

No. 1-11-2806

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KOMAA M.,)	
)	
Plaintiff-Appellant,)	Appeal from the
)	Circuit Court of
)	Cook County.
)	
v.)	Nos. 02 D 679097 &
)	02 D 679098
MICHELLE D.,)	
)	Honorable
Defendant-Appellee.)	Barbara Meyer and,
)	Lisa Ruble-Murphy,
)	Judges Presiding.

ORDER

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justice Connors and Justice Harris concurred in the judgment.

¶ 1 *Held*: Trial court did not err in denying plaintiff's motions for substitution of judge or in granting custody of minor children to defendant.

¶ 2 Plaintiff, Komaa M., appeals *pro se* from orders of the circuit court denying his motions for substitution of judge and granting defendant, Michelle D., sole custody of their two minor

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daughters.¹ For the reasons set forth below, we affirm the circuit court.

¶ 3

I. BACKGROUND

¶ 4 Plaintiff and defendant are the parents of two daughters, born on August 22, 1998 and April 2, 2002. Between September 2002 and March 29, 2004, the parties engaged in litigation over custody and child support of the minor children. On March 29, 2004, pursuant to an agreed order, the various pending motions filed by each party were dismissed and the case was removed from the court calendar when, according to plaintiff, the parties reached an oral agreement that he would have custody of the children and that defendant would have visitation rights and would be required to pay child support. This agreement was never reduced to writing and the trial court did not enter any orders regarding custody or child support.

¶ 5 From the record, it appears that the minor children resided with plaintiff until March 1, 2011, and that after that date the children were living with defendant. According to plaintiff, on July 26, 2011, he was returning the minor children to defendant's home when he was physically assaulted by defendant's boyfriend and another of defendant's male friends. Two days later, on July 28, 2011, plaintiff obtained an emergency order of protection against defendant and a no stalking order against her boyfriend. Pursuant to that order, the minor children were removed from defendant's home and placed in plaintiff's care. The next day, defendant filed for an emergency order of protection against plaintiff, which was denied.

¶ 6 On August 3, 2011, the case was before the trial court on plaintiff's emergency order of

¹ We note that no appellee's brief has been filed by defendant. However, we find that we may reach the merits of the case because the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

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protection. Plaintiff was not present, and Judge Meyer entered an order requiring plaintiff to appear in court with the children on August 5, 2011. Judge Meyer also entered an order appointing a child representative for the minor children. On August 5, 2011, both parties and the child representative were present in court when Judge Meyer entered an order continuing the July 28, 2011 emergency order of protection but modified it to allow defendant parenting time with the minor children. On that date, the half-sheet reflects that Judge Meyer also denied plaintiff's motion for substitution of judge as a matter of right.

¶ 7 Both parties and the child representative were in court again on August 26, 2011, at which time Judge Meyer set September 7, 2011, as the date for a hearing on plaintiff's petition for an order of protection, his emergency petition for rule to show cause, and his petition for custody, as well as defendant's emergency petition for custody and possession of the minor children. On August 30, 2011, defendant presented to the trial court an emergency petition for possession and custody. That petition was denied, and the trial court ordered plaintiff to bring the children to court on September 7, 2011.

¶ 8 On September 7, 2011, the matter was called at 9:30 a.m., at which time defendant and the child representative appeared. An order entered by Judge Meyer that day states that defendant and the child representative informed her that plaintiff, who was not in the courtroom, had filed a motion for substitution of judge for cause. Plaintiff appeared at 9:40 a.m., and Judge Meyer transferred the case to Judge Ruble-Murphy for a hearing on plaintiff's motion. Judge Ruble-Murphy denied the motion and returned the case to Judge Meyer. Later that day, at approximately 12:00 p.m., plaintiff returned to Judge Meyer's courtroom with Judge Ruble-

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Murphy's order and, according to an uncertified bystander's report filed by plaintiff, was told by the court clerk that the case would not be heard that day. Plaintiff asserts that he asked the clerk to send him a copy of the order rescheduling the pending motions. Plaintiff then left the court building. However, according to the order entered by Judge Meyer that day, after Judge Ruble-Murphy denied plaintiff's motion for substitution of judge for cause, plaintiff returned to Judge Meyer's courtroom at about noon and told her that "the court could do as it wished because he did not care what the court did, he did not intend to appear in court again, and that he intended to file an appeal."

¶ 9 Later that day, defendant filed a third emergency petition for possession and custody and gave notice to the child representative. A hearing before Judge Meyer's was held at approximately 2:45 p.m. The defendant and the child representative were present at the hearing; the plaintiff was not. The record does not contain a report of this proceeding. According to an order entered by Judge Meyer, defendant testified that plaintiff came to her home with the minor children on September 6, 2011, that the children told her that they were forced to move out of the home where they were living, that they had run away from plaintiff on August 29, 2011, and that she believed the children were homeless.

¶ 10 Based on the evidence presented, Judge Meyer found that, pursuant to section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2008)), it was in the children's best interest for defendant to have sole custody. The court stated that pursuant to section 14(a)(2) of the Illinois Parentage Act (750 ILCS 45/14(a)(2) (West 2008)), if a judgment of parentage contains no explicit award of custody, the establishment of a support obligation or

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of visitation rights in one parent shall be considered a judgment granting custody in the other parent. Further, the court noted that section 14 provides that if a parentage order does not provide for support or visitation, custody shall be presumed with the mother. 750 ILCS 45/14(a)(2) (West 2008). The court then proceeded to enter an order granting sole custody of the parties' minor children to defendant, while reserving plaintiff's right to visitation. The court also dismissed all of plaintiff's previously filed petitions for want of prosecution, discharged the child representative, ordered the child representative to notify plaintiff of the order via Federal Express and regular mail, and removed the case from the court's call.

¶ 11 On September 23, 2011, plaintiff filed a timely notice of appeal arguing that: (1) Judge Meyer erred in denying his motion for substitution of judge as of right and Judge Ruble-Murphy erred in denying his motion for substitution of judge for cause; and (2) the trial court erred in entering an *ex parte* order granting defendant sole custody of the minor children.

¶ 12

II. ANALYSIS

¶ 13

A. Denial of Motions for Substitution of Judge

¶ 14 On appeal, plaintiff first argues that Judge Meyer erred in entering an order on August 5, 2011, denying his motion for substitution of judge as of right. A motion for substitution of judge as of right shall be granted if it is presented before trial and before the judge has made a ruling on any substantial issue. 735 ILCS 5/2-1001(a)(ii)(2)(West 2008). The trial court “has no discretion to deny a proper motion for substitution of judge.” *Rodisch v. Camacho-Esparza*, 309 Ill. App. 3d 346, 350 (1999). In addition to the "substantial issue" rule, a motion for substitution of judge can be properly denied where the happenings at a pretrial conference allow a party to “test the

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waters” and get an idea of the judge's opinion on some of the issues of the case. *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004). The purpose of this exception is to keep parties from “judge shopping” when they are able to tell which way a judge is leaning on a case before substantial issues have been decided. *Id.* The denial of a motion for substitution of judge is reviewed *de novo*.

¶ 15 In this case, both parties appeared *pro se* before Judge Meyer on August 2, 2011, on plaintiff's motion for an emergency order of protection. On August 5, 2011, the parties again appeared *pro se* on plaintiff's emergency order of protection, and afterwards Judge Meyer entered an order modifying the emergency order to grant defendant parenting time with the minor children. At that time, Judge Meyer also denied plaintiff's motion for substitution of judge as of right. Defendant contends that the trial court erred in denying that motion and asks this court to reverse.

¶ 16 Our supreme court has long recognized that to support a claim of error the appellant has the burden to present a sufficiently complete record. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984). "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Foutch*, 99 Ill. 2d at 391. "An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *Corral*, 217 Ill. 2d at 156. Without an adequate record preserving the claimed error, the court of review must presume the circuit court's order had a sufficient factual basis and that it conforms with the law. *Corral*, 217 Ill. 2 at 157;

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Foutch, 99 Ill. 2d at 392.

¶ 17 In this case, we have no transcript of the proceedings before Judge Meyer when the parties appeared before her on August 2, 2011 and August 5, 2011. Plaintiff has submitted a bystander's report for both dates, however, it does not comply with the requirements of Supreme Court Rule 323© and therefore, will not be considered by this court. Pursuant to Supreme Court Rule 323©, in the absence of a transcript of proceedings, an appellant may submit a bystander's report of the proceeding in the record on appeal. Ill. S. Ct. R. 323© (eff. Dec. 13, 2005). Rule 323© provides, in pertinent part:

"If no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. *** The proposed report shall be served on all parties within 28 days after the notice of appeal is filed. Within 14 days after service of the proposed report of proceedings, any other party may serve proposed amendments or an alternative proposed report of or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, *certify*, and order filed an accurate report of proceedings. Absent stipulation, only the report of proceedings so *certified* shall be included in the record on appeal." (Emphases added.)
Ill. S. Ct. R. 323© (eff. Dec. 13, 2005).

¶ 18 Here, there is no evidence that plaintiff served his bystander's reports on defendant, nor does it include a certification or approval by the trial court. As such, we cannot consider it on appeal. Therefore, without an adequate record preserving the claimed error, we must presume

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that Judge Meyer's denial of plaintiff's motion for substitution of judge for cause had a sufficient factual basis and that it conforms with the law. *Corral*, 217 Ill. 2d at 157; *Foutch*, 99 Ill. 2d at 392.

¶ 19 Plaintiff next contends that Judge Ruble-Murphy erred in denying his motion for a substitution of Judge Meyer for cause on September 7, 2011. Section 2-1001(a)(3) of the Code of Civil Procedure provides for a substitution of judge for cause. 735 ILCS 5/2-1001(a)(3) (West 2008). A trial judge facing a petition for substitution is required to refer the petition to a "judge other than the judge named in the petition." 735 ILCS 5/2-1001(a)(3) (West 2008). We will reverse the determination of the judge to whom the petition was transferred pertaining to allegations of prejudice on the part of the transferring judge only if the finding is contrary to the manifest weight of the evidence. *Levaccare v. Levaccare*, 376 Ill. App. 3d 503, 509 (2007).

¶ 20 Although section 2-1001(a)(3) does not define "cause," Illinois courts have held that in such circumstances actual prejudice has been required to force removal of a judge from a case, that is, prejudicial trial conduct or personal bias. *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 30. Judges are presumed impartial, and the burden of overcoming the presumption by showing prejudicial trial conduct or personal bias rests with the party making the charge. *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). The fact, for example, that a judge has previously ruled against a party in any particular case would not disqualify the judge from sitting in a subsequent case involving the same party. *Eychaner*, 202 Ill. App. at 280. With respect to bias based upon a judge's conduct or comments during a trial, we have relied upon the United States Supreme Court's description:

“ [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.’ (Emphases in original.)” *Eychaner*, 202 Ill. App. at 281 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

¶ 21 Thus, while most bias charges stemming from conduct during trial do not support a finding of actual prejudice, there may be some cases in which the antagonism is so high that it rises to the level of actual prejudice. Indeed, our supreme court recently reaffirmed its reliance on *Liteky* in *In re Estate of Wilson*, 238 Ill. 3d 519, 554-44 (2010). In any event, the law is clear in Illinois that when, as in this case, a substantive ruling has been made, substitution under section 2-1001(a)(3) may be granted only where the party can establish actual prejudice.

¶ 22 In this case, plaintiff contends that Judge Meyer was prejudiced against him from the first day the case was brought to her court. He asserts that when Judge Meyer ordered him to bring the children to court on the morning of August 3, 2011, she failed to accommodate his request for a later time so that he could attend a hearing in another court and that from that date on, her demeanor and comments indicated that she was prejudiced against him. Plaintiff argues,

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therefore, that Judge Ruble-Meyer erred in denying his motion for substitution of judge for cause.

¶ 23 As addressed above, our supreme court has long recognized that to support a claim of error the appellant has the burden to present a sufficiently complete record. *Corral*, 217 Ill. 2d at 156; *Foutch*, 99 Ill. 2d at 392. Without an adequate record preserving the claimed error, the court of review must presume the circuit court's order had a sufficient factual basis and that it conforms with the law. *Corral*, 217 Ill. 2 at 157; *Foutch*, 99 Ill. 2d at 392.

¶ 24 In this case, we have no record of what took place before Judge Ruble-Murphy. Plaintiff asserts in a bystander's report that Judge Ruble-Murphy denied his motion without explanation, stating only that plaintiff and Judge Meyer had a "difference of opinion." However, because there is no evidence that plaintiff served the bystander's report on defendant or had it certified or approved by the trial court, as required by Supreme Court Rule 323© (Ill. S. Ct. R. 323© (eff. Dec. 13, 2005)), we cannot consider it on appeal. Therefore, without an adequate record preserving the claimed error, we must presume Judge Ruble-Murphy's order had a sufficient factual basis and that it conforms with the law. *Corral*, 217 Ill. 2 at 157; *Foutch*, 99 Ill. 2d at 392. We further note that contrary to plaintiff's assertion, nothing in the record before us indicates that at anytime during the proceedings, Judge Meyer made comments that reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. We also note that plaintiff's contention that Judge Meyer was biased against him from the start is belied by the fact that in August 2011, shortly after taking on the case, Judge Meyer denied defendant's request to lift the order of protection granted to defendant. Therefore, based on the lack of evidence of bias or prejudice in the record, we find that Judge Ruble-Murphy did not err in denying plaintiff's

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motion for substitution of judge for cause.

¶ 25 Next, plaintiff contends that the trial court erred in entering the order awarding custody to defendant because it was issued *ex parte* and failed to comply with the requirements of Cook County Circuit Rules regarding notice of a hearing. In particular, plaintiff asserts that the trial court violated Cook County Circuit Court Rule 13.4(a)(iv), which governs *ex parte* matters during the pre-trial phase of a domestic relations proceeding and provides as follows:

"a. An *ex parte* matter is one where a party appears in court without giving notice for good cause shown. Such matters shall be heard at a time designated by the judge to whom the case is assigned.

b. When an *ex parte* order is sought, the petition shall state the reason why notice should not be given and why the matter should be heard *ex parte*.

c. If the court does not deem the matter appropriate to be heard *ex parte*, the movant may set the matter on the motion call, with proper notice.

d. No *ex parte* order for custody shall be granted without notice unless it clearly appears from specific facts shown in a verified petition that immediate irreparable harm will be suffered by the child if notice is served before a hearing is held. All *ex parte* orders for custody shall set a status or hearing date on or before the 10th day after said order is entered and shall take precedence over all other matters. A copy of the *ex parte* custody order, with a copy of the underlying petition, shall be immediately served upon the other party. On two (2) days notice to the party who obtained the *ex parte* custody order, the

adverse party may appear and move for a re-hearing or modification on the *ex parte* order." Cook Co. Cir. R. 13.4(a)(iv) (eff. June 1, 2011).

¶ 26 Here, plaintiff asserts that the trial court erred in granting defendant's petition because it failed to state why notice should not be given as required by Rule 13.4(a)(iv)(b) and that it is not evident from the facts shown in the verified petition that immediate irreparable harm would be suffered by the children if notice was given as required by Rule 13.4(a)(iv)(d). Further, plaintiff asserts that, as also required by Rule 13.4(a)(iv)(d), he was not served with a copy of the *ex parte* custody order immediately, since it was not mailed until two days after the hearing, and that he was only sent a copy of the order and not the petition. He also contends that the trial court failed to set a status or hearing date on or before the 10th day after the order was entered but instead removed the case from the call.

¶ 27 The right to be present at trial may be waived by a party voluntarily or involuntarily absenting himself from trial. *Givens v. Givens*, 192 Ill. App. 3d 97, 102 (1989). Here, both parties and the child representative were present in court on August 26, 2011, when the trial court set September 7, 2011 as the date for a hearing on both parties' petitions for custody and on the other pending petitions. Plaintiff acknowledges that he was in court on September 7, 2011. However, in an uncertified bystander's report, plaintiff contends that he left the court before the case was called a second time because when he returned to Judge Meyer's court after Judge Ruble-Murphy had denied his petition for substitution of judge for cause, he was told by the trial court clerk that the case would not be heard that day but would be rescheduled for a different date.

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¶ 28 As discussed above, in the absence of a transcript of proceedings, an appellant may, pursuant to Supreme Court Rule 323© submit a bystander's report of the proceeding in the record on appeal. Ill. S. Ct. R. 323© (eff. Dec. 13, 2005). However, a copy of the bystander's report must be served on all parties within 28 days after the notice of appeal is filed, so that those parties may propose amendment to the report, and the trial court must then "promptly settle, *certify*, and order filed an accurate report of proceedings." (Emphasis added) Ill. S. Ct. R. 323© (eff. Dec. 13, 2005).

¶ 29 Here, because there is no evidence that plaintiff served his bystander's report on defendant or obtained certification or approval of the bystander's report from the trial court, we cannot consider it on appeal. Further, the order entered by Judge Murphy directly contradicts defendant's version of events. According to that order, after plaintiff's motion to substitute judge for cause was denied by Judge Ruble-Murphy, plaintiff returned to Judge Meyer's courtroom and informed her that he would no longer be participating in the proceedings but would instead be filing an appeal. Plaintiff then left the courtroom. Therefore, because plaintiff had notice that a hearing would be held on his and defendant's petitions for custody on September 7, 2011, and chose not to be present, we do not find that the trial court erred in entering an order granting sole custody to defendant despite the fact that plaintiff was absent from court.

¶ 30 Lastly, we consider plaintiff's argument that the trial court's decision to grant sole custody to defendant was against the manifest weight of the evidence. In making a custody determination, the trial court's primary consideration is the best interest and welfare of the children involved. *Prince v. Herrera*, 261 Ill. App. 3d 606, 611 (1994). Under section 602 of

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the Illinois Marriage and Dissolution of Marriage Act, the court is to consider “all relevant factors” including the following in determining the best interest of the children:

- “(1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school and community;
- (5) the mental and physical health of all individuals involved;
- (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
- (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;
- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; and
- (9) whether one of the parents is a sex offender.” 750 ILCS 5/602 (West 2008).

¶ 31 The trial court's custodial decision rests on temperaments, personalities and capabilities of the parties, and the trial judge is in the best position to evaluate these factors. *Prince*, 261 Ill. App. 3d at 612. The trial court has broad discretion in determining custody and we will not

disturb that determination on appeal unless it is against the manifest weight of the evidence. *Id.*

¶ 32 Here, the trial court held a custodial hearing on September 7, 2011, and heard testimony from defendant. The record on appeal does not contain a transcript, a certified bystander's report, or an agreed statement of facts from that hearing. We do have a copy of the trial court's order, which states that defendant testified that the minor children told her that they had run away from plaintiff's home on August 29, 2011, and that she believed the children were homeless. Based on this testimony, the trial court's finding that granting custody to defendant was in the children's best interest was not against the manifest weight of the evidence. Further, in the absence of a transcript or a bystander's report showing what other evidence was presented at the hearing, we must presume the circuit court's order had a sufficient factual basis. *Corral*, 217 Ill. 2d at 157; *Foutch*, 99 Ill. 2d at 392.

¶ 33 Plaintiff contends that had he been at the hearing, he could have presented evidence showing that defendant has a history of associating with men who have criminal records and substance abuse problems, which is not in the children's best interest. Further, he asserts that he would have testified that defendant has demonstrated an unwillingness to facilitate and encourage a close relationship between plaintiff and the children. However, as discussed above, plaintiff had notice that a hearing would be held on the parties' motions for custody but absented himself from the hearing and therefore, waived his right to present this evidence at the hearing.

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¶ 34

III. CONCLUSION

¶ 35 For the foregoing reasons, we affirm the circuit court.

¶ 36 Affirmed.