

No. 1-11-1130

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re the MARRIAGE OF:)
) Appeal from the
KATHRYN NADWODNEY,) Circuit Court of
) Cook County
)
Petitioner-Appellant,)
)
v.) No. 06 D3 31171
)
TIMOTHY NADWODNEY,) Honorable
) Daniel Sullivan,
Respondent-Appellee.) Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court acted in the children's best interests when it entered an order for an evaluation to be completed by a licensed clinical psychologist regarding the visitation of three minor children with their parents. The trial court did not err in adopting the psychologist's report as a Section 604(b) report and in sealing the report. The trial court's finding that a substantial change in circumstances occurred warranting the change in sole custody from the children's mother to their father was not against the manifest weight of the evidence.

¶ 2 Petitioner-appellant Kathryn Nadwodney appeals the trial court's ruling granting a petition for modification of custody where it removed her as the sole custodian of her minor children and awarded sole custody to the children's father, Timothy Nadwodney. Kathryn contends that procedural irregularities violated her due process rights and she was denied a fair trial. Kathryn also contends that the trial court's ruling granting Timothy's petition for modification of custody was against the manifest weight of the evidence because the trial court was biased against her based on a report completed by a psychologist in accordance with Section 604(b) (604(b) report) of the Illinois Marriage and Dissolution Act (Act) (750 ILCS 5/604(b) (West 2010)). For the reasons that follow, we affirm the trial court.

¶ 3 *Background*

¶ 4 Kathryn and Timothy were married on February 26, 1992. During the marriage, three children were born: (1) Elana, born on March 8, 1992; (2) Anda, born on May 27, 1995; and (3) Krista, born on March 8, 2004. Kathryn filed a petition for dissolution of marriage (petition) on December 13, 2006. The trial court entered a Default Judgment for Dissolution of Marriage on May 21, 2007, and awarded sole custody of the three minor children to Kathryn. The issue of Timothy's visitation was reserved since a default judgment was entered.

¶ 5 On January 2, 2008, Timothy filed a motion for unsupervised visitation with Elana, Anda and Krista. On January 17, 2008, the trial court entered an order appointing a guardian *ad litem* for the three minor children. The trial court ordered Dr. James Dugo to conduct a risk assessment of Timothy and stated that he would have no visitation or contact with the children until further order of the court.

1-11-1130

¶ 6 Kathryn filed a petition for order of protection on March 10, 2010 against Timothy regarding his contact with Krista, which the trial court issued. Kathryn subsequently filed another petition for order of protection against Timothy regarding his contact with all three minor children. The trial court issued an emergency order of protection on March 19, 2010. The order of protection was extended on September 27, 2010. On October 8, 2010, the trial court again extended the order of protection to October 20, 2010, and modified the existing order of protection by ordering that "Deb Meyer will be the supervisor of Respondent's visitation with Krista on Wed. nights with location TBD by Ms. Meyer. The child shall not sit on Respondent's lap nor have any communication outside of Ms. Meyer's hearing. Petitioner shall provide transportation to and from visitation." The trial court set the hearing regarding the order of protection for December 29, 2010.

¶ 7 On May 14, 2010, Kathryn filed a petition for rule to show cause and to modify child support. Kathryn requested the trial court to issue a rule to show cause why Timothy should not be held in contempt for failing to pay child support. She also requested the trial court to determine the proper amount of child support based upon Timothy's new employment position. The trial court entered an order on June 4, 2010 granting Timothy 21 days to respond to Kathryn's petition. The trial court also ordered Kathryn to complete all interviews and present the minor children as requested by Dr. Finn prior to the next scheduled court date of June 25, 2010. Dr. Finn "met on multiple occasions with each parent, interviewed all three children, administered psychological testing to each parent, reviewed collateral data submitted by the parties, and spoke with other collaterals who have been involved with the parties and/or their

1-11-1130

minor children." Dr. Finn submitted a report dated November 30, 2010 to the trial court. Dr. Finn recommended that Timothy be granted sole custody of Krista and Anda. Dr. Finn made no recommendations regarding Elana because she reached the age of 18.

¶ 8 During a status hearing on December 7, 2010, the trial court entered an order granting Timothy leave to file a petition for modification of custody by December 14, 2010. In the same order, the trial court deemed confidential Dr. Finn's report and Alberto Hurtado's psychosexual evaluation of Timothy relied upon by Dr. Finn and sealed the reports. On December 10, 2010, Timothy filed a petition for modification of child custody and other relief. Timothy alleged in the petition that a substantial change of circumstances occurred and, as a result, a change in custody would be in the best interests of the two minor children, Anda and Krista. Elana attained the age of 18 and was not subject to the petition for modification of custody. Timothy alleged that Kathryn's actions during the past 11 months attempted "to alienate and criminalize the Respondent and constitute a serious endangerment to the children's physical, mental, moral or emotional health." Kathryn filed a response on December 27, 2010.

¶ 9 On December 29, 2010, the trial court entered an order "that Dr. Finn's report is adopted as the court's report. That said report is still under a protective order from disclosure from anyone but the attorneys of record." Kathryn filed an emergency motion for protective order, continuance of hearing and other relief on January 20, 2011. In the emergency motion, Kathryn pled that she subpoenaed treating psychologists and other parties who would testify to the allegations in the petition for modification of child custody and as to the best interests of Anda and Krista. The witnesses, however, indicated that they were unable to appropriately advise as to

1-11-1130

their testimony without knowledge of and review of Dr. Finn's report. Kathryn alleged that she could not fully prepare witnesses for a hearing without disclosing to them Dr. Finn's report and his recommendations.

¶ 10 On January 21, 2011, the trial court entered an order releasing Dr. Finn's report to the children's treating counselors. Kathryn filed a petition to appoint an evaluator to determine the best interests of the minor children as to their custody and visitation. The trial court denied Kathryn's petition because the custody matter was pending for six months and it would not be in the children's best interests to postpone a ruling as to custody until another evaluation was completed by Kathryn's psychologist. The trial court set the hearing date for Timothy's petition to modify custody and Kathryn's order for protection for January 20 and 21, 2011. The hearing was continued until March 10, 2011 and concluded on March 16, 2011. During the hearing, Kathryn testified, as did Anda's and Elana's treating counselors.

¶ 11 Kathryn testified that on January 11, 2010, Krista notified her about incidents that occurred during her visit with Timothy. After Kathryn talked with Steve Pugh and Deb Meyer at her church about the information that Krista told her, she then went to the Palatine Police Department on Wednesday, January 13, 2010. An officer at the Palatine Police Department told Kathryn to go to the Hoffman Estates Police Department, and she did so on the same day. She talked with an officer at the Hoffman Estates Police Department and after their conversation, the department contacted the Department of Children and Family Services (DCFS). After talking with a DCFS worker who contacted Kathryn, she took Krista to Lutheran General Hospital's emergency room on that same Wednesday. The DCFS worker met Kathryn and Krista at the

1-11-1130

hospital. The DCFS worker also scheduled a victim sensitive interview (VSI) at the Hoffman Estates Children's Advocacy Center to be done on Friday, January 15, 2010. During the VSI, the DCFS worker, a detective from the Hoffman Estates Police Department and a State's Attorney were present along with Kathryn, Krista, Anda, Elana and Kathryn's niece, Lana. Anda and Elana were also interviewed as part of the VSI. As a result of the VSI, Kathryn was to arrange counseling for the children. Kathryn took the children for counseling at The Bridge. Anda and Elana shared a counselor and Krista had a separate counselor. After counseling began, Anda's and Elana's counselor filed a report with the DCFS on their behalf.

¶ 12 On Monday, January 18, 2010, Kathryn received a telephone call from an officer of the Hoffman Estates Police Department. As a result of that conversation, Kathryn contacted Detective Jeff Aiello at the Arlington Heights Police Department. After speaking with Detective Aiello, Kathryn filed a petition for an order of protection against Timothy to prevent him from seeing Elana, Anda and Krista.

¶ 13 On approximately February 7, 2010, Anda made sexual abuse allegations against Timothy. Kathryn called Anda's counselor that night because Anda was unable to calm down. The counselor instructed Kathryn to take Anda to Northwest Community Hospital's emergency room. Anda was examined by a doctor for child psychiatry and a S.O.S. worker, who analyzes a situation to determine if self-harm or suicide is a possibility. The staff at Northwest Community Hospital recommended that Kathryn take Anda to Alexian Brothers Behavior Health Center (Alexian Brothers), which is the mental health facility in Hoffman Estates. Kathryn took Anda to Alexian Brothers, but they could not see her at that time. Kathryn made an appointment for

1-11-1130

another day and took Anda home in the meantime.

¶ 14 On approximately February 9, 2010, Elana also made sexual abuse allegations against Timothy. Kathryn was instructed to find a separate counselor for Elana. Michael Schlagel then became Elana's counselor.

¶ 15 On cross-examination, Kathryn acknowledged that the results of Krista's examination at Lutheran General Hospital indicated that there were no signs of sexual abuse, but that she had poor hygiene. Kathryn also acknowledged that Elana and Anda did not make allegations of sexual abuse against their father when they participated in the VSI. Kathryn stated that when she spoke to Detective Aiello, she informed him that the Cook County State's Attorney declined to take the case and the Hoffman Estates Police Department declined to criminally charge Timothy. Kathryn further acknowledged that the DCFS report concluded that the allegations were unfounded. Kathryn also contacted the Lombard and Villa Park Police Departments regarding the allegations and they did not criminally charge Timothy. The DuPage County State's Attorney also did not charge Timothy with a crime. Kathryn was aware that Timothy took a polygraph test regarding the allegations and that he passed the test. Kathryn petitioned for an order of protection on January 20, 2010 regarding the sexual abuse allegations that Krista made against Timothy. Kathryn petitioned for a new order of protection on March 20, 2010 based on the allegations of sexual abuse made by Elana and Anda. Kathryn agreed with counsel that all of the DCFS complaints were determined to be unfounded, all of the orders of protections have been terminated and no police agency or state's attorney criminally charged Timothy.

¶ 16 Susan DeLuca, a licensed clinical social worker, was counseling Anda for approximately

1-11-1130

one year. DeLuca stated that Anda is very connected to her mother and is concerned about her mother and her siblings. DeLuca indicated that Anda made allegations of sexual abuse against Timothy during her counseling sessions. DeLuca works with Anda to manage her depression, which includes suicidal ideation. DeLuca described Anda as having poor coping and impulse control and is very sad, distressed and highly anxious. Because DeLuca never met Timothy, she could not express an opinion about him having custody of Anda. DeLuca did not believe "that it would be in Anda's best interest to have no contact with her mother." DeLuca also stated that "Anda has expressed fear and anger at the possibility of being placed somewhere other than her current residence."

¶ 17 Michael Schlagel, a counselor, testified that Kathryn and Elana are his clients. Schlagel is counseling Kathryn regarding an adjustment disorder with depression and anxiety related to sexual abuse of her children. Schlagel counsels Elana regarding her memories of sexual abuse. Schlagel reviewed Dr. Finn's report, but disagreed with his diagnosis of Kathryn as having Munchausen by proxy, which Schlagel defined as occurring "where a caregiver exaggerates or fabricates * * * induces physical or psychological behavior to get attention." Schlagel's opinion was that Kathryn did not place in the children's minds the thought that their father abused them, and Kathryn was not perpetrating a myth about sexual abuse. Schlagel stated that Elana has expressed an opinion that she would not want to live with her father, but that she would want to live with her sisters.

¶ 18 On March 17, 2011, the trial court entered an order finding that "by clear and convincing evidence that the Petitioner, KATHRYN NADWODNEY, engaged in conduct that caused severe

1-11-1130

emotional and psychological abuse to the minor children, Krista Nadwodney and Anda Nadwodney constituting a substantial change in circumstances." The trial court also found that it was in the best interests of the children that Timothy have sole custody of the minor children, which was to be effective on March 18, 2011. The trial court noted that Dr. Finn recommended that Timothy have sole custody of the children, whereas the guardian *ad litem* and Anda's therapist opined that it was in the best interest of Anda to maintain some form of contact with Kathryn. The trial court ordered that Kathryn and Anda receive counseling to facilitate their visitation. Kathryn timely filed this appeal. On January 12, 2012, this court entered an order on its own motion taking the case on appellant's brief only.

¶ 19

Analysis

¶ 20 Kathryn contends that the trial court erred in granting the petition to modify custody because she did not receive a fair trial due to procedural errors that occurred during the proceedings leading to the hearing on the petition. Specifically, Kathryn claims that the trial court erred in ordering an evaluation when the issue of custody was not before the trial court and the trial court adopted the 604(b) report prior to trial thereby denying her a fair trial. Kathryn also contends that the trial court did not order a 604(b) report and Dr. Finn took it upon himself to conduct such an evaluation even though he was only ordered to conduct a visitation evaluation. Kathryn claims that the trial court erred in sealing the report and prohibiting its release to the parties because Dr. Finn was not an appointed custody evaluator. Kathryn maintains that reversal of the custody modification is warranted based on the fact that the trial court never released to the parties Hurtado's psychosexual evaluation of Timothy that Dr. Finn

1-11-1130

incorporated into his report as an addendum.

¶ 21 Although Kathryn is correct that a petition for modification of custody was not before the trial court when it ordered an evaluation by Dr. Finn, Kathryn's petition for an order of protection that raised the issue of Timothy's visitation with the children was pending before the court. In deciding custody and visitation issues, section 604(b) of the Act permits the trial court to seek the advice of professional personnel and appoint an independent evaluator on custody and visitation issues. *Johnston v. Weil*, 396 Ill. App. 3d 781, 786 (2009). An underlying purpose of the statute is to enable the trial court to obtain information to assist it in deciding custody and visitation issues, and "the expert witness is appointed to protect the interests of minor children regarding issues of custody and visitation." *Id.* Because Kathryn placed before the trial court a visitation issue, the trial court acted within its authority granted under section 604(b) of the Act to appoint a professional to conduct an evaluation to provide information to assist it in determining the pending visitation issues. Kathryn contends that Dr. Finn took it upon himself to conduct a section 604(b) custody evaluation even though he was not ordered to do such an investigation and was only ordered to do a visitation evaluation. Visitation, however, "is a form of custody." *In re Marriage of Mitchell*, 319 Ill. App. 3d 17, 22 (2001). Regardless of how the trial court denominated its order for Dr. Finn to conduct an evaluation, he was a court appointed evaluator. Thus, Dr. Finn was under an obligation to conduct an evaluation to protect the children's best interests regarding issues of custody and visitation. See *Johnston*, 396 Ill. App. 3d at 786 ("the expert witness is appointed to protect the interests of minor children regarding issues of custody and visitation.")

1-11-1130

¶ 22 Moreover, in Dr. Finn's written report to the trial court, he stated that he "conducted this evaluation pursuant to your Court Order dated April 9, 2010." The referred to order is excluded from the record; however, in its order dated June 4, 2010, the trial court ordered Kathryn to complete all interviews and present the minor children as required by Dr. Finn prior to the next court dated scheduled for June 25, 2010. Section 604 of the Act is entitled "Interviews" and provides two methods by which the trial court may conduct interviews, those being of the child in chambers or by seeking the advice of professional personnel. 750 ILCS 5/604 (West 2010). Thus, the trial court's order requiring Kathryn to participate in all interviews required by Dr. Finn falls within the purview of section 604 of the Act even if the trial court did not specify explicitly the pertinent code section that it was relying on when it ordered an evaluation to be completed by Dr. Finn. We can deduce that the trial court did, in fact, intend for Dr. Finn to conduct an evaluation of the respective parties, including the minor children, pursuant to its June 4, 2010 order even if it did not specifically term the evaluation a 604(b) evaluation. After receiving Dr. Finn's report, the trial court did not err in adopting the report pursuant to section 604(b) of the Act, which provides the trial court with the authority to conduct interviews to determine the best interests of the children.

¶ 23 The trial court also did not err in sealing the report. It is within the trial court's discretion whether records in a proceeding should be opened to the public and in making the decision, the trial court "must take into consideration all facts and circumstances unique to that case." *Skolnick v. Alzheimer & Gray*, 191 Ill. 2d 214, 231 (2000). In the case at bar, the trial court had a compelling interest in sealing Dr. Finn's report, which was to protect the children's best interests

1-11-1130

and shield them from public knowledge of the specifics of the sexual abuse allegations brought against their father. Although Hurtado's comprehensive psychosexual evaluation of Timothy remained under seal, Dr. Finn's report sufficiently referred to Hurtado's findings and the report adequately informed the parties of the content and results of Hurtado's evaluation.

¶ 24 Even though Kathryn contends that she had no knowledge of Dr. Finn's report until approximately 24 hours before she was to testify at the hearing on the petition to modify custody, the trial court complied with section 604(b) of the Act by disclosing the report to the parties' counsel. Section 604(b) of the Act states in pertinent part that advice given by the professional personnel "shall be given in writing and made available by the court to counsel." 750 ILCS 5/604(b) (West 2010). Nonetheless, the trial court also released the report to Kathryn for her review before she was to testify at the hearing. Also, we note that Kathryn did not file a motion for an extension of time to further prepare before testifying at the hearing after receiving the 604(b) report.

¶ 25 We disagree with Kathryn's contention that the trial court was prejudiced against her and that she was denied a fair trial. The trial court held hearings regarding the modification of the childrens' custody and allowed her attorney to call witnesses who testified during the hearings. Any procedural errors that Kathryn alleged may have occurred did not substantially prejudice her and would not have affected the outcome of the case. See *Wilbourn v. Cavallenes, M.D.*, 398 Ill. App. 3d 837, 848 (2010). In fact, Kathryn has failed to establish a hint of prejudice. Even assuming *arguendo* that procedural errors occurred, "parties are entitled to a fair trial, not a perfect trial." *Id.* at 855. Moreover, the best interests of the children is the trial court's

1-11-1130

paramount concern in determining custody and visitation issues. See 750 ILCS 5/602(a) (West 2010); *In re Marriage of Cotton*, 103 Ill. 2d 346, 356 (1984) ("The guiding principle in child custody cases is the best interests of the child.") Here, Kathryn has failed to present errors that would have affected the outcome of the proceedings and the trial court conducted the proceedings consistent with determining the best interests of the children.

¶ 26 Lastly, Kathryn claims that the trial court's decision to modify custody and award custody of the children to Timothy was against the manifest weight of the evidence. Kathryn claims that the trial court erred in basing its custody decision on Dr. Finn's report and not considering the children's treating therapists' opinions.

¶ 27 Section 610(b) of the Act addresses modification of custody judgments and states in pertinent part:

"(b) The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, that the modification is necessary to serve the best interest of the child. The existence of facts requiring notice to be given under Section 609.5 of this Act shall be considered a change in circumstance. In the case of joint custody, if the parties agree to a termination of a joint custody arrangement, the court shall so terminate the joint custody and make any modification which is in the child's best interest. The

1-11-1130

court shall state in its decision specific findings of fact in support of its modification or termination of joint custody if either parent opposes the modification or termination."

750 ILCS 5/610(b) (West 2010).

¶ 28 In reviewing custody modification judgments, we adopt the manifest weight of the evidence standard of review. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004). When reviewing the trial court's ruling to determine whether it was against the manifest weight of the evidence, "the reviewing court views the evidence in the light most favorable to the appellee." *Id.* at 516. A trial court's custody determination "is afforded 'great deference' because 'the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child.' " *Id.*, quoting *In re Marriage of Gustavson*, 247 Ill. App. 3d 797, 801 (2004). A ruling is against the manifest weight of the evidence "if the opposite conclusion is clearly evident, or if the jury's findings are unreasonable, arbitrary, or not based on the evidence." *Guski v. Raja*, 409 Ill. App. 3d 686, 703 (2011).

¶ 29 In the case at bar, the evidence supports the trial court's ruling to modify its earlier judgment regarding the children's custody. In modifying its prior custody judgment, the trial court considered not only Dr. Finn's report, but the guardian *ad litem's* report, as well. The trial court agreed with the guardian *ad litem* that a relationship between Anda and Kathryn should be maintained, which contradicts Dr. Finn's position. Thus, the trial court did not base its decision to modify the children's custody only on Dr. Finn's report and findings. The trial court also stated that it considered the testimony and credibility of the witnesses. Both Anda's and Elana's counselors testified at the hearings. Anda's counselor stated that it would not be in Anda's best

1-11-1130

interest for her to have no contact with her mother. Thus, the trial court's ruling is consistent with Anda's counselor's position, as well. The trial court noted that Kathryn initiated multiple DCFS investigations and police reports, and once initiated, the departments were required to conduct an investigation of Timothy and the children. The trial court noted that even though initial investigations did not result in charges against Timothy, Kathryn nonetheless filed repeated allegations of child sexual abuse against Timothy with authorities charged with the responsibility of investigating such allegations. The children were forced to participate in repeated investigations conducted by the authorities. The trial court also noted that Timothy passed a polygraph examination regarding the sexual abuse allegations. After considering the evidence, the trial court found "by clear and convincing evidence that Kathryn by her words and actions had inflicted severe emotional and psychological abuse upon the children resulting in a substantial change of circumstances demanding that I change custody, and this will be for the best interest of the children." Based on the evidence in the record, the trial court's finding was not against the manifest weight of the evidence.

¶ 30 Accordingly, the judgment of the trial court is affirmed.

¶ 31 Affirmed.