2015 IL App (2d) 141151-U
No. 2-14-1151
Order filed August 6, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF ANN MARIE ANDEXLER, Petitioner, and CHRISTOPHER A. ANDEXLER, Respondent-Appellant. (Lynn Mirabella, guardian *ad litem*, Appellee.)	))))))))))))	Appeal from the Circuit Court of Du Page County. No. 12--MR--70 Honorable John W. Demling, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in allowing and allocating the guardian *ad litem*'s application for fees. We vacated the trial court's October 20, 2014, order and remanded the cause for further proceedings.

¶ 2 Respondent, acting *pro se*, Christopher A. Andexler, appeals from the trial court's October 20, 2014, order allowing and allocating guardian *ad litem* (GAL) fees. By that same order, the trial court also increased respondent's child support obligation and directed that the

additional payments be forwarded to the GAL until the GAL's fees were satisfied. For the following reasons, we vacate the trial court's October 20, 2014, order and remand the cause for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Petitioner and respondent lived in Florida and had four children during the course of their marriage. On April 18, 2011, the circuit court of Volusia County, Florida, entered a "Final Judgment of Dissolution of Marriage with Minor Children," finding the parties' marriage to be irretrievably broken. The Florida court ordered that respondent was entitled to contact with the children three days per month and further ordered that he pay $924.76 per month for child support. Concurrent with the dissolution judgment, the Florida court also entered a "Final Judgment Granting Relocation" to petitioner, thereby allowing petitioner to move to Illinois with the four children. Upon moving to Illinois, petitioner enrolled the Florida judgments and initiated two separate actions in the Du Page County circuit court.

¶ 5 First, petitioner sought an order of protection against respondent in case No. 11--OP--1798. The judge in that case entered a plenary order of protection on January 10, 2012, which was to remain in effect until January 2, 2013.

¶ 6 On February 27, 2012, petitioner filed a "Petition to Modify Respondent's Visitation and for Other Relief" in case No. 12--MR--70. Petitioner asserted that the relationship between respondent and the children had become further strained since they moved to Illinois, and requested that respondent's visitation rights be terminated, or, in the alternative, supervised. On May 21, 2012, the trial court appointed the GAL to specifically address whether there should be any restrictions on respondent's visitation rights. The trial court's order stated that the GAL was

to be paid a retainer of $2,000, against an hourly rate of $250, with petitioner and respondent each paying half.

¶ 7 During a hearing on June 7, 2012, the GAL made an initial recommendation that respondent's visits with the four children be supervised pending the outcome of the "Petition to Modify Respondent's Visitation and for Other Relief." Near the end of the hearing, respondent sought leave to file a motion for a reduction of his child support payments. The trial court explained that child support was a separate issue from custody and visitation, and that the Florida court retained jurisdiction over the child support payments. Respondent then stated that he was unemployed and asked whether he could file a motion to reduce his portion of the GAL fees. The trial court responded that the parties could request a reallocation of the fees at the close of the case, commenting that it had entered the May 21 order regarding payment of the GAL fees "irrespective as to whether the parties were working or not."

¶ 8 On August 10, 2012, respondent filed a motion to vacate the plenary order of protection in case No. 11--OP--1798. On September 28, 2012, the judge in the order-of-protection case denied respondent's motion and also entered an order consolidating case No. 11--OP--1798 into case No. 12--MR--70. The consolidation order stated that all future correspondence and orders were to be captioned with the case No. 12--MR--70.

¶ 9 On January 4, 2013, the judge in the order-of-protection case entered an order granting respondent "Leave to Sue or Defend as an Indigent Person," captioned with case No. 12--MR--70. The order reflected that respondent was found to be "an indigent person." The order also provided that respondent was permitted to sue or defend "without payment of filing fees, costs and charges."

¶ 10 On January 8, 2013, the GAL filed a "Petition for Adjudication of Indirect Civil Contempt," requesting that respondent be ordered to pay his half of the $2,000 retainer. On February 14, 2013, respondent filed a response to the GAL's petition, stating that he had been unemployed for several months and that he was behind in his child support obligations. Respondent also cited the order granting him leave to sue or defend as an indigent person, attached a copy of the order, and requested that he be absolved of his duty to pay any portion of the GAL fees. The record reflects that the matter was continued, and that the trial court made no finding with respect to the GAL fees.

¶ 11 On November 22, 2013, the GAL filed an application for her fees, stating that her law firm had expended a total of 69.25 hours, amounting to $16,343.46 in fees. An invoice was attached to the application that described the work performed for each billing entry. The GAL filed an amended petition on November 26, 2013, that was substantively similar to the November 22 petition.

¶ 12 On January 6, 2014, respondent filed a response to the GAL's fee application. Respondent stated that he had been unemployed for nine months and once again acknowledged that he was behind with his child support payments. He also cited the order granting him leave to sue or defend as an indigent person and attached a copy of that order. In this request for relief, respondent now asked to be absolved of his duty to pay the GAL fees, or, in the alternative, that his financial responsibility be limited to one-half of the GAL's $2,000 retainer fee. The record reflects that the matter was again continued, and that the trial court made no finding with respect to the GAL fees.

¶ 13 Following a hearing in March 2014, the trial court granted petitioner's "Petition to Modify Respondent's Visitation and for Other Relief" and ordered that respondent "shall not

have visitation of any kind with the minor children until further Order of this Court." Respondent appealed, and this court affirmed the trial court's judgment. See *In re Marriage of Andexler*, 2015 IL App (2d) 140476-U.

¶ 14 On September 17, 2014, while the first appeal was pending, the GAL filed a supplemental affidavit. The GAL stated that her firm had now expended a total of 84.75 hours, amounting to $19,660.98 in fees. The GAL added that respondent had paid $375 toward his portion of the fees. Unlike the GAL's November 22, 2013, application for fees, the supplemental affidavit contained no invoices describing the work performed.

¶ 15 The trial court conducted a hearing on October 20, 2014, on the GAL's application for fees; respondent was not present. During the hearing, the GAL briefly explained to the trial court that it would be "next to impossible" to collect from respondent because he lived in Florida. The GAL then suggested that, as a means of collecting her fee, respondent's child-support obligation be increased by $200 per month. The GAL intimated that she had spoken with petitioner's attorney, and that petitioner would agree to forward the additional payments to the GAL. The trial court responded, "[t]hat's fine," and entered a judgment against respondent in the amount of $9,455.49 (equaling one-half of the $19,660.98 [$9,830.49], and then subtracting from that amount the $375 that respondent had already paid [$9,455.49]). The trial court further ordered that respondent's child support obligation be increased by $200 per month, and that petitioner forward the additional payments to the GAL. Respondent filed a timely notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 We must initially address matters aside from the substantive merits of this case. First, respondent moved to strike the 117-page appendix to the GAL's brief, arguing that the appendix constitutes "supplemental evidence." We have taken respondent's motion with the case.

¶ 18 Although the pages in the GAL's appendix are marked "A1" through "A117," they include no corresponding page numbers from the common law record; thus, it is not immediately apparent whether the pages in the appendix were taken from the record on appeal. See Ill. S. Ct. R. 342 (eff. Jan. 1, 2005) (stating that the appellee's brief may include a supplementary appendix with materials "from the record" which may guide our understanding of the issues raised in the appeal).

¶ 19 Generally, a reviewing court will not strike portions of a party's brief unless it includes such flagrant improprieties that it hinders our review of the issues. *Lock 26 Constructors v. Industrial Comm'n*, 243 Ill. App. 3d 882, 886 (1993). Our review here reveals that each of the 117 pages in the GAL's appendix can be found in the record on appeal. Therefore, we conclude that the GAL's violation of Rule 342 does not hinder our review of the case, and we decline to strike the GAL's appendix. We caution, however, that although we encourage the preparation of appendices in accordance with Rule 342, the materials contained therein must be taken *from the record*, such that they include the page numbers that have been assigned in the record on appeal. Otherwise, reviewing courts will be unnecessarily burdened with verifying that such appendices are indeed taken from the record on appeal, as was the case here.

¶ 20 Next, the GAL has moved within her appellate brief to strike respondent's statement of facts, asserting that the statement of facts improperly contains conclusory arguments. Supreme Court Rule 341(h)(6) provides that the statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with

appropriate reference to the pages of the record on appeal ***." Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). We agree with the GAL that portions of respondent's statement of facts violate this rule. Accordingly, we grant the GAL's motion in part, and will disregard those portions of respondent's statement of facts that violate Rule 341(h)(6).

¶ 21 Finally, we note that a number of the arguments in respondent's *pro se* brief were previously addressed and resolved in his first appeal. See *In re Marriage of Andexler*, 2015 IL App (2d) 140476-U. We decline to address those arguments for a second time.

¶ 22 We now turn to the merits of this appeal, which involve the propriety of the trial court's October 20, 2014, order. As discussed, there were two components of this order. First, the trial court allowed $19,660.98 in GAL fees and allocated one half of those fees to respondent. Second, the trial court increased respondent's child support obligation by $200 per month and ordered that petitioner forward the additional payments to the GAL until the GAL's fees had been satisfied. In challenging the first component, although he fails to address the appropriate standard of review, (Ill. S. Ct. R. 341(h)(3) (eff.Feb.6, 2013)), respondent contends generally that the trial court erred by allowing and allocating the GAL's fees. For the reasons that follow, we agree.

¶ 23 Section 506 of the Illinois Marriage and Dissolution of Marriage Act (the Act) provides that in any proceeding involving the custody of a child, the court may, on its own motion or that of any party, appoint an attorney to serve as a GAL for the child. 750 ILCS 5/506(a)(2) (West 2012). The GAL must then file with the court a detailed invoice for every 90-day period following the appointment; the court shall review these invoices and approve the fees if they are reasonable and necessary. 750 ILCS 5/506(b) (West 2012). In determining the amount of GAL fees to be awarded, the court must consider the total circumstances involved, including the

difficulty of the questions raised, the degree of responsibility involved from a management perspective, the time and labor required, and the usual and customary charge in the community. *In re Marriage of Soraparu*, 147 Ill. App. 3d 857, 864 (1986). The court should also consider the total circumstances of the parties when determining the proper allocation of GAL fees, including the parties' financial resources and relative ability to pay. *McClelland v. McClelland*, 231 Ill. App. 3d 214, 228 (1992). Additionally, a court may consider which party necessitated the guardian's appointment and make that party bear the greater part, if not all, of the GAL's expenses. *Gibson v. Barton*, 118 Ill. App. 3d 576, 583 (1983).

¶ 24 The decision regarding the allowance and allocation of GAL fees rests within the sound discretion of the trial court, and will not be disrupted on review unless the discretion is clearly abused. *Soraparu*, 147 Ill. App. 3d at 864; *In re Estate of K.E.S.*, 347 Ill. App. 3d 452, 468 (2004). A trial court abuses its discretion where its ruling is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the trial court. *In re Marriage of Iqbal & Khan*, 2014 IL App (2d) 131306.

¶ 25 Here, the GAL submitted an invoice with her fee application on November 22, 2013, showing that her law firm had expended a total of 69.25 hours, amounting to $16,343.46 in fees. The record reflects that the GAL did not submit an invoice with her supplemental affidavit on September 17, 2014, wherein she claimed that her firm had expended a total of 84.75 hours, amounting to $19,660.98 in fees. Thus, respondent correctly observes that the GAL failed to account for more than $3,000 in fees; the GAL offers no explanation for this lack of accounting. As noted above, the trial court signed the GAL's prepared order following a brief discussion on the record. The order stated that, "[p]ursuant to 750 ILCS 5/506(b), the [GAL's] fees are found to be fair, reasonable and necessary incurred." Given the GAL's failure to account for more than

$3,000 in fees, and the trial court's failure to notice the absence of a detailed invoice, we conclude that the trial court erroneously allowed the GAL's fee application. While we are mindful that respondent did not appear for the hearing in question, we note that this did not absolve the trial court of its duty to conduct a proper inquiry pursuant to section 506(b) of the Act.

¶ 26 Furthermore, it is clear from the record that the trial court allocated the GAL's fees without a proper consideration of respondent's ability to pay. See *McClelland*, 231 Ill. App. 3d at 228. The record reflects that the trial court was well aware of respondent's financial circumstances; namely, that he had been unemployed for a significant period of time during the proceedings, he was behind in his child support obligations, and he had been granted leave to sue or defend as an indigent person. Again, respondent's failure to appear at the hearing in question did not absolve the trial court of its duty to conduct a proper inquiry regarding respondent's ability to pay. Based on our review of the record, we hold that the trial court abused its discretion in allowing and allocating the GAL fees.

¶ 27 In so holding, the trial court on remand will need to determine the effect of the order granting respondent leave to sue or defend as an indigent person. We note that respondent completed and submitted a court-provided "Application to Sue or Defend as an Indigent Person." This form application included a copy of section 5-105 of the Code of Civil Procedure (the Code). 735 ILCS 5/5-105 (West 2012). Subsection 5-105(b) provides that, upon on a finding that the applicant is an indigent person, the court "shall grant the applicant leave to sue or defend the action without payment of the fees, costs, and charges of the action." As used in section 5-105, "fees, costs, and charges" means "payments imposed on a party in connection with the prosecution or defense of a civil action, including, but not limited to *** guardian *ad litem* fees

*** and all other processes and procedures deemed by the court to be necessary to commence, prosecute, defend, or enforce relief in a civil action." 735 ILCS 5/5-105(a)(1) (West 2012). Hence, as respondent correctly asserts, section 5-105 provides that an applicant may be permitted to sue or defend in a civil action without payment of GAL fees upon a finding that the applicant is indigent.

¶ 28 However, in its order granting respondent leave to sue or defend as an indigent person, the trial court stated that respondent was "permitted to sue or defend without payment of *filing* fees, costs and charges." (Emphasis added). As the GAL argues, this could be reasonably construed as permitting respondent to proceed only without paying the administrative expenses associated with the Du Page County clerk's office.

¶ 29 We note that in *People v. Lewis*, 2011 IL App (5th) 110279, the appellate court held that it was error for the trial court to reduce the amount of fees under section 5-105 of the Code. There, the trial court granted the defendant's section 5-105 application, but only to the extent of reducing his fees to $75 in each of the underlying cases. *Id.* ¶ 4. The appellate court held that no such option existed under the Code, and that only "all-or-nothing" options were available. *Id.* ¶ 13.

¶ 30 While *Lewis* stands for the proposition that section 5-105 of the Code contemplates only "all or nothing" options in granting an applicant leave to sue or defend as an indigent person, we observe that there may be other considerations in this case. As explained above, the GAL was appointed on May 21, 2012, and respondent was not granted leave to sue or defend as an indigent person until January 4, 2013. Moreover, it was the judge in the order-of-protection case that granted respondent leave to sue or defend as an indigent person; that judge may not have been aware that the GAL had been appointed in case No 12--MR--70. As a result, a re-

evaluation of respondent's financial circumstances may be justified. Given the procedural posture of this case, we decline to provide an advisory opinion on the matter. See *In re J.T.*, 221 Ill. 2d 338, 349 (2006) (noting the "basic tenet of justiciability that reviewing courts will not decide moot or abstract questions or render advisory opinions").

¶ 31 Furthermore, because we are vacating the trial court's October 20, 2014, order in its entirety and remanding the cause for a proper section 506(b) inquiry and consideration of respondent's ability to pay, we need not address the propriety of the trial court's order insofar as it modified respondent's child support obligation. However, we take this opportunity to briefly note our concern regarding the manner in which the trial court sought to have the GAL compensated.

¶ 32 First, we remind the trial court that it must protect the best interests of the children in determining child support issues. *In re Marriage of Case*, 351 Ill. App. 3d 907, 911 (2004). To that end, the purposes of the Act include the mitigation of potential harm to children caused by the process of dissolving a marriage, and making "reasonable provision for spouses and minor children during and after litigation." 750 ILCS 5/102(4), (5) (West 2012). We question whether increasing one parent's child support obligation to compensate a GAL frustrates these purposes.

¶ 33 We also remind the trial court that respondent's child support obligation was entered pursuant to the dissolution of marriage proceedings in the circuit court of Volusia County, Florida. When respondent broached the subject of reducing his child support obligation during the hearing on June 27, 2012, the trial court explained that the Florida court retained jurisdiction over the matter. Yet, when the GAL later proposed that respondent's child support obligation be increased as a means of collecting her fee, the trial court agreed to do so without considering its prior ruling or rationale. We note that the modification of another state's child-support order is

governed, in part, by section 611 of the Uniform Interstate Family Support Act. 750 ILCS 22/611 (West 2012). While the record is not clear, we question again whether the trial court considered the requirements set forth therein.

III. CONCLUSION

¶ 34 In light of the foregoing, we vacate the trial court's October 20, 2014, order in its entirety and remand the cause for proceedings consistent with this order.

¶ 35 Vacated and remanded.