2015 IL App (5th) 150218-U

NO. 5-15-0218

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
CHRISTINA BROWN,	)	Madison County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 13-D-51
	)	
JEREMY BROWN,	)	Honorable
	)	Philip B. Alfeld,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Schwarm and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: Portion of the judgment of dissolution regarding custody vacated and remanded with directions for circuit court to reconsider the best-interest factor of the wishes of the children (750 ILCS 5/602(a)(2) (West 2014)), taking into consideration its discretion to *sua sponte* order an *in camera* interview of the minor children. Circuit court further directed to order an updated GAL report and to ensure that the report becomes a part of the record. Should the circuit court, upon remand, award joint custody, the circuit court is directed to enter a joint parenting order in compliance with section 602.1 of the Illinois Marriage and Dissolution of Marriage Act. 750 ILCS 5/602.1 (West 2014). Portion of the judgment of dissolution regarding tax exemptions vacated and remanded with directions for the circuit court to reconsider this issue, if necessary, pursuant to the ultimate custody decision.

¶ 2 The respondent, Jeremy Brown, appeals the judgment of dissolution of his marriage to the petitioner, Christina Brown, that was entered in the circuit court of Madison County on January 15, 2015. He contends that the circuit court erred in its custody determination, as well as the allocation of the parties' children as tax exemptions. For the following reasons, we vacate the judgment in part and remand with directions.

¶ 3 FACTS

¶ 4 At the outset, we note that this is an expedited appeal, pursuant to Illinois Supreme Court Rule 311(a) (eff. Feb. 26, 2010). The deadline for the filing of this disposition was October 17, 2015. However, the deadline was not met for good cause. The docketing statement was overdue, Jeremy filed a motion for extension of time to file his appellant brief, which was granted, the appellant brief was defective, and Jeremy filed a motion for leave to file an appellant brief *instanter*, which was granted. These delays, each of which was attributable to Jeremy, resulted in the case not being placed on the docket until December 2015. Accordingly, the disposition was filed as soon as possible after it was docketed. We also note that Christina did not file an appellee brief in this case. However, "if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal." *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). On that basis, we address the merits of Jeremy's appeal.

¶ 5 The parties were married on September 23, 2003. At the time, Christina had a son from a previous relationship. Two children were born to the parties during the marriage. A son, E.B., was born on June 9, 2004, and a daughter, M.B., on January 3, 2008. On

January 18, 2013, Christina filed a *pro se* petition for dissolution of the marriage. Jeremy filed a counter petition for dissolution on February 1, 2013. Upon becoming represented by counsel, Christina filed a first amended petition for dissolution on April 10, 2013. A guardian *ad litem* (GAL) was appointed by the circuit court on July 3, 2013. A hearing on the petitions was conducted on December 16, 2014. At the conclusion of the hearing, the circuit court took the matter under advisement and on January 15, 2015, entered a judgment of dissolution of the marriage that, *inter alia*, awarded joint custody of the two minor children to the parties, with Christina designated as the primary custodian, and awarded each party one child as a tax exemption. Jeremy filed a timely notice of appeal of these two issues. Additional facts will be provided in the following section.

¶ 6 ANALYSIS

¶ 7 This case demonstrates the importance of using proper procedure and a thorough application of the statutory requirements in cases involving custody. The record contains procedural improprieties which hinder our review of the issues on appeal. As aforementioned, the circuit court awarded joint custody to the parties and designated Christina as the primary custodian. Section 602.1(c) of the Illinois Marriage and Dissolution of Marriage Act (Act) provides that:

> "The court may enter an order of joint custody if it determines that joint custody would be in the best interests of the child, taking into account the following:
>
> (1) the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child. 'Ability of the parents

to cooperate' means the parents' capacity to substantially comply with a Joint Parenting Order. ***

(2) [t]he residential circumstances of each parent; and

(3) all other factors which may be relevant to the best interest of the child." 750 ILCS 5/602.1(c)(1), (2), (3) (West 2014).

¶ 8 "The statutory prerequisites for joint custody outlined in section 602.1(b) of the Act indicate the legislature's intent that joint custody be awarded only where the parents are willing to cooperate in the upbringing of their children." *In re Marriage of Swanson*, 275 Ill. App. 3d 519, 522 (1995). "In 1986, the legislature amended the [Act] to eliminate the requirement that both parents agree to joint custody." *Id.* "Nevertheless, the [Act] still requires that the parents be able to 'cooperate effectively and consistently with each other towards the best interest of the child.' " *Id.* (quoting 750 ILCS 5/602.1(c)(1) (West 1992)).

¶ 9 We emphasize that the Act further provides that "[j]oint custody means custody determined pursuant to a Joint Parenting Agreement or a Joint Parenting Order." 750 ILCS 5/602.1(b) (West 2014). "Such Agreement shall specify each parent's powers, rights and responsibilities for the personal care of the child and for major decisions such as education, health care, and religious training." *Id.* "The Agreement shall further specify a procedure by which proposed changes, disputes and alleged breaches may be mediated or otherwise resolved and shall provide for a periodic review of its terms by the parents." *Id.* "In the event the parents fail to produce a Joint Parenting Agreement, the court may enter an appropriate Joint Parenting Order *** which shall specify and contain

the same elements as a Joint Parenting Agreement, or it may award sole custody ***." *Id*.

¶ 10 In this case, no joint parenting agreement exists in the record. The circuit court entered a mediation order on March 6, 2013, directing the parties to reach an agreement on issues of custody and visitation. The mediator filed a report on April 18, 2013, stating that the parties had reached a partial agreement and desired to continue mediation to further resolve the issues. The mediator stated that a final report would be filed at the conclusion of the mediation. A final report was never filed and there is no evidence of a joint parenting agreement. Accordingly, pursuant to section 602.1(b) of the Act, the circuit court had the option of either entering a joint parenting order containing the specifications delineated in that section, or awarding sole custody (750 ILCS 5/602.1(b) (West 2014)). It did neither.

¶ 11 The record reflects what could be construed as an attempt to comply with the requisites of 602.1 (750 ILCS 5/602.1 (West 2014)). The circuit court incorporated into the judgment of dissolution, the terms of a temporary visitation order that was entered on March 6, 2013. The circuit court further provided the following general statement in the judgment of dissolution: "[Jeremy] shall share and cooperate in all child rearing decisions. In the event of disagreement, they shall mediate that conflict before submitting it for the Court's resolution. Parties are admonished this is mandatory, not merely suggestive." (Emphasis in original.) We find this statement lacks the specificity required by section 602.1 of the Act (750 ILCS 5/602.1 (West 2014)), and it is therefore insufficient to comprise a proper joint parenting order. On remand, if the circuit court

wishes to award joint custody rather than sole custody, we direct it to enter a joint parenting order that conforms to the specific requirements of section 602.1 (750 ILCS 5/602.1 (West 2014)).

¶ 12 Besides the above statutory prerequisites to an award of joint custody, there are best-interest factors that must be considered by the circuit court prior to making a custody determination. See 750 ILCS 5/602 (West 2014). In this case, we acknowledge that three pages of the judgment of dissolution are dedicated to the circuit court's observation of the best-interest factors relevant to this case, and we commend the attention given in that regard. Of concern, however, is the circuit court's statements regarding the wishes of the children as to their custodian (750 ILCS 5/602(a)(2) (West 2014)). In referencing that factor, the circuit court states that "[n]either Party requested that the Court conduct *in camera* interviews of the children and therefore their wishes are unknown." This statement is problematic because it indicates a possible lack of knowledge on the part of the circuit court that *in camera* interviews are discretionary and may be conducted in the absence of a motion by the parties. Section 604(a) of the Act provides that "[t]he court *may* interview the child in chambers to ascertain the child's wishes as to his custodian ***." (Emphasis added.) 750 ILCS 5/604(a) (West 2014). Although section 604 requires counsel to be present at the interview unless otherwise agreed to by the parties, there is no requirement that a motion by one or both of the parties precede the interview. See 750 ILCS 5/604 (West 2014). Indeed, "[t]he decision of whether to conduct an *in camera* interview is a matter for the trial court's discretion." *In re Marriage of Wanstreet*, 364 Ill. App. 3d 729, 733 (2006).

¶ 13 To reiterate, the circuit court stated that "[n]either Party requested that the Court conduct *in camera* interviews of the children and therefore their wishes are unknown." That statement was immediately contradicted by the circuit court's next sentence: "Respondent claims that E.R.B. wants to return to live with him in Highland. The GAL also states that E.R.B. wishes to live in Highland with his father." We initially note that case law provides that "[a] better way than an *in camera* hearing to get the child's preferences before the court may be through admission of the child's hearsay statements, through the testimony of a guardian *ad litem* ***." *In re Marriage of Hefer*, 282 Ill. App. 3d 73, 76 (1996). Accordingly, the findings of the GAL are evidence indicative of the children's wishes.

¶ 14 With this in mind, we refer back to the circuit court's statement that "[t]he GAL also states that E.R.B. wishes to live in Highland with his father." The GAL never actually said that in his testimony. On July 23, 2014, the GAL filed a petition to file his report under seal. On September 23, 2014, the circuit court entered an order granting the GAL's petition. Both the table of contents and the record of minutes reflect the above filings and the documents are present in the common law record. However, neither the table of contents nor the record of minutes reflect that the GAL report was ever filed, under seal or otherwise. A hearing on the petitions for dissolution was conducted on December 16, 2014. The portion of the transcript from the hearing relevant to the GAL report reflects the following:

"THE COURT: Can I interrupt for a second? I don't see a GAL report.

MR. DOS SANTOS: It's under seal. It's probably in an envelope in the back. I used their names and birth dates.

MR. MICHAEL: I have an additional copy if you'd like it, your Honor.

THE COURT: That would be great. Thank you.

MR. MICHAEL: Unfortunately, this is the one I marked up a little bit. There's [*sic*] just some underlines here and there.

THE COURT: Thanks. Sorry to interrupt. Go ahead."

¶ 15 What could be purported to be a GAL report was discovered by this court in the exhibit folder. It was not file-stamped, it certainly was not within a sealed or file-stamped envelope, it was not marked as an exhibit, nor was it offered into evidence at the hearing. Accordingly, it is not an official part of the record and may not be considered. The GAL did testify pursuant to his report, but his testimony does not reflect the circuit court's statement that "[t]he GAL also states that E.R.B. wishes to live in Highland with his father." Rather, the closest thing to that statement in the GAL's testimony is his recommendation to the circuit court to award joint custody, with Jeremy as the primary custodian. An indication of E.B.'s preference may have been contained in the GAL's report, but that is not a part of the record on appeal. Of significance is the fact that the circuit court went against the GAL's recommendation to award joint custody, with Jeremy designated as the primary custodian. The GAL also testified that "it was a difficult case because both parties are good parents." This further emphasizes the importance of revisiting the children's wishes regarding their custodian upon remand, keeping in mind all of the circuit court's options, such as exercising its discretion to, *sua*

sponte, conduct one or more *in camera* interviews, should the circuit court deem it to be appropriate.

¶ 16 On remand, we further direct the circuit court to order an updated GAL report–since it has been nearly one year since the hearing–and to consider the conclusions of that report when considering the wishes of the children regarding their custodian. See 750 ILCS 5/602(a)(2) (West 2014); see also *In re Marriage of Hefer*, 282 Ill. App. 3d at 76. We further direct the circuit court to ensure that the GAL report becomes a part of the record so it may be properly considered in making its determination and available for future review should the need arise. Because we are vacating the portion of the judgment of dissolution pertaining to custody and remanding with directions to reconsider the issue, we also vacate the portion of the judgment relative to the tax exemptions and direct the circuit court to also reconsider that issue, if necessary, in accordance with its ultimate custody decision.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, we vacate the portion of the judgment of dissolution regarding custody and remand with directions for the circuit court to reconsider the best-interest factor of the children's wishes regarding their custodian (750 ILCS 5/602(a)(2) (West 2014)), taking into consideration the circuit court's discretion regarding this factor. We further direct the circuit court to order an updated GAL report and to ensure that the report becomes a part of the record. Should the circuit court award joint custody upon remand, we direct the circuit court to enter a joint parenting order, pursuant to section 602.1 of the Act (750 ILCS 5/602.1 (West 2014)). We also vacate the portion

of the judgment of dissolution regarding tax exemptions and remand with directions for the circuit court to reconsider this issue, if necessary, pursuant to its ultimate custody determination.

¶ 19 Vacated in part; cause remanded with directions.