2015 IL App (1st) 142549-U
No. 1-14-2549
September 15, 2015

SECOND DIVISION



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| *In re* MARRIAGE OF PAULA FUSCO, | ) | Appeal from the Circuit Court |
| | ) | Of Cook County. |
| Petitioner-Appellee, | ) | |
| | ) | |
| and | ) | No. 11 D 230102 |
| | ) | |
| JOHN FUSCO, | ) | The Honorable |
| | ) | Lisa Ruble Murphy, |
| Respondent-Appellant. | ) | Judge Presiding. |

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

**ORDER**

¶ 1 *Held*: When an appellant has not presented on appeal a record containing the evidence presented at trial, the appellate court must affirm rulings based on the evidence.

¶ 2 In divorce proceedings, the trial court found John Fusco in default for failure to file a timely appearance after his first two attorneys withdrew from the case. The court entered a final judgment allocating the marital property and limiting John's visitation time with his children. In this appeal, John did not provide a transcript or bystander's report for the trial

and other hearings that led to the court's orders. We hold that the record on appeal does not show that the trial court erred when it allocated the property and limited John's visitation. Therefore, we affirm the trial court's judgment.

¶ 3 BACKGROUND

¶ 4 Paula Roginski married John on July 27, 2002. Paula gave birth to Andrew Fusco in 2003 and to Alexis Fusco in 2008. Paula and John separated in November 2010. On February 28, 2011, Paula filed a petition for dissolution of the marriage.

¶ 5 In November 2011 and February 2012, the trial court entered agreed orders providing that Andrew and Alexis would stay with Paula; John would have parenting time and he would refrain from disparaging Paula in the presence of the children; John would pay Paula $500 each month in child support; John would undergo treatment for anger management; and the parties would work together to settle the remaining issues.

¶ 6 Paula filed her first petition for a rule to show cause why the court should not hold John in contempt for violating the agreed orders in March 2012. She alleged that John refused to pay the agreed child support, refused to work on a plan for parenting time, and disparaged her to the children. John responded to the petition with a petition to set a visitation schedule. Paula filed a petition to restrict John's visitation. On June 28, 2012, following a hearing concerning visitation, the court ordered John to "submit to drug/alcohol testing prior to 4:00 p.m. on today's date with Nancy Mynard."

¶ 7 In July 2012, Paula filed her second petition for a rule to show cause, alleging that John had refused to submit to the testing the court ordered on June 28, 2012, and that John violated the agreed orders in other ways.

¶ 8 At a hearing on July 23, 2012, the court again ordered John to submit to drug testing that day. John did not submit to the testing until July 30, 2012. When the court received the test results, it entered an order, dated August 9, 2012, in which the court said:

> "There shall be no visitation or telephone contact conferences with the children by John in the 'foreseeable future,' unless/until John complies with the Court's specific recommendations *** to obtain a complete comprehensive evaluation for drugs, alcohol, psychological."

¶ 9 A week later, the court entered an order permitting John limited telephone contact with Andrew and Alexis. The court entered an order, dated October 2, 2012, allowing supervised visits. The court set the case for a trial to begin on November 28, 2012.

¶ 10 John filed two petitions on November 1, 2012. In the first, he sought to delay the trial, and in the second, he sought a reduction in the child support.

¶ 11 The court began the trial on April 9, 2013, and continued proceedings twice for presentation of further evidence. On the third day of trial, June 25, 2013, the court entered a written order instructing John "to go directly from Court to [Maynard's] office + submit for random drug/alcohol testing." The court set the trial to resume upon John's return from testing. John did not go to Maynard's office. The court entered another written order for

continuance, adding the following note: "The record will reflect that John Fusco left the building and as a result the trial could not resume."

¶ 12 On August 7, 2013, the court entered an order in which it said:

> "The continued use of cocaine and alcohol by JOHN M. FUSCO, Respondent, represents a serious endangerment to the minor children of the parties ***.
>
> ***
>
> *** In order to facilitate parenting time between JOHN FUSCO *** and the minor children, his parents, DOROTHY and/or DANIEL FUSCO, shall serve as supervisors during all scheduled parenting time as specifically set forth hereinbelow and strictly subject to the following conditions, to wit:
>
> a. JOHN shall submit to random drug/alcohol testing with AMS DATA, INC. ***
>
> b. JOHN is required to cooperate with random alcohol and/or drug testing, as more fully determined by the [guardian ad litem for the children] and/or AMS as required. ***
>
> * * *
>
> e. JOHN shall abstain entirely from drinking any alcohol or using cocaine *** at a minimum for not less than 48 hours prior to the beginning of his supervised parenting times and he shall further abstain while exercising his supervised visitation or speaking to the children on the telephone or other forms of communication."

¶ 13 The court set times for John to have two visits with his children every week.

¶ 14 Paula filed her third petition for a rule to show cause on September 5, 2013, alleging that John failed to submit to required drug and alcohol tests and failed to appear for several scheduled visits with the children.

¶ 15 John's attorney filed a motion to withdraw from representing John, alleging irreconcilable differences. On September 17, 2013, the trial court granted the unopposed motion and gave John 21 days to either find new counsel or file an appearance *pro se*.

¶ 16 The 21 day deadline passed without any appearance filed on John's behalf. Paula filed a motion to hold John in default. John did not come to court for the scheduled status hearing on October 10, 2013. Instead, John's parents appeared and addressed the court. At the conclusion of the hearing, the court entered an order suspending all contact between John and his children "pending completion + compliance by John with a drug + alcohol treatment program to the satisfaction of the court."

¶ 17 Before the next hearing, on November 28, 2013, John filed an appearance *pro se*. The court directed Paula's attorneys to prepare a proposed settlement agreement and the court ordered John to respond to the draft in writing within one week from the date he received the draft.

¶ 18 Neal Simon filed an appearance as counsel for John on December 23, 2013. Simon requested additional time to respond to the draft settlement agreement, and the court granted the request. On the date set for hearing, January 23, 2014, Simon moved to withdraw, alleging irreconcilable differences with John. The court permitted Simon to withdraw.

Again, John had 21 days, until February 14, 2014, to find a new attorney or file another appearance *pro se*.

¶ 19 John missed the deadline. Paula filed a second motion for default on February 14, 2014. John's new attorneys, Hurst, Robin & Kay, LLC, filed an appearance on his behalf on February 18, 2014. The trial court wrote, in an order dated February 18, 2014, "John Fusco having failed to timely file an appearance, *pro se* or by counsel, by February 14, 2014, is found to be in default." The court scheduled a prove up hearing for March 14, 2014. John filed a motion to vacate the default order. The court denied the motion and proceeded with the prove up as scheduled.

¶ 20 At the hearing on March 14, 2014, Paula testified that she had paid extraordinary expenses for her children, totaling more than $38,000, which she itemized. Paula and John sold their home, but the sale left them with no proceeds to divide. Paula testified that the parties had already divided their personal property.

¶ 21 The court made a number of findings at the conclusion of the hearing, and the court incorporated the transcript of the hearing, including those findings, into its written order dated March 14, 2014. The court said, "at least[] half of the fees that Mrs. Fusco has incurred are a direct result of Mr. Fusco's failing to comply with court orders" and John "fail[ed] to comply with court orders without cause or justification." The court ordered John to pay Paula's attorney $40,000. Concerning visitation, the court said, "the reason why Mr. Fusco's visitation with the children is reserved *** is because the Court finds that Mr. Fusco has presented no evidence during the last two years that he has participated in the drug and

alcohol rehabilitation program; and, therefore, it's the Court's finding that he continues to represent a serious endangerment to the children."

¶ 22 The court entered its final judgment dissolving the marriage on April 1, 2014. In the written judgment order, the court said, "JOHN's visitation or any contact with the children is suspended pending his successful completion of an in-house, extended substance abuse and psychological counseling program deemed acceptable by the Court and further Order of the Courts." The court awarded each party the bank accounts and retirement accounts in their names, and "all of the furniture *** and other personal property currently in their respective possessions."

¶ 23 On April 25, 2014, John filed a motion to vacate the final judgment. John attached to the motion three documents purportedly reporting on John's progress in treatment for substance abuse, eight pages from the transcript of the trial, and a disclosure statement in which he claimed that his living expenses exceeded his income by $1,000 per month. The court denied the motion to vacate the judgment. John now appeals. He filed only the common law record, and no transcripts or bystanders' reports, as the record on appeal.

¶ 24 ANALYSIS

¶ 25 John argues that the trial court erred by (1) restricting his visits with his children, (2) dividing the marital property unfairly, and (3) denying his motion to vacate the default.

¶ 26 The trial court based its visitation order on (1) evidence presented at the trial, held on April 9, 2013, April 30, 2013, and June 25, 2013; (2) John's conduct in court at the trial and at hearings held on June 28, 2012, July 23, 2012, August 9, 2012, and August 7, 2013; and

(3) the court's discussion with John's parents at a hearing on October 10, 2013. The record on appeal does not include transcripts or bystanders' reports from any of those hearings, apart from the eight page excerpt from the trial transcript that John appended to the motion to vacate the judgment.

¶ 27 A reviewing court must presume that the trial court acted in conformity with the law unless the record proves error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Because we have no record showing the testimony presented at trial, or the behavior that led the court to order John on three separate dates to go directly from a court hearing to have testing for substance abuse, we have no grounds for disturbing the trial court's visitation order. See *Webster v. Hartman*, 195 Ill. 2d 426, 432-34 (2001). Similarly, we cannot disturb the property distribution without a record containing the evidence the court heard concerning the parties' property. *Webster*, 195 Ill. 2d at 432-34.

¶ 28 The trial court held no evidentiary hearing on the motion to vacate the default judgment. A party who moves to vacate a default order bears the burden of establishing adequate grounds for the court to grant the relief sought. *In re Marriage of Ward*, 282 Ill. App. 3d 423, 432 (1996). The court should consider "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." *In re Marriage of Kopec*, 106 Ill. App. 3d 1060, 1062 (1982). "Whether substantial justice is being achieved is not subject to precise definition, but relevant considerations include the lack of diligence by the defaulter, the absence of a meritorious defense by the defaulter, the severity of the penalty resulting from

the entry of a default order, and the relative hardships on the parties arising from a grant or denial of default." *Ward*, 282 Ill. App. 3d at 433. In assessing these factors, the court "should consider all events leading up to the judgment." *In re Haley D.*, 2011 IL 110886, ¶ 69. We will not reverse the trial court's decision on a motion to vacate unless the trial court abused its discretion. *Ward*, 282 Ill. App. 3d at 433.

¶ 29 John presented his motion to vacate the default promptly, but in other respects he has not shown diligence throughout the proceedings. John delayed the proceedings repeatedly. He walked out of court during trial, and he failed to act diligently to find new attorneys when his first and second attorneys withdrew due to irreconcilable differences.

¶ 30 John argues that he has a meritorious defense, as shown by the purported progress reports from treatment, his disclosure statement, and the brief excerpt from the trial transcript. We cannot evaluate the strength of these defenses against the evidence presented at the trial, because John has not supplied a record containing the trial testimony. We cannot determine from this record whether John presented the progress reports to the court prior to the entry of the final judgment. Moreover, the progress reports may pale in significance when considered in light of John's behavior in the courtroom. John has not provided a transcript or bystander's report from the three hearings when the court felt compelled to order John to have immediate testing for substance abuse. On this incomplete record, we cannot find that John has meritorious defenses.

¶ 31 John claims that the award of property severely penalizes him, but in the absence of a record showing all the evidence the court heard concerning the parties' income and assets, we cannot find that John suffered a financial penalty from the award of property.

¶ 32 The restriction on visitation adversely affects John's interest in parenting his children. The restriction may have effect for only a short time, if John can show grounds for modification of the visitation. See 750 ILCS 5/607(c) (West 2014). On this record, we cannot disturb the trial court's finding that unsupervised visits with John would endanger the children because of John's continuing problems with abuse of cocaine and alcohol. In light of the trial court's finding concerning the safety of the children, we cannot consider the restriction on visitation as a penalty to John. John has not shown that he suffered a severe penalty as a result of the default order.

¶ 33 Finally, prolonging proceedings in this case and reopening the evidence for more testimony about the parties' assets, income, and relationships with their children would create a hardship for Paula and would further destabilize the lives of Andrew and Alexis. See *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 409-10 (1994). Here, as in *Ward*, the trial court's decision to deny the motion to vacate the default "was reasonably made to prevent further delays and expense in reaching an end to this litigation." *Ward*, 282 Ill. App. 3d at 433. John has not presented a record that shows that the trial court abused its discretion when it denied the motion to vacate the judgment.

¶ 34 CONCLUSION

¶ 35 The record on appeal, with important reports of proceedings missing, cannot support a finding that the trial court erred in entering its orders restricting visitation and allocating the parties' assets. John has not met his burden of presenting a record that shows that the trial court abused its discretion when it denied his motion to vacate the default judgment the court entered. Accordingly, we affirm the trial court's judgment.

¶ 36 Affirmed.