SIXTH DIVISION
October 23, 2015

No. 1-15-1611

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re the Marriage of	)	Appeal from the
	)	Circuit Court of
MATTHEW DAVID COHEN,	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 09 D 5171
	)	
DEBORAH NICK COHEN,	)	Honorable
	)	Raul Vega,
Respondent-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justice Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Amended final custody judgment is reversed, and this matter is remanded for further proceedings, where order was: (1) entered following a hearing that did not comply with the requirements of the Illinois Marriage and Dissolution of Marriage Act, and (2) was not agreed to by the parties.

¶ 2 In this marriage dissolution action involving respondent-appellant, Deborah Nick Cohen (Deborah), and petitioner-appellee, Matthew Cohen (Matthew), Deborah appeals from the entry of a post-dissolution amended final custody judgment. On appeal, Deborah contends that the amended final custody judgment was improperly entered without the benefit of an evidentiary hearing and was not agreed to by the parties. For the following reasons, we reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 We state here only those facts necessary to the resolution of this appeal.

¶ 5 The record reflects that Deborah and Matthew were married in 2004 and had two children together: Ezra, born in 2005; and Audrey, born in 2007. Matthew filed the instant action for dissolution of the marriage in June of 2009.

¶ 6 On October 28, 2010, a custody judgment was entered by the circuit court. That custody judgment incorporated a parenting agreement that was both signed by Deborah and Matthew and approved by the circuit court. Therein, the parties agreed that Deborah would have custody of the children, subject to Matthew's right to visitation. They also agreed that "[a]ny mediation required by this agreement shall be conducted by attorney Steven Wasko." On May 11, 2011, a judgment of dissolution of marriage was entered by the circuit court prior to trial, pursuant to a marital settlement agreement incorporated therein. In the settlement agreement, the parties—*inter alia*—acknowledged that the prior custody judgment "remains in full force and effect as an order of the Court."

¶ 7 Thereafter, the parties engaged in a great deal of post-dissolution litigation. Of relevance to this appeal, that litigation included: (1) Matthew's separate petitions seeking a modification of custody or the modification of the parenting provisions contained in the original custody judgment, and (2) Deborah's motions to strike those petitions, and (3) Deborah's petitions to reset the amount of Mathew's child-support obligation and for the payment of past-due child support. A host of subsequent orders entered by the circuit court reflect that the parties attempted to resolve these and other issues by engaging in mediation with Mr. Wasko, and this case was continued a number of times while those efforts were ongoing. On a number of occasions, the circuit court specifically ordered the parties to continue their attempts at mediation with Mr.

Wasko—referred to as a court-appointed mediator—when the parties' prior efforts at reaching a full and final agreement had failed. This included one occasion when the circuit court ordered the parties to schedule mediation with Mr. Wasko over Deborah's specific objection and in light of Mathew's pending motion to compel Deborah to attend mediation. On February 13, 2015, the circuit court entered an order scheduling a hearing for March 19, 2015, regarding "pending issues from Steve Wasko's last mediation agreement."

¶ 8 At that hearing, the parties discussed a proposed amended custody judgment that had been at least partially negotiated during mediation. The transcript from this hearing reflects that the parties agreed to the majority of the provisions of this proposed judgment, but that a number of issues remained unresolved. Over the course of the hearing, the circuit court made clear that it would decide any of the remaining issues that could not be resolved by agreement, the issues in dispute were discussed, and the disputed issues were resolved by the circuit court with some resolved in Deborah's favor and some resolved in favor of Matthew. The parties were not sworn in as witnesses at this hearing, and no testimony or other evidence was entered into the record.

¶ 9 At the conclusion of the hearing, the circuit court indicated that it would like the parties to prepare a final judgment reflecting the outcome of the hearing. Counsel for Deborah objected, contending that the matter was still in non-binding mediation and that, in the absence of a full agreement, Deborah was entitled to conduct discovery and present evidence at a full evidentiary hearing on the parties' pending petitions and motions. The circuit court rejected this argument, contending that it had just held a final hearing on all pending issues and that the parties had reached an agreement.

¶ 10 The matter was continued to March 25, 2015, for the entry of a final amended custody judgment. On that date, counsel for Deborah again asserted that no agreement had been reached

and that entry of a judgment was improper without a full hearing. The circuit court again rejected this argument. The final amended custody judgment was actually entered two days later, only after the circuit court again rejected Deborah's objections. The amended judgment was not signed by either party, although signature lines were provided. In addition, on March 27, 2015, the circuit court entered another order directing Mathew to pay Deborah $15,200 in past-due child support, $3,000 of which had already been paid.

¶ 11 Deborah subsequently filed a motion to vacate the amended custody judgment in which she reiterated her objection to the entry of that order without the full agreement of the parties and without a full evidentiary hearing. That motion was denied on April 30, 2015, and Deborah timely appealed.

¶ 12 II. ANALYSIS

¶ 13 As noted above, Deborah does not challenge the substance of the amended custody judgment on appeal. Rather, she contends that her due process rights were violated because that judgment was entered—in violation of relevant statutes and court rules—without the agreement of the parties and without the benefit of an evidentiary hearing. We review these contentions *de novo*. *People v. Austin M.*, 2012 IL 111194, ¶ 66 (noting that "issues involving questions of due process and statutory construction are subject to *de novo* review").

¶ 14 This dissolution proceeding was governed by the Illinois Marriage and Dissolution of Marriage Act (Act). 750 ILCS 5/101, *et seq.* (West 2014). More specifically, the original custody judgment was entered pursuant to section 602 of the Act and the subsequent amended custody judgment was entered pursuant to section 610(b). 750 ILCS 5/602, 610(b) (West 2014). Section 610(b) specifically provides that "[t]he court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the

prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child." 750 ILCS 5/610(b) (West 2014). A number of decisions have recognized that "in the absence of an agreement regarding child custody, a hearing by the court is necessary, as well as a complete opportunity for evidence to be presented by both sides." *In re Marriage of Breyley*, 247 Ill. App. 3d 486, 493 (1993); *In re Marriage of Staszak*, 223 Ill. App. 3d 335, 341 (1991) (same); *Henrikson v. Henrikson*, 26 Ill. App. 3d 37, 39, 324 (1975) ("A custody question presents an adversary proceeding and as such proof must be produced in open court by examination and cross examination of witnesses.").

¶ 15 As these decisions clearly recognize, however, agreement upon a question relating to custody is possible. Indeed, the rules of our supreme court specifically require circuit courts to provide a mediation program to facilitate such agreements. Ill. S. Ct. R. 905(b) (eff. Jan. 1, 2007) ("Each judicial circuit shall establish a program to provide mediation for dissolution of marriage and paternity cases involving the custody of a child or removal of a child or visitation issues ***."). Pursuant to this supreme court rule, the circuit court of Cook County has adopted a local rule to be used in this context. See Cook Co. Cir. Ct. R. 13.4(e) (Apr. 28, 2014). That local rule contains a number of relevant provisions.

¶ 16 For example, Rule 13.4(e)(ii)(b) provides that with respect to the "modification of custody, visitation, or parenting time," mediation is mandatory. Cook Co. Cir. Ct. R. 13.4(e)(ii)(b) (Apr. 28, 2014). Nevertheless, while "[p]arties and their representatives are required to attend mediation sessions, [they] are not compelled to reach an agreement." Cook

Co. Cir. Ct. R. 13.4(e)(i)(a) (Apr. 28, 2014). Furthermore, "[u]nless otherwise agreed by the parties, or ordered by the court, the parties may not engage in discovery on issues of custody, visitation, parenting time, or removal or relocation of the child while those issues are being mediated." Cook Co. Cir. Ct. R. 13.4(e)(viii)(a) (Apr. 28, 2014).

¶ 17 Rule 13.4 also includes provisions for the completion of such mediation, stating that "[m]ediation shall be considered to have been completed only upon the happening of one of the following events: (1) The entry by the parties into a written settlement agreement which is signed by each of the parties; (2) Entry of an order or judgment of the court approving an oral settlement agreement; (3) Certification by the mediator that the mediation has been concluded without the parties reaching agreement on any issues or with the parties reaching agreement as to some but not all issues; (4) Entry of an order by the court, upon the motion of a party or the mediator, or upon the court's own motion, terminating the mediation for good cause shown." Cook Co. Cir. Ct. R. 13.4(e)(vi)(a) (Apr. 28, 2014). Finally, Rule 13.4 states that "[s]ettlement agreements reached in mediation on child-related issues are not binding upon the parties or the court unless: (i) the agreement is in writing, signed by the parties, and approved by the court, or (ii) the agreement is oral, has been stated in the record, and has been approved by the court. Child-related issues include: (1) initial determinations of custody, visitation, or parenting time; (2) modification of custody, visitation, or parenting time; (3) removal or relocation of the child; and (4) child support." Cook Co. Cir. Ct. R. 13.4(e)(vi)(d) (Apr. 28, 2014).

¶ 18 Here, the record clearly reflects that the amended custody judgment was not entered in compliance with the requirements of section 610(b). Because the parties were involved in mediation, Deborah was not permitted to propound any discovery with respect to the issues of custody prior to the entry of that judgment. Cook Co. Cir. Ct. R. 13.4(e)(viii)(a) (Apr. 28, 2014).

Moreover, at the hearings held by the circuit court prior to the entry of the amended judgment, the circuit court swore no witnesses, heard no testimony, and received no exhibits into evidence. As such, in the absence of an agreement with respect to custody, there was simply no evidence before the circuit upon which it could base a determination of whether there had been a change of circumstances warranting a modification to the original custody judgment in the best interests of the parties' children. 750 ILCS 5/610(b) (West 2014). The hearings held by the circuit court also did not provide a "complete opportunity for evidence to be presented by both sides." *In re Marriage of Breyley*, 247 Ill. App. 3d at 493.

¶ 19 In addition, the record also reflects that the parties did not reach a *full* agreement with respect to the amended custody judgment, such that the requirements of section 610(b) could be considered satisfied. Clearly, the parties had engaged in significant mediation prior to the March 19, 2015, hearing, had reached agreement on a number of issues, and those agreements had been reduced to a written, proposed judgment. As a result, on February 13, 2015, the circuit court entered an order scheduling a hearing for March 19, 2015, regarding "pending issues from Steve Wasko's last mediation agreement."

¶ 20 Just as clear, however, is the fact that the parties had not reached a complete agreement prior to the March 19, 2015, hearing. The transcript from that hearing reflects that both Deborah and Matthew had disagreements and disputes with respect to various portions of the proposed amended custody judgment. The circuit court negotiated an agreed resolution of some of those issues but importantly, and without the agreement of the parties, it also independently resolved some disputed issues in Deborah's favor and some in favor of Matthew. Thus, it was the circuit court itself that determined the final, full content of the amended custody judgment, without the agreement of the parties and without first holding an evidentiary hearing. As the circuit court

made clear on March 19, 2015, and in denying Deborah's petition to vacate: (1) "at this point someone needs to make a decision" and "I'm making the decision," and (2) the amended custody judgment was entered "because there has to be some finality and in the best interests of the children, because this constant going back and forth between the two parents is not good. So sometimes decisions have to be made. And I made it. And I thought this was in the best interests of the children."

¶ 21 Acknowledging the circuit court's clearly good intentions, this was improper. As Rule 13.4 provides, while "[p]arties and their representatives are required to attend mediation sessions, [they] are not compelled to reach an agreement." Cook Co. Cir. Ct. R. 13.4(e)(i)(a) (Apr. 28, 2014). Moreover, the requirements for the parties' mediation to be considered completed were not met where: (1) the amended custody agreement was not sighed by the parties, (2) as discussed above, the record does not reflect that an oral agreement on all issues was reached, (3) Mr. Wasko never certified the mediation had been concluded without the parties reaching agreement; and (4) the circuit court never entered an order terminating the mediation for good cause shown. Cook Co. Cir. Ct. R. 13.4(e)(vi)(a) (Apr. 28, 2014). Moreover, because the amended custody judgment was not signed by the parties and no oral agreement was reached, it was not even "binding upon the parties or the court." Cook Co. Cir. Ct. R. 13.4(e)(vi)(d) (Apr. 28, 2014). Indeed, the amended custody judgment itself included language indicating that it would take effect only "upon signature of both parties and upon approval and entry *** by a court of competent jurisdiction."

¶ 22 In light of the above discussion, we conclude that the amended custody judgment was improperly entered without the agreement of the parties and without the benefit of an evidentiary

hearing. As such, we reverse that judgment and remand this matter for further proceedings consistent with this order.

¶ 23 In reaching this conclusion, we necessarily reject a number of arguments raised by Mathew on appeal. Thus, we reject Mathew's contention that the requirements of section 610(b) do not apply here because the amended custody judgment did not actually modify custody in that custody of the two minors remained with Deborah. Clearly, the amended judgment modified the original custody judgment, and by its own terms section 610(b) is applicable in such situations. 750 ILCS 5/610(b) (West 2014). And, at a minimum the amended custody judgment modified the original custody judgment with respect to Mathew's own visitation. Courts have consistently recognized that visitation is a form of custody subject to the custody rules set forth in the Act. See *In re M.M.*, 156 Ill. 2d 53, 62 (1993); *In re Marriage of Mitchell*, 319 Ill. App. 3d 17, 22 (2001); *In re Marriage of Fields*, 283 Ill. App. 3d 894, 901 (1996); *In re Custody of Myer*, 100 Ill. App. 3d 27, 32 (1981).

¶ 24 We also reject Mathew's contention that Deborah is barred from complaining about the procedure employed by the circuit court, under the rule of invited error, because she participated fully in the March 19, 2015, hearing and only objected to the entry of a final amended custody judgment after an agreement had been reached.

¶ 25 "The rule of invited error or acquiescence is a form of procedural default also described as estoppel. [Citation.] The rule prohibits a party from requesting to proceed in one manner and then contending on appeal that the requested action was error. [Citation.] The rationale for the rule is that it would be manifestly unfair to grant a party relief based on error introduced into the proceedings by that party. [Citation.]" *Gaffney v. Board of Trustees of Orland Fire Protection District*, 2012 IL 110012, ¶ 33.

¶ 26 Here, the record reflects that the parties only continued mediating after the court ordered them to do so over Deborah's objection and in the face of Mathew's motion to compel Deborah to do so. Additionally, it is apparent that Deborah participated in the March 19, 2015, hearing in order to determine if a *full* agreement between the parties could be reached. That did not happen, as it was the circuit court that independently decided a number of the remaining contested issues. In addition, the record further reflects that Deborah consistently objected to the entry of the amended custody judgment before and after its entry below, and has done so again on appeal. The rule of invited error is simply not applicable here.

¶ 27 Lastly, we reject Mathew's contention that Deborah cannot be heard to complain about the amended judgment where she accepted the benefits of that agreement, in the form of the $15,200 in child support Mathew was ordered to pay on March 19, 2015. This assertion essentially invokes the doctrine of release of errors. "In the context of a divorce action, the doctrine of release of errors bars an appeal if, by reason of the nonmovant accepting benefits of the judgment appealed from, the movant would be distinctly disadvantaged were the judgment reversed. [Citation.] The existence of a distinct disadvantage is the critical inquiry, and the movant bears the burden of establishing its existence. [Citation.]" *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 336-37 (1999). Here, Mathew has made no effort to satisfy this burden by establishing how he would distinctly disadvantaged.

¶ 28 Moreover, there is an exception to the release of errors doctrine "which states that where the benefit being enjoyed is separate from the judgment being appealed, no waiver of appellate rights has occurred." *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 707-08 (1996). Here, the issue of back child support was separate from the issues of custody and visitation, and was in fact resolved via a separate order.

¶ 29 Finally, we feel compelled to state that we are sympathetic to the circuit court's extensive efforts to resolve the parties' disputes by a mediated, negotiated agreement. It is apparent that the parties did come to an agreement on many, but not all, of their disputes due in large part to the efforts of the circuit court and the court-appointed mediator. However, a full agreement was not ultimately reached, and therefore the resolution the remaining disputes and the entry of a modified custody judgment could not proceed without the circuit court first hearing any evidence.

¶ 30 III. CONCLUSION

¶ 31 For the foregoing reasons, we reverse the order of the circuit court and remand for further proceedings consistent with this order.

¶ 32 Reversed and remanded.