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2012 IL App (3d) 120237-U

Order filed August 16, 2012
Modified Upon Denial of Rehearing February 8, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2013

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 10 th Judicial Circuit,
MARGARET TOMLINS,)	Peoria County, Illinois,
)	
Petitioner-Appellee,)	
)	Appeal No. 03-12-0237
v.)	Circuit No. 08-D-645
)	
)	
CHRISTOPHER GLENN,)	
)	Honorable Michael Risinger,
Respondent-Appellant.)	Judge Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held:* Pursuant to section 2-1401 of the Code of Civil Procedure, father filed a *pro se* petition alleging the court-approved 2009 custody and visitation agreement resulted from mother's alleged fraudulent statements and should be considered void. The trial court denied father's petition to set aside the 2009 agreed custody

order after finding fraud did not exist. Father forfeited the right to challenge the impartiality of the trial judge in the petition for rehearing before the appellate court. We affirm.

¶ 2 On September 21, 2009, the court appointed attorney Michael Risinger as a successor GAL for the children during the pending dissolution proceedings. After successful mediation,¹ the parties entered into an agreed custody order, approved by Judge Dubicki on November 9, 2009, leaving only the remaining property issues unresolved.

¶ 3 On February 28, 2011, respondent-appellant Christopher Glenn (father) filed a “Petition to Void Fraudulent Custody Order” (“Petition to Void”) and petitioner-appellee Margaret Tomlins (mother) filed a timely motion to dismiss the “Petition to Void.” After March 24, 2011, a new judge, Judge Risinger, conducted all proceedings without an objection from either party.

¶ 4 On July 7, 2011, Judge Risinger allowed mother's motion to dismiss the change of custody allegations contained in father's “Petition to Void”, but reserved ruling on the section 2-1401 allegations of fraud by agreement of the parties, until a hearing occurred on March 12, 2012. Judge Risinger denied father's request to set aside the 2009 agreed custody and visitation order and father's request to reconsider this ruling. Father filed a timely notice of appeal on March 20, 2012.

¶ 5 This court filed its Rule 23 order on August 16, 2012, affirming the trial court’s March 2012 ruling. On September 6, 2012, father filed a petition for rehearing clearly challenging, for the first time, the impartiality of the trial judge, Judge Risinger.

¶ 6 We deny the petition for rehearing, and issue a modified order upon denial of rehearing

¹ During mediation, both parents were represented by counsel and the children were represented by a guardian *ad litem* appointed by the court.

that affirms the judgment of the circuit court.

¶ 7

BACKGROUND

¶ 8 On October 29, 2008, mother filed a petition for judgment of dissolution of marriage.

The court appointed a guardian *ad litem* to represent the two minor children born during the marriage and ordered the parents to attend mediation sessions. On September 21, 2009, the court appointed attorney Michael Risinger as a successor GAL for the children.

¶ 9 On November 9, 2009, after successful mediation, the parties and their respective attorneys appeared in court to present an agreed order regarding sole custody and visitation. In open court on that date, each party stated they had discussed the terms of the agreement with their attorneys, agreed to the terms, believed the agreement was in the best interests of their children, and felt it was a fair and equitable agreement. Thereafter, Judge Dubicki approved the agreement as requested by the parties and entered an “Agreed Custody and Visitation Order” (agreed custody order), granting sole custody of the children to mother and liberal visitation to father. The written order specifically included language that the agreed custody order was “entered per Illinois Supreme Court Rule 900 Series *** [and] as to issues of child custody[,] it is a final order for the sole purpose of Section 610 and 607 of the IMDMA [Illinois Marriage and Dissolution of Marriage Act] (the Act).” 750 ILCS 5/607, 610 (West 2008).

¶ 10 Between the dates of November 9, 2009, and February 28, 2011, Judge Dubicki conducted several contested hearings regarding the remaining unresolved issues, including the grounds for dissolution, property distribution, child support issues, discovery difficulties and requests for findings of contempt. The property issues remain unresolved at the time of filing this appeal.

¶ 11 Fifteen months after the entry of the agreed order, on February 28, 2011, father filed a seven-page, *pro se* “Petition to Void Fraudulent Custody Order” alleging a risk of serious endangerment to the children and the need to modify custody, pursuant to 610(a) and (b) of the Act (750 ILCS 5/610(a), (b) (West 2010)). This petition also alleged the 2009 agreed custody order was procured by fraud pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). Father attached his affidavit to the nine-page “Petition to Void” which included 94 paragraphs of facts supporting his request. The relevant portions of father's allegations claimed that, before the court approved the parties' 2009 custody agreement, mother misled father by indicating she was willing to consider reconciliation and misrepresented both the nature of her third party sexual relationship and her purported personal commitment to raise the children “according to the moral standards of the Roman Catholic Faith.”

¶ 12 Father claimed he “detrimentally relied” on mother's misrepresentations when he entered into the 2009 agreed custody order. In this petition, father asked the court to vacate the 2009 agreed custody order, and then modify the current custody arrangement by transferring the children into his sole custody.

¶ 13 Mother filed a timely motion to dismiss the “Petition to Void,” on March 28, 2011, arguing that respondent's petition did not state a cause of action. Alternatively, mother contended that the allegations regarding mother's sexual relationship with a third party was not material to the outcome of the 2009 agreed custody order.

¶ 14 When mother filed her motion to dismiss on March 29, 2011, a new judge, Judge Risinger, replaced Judge Dubicki. Consequently, on May 23, 2011, father filed an “Emergency Motion for Appointment of Guardian Ad Litem and Temporary Change in Custody,” wherein

father stated facts similar to those set out in his “Petition to Void,” previously filed on February 28, 2011.

¶ 15 On July 7, 2011, after proffers and arguments by each party, the court found, based on the case law, that the facts contained in father's “Petition to Void” did not demonstrate the children’s environment seriously endangered their physical, mental, moral, or emotional health as required by section 610(a) of the Act. 750 ILCS 5/610(a) (West 2010). Consequently, Judge Risinger denied father’s emergency request for a temporary change of custody and the appointment of a new successor guardian *ad litem* for the children. At this hearing, and by agreement of the parties, the court indefinitely postponed his ruling on the contentions of fraud pending the outcome of other motions filed by the parties.

¶ 16 Thereafter, on December 6, 2011, father filed a “Motion for Partial Summary Judgment” asking the court to consider the undisputed facts set out in the pleadings and rule on the unresolved section 2-1401 portion of his “Petition to Void” and to declare the 2009 agreed custody order void based on fraud.

¶ 17 On March 12, 2012, Judge Risinger conducted a hearing on father's “Motion for Partial Summary Judgment,” as well the unresolved section 2-1401 allegations in father’s “Petition to Void.” According to father, the only issue to be addressed during the hearing on March 12, 2012, was his request for the court to find the November 9, 2009, agreed custody order was procured by fraud.

¶ 18 During the hearing, Judge Risinger considered the pleadings and also allowed both *pro se* parties the opportunity to discuss facts beyond the pleadings, relevant to the merits of father’s “Motion for Partial Summary Judgment” and his “Petition to Void” before arguing their

respective positions. Neither party objected to proceeding in this informal manner or Judge Risinger's presence as the presiding trial judge.

¶ 19 Mother argued that, on November 9, 2009, the parties both were represented by counsel when they entered into the agreed custody order in open court, after the parties attended mediation sessions and consulted with counsel. In response to father's fraud allegations, mother indicated she disclosed her dating relationship with a third party during the mediation process, and father was aware of this relationship and she did not mislead him. Mother stated that, on November 9, 2009, the court asked both parties, who answered affirmatively, whether they believed their agreement was fair and in the children's best interest. According to mother, father demanded the incorporation of some additional conditions into the written agreement, which mother approved and added to the final agreed custody order entered on November 9, 2009.

¶ 20 Father argued that mother told him she would consider reconciliation at the time of the entry of the 2009 agreed custody order. Father stated this factor caused him to agree to the entry of the custody order on November 9, 2009. However, according to father, mother had a sexual relationship with the named third party at that time, fraudulently misled father, and never intended to reconcile. Father argued that, since the agreed custody order was procured by fraud, it was a void order.

¶ 21 On March 14, 2012, Judge Risinger entered his ruling, in open court, on father's "Motion for Partial Summary Judgment" and "Petition to Void." Regarding the "Motion for Partial Summary Judgment," the court stated:

"I do not find that fraud was ever used to obtain this [November 9, 2009] custody order that was agreed to by the parties. I believe that [father] either

misunderstood certain representations made by his wife or was hopeful that I would make the same inferences he did in assuming that she was being sneaky.

I don't see fraud here. And so, therefore, I deny the relief requested [in the motion for partial summary judgment] .”

¶ 22 Next, Judge Risinger addressed father's "Petition to Void." The court noted that, on July 7, 2011, it already denied father's request for a modification of custody, pursuant to section 610(a) of the Act, finding father did not demonstrate serious endangerment to the children; and pursuant to section 610(b) of the Act, because father's 2011 petition was filed within two years of the original custody order. Finally, the court found fraud did not occur or induce the agreed sole custody agreement as discussed in the denial of father's "Motion for Partial Summary Judgment.”

¶ 23 On March 19, 2012, father filed a "Post-Judgment Motion of [*sic.*] 2-1401 Petition," asking Judge Risinger to reconsider his ruling on the section 2-1401 petition, which the court denied. The motion to reconsider did not allege the trial judge should have disqualified himself or allege the court was less than impartial. On March 20, 2012, respondent filed a "Notice of Appeal re [*sic.*] 2-1401 Petition on Child-Custody," contending that the trial court erroneously dismissed his "Motion for Partial Summary Judgment" and the "uncontested 2-1401 petition.”

¶ 24 This court filed its Rule 23 order on August 16, 2012, affirming the trial court after addressing the only issues argued in father's appellate brief. On September 6, 2012, father filed a petition for rehearing in this appeal clearly raising, for the first time, an issue questioning the impartiality of the trial judge, Judge Risinger.

¶ 25

ANALYSIS

¶ 26 Initially, we note mother has not filed a brief in this case. However, our supreme court has held an appellate court may address the merits of a case on appeal, in the absence of an appellee's brief, if justice so requires and if the record and claimed errors are simple enough so that the appellate court can resolve the issues without the aid of an appellee's brief. *First Capitol Mortgage Co. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 27 We first address the serious contentions set out in the petition for rehearing in this appeal regarding Judge Risinger's impartiality. We acknowledge father vaguely mentioned, in his initial brief on appeal, the circumstances which allowed Judge Risinger to have access to and consider information gathered while serving in the capacity of a successor guardian *ad litem* for a short time in 2009. This general contention, without argument or citation to authority did not cause us to consider, *sua sponte*, whether Judge Risinger acted improperly by failing to recuse himself in this case. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Avery v. State Farm Mutual Automobile Insurance Co.*, 321 Ill. App. 3d 269, 276 (2001). Consequently, our original Rule 23 order did not focus on the trial judge's previous brief appointment as a successor GAL at the time the court approved the parties agreed order now subject to this appeal.

¶ 28 As father now alleges in the petition for rehearing filed in this court, the record reflects Michael Risinger served as the successor guardian *ad litem* on behalf of the minor children beginning on September 21, 2009, just before Judge Dubicki approved the parties' agreed custody order in November 2009. Two years later, in May of 2011, father filed a motion requesting the appointment of a guardian *ad litem* due to new issues arising out of father's 2011 petition to set aside the 2009 agreement based on fraud. However, from May, 2011 until Judge Risinger's ruling on March 14, 2012, father did not challenge Judge Risinger's ability to make

substantive rulings in the case based on his previous but brief involvement as a GAL in 2009.

¶ 29 The case law provides that, when a party has not filed a timely challenge to a judge's neutrality prior to a trial or hearing, a party challenging the judge's ruling following the contested proceeding for the first time on appeal must show the issue was not addressed sooner because that party was unaware or had no reason to be aware of the reason for the judge's potential disqualification. *F.D.I.C. v O'Malley*, 163 Ill 2d 130, 140 (1994). To hold otherwise would permit a party to await the outcome of a trial and then attempt to disqualify the judge only when the outcome is unfavorable. *Id.* at 140-41. For example, in *People v. Jones*, the defendant did not move for a substitution of judge at trial or seek the judge's disqualification. *People v. Jones*, 24 Ill. App. 3d 1052, 1056 (1974). Under such circumstances, the court held that the contention of error was waived and could not be presented for the first time on appeal. *Id.* Such is the situation presented in the case at bar.

¶ 30 The record documents that father filed an "Emergency Motion for Appointment of Guardian Ad Litem and Temporary Change in Custody" on May 23, 2011, but did not file a motion to substitute Judge Risinger. Several months later, on July 7, 2011, father appeared before Judge Risinger for a combined hearing on the merits of mother's motion to dismiss and father's 2011 "Petition to Void." On July 7, 2011, father did not object to Judge Risinger presiding over the contested hearing. Further, when Judge Risinger announced his ruling on the motion to dismiss and denied a request to appoint a GAL for the children on July 7, 2011, father *agreed* Judge Risinger should reserve ruling on the additional section 2-1401 allegations of fraud pending the outcome of other matters. Later, on December 6, 2011, father filed a "Motion for Partial Summary Judgment" asking Judge Risinger to finally rule on the unresolved section 2-

1401 portion of his “Petition to Void” without requesting Judge Risinger to step down.

Thereafter, father appeared and participated in the hearing before Judge Risinger on March 12, 2012, which resulted in the court's verbal ruling on March 14, 2012. On March 19, 2012, father filed a motion requesting Judge Risinger to reconsider the March 14, 2012, ruling without asserting the court should have been disqualified.

¶ 31 It is significant to this court that, in the petition for rehearing filed with this court, father does not allege on appeal that father was unaware Risinger's involvement as a GAL for a short time in 2009. Moreover, the record supports the view that father knew of Risinger's previous role as successor GAL, which precipitated father's 2011 motion to request the appointment of a GAL. This significant procedural history reveals father had multiple opportunities over a substantial period of time, to bring any concerns regarding Judge Risinger's potential disqualification to the judge's attention, but father did not do so.

¶ 32 The dissent asserts, “ However, to me it is beyond debate that an attorney, who actively participates in a case as a GAL, cannot later participate in the case wearing a black robe.” The dissent's point is well-taken. However, the dissent does not address the case law that provides a party forfeits the ability to question the court's decisions on appeal, based on ethical considerations alone, when that particular party was aware of the court's potential conflict but failed to file a motion for recusal or substitution for cause in the trial court. See *Kamelgard v. American College of Surgeons*, 385 Ill. App. 3d 675, 681 (2008).

¶ 33 Here, father filed his “Petition to Void Fraudulent Custody Order” on February 28, 2011,

when Judge Dubicki was conducting hearings in the case.² After Judge Risinger became involved as the trial judge some time after March 24, 2011, father did not ask Judge Risinger to recuse himself or formally request a substitution of judge at any point in time thereafter. Under these unique circumstances, we conclude father forfeited the ability to challenge the viability of the judge's ruling due to judicial ethical considerations alone.

¶ 34 Next, as addressed in the original Rule 23 decision issued by this court, we now turn to the *merits* of the court's ruling on father's section 2-1401 "Petition to Void," the only issue clearly articulated in father's initial, *pro se*, appellate brief. Originally, in this appeal, father claimed the trial court "erred in dismissing the cause *sua sponte* without an evidentiary hearing, given the uncontested factual allegations in the pleading and the uncontested factual allegations in the motion for partial summary judgment and attached affidavit."

¶ 35 We reject father's argument that the court decided to dismiss his petition *sua sponte* because mother failed to respond to his "Petition to Void" in the trial court. The record reflects that mother did, in fact, respond to father's petition by filing a timely motion to dismiss father's "Petition to Void" based on fraud. Therefore, we conclude the court did not *sua sponte* dismiss father's petition.

¶ 36 Father also submits that the trial court did not conduct a proper hearing before denying the 2-1401 relief father requested. The record shows that, on July 7, 2011, the trial court heard

² Both parties filed contested motions, between the dates of November 9, 2009, and February 28, 2011, including the pending "Petition to Void Fraudulent Custody Order" and motions to vacate the grounds for dissolution, and addressing other matters such as discovery problems, property distribution, child support issues, and requests for findings of contempt. Judge Dubicki heard all pending motions scheduled for hearings before March 24, 2011, and Judge Risinger heard all pending motions scheduled for hearings from March 24, 2011, through March 14, 2012.

arguments and ruled on the change of custody portions of father's "Petition to Void," but reserved ruling, by agreement, on the section 2-1401 allegations of fraud.

¶ 37 The record reveals that on March 12, 2012, both parties appeared *pro se* before Judge Risinger for the purpose of a hearing to resolve the remaining but previously reserved section 2-1401 fraud allegations set out in father's "Petition to Void." On that date, the trial court conducted a somewhat informal but thorough hearing on father's "Motion for Partial Summary Judgment" and father's "Petition to Void."

¶ 38 It is well-established that, under the doctrine of invited error, a party may not acquiesce or agree to proceed in one manner and then later contend on appeal that the course of action was in error. *People v. Bush*, 214 Ill.2d 318, 332 (2005). Therefore, we conclude the court properly conducted a hearing, albeit somewhat informal, and considered the facts presented by the parties at the hearing along with the pleadings when making his ruling. Having concluded the court properly conducted a hearing, based on procedures as agreed by the parties, we next consider the merits of the court's decision denying father's request.

¶ 39 Thus, we turn to the merits of father's petition for relief. The purpose of a section 2-1401 petition "is to bring before the court matters of fact which were unknown at the time the judgment was entered, and if known, would have affected or altered the judgment." *In re Marriage of Breyley*, 247 Ill. App. 3d 486, 490-91 (1993) (quoting *In re Marriage of Hoppe*, 220 Ill. App. 3d 271, 282 (1991)). To be entitled to relief under section 2-1401, a petitioner must affirmatively set forth specific factual allegations supporting: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting this claim or defense to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *Id.* at 491

(citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). If a section 2-1401 petition fails to state sufficient facts to warrant relief, it may be dismissed. *Id.*

¶ 40 Relief from final judgments and orders, under section 2-1401 of the Code, rests within the trial court's equitable powers and its ruling will not be overturned by a reviewing court absent an abuse of discretion. *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 566 (1995). The only allegations of "fraud" alleged in father's "Petition to Void" involved the alleged insincerity of mother's promise to attempt reconciliation and her failure to disclose that she had a sexual relationship with the third party prior to the entry of the November 9, 2009, agreed custody order.

¶ 41 Fraud exists where one party's knowing and material misrepresentations induce detrimental reliance by the other party, and fraudulent concealment of a material fact consists of affirmative acts or misrepresentations intended to exclude suspicion or prevent injury. *Palacios*, 275 Ill. App. 3d at 566. Here, mother asserted she disclosed her "dating" relationship with the third party to father during mediation prior to the agreed custody order, and any "sexual" relationship with that third party was not a material fact related to the custody and visitation issues which were resolved in the final agreed custody order entered on November 9, 2009.

¶ 42 The trial court, after reviewing the pleadings and affidavits, as well as observing and hearing arguments from both parties, determined:

“I do not find that fraud was ever used to obtain this custody order [entered November 9, 2009] that was agreed to by the parties. I believe that [father] either misunderstood certain representations made by his wife or was hopeful that I would make the same inferences he did in assuming that she was being sneaky.

I don't see fraud here. And so, therefore, I deny the relief requested.”

After careful review of the record, we conclude this was not an abuse of discretion by the trial court. See *Palacios*, 275 Ill. App. 3d at 566.

¶ 43

CONCLUSION

¶ 44 For the foregoing reasons, we deny the petition for rehearing but issue a modified order upon denial of rehearing and, once again, affirm the ruling on the Peoria County circuit court denying respondent's "Petition to Void."

¶ 45 Affirmed.

¶ 46 JUSTICE SCHMIDT, dissenting.

¶ 47 I respectfully dissent. While I do not see a lot of merit in appellant's 2-1401 petition, I believe the trial court's ruling must be vacated and this case remanded for another hearing before a different trial judge. Illinois Supreme Court Rules 63(C)(1)(a) and 63(C)(1)(b) (eff. April 16, 2007) required the judge to recuse himself even in the absence of a request by a party.

¶ 48 As pointed out above, the trial judge was previously the guardian *ad litem* (GAL) in the same case. I am not suggesting that the trial judge was biased. However, to me it is beyond debate that an attorney, who actively participates in a case as a GAL, cannot later participate in the case wearing a black robe.