2017 IL App (3d) 160523-U

Order filed January 17, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

A.K.,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Petitioner-Appellant/Cross-Appellee,	)	Henry County, Illinois.
	)	
v.	)	Appeal No. 3-16-0523
	)	Circuit No. 12-F-63
J.T.,	)	
	)	Honorable Terence M. Patton,
Respondent-Appellee/ Cross-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in ordering a child custody and psychological evaluation of the parties. (2) The trial court's custody determination was not against the manifest weight of the evidence. (3) The trial court did not abuse its discretion in ordering respondent to contribute $8,000 to petitioner's attorney fees.

¶ 2 The petitioner, A.K., appeals the trial court's ruling to appoint a child custody evaluator and to modify a previous custody agreement by awarding majority parenting time and sole decision-making responsibilities regarding the child's education, health, extracurricular

activities, and religion to the respondent, J.T. Respondent cross-appeals the trial court's award of $8,000 toward petitioner's attorney fees. For the reasons stated below, we affirm the trial court.

¶ 3 BACKGROUND

¶ 4 The parties' minor child, J.T., was born October 11, 2010. The parties, who never married, entered a joint parenting agreement on February 11, 2013. On November 11, 2014, petitioner sought modification of the agreement and sole custody of J.T. Respondent filed a counterclaim for sole custody on May 21, 2015, requesting a child custody and psychological examination of J.T. and the parties. The trial court ordered the evaluation on June 1, 2015, and thereafter appointed Dr. Daniel Hynan as the evaluator. In its order, the court found that it would "benefit from a custody and psychological examination of the parties" to make its custody determination. The court also appointed attorney Virgil Thurman as J.T.'s guardian *ad litem* (GAL).

¶ 5 Hynan's report, filed on August 24, 2015, recommended respondent be granted primary parenting duties as he would be more likely to facilitate J.T.'s relationship with petitioner than vice versa. Hynan testified that he had done between 700 and 800 custody evaluations. His methodology was to rely on objective observations and psychological tests rather than "he said/she said" evidence for his report. Petitioner's psychological test scores were abnormally high for defensiveness, which Hynan concluded was consistent with incidents of poor judgment and impulsive behavior. Hynan indicated that petitioner spoke poorly about respondent during her interviews and displayed highly confrontational behavior. Petitioner rebutted this testimony by arguing that Hynan was biased because respondent paid his fees for the evaluation.

¶ 6 The GAL's report, filed November 24, 2015, initially recommended petitioner be awarded primary parenting responsibilities, although he deemed the case a close one. However, after hearing the trial testimony, the GAL backed away from his initial recommendation and opined that both parties were equally fit to assume primary parenting responsibilities. In fact, the GAL indicated that he was impressed with respondent and explicitly retracted part of his report.

¶ 7 The trial court heard nine days of testimony over the course of seven months. Petitioner called 12 witnesses; respondent called 9; the GAL testified as the court's witness. A summary of the relevant evidence follows.

¶ 8 Petitioner has three sons not fathered by respondent—Lance, an adult, T.J., and B.J. Petitioner also has a grandson through Lance. T.J. and B.J. testified that petitioner is a good mother and that they have a loving relationship with J.T. Petitioner shares joint custody of T.J. and B.J. with her ex-husband, and J.T. would be with his brothers and mother Wednesday through Sunday every other week. T.J. and B.J. testified that petitioner plays lovingly with J.T. while respondent, on the other hand, is too competitive when he plays with J.T.

¶ 9 Dr. Evan Kvelland, J.T.'s former pediatrician, testified that he had no concerns about petitioner's parenting skills. Kvelland had no concerns about petitioner having a full-sized trampoline in the living room of her residence, J.T.'s toilet training regression at age five, or J.T.'s continued use of a pacifier at age five. The record indicates that Kvelland's office was in or near Geneseo where petitioner resided. Kvelland never interacted with respondent.

¶ 10 J.T.'s preschool teacher testified that petitioner is a loving mother and involved in J.T.'s school activities. However, J.T.'s teacher stated that he was very "touchy" with his friends and failed to respect others' personal space. Petitioner's friends and former employers gave testimony that she was a good person and good mother.

¶ 11 Petitioner testified on her own behalf. She earned an MBA in May 2013 and is also a certified massage therapist. She has worked part-time to accommodate J.T.'s schedule, earning an average of approximately $15,000 annually since 2013. She witnessed respondent drinking alcohol in front of J.T. and noted incidences where J.T. was injured while under respondent's care, including chipping his tooth while playing, and being bitten or "nipped" by respondent's sister's dog. Petitioner would send respondent cards that J.T. made at school and keep him apprised of events in J.T.'s life.

¶ 12 Respondent and others testified as to his parenting skills and relationship with J.T. J.T.'s nanny testified that respondent was a "hands-on" dad who took J.T. to soccer and hockey practices, as well as attended many preschool events. Because J.T. was enrolled in two preschools (one in each of his parents' locations), respondent would primarily attend activities at J.T.'s Riverside preschool. Respondent organized many play dates for J.T. She never heard respondent speak poorly of petitioner in the presence of J.T. Although the nanny indicated petitioner was a loving mother, she recounted an incident where petitioner became incensed when J.T. was without his pacifier for several days, even though he was managing without it. Petitioner would sometimes go into respondent's room and closet when she picked up J.T. Respondent eventually asked the nanny not to allow petitioner to go through the house anymore during pickup times.

¶ 13 Respondent's mother, who lives in Kansas City, Missouri, testified that she went on vacation with respondent and J.T. to Florida every year, and would see them in Chicago or Kansas City several times throughout the year. Respondent and J.T. built a fort together in the backyard and engaged in many father-son activities. Despite respondent's family being very

close, petitioner would seclude herself with J.T. at family events and talk poorly about respondent in front of J.T., even when the couple was still together.

¶ 14 Respondent's sister, Melinda, testified that she spent time with respondent and J.T. approximately six to eight times per year. Respondent would cook with J.T. and tell stories, which she believes has helped with J.T.'s vocabulary. Melinda also testified regarding specific events involving petitioner removing J.T. from a car seat while respondent was driving, and driving off with J.T. for hours during family gatherings, which she found strange. Melinda's dog nipped J.T. when J.T. accidentally sat on its tail—the bite did not break the skin, and J.T. was fine soon after. The chipped tooth occurred while J.T. was playing with other kids at a family gathering. He was running down a hill and fell. He did not cry, but respondent picked him up immediately and thereafter realized his tooth was chipped. J.T. received proper medical treatment for the injury.

¶ 15 Respondent's neighbor, Courtney, testified that her son is a classmate and friend of J.T's. She described respondent as an amazing dad who attends many preschool events that other parents cannot attend because they occur in the middle of the work day. She opined that respondent goes out of his way to show J.T. a great deal of love.

¶ 16 Respondent testified on his own behalf. He stated that he and J.T. would cook, play soccer, play board games, watch movies, read books, and tell stories together. They would also attend church together on Sundays. Petitioner had input in choosing respondent's house; the school district is rated in the top 100 by Newsweek. Despite having to travel to Geneseo from Riverside, respondent only missed two visitation periods while he and petitioner were separated, both because respondent had to travel abroad for work. Respondent is a grain broker who worked for a large bank prior to 2012. During his employment with the bank, respondent would

make well over $100,000 annually, sometimes as much as $600,000 based largely on commissions. After the bank cut its grain brokerage department in 2013, respondent and many others went to another institution, but have not done well in securing their past clients due to the lower reserves kept by the new institution. Since the job change, respondent's income has been lowered to approximately $30,000 to $60,000 annually.

¶ 17 Both parties presented ample testimony that they shared cards and moments of J.T.'s life with the other parent. From this evidence, the trial court noted that both parents clearly love J.T. The court found no evidence of abuse or any other reason to restrict parenting privileges. Ultimately, however, the court found that respondent would be more likely to serve J.T.'s best interests and facilitate a relationship between J.T. and petitioner. The court further ordered respondent to pay $8,000 of petitioner's attorney fees due to his financial situation and her inability to pay. We find no reversible error or abuse of discretion regarding any of the court's judgments.

¶ 18 ANALYSIS

¶ 19 I. The Custody Evaluation

¶ 20 Petitioner argues that there was no justification for the child custody evaluation. She points out that there was no issue of mental health raised in any of the custody petitions. Respondent, on the other hand, argues that the applicable statutes give trial courts broad discretion to appoint independent experts to collect information that will assist the court in making its determination. Further, respondent points out that the contentious and emotional nature of the litigation justified the court-ordered evaluation in this case.

¶ 21 Applicable at the time of the trial court's determination, section 604 of the Illinois Marriage & Dissolution of Marriage Act (Act) allowed courts to "seek the advice of professional

personnel, whether or not employed by the court on a regular basis." 750 ILCS 5/604(b) (West 2014). The statute also provided the court with discretion to allocate the fees between the parties based on their ability to pay. *Id.* Further, section 604.5 of the Act allowed parties to move for a custody evaluation, pay the evaluator's costs, and call the evaluator as a witness. 750 ILCS 5/604.5 (West 2014).

¶ 22 The determination to utilize a child custody evaluator under section 604 or 604.5 of the Act is within the broad discretion of the trial court and is reviewed only for abuse of that discretion. *In re Marriage of Iqbal & Khan*, 2014 IL App (2d) 131306, ¶ 43. The trial court abuses its discretion only where its ruling is arbitrary, fanciful, unreasonable, or where its ruling rests on an error of law. *Id.* Our supreme court determined that the purpose of section 604 of the Act was "to permit the court to make custodial and visitation decisions as informally and non-contentiously as possible, based on as much relevant information as can be secured, while preserving a fair hearing for all interested parties." *Johnston v. Weil*, 241 Ill. 2d 169, 180 (2011).

¶ 23 Here, the trial court heard petitioner's objections to respondent's motion and, nonetheless, determined that "continuance of the current custody arrangement will be detrimental to the child's emotional well being and that [petitioner alleges] she is the more 'compassionate' parent. This court will benefit from a custody and psychological examination of the parties." That determination is clearly within the court's discretion. Further, the court appointed a GAL to protect the interests of J.T. The record shows that the court sought to amass as much relevant information as possible in making this determination in a case where the parties were contentious, but also equally loving to their son. We see no abuse of discretion.

¶ 24 We also wish to address petitioner's arguments that Dr. Hynan's testimony was inadmissible under Supreme Court Rule 213(f)(3) (eff. Jan 1, 2007). Testimony and payment of

court-appointed custody evaluators was governed by section 604.5 of the Act at the time of the trial court's order—Hynan was not a controlled expert witness in this case, therefore Rule 213 does not apply. Further, petitioner's argument is not supported by any legal authority either relating to section 604.5 or any statute, case law, or legal doctrine as required by Supreme Court Rule 341(h)(7) (eff. July 1, 2008). Failure to comply with Rule 341 results in forfeiture of the issue. *See Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶¶ 80-82. Therefore, we will not consider the merits of this argument.

¶ 25 II. The Custody Determination

¶ 26 Petitioner argues that the trial court's custody determination was against the manifest weight of the evidence and showed an abuse of discretion. Specifically, petitioner took issue with the court's determination that respondent would be more likely to facilitate J.T.'s relationship with her due to evidence of petitioner's isolation with J.T., invasions of respondent's privacy, talking poorly of respondent around J.T., and other actions attempting to alienate respondent. Essentially, petitioner's brief argues that the trial court accorded more weight to respondent's evidence.

¶ 27 Respondent, unsurprisingly, argues that the nine days of evidence and testimony speaks for itself. Further, respondent points out that the court's determination fit not only the evidence presented to the court, but also the investigations and determinations of the court-appointed experts. Dr. Hynan recommended respondent be the primary custodial parent, while the GAL concluded after hearing the evidence that he could not make a recommendation due to both parents' apparent suitability.

¶ 28 Section 602.7 of the Act requires courts to allocate parenting time in accordance with the best interests of the child. 750 ILCS 5/602.7(a) (West 2016). The statute further requires trial

courts to evaluate 17 separate factors to determine the child's best interests. 750 ILCS 5/602.7(b) (West 2016).

¶ 29 The trial court has broad discretion on issues pertaining to custody, and its judgment is afforded great deference because of its superior position to judge the evidence and determine the best interests of the child. *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45. The reviewing court will not modify the trial court's custody determination unless its decision is against the manifest weight of the evidence and constitutes an abuse of discretion. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004). The evidence on appeal is reviewed in the light most favorable to the appellee. *Id.* at 516. If multiple inferences can be drawn from evidence, the reviewing court must accept the inferences that support the trial court's order. *Id.* Further, the reviewing court's deference to the trial court is greater than the weight afforded to court-appointed experts' opinions. See *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 53.

¶ 30 Here, the trial court heard nine days of testimony. It acknowledged that it was a close case involving two loving parents. The trial court's opinion meticulously considers each of the 17 statutory factors in coming to its conclusion, citing relevant evidence submitted during the hearings.

¶ 31 Turning to the manifest weight issue, the trial court concluded that it would be in J.T.'s best interests to attend school in Riverside and granted respondent the majority parenting time and sole decision-making responsibilities regarding J.T.'s education, health, extracurricular activities, and religion. The court preserved petitioner's right to access J.T.'s school and medical records, as well as granted weekend parenting time without restrictions, on weekends where J.T. could also be with his brothers.

¶ 32 Most of petitioner's argument focuses on the trial court's failure to accord enough weight to her evidence, and its alleged error in according weight to Dr. Hynan's testimony and recommendation. Looking at the record as a whole, we find no abuse of the trial court's discretion. The manifest weight of the evidence supports the trial court's decision.

¶ 33 III. Attorney Fees

¶ 34 Respondent argues that he is unable to afford the $8,000 in petitioner's attorney fees that the trial court ordered him to contribute. In addition to the parties' respective earnings discussed above, petitioner's brief pointed out that respondent's checking account received deposits in excess of $200,000 from early 2015 to early 2016. Respondent indicated that these sums were loans from family members to help with the litigation because of his job change and large decrease in compensation.

¶ 35 "The propriety of an award of attorney fees is dependent upon a showing by the party seeking them of an inability to pay and a demonstration of the ability of the other spouse to do so." *In re Marriage of Bussey*, 108 Ill. 2d 286, 299-300 (1985). An inability to pay does not mean destitution, however, and a party does not need to exhaust his or her entire estate to make such a demonstration. *In re Marriage of Vance*, 2016 IL App (3d) 150717, ¶ 61. We will not disturb a trial court's award of attorney fees absent an abuse of discretion. *Bussey*, 108 Ill. 2d at 299. We find none.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we affirm the judgments of the circuit court of Henry County.

¶ 38 Affirmed.