2019 IL App (2d) 190164-U
No. 2-19-0164
Order filed August 26, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF ARBEN TOSKA, Petitioner-Appellee, and MICHELLE YEAKEL-TOSKA, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 11-D-2030 Honorable Timothy J. McJoynt, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the trial court's judgment awarding sole decision-making responsibility to petitioner.

¶ 2 Respondent, Michelle Yeakel-Toska, appeals the decision of the trial court granting petitioner, Arben Toska, sole decision-making responsibility regarding the parties' two children, L.T. and A.T. Both issues raised by Michelle on appeal concern whether the trial court's finding that the children were not subject to physical violence, unnecessary corporal punishment, or

abuse was against the manifest weight of the evidence. For the following reasons, we find that the trial court's decision was not against the manifest weight of the evidence, and we affirm.

¶ 3 I. BACKGROUND

¶ 4 The trial court entered a joint parenting agreement and subsequently dissolved the parties' marriage on November 21, 2011, granting custody of the two children to Michelle. However, on July 14, 2014, Arben was granted temporary custody of the children. Thereafter, the children resided with Arben, their paternal grandparents, and their uncle in Bartlett, Illinois. Michelle had supervised parenting time from 2014 to 2018, and recently, had unsupervised parenting time.

¶ 5 On November 14, 2013, Arben filed a petition for sole decision-making responsibility of the children. Before the trial began on his petition, the parties agreed to hear only Arben's petition for sole decision-making of the children and Michelle's petition seeking parenting time and sole decision-making responsibility.[1] The parties also stipulated as to change of circumstances and agreed that they were unable to communicate appropriately to allow for joint decision-making. The parties further withdrew "[m]any old unprosecuted pleadings filed by both parties" and they confined the trial to evidence beginning as of the date of the July 14, 2014, order, which had granted temporary custody of the children to Arben.

¶ 6 Arben testified that the children, ages 11 and 9, respectively at the time of trial, were enrolled in Hawk Hollow School and were doing well. The youngest child, A.T., received special services through an individualized educational plan (IEP). He had been assessed with developmental delay, had difficulty focusing and listening, and struggled with anger issues. In

[1] Although the trial court mentions her petition in its decision at trial, Michelle does not provide a citation to the petition and we have not found the petition in the record.

addition, he had problems with reading, writing, and speech, and received speech and language assistance. Arben testified that changing schools would not be in the best interests of the children.

¶ 7 Arben worked out of the home a great deal, so he was able to provide care during the day, and he participated in many after-school activities with the children, especially swimming. Arben stated that when the children were with Michelle, they often missed swim meets and practices. He claimed that Michelle had received notice of all the swimming activities, practices, and meets and that there was no reason for her to miss those activities with the children when they were in her care.

¶ 8 Arben stated that he had done most of the parenting for the last four years with no or little help from Michelle. Arben is Albanian and took the boys to Macedonia for six weeks each summer because he believed that this was in the children's best interests.

¶ 9 As far as discipline was concerned, Arben admitted that he pushed homework on the children, but he denied using corporal punishment.

¶ 10 While in Macedonia with the children in 2018, Arben married a woman named Agnes. He denied that he was married to his prior girlfriend, Bukey Llugni, who had lived with Arben, the children, and Arben's extended family for approximately six months from February to September 2016. Arben testified that he did fight with Bukey at the end of the time she had lived with him. After she and Arben broke up, Bukey had a child that was born in New Jersey, and Arben was not sure whether the child was his.

¶ 11 Bukey testified that the child she just gave birth to was fathered by Arben. She also claimed that she and Arben were married in a church in April 2015, but she could not recall where that church was located. Bukey testified that Arben was a bad parent with the children

while she lived there. She stated Arben hit the children and she observed a lot of violent acts between Arben and his parents and other family members.

¶ 12 On cross-examination, Bukey stated that she had told the guardian *ad litem* (GAL) that Arben was a good father and that she had no complaints or concerns about his conduct towards his children. She also admitted to attempting to obtain money from Arben for some legal purposes. Arben claimed in his responsive testimony that the fights at the house were with Bukey when they were together and that was one of the reasons that they broke up.

¶ 13 Michelle testified that she lives in Aurora, Illinois, and had been there since approximately July 2014. She would like to have the children attend school in Aurora. She selected two different private school options and maintained these schools were better for the children, but she did not provide any corroboration or other evidence to support her claim. Michelle stated that she knew about the IEP that A.T. received at Hawk Hollow. She also admitted that both children have improved during the last four years, especially A.T.

¶ 14 Michelle further testified that she feared for the children because of Arben's anger and violent tendencies and claimed she had this fear since 2011. She believed the court should consider no overnights with Arben because of his poor conduct toward the children.

¶ 15 During cross-examination, Michelle testified that although in 2011 her fears of Arben's anger and violent tendencies did exist, she agreed to joint custody anyway. She did not discuss the Aurora school plans with the GAL. Michelle maintained that the cost of these two private schools that the court should consider could easily be paid by Arben. She thought these two schools had IEP special services, but was not clear whether they did. Michelle further claimed that the children disliked the Macedonian trips.

¶ 16 The GAL testified that she was appointed in February 2014 and had interviewed the children both with and without the parents many times. She also had interviewed collaterals and made investigations, including the DCFS claim from 2014 where an abuse report made by Michelle was found to be untrue. The children reported to her that they do not suffer from physical strikings by Arben. The GAL stated that Bukey told her that Arben was a good person and a good father and that she did not fear Arben. Bukey had confirmed this information twice to the GAL in the last four years, although Bukey had testified differently at trial.

¶ 17 The GAL stated that the children are in a good school, that the IEP is working well for A.T., and that it would be in their best interests to stay in the current school. She believed that it was important to continue the current structure that Arben was now providing for them. The GAL further testified that at times, Michelle missed appointments with her in 2014, but that she had done much better recently. Although she is doing much better, she noted that in 2014, Michelle was depressed, misused drugs, and was incapable of parenting the children.

¶ 18 The GAL stated that joint custody would not work, as both parties extremely disliked and distrusted each other. Among other recommendations, the GAL recommended sole decision-making to Arben and parenting time to Michelle.

¶ 19 Michelle testified again. During this part of the examination, she suggested that joint decision-making could work and that the court could consider it. Michelle further claimed that Arben uses corporal punishment with the children and that the children fear Arben.

¶ 20 The trial court made a lengthy ruling describing all of the evidence presented and it analyzed the factors set forth in sections 602.5, 602.5(c), and 602.7 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/5-602.5 (West 2018)). The court gave great weight to the GAL's testimony. The court found Bukey's testimony "completely incredible" and

"disregarded" it. Further, the court did not find that the children were subject to physical violence, unnecessary corporal punishment, or abuse. Based on the evidence presented and the best-interest factors the court found relevant, the court ordered that parental responsibility and decision-making for all major areas as outlined in the Act was granted solely to Arben but awarded parenting time to Michelle. This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Preliminarily, we must address certain deficiencies in Michelle's statement of facts. The content of an appellant's brief is governed by Supreme Court Rule 341(h) (eff. May 25, 2018). Pursuant to Rule 341(h)(6) (eff. May 25, 2018), a statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." The statement of facts in this case does not review the pertinent testimony adduced at trial; rather, it presents a significantly one-sided view of all of the facts favoring Michelle's position and omits contradictory testimony from the other witnesses, especially the GAL's. Among other notable problems, Michelle also sets forth facts that were not presented at the hearing, as some predated July 2014, which was, by stipulation, the date evidence would begin. Moreover, Michelle fails to mention that some facts were stricken from the record and that the trial court found Bukey's testimony was not credible and should be disregarded. The Illinois Supreme Court Rules are not suggestions; they have the force of law and must be complied with. *Szczesniak v. CJC Auto Parts, Inc.*, 2014 IL App (2d) 130636, ¶ 8. The violations are troubling, as they frustrate our ability to understand the facts of the case and cause this court to research the record when we are not a repository for an appellant to foist the burden of argument and research. *Cimino v. Sublette*, 2015 IL App (1st) 133373, ¶ 3. However, we retain the discretion to consider

Michelle's appellate brief notwithstanding her failure to comply with Rule 341(h)(6). *Lamb–Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, ¶ 21 (reviewing court would disregard any improper or unsupported statements).

¶ 23 Both issues raised by Michelle on appeal concern whether the trial court's finding that the children were not subject to physical violence, unnecessary corporal punishment, or abuse was against the manifest weight of the evidence. Her argument is based on her assertion that the trial court's factual findings were inaccurate. Because of the evidence of the abusive and detrimental environment, Michelle maintains that the trial court should not have granted Arben sole decision-making responsibilities.

¶ 24 The Act provides that "[t]he court shall allocate decision-making responsibilities according to the child's best interests." 750 ILCS 5/602.5(a) (West 2018). When determining the child's best interests, the court shall consider all relevant factors, including the following:

> "(1) the wishes of the child * * *;
>
> (2) the child's adjustment to his or her home, school, and community;
>
> (3) the mental and physical health of all individuals involved;
>
> (4) the ability of the parents to cooperate to make decisions, or the level of conflict between the parties that may affect their ability to share decision-making;
>
> (5) the level of each parent's participation in past significant decision-making with respect to the child;
>
> (6) any prior agreement or course of conduct between the parents relating to decision-making with respect to the child;
>
> (7) the wishes of the parents;
>
> (8) the child's needs;

(9) the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement;

(10) whether a restriction on decision-making is appropriate under Section 603.10;

(11) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;

(12) the physical violence or threat of physical violence by the child's parent directed against the child;

(13) the occurrence of abuse against the child or other member of the child's household;

(14) whether one of the parents is a sex offender, and if so, the exact nature of the offense and what, if any, treatment in which the parent has successfully participated; and

(15) any other factor that the court expressly finds to be relevant." 750 ILCS 5/602.5(c) (West 2018).

¶ 25 "In child custody cases, there is a strong and compelling presumption in favor of the result reached by the trial court because it is in a superior position to evaluate the evidence and determine the best interests of the child." *In re Marriage of Agers*, 2013 IL App (5th) 120375, ¶ 25. "We will not disturb a trial court's custody determination unless it is against the manifest weight of the evidence." *In re Marriage of Young*, 2015 IL App (3d) 150553, ¶ 12. Although the Act now refers to "decision-making responsibilities" instead of "custody" (750 ILCS 5/602.5 (West 2018)), we continue to apply the same standard of review, which is the manifest weight of the evidence.

¶ 26 Michelle lists numerous instances of what she calls the children's exposure to violence, verbal and physical abuse, and unnecessary corporal punishment by Arben and the children's

grandparents. However, the majority of the evidence Michelle relies on was elicited during Bukey's testimony, which the trial court disregarded because it found her to be unreliable. She also focuses on her own testimony and ignores other evidence, including Arben's testimony and the GAL's testimony, to which the trial court gave great weight. In fact, the GAL's testimony contradicted Bukey's trial testimony as Bukey had told the GAL, on two occasions, that Arben was a good father; that the children were well taken care of; that there was no evidence of verbal abuse; and, that the grandparents did not abuse the children. As evidence of corporal punishment, Michelle points out that Arben struck one child in the head on at least one occasion. The GAL testified that she thought Arben had utilized corporal punishment with the children but could not "say that it was beyond the scope of his parental authority," and that at her last meeting with the children, they indicated that if they did something wrong, they were sent to their room or had a privilege taken away. The GAL stated that, on one rare occasion, one child mentioned that "he was kind of whacked on the head or slapped on the head."

¶ 27 Michelle's argument presents evidence favoring her position but neglects the evidence upon which the trial court based its determination. Michelle largely argues "facts" that she believes the trial court failed to weigh in her favor or accept as true. Michelle completely ignores the well-established legal principal that the trier of fact, in this case an experienced judge, is free to accept or reject testimony and give whatever weight it deems appropriate to the evidence submitted. Under a manifest weight of the evidence review, we give the trial court's decision great deference because the trial court, having heard and observed all the witnesses, is in a better position than a reviewing court to evaluate the witnesses' credibility and weigh the evidence presented. See *First Chicago Insurance Company v. Molda*, 2015 IL App (1st) 140548, ¶ 52 (quoting *Bazydlo v. Volant*, 164 Ill. 2d 207, 214-15 (1995) (" 'The trial judge, as

the trier of fact, is in a position superior to a reviewing court to observe witnesses while testifying, to judge their credibility, and to determine the weight their testimony should receive.' ")). A reviewing court will not substitute its judgment for that of the fact finder "on matters of credibility of a witness, weight of evidence and the inferences drawn from the evidence" unless the opposite conclusion is evident from the record. *Northwestern Memorial Hospital v. Sharif*, 2014 IL App (1st) 133008, ¶ 26.

¶ 28 In this case, the trial court reviewed and considered the best interest factors and emphasized those factors it found relevant to the case. The court relied heavily on the GAL's testimony and totally disregarded Bukey's testimony in expressly finding there was no evidence of "physical violence", "unnecessary corporal punishment", or "abuse" (see factors 12, 13, and 15). The court also found that: (1) the children seemed to be quite adjusted and happy; (2) the children were in a good school and in a good home; and (3) the children were prospering in their current situation and that changing their schools again would not be in their best interests. In sum, the court found no credible evidence of an abusive and detrimental environment and the trial court's best-interests determination was consistent with the facts presented at trial. Accordingly, the trial court's findings were not against the manifest weight of the evidence.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the trial court's judgment granting sole decision-making responsibilities to Arben.

¶ 31 Affirmed.