2015 IL App (2d) 150363-U
No. 2-15-0363
Order filed November 17, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF VICTORIA H. STEIN, Petitioner-Appellee, and JOTHAM S. STEIN, Respondent-Appellant.	)))))))))	Appeal from the Circuit Court of Kane County. No. 13-D-533 Honorable Kathryn D. Karayannis, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied respondent's motion for leave to disclose a section 604(b) custody evaluation to various mental-health professionals and school counselors, as the statute permitted disclosure only to the court and the parties.

¶ 2 Respondent, Jotham S. Stein, appeals the trial court's order denying his motion for leave to disclose to his child's therapists and counselors a custody evaluation report prepared under section 604(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/604(b) (West 2012)). Applying *Johnston v. Weil*, 241 Ill. 2d 169 (2011), the court limited disclosure to treating therapists. We affirm.

¶ 3 I. BACKGROUND

¶ 4 As part of dissolution-of-marriage proceedings between respondent and petitioner, Victoria H. Stein, the trial court appointed Dr. David Finn to prepare an evaluation under section 604(b) concerning custody of the couple's child. Each party executed releases authorizing the child's therapist, Walter Miller, to turn over treatment records to Finn. Miller did not comply and, on October 23, 2013, the court ordered Miller to turn over the records, but also ordered that Finn could not make further disclosure of the records and could not share the content of the records with either of the parties. On February 5, 2014, the court modified the October 23, 2013, order to permit release of the custody-evaluation report to the parties and their attorneys, with the limitation that none of the parties were to discuss the content of the report or its recommendation with the child. In June 2014, the parties settled the issue of custody. Respondent was granted all final decision-making authority for all mental-health issues regarding the child. The marriage was dissolved in December 2014.

¶ 5 Respondent moved to further modify the October 23, 2013, order, stating that there was a need for mental-health professionals or school counselors to further evaluate the child. Respondent asked that the order be modified to specifically allow him "to turn over Dr. Finn's report to any mental health professional or school counselor who may meet with, treat, diagnose, or counsel" the child. No legal arguments were made in the motion. In March 2015, a hearing was held. There is no report of proceedings, but the parties have provided a bystander's report stating that respondent contended that Finn's report was not confidential and that the court could not enjoin disclosure of it unless all of the elements necessary to support a grant of injunctive relief were present. Respondent further argued that the restriction on disclosure was unreasonable and without justification. Petitioner argued that the court had broad discretion to

restrict disclosure of the report and that it must weigh the best interests of the child. Petitioner noted that the restriction was based on concerns about second-hand disclosure of the child's mental-health records that were turned over by Miller and quoted in the report. Petitioner also argued that the matter was moot because respondent was already entitled to full disclosure of the child's records. The trial court stated that it considered *Johnston* and denied the motion. However, the court held that the report could be disclosed to a treating therapist of either respondent or the child. Respondent appeals.

¶ 6 II. ANALYSIS

¶ 7 Respondent contends that the court applied the wrong standard in applying *Johnston* and considering the best interests of the child. Citing cases involving due process, he argues that the proper standard should have been whether the restriction was justified to protect the health, safety, or welfare of the child. He also argues separately that the restriction violated his due-process rights.

¶ 8 Petitioner's only contention is that the matter is moot because there is no issue in controversy. She argues that respondent asked for leave to disclose the report to mental-health practitioners and that the court allowed that. "Generally, a reviewing court will not consider moot or abstract questions or render advisory decisions." *In re Mary Ann P.*, 202 Ill. 2d 393, 401 (2002). Here, however, the court denied respondent's motion in part, permitting disclosure to treating therapists but denying it to others, such as school counselors. Thus, petitioner was still adversely affected by the order, with the issue of whether the court could restrict disclosure still in controversy. Thus, the matter is not moot.

¶ 9 Petitioner has failed to address the merits of the issue. " 'When an appellee does not address arguments in [its] brief, [its] position should be equivalent to that as if [it] had not filed a

brief at all.' " *People v. Bailey*, 375 Ill. App. 3d 1055, 1068 (2007) (quoting *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1088 (1995)). " 'When the record is simple, and the claimed errors are such that this court can easily decide them on the merits without the aid of an appellee's brief, this court should decide the appeal on its merits.' " *Id*. (quoting *Plooy*, 275 Ill. App. 3d at 1088). " 'Otherwise, if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record, the judgment of the trial court may be reversed.' " *Id*. (quoting *Plooy*, 275 Ill. App. 3d at 1088). Here, the record is simple, and we can decide the merits without the aid of argument from petitioner.

¶ 10 Respondent first argues that the trial court applied the wrong standard when it restricted disclosure of the report. The record does not reveal the exact standard that the court applied other than that it considered *Johnston*. Doing so was not in error.

¶ 11 Section 602(a) of the Act provides that "[t]he court shall determine custody in accordance with the best interest of the child." 750 ILCS 5/602(a) (West 2012). Section 604(b) provides:

> "(b) The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine, as a witness, any professional personnel consulted by the court, designated as a court's witness." 750 ILCS 5/604(b) (West 2012).

¶ 12 In *Johnston*, our supreme court construed section 604(b) to limit disclosure of section 604(b) reports to parties and their counsel. Johnston was married twice, with a child from each marriage, and her first husband sought to modify custody. The trial court ordered an evaluation under section 604(b). Johnston's second husband then sought discovery of the report in his own custody proceeding against Johnston. Johnston filed suit against her first husband, alleging that

he disclosed confidential information to her second husband. The trial court certified a question of law for interlocutory appeal as to whether reports obtained under section 604(b) were confidential under the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/1 *et seq*. (West 2006)).

¶ 13 In addressing the matter, our supreme court stated that there were several unresolved variables at work and that the certified question did not represent the full range of issues presented in the case. The court observed that it could "go beyond the limits of a certified question in the interests of judicial economy and the need to reach an equitable result." *Johnston*, 241 Ill. 2d at 175. Thus, the court addressed the limits on disclosure under section 604(b) of the Act.

¶ 14 The court noted that the purpose of the Act is to aid in determining which custodial arrangement is in the child's best interest. *Id*. at 179. The court further noted that child-custody proceedings epitomize the need for maximum disclosure of information in the goal of reaching justice. *Id*. at 180. Thus, under section 604(b), the trial court may call informally on a variety of experts without subjecting them to a formal hearing process, but their advice should be available to counsel for the parties so that the court's decision will not be based on secret information. See *id*. at 178. Interpreting section 604(b), the court held that "disclosure of the section 604(b) report is clearly intended to be limited to the parties in the particular proceeding." *Id*. The court further noted that the paramount and guiding principle is the best interests of the child and that the trial court may exercise broad discretion in admitting evidence that may assist it in arriving at a custody determination. *Id*. at 180. Thus, it specifically stated that disclosure of the report was confined to the court, counsel, and parties in the proceeding that it was prepared for. *Id*. at 181.

¶ 15 Here, under *Johnston*, the trial court properly applied section 604(b) in light of the best interests of the child. Further, *Johnston* clearly construed section 604(b) to limit disclosure of the report to the court, parties, and counsel. Thus, respondent does not have a right under section 604(b) to disclose the report to school counselors or other people not covered by the trial court's order. Respondent argues that the supreme court's discussion of section 604(b) in *Johnston* was judicial *dictum* because it was not part of the certified question. "[A]n expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if *dictum*, is a judicial *dictum*." *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). Here, the supreme court specifically noted its ability to go beyond the certified question and the necessity of doing so to reach an equitable result. Thus, the discussion of section 604(b) was essential to the case and was not judicial *dictum*. Further, even if viewed as judicial *dictum*, it is entitled to much weight, and is binding on us. *Id*. at 80. Given the plain language of section 604(b) and the purpose of the statute to assist the trial court in reaching a custody determination that is in the best interests of the child, and in the absence of any precedent from our supreme court to the contrary, we apply *Johnston*.

¶ 16 Respondent next argues that the trial court should have applied a due-process standard or that the restriction under section 604(b) denied him due process, arguing that the restriction should apply only when the health, safety, or welfare of the child is at risk. See *Wickham v. Byrne*, 199 Ill. 2d 309, 317 (2002). However, nothing in the record shows that respondent presented a due-process argument to the trial court.

¶ 17 A reviewing court will not consider arguments not presented to the trial court. *In re Application of the County Treasurer & ex officio County Collector*, 373 Ill. App. 3d 679, 702

(2007). That the argument implicates the constitutionality of a statute makes no difference. *Villareal v. Peebles*, 299 Ill. App. 3d 556, 560 (1998).

¶ 18 Here, respondent's motion did not present a due-process argument, nor does the bystander's report show that he made such an argument at the hearing. While the bystander's report shows that respondent argued that the restriction on disclosure was unreasonable and without justification, that does not amount to an argument that the court's application of the statute violated due process. "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Because the record does not show that a due-process argument was raised in the trial court, respondent has forfeited it.

¶ 19 III. CONCLUSION

¶ 20 The trial court did not err in limiting disclosure of the report. Accordingly, the judgment of the circuit court of Kane County is affirmed.

¶ 21 Affirmed.