2013 IL App (3d) 120846-U

Order filed March 4, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

R.M.,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Petitioner-Appellee,	)	Kankakee County, Illinois,
	)	
v.	)	Appeal No. 3-12-0846
	)	Circuit No. 05-F-54
D.Z.,	)	
	)	Honorable Michael D. Kramer,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when declining to conduct a second *in camera* interview of the minor children. The trial court's order directing a finding for R.M. is not against the manifest weight of the evidence. The trial court did not abuse its discretion in striking respondent's second motion to reopen proofs.

¶ 2 In March of 2005, R.M. filed a petition seeking child support from respondent, D.Z. The petition further sought a custody determination for the parties' two minor children. The circuit

court of Kankakee County entered a joint custody agreement in the matter on February 8, 2006. Four years later, on February 10, 2010, respondent filed a petition seeking modification of the joint custody agreement, which the trial court denied. Respondent appeals, *pro se*, claiming: (1) the trial court erred in denying his request to conduct an *in camera* interview of the two minors; (2) the trial court erred in directing a verdict in R.M.'s favor; and (3) the trial court erred in granting R.M.'s motion to strike respondent's motion to reopen proofs.

¶ 3 BACKGROUND

¶ 4 The minor children at issue in this custody dispute are twins born in August of 2000. The February 8, 2006, joint parenting agreement awarded joint custody, naming R.M. the residential parent. The agreement provided respondent with reasonable visitation and ordered him to pay slightly less than 28% of his net biweekly income due to the fact that he provides substantial daycare for the children. Following the entry of the agreement, no litigation or court action took place until respondent filed the instant petition on February 10, 2010.

¶ 5 The petition alleges that in August of 2009, R.M. and the two children moved in with respondent as they had no home of their own. Respondent and R.M. had not reconciled and were not living as man and wife.

¶ 6 The petition further alleges that R.M. announced an intent to leave respondent's residence and move into another residence in which her 17-year-old daughter, K.M., would also be residing. The petition continued that K.M.:

"has threatened to physically hurt the minor children by twittering

> on January 7, 2010, 'I'm going fucking insane I hope these little fuckers have school tomorrow or I will probably kill them ... my brothers are such ungrateful pricks I hate disrespectful little cretins.' On January 3, 2010, K.M. twittered 'beat kids.' "

¶ 7 Respondent attached documents to his petition purporting to be printouts from K.M.'s Twitter account. These documents also indicate that K.M. authored tweets about "drinking with my mom ... now I know why I only drink wine" and "drinking Bailey's with my mama." On February 5, 2010, K.M. tweeted, "I love drinking with my mom LMFAO."

¶ 8 The petition concluded that a change in custody must be forthcoming to ensure that the children attend and finish the school year without interruption and to provide a stable and safe home environment. Respondent claimed R.M. is irresponsible and not capable of providing safe housing or ensuring the children would complete the school year without interruption. The petition states that the circumstances of the parties have greatly and materially changed since the entry of the joint agreement noting: the August 1, 2009, move into respondent's residence; that respondent has been financially providing for all the minors' food, clothing, shelter, school expenses and other necessities; and the minor children's expression of a desire to continue to reside on a permanent basis with their father.

¶ 9 On February 15, 2010, R.M. and the minors moved from respondent's residence in Bourbonnais to Momence. R.M. answered the petition on March 19, 2010, noting that she no longer lived with respondent and that the children resided with her. The parties litigated the

matter resulting in a hearing on the petition taking place on April 18, 2011.

¶ 10 The hearing began with the court interviewing the boys *in camera*. The record reflects that "both sides" requested "an *in camera* inspection" of the minor children. The first minor to testify noted he was in fifth grade at Momence Grade School. He lived with his mom and other minor sibling in Momence. He further noted, "Sometimes K.M. my sister comes over" and that he does not have friends at his mom's house to play with. He does have a number of friends at his dad's house with whom he plays. As such, he usually stays inside his mom's house playing Wii or watching television but when at his dad's, he goes outside to play football and soccer.

¶ 11 Momence is the favorite school the minor had been to since third grade. There is nothing he dislikes about living with his mom. His older sister comes over, but she never plays with him. While he does have chores when staying at his dad's house, he does not at mom's. There is nothing he dislikes about staying at his dad's house. At the time of his testimony, this minor indicated his sister lived with his grandma. He acknowledged that sometimes he does not get along with her. She is finished with high school, but is not furthering her education and has no job. The minor felt he spends an equal amount of time with his father as he does with his mother and is "okay with" that arrangement.

¶ 12 The second minor testified that he, too, is in fifth grade at Momence Grade School. He liked the school he attended while living in Bourbonnais better than his school at Momence. The second minor also noted that it is only him, his brother and his mother living at his mom's residence. His sister comes to visit sometimes. He indicated that he felt he spends about the

same amount of time at his father's house as at his mother's house and that situation is good for him.

¶ 13 Respondent testified after his children. He lived with R.M. from the fall of 1997 through June of 2005. Beginning in January of 2009, he kept the minors approximately 20 nights per month until August of 2009 when R.M. and the minors moved in with him. K.M. would stay with them from time to time. R.M. and the children moved out February 15 of 2010.

¶ 14 At the time of respondent's testimony, it had been 406 nights since R.M. and the children moved out. Of those 406 nights, the boys stayed with him 227.

¶ 15 Diana Estes testified that she is employed as a social worker in the Bourbonnais Elementary School District. She had minimal contact with one of the twins and significant contact with the other as he exhibited anxious behaviors, including headaches and stomach aches. This twin has a learning disability for which the district implemented a behavior plan, placing the minor in a smaller class of 10 or 11 students. Estes noted it had been quite some time since she had seen the children prior to her testimony and had no personal knowledge of their "condition" at the time of her testimony.

¶ 16 R.M. testified at the hearing. She was employed at the K-Mart Distribution Center from October of 1997 through February of 2005. She then worked at Dabrico for more than a year until 2007. She drew unemployment until it ran out, then began working at Randy's Bar and Grill off and on for three years. At the time of her testimony, she had been on unemployment for three weeks.

¶ 17 R.M. acknowledged the minors had no friends around her house as she lives in the country. Sometimes the minors ask to go to their dad's house. She denied that the minors stayed four out of seven days at their dad's house since they moved out in February of 2010. R.M. stated that K.M. never moved to Momence with her, but she does stay from time to time noting, K.M. "stays a couple times a week" but lives full time with her grandmother. Despite testifying that K.M. never "lived" with her, R.M. acknowledged obtaining a medical card for K.M. indicating that K.M. did, in fact, live with R.M.

¶ 18 R.M. noted that she moved out of respondent's residence once she found a place that she could afford since the two did not get along very well. She did not think it was healthy for the children to be in that situation. She acknowledged that "it's possible" that respondent's numbers of having the children 64% of the time since she moved out are accurate.

¶ 19 R.M. was the last witness to testify at the April 18, 2011, hearing. After her testimony, she moved for a directed finding. After hearing arguments on the matter, the court noted it "is unable to find that there's clear and convincing evidence of a change in circumstances of the parents or the boys. Dad would like the Court to believe that there's been a change in the amount of time that could stand for a change in circumstance – amount of time that he spends with the boys. But the original judgment is a joint parenting agreement and order. It says that dad – – well, the first thing it says is that the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children is in the best interests of the children and that mom will be the residential parent and that the nonresidential

parent, the dad, shall have reasonable visitation with the minor children. Which he has had."

¶ 20 The court went on to note that the parties have always both maximized the amount of time they spent with the boys. As such, the court found "the time that the father's now spending with them cannot be designated as a change either. Absent that showing, the motion for directed finding will be granted and the petition for modification dismissed." The court then, again on April 18, 2011, entered a minute order granting R.M.'s motion for a directed finding and dismissing respondent's petition.

¶ 21 On May 18, 2011, respondent filed a *pro se* "Motion for Rehearing or Reopening of Proofs" and scheduled the matter for a hearing on June 6, 2011. Numerous continuances later, the trial court granted the motion to reopen the proofs. The court announced its intention to provide respondent a "full and adequate chance to present whatever he wants to present" and granted his request to depose K.M. Ultimately, the proofs were reopened and another hearing was held.

¶ 22 During this hearing which took place on May 31, 2012, K.M. testified that she lived with her grandmother in Limestone. She had lived there for four years. She described her relationship with the boys as that of normal siblings bickering. She noted the only negative feelings she had toward them were general "annoyance." After being asked about statements made on Twitter, she acknowledged making the aforementioned statements and indicated she "didn't mean that literally." She acknowledged using Ecstasy and marijuana. She used physical violence toward the boys on one occasion when she slapped them on their knees in a car.

¶ 23 After K.M.'s testimony, the trial judge explained that he could "certainly understand the motivation of a noncustodial father of two young boys bringing a motion to modify custody after reading the Twitter account postings of the boys' older sister who watches them from time to time ***." The court went on to find that R.M. had no knowledge of the ecstacy or marijuana use and that K.M. was not living with R.M. However, the court found "without some actual proof of some actual – – something actually occurring it's not going to be the basis of a change in custody." On the same day as the hearing, May 31, 2012, the trial court granted R.M.'s motion for a directed finding that no change in circumstance existed sufficient to warrant modification of the child custody agreement.

¶ 24 On June 29, 2012, respondent filed another motion to reopen proofs and for rehearing. R.M. moved to strike this motion on the basis that respondent had already filed a motion for reconsideration and to reopen proofs. On September 11, 2012, the trial court granted R.M.'s motion to strike the motion to reopen proofs. Respondent filed his notice of appeal on October 11, 2012. This appeal followed.

¶ 25 ANALYSIS

¶ 26 A. *In Camera* Interview

¶ 27 Respondent argues that the trial court erred in denying his request to conduct *in camera* interviews of the boys, T.Z and E.Z., at the May 31, 2012, hearing.

¶ 28 Section 604(a) of the Illinois Marriage and Dissolution of Marriage Act states that a "court may interview the child in chambers to ascertain the child's wishes as to his custodian and

as to visitation." 750 ILCS 5/604(a) (West 2010). As this court noted in *In re Marriage of Willis*, 234 Ill. App. 3d 156 (1992), "there is no absolute right to present a child's testimony during a custody proceeding, and, when that testimony is presented, it is left to the trial court's discretion whether to receive it from the witness stand or *in camera*." *Id*. at 159. "An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court." *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997).

¶ 29 The record reveals that on April 18, 2011, the trial court did conduct an *in camera* examination of E.Z. and T.Z. However, respondent notes that the trial court granted his motion to reopen proofs on November 28, 2011, and, therefore, concludes it created reversible error by refusing his request to call E.Z. and T.Z. to testify *in camera* at the May 31, 2012, hearing.

¶ 30 At that hearing, respondent argued that he wished to call the boys to testify to incidents that occurred after their April 18, 2011, testimony: specifically, a physical altercation with their mother; being locked in the closet by their sister; and the smoking of cigarettes by their sister and her boyfriend. The trial judge sustained the mother's objection to allowing the boys to testify, noting that they "have been interviewed *in camera*, they've testified on a wide variety of things. *** They covered what went on at home." We cannot say no reasonable person would agree with the position adopted by the trial court. Again, there is no absolute right to present a child's testimony during a custody proceeding. *Willis*, 234 Ill. App. 3d at 159.

¶ 31 As this court noted in *In Re Marriage of Johnson*, "Illinois courts have repeatedly held that the matter of *in camera* interviews is within the discretion of the trial court. When the trial

court determines that good reason exists not to conduct such an interview, a reviewing court will not substitute its judgment for that of the trial judge." *In re Marriage of Johnson*, 245 Ill. App. 3d 545, 554 (1993). While respondent's counsel informed the court that he had approximately 15 questions to ask the boys regarding their interaction with their mother and sister, it is clear the trial court felt the minors' previous interviews provided a sufficient picture of the children's environment upon which to determine custody. The record contains 55 pages of testimony from the boys discussing a wide variety of subjects ranging from: how they get to school in the morning; to how they interact with their parents and K.M.; to what responsibilities they have when staying at either parents' residence; to the manner in which each parent scolds them. For us to conclude that the trial court abused its discretion when refusing to allow respondent to pose an additional 15 questions on similar subject matter would simply result in us substituting our judgment for that of the trial court; a task we are not permitted to do. *Id.* at 554. As such, we hold the trial court did not err in refusing to conduct a second *in camera* interview of the children.

¶ 32 B. Directed Finding

¶ 33 Respondent next contends that the trial court erred in "making a directed finding" in favor of R.M. At the close of the initial hearing on April 18, 2011, R.M.'s counsel argued that respondent failed to adduce "sufficient evidence to warrant changing the residential parent of" the joint parenting agreement and, as such, requested "a directed finding" from the court to that effect. The trial court agreed and entered a minute order stating, "Motion for directed finding at

the close of movant's case made. Motion allowed. Petition to change custody dismissed."

¶ 34 Subsequent to that order, as discussed above, the trial court reopened proofs and allowed respondent to put on additional evidence consisting of K.M.'s testimony. Following that testimony and argument, the trial court again found "the evidence does not support a change" and, as such, held "the motion for directed finding will be granted."

¶ 35 When announcing these rulings, the trial court noted that it understood respondent's motivation for bringing the petition to change custody given the Twitter postings of K.M. However, the court noted that "it's become apparent to the court after hearing many of these types of cases now that young people don't put the normal every day occurrences of life on their Twitter account postings. *** And trying to rely upon Twitter account postings or MySpace or Facebook as proof of facts, actually things that have happened, just can't be done – – especially with young people."

¶ 36 The court acknowledged K.M.'s use of Ecstasy and marijuana, finding them troublesome, but found the mother was not aware of the use of either. The court noted the drug use "was not with permission or promotion or knowledge of the parent that she was not even living with. So the evidence that's been presented regarding drug use is not supportive of a change in custody. Had mom known about it, had mom promoted it, provided it that would be different."

¶ 37 While the court noted the attitude toward the boys as displayed in the Twitter postings "is alarming," it found that the postings were not proof of "something actually occurring." Ultimately, the court noted that "actual evidence of occurrences is – – is just lacking."

¶ 38 Respondent takes issues with these findings. He claims the findings are not only against the manifest weight of the evidence, but also that R.M. made certain judicial admissions in direct contradiction of the findings. Specifically, respondent claims the court's "finding that K.M. was not living with her mother while she was abusing drugs is error." Before we address the substance of respondent's argument, we note he specifically acknowledges in his brief that "K.M. never testified about the time frame in which she abused Ecstasy" and "K.M. never testified to the time frame for her addiction." Nevertheless, respondent concludes that the record contains a judicial admission by R.M. that K.M. lived with her while abusing Ecstasy.

¶ 39 Respondent arrives at this conclusion by noting that the "only reference the court had regarding the time period K.M. was abusing Ecstasy" came from a "blog posting" dated December 20, 2009. This blog posting refers to Ecstasy use the previous winter. As R.M. testified she lived with K.M and the boys until August of 2009, respondent claims that the trial court's finding that the drug use "was not with permission or promotion or knowledge of the parent that she was not even living with" is simply not supported by the record.

¶ 40 Respondent continues this argument, claiming the record contains a second judicial admission by R.M. that the evidence of K.M.'s drug use satisfies his burden to prove a change in circumstances. Respondent notes that R.M.'s lawyer stated, "When he characterizes R.M. well was she supporting this drug abuse, no. It's clear the only evidence from K.M. who said my mother was not aware of it. She was not living with R.M. at the time. If she was living with R.M. 24/7, then maybe there's a higher expectation of mom to pick up on some things." This,

respondent claims, is a judicial admission by R.M. that if the evidence showed K.M. used drugs when living with K.M., then there can be no doubt respondent satisfied his burden of proof.

¶ 41 While respondent is correct in his assertion that "judicial admissions are binding upon the party" making it and "cannot be controverted" by other evidence (*Renshaw v. Black*, 299 Ill. App. 3d 412, 418 (1998)), the statement by R.M.'s counsel does not equate to a judicial admission that R.M. knew of and/or supported K.M.'s drug use or that respondent satisfied his burden of proof. "Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998).

¶ 42 The statements made by R.M.'s attorney are far from "clear, unequivocal statements" establishing a concrete fact that K.M. used drugs with the support and knowledge of R.M. Moreover, while respondent wishes to categorize the blog post as unequivocal proof that K.M. abused Ecstasy while living with R.M., the record is clear that K.M. testified that her mother was never aware of her Ecstasy or marijuana use and that she never used drugs around her brothers.

¶ 43 When a party petitions for a modification of custody "pursuant to section 610 of the Act," as respondent did in the case at bar, the burden is on the party seeking the modification to "prove by clear and convincing evidence" that a material change in circumstances has occurred. *In re Marriage of Maurice B.H. & Gatanya A.A.*, 2012 IL App (1st) 121105, ¶ 19. "When deciding whether to modify child custody, the trial court must look at the totality of the circumstances." *Id*.

¶ 44 Respondent takes issue with the trial court's directed finding that he failed to meet his

burden of proving a material change in circumstance by clear and convincing evidence. We hold the trial court did not err in making this ruling as the opposite conclusion is not clearly evident. "A decision regarding child custody modification will not be disturbed on appeal unless it is against the manifest weight of the evidence." *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177 (2002). A determination will be found to be against the manifest weight of the evidence only if the opposite conclusion is clearly evident or the determination is unreasonable, arbitrary, or not based on the evidence presented. *In re D.F.*, 201 Ill. 2d 476, 498 (2002). Under a manifest weight of the evidence standard, we give deference to the trial court as the finder of fact, as it is in the best position to observe the conduct and demeanor of the parties and the witnesses and has a degree of familiarity with the evidence that a reviewing court cannot possibly obtain. *Id.*

¶ 45 The record reflects that the joint parenting agreement identified R.M. as the residential custodian and noted that the primary physical residence of the children shall be with her. It further noted that she "shall have the sole responsibility for determining the location of such residence" and afford respondent reasonable visitation. At the time the trial court approved the agreement, February 8, 2006, the parties lived in separate residences. Respondent alleged in his petition to modify that agreement that a change in circumstance occurred; that being, R.M. allowing her teenage daughter to reside in the custodial residence when doing so would be harmful to the children. Respondent alleged this change to be harmful given K.M.'s drug use and descriptions of the boys on social media sites. The trial court found that K.M. did not live with

R.M. and the boys, that R.M. had neither supported nor knew of the drug use and that K.M.'s reference to the boys on social media sites did not equate to a material change in circumstance sufficient to modify custody. We hold that sufficient evidence exists in the record to support these findings and, as such, find they are not against the manifest weight of the evidence.

¶ 46 C. Denial of Second Motion to Reopen Proofs

¶ 47 At the May 31, 2012, hearing, the trial judge entered a minute order stating, "Case called for hearing on additional evidence on motion to modify custody. *** Evidence heard. Motion for directed finding allowed." Thereafter, on June 29, 2012, respondent filed a *pro se* petition "to reopen the proofs, rehearing, or reconsideration of hearing of May 3[1], 2012." R.M. moved to strike respondent's motion and the matter proceeded to a hearing on September 11, 2012. At the hearing, the trial court found that the "new June 2012 motion to reopen is essentially a rehash of what has already been presented to the court." Therefore, the trial court granted R.M.'s motion to strike respondent's petition to reopen the proofs and for rehearing. Respondent argues on appeal this ruling was erroneous as R.M.'s motion to strike failed to contain a citation to the authority under which R.M. moved to strike.

¶ 48 Citing to *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469 (1994), respondent correctly notes that our supreme court has stated that "[m]eticulous practice dictates that a lawyer specifically designate whether her motion to dismiss is pursuant to section 2-615 or section 2-619." *Id*. at 484. As R.M. failed to identify the statute under which she believed the court should strike respondent's petition to reopen proofs, respondent reasons that this passage from *Illinois*

Graphics mandates reversal. The *Illinois Graphics* court continued, however, noting that the "failure to do so may not always be fatal." *Id*. "When confronted with such an omission, however, reviewing courts typically review the nondesignated motion according to its grounds, its requests, or its treatment by the parties and the trial court." *Id*. "This court will not reverse the [trial] court's order granting [a] motion to strike absent an abuse of that discretion." *People v. Lindmark*, 381 Ill. App. 3d 638, 658 (2008). Again, an abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court. *Schwartz,* 177 Ill. 2d at 176. In substance, R.M.'s motion to strike was simply an objection or response to respondent's second motion to reopen proofs.

¶ 49 Reviewing respondent's petition, it appears to contain two distinct themes. Initially, it asks the trial court to reopen proofs as "a transcript of the hearing from April 18, 2011 was inadvertently not introduced as evidence, restricting the court's proper evaluation of all relevant facts." The remainder of respondent's motion contains arguments similar to those addressed above in which respondent emphasizes evidence he claims the trial court ignored, most notably, the evidence respondent believes unequivocally proves that K.M. lived with R.M. Every case must have an endpoint.

¶ 50 Respondent attached the transcript of the April 18, 2011, hearing to his petition, arguing that the court must reopen the proofs to consider the testimony in the transcript in conjunction with the additional testimony heard during the May 31, 2012, hearing. We note, however, the same judge who struck respondent's motion to reopen proofs, Judge Michael Kramer, was also

the judge who presided over the April 18, 2011, hearing. As such, he was well aware of all the evidence presented therein. We cannot say the trial court abused its discretion by refusing to reopen proofs to consider evidence of which it was already aware.

¶ 51 Finally, respondent argues that the trial court "erred in dismissing respondent's post trial motion." The posttrial motion respondent refers to is his June 29, 2012, petition to reopen proofs, which included a section requesting rehearing and reconsideration. When striking respondent's petition, the trial court effectively denied the portion of the petition requesting rehearing. We find no error in denying respondent's petition for rehearing.

¶ 52 The substance of respondent's arguments seeking a rehearing equate to a disagreement with the trial court's finding that K.M. did not live with R.M., and that the trial court erred in finding that the evidence admitted failed to support the conclusion that K.M. posed a threat to the minor children. As noted above, sufficient evidence exists in the record to support the trial court's findings that K.M. does not live with R.M and that her social media postings do not evince a material change in circumstances sufficient to modify custody. As such, we cannot say the court erred in denying respondent's motion for a rehearing.

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 55 Affirmed.