2016 IL App (2d) 160450-U
No. 2-16-0450
Order filed September 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re PARENTAGE OF FRANCES A.K., a minor,	)	Appeal from the Circuit Court of Du Page County.
	)	No. 12-F-304
(Susan Kathleen Rakowski, Petitioner-Appellant, v. Seth Pemberton Knaebel, Respondent-Appellee).	)	Honorable Linda E. Davenport, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The mother has forfeited her claim of procedural error where her attorney actively participated in, and never objected to, the manner in which the trial court conducted a hearing addressing visitation details. Further, the question of modification was not before the trial court during the 2016 proceedings precipitating this appeal, so we cannot review the 2014 order that the child visit her father once per month in Ohio. Affirmed.

¶ 2 In February 2014, the trial court entered the agreed final custody judgment for petitioner, Susan Kathleen Rakowski (mother), and respondent, Seth Pemberton Knaebel (father). As to visitation, the parties agreed that their child, Frances A.K., then age 3, would visit her father once per month in Ohio. In November 2014, the mother filed a petition to modify the custody judgment as pertained to visitation, attaching a letter from a psychologist averring to the child's

separation anxiety, and asking that the Ohio visits be postponed. In a series of 2015 orders, the trial court granted the mother the relief that she sought, ordering that the father visit the child in Illinois instead of Ohio through winter 2016.

¶ 3 On May 11, 2016, the court heard a number of pending matters. As to visitation, the father complained that the parties continued to disagree on Ohio travel logistics. The mother noted points of disagreement, such as the method of transportation and the child's school schedule. That same day, the court ordered that the parties alternate months choosing the method of transportation and that, where possible, the visits coincide with school holidays so that the child, now age 5, would have a longer rest between the seven-hour car rides.

¶ 4 The mother appeals the May 11, 2016, order. She argues that she did not receive due process at the hearing leading up to the order, and, even if she did receive due process, the trial court abused its discretion by ordering a small child to travel to Ohio once per month. We hold that the mother forfeited her due-process argument, because her attorney actively participated in, and never objected to, the manner in which the trial court conducted the hearing. Also, during the hearing, the mother accepted that the child would travel to Ohio once per month when she asked the court to set the Ohio travel logistics. The question of modification, *i.e.*, further postponement or cancellation of the Ohio visits, was not before the trial court, so we cannot review the general propriety of the Ohio visits. In any event, the trial court did not abuse its discretion by setting travel logistics so as to ensure execution of the existing visitation order that the child travel to Ohio once per month.

¶ 5 I. BACKGROUND

¶ 6 The mother, a corporate buyer, and the father, an engineer, lived in Ohio during 2010. In December 2010, they had a child. They never married. When the child was approximately 10

months old, the mother and the child moved to Du Page County, Illinois. They lived with the mother's parents. Following petitions for paternity and petitions for support, which occurred soon after the move, the father regularly paid child support.

¶ 7 The parties filed numerous pleadings, some of which the trial court deemed frivolous. As to the main issue of visitation, we focus our recitation of the facts on: (1) the trial court's February 25, 2014, agreed final custody judgment; (2) the mother's November 25, 2014, amended petition to modify the custody judgment; (3) the trial court's orders, dated January 16, 2015, March 16, 2015, June 15, 2015, and December 21, 2015, which effectively granted the mother's petition to modify by ordering transitional visits in Illinois before commencing the Ohio visits; and (4) the May 11, 2016, hearing and order, which set the Ohio travel logistics.

¶ 8 On February 25, 2014, the court entered the agreed final custody judgment. In essence, the visitation plan called for the child's progressive introduction to the father's Ohio life and her own paternal family. During the first three months of the plan, the father would come to Illinois to visit the child. During the end of that period, there would be overnight visits in Illinois. During the next period, the child would travel to Ohio once per month. Over time, the overnight visits would progress in length from one night to three nights. If, in the future, a visit interfered with school, the visit would be shortened. From 2014 to 2020, vacation time in Ohio would increase, including up to a three-week visit in the summer of 2020. The parties would use Skype to maintain the child's familiarity with her father.

¶ 9 The visits did not progress as agreed, and each party blamed the other. On November 25, 2014, the mother filed a petition to modify the custody judgment. 750 ILCS 5/610 (West 2014) (no motion to modify a custody judgment may be made earlier than two years after its date, unless on the basis of endangerment to the child's physical or emotional health). In the petition,

the mother alleged that the child was not emotionally ready to travel to Ohio. To date, the child had traveled to Ohio only once, to attend a paternal family wedding. The mother accompanied the child to Ohio, and, as ordered by the court three days prior to the trip, the child spent the night in the mother's hotel room. The mother alleged, and the father later denied, that the child experienced separation anxiety during the weekend's day-time events. The mother argued that the child needed more time to grow accustomed to her father and accept short-term separation from her mother. To facilitate the child's transition to overnight visits in Ohio, the mother requested that the next three monthly overnights occur in Illinois rather than Ohio. She also asked for other relief as may be appropriate under the circumstances.

¶ 10 The mother attached a letter from the child's clinical psychologist, Dr. Patricia Bernbom. Dr. Bernbom wrote that the child met the criteria for separation anxiety, as the child continued to have "intermittent problems" separating from her mother. Dr. Bernbom felt that the legal system discredited the mother, who was "very much in touch" with her child's emotional and developmental needs. Dr. Bernbom also had some positive words for the father, calling him "earnest" and reporting that he tries to connect with the child "in his own way." The father uses Skype to show the child the bedroom that he decorated for her and to show her his pet dog. In Dr. Bernbom's view, the father is beginning to understand the difficult reality that his child's emotional security rests more strongly with the other parent at this stage in the child's development.

¶ 11 Less than two months later, on January 16, 2015, the trial court ordered that the February visit (occurring January 31, 2015, and February 1, 2015) would take place in Illinois. It would not be an overnight. Rather, each day, pick up and drop off would be at the mother's home.

¶ 12 On March 16, 2015, the trial court ordered that, in April, May, and June of 2015, the two-day monthly visits would take place in Illinois. Again, there would be no overnights. In addition to traditional visits, the father would continue to use Skype twice per week to communicate with the child. Dr. Bernbom would facilitate a third Skype session. On June 15, 2015, and December 21, 2015, the trial court again ordered that the visits take place in Illinois. The December order specified that the upcoming January and February 2016 visits would be overnights in Illinois.

¶ 13 The parties dispute the father's compliance with the 2015 orders for a gradual transition to the overnight visits in Ohio. It is not clear from the record how each scheduled visit unfolded. However, the mother acknowledges in her reply brief that the transitional Illinois visits "finally occurred." The next step was to proceed with overnight visits in Ohio.

¶ 14 On May 11, 2016, the trial court conducted the hearing at issue in this appeal. At the hearing, the court addressed: (1) a minor outstanding medical debt (which the father agreed to pay); (2) the mother's petition for sanctions; and (3) visitation logistics, such as travel costs and method of transportation.

¶ 15 As to the mother's petition for sanctions, she alleged that the father had filed a false financial affidavit. The father filed, but later withdrew, a petition to reduce child support. He attached a financial affidavit showing a decrease in income; there had been an across-the-board pay decrease at his company. However, the father failed to mention that, along with his pay decrease, his expenses decreased. His parents offered to help pay his home mortgage due to his decrease in income.

¶ 16 The trial court granted the mother's petition for sanctions. It determined that the financial affidavit was not false, because the father's pay did decrease. However, the court stated the affidavit was misleading, because the father failed to report that his parents offered to help

with expenses. The court asked the mother's attorney for the amount that she billed in defending against the petition to reduce child support before the father withdrew the petition. The attorney answered $3,000. The court ordered that the father pay for one-half of those costs, $1,500.

¶ 17 As to visitation, the court did not revisit, nor did the mother ask it to revisit, the general agreement that the child would begin the Ohio visits. Rather, the father's attorney informed the trial court that the parties could not agree on the specific dates for the monthly visits, so they did not occur. The court said, "If they can't agree on dates, I am going to get out the calendar ***. They are just going to be stuck with whatever I say." The father's attorney stated: "I am fine with [that]." The mother's attorney said nothing.

¶ 18 Later, the mother's attorney asked the court to address transportation costs associated with the Ohio visits. The court, with input from counsel, decided that the parties would split costs as follows. One month, the mother would choose and effectuate the mode of travel. She would pay for all costs associated with her chosen mode of travel. If she chose to fly, she would pay for flights. If she chose to drive, she would pay for gas. The next month, the father would choose and effectuate the mode of travel. He would pay for all costs associated with his chosen mode of travel. Neither party objected to the plan.

¶ 19 The mother's attorney then asked to make a minor amendment to the plan. She was concerned that, if the father chose to drive, rather than fly, the child would spend too much time in a car. The court responded: "I am not going to order [the father] to pay for a plane ticket." However, where possible, the court would coordinate with the school schedule so that the visits would be from Friday to Monday, rather than Friday to Sunday. "One of the things these [school] kids have is lots of holidays." This scheduling would allow for the desired three-night visit and more time between long car rides. The court recessed to allow the parties to consult the

school calendar. Neither party objected to the solution. (The mother had subpoenaed the child's future kindergarten teacher to be present for the hearing, but the mother never called the teacher to testify.)

¶ 20 The trial court instructed the attorneys to draft the order. Neither party objected. After drafting an order, the parties informed the court that they continued to have minor areas of disagreement, including the: (1) departure time during the months when the father was in charge of transportation (the father wanted to leave directly from school, and the mother wanted him to wait until she got home from work, which was at 6 p.m.); and (2) number of scheduled Skype calls to the mother during each Ohio visit. The court ruled that the father could leave directly from school and that there would be one scheduled Skype call during each Ohio visit. The parties added the appropriate amendments to the order, and the court entered it. This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, the mother argues that the trial court: (1) violated her due process rights by failing to conduct an evidentiary hearing as required by, *inter alia*, section 610.5(c) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610.5(c) (West 2016) (concerning modifications to orders allocating parenting responsibilities due to a substantial change in circumstances)) and by failing to request documentary support for her contempt petition; and (2) abused its discretion when it failed to consider the best interests of the child pursuant to section 602.7 of the Act (750 ILCS 5/602.7 (West 2016)).

¶ 23 A. Due Process

¶ 24 The mother has forfeited her due process arguments. "Where it is contended that the procedure of the trial court is in error, the failure to object to such procedure in the trial court

precludes its review." *Hargrove v. Gerill Corp.*, 124 Ill. App. 3d 924, 929 (1984). Here, the mother complains that she did not receive an evidentiary hearing, but, at the May 11, 2016, hearing, she never sought to introduce additional evidence pertaining to either visitation or her contempt petition.

¶ 25 1. Visitation

¶ 26 This case is wholly distinguishable from *In re Marriage of Cohen*, 2015 IL App (1st) 151611-U, the unpublished case upon which the mother relies. Unpublished cases are not precedential, but we address *Cohen* as it relates to the mother's argument. In *Cohen*, the trial court entered an order modifying the father's visitation. *Id*. ¶ 23. The mother had asked for an evidentiary hearing, but the trial court did not allow it. *Id*. ¶ 9. The appellate court reversed for further proceedings, stating that "there was simply no evidence before the [trial] court upon which it could base a determination of whether there had been a change of circumstances warranting a modification to the original custody judgment in the best interests of the children." *Id*. ¶ 18.

¶ 27 Here, unlike in *Cohen*, the mother did not move to introduce evidence. She had subpoenaed her daughter's future kindergarten teacher, but she never moved to call the kindergarten teacher to testify. (Of course, because she never moved to call the teacher, the trial court never prevented her from calling the teacher, and she never submitted an offer of proof.)

¶ 28 Also unlike in *Cohen*, the May 11, 2016, order did not modify the original 2014 judgment requiring a monthly visit to Ohio. The mother implies, by citing section 610.5(c) of the Act (750 ILCS 5/610.5(c)(West 2016)), that her November 25, 2014, petition to modify based on a substantial change in circumstances was before the court during the May 11, 2016, hearing. It was not. The November 25, 2014, petition to modify alleged a substantial change in

circumstances in that the child had severe anxiety and needed additional visits in Illinois before progressing to the Ohio visits. The petition attached a letter from the psychologist detailing the then three-year-old child's mental state and attachment needs. The child is now five years old, and the mother did not seek to introduce new evidence. In any case, in response to the November 25, 2014, petition, the trial court entered numerous orders granting additional, transitional visits in Illinois before proceeding to the Ohio visits. Thus, the mother received the relief that she requested in her 2014 petition to modify. The purpose of the May 11, 2016, hearing was not to address a petition to modify based on a substantial change in circumstances. It was to address minor details so that the visits to Ohio could proceed.

¶ 29 2. Contempt Petition

¶ 30 The mother argues that she was denied due process when the trial court decided to grant her contempt petition and award her $1,500 in attorney fees related to defending against the father's petition to reduce child support without accepting documentary evidence. She cites *In re Marriage of de Bates*, 212 Ill. 2d 489, 514-15 (2004), where the trial court erred by accepting a child representative's recommendations without subjecting the representative to cross-examination.

¶ 31 Here, the trial court determined that the father's financial affidavit was not false, but, rather, it was misleading. It accepted the mother's attorney's representation that she billed approximately $3,000 in defending against the petition to reduce child support. The trial court decided to award one-half that amount, $1,500.

¶ 32 The mother's attorney never asked to submit documentary evidence of the billing. The trial court *accepted* the attorney's oral representation. On appeal, the mother does not suggest that the $3,000 figure is incorrect, nor does she challenge the trial court's legal decision to award

half the costs. It is unclear how additional evidence would have aided the trial court's resolution of the issue. The mother points to instances where the trial court did not allow her to speak. In some of those instances, the court kept the mother from interrupting her own attorney. There was no failure of due process here.

¶ 33 B. Merits of the Order

¶ 34 Next, the mother argues that, even if she received due process, the trial court abused its discretion in ordering the child to travel to Ohio once per month. She states in her brief: "[T]he trial court failed to take into account [the child's] tender age and lack of familiarity with her father;" "Despite [the mother's attorney's reference] to the child's tender age and academic schedule, the trial court failed to acknowledge the bests interests of [the child] by requiring her to travel seven hours to Ohio, and seven hours back to Illinois, every month;" and "[The father] requested that [the child] travel seven hours to spend time with him, in a home she is unfamiliar with, without considering any other alternatives that may be more favorable to the well-being of [the child.]"

¶ 35 We find this line of argument disingenuous. The mother intimates that, as of May 2016, the general plan to allow the child to travel to Ohio once per month remained in dispute. To the contrary, the parties had agreed, since 2014, that the child would travel to Ohio once per month. In November 2014, the mother petitioned to modify, asking to postpone the Ohio visits. In several 2015 orders, the court granted that relief. At the May 2016 hearing, the parties did *not* dispute the general plan to allow the child to travel to Ohio once per month. The mother's attorney never suggested that the court reconsider or postpone the general plan. Rather, the attorney actively participated in securing implementation details that were advantageous to her client. For example, in response to a complaint raised by the mother's attorney, the court

ordered that, where possible, the visits would occur over holiday weekends so as to maximize time between car rides. The trial court did not abuse its discretion by setting travel logistics so as to ensure execution of the existing visitation order that the child travel to Ohio once per month.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the trial court's May 11, 2016, order.

¶ 38 Affirmed.