2015 IL App (4th) 140998-U

NO. 4-14-0998

FILED
March 26, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JOHN GRANT,	)	Appeal from
Petitioner-Appellant,	)	Circuit Court of
v.	)	Logan County
WENDY HUSKINS,	)	No. 11F56
Respondent-Appellee.	)	
	)	Honorable
	)	Thomas W. Funk,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court found (1) the trial court did not err in awarding custody to respondent and (2) petitioner did not show the trial judge should have been substituted or disqualified due to a conflict of interest.

¶ 2 In January 2013, petitioner, John Grant, filed a petition for temporary and permanent custody of his son, K.L. After John was awarded custody, respondent, Wendy Huskins, K.L.'s mother, filed a motion to vacate the order. In January 2014, the trial court granted custody of K.L. to Wendy. In May 2014, John filed a petition for substitution of judge, which was denied.

¶ 3 On appeal, John argues the trial judge (1) erred in awarding custody of K.L. to Wendy and (2) should have been disqualified because of a conflict of interest. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2013, John filed a petition for temporary and permanent custody of

K.L, born in March 2011, the minor child of John and Wendy. The petition alleged Wendy, who had full and permanent custody of K.L. since his birth, resided in the Logan County jail following her arrest on drug charges. John sought custody of K.L., arguing to do otherwise would cause irreparable harm and not be in the minor's best interest. At some point in time, it appears John was granted temporary custody of K.L. In April 2013, the trial court ordered that temporary custody remain with John and allowed Wendy to visit with K.L. at the jail.

¶ 6 In August 2013, Wendy filed a motion to vacate the order of temporary custody. Wendy stated she had been released from incarceration and argued it was in the best interest of K.L. to restore custody to her.

¶ 7 In December 2013 and January 2014, Judge Thomas W. Funk conducted hearings on Wendy's motion to vacate the temporary custody order. Wendy testified she lived in Beason with her parents, her husband, and two other children. She had custody of K.L. prior to her arrest for delivering a controlled substance in January 2013. Her husband and her children moved in with her parents when she went to jail. She served 180 days in jail and remained on probation. She stated she passed her recent drug drops. She stated she would not go back to selling drugs because she had "learned [her] lesson."

¶ 8 Wendy stated John visited K.L. "about two or three times" between March 2011 and September 2011. John had also never paid child support. From January 2012 to January 2013, the parties agreed John could have visitation every other weekend. Wendy stated John only showed up half of the time.

¶ 9 Wendy testified her parents were both 57 years old and retired. They provide child care as needed. Wendy and her husband live in her parents' remodeled garage. K.L. and her other son share a room and her daughter has her own. All three children get along well

during visits. She stated she lost custody of her son and daughter for nine months in 2009, after her ex-husband filed an order of protection against her. Wendy stated she was 29 years old and set to start working at Precision Products the Monday after the hearing. Her husband also had a felony drug conviction in 2012.

¶ 10 John testified he and his wife live near Collinsville with his daughter and his granddaughter. They live in a four-bedroom home and K.L. has his own room. John drives a semi-truck three days a week for a grain company, but he can work seven days a week during harvest season. If he and his wife are working, a babysitter looks after K.L. John stated K.L. returns from visits with Wendy and is "very rude and rambunctious," "real hyper-like," and "thinks he can jump off the table or couch." John stated it takes "about three days" after a visit to get K.L. to behave better. He also testified to pictures of apparent bite marks or other marks on K.L. that he allegedly received during visits with Wendy from 2012 to 2013.

¶ 11 John testified his wife told their daughter, Terisha, she needed to move out of the house. Terisha babysat for K.L. "a couple times" while living in the residence. She was arrested in January 2014 for showing up in court with her baby while being drunk. Her mother, Sherri Grant, then filed an order of protection against her.

¶ 12 John stated K.L. is "very clean" and up to date on his medical appointments. John stated K.L. has accompanied him in the semi-truck and they stop at rest areas or historical sites. John believed traveling with a three-year-old child in the semi-truck was "a learning experience" for K.L.

¶ 13 Timothy Lyon, Wendy's father, testified he resided in Beason with his wife, Wendy, her husband, and her two children. The two children, along with K.L., came to live with Timothy and his wife after Wendy's arrest. Prior to her incarceration, Timothy stated Wendy

was a "good mother" and raised the children in a clean home. Timothy picked up K.L. from John's residence on several occasions and found K.L. to be unclean. Once K.L. "smelled like diesel fuel coming from a semi" and another time he smelled "like an ashtray." Timothy believed K.L. had a bond with his siblings.

¶ 14 Loy Lyon, Wendy's mother, testified Wendy is a "very loving" and "very attentive" mother to all three children. Loy stated the children were bathed, fed, and clothed. Since her arrest, Wendy is "calmer" and "home all the time when she is not working." She stated K.L.'s siblings were "very loving" to him.

¶ 15 Tammy Elam testified she lived with John from approximately October 2011 through June 2013. During a portion of that time, John drove a semi-truck and took K.L. on the road "a few times." She stated John "was a good father." Patricia Nota, an acquaintance of John, testified he is "a good role model" for K.L. She stated K.L. is clothed appropriately and "very clean." Helen Meredith, John's mother, testified K.L. "loves his daddy." She said K.L. is "always dressed" and bathed.

¶ 16 Sherri Grant, John's wife, testified they were married in November 2013. She acknowledged her daughter had been arrested but Sherri does not tolerate drugs or alcohol. She stated K.L. "is a daddy's boy all the way around." K.L. undergoes regular medical checkups and has not had any illnesses since staying with them. K.L. has his own room in the home. Sherri stated she smokes "about half a pack" of cigarettes a day but outside the home. She stated John also does not smoke in the house.

¶ 17 Desiree Lienemann testified she babysat for K.L. on a number of occasions. She stated K.L. "is very well taken care of." When K.L. returns from visits with his mother, Lienemann has noticed "he does not want to go to the bathroom properly" and "does not play

well with others." Lienemann stated that when K.L. returns, "we have to start all over again."

¶ 18 Following closing arguments, the trial court granted Wendy custody of K.L. The court also granted John visitation every other weekend. In February 2014, John filed a motion for rehearing, retrial, or to vacate the judgment, arguing the court erred in awarding custody to Wendy.

¶ 19 In May 2014, John filed a petition for substitution of judge for cause pursuant to the Code of Civil Procedure (Procedure Code) (735 ILCS 5/1 to 22-105 (West 2012)). The petition alleged Judge Funk had represented both John and Wendy as an attorney. John claimed Judge Funk was prejudiced against him and he could not have a fair trial on the issues.

¶ 20 In June 2014, Judge Elizabeth Robb assigned the case to Judge William Yoder to hear John's petition for substitution of judge. In July 2014, Judge Yoder denied John's petition. In a docket entry, Judge Yoder found Judge Funk had heard at least five different hearings in this matter and the allegations of prejudice arose from a time prior to those hearings and before Judge Funk became a judge. Judge Yoder stated a party cannot "test the waters" by proceeding to a substantive hearing and then filing a petition for substitution of judge after an undesired outcome. Thereafter, John filed a motion for reconsideration, arguing Judge Funk was required to recuse himself under the Supreme Court rules. Judge Yoder denied the motion.

¶ 21 In October 2014, Judge Funk denied John's motion for rehearing, retrial, or to vacate the custody judgment. This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 A. Custody Award

¶ 24 John argues the trial court's decision to award custody of K.L. to Wendy was against the manifest weight of the evidence and an abuse of discretion. We disagree.

¶ 25 In a dispute over custody, "the primary consideration is the best interest and welfare of the child." *Hall v. Hall*, 226 Ill. App. 3d 686, 689, 589 N.E.2d 553, 555 (1991). In making its decision, the trial court should consider all relevant factors, including those set forth in section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602(a) (West 2012)). Section 602(a) lists the factors to consider: (1) the parents' wishes; (2) the minor's wishes; (3) the minor's interactions with parents, siblings, and others who may affect the minor's best interest; (4) the minor's adjustment to his or her home, school, and community; (5) the mental and physical health of all individuals involved; (6) physical violence, or threats thereof, by the minor's potential custodian, whether directed at the minor or another person; (7) the occurrence of ongoing or repeated abuse, whether directed at the minor or another person; (8) the willingness of each parent to facilitate a relationship between the minor and the other parent; (9) whether one of the parents is a sex offender; and (10) the terms of a parent's military family-care plan if the parent is subject to be deployed. 750 ILCS 5/602(a) (West 2012). Section 602(a) applies even to parents who have never been married. *Hall*, 226 Ill. App. 3d at 689, 589 N.E.2d at 555.

¶ 26 A strong presumption favors the custody determination reached by the trial court. *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103, 108, 775 N.E.2d 282, 286 (2002). "The trial court's custody determination is afforded 'great deference' because the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child." *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177, 768 N.E.2d 834, 837 (2002) (quoting *In re Marriage of Gustavson*, 247 Ill. App. 3d 797, 801, 617 N.E.2d 1313, 1316 (1993)).

¶ 27 A trial court's award of custody will not be overturned on appeal unless it is against the manifest weight of the evidence or constitutes an abuse of discretion. *Marriage of*

Seitzinger, 333 Ill. App. 3d at 108, 775 N.E.2d at 286. "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 609, 884 N.E.2d 160, 182 (2007). "A judgment is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent." *In re Parentage of J.W.*, 2013 IL 114817, ¶ 55, 990 N.E.2d 698.

¶ 28 In this case, the trial court considered the applicable factors set forth in section 602(a) of the Act before awarding custody to Wendy. The court found both parents wanted custody but noted K.L. was too young to state his own wishes. In considering the mental and physical health of the parties, the court noted Wendy had a criminal conviction for selling illegal drugs. Wendy claimed she was no longer using drugs, and the court found her testimony credible considering the lack of any failed drug tests.

¶ 29 The trial court found both homes appeared "to have persons that are interested in this child." In noting Wendy lived with an extended family in that she, along with her husband and children, lived with her parents, the court found she was getting the necessary assistance in "overcoming past problems" and the environment was suitable for children. While the court stated John's home was suitable, it found John's current circumstances "a little less stable." The court noted John worked as a truck driver throughout the state, while Wendy lived near her job and had "ready access to her child."

¶ 30 The trial court concluded by stating the "biggest impact" centered on the relationship of K.L. with his siblings. The court stated a good relationship existed between them and it was "important for that piece of the stability of the children to remain intact."

¶ 31 In arguing the trial court's custody award was against the manifest weight of the

evidence, John points out the drug convictions for Wendy and her husband and her financial distress. John also points out he is a good father, has the means to provide for his son, and raises K.L. in a well-ordered home.

¶ 32 While John's points are valid, we reiterate the strong presumption in favor of the trial court's custody decision. The trial court is in the best position to judge the credibility of the witnesses and consider the totality of the evidence. The court heard testimony from two parents who love their child and considered their life circumstances in the context of the statutory factors. The court found Wendy was on the rebound, she had a suitable home environment, and the stability of all of the children was important. We find the court's decision to award custody to Wendy was not against the manifest weight of the evidence or an abuse of discretion.

¶ 33 B. Petition for Substitution of Judge

¶ 34 John argues Judge Funk should have been disqualified because of a conflict of interest. We disagree.

¶ 35 In January 2014, Judge Funk granted Wendy's motion to vacate the temporary custody order and returned custody of K.L. to her. In February 2014, John filed a motion for rehearing, retrial, or to vacate the judgment. In May 2014, John filed a petition for substitution of judge for cause "pursuant to 735 ILCS 5/2(3)" of the Procedure Code, which we take as being section 2-1001(a)(3) (735 ILCS 5/2-1001(a)(3) (West 2012)). John alleged Judge Funk had previously represented him and Wendy prior to this case. John claimed Judge Funk was "prejudiced against him" and he could not receive a fair trial.

¶ 36 The petition for substitution of judge was reassigned to Judge Yoder, who found Judge Funk had conducted or heard at least five different hearings in this case and "the allegations of prejudice [arose] from a time prior to said hearings or Judge Funk becoming a

Judge." The docket entry states Wendy's counsel asserted "that full disclosure and waiver by both parties was put on the record at the first of such contested hearings." Our search of the record does not reveal this disclosure and waiver. Judge Yoder found "that regardless of said disclosure or waiver, a party cannot 'test the waters' by proceeding to substantive hearing, lose, and then file a [petition] for Substitution just because he/she does not like the outcome." Judge Yoder then denied John's petition.

¶ 37 In July 2014, John filed a motion to reconsider the denial of his petition for substitution of judge. John argued he had "a meritorious claim for the substitution of the judge because the court as a private attorney had represented both Parties in [] separate causes of action." John stated Judge Funk represented him over seven years prior to the hearings in this case and represented Wendy within the previous seven years. John cited "the rules of judicial conduct of the Supreme Court of Illinois, paragraph (c) disqualification (C 1) (c)," which we take to mean Illinois Supreme Court Rule 63(C)(1)(c) (eff. July 1, 2013), which states a judge shall disqualify himself "in a proceeding in which the judge's impartiality might reasonably be questioned," including when the judge represented a party within the previous seven years as a private attorney. John stated it was mandatory that Judge Funk recuse himself because he represented Wendy within the previous seven years as a private attorney and "he may be subconsciously against or for" John. Judge Yoder denied the motion to reconsider.

¶ 38 Now, on appeal, John argues the trial court "inevidently [*sic*] formed an opinion" of both John and Wendy "as to their credibility which could result in prejudice" to John and favor to Wendy. John also argued, "[a]s the judge had personal knowledge of the parties and may have formed by [*sic*] prejudice in favor of one or both parties the trial court should have been disqualified."

¶ 39 Section 2-1001(a)(3) of the Procedure Code allows for the substitution of a judge for cause if the request is made by petition, the petition sets forth the specific cause for substitution, and the petition is verified by an affidavit. 735 ILCS 5/2-1001(a)(3) (West 2012). Upon the filing of a petition for cause, "a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition." 735 ILCS 5/2-1001(a)(3)(iii) (West 2012).

¶ 40 "A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice." *Eychaner v. Gross*, 202 Ill. 2d 228, 280, 779 N.E.2d 1115, 1146 (2002). "[I]n construing the term 'cause' for purposes of a substitution once a substantial ruling has been made in a case, Illinois courts have consistently required actual prejudice to be established[.]" *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 30, 958 N.E.2d 647. Actual prejudice by the trial judge can be shown either in prejudicial trial conduct or by a personal bias. *Marriage of O'Brien*, 2011 IL 109039, ¶ 30, 958 N.E.2d 647.

¶ 41 "Proving prejudice so as to justify a substitution for cause is a heavy burden and the conclusion of prejudice will not be made lightly." *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 340, 744 N.E.2d 877, 888 (2001). A determination regarding allegations of judicial prejudice in a petition for substitution of judge for cause will not be reversed unless it is against the manifest weight of the evidence. *In re Marriage of O'Brien*, 393 Ill. App. 3d 364, 373, 912 N.E.2d 729, 739 (2009).

¶ 42 Our supreme court has noted "recusal and substitution for cause are not the same thing." *Marriage of O'Brien*, 2011 IL 109039, ¶ 45, 958 N.E.2d 647. "Unlike a [petition] for substitution of judge, a motion for recusal does not trigger a duty on the part of the trial judge to transfer the motion to another judge for determination." *Kamelgard v. American College of*

Surgeons, 385 Ill. App. 3d 675, 681, 895 N.E.2d 997, 1003 (2008).

¶ 43 Illinois Supreme Court Rule 63(C)(1)(c) (eff. July 1, 2013), which is part of canon 3 of the Code of Judicial Conduct, provides, in part, as follows:

> "(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> * * *
>
> (c) the judge was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy (provided that referral of cases when no monetary interest was retained shall not be deemed an association within the meaning of this subparagraph) or, for a period of seven years following the last date on which the judge represented any party to the controversy while the judge was an attorney engaged in the private practice of law[.]"

The parties may waive disqualification of a judge pursuant to Illinois Supreme Court Rule 63(D) (eff. July 1, 2013), which states, in part, as follows:

> "If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge

should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. This agreement shall be incorporated in the record of the proceeding."

¶ 44 "Case law reflects that when a party moves for substitution for cause based upon an alleged violation of Rule 63(C)(1), the movant need only show the existence of that factor and that an objective, reasonable person would conclude that the judge's impartiality might reasonably be questioned, and need not show actual prejudice." *Marriage of O'Brien*, 393 Ill. App. 3d at 374, 912 N.E.2d at 739; see also *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 176, 886 N.E.2d 976, 983 (2008) (stating the test under Rule 63(C)(1) "mandates disqualification when a reasonable person might question the judge's ability to rule impartially").

¶ 45 In this case, it appears John relied on section 2-1001(a)(3) of the Procedure Code in his petition for substitution of judge for cause and Rule 63(C)(1)(c) in his motion to reconsider. Under either one, we find Judge Yoder did not err in denying his petition. First, John failed to establish actual prejudice on the part of Judge Funk. John relies only on speculation, setting forth the conclusory claim that Judge Funk was prejudiced against him and in favor of Wendy. On appeal, John claims Judge Funk "may have" been prejudiced against him. We find John failed to show Judge Funk had a personal bias against him.

¶ 46 Second, John failed to show Judge Funk should have disqualified himself under Rule 63. "The rule contemplates that the basis for disqualification will be disclosed at an early stage." *Federal Deposit Insurance Corp. v. O'Malley*, 163 Ill. 2d 130, 140, 643 N.E.2d 825, 830 (1994). John did not claim he was unaware of Judge Funk's prior representation of Wendy. See *O'Malley*, 163 Ill. 2d at 140, 643 N.E.2d at 830 (stating before the defendant could seek a new trial under Rule 63(C)(1)(c), "he must show that he did not know the reason for disqualification

or have a reason to know"). Our supreme court stated "[t]o hold otherwise would permit a party to await the outcome of a trial and object only when the outcome is unfavorable." *O'Malley*, 163 Ill. 2d at 140-41, 643 N.E.2d at 830.

¶ 47 Here, John filed his initial petition in January 2013 but made no objection to Judge Funk presiding over this case. Even after Judge Funk entered a custody order in favor of Wendy in January 2014, it was not until May 2014 that John filed his petition for substitution of judge. John offers no reason why he could not have filed his petition for substitution at an earlier stage of the proceedings. Thus, by regularly appearing before Judge Funk since the outset of the proceedings and by waiting until well after Judge Funk ruled in favor of Wendy to file his petition, John has forfeited his claim that the custody order be vacated due to a Rule 63 conflict.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the trial court's judgment.

¶ 50 Affirmed.