2015 IL App (4th) 150240-U

NO. 4-15-0240

FILED
August 26, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

MATTHEW WILLIAMS,	)	Appeal from
Petitioner-Appellant,	)	Circuit Court of
v.	)	Jersey County
REBECCA KENNEDY JODWAY,	)	No. 04F53
Respondent-Appellee.	)	
	)	Honorable
	)	Eric S. Pistorius,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justice Turner concurs in the judgment.
Justice Appleton dissents.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment, which denied petitioner's motion to modify child custody and visitation.

¶ 2 Following a relationship between respondent, Rebecca Kennedy Jodway, and petitioner, Matthew Williams, Jodway gave birth to J.W. (born May 23, 2003). Based on Williams' July 2004 petition under the Illinois Parentage Act of 1984 (Parentage Act) (750 ILCS 45/1 to 27 (West 2004)), the trial court entered an order (1) establishing Williams' paternity and child-support obligation and (2) granting Williams visitation with J.W. as agreed to by the parties. In January 2013, Jodway *pro se* filed a motion to clarify the parentage order, requesting that the court confirm her status as J.W.'s custodial parent. In February 2013, Williams filed a motion to modify child custody and visitation, arguing that a substantial change in circumstances warranted transferring custody of J.W. from Jodway to Williams.

¶ 3 Following hearings on the parties' motions that ended in August 2014, the trial court entered a September 2014 order that (1) denied Williams' motion to modify child custody and visitation and (2) confirmed Jodway's status as J.W.'s custodial parent.

¶ 4 Williams appeals, arguing that the trial court erred by denying his motion to modify child custody and visitation. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Circumstances Preceding the Parties' Filings

¶ 7 In May 2003, Jodway gave birth to J.W. In July 2004, Williams filed a paternity petition, requesting that the trial court (1) adjudicate him as J.W.'s biological father and (2) award the parties joint custody of J.W. Following a hearing conducted later that month, the court entered an order (1) recognizing Williams as J.W.'s biological father, (2) implementing the parties' agreement as to Williams' visitation with J.W., and (3) ordering Williams to pay Jodway monthly child support. From 2004 to 2007, the parties filed numerous pleadings, requesting modification of child custody, child support, and visitation rights.

¶ 8 In February 2008, Jodway *pro se* filed a motion, requesting to relocate J.W. from Illinois to Michigan. In March 2008, the trial court granted Jodway's motion, based, in part, on her commitment to transport J.W. to and from Williams' residence during his weekend, holiday, and summer visitation schedule. Sometime prior to November 2008, Jodway moved to Mount Vernon, Illinois. In 2011, Jodway relocated to Greenfield, Illinois.

¶ 9 B. The Parties' Filings

¶ 10 In January 2013, Jodway *pro se* filed a motion to clarify the parentage order, requesting that the trial court confirm her status as J.W.'s custodial parent. Jodway's filing was based on her claim that Williams had represented to school, medical, and other officials that the

parties had joint custody of J.W. In February 2013, Williams filed a motion to modify child custody and visitation, arguing that a substantial change in circumstances warranted awarding him custody of J.W. In April 2013, the court ordered the parties into mediation, which subsequently failed.

¶ 11 C. The Hearing on the Parties' Filings

¶ 12 During several hearings, which ended in August 2013, the parties presented the following evidence on their respective filings.

¶ 13 1. *Jodway's Testimony*

¶ 14 Jodway testified that although she was satisfied with the parties' visitation schedule, the purpose of her motion was to clarify the parties' respective obligations with regard to Williams' weekend, holiday, and summer visitations with J.W.

¶ 15 Jodway opposed Williams' motion to change custody because as J.W.'s custodian, she was aware of J.W.'s health and welfare needs. Jodway explained that J.W. was prone to "psycho fits" in which she would (1) break things, (2) attempt to harm herself, and (3) scream that nobody loved her and "it would be better if she just disappeared." Initially, Jodway responded to these fits by holding J.W. down on the ground until she calmed down. Doctors later diagnosed J.W. with attention deficit/hyperactivity disorder (ADHD) and prescribed daily medication to manage that condition. Jodway acknowledged, however, that J.W. continued to talk "like an auctioneer" in that her speech remained rapid because of her ADHD, which caused J.W. to experience bullying while at school. In addressing that concern, Jodway stated the following:

> "[J.W.] needs to learn coping mechanisms to deal with that, which is why I thought it would be best for her to go to the *** school counselor who specializes in bullying[.] [Williams] said he

> was fine with that and then I also had mentioned to [Williams] that [J.W.] had said that when [Williams] comes and pulls her out of class and eats lunch with her for three or four times a week that the kids make fun of her for that[;] calling her baby because she always has to have her daddy there. So I told [Williams] go [to school for] parent-teacher conferences, plays, *** stuff like that *** would be appropriate but just going to her school whenever he feels like it [and] pulling her out of class and away [from] the kids at recess to where [J.W.] can't have that social interaction with other kids her age, they're going to continue to bully her."

¶ 16 Despite Jodway's attempts to help J.W. with her schoolwork, J.W. received special education services because she struggled in school. Those services included individual education plan (IEP) meetings that the school invited parents to attend, but Williams would either not attend the IEP meetings or would send a family member to represent him. Jodway confirmed that J.W.'s performance on the 2012 and 2013 Illinois Standards Achievement Test was below average for reading, math, and science.

¶ 17 Jodway had not authorized Williams to receive updates from J.W.'s school, which she acknowledged violated the trial court's March 2008 order. Jodway explained that she interpreted the court's order to mean that Williams could get access to J.W.'s educational information, but she did not know that it was her responsibility to authorize such disclosure by providing Williams' personal information to the appropriate authorities. Jodway added that she and Williams "could not agree on much of anything," and the only time that Jodway spoke to Williams about J.W.'s welfare was during visitation pick up or drop off, which was sporadic because on some

occasions, Williams had "somebody else" assume those duties. Jodway added that "most of the time" Williams did not answer her phone calls, ignored her voice and text messages, or took hours to respond.

¶ 18 Jodway admitted that she had alleged Williams had sexually assaulted J.W. on 5 occasions during the past 11 years, which the Department of Children and Family Services determined were unfounded. Jodway acknowledged that she had not made any such allegations against Williams in the past year. Afterward, the following exchange occurred:

> "[WILLIAMS' COUNSEL:] Have you on Facebook called [Williams] a [pedophile]?
>
> [JODWAY:] No.
>
> [WILLIAMS' COUNSEL:] So your statement on Facebook regarding a [pedophile]…
>
> [JODWAY:] I didn't *** specifically say [Williams] so if [Williams] has a problem with my statement on Facebook saying [pedophile], and if he believes that refers to him that is not my problem. *** [T]he definition of a [pedophile] is an adult who is sexually attracted to a young child. I was 14 [years old] he was 23 [years old]. That's an adult who was sexually attracted to a young child. So I mean if he has a problem with that then maybe he should stop sleeping with people who are under 18 [years old]."

¶ 19 2. *Williams' Testimony*

¶ 20 Williams testified that with regard to bullying, he attempted to talk to teachers, school counselors, and peers in similar situations to determine the source of the bullying. Wil-

liams also had J.W. talk to his local pastor and bought self-esteem books "to help J.W. keep her self-esteem good." Williams confirmed that he visited J.W. during her school lunchtime and a portion of her recess. During those visits, Williams noticed that J.W. had body odor, oily hair, and wore clothes that were either soiled or too small. Williams complained that Jodway did not provide him information on J.W.'s educational progress, and, aside from initially telling him about J.W.'s ADHD diagnosis, Jodway did not provide updates on J.W.'s ongoing health concerns. Williams arranged tutors to assist J.W. with her schoolwork, but Jodway would not let J.W. attend because it was not during Williams' visitation time.

¶ 21 Williams stated that he was in a two-year relationship and his partner had just given birth to a girl that J.W. loves and dotes on as a "mother hen." During his visitation time with J.W., Williams stated that they go on walks, ride bikes, and have father-daughter talks. Williams noted that J.W. also goes to the neighborhood playground and plays with her friends. Williams was concerned with J.W.'s emotional and mental state because he observed that J.W. had an inferiority complex—specifically, a feeling that she did not belong. If granted custody, Williams planned to send J.W. to a different school because "it would pull [J.W.] out of a bullying situation *** and possibly make it better." Williams stated that he also has the support of his mother and stepfather, both of whom had a good relationship with J.W.

¶ 22 3. *The Trial Court's Judgment*

¶ 23 In September 2014, the trial court entered a written order in which it found that a substantial change in circumstances had occurred since the entry of its March 2008 order, which authorized Jodway to move J.W. to Michigan. Specifically, the court noted that J.W. had (1) a speech impairment and (2) been diagnosed with ADHD, which affected her academically, socially, and behaviorally. The court also noted that (1) Jodway had been J.W.'s custodial parent since

May 2003, when J.W. was born; (2) Jodway had J.W. evaluated by a medical professional, who diagnosed J.W.'s ADHD and provided treatment for that condition; and (3) Jodway had been working with school administrators to address J.W.'s educational needs. The court then continued, as follows:

> "As noted in [Jodway's] [p]osition [s]tatement, '[s]tability for the child is a major consideration both with an initial award of custody under section 602 of the [Illinois Marriage and Dissolution of Marriage Act (Marriage Act)] (750 ILCS 5/610 (West 1992)) and with a modification of custody under [section] 610 of the [Marriage] Act (750 ILCS 5/610 (West 1992))[.'] **It is a mistake to change custody from a good custodian in hopes that another may be better**. The policy favoring stability finds its strongest expression in cases involving attempts to modify a previously made custody decision, under section 610 of the [Marriage] Act. By creating a presumption in favor of [Jodway], the legislature[,] in section 610 [of the Marriage Act,] has sought to promote a stability and continuity in [J.W.'s] custodial and environmental relationships which is not to be lightly overturned. As noted above, [Jodway] has been the primary custodial parent since [J.W.'s] birth. As issues have arisen with [J.W., Jodway] has addressed those issues. Has [Jodway's] response to these issues always been perfect? No, but they have been timely and appropriate." (Emphasis in original.)

In denying Williams' motion to modify child custody and visitation, the court rejected Williams' claim that he would be a better parent to J.W., finding that Williams "has demonstrated little over the child's life to suggest that to be true, particularly when the standard is clear and convincing evidence." In so concluding, the court granted Jodway's motion to clarify the parentage order, finding that Jodway "has always been the custodial parent."

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 Williams argues that the trial court erred by denying his motion to modify child custody and visitation. Specifically, Williams contends that (1) the court misapplied portions of section 610 of the Marriage Act and (2) the court's denial of his motion to modify custody was against the manifest weight of the evidence. Prior to addressing Williams' contentions, we first consider Jodway's deficient brief to this court.

¶ 27 A. Jodway's Brief to this Court

¶ 28 We note that Jodway's *pro se* brief to this court consists of two typewritten pages entitled, "Response to the appeal of the [trial] court's decision." Because Jodway's brief fails completely to comply with Supreme Court Rule 341 (eff. Feb. 6, 2013), we decline to consider it. Indeed, given the issues on appeal, we proceed as if Jodway had not filed a brief.

¶ 29 In *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493, 495 (1976), the supreme court explained the options a reviewing court may exercise when an appellee fails to file a brief, as follows:

> "We do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judg-

ment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed."

¶ 30 In other words, the supreme court has set forth three distinct discretionary options a reviewing court may exercise in the absence of an appellee's brief: (1) it may serve as an advocate for the appellee and decide the case when the court determines justice so requires; (2) it may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of the appellee's brief; or (3) it may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record. *Thomas v. Koe*, 395 Ill. App. 3d 570, 577, 924 N.E.2d 1093, 1098-99 (2009) (citing *Talandis Construction Corp.*, 63 Ill. 2d at 133, 345 N.E.2d at 495). Given the child-custody issues presented and the record before us, we conclude that justice requires this court to address the merits of Williams' arguments.

¶ 31 B. The Pertinent Statutes and the Standard of Review

¶ 32 Section 16 of the Parentage Act provides, as follows:

"Modification of Judgment. The court has continuing jurisdiction to modify an order for support, custody, visitation, or removal included in a judgment entered under this Act. Any custody, visitation, or removal judgment modification shall be in accordance with the relevant factors specified in the *** Marriage *** Act ***."

750 ILCS 45/16 (West 2012).

¶ 33 Section 610(b) of the Marriage Act provides, in pertinent part, as follows:

> "The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child." 750 ILCS 5/610(b) (West 2012).

¶ 34 Section 602(a) of the Marriage Act provides that in determining child-custody matters, a trial court must consider all relevant factors including (1) the parent's wishes as to custody; (2) the minor's wishes as to the custodian; (3) the minor's interactions with parents, sibling, and others who may affect the minor's best interest; (4) the minor's adjustment to his home, school, and community; (5) the mental and physical health of all involved individuals; (6) physical violence or threats of physical violence by the custodial parent; (7) the occurrence of ongoing or repeated abuse; (8) the willingness of the minor's parents to foster a close and continuing relationship with each other as well as the minor; (9) whether one parent is a sex offender; and (10) whether a parent who is a member of the armed forces has complied with the terms of a military family-care plan. 750 ILCS 5/602(a) (West 2012).

¶ 35 When making child-custody determinations, a trial court should consider all relevant factors, including those listed in section 602(a) of the Marriage Act (750 ILCS 5/602(a)

(West 2012)). *In re Marriage of Marsh*, 343 Ill. App. 3d 1235, 1239, 799 N.E.2d 1037, 1041 (2003). "On appeal, we give great deference to the trial court's best-interest findings because that court had a better position than we do to observe the temperaments and personalities of the parties and assess the credibility of witnesses." (Internal quotation marks omitted.) *In re B.B.*, 2011 IL App (4th) 110521, ¶ 32, 960 N.E.2d 646. "[A] reviewing court will not reverse a trial court's custody determination unless it (1) is against the manifest weight of the evidence, (2) is manifestly unjust, or (3) results from a clear abuse of discretion." *Id.* Additionally, due to the delicacy and difficulty of child-custody cases, the trial court is afforded wide discretion to an even greater degree than any ordinary appeal, to which the familiar manifest-weight principle is applied. *In re N.T.*, 2015 IL App (1st) 142391, ¶ 27, 31 N.E.3d 254.

¶ 36 C. The Trial Court's Child Custody Determination

¶ 37 In support of his argument, Williams first contends that the trial court misapplied portions of section 610 of the Marriage Act. Simply put, we find no basis for this contention.

¶ 38 Under the plain language of section 610(b) of the Marriage Act, "the party seeking modification of custody must prove by clear and convincing evidence that (1) a change has occurred in the circumstances of the child or his custodian and (2) modification of custody is necessary to serve the best interest of the child." *In re Marriage of Rogers*, 2015 IL App (4th) 140765, ¶ 57, 25 N.E.3d 1213. "An important—and we think obvious—caveat to this rule is that the change in circumstances must be material to the child's best interest." *Id.* "In other words, '[c]hanged conditions alone do not warrant modification in custody without a finding that such changes affect the welfare of the child.' " *Id.* (quoting *In re Marriage of Nolte*, 241 Ill. App. 3d 320, 325-26, 609 N.E.2d 381, 385 (1993)).

¶ 39 In this case, the trial court found that a change in circumstances had occurred

since its March 2008 order in that J.W. (1) had a speech and language impediment and (2) was diagnosed with ADHD, which affected J.W. academically, socially, and behaviorally. Williams does not object to this portion of the court's written order but, instead, challenges the court's finding that he failed to prove by clear and convincing evidence that the existence of those circumstances affected J.W.'s welfare such that a change in custody was warranted. In this regard, Williams asserts, generally, that the court misapplied the second prong of the analysis—that is, that modification of custody was necessary to serve the best interest of the child—by not applying its factual findings to the 10 statutory factors enumerated in section 602(a) of the Marriage Act. However, a court is not required to make a specific finding regarding each factor listed in section 602(a) of the Marriage Act as long as evidence was presented from which the court could consider the factors prior to making its decision. *In re Marriage of Hefer*, 282 Ill. App. 3d 73, 79, 667 N.E.2d 1094, 1099 (1996).

¶ 40 The trial court found that despite the changed circumstances brought about by J.W.'s medical and psychological conditions, the evidence presented showed that Jodway addressed J.W.'s academic, social, and behavior issues by (1) seeking medical attention, which resulted in a diagnosis of ADHD; (2) administering the appropriate medication to manage that condition; and (3) alerting school officials so that counseling and curriculum adjustments could be made to facilitate further learning. The court also found that, although not perfect, Jodway had appropriately addressed other issues that arose in a timely manner, such as seeking counseling to address J.W.'s bullying issues. In other words, in considering the totality of the circumstances presented—which included the applicable factors listed in section 602(a) of the Marriage Act—the court determined that despite the changed circumstances, J.W.'s welfare was not adversely affected. Thus, we reject Williams' contention that the court misapplied the law in so

finding.

¶ 41 We also reject Williams' second contention that the trial court's denial of his motion to modify custody was against the manifest weight of the evidence.

¶ 42 The trial court denied Williams' motion to modify custody and visitation based on Williams' failure to rebut the presumption of maintaining the status quo in custody arrangements. *In re Marriage of Davis*, 341 Ill. App. 3d 356, 359, 792 N.E.2d 391, 394 (2003). Specifically, the court determined that J.W.'s changed circumstances did not warrant a change in custody because of the then 11 years of stability provided to J.W. by Jodway's custodial presence and parenting. In making that determination, the court quoted portions of *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 409-10, 639 N.E.2d 897, 900 (1994), in which this court reasoned, as follows:

> "Stability for the child is a major consideration both with an initial award of custody under section 602 of the [Marriage] Act [citation] and with a modification of custody under section 610 of the [Marriage] Act [citation]. Some decisions suggest that 'stability' is achieved when a child is moved from a home where there is turmoil to one where there is quiet. [Citations.] 'Stability' is also used in the sense of continuity, the absence of change. Some child development experts believe:
>
> > 'that interruption of a continuous relationship with a loving and nurturing parent invariably leaves scars that do not heal completely and may affect the child's future ability to form relationships and become a good parent himself. Such experts

> are likely to recommend that the child stay with the parent to whom he has the stronger attachment (if they can determine which parent that is), even though the other parent may be better off, more intelligent, more consistent, more patient, and generally more appealing.' [Citation.]
>
> It is a mistake to change custody from a good custodian in hopes that another may be better.
>
> The policy favoring stability finds its strongest expression in cases involving attempts to modify a previously made custody decision, under section 610 of the Act. By creating a presumption in favor of the present custodian, the legislature in section 610 has sought to promote a stability and continuity in the child's custodial and environmental relationships which is not to be lightly overturned. [Citation.] ' "[I]nsuring the decree's finality is more important than determining which parent should be the custodian. [Citation.]" ' "

See *In re Marriage of Spent*, 342 Ill. App. 3d 643, 652, 796 N.E.2d 191, 198-99 (2003); *In re Marriage of R.S.*, 286 Ill. App. 3d 1046, 1051, 677 N.E.2d 1297, 1300-01 (1996) (citing *Wycoff* approvingly); See also *In re Marriage of Wechselberger*, 115 Ill. App. 3d 779, 786, 450 N.E.2d 1385, 1389 (1983) ("Section 610(b) reflects an underlying policy favoring the finality of child-custody judgments and making their modification more difficult.").

¶ 43 Although we note that Williams presented a colorable claim that his family situa-

tion, support structure, and plans to address J.W.'s bullying issues could also provide J.W. stability, the trial court found that the evidence presented showed Williams had demonstrated little over the course of J.W.'s life to suggest he would be a better parent to J.W. than Jodway. Given the court's overarching rationale that the stability provided by Jodway's custodial parentage was in J.W.'s best interest, we conclude that the court's decision to deny Williams' motion to modify custody and visitation was neither against the manifest weight of the evidence, manifestly unjust, nor an abuse of the court's discretion.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm the trial court's judgment.

¶ 46 Affirmed.

¶ 47 JUSTICE APPLETON, dissenting.

¶ 48 I respectfully dissent. Children, especially children with special needs, require stability in their environment. Petitioner is able to provide that stability while respondent is not. Moreover, respondent's attempts to control the child's tantrums by lying on top of her are a questionable stratagem, bordering on abuse.