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2013 IL App (3d) 121051-U

Order filed September 11, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

In re ADAM P. RICHTER,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Petitioner-Appellee,	)	Will County, Illinois,
	)	
	)	Appeal No. 3-12-1051
and	)	Circuit No. 10-F-45
	)	
BARBARA A. ZAK,	)	Honorable
	)	Matthew G. Bertani,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Modification of visitation awarding father unsupervised visitation every other weekend and once a week was not a restriction on visitation where prior paternity order provided that father had the right to supervised visits for two hours once a week. Therefore, the trial court erred, as a matter of law, in modifying visitation absent a finding that the modification was in the best interests of the children.

¶ 2 Respondent Barbara A. Zak appeals from the order of the circuit court modifying petitioner Adam Richter's visitation rights to allow unsupervised visits every other weekend and one day a

week. On appeal, Barbara claims that the trial court (1) erred in denying her motion to strike and dismiss, (2) erred in refusing to admit Adam's alcohol evaluation, and (3) erred, as a matter of law, by placing the burden of proof on Barbara to demonstrate substantial endangerment. We vacate and remand for a hearing to determine whether modification is in the children's bests interests.

¶ 3 Barbara and Adam had two sons together: M.Z. born August 25, 2004, and K.Z. born December 7, 2006. In January 2010, Adam filed a petition to establish paternity, and in response, Barbara filed a petition for child support. On November 23, 2010, the parties agreed to an order granting Barbara sole custody of the children and awarding Adam supervised visits with the children at Barbara's residence for two consecutive hours once a week. The order further provided:

> "The supervised visitation schedule set forth in paragraph 3 shall be reviewed in four (4) months; provided however that if Adam's criminal case NO. 2010CM3364 [domestic battery charge] has not concluded, the review shall be extended to a date after conclusion of the criminal matter.
>
> Pursuant to the terms of [a] separate court order, Adam shall be subject to and shall submit himself for random alcohol and drug testing on four (4) occasions over the next four months."

¶ 4 On March 3, 2011, the court signed another agreed order in which Premier Occupational Health was appointed as the examiner for drug and alcohol testing. The order stated that the examiner was to conduct four random "Drug Screen 10 panel" alcohol and drug tests over the next four months.

¶ 5 On May 1, 2012, Adam filed an "Emergency Petition to Modify/Review Visitation." In the petition, he alleged that the criminal matter was no longer pending and that he had submitted himself

to random alcohol and drug testing as required in the agreed orders. He requested a written visitation order and alleged that a visitation schedule was in the best interests of the children. In his prayer for relief, Adam asked the trial court to "modify the visitation schedule currently in effect, remove the requirement for visitation and grant him [unsupervised] visitation with the minor children" in accordance with the court's guidelines.

¶ 6 At a hearing date on August 17, 2012, Barbara filed *instanter* a motion requesting that the court order Adam to undergo a physical and mental examination under Illinois Supreme Court Rule (eff. July 1, 2002). The trial court dismissed her Rule 215 motion, finding that the requisite two-day notice had not been given.

¶ 7 Barbara also filed a motion to strike and dismiss Adam's petition to modify visitation. Specifically, Barbara alleged that Adam failed to complete the alcohol and drug testing requirements because he received only 3 random drug tests following the March 2, 2011, order. In addition, she argued that Adam failed to fulfill the requirements because the testing facility conducted a "Drug Screen 9 panel" instead of a "Drug Screen 10 panel." The trial court found that Adam substantially complied with the order and denied Barbara's motion.

¶ 8 The court then heard testimony from Adam, Barbara and Kristine Moore, Adam's estranged girlfriend. Adam testified that he lives in a duplex in Plainfield and has been employed for 5 years as a machine operator. He usually contacts Barbara by text once or twice per month to request visitation. According to Adam, Barbara typically says that the time he requested will not work and that she will get back to him.

¶ 9 Kristine Moore testified that she lived with Adam for approximately 4 years between April 2008, and October 2012. She testified to numerous incidents in which Adam drank excessively,

engaged in aggressive physical contact with Kristine and others, and used profane language in the presence of her eight-year-old daughter and Adam's 15-year-old son from another union.

¶ 10 Barbara stated that she and Adam communicate only by text and that she will not talk to him on the phone because he is hostile. Barbara testified that during visitation Adam shows little affection toward the boys. The boys do not greet him with a hug or a kiss. Adam does not engage the children and always seems agitated. Barbara said that she would be uncomfortable with unsupervised visitation because Adam does not know the boys well; for example, he does not know their daily habits, their clothes sizes, or the foods they like. She testified that she is most concerned about Adam's alcohol consumption.

¶ 11 Adam also testified as an adverse witness. He admitted that he was charged with driving under the influence in Du Page County in 2008. Barbara's counsel then attempted to introduce Adam's alcohol evaluation from 2009. In an offer of proof, Adam stated that he did not know if the evaluation cover letter was the same document that was sent to him in 2009. The trial court sustained Adam's objection to its admission on the grounds that the letter was not certified and was not otherwise authenticated by the witness.

¶ 12 At the conclusion of the hearing, the trial court granted Adam's petition. In its written order, the court stated that "the law is clear that liberal visitation is the rule, and that a restriction on a noncustodial parent's visitation is inappropriate absent a finding of serious endangerment which the custodial parent must prove by a preponderance of the evidence." The court then concluded:

> "In this case, I find that [Barbara] did not meet the burden of showing substantial endangerment, and particularly has failed to present the current restrictions under which she has dictated contact with the boys."

The trial court awarded Adam unsupervised visitation on alternating weekends from Friday at 5 p.m. until Sunday at 7 p.m. and one day during the week. The order included a provision which prohibited Adam from consuming alcohol during visitation and for a period of 12 hours preceding visitation.

¶ 13 ANALYSIS

¶ 14 I

¶ 15 Barbara first argues that the trial court erred in denying her motion to strike and dismiss Adam's petition to modify visitation.

¶ 16 Section 2-615 of the Code of Civil Procedure provides that a party may request a pleading be stricken because it is substantially insufficient in law or that an action be dismissed. 735 ILCS 5/2-615(a) (West 2012). A complaint should be dismissed when it appears that no set of facts could be proved under the pleadings that would entitle the plaintiff to relief. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11 (1995). A section 2-615 motion admits all well-pleaded facts as true and attacks the legal sufficiency of the complaint. *Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d 434 (2011). Our review is *de novo*. *Zahl v. Krupa*, 365 Ill. App. 3d 653 (2006).

¶ 17 Under section 607(c) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) (750 ILCS 5/607(c) (West 2012)), the court may modify an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child. 750 ILCS 5/607(c) (West 2012). Here, the November 23, 2010, agreed order provided that Adam could seek modification of supervised visitation four months after entry of the order, unless his criminal case was still pending. Eighteen months after the agreed order was entered, Adam filed a motion to modify visitation in which he alleged that his criminal case had concluded and that modification

would serve the best interests of the children. Accepting these well-pleaded facts in the complaint as true, the petition was legally sufficient to state a claim for modification in accordance with section 607 of the IMDMA and the agreed order. We find no error in the trial court's denial of Barbara's motion to strike and dismiss.

¶ 18 Barbara also argues that Adam's petition should have been dismissed because he failed to fulfill the requirement that he submit to four random drug tests during a four-month period. Although the court's order required Adam to submit to four random drug tests, review of the supervised visitation schedule was not contingent upon his completion of those tests. The paragraph stating that supervised visitation schedule shall be reviewed in four months is separate and distinct from the provision stating that "pursuant to the terms of separate court order, Adam shall be subject to and shall submit himself for random alcohol and drug testing." Thus, we do not read the parties' agreed order of November 23, 2010, to include the four drug tests as a condition precedent to filing a petition to modify visitation. The order imposes only two conditions before a modification petition may be filed: (1) that at least four months have lapsed; and (2) that the criminal case pending against Adam be concluded. Both of the conditions were met.

¶ 19 II

¶ 20 Barbara also argues that the trial court erred when it refused to admit Adam's alcohol evaluation into evidence.

¶ 21 The evaluation report appears to consist of a cover letter in which a DUI evaluator summarized certain findings following Adam's 2009 assessment interview. However, Barbara did not present the evaluator as a witness, nor did she present affidavits or deposition testimony authenticating the letter. “Basic rules of evidence require that a party lay a proper foundation for the

introduction of a document into evidence." *People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245, ¶ 47. To properly authenticate a document, a party must present evidence that demonstrates that the document is what the party claims it to be. *Id.* " 'Without proper authentication and identification of the document, the proponent of the evidence has not provided a proper foundation and the document cannot be admitted into evidence.' " *Anderson v. Human Rights Comm'n*, 314 Ill. App. 3d 35, 42 (2000); see also *Complete Conference Coordinators, Inc. v. Kumon North America, Inc.*, 394 Ill. App. 3d 105, 108 (2009) (trial court did not err in deeming emails inadmissible because plaintiff failed to provide anything before the trial court to authenticate the e-mails, other than their production in discovery). In addition, counsel failed to elicit sufficient authentication from Adam, where he testified that he did not know if the document presented at trial was the same letter he received three years earlier. Accordingly, the evaluation lacked foundation and authentication and was inadmissable as evidence at trial.

¶ 22 III

¶ 23 Last, Barbara claims that the trial court erred as a matter of law when it placed the burden on her to show that unsupervised visitation would seriously endanger the children, rather than requiring Adam, as the petitioner, to demonstrate that modification of the visitation schedule was in the children's best interests.

¶ 24 Under section 607(c) of the IMDMA, the trial court may modify an order granting or denying visitation rights "whenever modification would serve the best interest of the child." 750 ILCS 5/607(c) (West 2012)). The party seeking the modification has the burden of showing that a modified visitation is in the best interest of the child. *Sarchet v. Ziegler*, 278 Ill. App. 3d 460 (1996). By contrast, the endangerment standard was created to place the burden on the party seeking a

reduction in a parent's visitation time to demonstrate the noncustodial parent's deficiencies. *In re Marriage of Chehaiber*, 394 Ill. App. 3d 690 (2009) (discussing the difference between a "reduction" and a "modification" and the burdens of proof imposed).

¶ 25 Here, Adam filed a petition to establish paternity and requested visitation. An agreed order was entered stating that Barbara would have sole custody and that visitation would be supervised by Barbara or another family member for two hours once a week. More than a year later, *Adam* petitioned for modification of the supervised visitation order. In response to Adam's petition to modify, Barbara requested that the trial court continue the visitation schedule that had been previously imposed by court order. She did not file a petition to further reduce or restrict Adam's visitation time with the children. Thus, where Adam filed the petition to modify visitation, the trial court erred, as a matter of law, by placing on Barbara the burden of proving that unsupervised visitation would seriously endanger the children. See *Chehaiber*, 394 Ill. App. 3d at 696-97.

¶ 26 We have before us the transcript of the hearing in the trial court. However, this court functions as a court of review, not a finder of fact. A best interest determination is heavily fact dependant; it cannot be reduced to a simple bright line test, but rather must be made on a case-by-case basis, depending on the circumstances of each situation. *In re Marriage of Eckert*, 119 Ill. 2d 316, 326 (1988). On review, a trial court's determination of what is in the child's best interest will not be reversed unless it is against the manifest weight of the evidence and has resulted in manifest injustice. *In re Marriage of Smith*, 172 Ill. 2d 312 (1996). There is a strong presumption in favor of a trial court's ruling because it had the opportunity to observe the parents and the children and evaluate their temperaments, personalities and capabilities. *Id*. at 321. We had no such opportunity. Therefore, we find that it is necessary to remand this cause for further proceedings consistent with

this order. In remanding the cause to the trial court, we make no finding as to the merits of Adam's petition to modify visitation under the best interest standard.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Will County is reversed and remanded with directions.

¶ 29 Reversed and remanded.