2016 IL App (2d) 160480-U
No. 2-16-0480
Order filed November 18, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF DAWN M. ATLEE, Petitioner-Appellee, and MICAH K. ATLEE, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 14-D-801 Honorable Brendan A. Maher, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decision to grant sole custody of the parties' child to petitioner was not against the manifest weight of the evidence.

¶ 2 Respondent, Micah K. Atlee, appeals the order granting petitioner, Dawn M. Atlee, sole legal custody and primary residential custody of the couple's son, A.J.A. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Dawn and Micah were married on June 26, 2010, resided together in Johnson City in Williamson County, and A.J.A. was born in March 2013. Micah previously had been married to

Brandi Craft, who had sole custody of their two sons Nicholas and Christopher. Micah was very involved in the lives of Nicholas and Christopher, and they enjoyed spending time with A.J.A.

¶ 5 On August 2, 2014, Dawn drove 360 miles with A.J.A. to her parents' home in Winnebago County. Five days later, Dawn filed a petition for dissolution of the marriage. Dawn also filed, but ultimately withdrew, a petition for an order of protection. Micah remained in the marital residence in Johnson City.

¶ 6 After it became clear that the parties would dispute custody, the trial court appointed Kimberly McKenzie, an attorney, as guardian *ad litem* (GAL) and conducted a custody trial on March 2, 4, and 18, 2015. On July 7, 2015, the trial court entered a 17-page, single-spaced memorandum of decision, awarding Dawn sole legal and primary residential custody of A.J.A., subject to the terms of a co-parenting order and to Micah's right to seek modification of custody.

¶ 7 The court summarized the GAL's findings, including that Dawn and Micah were both fit and loving parents who had bonded with A.J.A. However, the GAL recommended that Dawn be awarded sole legal custody and primary physical custody, subject to Micah's visitation rights. First, the GAL cited Dawn's training and experience as a school teacher, including her two master's degrees in the education field, though the trial court stated that the training did not necessarily mean that Dawn would be a better parent. Second, the GAL noted that A.J.A. would be Dawn's only child, while Micah was actively involved in the lives of his two older sons, one of whom has special needs. The GAL recommended against joint legal custody, which in her opinion "would be a breeding ground for perpetual litigation between the parties." The court noted that, in addition to interviewing and spending time with the parties and A.J.A., the GAL observed the trial and did not change her recommendation. The court found the GAL to be

credible and sincere and incorporated her findings, but not necessarily the conclusions drawn therefrom.

¶ 8 After considering the testimony of the witnesses and the arguments of the parties, the court addressed each relevant factor affecting custody under section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/602(a) (West 2014) (now 750 ILCS 5/602.7(b) (West Supp. 2015))). First, the court found that both Dawn and Micah were actively involved in providing care for A.J.A. immediately before Dawn moved with A.J.A. to Winnebago County. See 750 ILCS 5/602(a)(1) (West 2014).

¶ 9 Second, the court agreed with the GAL that A.J.A., at two years of age, was too young to express a meaningful preference between his parents, and therefore, the factor did not weigh in either party's favor. See 750 ILCS 5/602(a)(2) (West 2014).

¶ 10 Third, the court found that A.J.A. has positive, meaningful, and loving relationships with his parents, grandparents, and stepbrothers. While both parents love and want to spend as much time as possible with A.J.A. and Micah played a role in raising him, Dawn "filled more of a traditional 'primary caregiver' role." The court concluded that A.J.A. had adapted well to moving with Dawn into her parents' home and continued to do well when returning to spend time with Micah. The court agreed with the GAL that, as the parent of only one child, Dawn likely would have more time to devote exclusively to A.J.A.'s care and development than Micah, who has two very active older sons. The court emphasized that its observation was not intended to punish Micah for his involvement in his older sons' lives. See 750 ILCS 5/602(a)(3) (West 2014).

¶ 11 Fourth, the court found that A.J.A. did not have difficulty adjusting to having different caregivers upon his move to Winnebago County. At only 2½ years old, A.J.A. was not currently

enrolled in a formal education program and did not have strong ties to any school or community organization, and the factor did not weigh strongly in favor of either parent. See 750 ILCS 5/602(a)(4) (West 2014).

¶ 12 Fifth, the court found that, despite the absence of expert testimony on the parties' mental health, Dawn focused on Micah's alleged alcoholism to such an extent that she brought Brandi into the proceedings to testify on the subject, even though Dawn previously had testified against Brandi in Micah's attempt to gain custody of Nicholas and Christopher. The court found that Dawn had not shown by a preponderance of the evidence that Micah's use of alcohol prior to her decision to move out of the marital home had any effect on A.J.A. The GAL reported that Micah had expressed concerns about Dawn's mental health, suggesting that it had changed in some unspecified way after A.J.A. was born. The court found that, like Dawn, Micah had failed to prove that Dawn suffered from a mental health problem. See 750 ILCS 5/602(a)(5) (West 2014).

¶ 13 Sixth, the court found that there was no evidence that Micah or Dawn ever engaged in physical violence or abuse against A.J.A. or in his presence. See 750 ILCS 5/602(a)(6), (a)(7) (West 2014).

¶ 14 Finally, the court found that, although Micah testified credibly and sincerely that he was willing to work with Dawn, his willingness had never been tested seriously in light of the physical distance between them and the court-ordered restrictions of the parties' direct communication with each other. The court recalled from hearings regarding the division of parenting time that the GAL accurately reported that " 'Micah has been more interested in developing ways for both parents to spend time with [A.J.A.] Micah repeatedly told [the GAL] that he thought it was important for both parties to have a close and continuing relationship with [A.J.A.] Dawn has been less inclined to facilitate the relationship between [A.J.A.] and his

father and continues to believe that it is in [A.J.A.'s] best interest to keep contact at a minimum for the reasons [Dawn provided to the GAL and] set forth in this report. However, [the GAL] believe[s] Dawn will follow any and all court orders.' " The court concluded that "Dawn has resisted most of Micah's efforts to obtain significant blocks of court-ordered parenting time, and has entirely resisted the idea that she and Micah should have anything approximating 'equal' parenting time." Nevertheless, the court found that the parties' respective ability to encourage a close and continuing relationship between A.J.A. and the other parent was less pressing in light of the joint parenting order that would set forth their rights and obligations in a way that they could understand and follow. The court found the parties to be "capable" of communicating and cooperating with each other but currently unwilling to be flexible or solve problems that might arise. The court did not weigh the factor strongly for either party. See 750 ILCS 5/602(a)(8) (West 2014).

¶ 15 After considering the relevant factors of section 602(a), the court awarded Dawn the sole legal and primary residential custody of A.J.A. When the parties could not reach a co-parenting agreement as suggested, the court resolved the issue by allocating parenting time in a final custody order entered on October 2, 2015. On May 25, 2016, the trial court disposed of the last posttrial motion, and Micah filed a timely notice of appeal on June 22, 2016.

¶ 16 II. ANALYSIS

¶ 17 Micah challenges the trial court's order awarding Dawn custody of A.J.A. and asks this court to reverse the order and remand the cause with directions to award him sole custody. A trial court decides custody according to the best interest of the child. 750 ILCS 5/602(a) (West 2012); *In re Marriage of Smith*, 2013 IL App (5th) 130349, ¶ 9. In making a custody determination, the court considers a number of factors, including: (1) the parent's or parents'

wishes regarding custody; (2) the child's wishes; (3) the child's interaction and interrelationship with his parents; (4) the adjustment of the child to his home, school and community; (5) the mental and physical health of all involved individuals; (6) physical violence or the threat of it by the potential custodian, directed at the child or another person; (7) ongoing or repeated abuse toward the child or another person; and (8) each parent's ability and willingness to foster the child's relationship with the other parent. 750 ILCS 5/602(a)(1)-(8) (West 2012); *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶ 33. The trial court is in the best position to judge witness credibility and determine the child's best interests. *Lonvick*, 2013 IL App (2d) 120865, ¶ 33. We will not disturb a trial court's custody determination unless it is against the manifest weight of the evidence. *In re Marriage of Apperson*, 215 Ill. App. 3d 378, 383 (1991).

¶ 18 Micah does not quarrel with much of the trial court's application of section 602(a). However, he argues that the court erred in weighing the factors in the relevant versions of sections 602(a)(3) and 602(a)(8) of the Dissolution Act (750 ILCS 5/602(a)(3), (a)(8) (West 2014) (now 750 ILCS 5/602.7(b)(5), (b)(13) (West Supp. 2015))).

¶ 19 Dawn responds that the custody order must be affirmed because Micah has furnished an inadequate record without a report of proceedings or a suitable substitute for one of the three hearing dates. The March 4, 2015, date appears to have been dedicated to the testimony of Micah's witnesses. The other two dates, for which we have transcripts, focused on the testimony of Dawn, her witnesses, Christopher, and the GAL. Under *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), Micah, as the 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 conformed with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92.

¶ 20 Even if there was no court reporter at the March 4, 2015, hearing date, Micah could have remedied that circumstance easily. In this court, Micah could have filed a bystander's report under Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005)) or an agreed statement of facts under Rule 323(d). Either could have provided a summary of the testimony from that day to facilitate a more thorough review of the trial court's decision. While the record contains transcripts of the other two hearing dates, any doubts that arise from the incompleteness of the record will be resolved against Micah. See *Foutch*, 99 Ill. 2d at 392.

¶ 21 A. Interaction and Interrelationship with Relatives

¶ 22 Micah seeks review of the trial court's consideration of "the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest." 750 ILCS 5/602(a)(3) (West 2014). Micah argues that the factor, at worst, favors neither party and, at best, favors him.

¶ 23 In considering section 602(a)(3), the court commented that it "ha[d] given some weight to the GAL's observation that Dawn, as the parent of only one child, will likely have more time to devote exclusively to A.J.A.'s care and development than Micah, who has by all accounts, two very active older sons in whose lives he is intimately involved." Micah argues that "the trial court gave most weight, reluctantly, to the GAL's thought that Dawn would only have one child to look after whereas Micah would have three to look after." Micah claims the trial court reduced its analysis to "a 'numbers' game where the party with fewer children to look after gets the nod."

¶ 24 As Micah concedes, the trial court expressly addressed his concern by stating that "[i]t is certainly not this court's intent to penalize Micah for being heavily involved in his older sons' lives, or to being actively engaged in caring for an older child with special needs." The court's

rationale was not based merely on a "numbers game," but rather on the difference in available time that Micah and Dawn had to spend with A.J.A., which may be considered with all the other evidence concerning A.J.A.'s best interest.

¶ 25 Micah also argues in passing that the trial court "mostly forgot[]" to consider A.J.A.'s close relationship with Christopher and Nicholas. We disagree. The court expressly found that "A.J.A. has positive and loving relationships with *** his stepbrothers by way of Micah's first marriage, Nicholas and Christopher."

¶ 26 In the trial court's own words, "this is a case that ultimately depends *heavily* on this court's opportunity to observe the witnesses, including their demeanor, in order to assess both credibility and sincerity of motives (distinguished from credibility); in other words both on the court's willingness to *believe* a party's testimony on a disputed issue as well as the court's *impressions* of the party within the context of the evidence presented." (Emphases in original.) The court found that both parents love A.J.A. and are committed to his well-being. However, after considering the evidence, the court held that section 602(a)(3) weighed slightly in favor of Dawn mostly, though not exclusively, because she had been A.J.A.'s primary caregiver his whole life. The court concluded that Dawn was best suited, from a personality and parenting standpoint, to make parenting decisions for A.J.A. at this point in his life. The trial court was in the best position to make these assessments, as we neither heard the live testimony nor possess a complete transcript of the proceedings.

¶ 27 B. Encouraging Child's Relationship with Other Parent

¶ 28 Micah also seeks review of the trial court's consideration of "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." 750 ILCS 5/602(a)(8) (West 2014). The court did not weigh the factor

strongly for either party. Micah argues that it weighs against Dawn because of (1) the way she unilaterally put 360 miles between Micah and A.J.A. and filed dissolution proceedings without warning, and (2) the GAL's observation that Micah has been more interested in developing ways for both parents to spend time with A.J.A., while Dawn believed that it is A.J.A.'s best interest to minimize his contact with Micah.

¶ 29 The fact that Dawn's parents live so far from Micah is unfortunate, but Dawn did not act unreasonably in moving there when she felt that her marriage had broken down. The court observed that Micah's apparent willingness to facilitate a relationship between Dawn and A.J.A. had never been tested seriously, due to the logistics of their shared parenting and the court-ordered restrictions on their communication with each other. Also, the court agreed with the GAL that, despite Dawn's apparent unwillingness to facilitate a relationship between Micah and A.J.A., she would follow any and all court orders. The court surmised that the parties' respective ability to encourage a close and continuing relationship between A.J.A. and the other parent was a "less pressing" factor because the joint parenting order would set forth their rights and obligations in a way that they could understand and follow. See 750 ILCS 5/602(a)(8) (West 2014). Based on the trial court's superior position to assess the witnesses' credibility and sincerity and the totality of the evidence for which we have a record, we conclude that the court's decision to award sole legal and primary residential custody was not against the manifest weight of the evidence.

¶ 30 III. CONCLUSION

¶ 31 For the preceding reasons, the custody order of the circuit court of Winnebago County is affirmed.

¶ 32 Affirmed.