

2013 IL App (2d) 120973-U
No. 2-12-0973
Order filed January 23, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
JOSEPH ROLAND,)	of Lee County.
)	
Petitioner-Appellee,)	
)	
and)	No. 11-D-75
)	
KIMBERLY R. ROLAND,)	Honorable
)	Ronald M. Jacobson,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

Held: Trial court's order granting sole custody of the parties' son to petitioner affirmed.

¶ 1 Respondent, Kimberly R. Roland, appeals the trial court's order in which it denied her request to appear at a custody hearing via telephone and, thereafter, awarded petitioner, Joseph Roland, sole custody of their child. No appellee's brief was filed in this case; however, the record is simple, and we may resolve the claimed errors without the aid of an appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). For the following reasons, we affirm.

¶ 2

I. BACKGROUND

¶ 3 The record reflects that, on September 23, 2011, petitioner and respondent appeared before the trial court with their son, C.R. (born January 18, 2010), and agreed to dissolution grounds on the basis of irreconcilable differences. On October 11, 2011, petitioner's counsel represented to the court that respondent had requested that C.R. undergo a DNA test, and respondent agreed. On December 13, 2011, respondent appeared in court and agreed that the DNA test reflected that petitioner was C.R.'s father. The trial court agreed to allow the parties time to discuss outstanding matters, and it set the next court date for January 10, 2012.

¶ 4 On January 10, 2012, however, respondent did not appear. Petitioner informed the court that, despite Christmas visitation having been arranged between the parties, respondent left Illinois with C.R. and her paramour. Petitioner had recently learned that respondent was living in the State of Washington. The court entered an order that respondent was to immediately return to Illinois with C.R. and appear before the court and that the failure to do so might subject her to contempt as well as imprisonment. On March 13, 2012, petitioner's counsel informed the court that its order had been served on respondent by the Sheriff of Washaw County in Washington, but that she chose to disregard the order and, further, it appeared that there had been an incident involving respondent's Washington residence, requiring social services to remove C.R. from her care. Petitioner's counsel was having difficulty obtaining information regarding whether C.R. had been returned, and questioned whether a kidnaping complaint ought to be filed, given that it was allegedly the DNA test's confirmation of petitioner's paternity that led to respondent's flight. The court suggested setting the matter for a custody hearing and serving respondent notice thereof.

¶ 5 On March 27, 2012, the custody hearing was continued because petitioner had been unsuccessful in his attempts to serve respondent with notice. On April 10, 2012, petitioner remained unsuccessful in serving respondent, and the custody matter was again continued. On May 8, 2012, petitioner informed the court that he could not locate an address to serve petitioner notice, and that petitioner had been in trouble with social services for providing an unsafe environment. Accordingly, counsel stated that he wished to contact the State's Attorney's office regarding abduction charges.

¶ 6 On July 13, 2012, however, the court held a hearing in which respondent was present via telephone. The court noted that it had received a letter from respondent. The letter stated (and attached documents reflecting) that Washington's social services agency had concluded that the unsafe-environment charges against respondent and her paramour were "unfounded," but that respondent was not told whether she could leave the state with C.R. Further, respondent's letter represented that she lacked the financial resources to travel to Illinois and that, if she left the shelter care where she was living, she might lose her residence there. The court summarized the aforementioned letter and then stated "I am advising the parties that it has never been and will not be the practice of this Court to conduct hearings of any substantive issues by telephone so the answer is no."

¶ 7 However, the court noted respondent had alternatively requested a continuance to gather the resources to travel. The court asked respondent how long she would need; respondent stated that, because neither she, nor her paramour, were working, around two months would be needed. In response, petitioner noted that he had not seen C.R. since mid-December of 2011, and that he had been patient while trying to locate respondent and C.R. The court set the custody hearing for August

3, 2012. Respondent asked what she should do if, financially, she could not attend. The court stated “that’s your responsibility. This Court has the responsibility to both parties to have this matter taken care of expeditiously. It’s your responsibility to determine how to get here.” Further, the court informed respondent that “if you are going to hire counsel, [respondent], have that attorney aware of that court date because this hearing will go at 9:00 o’clock that morning.”

¶ 8 On Friday, August 3, 2012, respondent did not appear at the custody hearing. The court noted that, on Monday, July 30, 2012, it received a letter from respondent indicating that she had recently (after the July 13, 2012, telephone hearing) learned that she was pregnant. Respondent wrote that her physician had advised her that, due to respondent’s history of developing blood clots during and after her prior pregnancies, her pregnancy was considered high risk and that traveling could cause a blood clot which could, in turn, prove fatal. Respondent inquired as to her options for working with the court. Also, respondent attached a letter from Constance Mao, M.D. from Harborview Medical Center in Seattle, stating that respondent’s pregnancy was high risk and that she had recommended that respondent not travel because it would require sitting for long periods.

¶ 9 The court stated: “it’s my position that the decision about no telephone hearing stands. [Respondent] was aware of today’s date. Could have hired counsel in the area to represent her interests, has not done that and I see no justification for continuing the matter ***. Obviously, if we’re going to go ahead with the hearing and the order is presented, then once that’s served on her she has a period of time to file a motion, but I believe that under the circumstances she could have protected her interests and should have protected her interests by having an attorney involved***.”

¶ 10 Thereafter, the court heard testimony from petitioner that, when C.R. lived in Illinois, he regularly visited and cared for him. If granted custody of C.R., petitioner had arranged for his own

parents to watch C.R. while working. In addition, in case of emergency, his former wife, Jennifer Roland, would be willing and able to spend time with C.R. Petitioner believed that it would be best that he receive custody because of respondent's "eccentricities," and he noted that respondent "has some problems with, psychological problems." Petitioner identified respondent's move to Washington without any notice as one such example. Further, petitioner testified that he believed respondent would be considered unfit to continue care for C.R.

¶ 11 In response to the court's questioning regarding whether respondent had attempted to go to Washington to visit C.R., petitioner stated that he did not have any idea where he and respondent were. Petitioner explained that he still did not have respondent's address and that, when he asked where she was living, she refused to give him one. The court asked whether, while she has been in Washington, respondent had made any attempts to encourage a relationship between petitioner and C.R., and petitioner answered that she had not. The court asked petitioner whether he was aware of any specific instances wherein respondent had jeopardized C.R.'s personal safety. Petitioner replied that, in the fall of 2011: "there were several times when she was living here in Illinois with other people, either with her grandparents or with some of her friends and they told me about how she sleeps all the time and always stayed on pain medication and even at one point fall [*sic*] asleep on top of my son and they had to wake her up and yell at her to let her know that she's asleep on top of my son."

¶ 12 Petitioner's counsel confirmed for the court that petitioner did not have respondent's address. Counsel explained that the only available address was for a Washington attorney; since the attorney refused to provide respondent's address, petitioner's counsel served the attorney with notice of the hearing on respondent's behalf. Further, counsel reminded the court that, while in Washington, C.R.

and another child from a previous relationship were removed from respondent's care because there was, apparently, a sex offender in the apartment complex where she was staying.

¶ 13 Next, petitioner's mother testified that petitioner and C.R. have a "really good bond," and that C.R. is always "really excited" to see petitioner. Petitioner took good care of C.R. (*e.g.*, changed his diapers, fed him, played with him in age-appropriate ways), C.R. would cling to petitioner, and C.R. would not want to be separated from petitioner.

¶ 14 Similarly, Jennifer Roland testified that she is petitioner's ex-wife, but that they maintain a good relationship and continue to support one another in various ways. She has observed petitioner's interaction with C.R., describing it as "great." Roland testified that C.R. and petitioner played together; petitioner was always age appropriate in terms of any required discipline; petitioner put C.R. down for bed, fed him, etc.; and C.R. "absolutely" enjoyed his visits with petitioner. Roland testified that petitioner is "absolutely" a fit and proper person with whom to award custody.

¶ 15 The court found that, although both parties wished to have custody over C.R., petitioner would be awarded sole custody. The court found, based upon the testimony, that it was "obvious" C.R. "has had and would continue to have [a] tremendous relationship with his father and that that relationship would be strong as well as with the grandparents and with other people involved in the family life of the parties." Further, the court stated that it had heard nothing that would make it concerned regarding C.R.'s adjustment to home, school, and community, were petitioner to be his custodian. As for the mental and physical health of the parties, the court stated:

"[A]lthough there's been no actual proof by way of documents[,] there's been testimony of concern regarding [respondent] and any issues that may be present in her life. There was testimony specifically by [petitioner] about some of the things that would occur,

sleeping all the time, having to be woken in order to not hurt the child in the fairly recent past that concern the court when it comes to this factor. As far as whether physical violence or threats of physical violence has occurred, I don't find that that applies because I haven't heard any evidence of that. I haven't heard of any issues of ongoing or repeated abuse.

I do find one very important factor, the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. It is the Court's opinion based on the testimony I've heard that that is utterly lacking right now with [C.R.] out with the mother and that there's been no attempt by the mother to do anything to encourage a relationship between [petitioner] and the child. There, there has been some attempt by [petitioner] to get in touch with his son but [that] has been frustrated because of the fact that [respondent] has not provided accurate information about her address and I find that as far as this factor is concerned it's utterly lacking when it comes to [respondent's] willingness and ability to allow [C.R.] to have a close and continuing relationship between [petitioner] and his son.” (Emphasis added.)

¶ 16 The court awarded petitioner sole custody of the child, subject to reasonable, supervised, visitation by respondent. Respondent did not file any subsequent motions with the trial court. She appeals.

¶ 17 II. ANALYSIS

¶ 18 On appeal, respondent argues that the trial court violated her due process rights by denying her a hearing by phone on August 3, 2012, particularly given that she submitted proof that her inability to travel was due to serious medical reasons. In addition, respondent argues that the court

erred where it allowed hearsay testimony and relied on that testimony in awarding petitioner sole custody. For the following reasons, we reject these arguments and affirm.

¶ 19 Due process requires notice and an *opportunity* to be heard. See *In re Ayala*, 344 Ill. App. 3d 574, 586 (2003). “As long as these elements are satisfied, a party is not denied due process, even if he fails to avail himself of his opportunity to be heard.” *Milenkovic v. Milenkovic*, 93 Ill. App. 3d 204, 215 (1981); see also *In re E.L.*, 152 Ill. App. 3d 25, 33 (1987). Here, respondent had both: on July 13, 2012, the court notified her that a custody hearing would take place on August 13, 2012, and it informed her that she could either personally appear or have counsel appear on her behalf. She did neither. Thus, although respondent did not avail herself of the opportunity to be heard, her due process rights were not violated.

¶ 20 Respondent essentially argues that, in light of her medical condition, she could not avail herself of the opportunity to be heard and, so, the court should have provided her with another one, *i.e.*, it should have allowed her to participate by telephone. We note first that, in her letter informing the court of her high-risk pregnancy, respondent did not directly request a telephonic hearing; rather, she wrote that she was inquiring about her options for proceeding. Second, the decision whether to permit hearings via telephone is governed by local rules. See Sup. Ct. R. 185 (eff. Aug. 1, 1992) (“except as may be otherwise provided by rule of the circuit court, the court *may*, at a party’s request, direct argument of any motion or discussion of any other matter by telephone conference without a court appearance) (emphasis added.). Here, the local rules provide that routine matters may, at the trial court’s discretion, be heard by telephone, but that, unless all parties and the trial judge agree, contested matters will *not* be permitted via telephone. See 15th Judicial Cir. Ct. R. 4.2(c) (Apr. 1, 2007) (“pursuant to Supreme Court Rule 185, the hearing of routine matters and Case Management

Conferences may be done by telephone conference at the discretion of the trial judge. It is not expected that these conferences will be reported and *therefore no contested matter will be heard by telephone conference* except by agreement of all parties and the trial judge”) (emphasis added.) On July 13, 2012, the trial court permitted respondent to appear at one hearing telephonically, wherein it advised respondent that substantive matters will not be heard over the phone. As the child custody issue was clearly both contested and substantive, the trial court’s position comports with Circuit Rule 4.2(c). Further, the court attempted to accommodate respondent’s situation by continuing the custody hearing so that respondent would have additional time to either acquire the resources to travel to Illinois or to hire counsel. The court properly explained, however, that it also owed petitioner an obligation to address the custody issue in a timely fashion. See also Sup. Ct. R. 900(a) (eff. July 1, 2006) (emphasizing the importance of circuit court ensuring child custody proceedings are expeditious, fair to all, and child-focused).

¶ 21 The week of the re-scheduled custody hearing, respondent informed the court that medical reasons precluded her from traveling to Illinois for the hearing. However, as the court noted, respondent could have obtained the assistance of counsel to stand in her stead.¹ Respondent complains that a court may not force an attorney upon her. But the court did not do so. Rather, the court clearly informed respondent that she could appear in person *or* hire an attorney but that, either

¹It appears from the record that respondent had contact with an attorney in Washington, who at the very least communicated with petitioner’s counsel and accepted service on her behalf. We do not know if respondent paid for those services, but presumably she or her attorney could have arranged for an appearance by counsel in Illinois.

way, the hearing would proceed as scheduled. Although it turned out that respondent's health left only one option, an attorney, she chose not to exercise that option.

¶ 22 Once it became apparent that respondent would not personally appear, nor would counsel appear on her behalf, the court declined to permit a telephonic hearing or to delay the hearing. Given the history of this case, we conclude that the court did not abuse its discretion in finding that a custody hearing by telephone was inappropriate. Frankly, while we are not unsympathetic to respondent's medical condition, her complaints that she could not travel in her condition ignore that, had she not moved from the jurisdiction in the first place, the risk of travel would not have been an issue. It bears noting that respondent *chose* to move out of state and across the country: with no notice or forwarding contact information, in the midst of dissolution proceedings, before custody had been determined, and after receiving scientific proof that C.R. is petitioner's child. Several months passed and numerous attempts to reach her went unanswered. The court received alarming news that Washington's social services agency had removed C.R. for a period from respondent's care. Despite these actions, and although the court had issued an order requiring her to return to Illinois with C.R. or risk being found in contempt or imprisoned, the court did not, once respondent was located, execute either of those sanctions. Rather, the court was lenient and accommodating: it continued the custody hearing and simply told her to either appear in person for the hearing or hire an attorney. Finally, we note that despite the trial court's reminder that, upon receipt of the court's custody order, respondent could file a motion (presumably to reconsider or modify the custody order), respondent never filed a motion to reconsider or any other motion with the court. In light of the foregoing, respondent's due process rights were not violated and the court did not abuse its discretion in declining to hold the custody hearing by telephone.

¶ 23 Respondent’s second argument is that the trial court improperly admitted and considered hearsay evidence. Specifically, respondent complains of petitioner’s testimony that he was told that she slept all day, took pain medications, and fell asleep on top of C.R. Respondent argues that hearsay is improper because it is unreliable and, therefore, the court should not have considered those statements as a basis to award petitioner custody.

¶ 24 Even if we were to accept respondent’s argument and assume that the evidence was inadmissible and did not meet one of the exceptions to the hearsay rule (such as, for example, reflecting petitioner’s state of mind for requesting sole custody), the error would be harmless. There is no reasonable probability that the hearing’s outcome would have been any different absent the error. See *e.g.*, *People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005); *People v. Hood*, 244 Ill. App. 3d 728, 734 (1993). The trial court’s ruling clearly considered a multitude of factors in awarding custody. The court noted that there was no “actual proof” to support petitioner’s testimony that respondent took medications, etc. Critically, the court’s ruling makes clear that, in awarding petitioner sole custody, it found “very important” that petitioner had left the state with no contact information and had made no attempt to encourage a relationship between petitioner and C.R. We note that, even if respondent had appeared at the hearing by telephone, this factor, which weighed heavily in the court’s decision, was already of record. Thus, as the court’s decision would have remained the same even absent hearsay evidence, we reject respondent’s argument and affirm.

¶ 25

III. CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Lee County is affirmed.

¶ 27 Affirmed.