2011 IL App (2d) 110467-U
No. 2-11-0467
Order filed October 26, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF	)	Appeal from the Circuit Court
GERALD BONUS,	)	of Kane County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 10-D-1491
	)	
BETHZAIDA SANABRIA,	)	Honorable
	)	John A. Noverini,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment.

ORDER

Held: Absent a transcript of the trial, we could not say that the trial court's decision to give sole custody of the parties' son to the father was against the manifest weight of the evidence or an abuse of discretion. However, the trial court abused its discretion by allowing the father to determine on an on-going basis whether the mother was a threat to the child and could receive overnight visitation. Accordingly, we vacated that provision of the dissolution judgment and remanded the cause.

¶ 1 Respondent, Bethzaida Sanabria, appeals *pro se* from a judgment dissolving her marriage to petitioner, Gerald Bonus. The dissolution judgment awarded Gerald sole custody of the parties' son, Darien Bonus, and gave Bethzaida eight hours of weekend visitation per week. It further provided that the visits would be changed to overnight visits once Gerald determined, in his sole

discretion, that she was "no threat" to Darien. On appeal, Bethzaida argues that the trial court erred in its custody decision, and that it is in Darien's best interest to be with her. As we subsequently discuss, Bethzaida's failure to file transcripts of the trial prohibits us from fully reviewing the custody determination. However, it is apparent that the trial court abused its discretion by giving Gerald the power to unilaterally determine whether Bethzaida should receive overnight visitation with Darien at any given time. We therefore affirm as modified.

¶ 2 I. BACKGROUND

¶ 3 Bethzaida and Gerald were married on June 23, 2007. Darien was born on August 17, 2007. Gerald filed a petition for dissolution of marriage on October 28, 2009, in which he sought sole custody of Darien. On the same day, he filed a motion for disclosure of medical records, alleging that Bethzaida had been treated at the hospital for depression and a nervous breakdown on September 11. Gerald further alleged that Bethzaida left the marital residence on September 22, 2009, taking both Darien and Gerald's nine-year-old daughter from a previous marriage. He alleged that Bethzaida obtained an ex-parte order of protection against him, which was subsequently dismissed.

¶ 4 On November 16, 2009, the trial court entered an order requiring Bethzaida to allow unsupervised visitation between Darien and Gerald on alternating weekends. On November 25, 2009, the trial court altered the temporary custody arrangement to alternating weeks with each parent. On December 21, 2009, the trial court appointed Lynn Mirabella as guardian *ad litem* for Darien. On May 20, 2010, the trial court granted Gerald temporary custody of Darien, with Bethzaida having visitation on alternating Saturdays.

¶ 5 On July 15, 2010, Bethzaida's attorney was granted leave to withdraw. Bethzaida subsequently represented herself *pro se.*

¶ 6 On July 19, 2010, Gerald filed a motion for supervised visitation. He alleged that by Bethzaida's own testimony during a temporary custody hearing, she did not follow up with medical recommendations to pursue psychiatric follow-up treatment. He alleged that Bethzaida's failure to receive treatment for her "psychological condition" endangered Darien, in that Bethzaida had thrown a phone at Gerald and threatened herself with a knife, both in Darien's presence. Gerald also alleged that Bethzaida had suicidal ideations while caring for Darien. Gerald requested that Bethzaida's visitation with Darien be supervised by an adult over the age of 21, until further court order. The trial court granted this request on July 19, 2010, subject to Bethzaida receiving psychiatric treatment.

¶ 7 On December 3, 2010, Bethzaida filed a motion to reconsider the temporary child custody decision. The trial court apparently denied this motion, though it is not clear from the record when it did so.

¶ 8 On January 6, 2011, the trial court entered an order suspending Bethzaida's visitation with Darien until she obtained a "psychiatric evaluation from Dr. Brown in Kane County" and began treatment and/or medication per his recommendation. The order also stated that Luis Rivera (Bethzaida's boyfriend) and his family could not be present with Darien "during visitation or otherwise." On January 14, the court ordered that Gerald arrange supervised visitation between Bethzaida and Darien for two to three hours every 10 days.

¶ 9 A trial took place on March 16, 2011, but the record does not contain a report of proceedings from that, or any other, date. The trial court's order states that it heard testimony, reviewed Gerald's comprehensive financial statement, and "conferenc[ed] the issues." Five exhibits were admitted into evidence, consisting of: (1) Mirabella's resume; (2) Mirabella's affidavit for fees; (3) Mirabella's final guardian *ad litem* report; (4) Gerald's comprehensive financial statement; (5) and a "[p]atient [v]isit" statement from Edward Hospital. The patient statement was from September 11, 2008.

Under "Patient Instructions Reviewed," it states "Depression Postpartum Depression." The recommendation for treatment is "adult MH Patient Hospital Program," and it provides a phone number "if interested in this level of care." It additionally states that "outpatient counseling is also being recommended at this time."

¶ 10 We briefly summarize relevant portions of the final guardian *ad litem* report, as Bethzaida contests it on appeal. It states that Bethzaida obtained an order of protection against Gerald on September 28, 2009, which was vacated on October 19, 2009. She obtained a second order of protection on October 23, 2009, which was vacated on November 12, 2009. She had filed allegations of sexual and other abuse with the Aurora Police Department, the Department of Children and Family Services (DCFS), and the Child Advocacy Center. The result of the DCFS investigation was "unfounded." Gerald obtained an order from the court giving him sole responsibility for Darien's medical care after Bethzaida unilaterally changed his primary care doctor and allegedly subjected him to "unnecessary testing procedures." Gerald reported that Bethzaida had been diagnosed several times with depression and prescribed medications for the illness, but she refused to follow through with treatment and often did not take the medications. Gerald related various alleged instances showing erratic behavior. Bethzaida reported that she moved out of the marital residence with Darien and Gerald's daughter because she believed that Gerald was sexually abusing the daughter. Bethzaida described what led her to believe there was sexual abuse, as well as incidents of alleged physical and verbal abuse. She believed that she was in good physical and mental health, and that any prior depression was due to boredom and stress at home. During other interviews, Bethzaida said that she was never treated for depression and did not need to be treated for depression. She related that she worked with special needs children, which she could not have been allowed to do if she were not physically and mentally stable. The guardian *ad litem* report

further listed various information from Bethzaida's medical records, some of which included diagnoses of depression. Mirabella summarized the medical history by stating that the diagnosis appeared to be depression, post-partum depression, and anxiety, and that it appeared that Bethzaida was resistant to follow-up care and medications. Mirabella noted that as of the date of her report, Dr. Brown had not yet provided his evaluation.

¶ 11 Mirabella made the following conclusions: both parents desired sole residential custody of Darien; Darien was too young to state a preference; Darien was well-bonded to both parents and other family members; he was adjusted to Gerald's home, school, and community; Gerald appeared healthy and able to effectively parent Darien, but Bethzaida's health and ability to parent effectively were in question; both parents alleged prior physical abuse by the other, which was unlikely to reoccur now that they were living apart, but Bethzaida's behavior was more of a current concern based on her mental health and lack of follow-up care; and the parents had a limited ability to facilitate and encourage a close relationship between the other parent and child, especially Bethzaida, who had sought orders of protection to prevent Gerald's contact with Darien. On the issue of joint versus sole custody, Mirabella found that the parents, especially Bethzaida, had a limited ability to cooperate in matters affecting the child's joint parenting, and Gerald currently resided in a three bedroom, two-bath home in the Naperville school district while Bethzaida resided in a Chicago apartment. Mirabella recommended that Gerald have sole legal and physical custody of Darien and that Bethzaida have visitation at least once per week, with continued mandated individual counseling.

¶ 12 The psychological evaluation[1] ordered by the court was also filed on March 16, 2011. It stated that the report's purpose was to assess Bethzaida's current psychological functioning and provide any relevant treatment recommendations. It concluded that Bethzaida was functioning in the average range of intellectual ability. Further,

¶ 13 "Records available at the time of the present evaluation indicate that the allegations regarding [Bethzaida's] mental health were the result of difficulties she experienced in the past. Given the information obtained in the present evaluation, [Bethzaida] currently does not meet the diagnostic criteria for mental illness ***. While medical records indicate that she has suffered from symptoms related to Depression and Anxiety in the past, she is currently not reporting or exhibiting any signs or symptoms of any clinically significant pathology at this time."

Based on the lack of current mental illness and Bethzaida's prior unwillingness to participate in counseling or take psychotropic medications, "court-mandated counseling or psychiatric services would not be beneficial and are not being recommended at this time." The report stated that the issue of custody was outside the scope of the evaluation, so the trial court should follow the recommendations of the guardian *ad litem*. The report also stated that given Bethzaida's reported history of domestic violence, she would benefit from domestic violence counseling.

¶ 14 The judgment of dissolution of marriage was drafted by Gerald's attorney and entered by the trial court on May 6, 2011. It gave sole custody of Darien to Gerald and stated that Bethzaida "shall

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[1]Although the trial court's January 2011 order refers to a "psychiatric evaluation" by Dr. Brown, the trial court presumably intended a psychological evaluation, as Dr. Timothy Brown's title is listed on the report as "Supervising Psychologist."

receive unsupervised visitation, 8 hours per week on a weekend day, at her residence or where designated by agreement of the parties, until such time as [Gerald], in his sole discretion, believes that she is no threat to the minor and overnights shall commence between the Mother and child on alternating weekends."

¶ 15 Also on May 6, 2011, Bethzaida filed motions to reconsider the "child custody decision" and the dissolution judgment, arguing that she should have full custody of Darien. Bethzaida argued that she had been a stay-at-home mom to Darien until she left the marital residence; she left the residence due to domestic violence and in order to seek a safe place for Darien and his half-sister; she had ten years of experience working with children and had an impeccable record; the psychological evaluation verified that her mental health was excellent; she did not represent any threat to Darien; and Gerald was not a fit parent because he physically abused her while she was pregnant.

¶ 16 The trial court denied Bethzaida's motions the same day. Bethzaida timely appealed. Both parties have filed *pro se* briefs on appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, Bethzaida argues that we should reconsider the trial court's child custody decision and recognize that it is in Darien's best interest to be with her. Bethzaida's main argument appears to be that the trial court erred in awarding full custody of Darien to Gerald rather than her.

¶ 19 Bethzaida provides the following arguments, which are similar to those she asserted in the trial court. She left the marital residence because she, Darien, and Darien's half-sister were the victims of domestic violence by Gerald. Guardian *ad litem* Mirabella's report was biased because it was based on Mirabella's personal, non-expert doubts about Bethzaida's mental stability. She also included background information on only Gerald and interviewed him on many more occasions.

However, Mirabella was influenced by Gerald's false statements, and her report was done before Bethzaida's psychological evaluation was complete. Bethzaida had experienced "some distress" while living with Gerald because of the domestic violence, but it never interfered with her routine or care of the children. The psychological evaluation determined that there was no evidence of present mental illness. However, at trial Mirabella "insistently" questioned her mental health without consulting the psychological evaluation and investigating her properly, and she recommended that Gerald have sole custody of Darien.

¶ 20 Bethzaida further argues that she followed the psychologist's recommendations to obtain domestic violence counseling. She has worked with children for ten years, including disabled children, and has a perfect record. Bethzaida did not represent a threat to Darien. Gerald was not a fit parent to raise the child because he physically abused her while she was pregnant. In contrast, she had been a stay-at-home mother to Darien, and he was very bonded to her.

¶ 21 Gerald argues as follows. Mirabella was well-credentialed and issued an extensive report spanning 16 to 18 months. Bethzaida's parental ability was heavily scrutinized due to the false allegations of domestic violence and child abuse, which had all been shown to be unfounded. The medical records showed that there were issues with depression and that doctors recommended counseling and treatment, but Bethzaida failed to comply. Gerald frequently contacted Mirabella to provide her with updates on issues that affected Darien's best interests, such as updates on his progress with a learning deficiency and Bethzaida's act of changing Darien's pediatrician without consulting him. Another issue was Bethzaida's boyfriend's drug use, which resulted in a visitation restriction in January 2011 which Bethzaida "continues to break as recent[ly] as August 28, 2011."[2]

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[2]We note that a final custody order supercedes prior temporary custody orders (*In re*

Bethzaida refused to undergo a psychological evaluation until she was ordered to by the court. Both Mirabella and the trial court had the opportunity to consider the evaluation during the trial. It affected Mirabella's final recommendations, as she recommended in the report that Bethzaida be required to undergo counseling, but both she and the trial court deemed such counseling unnecessary in light of the evaluation. The evaluation also reported an attempted manipulation of the test[3] and recommended that the court follow the recommendations of the guardian *ad litem*.

¶ 22 The trial court should determine custody according to the child's best interest. 750 ILCS 5/602(a) (West 2010). In determining the child's best interest, the trial court is to consider all relevant factors, including: the parents' wishes; the child's wishes; the relationship of the child with his parents, siblings, and other significant individuals; the child's adjustment to home, school, and community; the mental and physical health of all involved individuals; any threat of physical violence by the child's potential custodian; domestic violence; the parents' willingness and ability to encourage a close relationship between the other parent and child; whether one of the parents is a sex offender; and the terms of any military family-care plan. 750 ILCS 5/602(a) (West 2010). Child custody determinations largely rest within the trial court's discretion, and we will not disturb

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Marriage of Kostusik, 361 Ill. App. 3d 103, 108 (2005)), so the January 2011 restriction is no longer in effect.

[3]The evaluation states that Bethzaida attempted to present herself in a favorable light on emotional functioning tests, but that was common for people completing the tests for custody-related cases. Thus, the "response-style should not be viewed as a defiant act," and the test results were still valid.

its decision unless it is against the manifest weight of the evidence or the trial court abused its discretion. *In re Marriage of Smithson*, 407 Ill. App. 3d 597, 600 (2011).

¶ 23 As stated, the record contains no reports of proceedings. As the appellant, Bethzaida has the burden to provide a sufficiently complete record of trial proceedings to support her claims of error. See *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009). If a report of proceedings is not available, a party may file a certified bystander's report (Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)) and/or an agreed statement of facts (Ill. S. Ct. R. 323(d) (eff. Dec. 13, 2005)). Without a sufficient record preserving the claimed error, we must presume that the trial court's order had a sufficient factual basis and conformed to the law. *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d at 422. That is, we must resolve any doubts that arise from the incompleteness of the record against Bethzaida. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 24 Regarding the guardian *ad litem* report, we find no overt bias in the report itself. The purpose of a guardian *ad litem* is to help the trial court determine a child's best interest. 750 ILCS 5/506(a)(2), 601(f) (West 2010); *Roth v. Roth*, 52 Ill. App. 3d 220, 227 (1977). Bethzaida does not dispute Mirabella's conclusion that joint parenting would not be feasible between the parties. Thus, Mirabella had to recommend one parent over the other. The lack of background information on Bethzaida is explained by the report's statement that Bethzaida requested that her initial interview take place the same morning of Mirabella's appointment. Thus, as stated by the report, Bethzaida did not fill out a "Parent Interview Sheet." Further, there is extensive information about both parents in the report. Mirabella also documented in detail Bethzaida's explanation of why she believed Gerald was sexually abusing his daughter and Bethzaida's accounts of violence against herself. Mirabella also stated positive conclusions about Bethzaida, such as that she was "well-bonded" to Darien. Gerald raised Bethzaida's emotional health as an issue, and thus Mirabella needed to

consider it in determining Darien's best interest. She cited medical reports diagnosing depression and anxiety, and she specifically noted that the court-ordered evaluation was not complete by the time of the report. Further, Bethzaida had the right to cross-examine Mirabella at trial (750 ILCS 5/506(a)(2) (West 2010)) and could have asked questions highlighting any bias or shortcomings in her report.

¶ 25 Regarding the custody decision itself, we recognize that the court-ordered psychological evaluation concluded that Bethzaida did not currently have a mental illness. However, as stated, Bethzaida does not dispute that joint parenting was not a viable option, so the court had to determine which parent to award custody to. Although Bethzaida alleged that Gerald had sexually abused his daughter and obtained orders of protection against him, the orders of protection were subsequently vacated, and the DCFS investigation was determined "unfounded." Thus, it would not have been against the manifest weight of the evidence for the trial court to determine that Gerald was not a danger to Darien. Further, Mirabella's recommendation that Gerald be given custody was based not just on prior information about Bethzaida's mental health, but also on considerations such as Darien's adjustment to Gerald's home, school, and community; his bond with his step-sister; and Bethzaida's attempts to limit Darien's contact with Gerald through orders of protection. Regardless, without a transcript of the trial, we cannot say that the trial court's decision to award sole custody of Darien to Gerald was against the manifest weight of the evidence.

¶ 26 That being said, we do find error in the trial court's visitation award, in light of the psychological evaluation and statutory requirements. See *In re Marriage of Mitchell*, 319 Ill. App. 3d 17, 22 (2001) (visitation is a form of child custody). Liberal visitation is the rule, while restrictive visitation is the exception. *In re Marriage of Diehl*, 221 Ill. App. 3d 410, 429 (1991). "A parent not granted custody of the child is entitled to reasonable visitation rights unless the *court*

finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health." (Emphasis added.) 750 ILCS 5/607(a) (West 2010); see also 750 ILCS 5/607(c) (West 2010) ("The court may modify an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral or emotional health"). "The appellate court has interpreted section 607(c) to protect the right of a noncustodial parent to 'standard' visitation, which includes unsupervised, overnight visitation in the home of the noncustodial parent." *In re Marriage of Saheb and Zhazal*, 377 Ill. App. 3d 615, 622 (2007). This interpretation of standard visitation is equally applicable to section 607(a), which, like section 607(c), guarantees a parent reasonable visitation absent a finding of serious endangerment to the child. The endangerment standard is onerous and not met easily. *In re Marriage of Slayton*, 292 Ill. App. 3d 379, 387 (1997).

¶ 27 Here, the dissolution judgment gave Bethzaida "unsupervised visitation, 8 hours per week on a weekend day, at her residence or where designated by agreement of the parties, *until such time as [Gerald], in his sole discretion, believes that she is no threat to the minor* and overnights shall commence between the Mother and child on alternating weekends." (Emphasis added.) Bethzaida argues that she does not present a threat to Darien. Contrary to explicit requirements of section 607, the trial court did not determine that standard overnight visitation with Bethzaida would "endanger seriously" Darien's physical, mental, moral or emotional health, but rather left that determination to Gerald to continually reassess on an on-going basis. Thus, the provision represents an abuse of discretion. Accordingly, we vacate the language allowing Gerald to dictate whether Bethzaida represents a threat to Darien. We further remand the cause for the trial court to make clear findings as to whether unsupervised, overnight visit with Bethzaida would seriously endanger Darien.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the portion of the dissolution judgment giving sole custody of Darien to Gerald. However, we vacate the language of the judgment limiting Bethzaida's overnight visitation with Darien "until such time as [Gerald], in his sole discretion, believes that she is no threat to the minor." We further remand the cause for further proceedings consistent with this order.

¶ 30 Affirmed in part and vacated in part; cause remanded.