2014 IL App (4th) 140643-U

NO. 4-14-0643

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 11, 2014
Carla Bender
4th District Appellate
Court, IL

In re: MARRIAGE OF	)	Appeal from
GINGER HOHN SCHELL,	)	Circuit Court of
Petitioner-Appellee,	)	Vermilion County
and	)	No. 08D311
PAUL RYAN SCHELL,	)	
Respondent-Appellant.	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justice Appleton concurred in the judgment.
Justice Steigmann dissented.

ORDER

¶ 1 *Held*: The appellate court vacated the trial court's order denying respondent's motion for increased visitation where the court failed to apply the appropriate best-interest factors.

¶ 2 In September 2008, petitioner, Ginger Hohn Schell, filed a petition for dissolution of marriage from respondent, Paul Ryan Schell. In May 2012, the trial court entered an order granting physical care and possession of the couple's minor children to Ginger and supervised visitation to Paul. In January 2014, Paul filed a motion for increased visitation. In June 2014, the court denied Paul's motion, finding Paul had not demonstrated a significant change in circumstances sufficient to warrant increasing his visitation.

¶ 3 Paul appeals, asserting the trial court erred in denying his motion for increased visitation. For the following reasons, we vacate the court's order and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 A. Dissolution Proceedings

¶ 6 In 1992, Ginger and Paul married in South Carolina. They had four children: A.S. (born June 3, 1994), J.S. (born August 23, 1995), K.S. (born December 24, 1998), and B.S. (born January 16, 2006).

¶ 7 In September 2008, Ginger filed for dissolution of her marriage to Paul. At the same time, Ginger filed a petition for temporary relief, requesting the trial court grant her temporary custody and order Paul to have supervised visits. Ginger also obtained an emergency order of protection on behalf of herself and the children wherein she alleged Paul committed acts of physical abuse and prohibited the family from leaving the home or contacting anyone without his permission.

¶ 8 In November 2008, Judge Wall entered an interim order continuing Ginger's physical care and possession of the minor children pending a hearing for a plenary order of protection. However, Judge Wall amended the order of protection, (1) permitting Paul weekly supervised visitation, (2) requiring Paul to obtain a psychological evaluation, and (3) awarding temporary child support to Ginger. The parties, by agreement, continued the interim order of protection, including the placement of the minors with Ginger, until Judge Wall entered a January 2011 plenary order of protection. The plenary order of protection (1) extended Ginger's order of protection against Paul for two years, (2) granted Ginger physical care and possession of the children, and (3) included protection on behalf of the children. In February 2011, Paul filed a

notice of appeal challenging the plenary order of protection, but the appeal was later dismissed for Paul's failure to comply with Illinois Supreme Court Rule 326 (eff. Feb. 1, 1994). *In re Marriage of Schell*, No. 4-11-0106 (2011) (unpublished order under Supreme Court Rule 23).

¶ 9 B. May 2012 Order

¶ 10 In May 2012, Judge Karen E. Wall entered a temporary order modifying the plenary order of protection. At this point, the children had not participated in face-to-face visitation with Paul in over a year. Judge Wall ordered (1) supervised visitation between Paul and the children for three hours on alternate weekends, (2) the parties agree to a supervisor for those visits, and (3) Paul and the children to obtain counseling services as necessary to reintroduce the family. If Paul complied with the order and the relationship between Paul and the children progressed, Judge Wall would order a more traditional schedule of visitation.

¶ 11 C. July 2013 Order

¶ 12 In May 2013, Paul filed a motion for increased visitation. In the motion, Paul asserted (1) he had done nothing to support the denial of visitation, (2) Ginger interfered with his efforts to visit with the children, (3) he provided three psychological evaluations as ordered by the court, (4) Ginger had a history of mental disorders that rendered her unable to care for the children, and (5) he had a close relationship with his children prior to Ginger filing for divorce.

¶ 13 In June 2013, Judge Michael D. Clary conducted a hearing on Paul's motion for visitation. In July 2013, Judge Clary entered a directed finding in Ginger's favor. The judge found Paul (1) had not participated in any counseling; (2) refused to consider a new visitation supervisor, resulting in Paul receiving no visitation for six months; and (3) failed to present evidence showing it was in the children's best interest to modify Judge Wall's 2012 order. Paul filed a notice of appeal; however, the appeal was later dismissed for lack of jurisdiction because

the order was not final for purposes of appeal. *In re Marriage of Schell*, 2014 IL App (4th) 130555-U (unpublished order under Supreme Court Rule 23).

¶ 14 Later that month, Judge Clary entered an order for the dissolution of Paul and Ginger's marriage but retained jurisdiction over the parties and the subject matter pending the resolution of all remaining issues.

¶ 15 D. June 2014 Order

¶ 16 In January 2014, Paul filed another motion to increase visitation. In March 2014, Ginger filed a motion to strike pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)), asserting Paul failed to plead that he had complied with the trial court's previous orders with regard to visitation or that any change in circumstances had occurred.

¶ 17 In June 2014, Judge Craig H. DeArmond held a hearing to resolve any remaining issues between the parties. At the beginning of the hearing, the parties indicated they had reached an agreement on all remaining issues except for Paul's motion for increased visitation and Ginger's related motion to strike. Accordingly, the judge addressed only those pending motions during the hearing. The judge began by taking judicial notice of the May 2012 order entered by Judge Wall and the July 2013 order entered by Judge Clary.

¶ 18 Following the presentation of evidence, Judge DeArmond denied Paul's motion for increased visitation. In doing so, the judge noted, "[r]ather than fixate on those things over which you have no control, which you clearly find very frustrating, you could have fixated on those things which would put you in a better position to argue for more visitation with your children." According to the judge, the May 2012 order provided Paul with guidelines for obtaining more frequent and unsupervised visitation; Paul failed to follow those guidelines.

Judge DeArmond found, despite Paul's assertion that he was trying to protect his children, Paul was unwilling to "do what might be in the best interest of the children."

¶ 19 Judge DeArmond characterized the central question before him as, "[h]as he presented a significant change in circumstances sufficient to warrant a change in the current visitation schedule? No. He's just argued about the visitation arrangement." The judge further stated, "if we're really talking about what's in the best interests of your children, then [do] whatever you got a [*sic*] do to get there. Nothing's changed. You haven't presented anything to me today that has changed where things were when the order was previously entered." In observing Paul may not perceive the court's comments as being designed to assist him, the judge further stated, "I can't help that, I can only put on the record the reasons why I have to find that there is no sufficient change in circumstances warranting a change in the visitation schedule."

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, Paul asserts the trial court erred by denying his motion for increased visitation. Initially, we note Ginger did not file an appellee's brief. However, because the record before us is simple and the claimed errors are such that this court can easily decide them without the aid of an appellee's brief, we will address the merits of Paul's appeal. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493, 495 (1976). In proceeding without an appellee's brief from Ginger, this court's role is not to serve an advocate for the appellee, nor are we required to search the record for grounds to sustain the trial court's judgment. *Id.*

¶ 23 "The court may modify an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child[.]" 750 ILCS 5/607(c) (West

2012)). "The party seeking the modification has the burden of showing the modification is in the best interest of the child." *Sarchet v. Ziegler*, 278 Ill. App. 3d 460, 462, 663 N.E.2d 25, 26 (1996). In weighing the best interests of the child, the court should consider, in part:

> "(1) the wishes of the child's parent or parents ***;
>
> (2) the wishes of the child ***;
>
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
>
> (4) the child's adjustment to his home, school and community;
>
> (5) the mental and physical health of all individuals involved;
>
> (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
>
> (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person; [and]
>
> (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child[.]" 750 ILCS 5/602(a) (West 2012).

The trial court should also consider that it is in the children's best interest to have a close and healthy relationship with both parents. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 157, 993 N.E.2d 1062. We will not overturn the court's order on a motion to modify visitation unless the court's decision was against the manifest weight of the evidence. *Sarchet*, 278 Ill. App. 3d at 462, 663 N.E.2d at 26. However, where the court fails to apply the correct legal standard, our review is *de novo*. *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 23, 983 N.E.2d 1124.

¶ 24 In this instance, though the trial court made several references to the best interest of the children, the court focused its order on whether Paul presented a significant change of circumstances to warrant the modification of visitation. That is not the appropriate standard for the modification of visitation. See 750 ILCS 5/607(c) (West 2012). When entering its order, the trial court did not reference the best-interest factors set forth under section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2012)) or engage in an analysis suggesting it took those factors into consideration in reaching its decision. Rather, the court's focus remained on whether Paul had complied with the May 2012 court order, thus demonstrating a significant change in circumstances. Indeed, the court's supplemental order fails to mention the best-interest standard but does include a finding Paul has failed to establish a change in circumstances.

¶ 25 This court has the ability to affirm on any basis in the record. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 734, 910 N.E.2d 1134, 1148 (2009). However, the difficulty in doing so in this case is twofold. First, though we recognize the trial court is not required to specifically outline on the record the best-interest factors it considered in reaching its decision, in this case, the court's commentary and subsequent order suggests the court applied the

incorrect legal standard—whether Paul presented a significant change in circumstances—to the evidence. Second, during the hearing in this matter, the parties presented conflicting testimony on several issues. For example, the parties disputed the quality of Paul's relationship with K.S. and whether Paul's visits with B.S. should remain supervised. It is the trial court's duty to weigh the evidence and judge the credibility of the witnesses, and we should give the court the opportunity to consider the evidence in light of the correct legal standard. See *Hasek v. DaimlerChrysler Corp.*, 319 Ill. App. 3d 780, 787-88, 745 N.E.2d 627, 634 (2001) (the trial court is in the best position to weigh the evidence and judge the credibility of the witnesses). Accordingly, we conclude it would be more appropriate to provide the trial court with an opportunity to supplement its order, applying the best-interest standard and, if necessary, requesting a further hearing on the matter.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, we vacate the trial court's order denying Paul's motion for increased visitation and remand with directions to apply the appropriate best-interest factors. See 750 ILCS 5/602(a) (West 2012).

¶ 28 Judgment vacated; cause remanded with directions.

¶ 29 JUSTICE STEIGMANN, dissenting.

¶ 30 I disagree that this court should vacate the trial court's order. Given the history of this case that was before the trial court, as well as the evidence the court heard at the June 2014 hearing, I conclude the court's decision was soundly based and consistent with the applicable statutory factors. I disagree that the court was required to explicitly set forth those factors for its order to pass muster on appeal. Accordingly, I respectfully dissent.

¶ 31 In ¶ 24 *supra*, the majority (1) states that the trial court focused its order on whether Paul presented a significant change of circumstances to warrant the modification of visitation and (2) observes that the court's doing so was not the appropriate standard for modification of visitation. The majority then states in that paragraph that when the trial court entered its order, it did not refer to the best-interest factors as set forth under section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2012)). However, I do not find this is a fair characterization of the circumstances before the trial court.

¶ 32 The context in which this case came before the trial court at the June 2014 hearing is that Paul's visitation with the children had been restricted for years based upon orders entered and findings made by different judges in earlier proceedings. In June 2013, one of those earlier judges denied Paul's motion for visitation, noting that Paul had (1) not participated in any counseling and (2) failed to present evidence showing it was in the children's best interest to modify the earlier restricted visitation order.

¶ 33 Thus, it should come as no surprise that in a hearing conducted a year later on Paul's new motion to increase visitation, the trial court focused on Paul's continuing failure to do those things that he was told to do by the court to achieve the modification of visitation he has consistently sought. That the court emphasized Paul's failure to do so does not, in my opinion,

constitute a basis for concluding that the court did not appropriately consider the best-interest factors as set forth under section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2012)).