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2014 IL App (3d) 130948-U

Order filed May 8, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

<i>In re</i> MARRIAGE OF BRIAN MURPHY,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Petitioner-Appellee,)	
)	Appeal No. 3-13-0948
and)	Circuit No. 12-D-2091
)	
DIANE MURPHY,)	Honorable
)	Brian E. Barrett,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices McDade and Carter concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's award of residential custody to the petitioner was supported by the record on appeal.

¶ 2 Respondent, Diane Murphy, appeals from an order of the circuit court of Will county granting residential custody of the parties' two minor children to the petitioner, Brian Murphy. The appellant maintains on appeal that: (1) the trial court erred in admitting into evidence and considering a report prepared pursuant to section 604(b) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/604(b) (West 2012) by Dr. Robert Shapiro; (2) her

right to due process was violated when the trial court granted temporary custody of the children to the Brian prior to its final custody determination; and (3) the trial court's award of sole residential custody to Brian was against the manifest weight of the evidence.

¶ 3

BACKGROUND

¶ 4 The parties were married and had minor children: K.M., born January 2, 2008, and M.M., born October 2, 2009. Diane filed a petition for dissolution of marriage in Will County (No. 10-D-1404) sometime in July 2010, seeking sole residential custody of the children and Brian filed a response in which he also sought sole residential custody. An order was entered granting temporary custody of the children to Diane with Brian exercising visitation one week night per week and on alternate weekends. The court appointed Dr. Robert B. Shapiro, a licensed clinical psychologist, to issue a custody evaluation report pursuant to section 604(b) of the Act. 750 ILCS 5/604(b) (West 2012). Dr. Shapiro was appointed in early December 2011.

¶ 5 On June 1, 2012, Dr. Shapiro issued a 20 page report in which he presented his findings and recommendations to the court. Dr. Shapiro's report was addressed to the court and indicated that copies were sent to the attorneys representing each party on or about June 1, 2012. In addition, the report was faxed to Brian's attorney on June 12, 2012. In the report, Dr. Shapiro gave a detailed factual analysis in support of an opinion that Brian be made the sole residential custodian of the children with significant unrestricted visitation for Diane.

¶ 6 Following the issuance of Dr. Shapiro's report, there was no significant activity until Diane voluntarily dismissed her petition for dissolution on October 6, 2012.

¶ 7 On October 29, 2012, Brian filed a petition for dissolution of marriage which gave rise to the instant appeal. On February 22, 2013, he filed an emergency petition for temporary custody. Brian was granted a temporary custody order following an *ex parte* hearing on February 26, 2013.

¶ 8 On June 26, 2013, Dr. Shapiro was appointed to perform a custody evaluation pursuant to section 604(b) of the Act. 750 ILCS 5/604(b) (West 2012). Dr. Shapiro issued a three page report on August 3, 2013, in which he referenced the prior report and provided details concerning the interviews he conducted with the parties in July 2013. In the new report, Dr. Shapiro opined that it would be in the best interest of the children that Brian be given sole residential custody of the children with Diane to have visitation approximating 50% of the time. Dr. Shapiro noted in his second report that the parties had agreed to a 50/50 custody allocation during the time period between Diane dismissing her petition and Brian filing his petition. The record indicates that both Dr. Shapiro's original report and his subsequent report were filed with the trial court on August 20, 2013.

¶ 9 A hearing on the issue of custody was held on or about August 6, 2013. Dr. Shapiro testified and was cross-examined at that hearing. The cross-examination focused on the fact that the amount of time Dr. Shapiro spent preparing the first report far exceeded the amount of time he spent on the second report. Dr. Shapiro noted, however, that unlike the first report, Diane did not make herself available until the shortly before the report was due.

¶ 10 On August 30, 2013, the trial court entered an order granting sole residential custody of the minors to Brian. On November 8, 2013, the trial court denied Diane's motion to reconsider and she filed a timely appeal.

¶ 11 ANALYSIS

¶ 12 The appellant first maintains that the trial court erred in considering the report issued by Dr. Shapiro in the prior proceeding. She cites *Johnston v. Weil*, 241 Ill. 2d 169, 178 (2011) for the proposition that a report prepared by a custody evaluator pursuant to section 604(b) of the Act (750 ILCS 5/604(b) (West 2012)) cannot be considered in a different proceeding involving

the same parties. Because this issue raises a question of statutory construction, we will review the claim *de novo*. *In re Marriage of Tegeler*, 365 Ill. App. 3d 448, 453 (2006).

¶ 13 We do not agree with the appellant's understanding of the holding in *Johnston*. We also note that the facts in *Johnston* are clearly distinguishable from the instant matter. In *Johnston*, Heather Johnston married Andrew Weil after divorcing Sean McCann. Johnston and McCann were subsequently involved in a post-dissolution petition to modify custody of their son. In that proceeding, a clinical psychiatrist was appointed by the court to conduct an independent evaluation to assist the court in determining custody of McCann's son. The report was filed with the trial court. During the pendency of the Johnston-McCann proceeding, Weil began dissolution proceedings against Johnston and sought custody of the daughter that had been born to this marriage. *Johnston*, 241 Ill. 2d at 173. Weil sought discovery of the custody evaluation report filed in the Johnston-McCann proceedings. Johnston opposed disclosure and admission of the McCann report in the Weil proceedings, invoking section 604 of the Marriage Act (750 ILCS 5/604(b) (West 2012) and citing privilege under the Mental Health and Developmental Disabilities Confidentiality Act (Confidentiality Act) (740 ILCS 110/1 *et seq.*).

¶ 14 In *Johnston*, our supreme court addressed the certified question of whether reports and information obtained pursuant to section 604(b) of the Marriage Act are confidential under the Confidentiality Act. *Johnston*, 241 Ill. 2d at 172. Since the Confidentiality Act is not at issue in the instant matter, we will focus our analysis on whether the Marriage Act prevents disclosure of a custody evaluation report, as the appellant maintains. The *Johnston* court observed that "section 604(b) of the Marriage Act, *considered alone*, requires disclosure of the 604(b) report only in the particular proceeding in which the advice is sought." (Emphasis added). *Johnston*, 241 Ill. 2d at 177. However, as the *Johnston* court then pointed out, section 604(b) of the Marriage Act cannot be considered alone but must be read in conjunction with other sections of

the Marriage Act, particularly section 605 (750 ILCS 5/605 (West 2012)) which allows disclosure of any reports or documents considered by a custody evaluator whether in the same or different proceeding. *Johnston*, 241 Ill. 2d at 178. The *Johnston* court held that the report prepared in the McCann proceeding was admissible in the Weil matter. *Id.*

¶ 15 In the instant matter, we find that *Johnston* supports the use of Dr. Shapiro's report prepared in the prior proceeding. Pursuant to section 605 of the Marriage Act, Dr. Shapiro was entitled to utilize all the information he gathered from all sources (including himself) when he prepared his report and recommendation in the second proceeding. Moreover, we note that the trial court exercises broad discretion in determining what constitutes relevant evidence in a custody determination. *Marcus v. Marcus*, 24 Ill. App. 3d 401, 407 (1974). Clearly the information gathered by Dr. Shapiro in preparing his first report was relevant to the weight or lack thereof to be given to his second report and to the opinion he rendered in the instant proceeding. We find no error in the trial court's acceptance of Dr. Shapiro's recommendation which included reference to his prior report.

¶ 16 The appellant next maintains that the trial court erred in awarding temporary custody to Brian following the *ex parte* hearing on February 26, 2013. It is well-settled that the award of temporary custody is not a final order and can only be appealed by the filing of a timely interlocutory appeal pursuant to Supreme Court Rule 306(a)(5) (eff. Feb. 6, 2011). *In re Marriage of Kostusik*, 361 Ill. App. 3d 103, 111 (2005). If a timely interlocutory appeal of a temporary custody order is not filed, the temporary order cannot be appealed. *Id.* Such is the case in the instant matter. Since the temporary order was not appealed, all arguments concerning the temporary order are moot. *Id.*

¶ 17 The appellant last maintains that the trial court's order awarding custody of the parties' minor children to Brian was in error because the trial court relied "almost exclusively" on Dr.

Shapiro's report. A trial court's custody determination will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Eckert*, 119 Ill. 2d 316, 328 (1988). A decision is against the manifest weight of the evidence where the opposite conclusion is clearly apparent or where the findings are unreasonable, arbitrary, and not based upon any of the evidence. *In re Marriage of Main*, 361 Ill. App. 3d 983, 989 (2005).

¶ 18 Reviewing the record in its entirety, we cannot say that the trial court's custody decision was against the manifest weight of the evidence. Dr. Shapiro's written reports provide detailed factual support for the trial court's custody determination. Dr. Shapiro also testified at the hearing on the final custody determination and was subjected to cross-examination by opposing counsel. It is well-settled that while a trial court is not required to rely upon the findings and recommendations of the court-appointed evaluator, the court may at its discretion give appropriate weight to those findings and opinions. *In re Marriage of Felson*, 171 Ill. App. 3d 923, 928 (1988). Here, we find nothing in the record to suggest that the court's determination, including the weight it gave to Dr. Shapiro's written report and cross-examined testimony was against the manifest weight of the evidence.

¶ 19 **CONCLUSION**

¶ 20 The judgment of the circuit court of Will County is affirmed.

¶ 21 Affirmed.