

2014 IL App (2d) 140380-U
Nos. 2-14-0380 & 2-14-0403 cons.
Order filed September 15, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

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| In re PARENTAGE OF GREYSON J.K., |) | Appeal from the Circuit Court |
| a Minor, |) | of Kane County. |
| |) | |
| |) | No. 07-F-632 |
| |) | |
| |) | Honorable |
| (Holly A., Petitioner-Appellant, v. Timothy H., |) | Kathryn D. Karayannis, |
| Respondent-Appellee). |) | Judge, Presiding. |

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court applied the proper legal standard of proof in determining whether to grant the motion to vacate; did not abuse its discretion in denying the motion to vacate; and, because we find no error, we need not address whether the court improperly considered evidence from the custody hearing in determining visitation; affirmed.

¶ 2 In these consolidated appeals, petitioner, Holly A., appeals from the judgment granting sole custody of the parties' minor child, Greyson J.K., to respondent, Timothy H., from the denial of the motion to vacate the custody order, and from the order of visitation. Petitioner contends on appeal that the trial court: (1) improperly applied the wrong legal standard of proof in determining whether to grant the motion to vacate; (2) erred by denying the motion to vacate;

and (3) improperly considered evidence from the custody hearing in determining visitation. We affirm.

¶ 3

I. BACKGROUND

¶ 4 This case originated as a petition to establish child support brought under the Illinois Parentage Act of 1984 (750 ILCS 45/7 (West 2012)). The parties are the natural parents of the minor, who was born on August 17, 2007. Petitioner was awarded sole custody of the minor, and the parties subsequently entered into a parenting agreement, which did not change custody.

¶ 5 On August 1, 2012, respondent filed a petition for modification of custody. Respondent requested, *inter alia*, that the court amend prior orders to provide that he be granted “residential custody of the minor” and “such other, further, and/or different relief” as the court deemed “just and in the best interests of the minor.” On October 29, 2013, the trial court set the matter for trial to January 27, 2014. On January 23, 2014, petitioner filed a motion to continue the trial date. In the motion, she alleged that she had been in inpatient care since December 28, 2013, and would be discharged on January 26, 2014. She requested a continuance to allow her to prepare adequately for trial. The morning of January 27, 2014, the trial court denied petitioner’s motion to continue, finding that petitioner had not shown just cause to continue the matter and “had not utilized due diligence in filing her motion.”

¶ 6 The trial court set the trial to begin at 1:45 p.m. the afternoon of the 27th. At that time, the court noted for the record that petitioner had been present in person in the morning representing herself on her motion to continue, which the court had denied. The court stated that it was ready to proceed with the trial, but petitioner was not present. Sean Kelleghan, a friend of petitioner’s, appeared in court and stated that petitioner would not appear that afternoon because she was in the hospital, “having suffered an anxiety attack.”

¶ 7 Both the guardian *ad litem* (GAL) and respondent reported that they were prepared to proceed. The GAL urged the court to proceed to trial “in the child’s best interests.” The court ruled that it would go forward with the trial, finding that a continuation of the trial date would not be in the child’s best interest.

¶ 8 Respondent then orally moved to amend his petition not only to seek residential custody of the minor but seek sole legal custody. The court stated that it typically had no problem allowing an oral motion to amend the pleadings, but it was concerned that petitioner was not there and that “we are essentially going to be proceeding by default.” In granting the oral motion, the court stated that it believed that it was conceivable that the court could certainly enter the finding of sole custody without the motion being made.

¶ 9 Later, the judge stated “I think I may have said we’ll proceed by default. That is not how the Court intends to proceed. I will proceed without [petitioner] being here if you would like to present testimony. If you have changed your mind and you would like to continue the matter, I will certainly consider that as well.” In deciding to proceed in petitioner’s absence, the court made the record clear that it was “not entering a default finding,” but that it would take evidence.

¶ 10 At trial, the GAL testified that, prior to the filing of respondent’s petition to modify custody, petitioner consistently allowed respondent more time with the minor than that which was set forth in the parenting agreement or other court orders. But this had changed after respondent had filed the motion to modify custody. The GAL further testified that petitioner exhibited a lack of care and supervision of the minor. His investigation revealed that the minor was late to school nearly 80% of the time while in petitioner’s care. Further, petitioner had three DUI’s, two alcohol-related car accidents, had been struggling very seriously with an alcohol problem, and exhibited very bizarre behavior beginning in 2009, which was completely related

to abuse of alcohol. Petitioner had left the minor unattended while passed out, had lost residential custody of her other two children, and had repeatedly spoken to the minor about the litigation and attempted to coach him. Petitioner specifically directed the minor to tell respondent that the litigation should go away and, if he ended up living with his father, he would never see his half sisters again. Respondent and other “random people” were often called upon to pick up the minor from school. There were other times that the minor was left at school for substantial periods of time when petitioner was supposed to pick him up and did not. The GAL noted that personnel at the minor’s school believed that the minor was poorly adjusted; he was becoming much more aggressive, striking other children, and showing a lack of interest in his academics. The GAL was concerned about the minor’s academics and petitioner’s use of alcohol, which left her completely unable to properly care and supervise the minor. The GAL also reported that the minor was subject to physical abuse by petitioner.

¶ 11 The GAL further testified that respondent’s business was doing well and his work schedule was more flexible than it had been when the original custody judgment had been entered. The GAL noted that respondent had the ability to impart a stable structure and residence for the minor much more than petitioner could. Respondent offered more structure and discipline and the minor appeared to be a completely different child when in respondent’s care. Respondent was involved in a number of activities with the minor, and the GAL reported that respondent and the minor appeared to be well bonded. The GAL also stated that it was his assumption that petitioner might very well lose her home; a foreclosure action had been filed and petitioner did not have any independent assets to pay her mortgage. The GAL noted further that, at the time of the original judgment, it was important to petitioner that the minor live with her so that he could be with his half sisters, but that had changed because the girls now primarily

resided with their father. Although the GAL applauded petitioner for seeking treatment for her alcohol abuse, he opined that it was another indication that petitioner was very likely not in a position to be properly caring for a six year old boy.

¶ 12 The GAL recommended that respondent be named the child's "residential custodian." But, he felt that "we need to see what develops here and what is going on with [petitioner] mentally before we can really establish a long-term parenting schedule." The GAL currently recommended that petitioner's parenting time be reserved, and that he was concerned about petitioner having anything but supervised visitation.

¶ 13 Respondent testified that, from the beginning, he was involved in the minor's life, spending time with the minor. Although respondent had agreed that petitioner could have sole custody, he did not feel that she could make decisions that substantially affected the education and health of the minor. Respondent felt that the drinking, alleged drug use, and petitioner's mental state impacted her parenting of the minor. He believed that it would be practical for the minor to live with him and that he should be making the major decisions in the minor's life. Respondent was unsure what petitioner's role in the minor's life should be due to everything that was going on with her. However, he did feel that petitioner was an important part of the minor's life.

¶ 14 The court found that there was "no question in the Court's mind that [petitioner's] behavior is clearly on a downward spiral," and that her behavior significantly impacted the minor. The court found that there had been a change in the circumstance of both the minor and petitioner and that a modification was necessary to serve the minor's best interests. The court granted respondent's oral motion to amend and granted respondent sole custody and residential custody of the minor. The court further found that it was in the child's best interest to restrict

visitation because of concern that the minor's physical, mental and emotional health would be endangered seriously. The court subsequently entered a *nunc pro tunc* order granting the temporary change of custody to December 30, 2013.

¶ 15 On February 7, 2014, petitioner filed a motion to vacate the judgment and all orders entered by the court after 1:30 p.m. on January 27, 2014. She alleged, *inter alia*, that she was hospitalized when trial began the afternoon of January 27, 2014, and could not appear. On March 10, 2014, petitioner, now represented by counsel, filed an amended motion to vacate the custody judgment pursuant to section 2-1301(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2012)).

¶ 16 At the hearing on the motion to vacate, Diane Feltes, a social worker at Delnor Hospital where petitioner had been hospitalized on the afternoon of the 27th, testified that she saw petitioner that day at about 1:30 p.m. She observed that petitioner was extremely distressed, crying, and had difficulty breathing. When petitioner was discharged later that afternoon, she appeared calm and composed.

¶ 17 Michelle Klecka, a registered nurse in the Delnor Hospital emergency department, testified that she too saw petitioner in the emergency room on the afternoon of the 27th. Klecka stated that petitioner appeared anxious and tearful. It was her opinion that petitioner was suffering from anxiety that afternoon.

¶ 18 Petitioner testified that she had come to court the morning of the 27th to request a continuance of that afternoon's trial. She was shocked and extremely disappointed that the court had refused her request. Afterwards, she began to feel nauseated, short of breath, became dizzy, and shaky. She knew that she was having symptoms of a panic attack and Sean Kelleghan drove her to the hospital. Her symptoms began to subside close to 4 p.m. and she was in no condition

to be in court for the custody trial earlier that afternoon, as it would have been impossible to compose herself. Petitioner denied going to the hospital to avoid the custody trial.

¶ 19 Petitioner further testified that she had been in an inpatient alcohol treatment program and was not allowed to leave it from December 18, 2013, to January 26, 2014. She testified that her admission to the program was voluntary. Petitioner signed admission papers agreeing to stay at the program. Had she left, she would have been discharged from the program and would not have been readmitted.

¶ 20 Petitioner could not recall when she first learned of the January trial date. When she arrived at court the morning of the 27th, she was not prepared to go to trial. She stated that it was extremely difficult to prepare and file motions while in inpatient treatment. Petitioner was told not to have anything to do with the legal process while in treatment. When she first entered the program, petitioner did file motions, but when the staff and director found out, petitioner was severely reprimanded and told that it could not continue.

¶ 21 Following argument, the judge noted that, “while I do not believe that I was proceeding by default, I do acknowledge the statement that was made when we began,” and, while petitioner was not at the trial, there “was clearly and obviously testimony and evidence presented at that hearing.” The court noted that, under section 2-1301(e) of the Code, the moving party has a burden of establishing sufficient grounds to vacate the default judgment, and while the standard of review is whether the trial court’s decision amounts to an abuse of discretion, the overriding consideration should be whether substantial justice is being done between the litigants and “whether under the circumstances of the case it is reasonable to compel the other party to go to trial on the merits.”

¶ 22 The court pointed out the following facts. The petition to change residential custody was filed in August 2012, and trial originally was set for September 23 through 26, 2013. On September 12, 2013, the trial dates were struck and the matter was continued for entry of an agreed order. Petitioner's attorney was granted a leave to withdraw. The case was continued to January 29, 2014, to give petitioner an opportunity to file a *pro se* appearance or hire a new attorney. On October 29, a trial date was reset for January 27 through January 31, 2014. Petitioner at that time was present *pro se*. On November 6, 2013, the matter was in court on a petition for interim relief, and the matter was set for hearing on November 19, 2013, where an agreed order was entered which resolved the motion for interim relief. Petitioner filed an amended *pro se* appearance on December 23, 2013. The court found this to be an important date because, at that time, petitioner, according to her own testimony, was already in inpatient treatment. The matter was then in court on January 6, 2014, on petitioner's petition for an emergency hearing.

¶ 23 The court also pointed out that the petition petitioner had signed stated that she was about to get her first four-hour pass, or that she had been given a four-hour pass in December 2013. So, in her pleading from January 6, 2014, where she brought to court an emergency motion to rehear a matter, petitioner stated that she had received a four-hour pass in December 2013, when she was in the treatment facility and totally contrary to her testimony, when petitioner stated that she could not leave the treatment facility. On January 8, 2014, when petitioner's emergency petition was in court for hearing, petitioner was not present. The court struck her petition and specifically noted on the order that trial was set to proceed on January 27, as previously scheduled. Sean Kelleghan was present in court on the 8th and informed the court that petitioner was in inpatient treatment. Then, on January 23, 2014, petitioner filed her motion to continue

“purportedly while she was still in inpatient treatment.” And, on the 27th, she was in court in the morning for her motion to continue. The court stated that it was “important to the Court that [petitioner] knew about this trial date well in advance of her inpatient treatment, well in advance of going into that program and while in that program was reinforced that the matter was going to proceed.”

¶ 24 The court had “absolutely no quarrel” with petitioner’s decision to check into inpatient treatment, but it did have a problem with the timing of that decision. The court did not believe petitioner was “between a rock and a hard place” because had she come to court before she went into inpatient treatment and, had she said she wanted to seek treatment, the court “might very well be looking at a different scenario.” “She did not file a Motion to Continue while she was in her inpatient treatment saying that she couldn’t do that, and yet it’s clear to the Court that she filed several things while she was in an inpatient treatment program.”

¶ 25 Again, the judge found that petitioner’s testimony clearly showed that “she had the ability to address this issue before she did.” The court observed that on the 27th petitioner appeared in court in the morning and argued her motion to continue “very articulately without expressing any form of anxiety.” The judge found that petitioner knew what the symptoms of anxiety were and, “based on the rest of her testimony, which I don’t find credible, I think it’s very likely that [petitioner] was making these symptoms up, if not at the minimum, embellishing them when she was at the hospital. I simply do not find that credible.”

¶ 26 The court noted that this case was filed in August 2012, and under Supreme Court Rules (see Ill. S.Ct. R. 922 (eff. July 1, 2006)), the court must have these matters decided within 18 months, and since the trial had begun at the 17th month, the court concluded that it was in the minor’s best interest to decide the matter at that time. Accordingly, the court denied the motion

to vacate. A written order was entered on March 20, 2014. Petitioner filed a notice of appeal challenging the January 27th judgment, as well as the denial of the motion to vacate entered on March 20. (Appeal No. 2-14-0380.)

¶ 27 Thereafter, the court held an evidentiary hearing on petitioner's petition for visitation. In reaching its decision, the court relied, in part, on the evidence heard at the initial custody trial. Based upon the evidence presented at the initial custody trial, and the GAL's observations and recommendations, the court did not grant overnight visitation. The court adopted the GAL's recommended schedule, and entered a written order on April 21, 2014. On April 25, 2014, petitioner filed a notice of appeal from the visitation judgment and all prior orders of court. (Appeal No. 2-14-0403.) We granted petitioner's motion to consolidate the appeals.

¶ 28

II. ANALYSIS

¶ 29

A. Legal Standard of Proof on the Motion to Vacate

¶ 30 Petitioner first contends that the trial court improperly applied the wrong legal standard of proof in deciding whether to grant the motion to vacate. The question as to whether or not the trial court applied the correct legal standard is a question of law reviewed *de novo*. *In re Marriage of Sobol*, 342 Ill. App. 3d 623, 627 (2003).

¶ 31 Petitioner identifies the judgment order entered as a default order pursuant to section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2012)). The judgment entered by the trial court on January 27, 2014, was actually an *ex parte* judgment and not a default judgment. When a party has filed an appearance and an answer, but fails to appear at the trial, the other party must prove his case and cannot simply obtain judgment by default. *In re Marriage of Drewitch*, 263 Ill. App. 3d 1088, 1094 (1994). This is the course which occurred here. Petitioner failed to appear for the trial that she had requested be continued, which had been denied, and the trial

proceeded in her absence, where the trial court heard extensive testimony by respondent before granting his petition to modify custody on January 27. See *Drewitch*, 263 Ill. App. 3d at 1095; *Teitelbaum v. Reliable Welding Co.*, 106 Ill.App.3d 651, 659 (1982).

¶ 32 Section 2-1301(e) states that “[t]he court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.” 735 ILCS 5/2-1301(e) (West 2012). Petitioner filed the initial *pro se* motion to vacate within 30 days after the entry of the custody judgment. However, regardless of whether we call it a default or an *ex parte* judgment, we treat the motion as one to vacate pursuant to section 2-1301(e), which allows motions to vacate any type of judgment within 30 days of entry. See *Drewitch*, 263 Ill. App. 3d at 1095.

¶ 33 Under section 2-1301(e), “the litigant need not necessarily show the existence of a meritorious defense and a reasonable excuse for not having timely asserted such defense. Rather, the overriding consideration is simply whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits.” *In re Haley D.*, 2011 IL 110886, ¶ 57. “By contrast, where a litigant seeks relief from a final order or judgment more than 30 days after its entry pursuant to section 2-1401(a) (735 ILCS 5/2-1401(a)) (West 2012)), the burden he or she faces is substantially greater. A party seeking to set aside a final order or judgment under section 2-1401(a) is required to show by a preponderance of the evidence not only the existence of a meritorious claim or defense in the original action, but also due diligence in pursuing the claim or defense in the circuit court as well as due diligence in presenting the petition for relief under section 2-1401(a).” *Haley D.*, 2011 IL 110886, ¶ 58.

¶ 34 Petitioner claims that the trial court imposed the stricter standard of proof required under section 2-1401(a) when it found that relevant considerations for it to consider in determining whether substantial justice is achieved include “lack of diligence by the defaulter” and “absence of a meritorious defense by the defaulter.” Petitioner notes that the court then twice found that petitioner had failed to exercise due diligence in seeking a continuance, remarked that petitioner “made up her anxiety symptoms or embellished them at the hospital,” and denied the motion. In contrast to what is required to be successful on a section 1301(e) petition to vacate, petitioner contends that the improper burden which the court required her to show “due diligence” and a “meritorious claim or defense” was a substantially greater burden and not required under the law. Because the trial court used an incorrect legal standard in ruling on petitioner’s motion, she asserts that the trial court committed reversible error.

¶ 35 In making the determination whether substantial justice was done between the litigants and whether it was reasonable, under the circumstances, to compel the other party to go to trial on the merits pursuant to section 2-1301(e), a court should consider all events leading up to the judgment. *Haley D.*, 2011 IL 110886, ¶ 69. “What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome. [Citation.]” (Internal quotation marks omitted.) *Mann v. The Upjohn Co.*, 324 Ill. App. 3d 367, 377 (2001). Thus, although there is a higher standard of proof required under section 2-1401, that does not prevent the trial court from considering evidence of due diligence and a meritorious defense as factors in determining whether substantial justice was being done between the litigants and whether it was reasonable, under the circumstances, to compel the other party to go to trial on the merits.

¶ 36 In this case, among the issues the trial court had to determine were (1) whether or not to grant petitioner’s motion to continue the trial, and (2) whether or not to proceed *ex parte* when petitioner did not return for trial in the afternoon. Whether petitioner exercised due diligence in filing the motion to continue was an extremely relevant consideration in determining whether or not to grant petitioner’s motion to continue the trial. Consideration of a meritorious defense also was relevant in determining the reasonableness of vacating the judgment and ordering a new custody hearing. Even though the trial court used the phrases “due diligence” and “absence of a meritorious defense,” the evidence shows that the trial court treated the motion under the correct standard of proof as set forth in section 2-1301(e), and then it considered the evidence which was relevant to that standard. Accordingly, we reject petitioner’s first contention that the trial court incorrectly applied the wrong legal standard of proof in determining whether to grant her motion to vacate.

¶ 37 **B. Motion to Vacate**

¶ 38 Petitioner next contends that the trial court abused its discretion by denying the motion to vacate. Whether to grant or deny a motion under section 2-1301 is within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of discretion or a denial of substantial justice. *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548 (2008). We may find an abuse of discretion only where no reasonable person would take the position adopted by the trial court; that is, where the trial court acted arbitrarily or ignored recognized principles of law. *Id.* at 548-49. Whether substantial justice is being achieved by vacating a judgment or order is not subject to precise definition, but relevant considerations include diligence or the lack thereof, the existence of a meritorious defense, the severity of the penalty resulting from the order or judgment, and the relative hardships on the parties from granting or denying vacatur. *Id.*

¶ 39 Petitioner argues that substantial justice was not served because (1) there was no pressing reason for the trial court to hold trial on January 27, when the case had been scheduled from January 27 through January 31; (2) the court was well aware that petitioner had been in inpatient treatment; (3) petitioner had advised the court that she would complete her treatment program on January 26 and needed time to prepare for trial; (4) the alleged best interests of the child was not in jeopardy, as the court already ordered a change of temporary custody; (5) the court was aware on the afternoon of the 27th that petitioner was in the hospital after suffering an anxiety attack; (6) proceeding without her was a drastic and needless action; and (7) allowing respondent to orally amend his pleading to seek sole custody with no notice to petitioner “exceeded the trial court’s jurisdiction,” depriving petitioner of her right to notice and due process.

¶ 40 In light of the facts of this case, we cannot conclude that substantial justice was not served or that no reasonable person would take the trial court’s position. The trial court considered and rejected petitioner’s arguments regarding her reasons as to why she failed to appear. The court also considered and rejected petitioner’s argument regarding the severity of the penalty resulting from the judgment. Petitioner did not file the motion to continue in a timely manner. She waited until the last hour to file it when she could have, at the very least, filed it before she voluntarily checked herself into inpatient substance abuse treatment knowing that the trial date had been set since October and that she would not be released until one day before trial was to begin. Petitioner testified that she was unable to leave the treatment program, yet she was able to obtain four-day passes. Petitioner testified that she was unable to file pleadings while she was in treatment, but she filed three motions or pleadings while in treatment. Petitioner was not prepared for trial on the 27th, when she presented her motion to continue, because she thought her motion would be granted. The trial court did not find petitioner to be credible and believed

that she was either making up the symptoms of a panic attack or embellishing them. Moreover, we agree with respondent that, based on the facts and the court's determination of credibility, it appears that petitioner attempted to use her inpatient treatment and her panic attack as a means to avoid the trial. In sum, petitioner failed to appear for trial and lacked a valid basis for her failure to appear. See *Drewitch*, 263 Ill. App. 3d at 1095.

¶ 41 Additionally, the court believed that it was in the best interests of the minor that trial not be delayed any more, as the custody case had been pending for 17 months. See Ill. S. Ct. R. 922 (eff. July 1, 2006) (child custody proceedings in trial court shall be resolved within 18 months from date of service of the petition or complaint to final order). We agree that the minor deserves finality and stability and, given the facts, delaying the trial would not have been in the minor's best interest. Accordingly, we do not find that the trial court abused its discretion.

¶ 42 We reject petitioner's argument that she had no notice that respondent was seeking sole legal custody. Respondent's petition for modification, of which petitioner had notice, not only sought a change of residential custody but also specifically requested that the court grant "such other, further, and/or different relief" as the court deemed just and in the best interests of the minor. Based on the facts in this case, granting sole custody was a reasonable outcome, and we cannot say that the court's judgment granting sole custody to respondent was against the manifest weight of the evidence or an abuse of discretion. See *Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45 (citing *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004)) (We will not reverse trial court's modification of custody unless decision is against manifest weight of the evidence and an abuse of discretion).

¶ 43

C. Visitation Order

¶ 44 Petitioner last contends that the trial court erred by considering evidence from the custody hearing in making its visitation order. Petitioner argues that, should this court determine that the trial court erred as a matter of law in denying the motion to vacate the custody order and the ruling amounted to a denial of substantial justice, the trial court necessarily erred in relying on the testimony from the vacated proceeding in rendering its visitation ruling. Since we find no error, this argument fails.

¶ 45

III. CONCLUSION

¶ 46 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 47 Affirmed.