

No. 1-13-1674

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except under the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE of)	Appeal from
)	the Circuit Court
JACQUELINE M. GOLDIN,)	of Cook County
)	
Petitioner-Appellee,)	
)	
and)	No. 10 D 7010
)	
NEIL M. MORGANSTEIN,)	Honorable Lisa Ruble Murphy
)	Judge Presiding
Respondent-Appellant.)	

JUSTICE MASON delivered the judgment of the court.
Justices Neville and Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD:* Trial court properly denied untimely and unfounded petition for substitution for cause; trial court did not abuse its discretion in connection with orders relating to child support, visitation, maintenance and attorneys' fees.

¶ 2 On January 22, 2014, we decided the issues in this appeal related to child custody. As noted in that opinion, respondent-appellant, Neil Morganstein, has raised a number of other issues ranging from attorneys' fees to visitation. We elected to postpone consideration of those

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issues in the interest of expeditiously resolving matters related to child custody. We now address the remaining issues raised by Neil on appeal. For the reasons that follow, we affirm.

¶ 3 *Substitution for Cause*

¶ 4 As noted in our prior opinion, a two-day trial was held in this matter on November 7-8, 2012. On October 30, 2012, Neil filed a pleading styled "Petition for Judge Substitution for Cause" pursuant to section 2-1001(a)(3) of the Code of Civil Procedure. 735 ILCS 5/2-1001(a)(3) (West 2012). The petition itself was 46 pages long and attached 57 exhibits totaling an additional 180 pages. The petition was noticed for hearing the following day, October 31, 2012, at 9:30 a.m. before Judge Lisa Ruble Murphy.

¶ 5 On October 31, Judge Murphy entered an order denying the petition based on "opposing counsel's objection to notice and improper filing." Evidently, although our examination of the record does not shed light on the subject, the petition, even though it had already been denied, was transferred to another judge for hearing. Following a hearing on November 5, 2012, Judge Nancy Katz entered an order denying the petition and the matter was returned to Judge Murphy's calendar for trial.

¶ 6 Neil challenges the denial of this petition on appeal, but his arguments on this issue can be resolved summarily. First, Neil's petition was not timely filed. The petition was filed approximately one week prior to trial and was noticed for hearing on less than 24 hours' notice to opposing counsel. The grounds for "cause" asserted concerned rulings made by the trial court in June 2012, over four months earlier, and during 2011, a year before the petition was filed. Throughout the summer, the parties continued to present matters to Judge Murphy for ruling.

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Prior to the filing of his petition, Neil never suggested that Judge Murphy was biased or was not capable of resolving those matters. Based on these facts alone, Judge Murphy was justified in denying the petition without referral to another judge.

¶ 7 Section 5/2-1001(b) requires "reasonable notice" to the adverse party or his or her attorney. 735 ILCS 5/2-1001(b) (West 2012). Less than 24 hours' notice does not constitute "reasonable notice" under any circumstances, much less so when the rulings complained of were made months and up to a year earlier. Further, Neil did not present his petition "at the earliest practicable moment" as case law requires and he offered no excuse for his delay. See *In re Estate of Wilson*, 238 Ill. 2d 519, 556 (2010). Finally, the fact that Neil appeared before Judge Murphy on numerous occasions after the rulings he complains of and never suggested that she was biased until the eve of trial raises serious concerns about Neil's good faith in pursuing the motion. "Where it is apparent that the request [for substitution for cause] is not made in good faith but for purposes of delay, the denial of a motion to substitute does not constitute error." *Id.* at 557. For all of these reasons, Neil's petition was untimely.

¶ 8 Second, the matters raised in Neil's petition, even if true, would not support granting a substitution for cause. Neil based his claim that Judge Murphy was biased primarily on rulings made by Judge Murphy on matters presented to her for decision. In particular, Neil claimed that Judge Murphy wrongly denied his request for declaratory relief seeking to bar the testimony of an expert designated by his former wife, Jacqueline Goldin, erred in refusing to disqualify another expert, refused to sanction attorneys involved in the case or report them to appropriate disciplinary authorities and relied on recommendations from the Child Representative appointed

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by the court. "Where bias or prejudice is invoked as the basis for seeking substitution, it must normally stem from an extrajudicial source, *i.e.*, from a source other than from what the judge learned from her participation in the case before her." *Id.* at 554. As noted by our supreme court in *Wilson*, " 'opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings *** do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.' " 238 Ill. 2d at 554, quoting *Eychaner v. Gross*, 202 Ill. 2d 228, 281 (2002).

¶ 9 We have carefully examined the record in this case. As we noted in our prior opinion, the parties in this case fought bitterly over every imaginable issue. Many of the positions taken by Neil, particularly with respect to the retained and court-appointed experts, were objectively unfounded and unreasonable. We find no evidence in the record of any comments by Judge Murphy that could reasonably be construed as displaying a deep-seated favoritism toward Jacqueline or a deep-seated antagonism against Neil. Although Neil claims for the first time on appeal that the fact that Jacqueline was a party to another dissolution proceeding before Judge Murphy is somehow relevant, he failed to raise this issue in his 46-page petition and it is, therefore, waived. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007) (issues not raised in the trial court cannot be raised for the first time on appeal). Furthermore, it is apparent from the reported decision in that matter that Judge Murphy ruled against Jacqueline, thus dispelling any possible argument that she was favorably disposed toward her. See *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448. Consequently, apart

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from its untimeliness, the petition was substantively deficient as well. For these reasons, Neil's petition for substitution for cause was properly denied.

¶ 10 *Visitation, Maintenance and Child Support*

¶ 11 Neil also takes issue with the trial court's rulings regarding visitation with the parties' minor child, the denial of his request for maintenance from his former wife and his obligation for child support. We find no error in the trial court's rulings on these issues.

¶ 12 Neil characterizes the parenting schedule approved by the trial court as a "restriction" on his parenting time, citing section 607(c) of the Illinois Marriage and Dissolution of Marriage Act (the Act). 750 ILCS 5/607(c) (West 2010) ("the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health."). Neil claims that because the trial court failed to make a finding that additional parenting time would "endanger seriously" his son's "physical, mental, moral, or emotional health," the parenting schedule adopted by the trial court cannot stand.

¶ 13 But as recognized in *In re Marriage of Lee*, 246 Ill. App. 3d 628, 645 (1993), a "restriction" on visitation "limits, restrains, or confines visitation within bounds." Orders that terminate visitation, prohibit overnight stays or require supervised visitation fall into this category. *Id.* In contrast, an order specifying or modifying a schedule for parenting time that does not otherwise place restrictions on the parent's interaction with the child during that time is not governed by section 607(c). *Id.* See also *In re Marriage of Chehaiber*, 394 Ill. App. 3d 690, 696 (2009) ("the more stringent endangerment standard was created to place a greater burden on a party seeking a reduction in a parent's visitation time where the reduction is based on reasons

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pertaining to perceived deficiencies of the parent, as opposed to reasons pertaining directly to the child's best interests."). Here, the record reveals that the visitation schedule set by the trial court was based on evidence relating to the best interests of the parties' son and not any "perceived deficiencies" in Neil, his home environment or his parenting skills.

¶ 14 Further, the parenting schedule adopted by the trial court is reasonable in all respects. According to the detailed parenting schedule included as part of the child custody judgment entered on April 26, 2013, Neil is entitled to "routine parenting time" each Wednesday from the end of the school day until 7 p.m. and alternating weekends from Friday after school through Monday morning. If a school holiday falls on either Friday or Monday, Neil is entitled to elect additional parenting time on those days. The judgment also sets out in detail parenting time for religious holidays, Halloween, national holidays, spring break, Christmas break, and summer vacation. We have examined these provisions and find them fair and reasonable.

¶ 15 As we noted in our prior order, the parties' son has certain developmental disabilities and routinely participates in a number of therapies. Based on the evidence presented at trial, the court determined that it was in the child's best interests that there be as few transitions between parents as possible in his regular weekly routine. The court found and we agree that the routine parenting time schedule achieves the best balance between Neil's desire for parenting time and his son's need for consistency.

¶ 16 Neil also contends that the trial court erroneously denied his request for maintenance from Jacqueline. Prior to their marriage, Neil and Jacqueline executed a premarital agreement. As recited in the agreement, the parties each had substantial property and assets and both desired

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that "their respective property remain solely his or hers." The agreement further provided that the parties desired to fix in advance of their marriage "the rights and claims of each in and to the estate and property of the other, and to accept the provisions of this Agreement in lieu of and in full discharge, settlement and satisfaction of all such rights and claims." Under the heading "Marriage Termination," the agreement provided that both parties

"hereby waive and shall be barred from asserting any right or claim he or she may have to, and agree to request that a court make no provision for, alimony, separate maintenance, support, or maintenance (whether temporary, permanent or rehabilitative, in gross, lump sum or by periodic payment) or any other form of payment, or any award of property or income of the other *** in connection with any such termination of their marriage, including attorney's fees, accountant's fees or other expenses relating thereto, temporary or fixed ***."

Attached as exhibits to the agreement were schedules of assets intended by the parties to remain nonmarital property. According to Neil's schedule, his separate assets had a value of in excess of \$500,000.

¶ 17 On December 1, 2011, Jacqueline filed a motion seeking a declaration that the parties' premarital agreement was valid and enforceable. Following trial, the trial court found that the premarital agreement contained an enforceable mutual waiver of the right to seek maintenance and that, in any event, there was no evidence presented that would support a finding that Neil required maintenance from Jacqueline. Based on our review of the record, these rulings are manifestly correct.

¶ 18 Under the Act, the provisions of premarital agreements are "binding upon the court" unless it finds, after considering the economic circumstances of the parties and any other relevant evidence, that the agreement is "unconscionable." 750 ILCS 5/502(b) (West 2010). No evidence was presented at trial that the premarital agreement was not a voluntary undertaking by Neil and Jacqueline. Although Neil argues on appeal that Jacqueline failed to disclose certain assets she possessed prior to their marriage, Neil does not cite any evidence in the record supporting this claim. The parties' agreement contains an unambiguous mutual waiver of the right to seek maintenance. Such contractual undertakings are enforceable. *In re Marriage of Burgess*, 138 Ill. App. 3d 13, 15 (1985); see also *In re Marriage of Barnes*, 324 Ill. App. 3d 514, 517 (2001).

¶ 19 There is also no evidence in the record that would support a finding that the waiver of maintenance works a hardship on Neil that would justify overriding the terms of the premarital agreement. As far as the record shows, Neil elected to be self-employed as an audio-visual consultant during the parties' marriage, in addition to dabbling in a candy-making business for which he purchased substantial equipment. There is no evidence that Neil is unemployable or that he has been otherwise prevented from seeking gainful employment. Given the substantial assets disclosed by Neil in the premarital agreement, we cannot say that the trial court abused its discretion in determining that he was not entitled to maintenance from Jacqueline. See *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005) (party challenging maintenance decision bears burden to show abuse of discretion).

¶ 20 Neil's arguments regarding child support are equally unsupported by the record. Shortly after Jacqueline filed her petition for dissolution, the trial court entered an order requiring Neil to

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pay \$333.00 per month in child support on an interim basis, an amount the court recognized was "woefully inadequate" to satisfy Neil's support obligations. As part of its final order in this case, the trial court determined that Neil should pay \$750 per month in child support retroactive to the date of its earlier order. This amount was calculated based on an extrapolation from the amount of annual expenses Neil reported on a disclosure form filed with the trial court. Neil reported annual expenses of approximately \$55,000 annually, while on his 2011 tax returns he reported annual income of approximately \$5,000. Neil also reported no debt. Given the disparity between Neil's reported expenses and his income, the trial court, in calculating his responsibility for child support, imputed income to him that corresponded to his reported expenses.

¶ 21 Under the Act, child support is calculated based on the noncustodial parent's net income. 750 ILCS 5/505(a)(1) (West 2010). For one child, the guidelines specify a minimum child support payment of 20% of the supporting parent's net income. *Id.* A court is to apply the guideline amount set out in the Act unless it finds that the application of the guidelines is inappropriate after considering the child's needs and resources, the needs and resources of both parents, the standard of living the child would have enjoyed had the marriage not been dissolved and the physical and emotional condition of the child as well as his educational needs. 735 ILCS 5/505(a)(2) (West 2010); see also *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 108 (2000). Where the noncustodial parent's income is difficult to ascertain, the court can award an amount that is reasonable under the circumstances of the case. *Id.* at 109. If a court deviates from the guidelines, it must articulate its reasons for doing so. *Id.* at 108. The setting or modification of

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child support is a matter within a trial court's discretion and its determination of an appropriate level of child support will not be reversed absent an abuse of discretion. *Id.* at 105.

¶ 22 The trial court found that application of the guidelines to Neil's reported income would produce a monthly child support obligation of slightly over \$200 per month, a sum less than the amounts Neil reported as monthly expenses for storage of his wine collection and other property (\$348) and dining out (\$250). As noted by the trial court, although Neil had persistently pursued more parenting time with his son, he also resisted Jacqueline's efforts to set a meaningful level of child support. Neil was voluntarily underemployed during the parties' marriage and the trial court admonished him that in the absence of evidence of a realistic income level, it would have no recourse but to impute income to him based on his earnings potential. The court's use of Neil's reported expenses to extrapolate imputed income was entirely appropriate.

¶ 23 We find no error in the trial court's calculation of child support.

¶ 24 *Attorney's Fees and Expenses*

¶ 25 Neil assigns error in the trial court's refusal to require Jacqueline to pay interim and final awards of Neil's attorney's fees and in its allocation of the fees and costs of Joel Levin, the Child Representative appointed by the court. As we have noted, our review of the record indicates that both parties have unnecessarily prolonged this litigation and contributed to the associated increased expenses. Throughout these proceedings, the Child Representative has been required to moderate the internecine warfare between Neil and Jacqueline. We can find no abuse of discretion in the trial court's refusal to require Jacqueline to bear all or a portion of Neil's fees

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and expenses either on an interim or a final basis. Further, the trial court split equally the Child Representative's fees and expenses, a result that is likewise supported by the record.

¶ 26

Miscellaneous Issues

¶ 27 As we noted in our prior opinion, Neil's brief fails to comply with Illinois Supreme Court Rule 341 (eff. July 1, 2008). Containing no statement of facts necessary to an understanding of the issues raised, with citations to the record, Neil's brief intersperses arguments with facts and intermingles issues. While we refused to strike the brief given the fact that it concerned child custody issues, we will not search the record to divine the basis upon which Neil makes unsupported assertions regarding other issues such as Jacqueline's alleged concealment of assets in connection with the premarital agreement, "false" medical bills for the parties' son, or the source of funds used to pay for the parties' wedding reception. "[A] reviewing court is not simply a depository into which a party may dump the burden of argument and research." *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720 (2010); see also *U.S. Bank v. Linsey*, 397 Ill. App. 3d 437, 459 (2009); *Engle v. Foley & Lardner, LLP*, 393 Ill. App. 3d 838, 854 (2009). *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010). We decline to address these issues and, therefore, affirm the trial court's orders in their entirety.

¶ 28 For the foregoing reasons, the orders of the trial court appealed from are affirmed.

¶ 29 AFFIRMED.