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2015 IL App (3d) 140768-U

Order filed May 13, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
CHRISTINE KRIER,	)	Will County, Illinois.
	)	
Petitioner-Appellee,	)	
	)	Appeal No. 3-14-0768
and	)	Circuit No. 11-D-324
	)	
JOSEPH KRIER,	)	
	)	Honorable
Respondent-Appellant.	)	Dinah L. Archambeault,
	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: A directed finding denying a father's petition for sole custody of his minor child was upheld on appeal because, after the parties stipulated to a change of circumstances, the trial court's conclusion that it was in the best interest of the child to remain in the sole residential custody of his mother was not against the manifest weight of the evidence.

¶ 2 In a change of custody proceeding following a dissolution of marriage, the appellant husband, Joseph Krier, appealed from a judgment of the trial court directing a finding denying

his petition for sole custody of his minor child. Since the parties had stipulated that a change in circumstances had occurred and that sole custody was in the best interest of the child, after considering the best interest of the child, the trial court ordered that sole residential custody of the child remain with the appellee mother, Christine Krier. The husband appealed.

¶ 3 FACTS

¶ 4 The plaintiff wife, Christine Krier, and the defendant husband, Joseph Krier, were married on February 19, 2005. During their marriage, the parties had one child, a son born on April 20, 2008. On February 18, 2011, the wife filed a petition for dissolution of marriage. A judgment of dissolution of marriage was entered on August 8, 2012. That judgment provided that the husband and the wife would share joint custody of the child but the wife would have residential custody of the child. The parenting arrangement was set forth in a Joint Parenting Agreement (JPA) attached to the judgment. The husband was ordered to pay child support, including arrearages of temporary support. Judge Baron was the judge presiding over the case until June 2013, when the case was reassigned to Judge Archambeault.

¶ 5 On March 26, 2014, the husband filed a motion requesting a psychological evaluation of the wife. The motion alleged that the wife had made a number of misrepresentations and false accusations regarding him to the court, and that type of behavior was associated with psychological disorders. On March 27, 2014, the trial court entered an order ruling on a number of motions, and stating that neither party was allowed to file any additional motions for issues arising prior to that date. The defendant's motion for a psychological evaluation was continued, but amended by the court to only apply to issues arising after March 27, 2014.

¶ 6 On May 14, 2014, the husband filed an emergency petition for temporary and permanent change of custody, seeking sole custody of the child. In the petition, the husband alleged that the

wife had violated the JPA on numerous occasions and was not acting in the best interest of the child. The husband also filed a motion for substitution of the judge as a matter of right pursuant to 735 ILCS 5/2-1001(a)(2) (West 2012). The trial court denied that motion, finding that substantive issues had already been ruled on in the case. The trial court also denied the husband's request for a temporary change of custody. The parties were ordered to mediation, but no agreement was reached in mediation. On May 20, 2014, the husband filed an emergency motion for a psychological evaluation of the wife. On July 8, 2014, the trial court denied the husband's motion for a psychological evaluation, finding that the motion did not comply with supreme court rules. The wife filed her motion on August 25, 2014, seeking to change custody of the child from joint to sole custody with her.

¶ 7 The parties stipulated that they could not work together and that sole custody was in the best interest of the child, and the trial court held a hearing on the competing motions. At the close of evidence, the wife moved for a directed finding, arguing that the husband did not show that a change in residential custody to him would be in the best interest of the child. The trial court found that the fact that the wife and the husband could no longer co-parent was a change in circumstances to warrant a change in custody. After considering the best interest factors, the trial court found that the husband had not shown enough evidence to show by clear and convincing evidence that a change in residential custody was warranted. Thus, the trial court granted the directed finding, and ordered that residential custody remain with the wife. As the trial court noted, that also made the wife the sole custodian of the child. The husband appealed.

¶ 8 ANALYSIS

¶ 9 The husband argues that the trial court abused its discretion in denying his motion for a psychological evaluation of the wife. The husband also argues that the trial court abused its

discretion by denying his motion for sole custody and granting sole custody of the child to the wife.

¶ 10 As the husband points out, his motion for a psychological evaluation was denied for failure to comply with the supreme court rules, but neither the trial court's order nor the wife's appellate brief specifies which rule. Supreme Court Rule 215, which is a rule of discovery, provides:

> "In any action in which the physical or mental condition of a party or of a person in the party's custody or legal control is in controversy, the court, upon notice and on motion made within a reasonable time before the trial, may order such party to submit to a physical or mental examination by a licensed professional in a discipline related to the physical or mental condition which is involved. The motion shall suggest the identity of the examiner and set forth the examiner's specialty or discipline. The court may refuse to order examination by the examiner suggested but in that event shall permit the party seeking the examination to suggest others.." Ill. S. Ct. R. 215 (eff. March 28, 2011).

¶ 11 A trial court has the power to order a psychological examination of a party where that condition is an issue in the case. *In re Marriage of Scott*, 75 Ill. App. 3d 710, 713 (1979). However, like motions under this rule for an evidentiary autopsy or a DNA test, a motion for a psychological examination presents a "panoply of legal and emotional issues and problems." See *Jarke v. Mondry*, 2011 IL App (4th) 110150, ¶ 30 (quoting *Fosse v. Pensabene*, 362 Ill.App.3d 172 (2005)). While a court should not hesitate to order examinations under the rule when needed, it should not do so lightly, and should balance the interests of both parties in determining what justice requires. *Jarke*, 2011 IL App (4th) 110150, ¶ 30. We review the denial of such a motion for abuse of discretion. *Kaull v. Kaull*, 2014 IL App (2d) 130175, ¶ 22, *as*

modified on denial of reh'g (Jan. 27, 2015)**.** In this case, the father's original motion made a number of factual allegations regarding the mother's misrepresentations, falsehoods, and erratic behavior, which the father stated were often associated with psychological disorders. The trial court continued that motion, but limited it going forward to any behavior by the mother after March 27, 2014. When the father filed his May 2014 motion for a psychological evaluation, he made further factual allegations that occurred after March 27, 2014, but he did not allege how any of the recent visitation issues related to the mother's mental condition. Thus, we cannot conclude that the trial court's determination that the allegations in the husband's motion did not comply with rule 215 because they were not sufficient to put the wife's mental condition in controversy in the case was an abuse of discretion.

¶ 12 The husband raises a number of issues in support of his argument that the trial court abused its discretion in denying his motion for sole custody. First, the defendant argues that the trial court erred in denying his motion for substitution of judge. Although the husband's motion for a substitution of the judge stated that it was brought as of right, the husband's appellate brief alleges that he requested the substitution because the judge had heard testimony regarding the husband in a related hearing. The trial court denied the motion because it was brought as a motion for substitution as a matter of right, and it found that substantive issues had already been ruled upon. We review *de novo* an order denying substitution of judge as a matter of right. *Ramos v. Kewanee Hosp.*, 2013 IL App (3d) 120001, ¶ 84.

¶ 13 Section 2–1001(a)(2)(ii) provides that an application for substitution of judge as of right "shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties." 735 ILCS 5/2-1001(a)(2)(ii) (West 2012). Courts interpreting this provision have used

substantive and substantial interchangeably; a substantial issue is one that directly relates to the merits of the case. *In re D.M.*, 395 Ill. App. 3d 972, 976 (2009). The husband's petition was directed toward Judge Archambeault, who was not the judge who entered the judgment of dissolution of marriage. However, between the time that Judge Archambeault was assigned to the case and the husband's motion for substitution of judges, she had entered a number of orders. Those orders addressed fees based upon the judgment of dissolution of marriage, a motion to reduce child support, rules to show cause, and visitation disputes. Since these rulings related directly to the merits of the case, the husband's motion was properly denied. Even if the husband had brought the motion for substitution for cause, we still would find no error in the denial of the motion. The petition failed to set forth the specific cause for the substitution. See 735 ILCS 5/2-1001(a)(3)(ii) (West 2012). The husband argues in his brief that the judge had derived her opinion of him from an extrajudicial source, specifically a proceeding that resulted in a stalking/no contact order, and showed a high degree of favoritism. However, the husband fails to point this court toward any specific evidence of favoritism or prejudice. In addition, the other proceeding was not an extrajudicial source, but rather a related proceeding before the same judge, and does not show judicial bias or partiality. *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002); see also *In re Estate of Wilson*, 238 Ill. 2d 519, 554 (2010) (a judge's previous rulings almost never constitute a valid basis for a claim of judicial bias or partiality).

¶ 14 Secondly, the husband alleges that the trial court erred in denying his motion for a default judgment based upon the wife's failure to respond to his petition for a change in custody in a timely manner. The husband alleges that the wife's failure to respond was deliberate and a contumacious disregard for the court's authority. According to the record, by order dated August 1, 2014, the wife was to respond to the husband's motion by August 18, 2014, and the case was

set for hearing on August 29, 2014. The wife did not respond by August 18. However, on August 25, 2014, she filed a motion to continue, citing the fact that she had new counsel, and, on August 29, 2014, she filed her own motion for sole custody. Then, at the hearing on August 29, the husband moved for a default judgment based on the wife's failure to respond, which the trial court denied. This series of events does not suggest a deliberate and contumacious disregard for the court's authority. Thus, we find that the trial court did not abuse its discretion in denying the husband's oral motion for a default and proceeding to the merits of the competing petitions for custody. See *In re Marriage of A'Hearn*, 408 Ill. App. 3d 1091, 1099 (2011) (dismissal of litigation as a sanction is a drastic measure and should only be employed when a litigant has shown a "deliberate and contumacious disregard for the court's authority").

¶ 15 Thirdly, the husband contends that the trial court contradicted itself when it held that the husband did not meet his burden to establish a change in circumstances warranting a change in custody, although the parties stipulated that sole custody was in the best interest of the child. And, finally, the husband contends that the trial court's decision was against the manifest weight of the evidence. To modify a custody order, a petitioner must demonstrate by clear and convincing evidence (1) a change of circumstances of the child or his custodian has occurred and (2) a modification is necessary to serve the best interests of the child. *In re Marriage of Smithson*, 407 Ill. App. 3d 597, 600 (2011). However, when both parties stipulate to a change in circumstances, it was the role of the trial court to proceed directly to the determination of what custody modification was in the best interest of the child. *In re Marriage of Lasky*, 176 Ill. 2d 75, 81 (1997). That is what the trial court did in this case. It considered the statutory best interest factors, as enumerated in section 602 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602 (West 2012), and concluded that it was in the best interest of the

child to remain with the wife. Thus, the trial court granted the wife's request for a directed finding. We will not reverse the decision of a trial court on a directed verdict under section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2012) unless it is contrary to the manifest weight of the evidence. *Kokinis v. Kotrich*, 81 Ill. 2d 151, 154 (1980). After reviewing the record, we cannot say that the trial court's conclusion was contrary to the manifest weight of the evidence.

¶ 16 CONCLUSION

¶ 17 The judgment of the circuit court of Will County is affirmed.

¶ 18 Affirmed.