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No. 3--09--0467

Order filed January 20, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

DMITRY N. FEOFANOV,)
) Appeal from the Circuit Court
Petitioner-Appellant,) of the 14th Judicial Circuit,
) Whiteside County, Illinois,
)
)
v.) No. 09--OP--77ST
)
TOBY PAYNE,) Honorable
) Michael R. Albert,
Respondent-Appellee.) Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court
Presiding Justice Carter and Justice Lytton concurred
in the judgment.

ORDER

Held: Where the petitioner's claim of error is grounded in an argument not asserted in the trial court, that argument has been forfeited and cannot be considered in this appeal. Because the finding of the circuit court that no abuse of the minor occurred because the respondent stood *in loco parentis* to the minor and the challenged discipline was not unreasonable direction under the statute was not against the manifest weight of the evidence presented, the dismissal of the petition for a plenary order of protection is affirmed.

The petitioner, Dmitry N. Feofanov, obtained an emergency order of protection against the respondent, Toby Payne, on behalf of petitioner's minor son. After an evidentiary hearing on whether a plenary order of protection should issue, the trial court dismissed the cause. The petitioner appeals, arguing that the trial court erred as a matter of law when it found that the respondent was acting *in loco parentis* in disciplining the minor and that the discipline was not unreasonable direction under section 103(1) of the Illinois Domestic Violence Act of 1986 (Act) (750 ILCS 60/103(1) (West 2008)). We affirm.

FACTS

The petition for an emergency order of protection alleged that the respondent, the boyfriend of the minor's mother, used a metal serving spoon to physically discipline the minor. The emergency order was granted, prohibiting the respondent from physically disciplining the minor. After an evidentiary hearing on the entry of a plenary order of protection, the trial court found that the respondent had physically disciplined the minor, but that the respondent was acting *in loco parentis*. The trial court found that the respondent had been living in the same house with the minor for about three years, and that he was the father of the minor's half-brother. The trial court dismissed the case,

finding no abuse under section 103(1) of the Act (750 ILCS 60/103(1) (West 2008)) because it could not find the respondent's discipline of the minor to be unreasonable.

The petitioner appealed, and served a proposed bystander's report on opposing counsel. Thereafter, when no proposed amendment or alternative report was served, the petitioner filed a motion to certify the bystander's report pursuant to Supreme Court Rule 323(c) (210 Ill. 2d R. 323(c)). The trial court certified a modified version of the petitioner's proposed bystander's report. Thereafter, the petitioner filed a motion to amend the bystander's report, contending that the trial court rewrote his proposed bystander's report without notice to him. The petitioner requested that the trial court certify and order filed an amended bystander's report that accurately reflected the testimony adduced at the evidentiary hearing. The trial court granted the motion, amending the bystander's report to omit any references to the respondent as the minor's stepfather.

Both reports stated that the evidence adduced at the hearing established that: (1) the respondent did not know how to spell the minor's last name; (2) the respondent lived in the same house with the minor; and (3) the respondent was the father of the minor's half-brother. The trial court's certified report added facts that were noted in its minute entries following the evidentiary hearing, specifically, that: (1) the respondent had

lived with the minor for approximately three years and that the respondent acted as a father figure in that household; (2) the minor testified that the petitioner urged him to be disrespectful to the respondent, and that the minor had been disrespectful; (3) the minor was spanked on the buttocks by the respondent with a plastic spoon a long time ago and any recent spanking was done by the respondent with his open hand.

ANALYSIS

Initially, we note that the respondent failed to file a brief. When an appellee fails to file a brief, reviewing courts will decide the merits of the appeal if the record is simple and the errors can be easily decided without the aid of an appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976). In other cases, if the appellant's brief shows *prima facie* reversible error and the contentions in the brief find support in the record, the trial court's judgment may be reversed. *First Capitol Mortgage Corp.*, 63 Ill. 2d 128. Here, we will decide the merits of this appeal as the record is brief and uncomplicated and whether there was reversible error can be decided without an appellee's brief.

In this appeal, the petitioner argues that the trial court erred in finding that the respondent stood *in loco parentis* to the minor, and, thus, there was no abuse as defined by section 103(1) of the Act (750 ILCS 60/103(1) (West 2008)). The gist of

his argument is (1) that the court erroneously believed the respondent was the step-father of the minor, (2) that the respondent was, in fact, the mother's boyfriend and there was no thus no familial relationship with the minor, (3) that there was no showing that the respondent had assumed any financial responsibility for the minor, (4) that financial responsibility is a requirement for an *in loco parentis* finding, and (5) there was, therefore, no legal basis for the court's finding that the respondent stood *in loco parentis* to the minor.

Under the Act, the trial court shall issue an order of protection when it finds that a protected person has been abused by a family or household member. 750 ILCS 60/214(a) (West 2008). Thus, the central inquiry in such a proceeding is whether the protected person was abused. *Best v. Best*, 223 Ill. 2d 342 (2006). Under the statute, abuse does not include reasonable direction of a minor child by a person acting *in loco parentis*. 750 ILCS 60/103(1) (West 2008). The petitioner must prove abuse by a preponderance of the evidence. 750 ILCS 60/205(a) (West 2008). We will reverse a trial court's finding on the issue of abuse only if it is against the manifest weight of the evidence. *Best*, 223 Ill. 2d 342. A finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident or if the finding is unreasonable, arbitrary, or not based on the evidence presented. *Best*, 223 Ill. 2d 342.

As presented in this appeal, petitioner's argument raises what appears to be a question of first impression. However, petitioner has provided this court with no authority supporting his contention that the financial obligation required for a finding of *in loco parentis* in other contexts was intended by the legislature to apply in the context of domestic abuse.

The Act does not provide a separate definition of *in loco parentis*, but that phrase is generally defined as someone "[a]cting as a temporary guardian of a child." Black's Law Dictionary 791 (7th ed. 1999). A person *in loco parentis* to a child stands in the place of a natural parent and assumes the rights, duties, and obligations of a parent. *Phillips v. Dodds*, 371 Ill. App. 3d 549 (2007).

The petitioner contends that financial responsibility is a key factor in determining *in loco parentis* status, citing to a negligence action, *Busillo v. Hetzel*, 58 Ill. App. 3d 682 (1978), in which a grandmother sought to avoid liability on the basis of the parental immunity doctrine. A careful review of the record, including all three versions of the bystander's report, provides no indication that the petitioner raised any of his contentions concerning the asserted requirement that a person has assumed financial obligations for the minor as a condition of an *in loco parentis* finding in the trial court. Thus we find this argument has been forfeited.

We now consider whether the trial court erred in finding that there had been no abuse of the minor as defined in the statute because the respondent stood *in loco parentis* to the minor and the respondent's discipline of the minor was not unreasonable. This conclusion is supported by the facts as stated in the bystander's report¹ and the minute entry at the time the trial court's order was entered. While financial responsibility may be a factor to consider in determining whether a party has assumed the duties of a parent, it was not unreasonable for the court to treat it as a less important factor (or not to consider it at all) in an action such as this one, arising in the context of domestic violence. How the legal and

¹The petitioner challenges the trial court's modification of his proposed bystander's report. Supreme Court Rule 323(c) requires the trial court to "settle, certify, and order filed an accurate report of proceedings." 210 Ill. 2d R. 323(c). The trial court certified most of the facts included by the petitioner, and it added the facts contained in its minute entries that related to the finding of no abuse. The petitioner's motion to amend the certified bystander's report only specifically challenged the report's reference to the respondent as the minor's stepfather. The trial court modified the report to remove all such references.

factual determination of whether a person was acting *in loco parentis* should be made under the Domestic Violence Act was not raised by the petitioner before the trial court. His challenge faulting the court for not considering this issue cannot now be heard to allege judicial error.

The minor had lived with the respondent for three years. The respondent was the boyfriend of the minor's mother, and he was the father of the minor's half-brother. The trial court specifically found that the respondent acted as a father figure within that household. There was sufficient evidence for the trial court to find that the respondent was acting *in loco parentis* to the minor under the Act and that the discipline was not unreasonable. Thus, we cannot say that the trial court's determination was unreasonable, arbitrary, or not based on the evidence presented.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed.

Affirmed.