

2011 IL App (2d) 110683-U  
No. 2-11-0683  
Order filed September 30, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> MARRIAGE OF MARY LEE HEINRICH,	)	Appeal from the Circuit Court of Kane County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 10-D-622
	)	
PAUL HEINRICH,	)	Honorable
	)	John A. Noverini,
Respondent-Appellant.	)	Judge, Presiding.

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Justices McLaren and Burke concurred in the judgment.

*Held:* The trial court correctly rejected respondent's affirmative defenses to petitioner's petition for exclusive possession of the marital residence because those defenses violate public policy. The trial court also applied the correct legal standard in granting petitioner's petition, and its determination was not against the manifest weight of the evidence. We affirmed the judgment of the trial court.

**ORDER**

¶ 1 In April 2010, following eight years of marriage, petitioner, Mary Lee Heinrich, filed a petition for dissolution of marriage against respondent, Paul Heinrich. Prior to their marriage, the parties entered into a premarital agreement, providing that Missouri law shall cover the effect and construction of the agreement and that all disputes arising from a dissolution action shall be subject

to arbitration. On May 2, 2011, the parties entered into a joint parenting agreement providing, in relevant part, that the parties agreed to mediate any conflicts resulting from that agreement. Subsequently, petitioner filed a petition for exclusive possession of the marital residence pursuant to section 701 of the Illinois Marriage and Dissolution of Marriage Act (the Marriage Act) (750 ILCS 5/701 (West 2010)), which petition the trial court granted after conducting a hearing. Respondent now appeals the trial court's interlocutory order pursuant to Supreme Court Rule 307(a)(1) (eff. Feb 26, 2010), contending: (1) the trial court erred when it granted petitioner's petition for exclusive possession in light of his affirmative defenses that the issue was subject to arbitration pursuant to the premarital agreement or, alternatively, mediation pursuant to the joint parenting agreement; (2) the trial court erred when it applied a best-interests standard of review in granting petitioner's petition; and (3) the trial court's order was against the manifest weight of the evidence. We affirm.

¶ 2

## I. BACKGROUND

¶ 3 The record reflects that petitioner and respondent were married on May 26, 2001, and had two children during the course of their marriage. Prior to their marriage, petitioner and respondent entered into a premarital agreement. Section 6.2 of that agreement provides that the laws of the State of Missouri control the effect and construction of the agreement, regardless of whether the parties reside in Missouri. Section 6.8 further provides that, if any dispute or controversy results from an action of dissolution, the parties agree to submit all such disputes to binding arbitration.

¶ 4 On April 28, 2010, petitioner filed a petition for dissolution of marriage. The petition sought joint custody of the minor children and enforcement of the premarital agreement. On March 3, 2011, respondent filed a motion for declaratory judgment, asking the trial court to declare the rights

of the parties pursuant to the premarital agreement. On March 15, 2011, petitioner filed her response to respondent's motion for a declaratory judgment, requesting that the trial court find that the premarital agreement was valid and enforceable and that the trial court submit any disputes not related to their children to arbitration. On March 31, 2011, the trial court entered an order requiring respondent to submit to an alcohol evaluation and further providing that it was retaining jurisdiction over the issues of custody, visitation, and health insurance for the children. On April 8, 2011, the trial court entered an order finding that the premarital agreement was valid and enforceable and that the arbiter would determine the division of marital assets. On May 2, 2011, the trial court entered a joint parenting agreement providing that the parties would have joint custody of the minor children, with petitioner having residential custody. Paragraph 20 of the joint parenting agreement further provided that, if any conflicts arose as a result of the joint parenting agreement, the parties agreed to "make reasonable attempts" to negotiate a settlement of the conflict, and if they were unable to resolve the conflict, the issue would be presented to a specified mediator.

¶ 5 On June 7, 2011, petitioner filed a petition for exclusive possession of the marital residence. Petitioner alleged that respondent's conduct while residing at the marital residence jeopardized the physical and mental well being of her and the children as a result of his excessive alcohol consumption. Petitioner further alleged that respondent used profane language in front of the children and was verbally abusive.

¶ 6 On July 13, 2011, the trial court conducted a hearing on petitioner's petition for exclusive possession. Petitioner testified first on her behalf. Petitioner testified that respondent was living with her and the children at the marital residence. Petitioner testified that respondent used profanities and referred to her using derogatory names in the presence of the children, including

during an incident at the marital residence on April 16, 2011. Petitioner testified that respondent consumed gin at 7 a.m. on July 11, 2011, and had continued to consume alcohol and use profanity since the entry of the joint parenting agreement. Petitioner further testified that respondent has a residence in Wisconsin and that he travels there “usually every weekend,” and that respondent also travels to Springfield on other weekends.

¶ 7 On cross-examination, petitioner admitted that she did not seek mediation regarding the issues raised in her petition for exclusive possession and that she was planning a two-day vacation during which she would leave the children with respondent “and numerous babysitters.” Petitioner further acknowledged that, on April 16, 2011, there was an argument between her and respondent, but she denied initiating the argument or calling respondent names. Specifically, petitioner acknowledged that she and respondent had a dispute over who was watching their younger child for the day. According to petitioner, she planned on taking the child to occupational therapy group that morning, but respondent insisted that he was taking the child to another activity. Petitioner testified that respondent followed her into the child’s bedroom and demanded that petitioner get the child ready so he could take the child. Petitioner noticed their other child was upset and crying, and petitioner later called the police because she felt “shaken” and was “agitated” by respondent. Petitioner admitted that the dispute was resolved by itself, but only after the police had come to the residence. Petitioner further admitted that the police have not been back to the marital residence since that incident and that the situation in the marital residence has improved.

¶ 8 Petitioner next called respondent as an adverse witness. Respondent admitted that he owns property in northern Wisconsin and that he goes there on “occasional weekends.” Respondent further admitted that he was previously ordered to undergo an alcohol evaluation, but that he has yet

to do so. During questioning from his attorney, respondent testified that petitioner's description of the events on the morning of April 16, 2011, was inaccurate. Respondent testified that he told petitioner he wanted to take their younger child to the control tower at O'Hare Airport because he was invited by a friend to watch 747 airplanes take off, but petitioner would not permit him to take the child. Respondent testified that he gave petitioner plenty of notice of his plan to take the child that day and he also offered to take the child to the airport after the child returned from therapy. Respondent testified that he went upstairs to the child's bedroom and petitioner "barged" in and started yelling. Respondent testified that he spoke with the police after they arrived at the marital residence and he agreed to let petitioner have the children for the day. Respondent testified that he was going to counseling with their other child and that the situation in the marital residence has improved dramatically. Respondent further testified that he did not have sufficient income or assets to buy or rent another home.

¶ 9 Lisa M. Nyuli, the court-appointed guardian *ad litem* in the dissolution proceeding, testified next. Nyuli testified that she previously interviewed petitioner and respondent and visited the marital residence on at least one occasion. Nyuli further testified that her recommendation was for petitioner to have exclusive possession of the marital residence. During cross-examination, Nyuli admitted that she had not visited the marital residence or talked to the children since February 2011. Nyuli further admitted that she had not interviewed respondent since petitioner filed her petition for exclusive possession. On re-direct examination, Nyuli testified that her approval of the joint parenting agreement was based in part on the representation by respondent and his attorney that respondent would remove himself from the marital residence. Petitioner rested after Nyuli's testimony.

¶ 10 Respondent did not present witnesses, but rested on the basis that the motion for exclusive possession was not properly before the trial court. The trial court then granted petitioner's petition for exclusive possession. Respondent timely appealed the trial court's interlocutory order pursuant to Rule 307(a)(1).

¶ 11 II. DISCUSSION

¶ 12 A. Affirmative Defenses

¶ 13 Respondent's first contention on appeal is that the trial court erred by failing to properly consider his affirmative defenses to petitioner's petition for exclusive possession of the marital residence. Specifically, respondent argues that the issue of exclusive possession of the marital residence was a property and financial issue, and therefore, subject to arbitration pursuant to section 6.8 of the premarital agreement. Alternatively, respondent argues that the issue of exclusive possession was subject to the joint parenting agreement and subject to mediation.

¶ 14 Section 701 of the Marriage Act provides:

“Marital Residence - Order Granting Possession to Spouse. Where there is on file a verified complaint or verified petition seeking temporary eviction from the marital residence, the court may, during the pendency of the proceeding, only in cases where the physical or mental well being of either spouse or their children is jeopardized by occupancy of the marital residence by both spouses, and only upon due notice and full hearing, unless waived by the court on good cause shown, enter orders of injunction, mandatory or restraining, granting the exclusive possession of the marital residence to either spouse, by eviction from, or restoration of, the marital residence, until the final determination of the

cause. No such order shall in any manner affect any estate in homestead property of either party.” 750 ILCS 5/701 (West 2010).

Section 701 contemplates granting exclusive possession of the marital residence until a final determination of the cause, and an order entered pursuant to this section bears no relevancy to the disposition of marital property. *In re Marriage of Hofstetter*, 102 Ill. App. 3d 392, 396-97 (1981).

¶ 15 With respect to respondent’s argument that section 701 of the Marriage Act is not applicable because the issue of exclusive possession of the marital residence falls within the ambit of the parties’ premarital agreement, Illinois recognizes antenuptial agreements so long as they are fair and reasonable. See *Murphy v. Murphy*, 359 Ill. App. 3d 289, 299-300 (2005). Such agreements are subject to the law of contracts. *Id.* Nonetheless, a court will not enforce a private agreement that is against public policy. *In re Marriage of Best*, 387 Ill. App. 3d 948, 951 (2009) (citing *O’Hara v. Ahlgren, Blumenfeld & Kempster*, 127 Ill. 2d 333, 341 (1989)). “The public policy of this State is reflected in its constitution, its statutes, and its judicial decisions.” *O’Hara*, 127 Ill. 2d at 341. Whether a contract is contrary to public policy depends on the particular circumstances of each case. *Id.* at 341-42. Courts are permitted to *sua sponte* consider whether a contract violates public policy. *Best*, 387 Ill. App. 3d at 951. Construction of an antenuptial agreement and whether the agreement violates public policy is a question of law subject to *de novo* review. See *id.* at 949, 953-54 (holding that a fee-shifting bar in a premarital agreement violates public policy).

¶ 16 We reject respondent’s contention that the issue of temporary possession of the marital residence is subject to the premarital agreement’s arbitration clause because, even if the premarital agreement can be construed in such a manner, enforcing that clause would violate the public policy of this State. Our conclusion that submitting the issue of exclusive possession of the marital

residence to arbitration would violate public policy is reflected by the statutes enacted by our legislature. The clear legislative intent of section 701 of the Marriage Act, as reflected by the plain and unambiguous language of that provision (see *In re Marriage of Roger*, 213 Ill. 2d 129, 136 (2004) (stating that the “best indication of the legislature’s intent is the plain language of the statute”)), is to protect the well being of spouses and their children. Specifically, section 701 authorizes the courts to grant temporary exclusive possession of the marital residence to either spouse during the pendency of a dissolution proceeding if occupancy of the residence by both spouses jeopardizes the well being of a spouse or their children. The underlying policy of section 701 of enabling courts to protect spouses and children when their well being is jeopardized is consistent with other legislative enactments in this State, including the Illinois Domestic Violence Act of 1986 (the Domestic Violence Act) (750 ILCS 60/101 *et. seq.* West 2010). The Domestic Violence Act recognizes that domestic abuse harms society by creating “family disharmony in thousands of Illinois families” and enables courts to enter orders to prevent abuse and address issues related to child custody when necessary. 750 ILCS 60/102(2), (4) (West 2010). These statutes reflect a clear public policy in this State that courts should have broad authority to intervene when necessary to protect the well being of spouses and children. To hold that parties could contract to abrogate a court’s ability and authority to intervene when necessary to protect the well being of a spouse or children would clearly undermine that policy. Therefore, we conclude that, in this case, the issue of temporary exclusive possession of the marital residence cannot be subject to arbitration as it would violate the public policy of this State because enforcing such a provision would hinder our courts’ ability to intervene when the well being of a spouse or children is jeopardized. Therefore, the arbitration provision in the parties’ premarital agreement does not apply and is not

enforceable with respect to the issue of exclusive possession during the pendency of the dissolution proceeding. See *Best*, 387 Ill. App. 3d at 954 (refusing to enforce a fee-shifting provision in a premarital agreement because it was against public policy). Finally, in so holding that the arbitration provision in the parties' premarital agreement is inapplicable and unenforceable regarding temporary exclusive possession of the marital residence, it is unnecessary for us to determine whether Missouri law controls that agreement.

¶ 17 Similarly, we also reject respondent's argument that the issue of exclusive possession of the marital residence should be subject to mediation pursuant to the joint parenting agreement. A joint parenting agreement is also a contract (see *In re Marriage of Purcell*, 355 Ill. App. 3d 851, 856 (2005) (noting that, because a visitation agreement was memorialized in a joint parenting agreement, it should be enforced as a contract unless contractual reasons exist for voiding or rescinding it). As noted above, a court can refuse to enforce a contractual provision if it violates public policy. *Best*, 387 Ill. App. 3d at 951, citing *O'Hara*, 127 Ill. 2d at 341. For the reasons already discussed, even if the joint parenting agreement incorporates the issue of temporary exclusive possession of the marital residence and requires disputes to be resolved through mediation, such a provision does not apply and is unenforceable because it would violate the clear public policy of this State to enable courts to enter orders protecting the well being of spouses and children when necessary.

¶ 18 B. "Best Interests" Standard

¶ 19 Respondent's second contention on appeal is that the trial court erred by applying the wrong legal standard when it granted petitioner temporary exclusive possession of the marital residence. Respondent maintains that, "[a]lthough the trial court did not recite a legal standard [when granting petitioner's petition for exclusive possession], its bare ruling seemed to accept the [guardian *ad*

*litem*’s] ‘best interests’ standard.’ This is clearly erroneous, as the ‘best interests’ standard is much lower than the ‘physical or mental jeopardy’ standard required by section [701].”

¶ 20 Respondent’s contention is unavailing. Section 701 of the Marriage Act permits a trial court to enter an injunction granting exclusive possession to one spouse when the physical or mental well being of either spouse or their children is jeopardized. 750 ILCS 5/701 (West 2010). The trial court is permitted to enter such an order only after due notice and a full hearing, unless the hearing is waived by the court for good cause shown. *Id.* Here, the record is devoid of any indication that the trial court applied an incorrect legal standard or failed to consider the physical and mental well being of petitioner or the minor children. Rather, the transcript of the hearing clearly reflects that the trial court placed an emphasis on determining whether the current occupancy of the marital residence by both petitioner and respondent jeopardized the petitioner’s and the children’s well being. Specifically, the petition for exclusive possession was premised on allegations that respondent’s alcohol consumption, use of profanities, and references to petitioner with derogatory names jeopardized the well being of petitioner and the children. The testimony elicited at the July 13, 2011, hearing concerned those allegations. Accordingly, we reject respondent’s unsubstantiated contention that the trial court applied the wrong legal standard or that it failed to consider the requirements provided in section 701 of the Marriage Act.

¶ 21 C. Manifest Weight of the Evidence

¶ 22 Respondent’s final contention on appeal is that the trial court’s order granting petitioner temporary exclusive possession of the marital residence was against the manifest weight of the evidence. In support of this contention, respondent first argues that the trial court erred in granting exclusive possession without making specific findings of fact or conclusions of law. Respondent

then maintains that the evidence did not support a finding that his occupancy did not jeopardize the physical or mental well being of petitioner or the children.

¶ 23 As noted above, section 701 of the Marriage Act contemplates the granting of exclusive possession of the marital residence to either spouse pending the final determination of the cause. *Hofstetter*, 102 Ill. App. 3d at 396-97. A court has authority to grant exclusive possession if (1) a party has filed a verified petition seeking exclusive possession of the marital residence; and (2) the physical or mental well being of either spouse or their children is jeopardized by both spouses' occupancy of the marital residency. *In re Marriage of Lima*, 265 Ill. App. 3d 753, 756 (1994). The judgment of the trial court is entitled to great deference and "[t]he findings of the trier of fact will not be disturbed unless [those findings] are manifestly against the weight of the evidence." *Id.* A judgment is against the manifest weight of the evidence when the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *In re Marriage of Karonis*, 296 Ill. App. 3d 86, 88 (1998). When reviewing whether a trial court's determination was against the manifest weight of the evidence, a reviewing court views the evidence in the light most favorable to the appellee, and where the evidence supports multiple reasonable inferences, the reviewing court will accept those inferences that support the trial court's order. *In re Marriage of De Bates*, 212 Ill. 2d 489, 516 (2004).

¶ 24 In the current matter, the trial court could have reasonably concluded that occupancy of the marital residence by both petitioner and respondent jeopardized the well being of either petitioner or the children, or both. Initially, as respondent acknowledges, we note that the plain language of section 701 does not require the trial court to make specific findings of fact in ruling on a petition for exclusive possession of the marital residence. Compare 750 ILCS 5/610(b) (West 2010);

*Vollmer v. Mattox*, 137 Ill. App. 1 (1985) (holding that section 610(b) of the Marriage Act requires a trial court to make specific findings of fact when modifying a child custody order). In the current matter, therefore, the trial court's order was not deficient merely because the trial court did not make specific factual findings.

¶ 25 Moreover, the record reflects that petitioner testified that respondent consumed alcohol, used profanities, and referred to petitioner with derogatory names in front of the children. Petitioner further testified about an incident on April 16, 2011, during which she called the police to the marital residence as a result of a dispute with respondent. In addition, respondent acknowledged that he had not undergone an alcohol evaluation despite being ordered to do so by the trial court. Notably, respondent did not proffer testimony to rebut or counter petitioner's testimony that respondent used profanity and referred to petitioner with derogatory names in front of the children. Finally, Nyuli testified that, after reviewing petitioner's petition for exclusive possession, her recommendation was that petitioner should have exclusive possession. Pursuant to evidence presented, the trial court could have reasonably concluded that the well being of petitioner or the children, or both, was jeopardized by respondent's occupancy in the marital residence.

¶ 26 In reaching our determination, we recognize that the trial court was presented with conflicting evidence. In particular, respondent disputed the events that transpired on April 16, 2011, and also testified that he was going to counseling with one of the children and that the situation in the marital residence had "improved dramatically." Although this evidence could also lead to an inference that respondent's occupancy of the marital residence did not jeopardize the well being of petitioner or the children, the trial court could have rejected this testimony. Because the trial court was in the best position to assess the credibility of the witnesses, and in light of our deferential

standard of review, we will accept the inferences supporting the trial court's order. See *De Bates*, 212 Ill. 2d at 515-16. We further recognize, as respondent points out, the evidence did not demonstrate physical violence on his part. However, section 701 allows the trial court to grant exclusive possession when the well being of either spouse or their children is jeopardized, and physical violence is not a necessary element to meet that standard.

¶ 27 Accordingly, although the trial court was presented with conflicting evidence, the record contains sufficient evidence to enable the trial court to have reasonably concluded that occupancy of the marital residence by both petitioner and respondent jeopardized the well being of petitioner or the children. Therefore, we hold its determination to grant exclusive possession was not against the manifest weight of the evidence.

¶ 28

### III. CONCLUSION

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 30 Affirmed.