FIRST DIVISION
May 7, 2018

No. 1-17-2428

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re Marriage of:	)	Appeal from the
KAREN SAMHAT,	)	Circuit Court of
	)	Cook County.
Petitioner-Appellant,	)	
	)	
and	)	No. 13 D 5115
	)	
DAVID SAMHAT,	)	Honorable
	)	John T. Carr,
Respondent-Appellee.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Mikva concurred in the judgment.

ORDER

¶ 1 ***Held*:** We affirm the denial of the plenary order of protection sought by petitioner. The trial court did not err in vacating the August 22, 2017 order restricting respondent's parenting time.

¶ 2 The parties divorced in October 2013. The decree provided petitioner with custody of the parties' two minor children but allowed respondent parenting time during specified periods. In July 2017, petitioner sought to restrict respondent's parenting time. Petitioner obtained an emergency order of protection, which she successfully extended several times. At the same time

she also filed for a plenary order of protection. The trial court heard arguments for the plenary order of protection on September 8, 2017. After hearing testimony from both parties and respondent's ex-fiancé, the judge denied the plenary order of protection and vacated the order restricting respondent's parenting time. Petitioner then appealed.

¶ 3 Petitioner raises three issues before this court: (1) the court erred in vacating the August 22, 2017, order without conducting a plenary hearing, (2) the court failed to consider the best interest of the children, and (3) vacating the August 22 order was a manifest injustice that will have negative consequences.

¶ 4 For the reasons stated more fully below, we find no error with the proceedings below and affirm the trial court's order.

¶ 5 JURISDICTION

¶ 6 The trial court entered an order on September 8, 2017, denying all relief requested by petitioner and vacating the order of August 22, 2017. There were no more pending matters in the action after the court entered this order. On October 10, 2017 petitioner filed her notice of appeal.[1] Accordingly, this court has jurisdiction over this matter pursuant to article VI, section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 7 BACKGROUND

¶ 8 The parties were divorced on October 7, 2013. Two children were born during the course of the marriage. As part of the divorce, petitioner-appellant, Karen Samhat, was awarded the majority of the custody and parenting time. The agreement also provided appellee-respondent, David Samhat, opportunities to have parenting time with his children.

[1] October 9, 2017 was a court holiday.

¶ 9 On July 3, 2017, petitioner filed an *ex parte* emergency order of protection against respondent based on an allegation that respondent possessed child pornography. At the same time she filed for a two-year plenary order of protection. Both were filed in the domestic violence division. The *ex parte* emergency order of protection was heard and granted the same day. The order directed respondent to not make contact with either petitioner or his children. The order of protection was set to last until July 25, 2017.

¶ 10 On July 18, 2017, petitioner filed a motion to consolidate the domestic violence matter with the prior divorce proceeding. At the same time, petitioner also filed a motion to appoint a guardian *ad litem* to represent the best interest of the children. On July 25, the domestic violence matter was consolidated into the divorce proceeding. Additionally, petitioner's petition for a plenary order of protection was set for a hearing on September 8, 2017. Respondent brought a motion seeking a rehearing regarding the emergency order of protection and this was heard on August 10. At the August 10 hearing, the court revised the prior emergency order to allow respondent limited supervised visits with his children. The court also ordered the parties to undergo drug testing. Respondent's hair follicle test came back positive for cocaine.

¶ 11 On August 21, based in part on the positive drug test and the continuing allegation of child porn use, petitioner filed an emergency petition to restrict and/or suspend respondent's parenting time. The next day, after hearing argument on this petition, the trial court granted it. The order entered on August 22 essentially extended the prior revised order of protection put in place on August 10.

¶ 12 The trial court conducted a hearing on petitioner's plenary order of protection on September 8, 2017. At the onset of the hearing, counsel for petitioner indicated that she was withdrawing the petition for a plenary order of protection and wished to keep the August 22 order in place. Respondent's attorneys strenuously objected to such a proposal. After a great deal

of back and forth between all the attorneys and the court, the petitioner decided to proceed with her plenary order of protection. The court heard from three witnesses: petitioner, respondent, and Katelan Shirk (respondent's ex-fiancé). Petitioner testified that the basis of the emergency order of protection and the plenary order of protection came from information and pictures provided by Shirk at a June 25, 2017 meeting. While she expressed great concern for the minors' well being, she admitted the concern stemmed from the allegations relayed to her by Shirk. She admitted her children never told her they felt in danger or threatened while in respondent's care.

¶ 13 Shirk testified next. She testified that on June 7, she was using respondent's personal computer and came across ads for what she believed was an escort service. She relayed this information to petitioner while also telling petitioner the images "looked to be very young girls." Using the camera on her phone she took pictures of what she observed and these photos were entered into evidence.[2] She also found an e-mail from respondent to an escort service. The picture she took of this e-mail was also entered into evidence. On cross-examination, she admitted that the children did not have access to the laptop. She also admitted it was possible she brought up the photos on respondent's computer. She admitted she thought respondent was a "good guy," that even when their relationship ended she would still trust him alone with the children and that she never saw him harming his children. She also stated that respondent had never done drugs in front of the children and that she had never observed him viewing child pornography or engaging in any conduct with an individual under the age of 18. On redirect, she stated that drugs were present in the house.

¶ 14 Respondent testified last. He agreed with Shirk that his personal laptop was inaccessible to his children. He stated it was password protected, his children did not know the password and

[2] While these photos were entered into evidence, none of the exhibits entered into evidence during the hearing are part of the appellate record.

the laptop automatically locked after only 30 seconds of inactivity. He admitted he and Shirk viewed pornography. He recognized one of the pictures entered into evidence as being part of a text message Shirk had sent him. He denied any knowledge of the other picture.

¶ 15 After hearing the above testimony and evidence, the trial court concluded petitioner had failed to show respondent engaged in any "abuse, physical abuse, harassment, intimidation, interference with personal liberty, or willful deprivation" concerning his children. After viewing the two pictures, he acknowledged petitioner failed to establish either person was a minor, "I am not getting the – you know, I am not getting the child porn vibe." While there were accusations respondent engaged with or sought out prostitutes, respondent had not been arrested and "nobody has shown me that the kids had any contact with any of that." While acknowledging the positive cocaine test, the court concluded it had not been done in front of the children, had no effect on respondent's relationship with them, and did not constitute abuse. He did specifically warn respondent against continued usage. When petitioner's attorney objected and argued the court denied her an opportunity to fully examine the drug issue, the court stated that petitioner was free to bring another petition on the issue.

¶ 16 The court entered an order denying the plenary order of protection, vacating the August 22 order restricting respondent's parenting time, and denying the petition for a guardian *ad litem*. This resulted in the parties returning to the parental agreement contained in the divorce judgment. Petitioner timely filed her notice of appeal.

¶ 17 Before us, petitioner argues (1) the court erred in vacating the August 22, 2017 order without conducting a plenary hearing, (2) the court failed to consider the best interest of the children, and (3) vacating the August 22 order was a manifest injustice that will have negative consequences.

¶ 18 ANALYSIS

¶ 19 In her first issue, petitioner argues the trial court erred in vacating the order of August 22, 2017, without conducting a plenary hearing. She argues that no hearing was ever scheduled regarding her "emergency petition to restrict and/or suspend respondent's parenting time and/or the parenting time restrictions set forth in the August 22, 2017 Order." In support of her argument, petitioner cites to section 603.10(b), which provides,

> "[t]he court may modify an order restricting parental responsibilities if, after a hearing, the court finds by a preponderance of the evidence that a modification is in the child's best interests based on (i) a change of circumstances that occurred after the entry of an order restricting parental responsibilities; or (ii) conduct of which the court was previously unaware that seriously endangers the child." 750 ILCS 5/630.10(b) (West 2016).

She argues the September 8 hearing was insufficient because her attorney was told it was solely regarding the plenary order of protection and the court denied her an opportunity to sufficiently question respondent regarding his drug use.

¶ 20 We reject petitioner's argument the trial court failed to conduct a plenary hearing, or that it was required to hold two separate hearings. The record shows the trial court held a plenary hearing on September 8, 2017. After obtaining the *ex parte* order of protection, petitioner successfully extended it twice without a full hearing. Eventually, a hearing on the petition for a plenary order of protection was scheduled. At this hearing, petitioner sought to withdraw it and keep in place the August 22 order restricting respondent's parenting time. Respondent objected and the trial court rejected this move,

> "Let me tell you why I think that is a bogus argument because there is no doubt in my mind that when I said that we are going to have supervised visitation for that

> time, that was done until – that was – the purpose of it was to give him [respondent] some visitation *until the hearing, until I could have a full hearing on the order of protection.* And everybody knew that at the time." (Emphasis added).

Despite petitioner's protestations to this court concerning the sufficiency of the September 8 hearing, the transcripts shows the judge did hear testimony on both the child pornography and drug use accusation. After viewing the evidence, the court found the child porn allegations unsubstantiated. Shirk, the source of both allegations, denied respondent's drug usage put his children in danger. Moreover, the court specifically warned respondent against continued usage and cautioned that further allegations would be met with court action. At the end of the hearing, the judge explicitly told petitioner and her counsel that if they felt the need to re-raise the drug issue, they were free to file another petition and he would hear it. Petitioner took no further action and instead appealed the September 8 order. The trial court's action conformed to section 603.10(b) and it was not required to hold two separate hearings as petitioner now demands.

¶ 21 In her next issue, petitioner argues the trial court failed to consider the best interest of the children because it denied her an opportunity to fully elicit testimony from the witnesses regarding respondent's drug use.

¶ 22 Custody matters rest within the sound discretion of the trial court, and this court will not reverse a custody determination unless it is against the manifest weight of the evidence, manifestly unjust or a clear abuse of discretion. *In re Custody of G.L.*, 2017 IL App (1st) 163171, ¶ 24. "It is well established that a parent's use of drugs is relevant to the issue of custody only if the parent's conduct can be shown to affect his mental or physical health and his relationship with the child." *In re Custody of Gonzalez*, 204 Ill. App. 3d 28, 34 (1990) citing *In re Estate of Becton*, 130 Ill. App. 3d 763 (1985).

¶ 23 We find the decision of the trial court to vacate the August 22 order restricting respondent's parenting time and returning the parties to the original custody agreement set forth in the divorce judgment was not against the manifest weight of the evidence. The trial court heard from both petitioner and respondent's ex-fiancé, who was the source of petitioner's allegations against respondent. Petitioner presented her evidence concerning the allegations of child pornography and to a certain extent respondent's drug use. While petitioner presented the court with the allegedly pornographic photos, the ages of the individuals were unknown. After viewing them, the court found the claim unsubstantiated. The ex-fiancé testified respondent's conduct did not represent a risk of harm to his children. The trial court was aware of the positive drug test. During questioning regarding respondent's drug usage, the ex-fiancé did not believe the children were at any risk of harm from respondent's conduct. Petitioner acknowledged her children had never made any complaints to her regarding child pornography or drug use while they were in respondent's care. She admitted she had no personal knowledge to demonstrate the children were in immediate danger. After hearing the testimony and viewing the evidence, the court ultimately concluded, "I don't find under the evidence that has been presented that the kids are in any danger whatsoever."

¶ 24 Again, we note the trial court specifically told petitioner she was free to re-raise the drug allegations in a new petition and the court would consider it. Petitioner declined to file anything. Based on the September 8 hearing, the trial court's decision to vacate the August 22 order and restore the original custody agreement was not against the manifest weight of the evidence.

¶ 25 In her last issue, petitioner argues that "vacating the order of August 22 was a manifest injustice that will have harmful consequences." This is simply a rehashing of the previous two arguments. The trial court held a hearing on September 8 and heard testimony from petitioner, respondent, and his ex-fiancé. While petitioner may not have examined the issue to her complete

satisfaction, the trial court was aware of the positive drug test and it ultimately concluded the respondent's actions did not represent a danger to the children. The transcript demonstrates the trial court took both allegations seriously and was at all times concerned with the well-being of the minors. Based on this record, no manifest injustice occurred.

¶ 26 CONCLUSION

¶ 27 For the reasons stated above, the judgment appealed from is affirmed.

¶ 28 Affirmed.