2011 IL App. (1st) 111608-U

SECOND DIVISION
November 14, 2011

No. 1-11-1608

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF	)	Appeal from the
DAVID F. BAMBIC,	)	Circuit Court of
	)	Cook County
Petitioner-Appellant,	)	
	)	
v.	)	09 D 06743
	)	
CATHERINE M. WOOD,	)	Honorable
	)	David Haracz,
Respondent-Appellee.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

ORDER

Held: Trial court's marital dissolution judgment granting sole custody of children to mother was not against the manifest weight of the evidence where unrebutted trial evidence established a pattern of verbal and emotional abuse by father. Father's due process rights to be heard and to notice were not violated where record demonstrated that father had notice of trial and that father voluntarily absented himself from the courtroom in the middle of the trial and did not return.

¶1 Following a bench trial at which both parties proceeded *pro se*, the trial court granted sole custody of the parties' two children to respondent Catherine Wood. Petitioner David Bambic appeals, arguing that the trial court's judgment of sole custody for respondent was against the best interests of the children and that he was denied a fair trial. We affirm.

¶2 BACKGROUND

¶3 We initially note that our ability to review this case is hampered because of the incomplete and disorganized state of the record. The record on appeal is mostly limited to the common-law record, and there are no transcripts or other reports of proceedings from the trial. The record does contain a single transcript from a posttrial hearing on the subject of attorney fees and maintenance payments, but this hearing sheds little light on the issues on appeal. Additionally, the record is often out of chronological order and contains duplicative filings and exhibits of little relevance to the issues on appeal. As the appellant, it is respondent's burden to provide an adequate record of the proceedings in order for us to fully review his claims on appeal (*Altaf v. Hanover Square Condominium Association No. 1*, 188 Ill. App. 3d 533, 539 (1989)), so we must resolve any doubts that may arise due to the incompleteness of the record against him (*Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)).

¶4 Because there is no transcript, agreed statement of facts, or bystander's report from the trial, the following facts are taken from the trial court's written judgment of dissolution of marriage and documents that the trial court incorporated by reference into its judgment. See Ill. S. Ct. R. 323(a) (eff. Dec. 13, 2005) ("A report of proceedings may include *** a brief statement of the trial judge of the reasons for his decision"). The parties married in 1995 in Cook County and later had two children. Petitioner filed a petition for dissolution of marriage on July 17, 2009. At the time of the dissolution proceedings in April 2011, the children were 14 and 8 years old.

¶5 In December 2009, respondent petitioned the trial court for an emergency order of protection (OP), alleging various acts of emotional and verbal abuse by petitioner against respondent and the children. The trial court granted the emergency OP on December 1, 2009, and it was modified into an interim OP on December 15, 2009, pending completion of the

dissolution proceedings. The copy of the emergency order in the common-law record notes that this order is "without hearing and without prejudice," but does not explain why. (Later orders extending the OP, however, bear the stamp "RESPONDENT SERVED IN OPEN COURT.") The interim OP was extended several times over the next year and a half at various court hearings, although the children were later removed from the purview of the OP in order to allow for supervised visitation of the children by petitioner.

¶6 Respondent petitioned the trial court for a plenary OP for herself and the children on January 1, 2011, with an affidavit attached in support. The trial court later noted in its dissolution judgment order that respondent testified at trial to the facts contained in the affidavit, making the facts in the affidavit part of the trial record. In the seven-page affidavit, respondent attests that she is a licensed clinical social worker and drug and alcohol counselor, and that she works out of a private office in her home. Petitioner formerly worked as a maintenance worker at Argonne National Laboratory but was then unemployed, although it is unclear based on the entire record whether petitioner was actually unemployed or merely on disability leave during the dissolution proceedings. Respondent attested that petitioner had severe anger issues and had been recently diagnosed with "Adjustment Disorder with features of Depression and Anxiety."

¶7 In the affidavit (and later at trial), respondent attested to a number of instances of verbal and emotional abuse by petitioner in late 2010. We need only recount a few of the incidents for context. In one incident on December 25, 2010, petitioner drove the children from Joliet, where he lived, to Evanston, where respondent resided in the marital home. Respondent found the elder daughter standing in the snow with her belongings in front of a neighbor's house, crying and hysterical. The daughter told respondent that petitioner had made hostile and abusive statements to the children during the car ride, for example, " 'since the court said I beat you and

your psychopath mother, I might as well make it a reality;' 'after the divorce, since she works in a dangerous neighborhood, I will have your mother beaten within an inch of her life'; 'I will have her injected with HIV'; 'when she is worthless and you have to come to me, I will send you to foster care'; 'you are not my children.' " Respondent attested that she reported the incident to the police.

¶8 In another incident on December 22, 2010, petitioner stated in front of respondent and the children that he intended to quit his job. Petitioner stated that "he would rather go to jail that to pay child support," that "he wanted [respondent] to be in poverty and to live on the streets," that "he was going to make [respondent] lose [her] job and that [respondent and the children] would live in [their] car," and that "soon [respondent] won't have enough money and you [*i.e.*, the children] will have to live on the streets." Respondent also detailed a number of other, similar incidents in the affidavit, which she later recounted at trial.

¶9 The case proceeded to trial on April 29, 2011, at which the trial court heard evidence regarding both the dissolution proceedings and respondent's petition for a plenary OP. The trial, however, did not go smoothly. Without a transcript we do not know precisely what transpired, but the trial court summarized the proceedings in its judgment order as follows, which we reproduce at length for context:

> "On January 21, 2011, this matter was set for trial for the afternoon of April 29, 2011 at 1:30 p.m. The trial commenced at approximately 1:35 p.m. [Petitioner] repeatedly objected to this Court's jurisdiction and often refused to answer the Court's questions. As he has in almost every court appearance since representing himself,[1] [petitioner] appeared agitated and angry. He objected to

[1] From what we can tell from the record, petitioner appears to have had at least one and perhaps two separate attorneys at various points in case, but at trial he was unrepresented and proceeded *pro se*.

> any statement or question posed by [respondent] or the Children's Representative.[2] Over the initial hour of trial, the Court did elicit testimony from [p]etitioner as to his address at the time the action was filed, his current address, the date of his marriage and separation, the names and birthdates of his children, the grounds as set forth in his Petition for Dissolution, and his proposal for custody and distribution of personal property and marital debt. In addition, [petitioner] submitted documents to the Court as exhibits. At 2:45 p.m., [petitioner] requested for the second time that he be allowed a break from the proceedings. The Court instructed the parties to return to the courtroom at precisely 2:55 p.m. [Petitioner] was not present at 2:55 p.m. By 3:05 p.m. [petitioner] was still not present, so the Court began to take testimony from [respondent]. Five minutes later, at 3:10 p.m., [petitioner] returned, approached the bench and tossed a handwritten Motion for Voluntary Dismissal (which includes three pages of nonsensical attachments) toward the judge. [Petitioner] stormed out of the courtroom. He did not return.
>
> Over the next hour, the Court took testimony from [respondent], heard her answers to the Child Representative's questions, and heard argument from [respondent] and the Child Representative."

¶ 10 The trial court went on to find that petitioner's motion for voluntary dismissal was untimely and did not comply with section 2-1009 of the Code of Civil Procedure (735 ILCS 5/2-1009 (West 2010)). The trial court also found that it had jurisdiction over the parties. The trial court went on to note that, based on the exhibits that petitioner had submitted to the court,

[2] Although we do not have a transcript of the trial proceedings, we have reviewed the transcript from the posttrial hearing on attorney fees and maintenance payments. Petitioner's conduct during that hearing is consistent with the trial court's description of his behavior at trial.

petitioner was on sick leave from his job and under a doctor's care due to "adjustment disorder with symptoms of anxiety and depression due to work related stress." The trial court noted that it was unable to determine "whether [petitioner] applied for short term or long term disability, for unemployment insurance coverage, or whether he has any source of income." The trial court found that respondent made about $35,000 per year, and that she currently resided in the marital home (which was then in foreclosure) with the children. Finally, the trial court found that an OP was in effect at the time of trial.

¶11 Regarding custody, the trial court stated that it had considered the factors enumerated in section 602 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602 (West 2010)). The trial court stated that it considered that respondent was the children's primary caretaker; that respondent remained in the marital home in Evanston, close to the children's schools, friends, and activities, while petitioner lived in Joliet; and that respondent credibly testified to the events alleged in the OP affidavit. Based on these facts, the trial court granted sole custody of the children to respondent. Further, the trial court ordered that petitioner's visitation with the children be supervised until further order of court, finding that unsupervised visitation "would endanger seriously the children's mental and emotional health at this time." Finally, regarding the OP the trial court found that, based on respondent's testimony, "it has credibly been shown that there have been violations of the Domestic Violence Act[,] [t]hat abuse has occurred as defined by that Act[,] [and] [t]hat without this Court's intervention that abuse might continue."

¶12 The trial court incorporated its findings into a custody and dissolution order, and it issued a plenary OP on the same day as the trial protecting respondent and the children. Petitioner later filed a posttrial motion pursuant to section 2-1203 of the Code of Civil Procedure (735 ILCS

5/2-1203 (West 2010)), which included a 20-page "memorandum of fact" that essentially denied all of respondent's allegations of abuse and accused her of drug abuse and theft of narcotics from a neighbor. The trial court denied the motion, and petitioner now appeals.

¶13 ANALYSIS

¶14 Petitioner's primary contention on appeal appears to be that the trial court erred by granting sole custody of the children to respondent. Petitioner's brief on appeal is somewhat rambling and attacks many different actions of the trial court, often with little or no citation to the record, and petitioner rarely provides relevant case law in support of his contentions. See Ill. S. Ct. R. 341(h) (eff. July 1, 2004) (requiring argument to be supported by citations to the record and authority). Petitioner's core allegations, however, appear to be that the trial court's grant of sole custody for respondent was against the best interests of the children. The child representative and respondent have both filed separate response briefs in this case urging us to affirm the trial court's ruling.

¶15 "In child-custody cases, there is a strong and compelling presumption in favor of the result reached by the trial court, because in determining the child's best interests the trial court is in a superior position to observe and evaluate the witnesses' demeanor." *Connor v. Velinda C.*, 356 Ill. App. 3d 315, 323 (2005). We will not reverse the trial court's custody determination unless it is against the manifest weight of the evidence, which only occurs "when a finding opposite to that reached by the trial court is clearly evident." *Id.* at 323-24. Section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2010)) requires the trial court to consider 10 relevant factors. Although section 602 also requires the trial court to "presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the

child," the section also notes that there is "no presumption in favor of or against joint custody" and that a finding of ongoing abuse as defined under the Illinois Domestic Violence Act of 1986 (750 ILCS 60/103 (West 2010)) may require the court to limit the involvement of one parent in the custody of the children. 750 ILCS 5/602(c) (West 2010).

¶16 As petitioner makes abundantly clear in his brief and as the trial court noted in its order, in this case the only evidence presented at trial regarding the best interests of the children came through the testimony of respondent. Although petitioner was present for the beginning of the trial, he voluntarily left the courtroom midway through the proceedings and did not return. Respondent's unrebutted testimony presented a history of abusive behavior against respondent and the children by petitioner spanning at least several months and possibly longer. See 750 ILCS 5/602(a)(6) (West 2010) (requiring the trial court to consider "the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person"). Additionally, both respondent's testimony and the exhibits submitted by petitioner indicated that he was unemployed or on sick leave due to mental illness or instability. See 750 ILCS 5/602(a)(5) (West 2010) (requiring the trial court to consider "the mental and physical health of all individuals involved"). The trial court also noted that respondent's residence was located near the children's schools, doctors, and extracurricular activities in Evanston, while petitioner resided in Joliet. See 750 ILCS 5/602(a)(4) (West 2010) (requiring the trial court to consider "the child's adjustment to his home, school and community"). Finally and perhaps most importantly, the trial court expressly found that respondent's testimony demonstrated that petitioner had committed acts of abuse as defined under the Illinois Domestic Violence Act, indicating that petitioner's involvement with the children was detrimental to their best interest. See 750 ILCS 5/602(c) (West 2010).

¶17 Based on all of these unrebutted facts adduced at trial, it is not surprising that the trial court granted sole custody to respondent and allowed petitioner only supervised visitation with the children. No evidence was presented at trial to counter respondent's testimony, and without any evidence to the contrary we cannot say that the trial court's custody judgment was against the manifest weight of the evidence. There is accordingly no error in the custody judgment.

¶18 Petitioner makes much of the fact that the only evidence presented was respondent's testimony. However, petitioner absented himself from the trial and failed to submit any evidence to the trial court at that time. In fact, petitioner did not submit any evidence at all until his section 2-1203 motion, in which he attempted to present an extensive rebuttal and introduce his own evidence alleging drug abuse and theft by respondent. Interestingly, this motion included an (admittedly perfunctory) affidavit from a neighbor who attested that she had witnessed respondent stealing prescription medication and had heard respondent admit that she had a drug problem. Had defendant presented this witness at trial, then the trial court could have weighed this testimony against respondent's own testimony. Petitioner, however, failed to present this witness at trial or to testify to these matters himself. Regardless of the probative value of the allegations contained in respondent's section 2-1203 motion, petitioner failed to present them at trial when he was given the opportunity to do so. Because this evidence was not presented at trial, it has no bearing on our review of the trial court's custody judgment.

¶19 This brings us to petitioner's second main contention on appeal. Petitioner argues that his due process rights were violated because, among other things, (1) the trial court improperly extended the interim OP beyond 30 days in violation of section 220 of the Illinois Domestic Violence Act (750 ILCS 60/220 (West 2010)); (2) someone (it is not clear who) failed to provide petitioner, prior to trial, with a copy of a letter that his daughter wrote for the trial court,

allegedly in violation of Illinois Supreme Court Rule 213(f) (eff. Jan. 1, 2007); (3) the children's representative failed to provide petitioner with a pretrial memorandum; (4) the trial court failed to conduct a case management conference and set a discovery schedule and trial date; (5) the trial court denied petitioner a continuance on the date of trial so that he could obtain a copy of his file from his former attorney and file additional motions; (6) the children's representative failed to inform the court that an investigation by the Department of Children and Family Services (DCFS) had investigated respondent's allegations of abuse and found them to be unfounded, resulting in a fraud on the court; and (7) the trial court admitted hearsay statements of petitioner's daughter to be admitted at trial as evidence of abuse.

¶20 Petitioner's common refrain in all of these complaints is that his due process rights were violated at trial because he was denied the right to notice and the right to be heard. Petitioner presents little if any authority to support his arguments, and he at times conflates the rights of criminal defendants under the sixth amendment to the U.S. Constitution (*e.g.*, the right of a criminal defendant to present a defense) with due process protections under the fifth amendment to the U.S. Constitution and article I, section 2 of the Illinois Constitution of 1970. Even so, petitioner is correct that due process demands "an orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case." *Kazubowski v. Kazubowski*, 45 Ill. 2d 405, 417-18 (1970).

¶21 The problem with petitioner's argument is that he was in fact given the opportunity to be heard at trial, yet he voluntarily chose not to take part in the proceedings. Under such circumstances, petitioner's right to be heard was not violated. *Cf. id.* at 417 ("Claims of violation of the guaranty of due process are repelled by the record which shows that defendant

failed to appear and failed to avail himself of the opportunity to testify concerning his circumstances and his ability to pay."). To the extent that petitioner claims that he had no notice that the trial on the dissolution petitioner and OP would be on April 29, 2011, we can find no support for this contention in the record. Indeed, petitioner's claim is rebutted by the trial court's judgment order, which notes that the court had reserved that date for trial four months earlier. The common-law record also discloses that this case had been pending for nearly two years by the time of trial and that there had been numerous status hearings during that time. Under these circumstances, petitioner's claim that he was given no notice rings hollow.

¶22 Finally, the remainder of petitioner's claims, although couched as due process violations, are not due process claims at all but are merely evidentiary or procedural objections that should have been addressed at or before the time of trial. Based on the limited record before us, there is no indication that petitioner raised these issues before the trial court during trial. They are accordingly forfeit and we need not consider them. See *Thornton v. Garcini*, 237 Ill. 2d 100, 106 (2009) (review of an issue is forfeit unless the appellant both "object[ed] to an error at trial and include[ed] it in a written posttrial motion"). Even if we were to overlook petitioner's forfeiture, however, the record is silent on these issues and the trial court did not mention them in its judgment order. It was petitioner's burden to present an adequate record for us to review his claims of error (*Altaf*, 188 Ill. App. 3d at 539), and absent a sufficient record we must presume that the trial court's rulings on these matters "had a sufficient factual basis and *** conform[ed] with the law" (*In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009)).

¶23 CONCLUSION

¶24 The trial court's decision to grant sole custody to respondent was not against the manifest weight of the evidence. Given that the record demonstrates that petitioner had notice of the proceedings and the opportunity to be heard, petitioner's right to due process was satisfied.

¶25 Affirmed.