2014 IL App (1st) 133228-U

FOURTH DIVISION
March 31, 2014

No. 1-13-3228 and No. 1-13-3668 (consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN M. O.,	)	Appeal from the
	)	Circuit Court of
Petitioner/Counter Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 08 D 1083
	)	
HEATHER S., a/k/a HEATHER S.O.,	)	
	)	Honorable
	)	Naomi H. Schuster,
Respondent/Counter Petitioner-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: In Appeal No. 1-13-3228, we affirm the circuit court's denial of appellant's section 2-1401 petition to vacate several prior orders, pursuant to the principles enunciated in *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391–92 (1984) because appellant failed to provide this court with an adequate record. In Appeal No. 1-13-3668, we affirm the circuit court's order denying appellant's motion to reconsider its order awarding temporary possession of the minor to the noncustodial parent.

¶ 2 Respondent/counter petitioner, Heather S. (Heather), has filed, *pro se*, seven appeals in this matter. This is a consolidated appeal of two of those appeals and is on an accelerated docket because it involves a question of child custody, according to Heather. Of the five other appeals, two were dismissed at Heather's request, one was dismissed by this court for want of

prosecution, and two are pending. In appeal no. 1-13-3228, Heather filed a notice of appeal on October 4, 2013, from the trial court's October 2, 2013 order denying her motion to vacate various court orders, pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). In appeal no. 1-13-3668, Heather filed a notice of appeal on November 12, 2013, from the trial court's November 1, 2013 order denying her motion to vacate an order of indirect civil contempt and subsequent orders. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 Petitioner, John M. O. (John), did not file a response brief. However, although no appellee's brief has been filed in this case, we may address the merits of this appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp*., 63 Ill. 2d 128, 133 (1976) (in the absence of an appellee's brief, a reviewing court should address an appeal on the merits where the record is simple and the claimed errors are such that the court may easily decide the issues raised by the appellant). The relevant facts are taken from Heather's brief and the record in this consolidated appeal, as well as the record in one of Heather's other *pro se* appeals (No. 1-13-0434) which we allowed Heather to use as a supplemental record in this appeal. Although we cannot say "the record is simple and the claimed errors are such that the court may easily decide the issues raised by the appellant," we will not dismiss this appeal but only because it purportedly involves issues of child custody.

¶ 4 At the outset, we note that Heather's brief fails to adhere to the requirements set forth in Illinois Supreme Court Rule 341. Ill. S. Ct. R. 341 (eff. Feb. 6, 2013). We could justifiably strike Heather's brief, or dismiss this appeal, based upon her inadequate brief and her violations of Rule 341. Rule 341 provides that all briefs should contain a statement of facts section "which shall contain the facts necessary to an understanding of the case, stated accurately and fairly

without argument or comment, with appropriate reference to the pages of the record on appeal." Ill. S. Ct. R. 341(h)(6). Heather's Statement of Facts is incomplete and contains argument. Although an appellant may present evidence favorable to her position in the statement of facts, she cannot do so at the cost of this court's understanding of the case. See *In re R.G.*, 165 Ill. App. 3d 112, 115 (1988); *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 149 Ill. App. 3d 53, 57 (1986). A *pro se* litigant such as Heather is not entitled to more lenient treatment than attorneys. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 78. "In Illinois, parties choosing to represent themselves without a lawyer must comply with the same rules and are held to the same standards as licensed attorneys." *Id.* Rule 341 further requires that the brief contain an argument "which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). "It is axiomatic that [a] reviewing court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments [citations], and that failure to develop an argument results in waiver. [Citation.]" (Internal quotation marks omitted.) *Sexton v. City of Chicago*, 2012 IL App (1st) 100010, ¶ 79. Heather's brief does not comply with these requirements. Nonetheless, a reviewing court has the choice to review the merits, even in light of multiple Rule 341 mistakes. *Id.*, ¶ 19 (citing *Estate of Jackson*, 354 Ill. App. 3d 616, 620 (2004)). We are mindful that Heather, a nonattorney, has expended a tremendous amount of time and effort in trying to explain her position and her version of what has transpired below. Nonetheless, due to the violations of Rule 341 noted above, it is only possible for this court to discern the actual events that have transpired in this matter over the past several years and understand the issues in this appeal by painstakingly combing the record. We have done so. We note that Heather *has* provided a proper table of contents to the record in the appendix to her

brief, which has aided this court in identifying those portions of the record that are relevant to the issues she now raises. Therefore, in our discretion, we will review this appeal but only because it purportedly involves an issue of child custody. We include a very detailed procedural background because it will provide this court with reference in the future when we address the additional related *pro se* appeals that Heather has filed in this court.

¶ 5 BACKGROUND

¶ 6 John and Heather, now divorced, were married on December 18, 2007, in Chicago. The parties separated, approximately one month later, in January 2008. On February 5, 2008, John filed a petition for declaration of invalidity of marriage. He alleged that he was under extreme duress at the time of the marriage as a result of Heather telling him, in late October 2007, that she was pregnant with his child and stating, on or about December 18, 2007, that she would terminate the pregnancy unless he married her. He alleged he did not believe in abortion and wanted to save the life of his unborn fetus. Heather filed her response to the petition in May 2008. On May 20, 2008, John told Heather that he wanted her to place the child for adoption or, alternatively, he wanted her to have sole custody because he did not wish to raise the child with her. On July 7, 2008, John was ordered to pay Heather temporary support and also pay her health insurance premiums. On August 26, 2008, Heather gave birth to a child. A DNA test confirmed it was John's child.

¶ 7 On May 10, 2010, the court appointed a child representative and ordered each party to pay 50% of his retainer fee ($3,500 each). On August 26, 2010, the child representative filed a petition for indirect civil contempt against Heather for failure to comply with the court order. On September 20, 2010, the court issued against Heather a rule to show cause why she should not be held in indirect civil contempt for failure to pay the child representative's retainer. On December

22, 2010, the court ordered Heather to pay $3,070 in fees and continued the matter pending return of a rule against Heather for her non-payment of the $3,500 retainer fee. The hearing was continued from time to time and eventually was heard with notice to Heather.

¶ 8 On July 22, 2011, a judgment of dissolution was entered which incorporated the parties' written marital settlement agreement and written agreed custody judgment. The order also stated: "The parties stipulate to certain facts as laid out in 'Rider A,' attached under seal hereto and incorporated into this agreement." In accordance with the terms and provisions of the agreed custody judgment entered into between the parties, Heather was awarded sole custody of the parties' minor child. John was granted visitation rights. The court also entered a separate order on July 22, 2011, ordering that the child's name be changed from E.S. to E.S.O. which added John's surname.

¶ 9 On July 26, 2011, the hearing on the rule to show cause against Heather took place. Heather appeared individually and through counsel. It was undisputed that Heather had not paid all of the fees that she previously had been ordered to pay. At the time of the hearing, the child representative was owed a total of $6,860 which the court found to be "reasonable, necessary and quite conservative given the nature and length of these proceedings, [Heather's] numerous changes in attorneys, and unfounded allegations brought by [Heather] which precipitated the vast majority of the litigation." The court ordered John to pay $3,860, and Heather to pay $3,000. The court found Heather's testimony that she could not afford to pay the child representative's fees was "not credible," "completely undocumented," and "unsubstantiated." The court found that Heather had the ability to pay and further found she had dissipated assets to evade paying the child representative's fees. The court also found that Heather's failure to comply with the court order was "willful and contumacious and without substantial justification." The court

further found that Heather's conduct was "designed to defeat and impair the [child representative's] rights *** and impeded the Court in the administration of justice." The court found Heather to be in indirect civil contempt and ordered her committed to the Cook County jail until she purged her contempt. After the full hearing and ruling on the issue of contempt, the court granted the oral motion of Heather's counsel to withdraw, with Heather's consent.

¶ 10 On August 9, 2011, Heather filed two emergency motions pertaining to the July 22, 2011 order for the minor child's name change: one to stay execution and another to modify, vacate or reconsider. Heather argued, among other things, that "at no time was a petition filed asking the court to change the minor child's name." Heather has not asserted in her brief that she filed any motion regarding the July 22, 2011order holding her in contempt for not paying the fees owed to the child representative. However, Heather asserts in her brief, without citation to the record, that "the matters" were continued for months without the child representative appearing or filing any response. Heather filed two appeals (No. 1-11-2392 and 1-11-3717) requesting this court to vacate the trial court's orders of July 22, 2011. On June 20, 2012, she filed a motions to dismiss both appeals, apparently to pursue a motion to vacate in the trial court, under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). We granted her motions to dismiss both appeals.

¶ 11 The record contains several other motions that were filed in the trial court which Heather does not discuss in her brief, including Heather's emergency motions and Heather's motions to vacate various orders. For example, on December 19, 2011, Heather filed an "emergency" motion to modify visitation which the court denied on January 3, 2012, after finding no "emergency" existed, and that Heather had "not met her burden to modify custody within 2 years of the original custody order." Heather also ignores the court's findings made on December 22,

2011, denying her request for a two-year plenary order of protection (to which John would later refer in an emergency motion filed on October 18, 2012). According to the transcript of those proceedings, the court stated:

> "The Court also made certain findings and has a clear history of this case that since this child's birth and within three months, the mother has done everything to drive a wedge between the relationship of the child and the father and that this is one more wedge that she unilaterally imposed. This is a sentiment throughout the transcripts and throughout the proceedings in this case dating back to 2008. [T]he very same facts *** [Heather] has testified to are the very same facts that I heard at the time that I ruled. They are based on mere fears that it would complicate her life, not the child's. *** The Court denies the order of protection. The Court finds that [Heather] has not proven by a preponderance of the evidence that abuse occurred within the meaning of the Illinois Domestic Violence Act or put on sufficient proof that she or her children or her pets were threatened. [Heather] *is not credible in her allegations*. (Emphasis added.) The Court's observations are that she rambled instances [*sic*], mostly extremely remote in time and in vague generalities and seemed to be making up facts as she went along. It is clear from the history of this case and the Court's conducting of prior proceedings involving these parties that the primary purpose in seeking the order of protection was not present abuse but to stop visitation and to undo the agreement that [Heather] made with [John] in July 2011." *** Further, based on the evidence, the Court finds that [Heather's] allegations were based on mere fears. They were calculated and thematic based on the pattern in this case and

> paranoia of sorts that existed from virtually the day the child was born, past acts that she knew fully well of before entering into the custody judgment. Indeed, discussions were had in open court between counsel and the child representative and the parties about fears that [Heather] would continue to make unfounded abuse allegations against [John]. Notwithstanding, [John] has fought for many years to try to develop a relationship with his [child]. The Court again is very troubled that an emergency order of protection was used in this case as a sword and not a shield. *** [T]he Court finds that [John] was forthright and believable and answered the questions truthfully even when it did not necessarily help his case. *** *There is no evidence that [John's] conduct caused any harm whatsoever to [Heather], the children, or anyone else in this order or that he precipitated or perpetuated or caused [the child's] alleged medical conditions to be exacerbated*. (Emphasis added.) *** The Court finds that this petition for order of protection was brought as an attempt to undo the agreed-upon parenting agreement and to continue to keep [John] away from [the child] as was done *** virtually since the time of his birth."

¶ 12 The record contains a court order dated January 26, 2012, striking John's "2/10/2011 motion," striking the July 26, 2011 order of contempt against Heather, and taking the matter off the trial court's call. Heather refers to, but does not elaborate on, this order in her statement of facts.

¶ 13 On January 30, 2012, John filed a "Petition For Rule To Show Cause For Indirect Civil Contempt & Petition To Modify Visitation And Schedule Make-Up Visitation Instanter." Among other things, John argued that Heather had "consistently attempted to frustrate John's

relationship with his son through unfounded DCFS allegations, ex parte Emergency Orders For Protection which were subsequently terminated, and even as recently as the January 3, 2012 court date she was denied in her attempt to terminate John's overnight parenting time/visitation." In support of this argument, John attached two exhibits. One was the court order of January 3, 2012. The other was "Rider A" to the judgment of dissolution. As noted earlier, the judgment of dissolution provided: "The parties stipulate to certain facts as laid out in 'Rider A,' *attached under seal hereto* and incorporated into this agreement." (Emphasis added.) The record on appeal contains at least two copies of Rider A, unsealed. Without addressing the detailed facts, we note that it evinces that the parties stipulated that both DCFS investigations were "closed as unfounded" and that Heather had "voluntarily dismissed" her *ex parte* emergency order of protection against John and that no evidentiary hearing had taken place to test her allegations.

¶ 14 On February 10, 2012, the court issued a rule to show cause against Heather. On March 7, 2012, Heather filed a "Rule to Show Cause/Petition for Adjudication of Criminal Contempt" against John and his counsel for using − in unsealed motions of public record − Rider A which the court had ordered to be filed under seal.

¶ 15 On March 15, 2012, the trial court held a hearing on John's petition and considered Heather's affirmative defenses that John had not followed the party's judgment with regard to the minor child's care and safety, that John failed to communicate with her and follow medical directives, and that John was oblivious to, or not concerned with, the minor child's medical needs. The court found that these were not affirmative matters. The court stated that, since it had already issued the rule based on the denial of visitation pursuant to the judgment, the burden shifted to Heather to show cause why she should not be held in indirect civil contempt. The court heard testimony from Heather, who appeared *pro se*, and John, who was represented by

counsel. John testified that he was aware of the child's medical condition and had spoken to the neurologist who had done EEG (electroencephalogram) screening. John also testified regarding the child's medications. He also testified that he had never observed the child having a seizure while with him, but that he would recognize it based upon his Internet research (including "YouTube) which Heather had suggested. Heather called four witnesses. The first witness was Dr. Suzanne Dakil, a child abuse pediatrician. The next two witnesses were Jean Dietsch, a neighbor who had specialized training and knowledge with seizure disorders, and Michelle Wick, Heather's friend. Both Dietsch and Wick had taken care of the parties' child and had also dropped the child off with John for his scheduled visitation. Heather's fourth witness was a court-appointed supervisor for John, Mr. Al Shaken. Mr. Shaken testified that he is Heather's neighbor and they "watch out for each other." He testified that he had witnessed John shake the child forcefully. He also testified that neither DCFS nor police officers had contacted him regarding this 2009 event. Mr. Shaken further testified that he had not supervised any visits since July 2011.

¶ 16 After the hearing, the court stated that the only testimony it found credible was that of Dr. Dakil, and only to the extent that she testified about the two types of medications that had to be administered to the child. The trial court found both Dietsch and Wick not credible. The court also found that the testimony regarding the past abuse (which allegedly had occurred in 2009 and 2010), was irrelevant to the issue of Heather's more recent failure to provide visitation according to the 2011 court order. The court opined that Heather seemed "consumed and obsessed" with her son's epileptic seizures. Although the court, acknowledging she was the child's mother, did not fault her, the court also explained that John was not a "bad father" just because he was not as "obsessive" about the child's condition as Heather. The court found

Heather to be in indirect civil contempt. The court entered a written order stating that Heather's failure to abide by the court's July 22, 2011 judgment with regard to John's visitation time was "willful and contumacious of the Court and without good cause." The court also ordered that, in order to purge the contempt finding, Heather must produce the parties' child for visitation per the July 22, 2011 order and granted John four additional "make-up" weekend visitation periods. The court also discussed setting a briefing schedule on Heather's petition for a rule to show cause against John and his attorneys for using, in *his* petition, the document that had been filed under seal (Rider "A").

¶ 17 On April 20, 2012, after a hearing, the court entered an order setting the visitation schedule for the summer. The court further ordered that Heather would purge her contempt by complying with a make-up visitation schedule set by the court. During the hearing, Heather had argued that, in order for the child to receive the state services for his developmental issues, the child had to attend school in the summer during John's scheduled visitation time. The court ordered Heather to provide proof of this necessity "prior to the first summer vacation date scheduled or by the next court date, whichever is first." The court further ordered her not to schedule any appointments or conflicts during John's parenting time. The court also set a briefing schedule and a July 30, 2012 hearing date on John's petition for attorney fees, Heather's petition for rule to show cause, and John's motion to vacate Heather's petition against his attorney.

¶ 18 On July 30, 2012, Heather failed to appear for the hearing that had been set by the court on April 20, 2012, with both parties present. Heather asserts on appeal that she was not present because the parties' child was "in the Pediatric Intensive Care Unit related to his epilepsy." As will be discussed further below, Heather would later claim in a motion to vacate, and in this

appeal, that she had contacted both John's attorney and the judge's chambers to inform them of this. However, the court order merely states that Heather failed to appear. *More importantly, the record contains no transcript of, nor a bystander's report regarding, the July 30, 2012 proceedings.*

¶ 19 Also filed, and heard, on July 30, 2012, was John's emergency "Second Petition For Rule To Show Cause For Indirect Civil Contempt & Motion To Modify Previous Contempt Purge Ordered Against Respondent Heather " which he had filed on March 15, 2012. The notice of motion indicates it was sent to Heather by email as well as first-class mail. John also filed an affidavit in support of the motion stating that on the "weekend beginning on Friday, July 20, 2012, [Heather] denied [him] the entire weekend of parenting time with [their] son" and that she did so while she was "currently under this Court's contempt of court finding of March 15, 2012 with said contempt purge requiring [her] to produce [the parties' child] for John's parenting time." John attached his first petition (filed on January 30, 2012), and the court orders of March 15, 2012 and April 20, 2012.

¶ 20 In this certified petition, John noted that the parties' agreed custody judgment stated that the parents understood "that caring for [the child] when he is sick or experiencing minor health issues is a part of the parenting process and that such minor health matters will not interrupt with parent's scheduled parenting time." The parties' agreement further provided that "[i]n the event that Heather claims that [the child] is too sick for John to exercise his parenting time, she shall provide medical proof, such as a doctor's note indicating that [the child] is too sick to leave his home and be cared for by John PRIOR TO (emphasis in original) John's parenting time." John stated that his brother had flown in from Ireland on June 15, 2012, intending to spend time with the parties' child during John's scheduled parenting time but that Heather had "texted John that,

'[the child] will not be attending visitation until we can resolve issues related to his medical care.'" After John filed a police report, Heather turned over the child at 5:00 p.m. on June 16, 2012.

¶ 21 John further stated that his sister had flown in from Ireland on July 18, 2012, intending to spend time with the parties' child during John's scheduled parenting time but that Heather "texted John just prior to 6:00 p.m. that she was running late to drop off the minor child." John stated that "[a]t 6:15 p.m., [Heather] texted John stating that the minor child was not well enough to attend visitation." John filed a police report, but Heather took the child to the hospital. John stated that Heather has not provided "any medical proof to John prior to or after the scheduled visitation time regarding any medical concern" (emphasis in original) of the child. John additionally noted that Heather had refused to let the child visit John and his sister on July 22, 2012, and stated that the child's "discharge from the hospital required [the child] to remain in [Heather's] care." John again noted that Heather still did not provide any medical evidence to John. John also noted that, on July 24, 2012, Heather notified him via text that she "would not be complying with the Court ordered visitation until the doctor 'lifts medical restrictions.' "

¶ 22 John stated "[t]o date, [Heather] has not provided any medical documentation stating any change in the minor child's condition or medical restrictions." John noted that, when the parties had worked out the order for summer vacation and make-up visitation on April 20, 2012, Heather was "fully aware that John's family was planning to visit this summer." John asserted that Heather "continues to use wholly baseless excuses related to [the child's] medical condition as a red herring to deny John his parenting time and also to manipulate law enforcement personnel." John also contended that Heather had "consistently attempted to frustrate John's relationship with his [child] through unfounded DCFS allegations, ex parte Emergency Orders

for Protection which were subsequently terminated, and denying visitation with the child, for which she currently remains in indirect contempt of court."

¶ 23 On July 30, 2012, the trial court entered an order against Heather in the amount of $11,100 as reasonable attorney fees in favor of John "stemming from the 3/15/12 contempt finding." The court struck and dismissed Heather's March 7, 2012 petition for a rule to show cause. The court modified its previous purge conditions contained in the March 15, 2012 order, and ordered Heather to turn over the parties' child to John immediately and that "temporary possession" of the child "shall remain with John *** pending further order of the court."

¶ 24 On August 1, 2012, Heather filed an emergency motion to vacate the July 30, 2012 order, pursuant to section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2010)). Heather asserted that all orders stemming from the July 22, 2011 judgment were "awaiting trial" because she had petitioned the court to vacate all orders. She asserted that John had filed the emergency petition on July 30, 2012, "without notice" to her. She reiterated, several times, her claims as to John's "medical neglect" of the child. She included several assertions regarding the child's health issues. She stated that, at the time of the July 30, 2012 "*ex parte*" hearing, she was at the hospital with the child and had contacted John, his attorney, and the judge's chambers. She argued that there was no basis for the "emergency change in custody." Heather states the matter was set for hearing on August 30, 2012.

¶ 25 On August 21, 2012, Heather filed an emergency order of protection. On appeal, she states that she did so "to make sure the child had access to his epilepsy medication and the proper medical history was provided to any caregivers." The court entered an order on the same date stating that Heather "presented insufficient evidence of an emergency" and continued the petition for hearing on August 30, 2012, after service of process and notice upon John.

¶ 26 On August 24, 2012, John filed his response to Heather's emergency motion to vacate the July 30, 2012 order (that she had filed on August 1, 2012). Among other things, John stated that "although no notice is required for an emergency petition, [Heather] had actual notice of John's emergency motion via U.S. Mail and an email from John's attorney to [Heather]." John noted that Heather had acknowledged receipt of the emergency motion in a responsive email, which John attached to his response. John also raised several affirmative matters. He described the times Heather took the child to the emergency room and asserted that Heather's taking the child to the emergency room "under false pretenses like [those he described] to avoid visitation, contempt of court hearings, and further to greatly burden the financial support of [the child] is abusive and shows that [Heather] is not stable enough to parent our child." John also noted the court order of July 30, 2012 stating that "temporary possession of [the child] shall remain with John *** pending further order of the court." John conceded that Heather "currently has no visitation rights." John stated that Heather had appeared at the child's daycare facility on August 16, 2012, and August 17, 2012, in an attempt to remove the child and told the daycare personnel that she was entitled to remove the child and stated that she had full custody. On August 17, 2012, the police arrived at the daycare. After the police looked at both the original July 22, 2011 Agreed Custody Judgment (which granted Heather sole custody and granted John visitation rights) and the July 30, 2012 court order (granting John temporary possession until further order of the court), they sent the child home with John. John requested that the court deny Heather any visitation with the child or, alternatively, allow only supervised visitation. Also, on August 24, 2012, John filed a petition to terminate child support. John stated that since the child had been in his possession, he had assumed all of the child's costs of living. John further stated that, due to Heather taking the child to the hospital (on July 20, 2012 and July 30, 2012) "enormous hospital

bills have been incurred" for which he would likely face financial responsibility. Based on this change of circumstances, he requested his child support obligation be terminated. On appeal, Heather argues that this shows that John and his counsel "had some indication that despite Heather retaining sole custody as a matter of law, the intention was that the child would not be returned to Heather's care."

¶ 27 On August 27, 2012, Heather filed a verified petition for rule to show cause against John as to why he should not be held in indirect civil contempt and criminal contempt of court. Heather noted that the parties agreed custody judgment granted her sole custody. She stated that her motion to vacate all orders of July 22, 2011 (which we note includes the agreed custody judgment) was "awaiting trial." She asserted that "there has NEVER been any allegation of harm to [the child] or danger to [the child] while in Heather's care." (Emphasis in original). She argued that the July 30, 2012 order granting John possession of the child was done after an *ex parte* hearing. She argued that the July 30, 2012 order "set no return date for any future hearings related to the possession of the child stripped from his primary care giver, siblings, special education, and developmental therapies, medical plans, care providers, service enrollments, friend, extended family et al." She argued that this order was not in the child's best interest and was destructive to the child's well-being. She argued that none of John's emergency motions were true emergencies and were used to "create a legal remedy nothing short of court ordered **kidnapping**." (Emphasis in original.) Heather argued, as she had in her August 1, 2012, emergency motion to vacate the July 30, 2012 order that she had not received proper notice. She did not dispute that she received actual notice. However, Heather argued that, even if she had received proper notice, she had "cause" for not attending the hearing since the child had been "rushed to the hospital by ambulance for a prolonged seizure post clustered seizures."

¶ 28 On August 30, 2012, after a hearing with both parties present, the court vacated the July 30, 2012 order. In her appeal, Heather states that the child was returned to her care that day. All matters that had been previously set for hearing on July 30, 2012 (Heather's petition for a rule to show cause, John's petition for attorney fees, and his motion to modify the previous contempt purge) were set for hearing on October 5, 2012. *The record contains neither a transcript of, nor a bystander's report regarding, the proceedings.*

¶ 29 On October 5, 2012, as Heather notes, she filed several additional motions. The court order granted Heather leave to file a 20-page "Motion To Vacate the 3/15/12, 4/20/12 & 7/30/12 orders" and allowed John 21 days to respond. The court entered an order of continuance to November 1, 2012, on all seven pending matters (Heather's petition for a rule to show cause against John's attorney regarding Rider A; John's petition for attorney fees; John's motion to modify the previous contempt purge; Heather's motion to vacate the 3/15/12, 4/20/12 & 7/30/12 orders; Heather's August 27, 2012 petition for a rule to show cause; Heather's order of protection; and Heather's "emergency" motion to modify or restrict John's visitation). *Again, there is no transcript in the record.* Nonetheless, Heather's claim that the court cancelled the hearing "[w]ithout warning or notice" is a misrepresentation of the court's actions.

¶ 30 On October 18, 2012, John filed an "Emergency Petition To Modify Purge of Contempt and Enforce Visitation." As he had in previous filings, John outlined Heather's actions that had resulted in the interference with John's visitation time with the child. Additionally, John noted that during the time he had temporary possession of the child between July 30, 2012 and August 30, 2012, the child had no seizures. John also asserted that Heather had denied John his make-up visitation time that had been scheduled to start on September 7, 2012 pursuant to the April 20, 2012 court order. John also asserted that Heather had denied his visitation time on September

14, 2012, and again on September 28, 2012. Both times John had contacted the police who called Heather, but she did not answer her phone nor return the officers' calls. John also asserted that he did not want to make the trip again if Heather was going to again deny visitation, so he texted her *in the morning* on October 3, 2012, asking if she would be allowing visitation. Heather did not respond until 5:53 p.m., twenty-three minutes after the pick-up time, at which time she sent a text message asking John where he was. John noted that, again on October 12, 2012, Heather refused to allow John visitation and told the police that she was refusing visitation "out of fear that John would not provide the minor child with his seizure medications." John again contended that Heather had "consistently attempted to frustrate John's relationship with his son through unfounded DCFS allegations, ex parte Emergency Orders for Protection which were subsequently terminated, and denying visitation with the child, *for which she currently remains in indirect contempt of court*." (Emphasis added.) John noted that, on the evening of July 23, 2012, an investigator from DCFS had arrived unannounced at his home, inspected his home and conducted a one-hour interview with him regarding his parenting techniques and a report they had received regarding alleged child abuse for not administering [the child's] seizure medication. John noted that an additional interview was conducted with him on July 24, 2012, at the DCFS head office in Skokie. After a thorough investigation, no credible evidence of child abuse was found and DCFS issue its final report on September 26, 2012. As John noted, this was the third unfounded report issued by DCFS in 2012, and there had been a total of five such unfounded reports, including the ones from 2009 and 2011. John also noted that, since overnight visitation with the child had been granted by the court in July 2011, Heather had denied visitation on thirteen separate weekends. John requested the court to modify its previous contempt purge to require that possession of the child be turned over to him *instanter* and that Heather be ordered

incarcerated with the incarceration stayed pending her turnover within 24 hours. John also requested, among other things, three consecutive weekends of make-up visitation, attorney fees, and costs.

¶ 31 The court ruled on John's petition that day. In its October 18, 2012 order the court noted that John had sent proper notice of the petition to Heather via U.S. Mail on October 15, 2012, and Heather had failed to appear. The court made numerous findings which included the finding that John had previously had temporary possession of the child from August 1, 2012 through August 30, 2012, John had not been found, previously or currently, to endanger the child, and no reason existed for Heather's continuing denial of John's visitation with the child. The court found that Heather had had custody and possession of the child from August 30, 2012 and that, except for one two-hour evening visit, John had had no visitation with the child since August 30, 2012, and that the child was being deprived of a relationship with John due to Heather's actions. The court found that John's visitation rights were being unreasonably withheld by Heather. The court found it to be an emergency matter due to "the continuing nature" of Heather's violations of its orders and that the violations continued "unabated on a weekly basis" despite the court having previously held her in indirect civil contempt of court on March 15, 2012. The court further found that Heather had failed to purge that contempt and that she had "engaged in a pattern of alienation that has greatly hindered [the child's] relationship with John." The court found that Heather "supports her alienation by misrepresenting [the child's] health and medical diagnosis to the Court." The court found that Heather's "pattern of behavior constitutes a serious endangerment to [the child]." The court modified its previous contempt of court purge provisions in the March 15, 2012 order and granted John immediate, temporary possession of the

child. The matter was continued for status on compliance to November 1, 2012, which was the previously set court date.

¶ 32 On October 18, 2012, at 2:36 p.m., Heather filed two motions, including the one at issue in this appeal, a 19-page "Verified Motion to Reconsider 10/18/12 Court Orders/Judgement In The Above Captioned Matter And Grant An Automatic Stay of Enforcement Of Judgement."

¶ 33 According to Heather, on October 25, 2012, she turned the child over to John for his parenting time. She further asserts in her statement of facts that afterwards "the child was concealed from Heather and Heather was denied a post deprivation hearing for in excess of a year and has seen the child less than one hour in over one year."[1]

¶ 34 On November 1, 2012, the court entered an order, which Heather does not discuss. The court ordered the parties to present an agreed order on November 5, 2012, regarding temporary visitation, telephone contact, and medical disclosures. The order also scheduled a hearing on November 21, 2012 for a status report on the ruling on Heather's section 2-1401 petition to vacate the dissolution judgment of July 2011, which was pending before Judge Celia Gamrath.

¶ 35 On November 5, 2012, Heather filed a "notice of immediate termination" against her counsel whom she had apparently hired on October 19, 2012. However, the record contains no copy of the agreed order that was to be presented pursuant to the November 1, 2012 order.

¶ 36 On November 21, 2012, a status hearing was held. John's counsel and Heather appeared. *Once again, the record does not contain either a transcript of, or a bystander's report regarding the proceedings.* Nonetheless, in her statement of facts, Heather "argues" that the court entered

[1] On October 30, 2012, the court heard Heather's section 2-1401 motion to vacate the July 22, 2011 dissolution judgment. On January 4, 2013, the court entered a 26-page written order denying Heather's motion. Heather has also appealed this decision, and that appeal is currently pending.

an order against her "in retaliation." Heather refers to an affidavit from two "court observers" that she does not otherwise discuss. The record contains a copy of the court order entered which states that John had filed his petition to terminate child support on August 24, 2012, and that John had "temporary" possession of the child, and ordered that John's obligation to pay child support to Heather was "temporarily" abated until further order of the court. The order further states that "all matters, including compliance" were set for status on December 19, 2012. The court further ordered Heather's attorney to appear. Heather does not address what, if anything, transpired on December 19, 2012. The record does contain an order allowing Heather's counsel's motion to withdraw.

¶ 37 On December 21, 2012, Heather filed a *pro se* motion to vacate the court's November 21, 2012 order abating child support and for leave to file sanctions against John's counsel. She also requested that Judge Raul Vega recuse himself from the case.

¶ 38 On February 1, 2013, the court granted Heather's motion to vacate the November 21, 2012 order. The court also set John's petition to terminate child support for hearing on March 14, 2013. The court further ordered a status report on all other pending pleadings at that time.

¶ 39 Heather does not discuss what, if anything, transpired on March 14, 2013. The record indicates that the judge was not in court on that date. According to the record, on March 26, 2013, John's petition to terminate child support, as well as all other matters, was scheduled for April 2, 2013. On that date, eleven pending matters, including John's petition to terminate child support were set for hearing on June 19, 2013. The record also contains a May 7, 2013 court order entered by a different judge which, among other things, denied John's petition for leave to amend his petition to terminate support based on Heather's objections, but allowed him leave to

file a petition for child support. The court continued all matters to June 19, 2013, per the April 2, 2013 order.

¶ 40 On June 19, 2013, Judge Vega recused himself and the matter was reassigned to Judge Naomi H. Schuster. Heather states, without further explanation, that she "filed a [Supreme Court Rule] 383 Motion to the Supreme Court that same day which was denied 30 days later."

¶ 41 On June 24, 2013, John filed two motions which he scheduled for hearing on June 26, 2013. The first was an emergency petition to temporarily abate and suspend child support. The second was a motion to reschedule the hearing date on his petition to terminate child support (which had not been heard as scheduled on June 19, 2013). In support of his emergency motion, John provided an affidavit in which he stated that he had had temporary possession of the child at all times since October 25, 2012, Heather had not had any in-person contact with the child since that time and had not sought any visitation time, he had provided for all of the child's needs, and Heather had provided no financial support. John also argued in his motion that the trial court had "found [Heather] to be a serious endangerment to [the minor child] requiring that John maintain the possession and care for [the minor child]." John asserted that he was "the only available parent for [the minor child's] care and should be supported in that role" by the court.

¶ 42 John's motions were not heard on June 26, 2013, because the court had jurisdictional concerns in light of Heather's pending Supreme Court Rule 383. After the Supreme Court denied Heather's motion, the trial court resumed proceedings.

¶ 43 On July 16, 2013, Heather filed a "Verified And Affirmed Ex-Parte Emergency Motion For Temporary Restraining Order And Injunction Of Concealment Or Travel With Minor Child And Immediate Turnover Of Child And Enforcement Of Custody Judgement." On July 16,

2013, the court entered an order finding there was no emergency, entered a briefing schedule on Heather's motion, and set a hearing date of July 29, 2013.

¶ 44 Heather notes, and the record indicates, that the trial court held hearings on August 9, 2013, and October 2, 2013. However, *the record contains no transcript of either hearing*.

¶ 45 On October 2, 2013, the court entered a three-page order that: (1) granted John's motion for a directed finding and denied Heather's "Verified & Affirmed Ex-Parte Emergency Motion for TRO & Injunction of Concealment or Travel with Minor Child & Immediate Turnover Of child"; (2) granted John's "Emergency Petition to Suspend/Abate Child support"; (3) abated and suspended John's child support obligation retroactive to June 24, 2013, without accrual; (4) ordered any and all child support payments made by John to Heather subsequent to June 24, 2013 shall "enjoined & held" by Heather pending accounting and further order of court; (5) ordered Heather to produce to John's counsel, within 45 days, written proofs of any monies owed to her by John, and ordered John to review and respond to said accounting within 15 days; (6) provided that Heather did not need to make an immediate reimbursement of child support monies to John, pending the above accounting; and (7) denied Heather's "Motion to Vacate the 3/15/12, 4/20/12 & 7/30/12 orders" that she had filed on October 5, 2012.[2] The October 2, 2013 order further continued the four remaining matters for hearing on November 1, 2013: (1) Heather's "Verified Motion to Stay/Reconsider the 10/18/12 order" (filed October 18, 2012); (2) John's "Petition to Terminate Child Support" (filed August 24, 2012); (3) Heather's "Counter-Petition to Object" (filed August 16, 2013); and (4) Heather's "Amended Petition for Emergency

[2] This last order is the subject of the present appeal.

Intervention" (filed August 30, 2013). The court further allowed John ten days to respond to these, if necessary.

¶ 46 On November 1, 2013, the court held a hearing. Although Heather has included a copy of the order in the appendix to her brief, it appears that the record does not contain a copy of the order. *More importantly, the record contains no transcript of the November 1, 2013 proceedings*. It is well-settled that a reviewing court need not take judicial notice of documents contained in the appendix attached to a brief, if they are not included in the record. *City of Chicago v. Harris Trust & Savings Bank*, 346 Ill. App. 3d 609, 615, n. 2 (2004). This court has applied this principle to circuit court orders. *Id*. Nonetheless, we will take judicial notice of the November 1, 2013 written circuit court order. See *People v. Davis*, 65 Ill. 2d 157, 161 (1976) (quoting McCormick on Evidence, section 330, at 766 (2d ed. 1972)) ("it is said to be 'settled, of course, that the courts, trial and appellate, take notice of their own respective records in the present litigation, both as to matters occurring in the immediate trial, and in previous trials or hearings'"); accord *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, n.1. After the hearing, the circuit court: (1) granted Heather's motion to strike John's "responsive pleading filed 10/25/13"; (2) denied Heather's "Verified Motion to Reconsider the 10/18/12 Court Orders/Judgment in the above captioned matter & Grant Automatic Stay filed 10/18/12"; (3) denied Heather's "Amended Petition for Emergency Intervention filed 8/30/13"; and (4) entered and continued John's petition to terminate child support filed 8/24/12." Additionally, on its own motion, over Heather's objection, and "pursuant to section 750 ILCS 5/506 and the inherent power of the Court," the circuit court appointed a guardian *ad litem* (GAL) for the child, after finding that there were issues within the family affecting the minor child and that it was in the child's best interest to have a legal representative appointed to protect and preserve the child's

interest." The GAL was ordered "to report on whether or not the 10/18/12 order should remain in effect, become [subject to allocation] permanent or child would return to Mother." The court ordered each party to pay $1,500 to the GAL within seven days for "temporary prospective fees." As noted earlier, Heather filed a notice of appeal on October 4, 2013, from the October 2, 2013 order, and a notice of appeal on November 12, 2013, from the November 1, 2013 order.

¶ 47 JURISDICTION

¶ 48 Heather has asserted, *without any support or further analysis*, that we have jurisdiction based on Illinois Supreme Court Rules 301, 303, 304(b)(3), 304(b)(4), and 304(b)(5). We shall address each appeal in this consolidated appeal separately.

¶ 49 Supreme Court Rule 304(b)(3) makes appealable "[a] judgment or order granting or denying any of the relief prayed in a petition under section 2–1401 of the Code of Civil Procedure." Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010). In appeal no. 13-3228, we conclude we have jurisdiction pursuant to subsection (3) of Rule 304(b) to review the trial court's October 2, 2013 order denying Heather's section 2-1401 petition.

¶ 50 Supreme Court Rule 304(b)(5) makes appealable "[a]n order finding a person or entity in contempt of court which imposes a monetary or other penalty." Ill. S. Ct. R. 304(b)(5) (eff. Feb. 26, 2010). In its October 18, 2012 order, the court modified its previous contempt of court purge provisions in the March 15, 2012 order and granted John immediate, temporary possession of the child. In appeal 13-3668, we conclude we have jurisdiction pursuant to subsection (5) of Supreme Court Rule 304(b) as to that portion of the November 1, 2013 order denying Heather's "Verified Motion to Reconsider 10/18/12 Court Orders/Judgment in the above captioned matter & Grant Automatic Stay filed 10/18/12."

¶ 51 ANALYSIS

¶ 52 Having now combed the record and detailed the procedural history and background, we come to Heather's arguments. She contends that the court orders of March 15, 2012, April 20, 2012, July 30, 2012, October 18, 2012 and "forward" are void. She asserts various arguments including lack of notice, lack of emergency, lack of jurisdiction, lack of due process, defective pleadings, and court failure to follow statutory procedures. She argues that the contempt sanctions are void because they would coerce her into performing a criminal act in that her "knowingly placing [the child] in the care of John when he denied that [the child] required treatment and refused to give [the child] his medication would be criminal child endangerment."

¶ 53 Heather's violations of Supreme Court Rule 341 hamper our understanding of her claims. In addition to Heather's violations of our supreme court rules, her brief is frequently incoherent and *the record does not contain transcripts of proceedings on the very orders Heather now appeals.* As we have noted Rule 341 requires that argument section of a brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7). Heather's argument section is almost completely devoid of citations to the record, yet contains a litany of "facts" which do not appear in the record. A reviewing court is entitled to have issues clearly defined with pertinent authority cited and coherent arguments presented. *Klein v. Caremark International, Inc.*, 329 Ill. App. 3d 892, 905 (2002).

¶ 54 "An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005). It is the appellant's burden to provide a reviewing court with a sufficiently complete record to allow for meaningful appellate review. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391–92 (1984). In the absence of a sufficiently complete record, a

reviewing court will resolve all insufficiencies apparent therein against the appellant and will presume that the trial court's ruling had a sufficient legal and factual basis. *Id*. at 391–92. Once again, although we would be justified in dismissing Heather's appeal based upon these principles, we shall address her arguments but only as they pertain to child custody issues.

¶ 55 Appeal No. 1-13-3228

¶ 56 In appeal no. 1-13-3228, Heather appeals the trial court's October 2, 2013 order denying her motion to vacate, pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), the court's previous orders of March 15, 2012, April 20, 2012, and July 30, 2012.[3] Section 2–1401 of the Code of Civil Procedure provides a party with a means of obtaining relief from judgments older than 30 days. 735 ILCS 5/2–1401 (West 2010).

¶ 57 We review the trial court's decision on a section 2-1401 petition under the manifest weight of the evidence standard of review. *In re Marriage of Roepenack,* 2012 IL App (3d) 110198, ¶ 35. A trial court's decision is against the manifest weight of the evidence when the opposite conclusion is clearly evident. *Id*. The record contains a copy of Heather's 20-page motion and (approximately) 42 individual and group exhibits. However, we cannot locate in the record John's response to Heather's section 2-1401 petition that she filed on October 5, 2012. Heather's section 2-1401 petition contained 20 pages. Heather raised various arguments. In any event, as the order clearly states, Heather's petition for relief was denied after the trial court conducted a hearing, which we presume was an evidentiary hearing. *Yet, there is no transcript*

[3] With respect to the July 30, 2012 order, however, the record indicates that the court had *already* vacated that order on August 30, 2012, after a hearing *with both parties present*. In his response to Heather's previous motion to vacate the July 30, 2012, John disputed most of her "allegations" and provided his own affirmative statements. He denied that there had been any change in circumstances that would justify modification of child visitation. The record contains no transcript of the August 30, 2012 hearing, but we further note that the child was returned to Heather on that date.

of the hearing in the record and, therefore, we have not been provided with the basis of the court's denial of Heather's petition.

¶ 58 In contending that our review is *de novo*, Heather asserts that "[i]n denying the section 2-1401 petition, the trial judge concluded the court's subject-matter jurisdiction over child custody matters was invoked by the rule to show cause petition," she does so without any citation to the record. Absent a sufficient record to allow this court to meaningfully review the issues raised in appeal no. 1-13-3228, we presume that the trial court's order denying Heather's section 2-1401 petition comported with the law and was supported by the facts, and we must resolve any doubts against the appellant, Heather. *Foutch*, 99 Ill. 2d at 391–92. We therefore affirm the trial court's October 2, 2013 order denying Heather's section 2-1401 petition to vacate the court's prior orders.

¶ 59 Appeal No. 1-13-3668

¶ 60 In appeal no. 1-13-3668, Heather states that she is appealing from the trial court's November 1, 2013 order. The relief sought from this court states *verbatim*: "3/15/2012 order issued finding Appellant in indirect civil contempt. 4/20/12 order entered setting purge for 3/15/2012 civil contempt to begin in 8/2012. On 7/30/2012 & 10/18/2012 two ex parte orders were entered which 'modified' the 4/20/2012 purge to a punishment without a purge. 10/2/2013 & 11/01/2013 Court denied Appellant's Motion to Vacate the civil contempt and subsequent orders based on the blatantly void indirect civil contempt with a punitive 'purge' that offers no method of compliance for Appellant to stop being punished. *Appellant seeks the reversal of the Court's 11/01/2013 order and further seeks the enforcement of Appellant's parental rights without delay. Reverse/Remand WITH DIRECTIONS to the trial court*." (Emphasis added.)

¶ 61 On November 1, 2013, *after a hearing*, the trial court denied several of Heather's motions, including the one at issue in this appeal: Heather's ""Verified Motion to Reconsider the 10/18/12 Court Orders/Judgment in the above captioned matter & Grant Automatic Stay filed 10/18/12." *The record contains no transcript of the November 1, 2013 proceedings*.

¶ 62 Heather again asserts that the standard of review is *de novo* because the trial court lacked jurisdiction to "modify an indirect civil contempt purge to a criminal punishment or modify the parties' marital settlement agreement and custody judgment." She argues that "[f]iling a petition for contempt with respect to visitation in a dissolution proceeding does not present to the trial court a "justiciable matter" sufficient for the trial court to make a child custody determination." She argues that "[t]he justiciable matter before the court was an alleged violation of the visitation provisions of the judgment of dissolution. Child custody was not."

¶ 63 "Subject matter jurisdiction refers to the power of the court to hear and determine cases of the general class to which the proceeding in question belongs." *In re Marriage of Sullivan*, 342 Ill. App. 3d 560, 563 (2003) (citing *Belleville Toyota, Inc. v. Toyota Motor Sales U.S.A., Inc*., 199 Ill. 2d 325, 334 (2002). Whether the circuit court had subject matter jurisdiction presents a question of law and is subject to *de novo* review. *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 31.

¶ 64 Based on the record, we cannot say that the trial court lacked subject matter jurisdiction. Heather has failed to show otherwise. Although Heather states she "has denied on the record that the court lacked subject-matter jurisdiction [*sic*]" and provides in her brief a list of cases concluding subject matter jurisdiction was lacking, she has failed to offer a coherent argument for her claim that the trial court lacked subject matter jurisdiction.

¶ 65 Heather notes that she brought her motion to reconsider the October 18, 2012 order pursuant to section 2–1203 of the Illinois Code of Civil Procedure. Section 2–1203 provides:

> "[A]ny party may, within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief." 735 ILCS 5/2–1203(a) (West 2006).

The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." *Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 24 (2009). The decision to grant or deny a section 2–1203 motion is within the sound discretion of the circuit court. *Id*. Heather has not offered an argument as to in what manner she claims the trial court abused its discretion.

¶ 66 We believe that Heather has mischaracterized the visitation interference in this matter by asserting that there were only "alleged" violations. The record shows that the court made "findings" of visitation interference. Heather now argues that "[t]he careful wording of the 10/18/2012 Order which was clearly typed by opposing counsel before the ex-parte hearing seeks to circumvent the law." She further argues that "[t]he Appellate Court is familiar with this abuse of process and deception and their legal opinion about these tactics is clear." It appears that the gist of Heather's argument is that John obtained a modification of child custody without following the proper procedure and, therefore, the trial court's order awarding him "possession" of the child, even though "temporary" was void.

¶ 67 Heather argues that "[t]he continuation of 'possession' for an indefinite amount of time was punitive." The record does not indicate, however, that the court's intent was to punish Heather. Although John requested that Heather be incarcerated, the court did not order her

incarceration. Rather than "punish" Heather, the court order clearly was based on its concern for the child's well-being and John's visitation rights, as evidenced by the court's numerous findings which included that: no reason existed for Heather's continuing denial of John's visitation with the child; except for one two-hour evening visit, John had had no visitation with the child since August 30, 2012; John's visitation rights were being unreasonably withheld by Heather; the child was being deprived of a relationship with John due to Heather's actions; it was an emergency matter due to the continuing nature (they continued "unabated on a weekly basis") of Heather's violations of its orders despite the court having previously held her in indirect civil contempt of court on March 15, 2012; Heather had failed to purge that contempt by providing John with visitation; she had "engaged in a pattern of alienation that has greatly hindered [the child's] relationship with John"; Heather "supports her alienation by misrepresenting [the child's] health and medical diagnosis to the Court"; and Heather's "pattern of behavior constitutes a serious endangerment to [the child]."

¶ 68 Heather also asserts that the October 18, 2012 order "was akin to a change in custody without a hearing or post depravation [*sic*] hearing, the failure to give Heather notice pursuant to section 601(d) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/601(d) (West 2010)) deprived the court of jurisdiction to modify custody."

¶ 69 Heather has cited to a number of cases involving custody modification orders including *In re Marriage of Gordon*, 233 Ill. App. 3d 617 (1992) and *Kraft v. Kraft*, 108 Ill. App. 3d 590 (1982). In *Gordon*, the father filed a separate proceeding under, and misused, the Domestic Violence Act as a means to obtain possession and custody of the child. The court criticized this procedure:

> "Robert has not advanced any reason, nor can we find one, to justify his proceeding under the Domestic Violence Act rather than the Marriage Act. Whatever the relief he sought—extended visitation, injunction or custody—he could have received it under section 610 of the Marriage Act. To approve the procedure followed in this case would be an open invitation to parties disappointed in a custody dispute to file a separate action under the Domestic Violence Act and call it something other than a claim for custody." *Gordon*, 233 Ill. App. 3d at 648.

¶ 70 *In Re Marriage of Gordon* is inapposite. Nothing in the instant case shows that John engaged in a subterfuge to obtain "custody." He did not file a separate action nor did he seek "extended" visitation, an injunction, or "custody." Rather, he first sought to enforce his visitation rights. He followed the proper procedure by filing (on January 30, 2012) a "Petition For Rule To Show Cause For Indirect Civil Contempt & Petition To Modify Visitation And Schedule Make-Up Visitation Instanter." The temporary possession order afforded John "make-up" visitation time. After Heather *again* interfered with John's visitation rights, he filed the "Emergency Petition To Modify Purge of Contempt and Enforce Visitation." He did not file a petition to modify custody and the court order of October 18, 2018 granting him temporary possession, for a second time, was not a custody modification order.

¶ 71 *Kraft v. Kraft* is also distinguishable. There, pursuant to an agreement, the parties had joint custody of their minor child but the mother had "physical possession" of the child during her minority and the father had visitation rights. *Id*. at 591. After the mother petitioned the court for sole custody, the father did also. After a trial, the court decided that the current arrangement endangered the child's emotional stability and health and awarded "physical possession" of the

child to the father. The appellate court held that this decision was contrary to manifest weight of the evidence. The *Kraft* court noted that the parties there did not dispute that "a change in 'physical possession' of a child, even though joint custody remains unchanged, is a custody modification governed by section 610(b) of the Illinois Marriage and Dissolution of Marriage Act." *Id*. at 595. However, the order here granted John temporary possession. The order does not grant permanent possession or state that it is a permanent custody modification. The court (for the second time) granted John immediate, *temporary* possession of the child as a remedy for Heather's ongoing contemptuous interference with John's visitation rights. The matter was continued for status on compliance to November 1, 2012, which was the previously set court date.

¶ 72 Heather has further contended that "[s]he has had the child that she has loved and cared for taken and concealed on a void order in violation of a stay without any due process." She argues that "[t]he court allowed an ongoing concealment of a child and cut off all communication between a child and his primary care giver, his siblings, pets and treatment for in excess of a year – ex parte on nothing but John's word, which could easily be proven false if only the court would have given Heather her legal right to rebut [*sic*] the allegations, present evidence and witnesses."

¶ 73 We first note that Heather has used the term "*ex parte*" in referring to numerous trial court orders, both in her trial court pleadings and her appellate brief. Our supreme court has explained that the term "*ex parte*" means "a judicial proceeding brought for the benefit of one party only and without notice to or contest by any person adversely interested. [Citation]." (Internal quotation marks omitted.) *Parks v. McWhorter*, 106 Ill. 2d 181, 185 (1985). Even where a party claims that a trial court has held an improper *ex parte* hearing, our supreme court has explained that a subsequent duplicate hearing renders any earlier errors inconsequential. *In*

re D.S., 217 Ill. 2d 306, 321 (2005). We recognize that certain orders were entered without Heather's presence in court, but no hearings were held without notice to Heather. Heather has failed to show that this case involves any improper *ex parte* orders, and nothing in the record shows otherwise. The record also shows that the court held subsequent hearings on Heather's motions to vacate these so-called "ex parte" orders and denied her motions after a hearing. *Heather has failed to include transcripts of those hearings in the record.*

¶ 74 Although we have concluded that *Kraft v. Kraft* is distinguishable because the order at issue here was for "temporary" possession, as the *Kraft v. Kraft* court noted "a change in 'physical possession' of a child, even though joint custody remains unchanged, is a custody modification governed by section 610(b) of the Illinois Marriage and Dissolution of Marriage Act." Also, in the case of *In re Marriage of Fox*, 191 Ill. App. 3d 514, 520 (1989), this court explained that the filing of a petition for contempt with respect to visitation in a dissolution proceeding does not present to the trial court a "justiciable matter" sufficient for the trial court to make a child custody determination. Again, our decision today was premised on our conclusion that the trial court *did not* make a custody modification.

¶ 75 However, as noted earlier, on October 18, 2012, on its own motion, over Heather's objection, and "pursuant to section 750 ILCS 5/506 and the inherent power of the Court," the circuit court appointed a guardian *ad litem* (GAL) for the child, after finding that there were issues within the family affecting the minor child and that it was in the child's best interest to have a legal representative appointed to protect and preserve the child's interest. The GAL was ordered "to report on whether or not the 10/18/12 order should remain in effect, become [subject to allocation] permanent or child would return to Mother." It is undisputed that the parties' joint custody agreement granted Heather sole custody, but she no longer has possession of the child

and the court is contemplating making John's possession permanent. Thus, it is clear that the court is contemplating a custody modification. Heather states that a custody hearing has never been held.

¶ 76 In deciding issues pertaining to custody, the trial court has broad discretion, and we afford its judgment great deference because the trial court is in a superior position to judge the credibility of witnesses and determine the best interests of the child. *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45. Pursuant to section 610(b) of the Illinois Marriage and Dissolution of Marriage Act, in order to modify a custody judgment, the trial court must make two findings by clear and convincing evidence: (1) a change has occurred, and (2) the modification would be in the child's best interest. 750 ILCS 5/610(b) (West 2012). We anticipate that the court will follow the proper procedures before it decides any issues of permanent custody modification.

¶ 77 Accordingly, in appeal no. 1-13-3228, we affirm the trial court's October 2, 2013 order denying Heather's section 2-1401 petition to vacate the court's prior orders. In appeal no. 1-13-3668, we affirm the trial court's November 1, 2013 order.

¶ 78 Appeal No. 1-13-3228: Affirmed.

¶ 79 Appeal No. 1-13-3668: Affirmed.