

NOTICE

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2015 IL App (5th) 150254-U

NO. 5-15-0254

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

JACOB O'RILEY,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	St. Clair County.
)	
v.)	No. 09-F-320
)	
STACEY BAST-COFFEY,)	Honorable
)	Julia R. Gomric,
Respondent-Appellee.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.

Justices Goldenhersh and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court abused its discretion in failing to apply the requisite serious endangerment standard in restricting summer visitation and ordering permanent supervised visitation; but the order is affirmed regarding the court's decision to refrain from conducting an *in camera* interview, denying the petitioner's petition for contempt, and ordering child support arrearage.

¶ 2 The petitioner, Jacob O'Riley (Jacob), appeals from an order of the circuit court of St. Clair County ordering restricted summer visitation and denying his petition for an increased, unsupervised structured visitation schedule, his request for an *in camera* interview of J.O., and for a finding that the respondent, Stacey Bast (Stacey), was in civil contempt of court for failing to comply with visitation provisions and not providing a

health insurance card for J.O. during visits. On appeal, Jacob contends that the circuit court's denial of his petitions was against the manifest weight of the evidence and constituted an abuse of discretion. For the following reasons, we affirm in part and reverse and remand in part.

¶ 3 Together the parties have one son, J.O., born September 7, 2000. Since the couple's relationship ended in 2007, J.O. has primarily resided with Stacey, now in Ellis Grove, Illinois, while Jacob has lived in Marissa, Illinois, with his parents.

¶ 4 On November 12, 2009, the parties entered into a stipulated order regarding the custody and support of J.O. Stacey was awarded sole custody and Jacob was awarded visitation on alternating weekends from 6 p.m. on Friday until 6 p.m. on Sunday, with Stacey responsible for dropping off J.O. at Jacob's parents' residence at the beginning of each visitation session, and Jacob transporting J.O. to Stacey's home at the end of each visit. In addition, the parties were to alternate holidays. The circuit court allowed the parties to vary the visitation schedule, if needed and in agreement, but in the event conflict arose, the stipulated order ruled. The issues of Jacob's summer visitation privileges and permanent pick up time for weekend visitation were left for determination at the final hearing.

¶ 5 On March 29, 2010, as a result of J.O.'s numerous summer activities, the parties stipulated to a modified agreement to set a summer visitation schedule. The order provided that Jacob's weekend visitation would begin after 4 p.m., or immediately after school on Fridays, if Jacob wished to pick up J.O. from school. In addition, Jacob was awarded two nonconsecutive weeks of visitation in the summer of 2010, and three weeks,

with one week in each of June, July, and August, in the summer of 2011. Jacob was required to provide Stacey with notification of his chosen weeks by May 1st of each year. If a conflict arose over specific weeks, Jacob's choice would prevail during even-numbered years and Stacey's choice would prevail in odd-numbered years. Lastly, the parties would meet in Walsh, Illinois, to drop off and pick up J.O.

¶ 6 On August 8, 2014, Jacob filed a motion to modify the parties' physical custody schedule, requesting summer visitation for a consecutive span of two weeks, alternating every two weeks, as well as for the court's designation of additional holidays, including Halloween, Valentine's Day, Lincoln's Birthday, and St. Patrick's Day. Jacob requested that drop off and pick up times be modified from 6 p.m. to 8 p.m. during the school year, and from 6 p.m. to 9 p.m. in the summer. Additionally, Jacob requested that Stacey provide a health insurance card during J.O.'s visits, as well as reimburse him for 50% of the healthcare costs Jacob had already incurred.

¶ 7 On September 23, 2014, Stacey filed a motion to restrict visitation. Stacey requested the prohibition of overnight visits, alleging that J.O. did not have his own bed at Jacob's parents' residence. Stacey also filed a motion to modify visitation, detailing Jacob's charges for driving under the influence of alcohol on both August 13, 2010, and August 24, 2010, as well as for the possession of drug paraphernalia on March 2, 2012. Stacey alleged that J.O. had informed her that Jacob was often gone during weekend visits, leaving J.O. with his grandparents or babysitters. Stacey alleged that if J.O.'s activities interfered with Jacob's scheduled visitation, J.O. missed these events. Additionally, Stacey opined that Jacob had interfered with her regularly scheduled

weekend visitation over the last four summers. Further, Stacey filed a petition for contempt, alleging that Jacob was gainfully employed and thus could afford to pay child support, including approximately \$15,000 in arrearage.

¶ 8 On November 3, 2014, Stacey filed an emergency motion for restricted visitation. In this petition she listed four pending criminal charges against Jacob that occurred on September 24, 2014, after filing the September 23, 2014, motion to restrict visitation. These charges included: (1) the unlawful possession of a controlled substance (14-CF-133303); (2) aggravated fleeing and attempting to elude a police officer (14-CF-133302); (3) aggravated driving under the influence (14-TR-39712); and (4) driving with a revoked license (14-DF-133301).¹ Additionally, Stacey requested suspended visitation, given that Jacob was admitted into a residential rehabilitation treatment facility in Carbondale, Illinois, at the time and not present at visitation. Stacey asked the court to order supervised visitation with the paternal grandparents upon Jacob's successful completion from the rehabilitation program.

¶ 9 Following a hearing on January 18, 2015, the circuit court issued a temporary order for supervised visitation by the paternal grandparents until further court order. The court instructed supervised visitation to occur at the paternal grandparents' residence, with at least one grandparent present and the paternal grandfather as the designated transporter to and from Walsh, Illinois. The court advised Jacob that he was allowed to have alone time with J.O., as long as he was not driving a motor vehicle or in a tavern.

¹Record reflects that Jacob pled guilty to all charges on February 14, 2015.

¶ 10 On March 11, 2015, Stacey filed a position statement with the circuit court addressing her arguments for the final hearing. Stacey requested the court to set a summer schedule, providing Jacob with two weeks of summer visitation during the first full week of June every year, the first full week in July in odd-numbered years, and the second full week in July in even-numbered years. She requested that the court restrict weeklong visitation in August to allow J.O. to prepare for the new school year.

¶ 11 Stacey strongly objected to Jacob's motion to increase visitation for several reasons. First, Stacey believed that Jacob had a serious substance abuse problem. Second, Stacey alleged that on numerous occasions J.O. advised her that Jacob was out all night during his weekend visitations. Third, Stacey alleged that the paternal grandparents had often exercised Jacob's visitation with J.O. Further, Stacey stated that there had been issues with J.O. missing extracurricular activities, noting that Jacob relied on his parents for transportation, and at times, failed to bring J.O. to activities if it interfered with his visitation privileges. Lastly, as a result of J.O.'s increased participation in extracurricular activities and his desire to spend more time with friends as he entered high school, Stacey believed that it was in J.O.'s best interest to spend the majority of the summer with her in Ellis Grove, Illinois.

¶ 12 On May 13, 2015, the circuit court held a final hearing. Jacob testified that he requested the court to set a summer visitation schedule for a consecutive span of two weeks, alternating every two weeks; to include additional holiday visits; to alternate federal holidays; to modify the drop off time; and to request the court to order him to carry health insurance coverage for J.O., requiring Stacey to then contribute to the cost.

Jacob testified that he was arrested and charged with driving under the influence on August 13, 2010, and August 24, 2010, as well as four additional criminal charges on September 24, 2014. In addressing his use of alcohol, Jacob testified that he admitted himself into a residential rehabilitation facility in 2014, and as of the hearing, had been sober for 232 days. Furthermore, Jacob testified that he had never been intoxicated nor consumed alcohol in J.O.'s presence.

¶ 13 Stacey testified that J.O. had expressed his desire to see his father more often and that J.O. "would like to keep everything the same"; however, she believed Jacob was not always present at visitation. Stacey requested the circuit court to set the visitation schedule for the next four years with weeklong visits in June and July of each year. Stacey testified that Jacob's request for additional holiday visits, including Halloween, Valentine's Day, Lincoln's Birthday, and St. Patrick's Day, would be difficult given the long commute and J.O.'s weekday school schedule. Stacey testified that a change in the drop off time would significantly disrupt her family's schedule, as her two younger daughters were in bed before 8 p.m.

¶ 14 Stacey testified that she believed Jacob's drinking had caused J.O. to suffer emotional distress. She further expressed her concerns for J.O.'s safety and the fear that J.O. would emulate his father's actions. Stacey further testified that since Jacob and both of the paternal grandparents worked Monday through Friday during the summer, she had concerns regarding J.O.'s supervision during the day.

¶ 15 On May 26, 2015, the circuit court entered an order in favor of Stacey, denying Jacob's motion to modify the physical custody schedule and petition for contempt. The

court stated that "although the Court is encouraged by Father's 30 day inpatient treatment and his testimony regarding his commitment to remain sober," increased, unsupervised visitation was denied, noting Jacob's criminal charges, revoked license, treatment in a residential facility, and need for continued sobriety. In addition, the court restricted Jacob's visitation "given the need for supervision and the testimony regarding Father's and Grandparents' work schedules this summer," with visitation to remain every other weekend beginning May 29, 2015. The court allowed Jacob and the paternal grandparents to visit with J.O. for one full week in the summer, instead of the previously ordered three weeks, if "Father and Grandparent(s) (as supervisors) plan to take vacation from work and wish to visit with the child for one full week." Jacob was to inform Stacey of his chosen week by June 8, 2015; however, if Jacob's chosen week conflicted with Stacey's schedule, he was to pick another week.

¶ 16 The circuit court ordered Jacob to refrain from driving a motor vehicle, as well as the use of drugs or alcohol during visitation. The court denied Jacob's request to cover J.O. under his health insurance, and relieved Stacey from providing Jacob with a health insurance card. The court reasoned that since Stacey had sole custody of J.O., Jacob was to notify her in the event that medical care was needed. Lastly, the court ordered Jacob to pay \$11,601.11 in arrearage, while continuing to pay child support, by April 1, 2016. Jacob filed a timely notice of appeal on June 24, 2015.

¶ 17 Jacob contends that the circuit court abused its discretion in restricting his summer visitation rights without making a finding or hearing evidence to support a finding that the current visitation arrangement was seriously endangering J.O.'s physical, mental,

moral, or emotional health. In addition, Jacob argues that ordering permanent supervised summer visitation, only if Jacob and one of the paternal grandparents could take one week off of work, acted as a restriction and effectively provided Stacey with the ultimate determination of visitation. Thus, Jacob contends that constant disputes will continue to occur, as evidenced by the parties' last five years of litigation, without a court order outlining a structured summer schedule.

¶ 18 Visitation orders will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Ross*, 355 Ill. App. 3d 1162, 1167 (2005). The court may modify visitation rights if, due to a change in circumstances, it appears reasonable and proper to do so and if the best interests of the child make it advisable. *Id.* A restriction on visitation, which must meet the serious endangerment standard, is action that limits, restrains, or confines visitation within bounds. *In re Marriage of LaTour*, 241 Ill. App. 3d 500, 504 (1993). The court may modify an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child, but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health. 750 ILCS 5/607(c) (West 2012). To the extent limitations are imposed to account for the attributes of one or both of the parents, those conditions are properly labeled restrictions, whereas a modification applies the child's best interest standard. *In re Marriage of Chehaiber*, 394 Ill. App. 3d 690, 696-97 (2009).

¶ 19 We first discuss the circuit court's order restricting Jacob's summer visitation privileges and ordering permanent supervised visitation. A restriction, based on reasons

pertaining to the perceived deficiencies of a parent, requires a finding that the minor would be seriously endangered by continued visitation with that parent. Eliminating one day from a weekend visitation or shortening a summer visitation due to activities of the child is not a restriction. *LaTour*, 241 Ill. App. 3d at 504. Visitation restrictions include termination of visitation, a prohibition on overnight visitation, and a requirement of supervised visitation. *In re K.E.B.*, 2014 IL App (2d) 131332, ¶ 33. Stacey contends that any reduction in Jacob's visitation is not a restriction subject to the serious endangerment standard. We disagree.

¶ 20 First, we find that the circuit court's decision ordering permanent supervised visitation for the next four years was a restriction, as it focused on the perceived deficiencies of Jacob, and thus was improper without the requisite finding that unsupervised visitation would endanger seriously J.O.'s physical, mental, moral, or emotional health. A careful review of the record shows that J.O.'s well-being was never jeopardized as a result of Jacob's presence with J.O. during visitation on alternating weekends and three weeks in the summer. See *In re Marriage of Johnson*, 100 Ill. App. 3d 767, 789 (1981) (record reflected court's concern for child's welfare, a concern prompted by its findings concerning the father's aggressive behavior and suicidal tendencies). In fact, Stacey testified on January 14, 2015, that to her knowledge J.O. had never been harmed while in Jacob's presence. Jacob never consumed alcohol or drove while intoxicated with J.O. In addition, the record reveals that Jacob was subject to random alcohol and drug testing, had continued to participate in weekly outpatient treatment, and had been sober for 232 days preceding the final hearing. See *Johnson*, 100

Ill. App. 3d at 770 (court noted that it was unconvinced by the father's progress as psychological counseling had come about only in the two months preceding the hearing).

¶ 21 Next, we discuss the circuit court's decision ordering restricted visitation, which reduced Jacob's summer visitation privileges from three weeks to one week. After a careful review of the record, we do not find that the court's determination, due to changes in J.O.'s summer activities, is reasonable and in the best interest of J.O. Instead, we find that the modification in summer visitation acted as a restriction, seriously constraining Jacob's visitation, and was not based on a finding of serious endangerment.

¶ 22 We find the circuit court's modifications acted as improper restrictions, without the requisite finding that visitation would endanger seriously J.O.'s physical, mental, moral, or emotional health. Thus, the issues of restricted summer and supervised visitation are reversed and remanded back to the circuit court for further proceedings to apply the proper standard in determining Jacob's visitation rights. Moreover, we shall ask the court to outline a structured summer visitation schedule, as previously requested by both parties and clearly within the best interest of J.O.

¶ 23 Next, Jacob contends that the circuit court erred in denying his motion for an *in camera* interview with J.O. Although J.O. was 14 at the time of the final hearing, Illinois courts have repeatedly held that whether a child should be interviewed *in camera* lies within the considerable discretion given to circuit courts in such matters. *In re Marriage of Johnson*, 245 Ill. App. 3d 545, 554 (1993). In child custody cases there is a strong and compelling presumption in favor of the result reached by the circuit court because it is in the superior position to evaluate the evidence and determine the best interests of the

child. *In re Marriage of Simmons*, 221 Ill. App. 3d 89, 90 (1991). Accordingly, we affirm the court's decision.

¶ 24 Next, Jacob argues that the circuit court erred in denying his petition for contempt for visitation interference and compensatory days, as well as failing to require Stacey to provide a health insurance card. Proof of willful disobedience of a court order is essential to any finding of indirect civil contempt. *In re Marriage of McCormick*, 2013 IL App (2d) 120100, ¶ 17. The petitioner first must establish by a preponderance of the evidence that a violation occurred and then the alleged contemnor has the burden of showing that the violation was not willful and contumacious and that he or she had a valid excuse for failing to follow the order. *Id.* Whether a party is guilty of contempt is a question of fact for the circuit court, and a reviewing court should not disturb the circuit court's determination unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion. *Id.*

¶ 25 With regard to Jacob's allegations of visitation interference and compensatory days, we cannot find that Stacey willfully disrespected an order of the court. Thus, we cannot find that the court's decision was against the manifest weight of the evidence or an abuse of discretion.

¶ 26 In addition, Jacob contends that the circuit court erred in relieving Stacey of her responsibility to provide Jacob with a health insurance card for J.O., and for not holding her in contempt for failing to provide a card after the March 29, 2010, order. Testimony reveals that Stacey did provide Jacob with a health insurance card; however, personal identifying information, such as Stacey's husband's social security number, was blacked

out. Jacob testified that Stacey provided him with a copy of the card but that he was unable to use it. Based on the record, we do not find that Jacob proved by a preponderance of the evidence that Stacey willfully and contumaciously disrespected an order of the court. Therefore, we do not find that the circuit court abused its discretion in ordering Jacob to notify Stacey, the custodial parent, prior to J.O. receiving medical care.

¶ 27 Next, Jacob contends that the circuit court erred in granting summary judgment for past due child support, and for denying Jacob an award for attorney fees. The record outlines Jacob's child support summary payment history from October 30, 2010, through April 22, 2015, immediately preceding the final hearing on May 13, 2015. Jacob argues that the court erred in failing to set a separate trial to determine the facts of the child support payment issues, as he testified he had made payments by check prior to using the state's electronic child support system. Jacob contends that the court's error essentially denied him the ability to correct any mistakes on the record because he was unable to present evidence of his entire payment history. We disagree.

¶ 28 On May 19, 2011, the circuit court ordered Jacob to pay Stacey past due child support arrearage in the amount of \$9,626.54, as of April 30, 2011. On September 20, 2011, the court ordered Jacob to pay Stacey past due child support arrearage in the amount of \$6,385.55, plus \$352.17 in interest, as of October 31, 2010. On October 17, 2011, counsel for Stacey filed a motion to reconsider the court's September 20, 2011, order, indicating that it was in error and contending that the May 19, 2011, order accurately reflected the current past due child support amount.

¶ 29 On January 5, 2012, both parties appeared before the circuit court regarding the alleged discrepancies. The court vacated the September 20, 2011, order, finding that the May 19, 2011, order of \$9,626.54 was accurate. Following the hearing, Jacob failed to file a posttrial motion to claim any inaccuracies regarding payment history.

¶ 30 Now on appeal, Jacob argues that the child support payment history does not accurately credit him for the payments he made to Stacey by check before October 30, 2010. Stacey, as an obligee seeking satisfaction of the obligation created by the May 19, 2011, order, need only establish the existence of the obligation itself. See *In re Marriage of Jorczak*, 315 Ill. App. 3d 954, 956-57 (2000). Jacob, as the obligor, had the burden to establish the full extent of payment, to which he argues occurred by check when the couple first separated. *Id.* at 958. After a careful review of the record, we conclude that Jacob failed to establish the existence of additional payments that occurred by check prior to October 30, 2010.

¶ 31 However, we must also address the amount of child support that the circuit court ordered on May 26, 2015. After a careful review of Exhibit "A," which details Jacob's payment history from October 30, 2010, through April 22, 2015, and the child support interest calculator, labeled Exhibit "B," we find the court's determination of the arrearage in the amount of \$11,601.11 to be unclear.² Exhibit "A," as of April 30, 2015, provides

²It appears that Exhibits "A" and "B," attached to Stacey's position statement filed on March 11, 2015, were admitted into evidence at the final hearing on May 13, 2015, and referenced as Exhibit 3.

that payments totaled \$21,870.48, with payments starting in October 2010, whereas Exhibit "B" provides that payments totaled \$21,069.68, with payments starting in May 2011. Further, the court's order assessed \$1,974.57 in additional arrearage due to Jacob's failure to pay current support since the April 10, 2014, order. However, this amount in additional arrearage is not supported by either exhibit. Thus, we remand for further proceedings for the circuit court to provide a clearer determination regarding the final child support amount due by April 1, 2016.

¶ 32 Furthermore, we do not find merit to Jacob's argument that the circuit court abused its discretion in failing to impose Illinois Supreme Court Rule 137 (eff. July 1, 2013) sanctions on Stacey to pay Jacob's reasonable attorney fees. "The purpose of Rule 137 is to prevent abuse of the judicial process by penalizing claimants who bring vexatious and harassing actions." (Internal quotation marks omitted.) *Krautsack v. Anderson*, 223 Ill. 2d 541, 561 (2006). After a careful review of the record, we do not find that the court abused its discretion in failing to address or impose Rule 137 sanctions.

¶ 33 Lastly, we address Jacob's argument that the circuit court denied him the protections afforded to him under the fourteenth amendment. We disagree. The record reveals that Jacob was afforded all rights and liberties granted to him under the Constitution. Jacob was represented by counsel, and afforded the opportunity to present evidence and cross-examine witnesses at both hearings in January 2015 and May 2015. As such, we do not find that the court denied Jacob his protections under the fourteenth amendment.

¶ 34 For the reasons above, the order of the circuit court of St. Clair County is affirmed

in part, and reversed and remanded in part. We affirm the circuit court's decision to refrain from conducting an *in camera* interview of J.O., as well as the court's denial of Jacob's petition for contempt. We further affirm the court's decision that Jacob owes child support arrearage, but remand for a clearer determination of the amount of outstanding child support from October 30, 2010, through April 22, 2015. We order the court to conduct further proceedings to apply the proper standard in determining Jacob's visitation rights, as they pertain to restricted summer visitation and supervised weekend and summer visitation. In addition, we believe it is in the best interest of J.O. for the court to order a structured summer visitation schedule to lessen the already existing difficulties between the parties.

¶ 35 Affirmed in part; reversed and remanded in part.