section 602(a) of the Dissolution Act (750 ILCS 5/602(a) (West 2012)) requires courts to determine custody in accordance with the children's best interest by considering all relevant factors, including the 10 factors listed in the section. Additionally, we note "[c]ases involving custody rights of parents are *sui generis*, and each of them must be decided in accordance with the particular facts of each case." *In re Powers*, 94 Ill. App. 3d 646, 648, 418 N.E.2d 1145, 1147 (1981).

¶ 32 On appeal, we give great deference to the trial court's best-interest findings because that court had a better position than we do "to 'observe the temperaments and personalities of the parties and assess the credibility of witnesses.' " *In re Marriage of Marsh*, 343 Ill. App. 3d 1235, 1239-40, 799 N.E.2d 1037, 1041 (2003) (quoting *In re Marriage of*

Stopher, 328 Ill. App. 3d 1037, 1041, 767 N.E.2d 925, 928 (2002)). Thus, a reviewing court will not reverse a trial court's custody determination unless it (1) is against the manifest weight of the evidence, (2) is manifestly unjust, or (3) results from a clear abuse of discretion. *Marsh*, 343 Ill. App. 3d at 1240, 799 N.E.2d at 1041. Moreover, this court will not substitute its judgment for the trial court's and will find an abuse of discretion only when "the trial court 'acted arbitrarily without conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial injustice resulted.' " *Marsh*, 343 Ill. App. 3d at 1240, 799 N.E.2d at 1041 (quoting *In re Marriage of Suriano*, 324 Ill. App. 3d 839, 846, 756 N.E.2d 382, 388 (2001)). "A judgment is against the manifest weight of the evidence if an opposite conclusion is apparent or if the findings appear to be unreasonable, arbitrary, or not based upon the evidence." *In re A.S.*, 394 Ill. App. 3d 204, 214, 916 N.E.2d 123, 132 (2009).

¶ 33 Respondent notes the trial court recognized two visitation exchanges in which petitioner got out of hand, and he points out another time where she smashed respondent's cellular telephone. Respondent also points out petitioner's interference with his visitation with E.C., which the court also acknowledged. However, the court observed petitioner was very upset after the parties' relationship ended and admitted to making bad decisions. It found she had changed her ways after talking with her own father and half-sister about the importance of a child seeing her father. The court found "quite credible" petitioner's testimony she now realizes E.C. needs to have both parents in her life. Respondent contends petitioner's assertions she had changed were not credible. He also contends the court's finding E.C. had spent the bulk of her life with petitioner was also erroneous.

¶ 34 This court may not substitute its judgment for the trial court's on the matters of

witness credibility and the weight to be given their testimony. *In re Marriage of Gordon*, 233 Ill. App. 3d 617, 657, 599 N.E.2d 1151, 1178 (1992). However, the rule that a reviewing court is precluded from reviewing the witnesses' credibility is not absolute. *Gordon*, 233 Ill. App. 3d at 657, 599 N.E.2d at 1178. "The trier of fact must, as a matter of law, reject testimony which is so inherently improbable as to be contrary to the common experience of mankind." *Gordon*, 233 Ill. App. 3d at 657-58, 599 N.E.2d at 1178.

¶ 35 In this case, petitioner's testimony about making bad choices due to her being very upset after the parties' relationship ended and later changing her ways after close relatives talked with her is a common human experience and reasonable. Thus, we do not disturb the trial court's credibility finding as to petitioner. Moreover, the trial court's decision to give little weight to petitioner's prior acts due to her changed perspective and the court's belief the problems petitioner had would not continue was within the court's role as the trier of fact. Also, as the trial court noted, the parties not agreeing on make-up visitation was not indicative of either party acting in bad faith. The parties could simply not agree with each other. Additionally, we note that, while the court mentioned the physical-violence-or-threat-of-physical-violence and the ongoing-or-repeated-abuse factors contained in section 602(a) (750 ILCS 5/602(a)(6), (7) (West 2012)), the court only found petitioner "got a little out of hand" at two custody exchanges. It never expressly found petitioner was abusive or violent. The court definitely did not find petitioner's environment potentially harmful to E.C. As to the court's finding E.C. had spent the bulk of her life with petitioner, the facts showed petitioner had been a stay-at-home mother since July 2014, about five months, and had only worked 3 1/2 days a week before then. Thus, that finding was not against the manifest weight of the evidence.

¶ 36 In this case, the evidence showed both parties were good parents and loved E.C.

very much. The parties lived in the same town and had extended family nearby. While petitioner had issues after the parties' relationship ended, the court believed she had changed her ways and those issues were resolved. Respondent's arguments to the contrary essentially ask us to substitute our credibility determination for that of the trial court, which we will not do. Accordingly, we find the trial court's award of custody to petitioner was not against the manifest weight of the evidence, manifestly unjust, or the result of a clear abuse of discretion.

¶ 37 B. Admissibility of Settlement Negotiations

¶ 38 Respondent also contends the trial court erred by allowing testimony about his demeanor at the settlement conference with the guardian *ad litem* because such evidence is inadmissible under Illinois Rule of Evidence 408 (eff. Jan. 1, 2011). Petitioner asserts the testimony was proper because trial courts have broad discretion in admitting relevant evidence in determining custody. See *Johnston v. Weil*, 241 Ill. 2d 169, 180, 946 N.E.2d 329, 337 (2011). We need not address the merits of this issue because we find any error to be harmless. See *In re Marriage of Smith*, 2013 IL App (5th) 130349, ¶ 14, 3 N.E.3d 281. The trial court found "quite credible" petitioner's testimony about her changed perspective and behavior. Thus, its reference to the guardian *ad litem*'s testimony about petitioner making very reasonable concessions *as an example* supporting its belief petitioner's past problems will not continue does not indicate the court's judgment was based on that testimony. It was just an example supporting the court's finding based on other evidence presented at trial.

¶ 39 C. Visitation

¶ 40 Respondent also asserts the trial court erred by not awarding him more visitation time with E.C. Petitioner asserts the visitation award was proper. "On review, a trial court's decision regarding visitation will not be disturbed absent an abuse of discretion." *Wittendorf v.*

Worthington, 2012 IL App (4th) 120525, ¶ 50, 980 N.E.2d 754. "A trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court." *In re Marriage of Schneider*, 214 Ill. 2d 152, 173, 824 N.E.2d 177, 189 (2005).

¶ 41 Section 607(a) of the Dissolution Act (750 ILCS 5/607(a) (West 2012)) is the relevant standard to be considered regardless of whether visitation is sought under the Parentage Act or the Dissolution Act. *Wittendorf*, 2012 IL App (4th) 120525, ¶ 57, 980 N.E.2d 754. That section provides, in pertinent part, the following: "[a] parent not granted custody of the child is entitled to reasonable visitation rights ***." 750 ILCS 5/607(a) (West 2012). Illinois courts favor liberal visitation for the noncustodial parent because a child should have a healthy, close relationship with both parents. *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 877, 629 N.E.2d 812, 815 (1994). Accordingly, the trial court has broad discretion in determining the noncustodial parent's visitation rights, with the child's best interest as the primary concern. *Dobey*, 258 Ill. App. 3d at 877, 629 N.E.2d at 815.

¶ 42 In this case, the trial court awarded respondent visitation of every other weekend and one overnight per week. In reaching its decision, the court found it was important for E.C. to have consistency and stability and not be shuffled back and forth too often. It also noted it was tailoring visitation based on what was in E.C.'s best interest now, as a one year old. Respondent notes the guardian *ad litem* recommended two overnights per week, and petitioner testified reasonable visitation would be two overnights during one week and one overnight the next week. Respondent requested equal parenting time.

¶ 43 Petitioner had testified E.C. was still not sleeping through the night. Sometimes, E.C. got up four or five times a night. Petitioner believed it was from E.C. not being on the same schedule at both homes. During the week, respondent dropped her off at petitioner's home at 6

a.m., which meant E.C. was getting up between 5 a.m. and 5:30 a.m. At petitioner's home, E.C. went to bed at 8 p.m. and awoke around 7 a.m. Thus, the trial court's finding shuffling E.C. back and forth too much was not in her best interest had a factual basis. Here, the court had to balance E.C.'s need to spend time with respondent and her need for stability. We find a reasonable person could have weighed E.C.'s competing needs and reached the result adopted by the trial court. Accordingly, the trial court's visitation award was not an abuse of discretion.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm the judgment of the DeWitt County circuit court.

¶ 46 Affirmed.