2015 IL App (2d) 140346-U
No. 2-14-0346
Order filed April 13, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of Du Page County.
ELIZABETH K. ALDEN,	)	
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 08-D-1034
	)	
DANA A. ALDEN,	)	Honorable
	)	Robert A. Miller,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly determined it had jurisdiction to entertain respondent's motion to dissolve the imposition of supervised visitation, and therefore, the trial court properly denied respondent's motion to stay; Pursuant to *In re Marriage of Spangler*, 124, Ill. App. 3d 1023 (1984), the trial court had jurisdiction to conduct a hearing on respondent's motion to dissolve, despite a pending appeal of the trial court's original custody order; the trial court did not abuse its discretion when it awarded attorney fees to petitioner under section 508(b) of the Illinois Marriage and Dissolution of Marriage Act; and our prior review of the trial court's rulings from October 4 and 23, 2012, precludes reconsideration of the rulings in the current appeal.

¶ 2 In this postdissolution matter, respondent, Dana A. Alden, presents four issues for review: (1) whether the trial court erred when it scheduled a trial on "custody and visitation" when he had not filed any pleading, but rather had only filed a motion seeking temporary relief; (2) whether the trial court lacked jurisdiction to schedule a trial during the pendency of another appeal; (3) whether the trial court erred when it awarded $118,000 in attorney fees in favor of petitioner; and (4) whether the trial court erred when it scheduled a trial, rather than dissolving the restrictions on respondent's contact with his children based upon sworn deposition testimony. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Initially, we address petitioner's request to strike respondent's brief and dismiss the appeal because respondent's brief relies on factual allegations that are *de hors* the record. Petitioner argues that respondent's Statement of Facts section violates Illinois Supreme Court Rule 341 (eff. July 1, 2008) in that respondent submitted statements and relies on hearsay documents that were never in evidence before the trial court.

¶ 5 On our review of the record, we agree with petitioner that respondent has made numerous statements and arguments not only in the Facts section but throughout his brief, which have compelled this court to conclude that he has misrepresented and mischaracterized the proceedings. The misrepresentations, in turn, made our review difficult, since we had to verify all of respondent's statements presented as facts and his supporting arguments. Illinois Supreme Court Rule 341 (eff. July 1, 2008) provides that all briefs should contain a fact section, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment. The rules of procedure concerning appellate briefs are rules, not mere suggestions, and it is within the appellate court's discretion to strike a brief and dismiss the

appeal for failure to comply with those rules. See *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). However, we also recognize the protracted litigation the parties have endured and determine that resolving these matters in an effort to achieve finality should take precedence over respondent's lack of compliance. Therefore, despite these deficiencies, we will consider the issues but disregard any offending portions and admonish respondent, as we previously did, that the supreme court rules "are not advisory suggestions, but rules to be followed." See *In re Marriage of Alden*, 2014 IL App (2d) 121046-U (quoting *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 51).

¶ 6 As we referenced above, the parties have presented various appeals to this court. See *In re Marriage of Alden*, No. 2-14-0346 (current appeal); *In re Marriage of Alden*, No. 2-12-1046 (appeal of trial court's order finding respondent indirect contempt and awarding section 508(b) fees against respondent, appellate court affirmed December 19, 2014); *In re Marriage of Alden*, No. 2-12-1116) (appeal from trial court's order declining to hold respondent in direct criminal contempt, appellate court affirmed December 19, 2014); *In re Marriage of Alden*, No. 2-12-1127 (appeal of trial court's ruling on petitioner's emergency motion to implement the recommendations of Dr. Gardner, appellate court affirmed December 19, 2014); *In re Marriage of Alden*, No. 2-12-1208 (appeal of trial court's ruling that awarded petitioner the sole custody, care, and control of the children, appellate court affirmed December 19, 2014); *In re Marriage of Alden*, No. 2-13-1138 (appeal of trial court order denying respondent's motion to dissolve the imposition of supervised visitation entirely; appellate court denied November 18, 2013); *In re Marriage of Alden*, No. 2-13-1151 (appeal of trial court's order of October 15, 2013, refusing to modify an injunction; appellate court dismissed on December 31, 2013, except petitioner's motion for sanctions is reserved pending the completion of all other appeals); *In re Marriage of*

Alden, No. 2-13-1195 (appeal of trial court order enjoining respondent from filing exhibits to a motion, appellate court dismissed May 1, 2014).

¶ 7 A brief, objective, recitation of this litigation since the last appeal is necessary to place the issues raised in the proper context. We will not repeat the facts from the prior litigation or appeals; those facts are set out sufficiently in our prior Order filed on December 19, 2014. See *In re Marriage of Alden*, 2014 IL App (2d) 121046-U. The marriage of the parties was dissolved in December 2009. The trial court's judgment incorporated a Joint Parenting Agreement, which pertained to the parties' two children. On October 23, 2012, following a hearing, the trial court entered an order vacating the parties' Joint Parenting Agreement; awarding the sole care, custody, control, and education of the minor children to petitioner; and modifying respondent's visitation schedule. Respondent appealed this order, and this court affirmed. See *In re Marriage of Alden*, 2014 IL App (2d) 121046. Relevant to the instant appeal are the following facts.

¶ 8 On December 3, 2012, petitioner filed an emergency motion to suspend visitation. Petitioner alleged that the parties' daughter had advised her that respondent was doing things during visitation that made her uncomfortable and secretly communicating with the children. On December 5, 2012, respondent filed his response and attached reports from Family Solutions and the "DeGraw Declaration." The trial court conducted a hearing, and following arguments of the parties, declined to suspend visitation.

¶ 9 Thereafter, on February 22, 2013, petitioner filed a motion to modify, asking the trial court to order a consultation with the court-appointed therapists before requiring the children to attend family therapy with respondent. Petitioner also filed a motion for leave to take the depositions of respondent's family therapist, Dr. Daniel Fisher, and David Finn. Respondent filed a verified petition for adjudication of indirect criminal contempt, alleging that petitioner

was not cooperating with therapeutic visitation between him, the children, and Fisher. The trial court continued the matters to April 8, 2013.

¶ 10 On March 6, 2013, respondent filed a petition for rule to show cause, which was substantively similar to the petition for adjudication of indirect criminal contempt filed previously. The matter was also set for hearing on April 8. On April 8, the trial court conducted a hearing, and the trial court granted petitioner's motion to modify and denied respondent's petition for rule to show cause.

¶ 11 On April 30, 2013, respondent filed a petition for rule to show cause, alleging that petitioner had not provided any information to Fisher regarding scheduling family therapy sessions; respondent withdrew that petition on May 6, 2013.

¶ 12 On July 31, 2013, respondent filed "Father's Emergency Motion to Dissolve the Imposition of Supervised Visitation." Respondent requested that he be allowed to take the children unsupervised to New York to visit a terminally ill relative. Respondent alleged that, *inter alia*, the "ongoing imposition of supervised visitation harms children when supervision is unnecessary" and "[i]t is imperative that the children and [respondent] resume a normal family experience, and further delay prevents the parties from doing so." In addition to allowing visitation with the terminally ill relative in New York, respondent requested the trial court enter the following relief, that the orders of "October 10, 2013 and October 23, 2013 be modified so that the imposition of supervised visitation be removed."

¶ 13 On August 1, 2013, petitioner filed a motion to update the section 604(b) report of Gardner. Petitioner alleged the necessity of an updated custodial evaluation prior to the trial court's termination of supervised visitation. On August 5, 2013, respondent filed a "Memorandum in Support of Respondent's Emergency Motion to Dissolve Supervised

Visitation." In his memorandum, respondent acknowledged that his terminally ill relative had since died.

¶ 14 On August 5, 2013, the trial court conducted a hearing. With respect to respondent's emergency motion, respondent informed the trial court of the death of his relative. The trial court then inquired whether his motion was moot, and respondent replied that the "ongoing estrangement between me and my kids constitutes irreparable harm" and that "we need to lift supervision now." The hearing continued, and respondent called his family therapist, Dr. Daniel Fisher, to testify regarding the emergency situation. The trial court inquired whether the current supervision schedule posed a serious endangerment to the children's physical or mental welfare, and Fisher testified that he "would not go that far to say serious endangerment," but that "the next step is to begin to lift supervision." The trial court then asked Fisher, "if the next step did not occur today or tomorrow, that there would be some sort of irreparable harm to the children," and Fisher replied, "No."

¶ 15 Following arguments of the parties, the trial court found that there was no emergency. The trial court scheduled dates for the parties' responses to respondent's motion to dissolve the supervised visitation and petitioner's motion to update the section 604(b) report. On August 21, 2013, the trial court granted petitioner's motion to update the section 604(b) report and scheduled a hearing date for respondent's motion to dissolve. The trial court scheduled a hearing on respondent's motion to begin on November 18, 2013. During this time, petitioner's counsel clarified for the record the hearing was being scheduled on respondent's motion "to lift the supervised visitation."

¶ 16 On August 28, 2013, respondent filed a motion for unsupervised visitation for the purpose of bringing the children to Daniel Fisher and for other relief. Petitioner filed a motion to

strike this motion; the trial court denied petitioner's motion. The trial court scheduled the hearing on respondent's motion for unsupervised visitation for October 15, 2013.

¶ 17 On October 8, 2013, petitioner filed her response to respondent's August 2013 motion for unsupervised visitation. Petitioner argued, *inter alia*, that the trial court had already scheduled a hearing on respondent's motion to dissolve the supervised visitation. On October 15, 2013, the trial court conducted a hearing on respondent's August 2013 motion for unsupervised visitation. Respondent argued that he wanted unsupervised visitation so that he could take the children to counseling and participate with the children. Respondent added that there was no serious danger and no reason to impose restricted visitation. The guardian *ad litem* reported that Daniel Fisher was content with the children's progress and that there was no concern with the children not seeing respondent enough. Following arguments of the parties, the trial court denied respondent's motion for unsupervised visitation. The trial court noted the upcoming November 18 hearing on respondent's motion to dissolve the supervised visitation and explained that it would be informed by the testimony of the medical professionals.

¶ 18 Respondent filed two appeals of the trial court's October 15, 2013, order denying his August 2013 motion for unsupervised visitation. See *In re Marriage of Alden*, No. 2-13-1138 (appeal of trial court order denying respondent's motion to dissolve the imposition of supervised visitation entirely; appellate court denied November 18, 2013); *In re Marriage of Alden*, No. 2-13-1151 (appeal of trial court's order of October 15, 2013, refusing to modify an injunction; appellate court dismissed on December 31, 2013, except petitioner's motion for sanctions is reserved pending the completion of all other appeals). Respondent's notice of appeal in the current matter indicates that he is again appealing this order.

¶ 19 On October 22, 2013, respondent filed a motion to bar undisclosed opinions and unproduced documents and a motion to quash discovery. In respondent's motions, he argued that petitioner should be barred from presenting an updated report from the custody evaluator, Dr. Mary Gardner, because the parties had not conducted a Rule 218 conference and because discovery had closed on September 19, 2013. On October 23, 2013, respondent filed a motion for leave to file exhibits, in which he sought leave to file the transcript of Daniel Fisher and the new DeGraw Declaration, which he referenced in his motion to quash discovery. The trial court struck these motions for violating the local rule, but granted respondent leave to refile the motions in compliance with the relevant rules. The trial court also granted petitioner leave to file a request for a continuance of the November 18, 2013, hearing date on respondent's motion to dissolve supervised visitation.

¶ 20 On November 8, 2013, the trial court conducted a hearing on various outstanding motions. Following arguments, the trial court granted (over respondent's objection) petitioner's motion for a continuance of the November 18, 2013, hearing on respondent's motion to dissolve supervised visitation. The trial court scheduled the hearing on respondent's motion to dissolve to begin on January 22, 2014. The trial court also denied respondent's motion to file exhibits. The trial court then conducted a Rule 218 pretrial conference, set a schedule to close discovery, and determined that respondent's discovery motions were moot.

¶ 21 Respondent filed an appeal of the trial court's November 8, 2013, order, denying his motion to file exhibits. See *In re Marriage of Alden*, No. 2-13-1195 (appeal of trial court order enjoining respondent from filing exhibits to a motion, appellate court dismissed May 1, 2014). Respondent's notice of appeal in the current matter indicates that he is again appealing this order.

¶ 22 Thereafter, petitioner filed a motion to confirm the status of Dr. Daniel Fisher as a treating forensic mental health professional; the trial court granted petitioner's motion, noting that he was "not a 604(b) evaluator."

¶ 23 On January 10, 2014, respondent filed a motion seeking a continuance of the January 2014 hearing. Respondent attached an affidavit, which acknowledged that the "Father's Motion to Dissolve the Imposition of Supervised Visitation" was scheduled for hearing beginning January 22, 2014. The trial court denied respondent's motion for continuance.

¶ 24 On January 21, 2014, respondent filed a "Motion to Stay Respondent's Motion to Dissolve the Imposition of Supervision for Lack of Jurisdiction." On January 22, 2014, petitioner filed a response, and the trial court conducted a hearing on the same day. Respondent primarily argued that, because of all of the pending appeals, the trial court had been deprived of jurisdiction over the custody matters. Respondent also argued that his "emergency" motion to dissolve the supervised visitation was moot. Petitioner responded that respondent's motion to dissolve the supervised visitation sought a modification of the order, which was pending in the appellate court; but nonetheless, a motion for modification was permissible under section 607 of the Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/607 (West 2012)) and pursuant to *In re Marriage of Spangler*, 124 Ill. App. 3d 1023 (1984), and *In re Marriage of Petramale*, 102, Ill. App. 3d 1049 (1981).

¶ 25 During the hearing, the trial court asked respondent the purpose of the prior hearings if his motion to dissolve was moot, and respondent replied they were "in anticipation of petition to modify visitation in the case." Following arguments of the parties, the trial court found that it had jurisdiction, finding that *Spangler* applied to the circumstances. The trial court continued,

"I do find that there has been at least an allegation in [respondent's] pending motion that there has been a change in circumstances from the situation which existed at the time the original order was entered.

And because there is such an allegation, I believe the trial court does have jurisdiction to go forward with the hearing on the motion to lift the supervision.

So, the motion to suspend proceedings because this trial court lacks jurisdiction – subject matter jurisdiction with regard to modifying the supervision order is denied.

So, we're going forward."

¶ 26 The trial court's January 22, 2104, order states that "[Respondent's] Motion to Stay Respondent's Motion to Dissolve the Imposition of Supervision for Lack of Jurisdiction is denied. The Court has jurisdiction to decide [respondent's] Motion to Dissolve the Imposition of Supervision."

¶ 27 Thereafter, respondent informed the trial court that, "for me to preserve my objection to jurisdiction, I cannot participate in the hearing because doing so essentially is consent to the Court having jurisdiction." The trial court continued, indicating that it was respondent's motion and asked respondent to call his first witness. Respondent indicated that he was not going to call anyone. Petitioner moved for a directed finding and requested that respondent's motion to dissolve be denied. Petitioner also requested leave to file a fee petition.

¶ 28 The trial court ruled as follows:

"Well, I'm going to give a dual ruling.

One, there's been no evidence presented before me.

This is [respondent's] motion. He has the burden of going forward with the evidence. He has not called any witnesses.

*** The Court hasn't been persuaded in any way because there's been no evidence for me to consider.

And, therefore, the father's emergency motion to dissolve the imposition of supervised visitation is denied.

I'll say for the record that I have received Mary Gardner's report.

I have reviewed Mary Gardner's report.

If I were making a ruling and consider the Gardner report as evidence, it would not change my decision that [respondent] would not have met his burden, even if I used the Gardner report as the sole evidence in this case.

That isn't–I haven't done so, but if I were–I've read it. It–I find that the report standing on its own would not be sufficient to cause me to lift the imposition of supervised evidence.

In fact, it supports the opposite."

¶ 29 Petitioner asked the trial court to clarify and rule on whether the Gardner report was in evidence. The trial court stated, "It is not in evidence."

¶ 30 The trial court's written order of January 22, 2014, provides:

"[Respondent] having elected not to present any evidence or to proceed with his Motion to Dissolve the Imposition of Supervision, and having elected to stand on his objection to the Court's jurisdiction, [respondent's] Motion to Dissolve the Imposition of Supervision is denied.

*** The Court notes specifically that the 604(b) report of Mary Gardner is not in evidence.

*** The Court's findings contained in the transcript of the hearing of today's date *** are incorporated into this Order."

¶ 31 On February 6, 2014, petitioner filed a petition for attorney fees and costs pursuant to section 508(b) of the Act, as well as Illinois Supreme Court Rule 137 (eff. July 1, 2013).

¶ 32 On March 11, 2014, the trial court conducted a hearing on petitioner's petition for attorney fees. Petitioner's counsel testified regarding their qualifications, the amount of work performed for petitioner from July 31, 2013, through January 23, 2014, and the amounts billed. Respondent cross-examined the attorneys, and the trial court also questioned the attorneys. Respondent also testified to the trial court regarding the entries that he questioned. Following arguments of the parties, the trial court reviewed the billing statements. The trial court allowed some of the charges and disallowed others. The trial court instructed petitioner's counsel to recalculate the fees based on its rulings. The trial court's written order of March 11, 2014, specifically found "that the attorney fees sought are compensable under 508(b) [and] [Supreme Court] Rule 137. The pleadings brought by [respondent] were not well founded in the law, unnecessary, and brought for improper purpose."

¶ 33 Petitioner filed the recalculated fee submission, and on March 14, 2014, the trial court approved the amounts. The trial court entered a judgment in favor of petitioner and against respondent for $118,748.78 in attorney fees pursuant to section 508(b) of the Act and Supreme Court Rule 137; $7,392.96 for costs incurred on behalf of petitioner; and $6,943.75 for fees incurred to Mary Gardner.

¶ 34 Respondent filed a timely notice of appeal.

¶ 35 II. ANALYSIS

¶ 36 Prior to reaching the merits, we must dispose of an open motion by respondent to amend the record by filing a supplemental record filed June 11, 2014. Respondent seeks to admit an updated report of Dr. Mary Gardner, the custody evaluator. Gardner's updated report was dated

November 26, 2013. Petitioner responded, objecting to the motion. We have ordered the motion and objection to be taken with the case.

¶ 37 Petitioner objects and argues that this present appeal does not involve any issue based on an evidentiary hearing regarding visitation or custody, but rather, involves the trial court's jurisdiction, its award of attorney fees, and therefore, the updated report should not be a part of the record on appeal. Petitioner argues that respondent violated Illinois Supreme Court Rule 329 (eff. Jan. 1, 2006) by failing to seek the trial court's approval of the trial court, and petitioner further questions whether the document accurately disclosed what occurred in the trial court.

¶ 38 Supreme Court Rule 329 provides, in relevant part:

> "The record on appeal shall be taken as true and correct unless shown to be otherwise and corrected in a manner permitted by this rule. Material omissions or inaccuracies or improper authentication may be corrected by stipulation of the parties or by the trial court, either before or after the record is transmitted to the reviewing court, or by the reviewing court or a judge thereof. Any controversy as to whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by that court and the record made to conform to the truth."

¶ 39 The record reflects that the parties have not filed a stipulation pursuant to Rule 329 to supplement the record with the Gardner update or otherwise filed a stipulation to move to so supplement the record on appeal. It is well settled that the record on appeal cannot be supplemented by attaching documents to a brief or including them in a separate appendix. *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826 (2001). Moreover, the record on appeal can be "supplemented only with evidence actually before the trial court." *Jones v. Ford Motor Co.*, 347 Ill. App. 3d 176, 180 (2004); see also *Avery v. Sabbia*, 301 Ill. App. 3d 839, 843-44 (1998)

(matters not properly part of the record and not considered by the trial court will not be considered on review even though included in the record). In the present case, respondent filed a motion on October 22, 2013, seeking to bar petitioner from presenting the Gardner update—the same document he is now seeking to include. The trial court's order of January 22, 2014, specifically expressed that the Gardner update was not in evidence. Having reviewed the proceedings, including the circumstances pertaining to the Gardner update, we now deny respondent's motion to supplement the record with the Gardner update.

¶ 40 Turning to the merits, respondent presents four issues for review: (1) whether the trial court erred when it scheduled a trial on "custody and visitation" when he had not filed any pleading, but rather had only filed a motion seeking temporary relief; (2) whether the trial court lacked jurisdiction to schedule a trial on various matters during the pendency of another appeal, which matters were contained within his appellate briefs (appeal No. 2-12-1046); (3) whether the trial court erred when it awarded $118,000 in attorney fees in favor of petitioner; and (4) whether the trial court erred when it scheduled a trial on "custody and visitation," rather than dissolving the restrictions on respondent's contact with his children based upon his receipt of Dr. Daniel Fisher's opinions in the form of his sworn deposition testimony.

¶ 41 With respect to respondent's first issue, he characterizes his July 31, 2013, "Father's Emergency Motion to Dissolve the Imposition of Supervised Visitation" as a motion seeking only temporary relief. Respondent asserts that his motion was not a formal pleading to modify custody or visitation, even if the allegations contained within the motion would support a petition for modification of custody or visitation. Respondent relies on *Ligon v. Williams*, 264 Ill. App. 3d 701 (1994), in support of his assertion that his motion was not a pleading and not meant to modify custody or visitation. Respondent seeks *de novo* review of this issue.

¶ 42 This court in *In re Marriage of Rife*, 376 Ill. App. 3d 1050 (2007), provided an in-depth discussion of appellate review of trial court decisions. We review with deference "those trial court decisions that are within the special competence of the trial courts, and only to those decisions." *Id.* at 1058. The *Rife* court continued, "[w]hen we are reviewing a type of decision that the trial court was better qualified to make, we must proceed with due recognition of the trial court's superior vantage point." *Id.* at 1058-59. "Otherwise, we must exercise our prerogative to decide the issue without deference to the trial court." *Id.* at 1059 (citing *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1144 (2004)).

¶ 43 In the present case, the trial court conducted a hearing on respondent's January 2014 motion to stay, wherein it heard arguments regarding the allegations and substance of respondent's motion to dissolve and respondent's reasons for not bringing the matter to the court's attention until one day before the hearing on the motion to dissolve was to commence. To the extent the trial court not only reviewed the documents but also heard evidence of respondent's intent, our review will be conducted "with due recognition of the trial court's superior vantage point" (*Rife*, 376 Ill. App. 3d at 1058-59), and does not depend upon respondent's prior characterizations.

¶ 44 On July 31, 2013, respondent filed "Father's Emergency Motion to Dissolve the Imposition of Supervised Visitation." Respondent explained the reason for the emergency, his terminally ill relative, but a plain reading of the motion reflects that respondent was seeking more than an unsupervised visit with the relative. Respondent alleged the desire to "resume a normal family experience" and clearly requested in his prayer for relief that "[t]he order of October 10, 2013 (*sic*) and October 23, 2013 (*sic*) be modified so that the imposition of supervised visitation be removed." At the August 5, 2013, hearing on the emergency motion,

respondent informed the trial court of the death of his relative. The trial court then inquired whether his motion was moot, and respondent replied that the "ongoing estrangement between me and my kids constitutes irreparable harm" and that "we need to lift supervision now."

¶ 45 Respondent had an opportunity on August 5, 2013, to clarify to the trial court that "he had not filed any pleading" but rather sought only "temporary relief." Respondent also had an opportunity to inform the trial court of the true nature of his motion to dissolve on October 8, 2013, when the trial court scheduled the hearing for November 18. Respondent had another opportunity on October 15, 2013, when the trial court conducted a hearing on his motion to transport the children to see Dr. Fisher unsupervised. At that hearing, the parties and the trial court not only discussed and resolved the supervision with respect to the therapy appointments, they also discussed the scheduled hearing on respondent's motion to dissolve. Respondent filed other motions after August 5, 2013, and the parties appeared before the trial court in the subsequent months and discussed various matters, but respondent never once rejected or otherwise corrected the trial court's understanding of respondent's motion to dissolve the supervised visitation.

¶ 46 Contrary to what respondent would have this court believe, the record belies his assertions. Respondent presented the July 31, 2013, motion to dissolve the imposition of supervised visitation as an emergency, but when the emergent circumstances ceased to exist, respondent represented at the August 5, 2013, hearing and for months later, that he still sought the dissolution of the supervised visitation. For respondent now to argue to the trial court that his conduct was "in anticipation of [a] petition to modify visitation in the case" and to argue to this court that he "had not filed any pleading" is disingenuous at best. We conclude that the trial

court properly determined it had jurisdiction to entertain respondent's motion to dissolve, and therefore, the trial court properly denied respondent's January 21, 2014, motion to stay.

¶ 47 We are unpersuaded by respondent's reliance upon *Ligon v. Williams*, 264 Ill. App. 3d 701 (1994), as in that case, neither party had notice that the issue of custody would be before the court. In *Ligon*, neither party filed a petition relating to custody; rather, the trial court raised the issue of custody *sua sponte* and then entered an order switching custody of the minor from one parent to the other. On appeal, the reviewing court determined, *inter alia*, that, when neither parent had raised the issue of custody before the trial court, the court acted without authority in entering an order affecting custody because custody was not a justiciable matter before the court. *Id.* at 708. Because the trial court acted without jurisdiction, its order was void. *Id.* at 709. The circumstance of the present case are inapposite to those in *Ligon*, in that respondent filed a motion to dissolve and allowed petitioner and the trial court to proceed for months in a manner consistent with an understanding that respondent was seeking to dissolve the trial court's imposition of unsupervised visitation.

¶ 48 Having concluded that the trial court properly determined that respondent's July 31, 2013, motion to dissolve was a justiciable matter based on the substance of respondent's motion as well as respondent's conduct, we consider respondent's second contention. Respondent contends that, while his appeals were pending, the trial court had no jurisdiction over the case and, thus, had no jurisdiction to conduct a hearing on his motion to dissolve. We summarily reject respondent's contention, as it is well-established that "the pendency of [an] appeal from [an] original custody order [does] not deprive the court of jurisdiction to hear [a] petition to modify" pursuant to section 610 of the Act. *In re Marriage of Spangler*, 124 Ill. App. 3d 1023, 1027 (1984). In the present case, the trial court had entered an order on October 23, 2012,

vacating the parties' Joint Parenting Agreement; awarding the sole care, custody, control, and education of the minor children to petitioner; and modifying respondent's visitation schedule. Respondent filed his motion to dissolve the imposition of supervised visitation on July 31, 2013. Pursuant to *Spangler*, the trial court had jurisdiction to conduct a hearing on respondent's motion to dissolve, and therefore, we reject respondent's contention.

¶ 49 Respondent's third contention is whether the trial court erred when it awarded $118,000 in attorney fees in favor of petitioner. Respondent argues that the trial court's decision was not in compliance with section 508(b) of the Act or Supreme Court Rule 137 (eff. July 1, 2013). We have already rejected respondent's arguments that he never filed a pleading, requested only temporary relief, and that the trial court lacked jurisdiction, so we need not revisit those arguments for this issue. Respondent also argues that "the amount of fees awarded was grossly excessive and clearly unreasonable" because after his relative had died, his motion was "largely moot." Respondent's mootness argument was addressed at the August 5, 2013, hearing, when the trial court inquired whether the motion to dissolve was moot after the relative's death, and respondent replied that he still sought to dissolve the supervised visitation. Again, it is disingenuous for respondent to now argue that his July 31, 2013, motion to dissolve is moot after directly representing to the trial court that it was not. We also reject respondent's claim that petitioner's attorney fees were the result of her efforts to suspend his visitation indefinitely, because we have reviewed the record and the record does not support respondent's claim.

¶ 50 A trial court's decision to grant or deny fees under section 508 of the Act is generally reviewed for an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). Section 508(b) of the Act provides:

> "In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party. *** If at any time a court finds that a hearing under this Act was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation." 750 ILCS 5/508(b) (West 2012).

¶ 51 "Section 508(b) of the Act is mandatory, not discretionary, and does not allow for the court to exercise its discretion as to payment if the defaulting party's conduct was without cause or justification." *In re Marriage of Walters*, 238 Ill. App. 3d 1086, 1098 (1992).

¶ 52 There are two bases under which to award fees under section 508(b), and the record reflects that the trial court never made a finding regarding the first basis; namely, respondent's failure to comply with a court order. Regarding the second basis, respondent argues that his failure to participate in the January 22, 2014, hearing was not for any improper purpose, but rather, to object to the trial court's exercise of jurisdiction. We disagree.

¶ 53 The trial court awarded fees under the second basis of section 508(b). Under the second basis, "[i]mproper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation." 750 ILCS 5/508(b) (West 2012). In the present case, the trial court's order of March 11, 2014, specifically found that "the attorney fees sought are compensable under 508(b)" as well as Rule 137. The trial court's order also expressed that "the pleadings brought by [respondent] were not well founded in the law,

unnecessary, and brought for improper purpose." Based on our review of the record, we conclude that the trial court did not abuse its discretion when it so found, and once it did, it was required to award attorney fees under section 508(b) of the Act. See *In re Marriage of Walters*, 238 Ill. App. 3d at 1098 (stating that section 508(b) of the Act is mandatory, not discretionary).

¶ 54 Respondent's final contention is whether the trial court erred when it scheduled a trial on "custody and visitation," rather than dissolving the restrictions on respondent's contact with his children based upon his receipt of Dr. Daniel Fisher's opinions in the form of his sworn deposition testimony. Respondent seems to take issue with the trial court's October 10 and 23, 2012, rulings regarding custody and visitation. Respondent argues that "the injunctive relief and 'findings of fact' made at the October 4, 2012 hearing should not have carried with them any preclusive effect, and the trial court erred when it entered permanent relief on October 23, 2012 *** rather than proceeding with a full trial on the merits." Although respondent acknowledges that the trial court's decision was the subject of the prior appeal (No. 2-12-1046), he sets out selected deposition testimony from Dr. Fisher to support his position that his visitation with the children should not be supervised.

¶ 55 This court has already reviewed an appeal of the trial court's rulings from October 4 and 23, 2012, and issued a decision. See *In re Marriage of Alden*, 2014 IL App (2d) 121046. We decline respondent's request to revisit the trial court's rulings.

¶ 56 In his reply brief, respondent requests this court to dissolve the restrictions on his contact with the parties' children pursuant to Illinois Supreme Court Rule 366 (eff. Feb. 1, 1994). Supreme Court Rule 366(a)(5) permits a reviewing court, in its discretion, to make any order or grant any relief that a particular case may require. We decline, not only because respondent has

failed to show that dissolving the restriction is required, but also because doing so would render the trial court's decision meaningless.

¶ 57 As a final matter, we must clarify the nature of this appeal. On the front of his appellate brief, respondent expressed that the appeal involved "a question of child custody, adoption, termination of parental rights or other matter affecting the best interests of a child." See Ill. S. Ct. R. 311(a)(5) (eff. Feb. 26, 2010) (providing that, in appeals from orders concerning child custody, "[e]xcept for good cause shown, the appellate court shall issue its decision within 150 days after the filing of the notice of appeal"). Respondent's representation to this court was the sole reason for placing this appeal on the accelerated docket pursuant to Rule 311(a). Upon review of respondent's brief, and despite respondent's characterization of issues concerning "custody and visitation," it is apparent that neither child custody nor any of the other matters affecting the best interests of the children were raised. Accordingly, the appeal is hereby removed from the accelerated docket.

III. CONCLUSION

¶ 58 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 59 Affirmed.