FOURTH DIVISION
August 4, 2016

No. 1-16-0035

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
CINQUE R.,	)	Cook County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 06 D6 30907
	)	
JANEEN W.,	)	Honorable
	)	Sharon O. Johnson,
Respondent-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order denying petitioner's emergency motion to change custody is affirmed because petitioner withdrew the motion and even had the motion not been withdrawn petitioner failed to satisfy his burden of proof to establish substantial endangerment of the child's well being or that an award of temporary custody was in the child's best interest.

¶ 2 This appeal arises from a custody dispute in proceedings to dissolve the marriage of petitioner, Cinque R., and respondent, Janeen W. The circuit court of Cook County entered a

judgment dissolving the parties' marriage and awarding custody of their minor child to respondent. Petitioner filed the motion that is the subject of this appeal as an emergency motion for temporary custody and to permanently change custody to him. The court denied the emergency motion on the grounds the motion did not fit the criteria for an emergency and custody was already pending before the court. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The dissolution proceedings began on September 6, 2006. Petitioner sought sole custody of the parties' minor child (born August 14, 2006).[1] On May 17, 2007 the trial court entered a judgment for dissolution of marriage granting sole custody of the child to respondent and granting petitioner visitation. Both before and after the judgment dissolving the marriage petitioner filed numerous motions pertaining to visitation. To understand petitioner's argument on appeal and our disposition, we need only start with the motion petitioner filed *pro se* on April 22, 2014 (April 2014 motion). Petitioner titled the April 2014 motion "Emergency Motions for Contempt-of-Court and Modification of Custody." The motion alleged that respondent interfered with visitation between April 18 and 20, 2014. Petitioner alleged that although he had agreed to allow respondent to have the child that weekend, she "gave it back" when petitioner asked her to because it was Easter weekend. The April 2014 motion alleged that respondent's mother left several messages for petitioner, asking him to allow respondent to have the child that weekend. Allegedly, when petitioner told respondent to tell her mother it was his weekend and he wanted to keep it, respondent told petitioner to tell her himself. Petitioner's motion does not allege he did not have the minor on those dates. However, a later pleading respondent filed

[1] Effective January 1, 2016, the General Assembly modified the Illinois Marriage and Dissolution of Marriage Act to eliminate the concept of "custody" in favor of allocation of parental responsibilities.

stated that she had the child that weekend in accordance with petitioner's earlier agreement. The motion also complained of an instance in October 2013 when respondent failed to turn over the child for visitation. (The trial court later found that respondent's failure to provide a visit was not willful or contumacious because the visitation order was capable of two different interpretations as to the weekend in question.)

¶ 5 The April 2014 motion also alleged that respondent has "adversely affected the relationship" between him and the child by intentionally misleading the trial court and the justice system. (Petitioner was the subject of an Emergency Order of Protection initiated in DuPage County by respondent.) In the April 2014 motion petitioner specifically complained that respondent twice falsely accused him of sexually assaulting the child. He alleged that the Illinois Department of Children and Family Services (DCFS) found respondent's first complaint unfounded and during the time frame of the second complaint the minor was with her mother. Petitioner's motion alleged that the child had begun to exhibit poor behavior in school, including pulling down her pants, kissing boys, and rolling on the floor, she is "behind socially," and that the child's reading comprehension is below her grade level.

¶ 6 Petitioner further noted that respondent had admitted to physically pushing him while he was holding their daughter while accusing him of punching respondent in the face and kicking her in the chest at the same time. Those allegations in the April 2014 motion stem from respondent's complaints in her October 26, 2010 petition for an order of protection. In that petition, respondent alleged that petitioner insisted on talking about visitation when dropping off the minor to respondent, respondent attempted to take the minor into the home, and petitioner hit respondent on her chest with an open hand. Petitioner pushed respondent causing her to fall and petitioner also fell while holding the child. Respondent alleged that as she attempted to crawl toward them petitioner was getting up and kicked her.

¶ 7 Petitioner's April 2014 motion sought temporary physical custody of the child "pending trial for permanent physical custody and an order finding respondent in contempt of court for interfering with petitioner's visitation and his relationship with the child. On April 28, 2014, the trial court entered petitioner's motion and continued the matter to July 28, 2014.

¶ 8 On July 25, 2014, respondent filed an answer denying all of the allegations in the motion. Respondent asked the court to dismiss the emergency motions to modify custody and for a finding of contempt because petitioner failed to provide any evidence to support his claim the child faces or is in eminent danger from respondent. She further alleged that new evidence supported her having sole custody because of "a recent incident that occurred where [petitioner] inflicted bodily harm (domestic violence) to the minor child, which resulted in the incarceration of [petitioner.]" Respondent alleged that on May 29, 2014, she discovered two six-inch bruises on the back of the child's upper right thigh and later learned that the child received the bruises as a result of petitioner punishing the child with a belt. Respondent answered petitioner's remaining allegations against her and asked the court to dismiss petitioner's April 2014 emergency motions for modification of custody and contempt.

¶ 9 On July 28, 2014, the trial court entered an order stating that a child representative would be appointed for the child and continuing the matter. Subsequently petitioner filed a motion to stop respondent from taking the child out of state on vacation, which the court denied.

¶ 10 On August 25, 2014, petitioner filed a motion for leave to amend his April 2014 motion. Petitioner's motion for leave to amend alleged the child received bruising after petitioner filed the April 2014 motion and implied that criminal proceedings against respondent had begun as a result. Petitioner claimed respondent incriminated herself in her answer to his April 2014 motion, suggesting petitioner was referring to the same bruising on the child referenced in respondent's answer, which she accused him of inflicting. Petitioner complained the court had

refused to treat his motion as an emergency and "it became an even greater emergency after the minor child *** obtained bruises on her body." On August 29, 2014, respondent filed an answer to petitioner's motion for leave to amend the April 2014 motion in which she stated she discovered the bruises on the child on May 31, 2014, and that when she asked the child about them, the child told respondent her father "whipped her on Thursday, May 29, 2014 after school for receiving a bad behavior *** from class." Respondent asserted the incident was reported to DCFS which found the report indicated. Respondent asked the court to deny the motion for leave to amend. On September 4, 2014 the trial court granted petitioner leave to file an amended motion within 7 days and granted respondent 28 days to respond to an amended motion.

¶ 11 On September 18, 2014, petitioner filed a document titled "Motion to Show Cause" which alleged that respondent submitted documents to the child's school indicating petitioner was not to have visitation with the child, and when police went to respondent's home to ask for petitioner's visitation, respondent and the child were not home resulting in the issuance of a ticket for criminal visitation interference. Petitioner alleged this was the second such ticket respondent received, allegedly having pled guilty to the first, and that the paperwork allegedly stating he was not to have visitation with the child was "false."

¶ 12 Petitioner attached a copy of the document respondent allegedly gave the child's school: a plenary order of protection entered on August 22, 2014 which remained in effect until October 1, 2014. The plenary order of protection stated petitioner is not to remove the child from respondent's physical care. Petitioner's "Motion to Show Cause" asked the court to find respondent guilty of visitation abuse, fraud, and defamation.

¶ 13 On September 24, 2014, petitioner filed a motion titled "Emergency Ex Parte Child Abuse" in which he alleged the child was being physically abused by respondent or someone in her household, and that "emotional abuse is occurring on [the child] as [respondent] is arbitrarily

interfering with visitation." Petitioner claimed to have pictures of bruising on the child. His September 2014 motion sought a temporary change in custody and asked the trial court to order respondent arrested for violating court orders. On October 16, 2014, petitioner filed a petition on behalf of the child for an order of protection against respondent. The petition for order of protection claimed that abuse to the child occurred between May 29, 2014 and June 2, 2014 in which the child "sustained deep blue, purple and red bruises on her outer right thigh." The petition for order of protection also stated that respondent had accused petitioner of abuse but a court found him not guilty on October 1, 2014. The petition for order of protection on behalf of the child also complained that the child had been denied visitation with petitioner, and petitioner "had to endure prison and legal fees, etc." He also stated that his character had been defamed because of false arrests, and he had incurred attorney fees, costs, and missed employment. The trial court denied the petition for an emergency order of protection and continued the petition for order of protection for a hearing after service or notice to respondent.

¶ 14 On January 8, 2015 the court referred the matter to Forensic Clinical Services. In a separate order on the same date the trial court denied the petition for order of protection. The court specifically found "that no evidence was presented indicating the minor obtained the injuries at [the] mother's home" and that respondent "did not sustain his burden of proof." The court continued the matter for status on the referral to Forensic Clinical Services for an evaluation and also continued the matter for a hearing on petitioner's motion to show cause and emergency motion for contempt of court and modification of custody. The court ordered petitioner to take parenting classes.

¶ 15 On January 20, 2015, counsel filed an appearance on behalf of petitioner. On January 23, 2015, the court granted petitioner leave to file a motion for leave to amend petitioner's *pro se* pleadings. Petitioner's attorney filed the motion for leave to amend petitioner's *pro se* pleadings

on February 20, 2015. The motion to amend stated that petitioner's emergency motion, "which was denied as an emergency, combines a petition for rule to show cause and a request for modification in one." The motion to amend also stated that "these issues remain pending until the custody evaluation is completed, and cannot thus be heard prior to the completion of the custody evaluation."

¶ 16 On May 14, 2015, petitioner's attorney filed an amended petition for rule to show cause and an amended petition to modify custody. The amended petition for rule to show cause alleged respondent interfered with petitioner's visitation on Easter weekend in 2014 and when she informed the child's school petitioner was to have no visitation, and respondent received two citations for criminal visitation interference. The amended petition sought a rule to show cause why respondent should not be held in indirect civil contempt. The amended petition to modify custody alleged there had been a substantial change in circumstances that necessitated a change in custody. The alleged change in circumstances were a deterioration of the child's behavior in school, and that since being awarded primary custody, respondent "has been on a campaign to significantly interfere with [petitioner's] visitation." Petitioner sought sole care, custody, control, and education of the child.

¶ 17 On May 27, 2015, the trial court granted petitioner leave to file the amended motions and granted respondent 28 days to answer. On September 11, 2015, the court entered a status order setting petitioner's visitation schedule and continuing the matter for final status.

¶ 18 On October 22, 2015, petitioner filed a document *pro se* titled "Emergency Motion for Modification of Custody." Petitioner's *pro se* October 2015 motion alleged an emergency existed because the child's "moral, emotional, educational and social health are in immediate and great risk." Petitioner alleged the child has been disciplined constantly at school and has poor

grades. The *pro se* October 2015 motion sought "a temporary change in custody to [petitioner] pending the outcome of the full custody hearing, which date has not yet been set."

¶ 19 On October 29, 2015, petitioner's attorney filed a motion to withdraw their appearance as petitioner's attorney. On November 3, 2015, the trial court entered an order denying petitioner's emergency motion for custody because "it does not fit the criteria for an emergency" and "custody is already pending before the court."

¶ 20 On December 10, 2015 petitioner filed an emergency motion for visitation in which he alleged his visitation was being interfered with. Petitioner asked for visitation to be modified, and asked the court "to hear the emergency motion filed April 2014 and refiled May 2015 for clarity." Petitioner continued: "Abuse has been alleged and proven and this court has *** ruled the motion not an emergency. The court must rule now."

¶ 21 On December 17, 2015 the trial court denied petitioner's December 10, 2015 emergency motion, finding the motion "is not an emergency and is therefore denied." The court ruled that trial on all pending matters would be held on April 13 and 14, 2016.

¶ 22 A document petitioner filed on December 24, 2015 titled "Emergency Motion to Reconsider Visitation/Child Abuse Order" sought to bring allegedly new evidence to the court's attention in the form of a transcript of respondent's testimony describing the incident in which both parties fell while petitioner was supposed to be returning the child to respondent after visitation. Petitioner also alleged respondent hit the child with the belt causing the bruising to her leg and also described an incident in which respondent allegedly pulled the child down a flight of stairs causing her to fall on a locked baby gate at the bottom of the stairs resulting in bruises to the child. Petitioner alleged a court-appointed home study and the forensics study revealed respondent's abuse of the child because they allegedly found the child "exhibits behavior of a child physically and/or sexually abused" and that respondent's testimony was

vague and confusing. Petitioner sought sole custody and an order of protection for the child against respondent.

¶ 23 On January 4 and 5, 2016 petitioner filed petitions for an order of protection on behalf of the child against respondent. On January 7, 2015, petitioner filed a notice of appeal from the trial court's December 17, 2015 judgment on petitioner's motion seeking an emergency modification of custody. Respondent did not file an appellee's brief in this court. On July 7, 2016, this court granted petitioner's motion to proceed on the record and appellant's brief only.

¶ 24 ANALYSIS

¶ 25 Petitioner asks this court to reverse the trial court's December 17, 2015 judgment denying his motion to hear the April 2014 motion for change of custody as an emergency and seeks an order from this court directing the trial court to immediately hear the motion. Therefore, we have jurisdiction to hear this interlocutory appeal of a child custody order pursuant to Supreme Court Rule 304(b)(6) (eff. Mar. 8, 2016). We construe petitioner's complaint that the trial court failed to treat his motion as an "emergency" as a suggestion that his request for temporary custody should be treated under the standards of the former section 610(a) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act). "[S]ection 610(a) provides a safety valve for emergency situations where modification is otherwise prohibited. [Citations.]" (Internal quotation marks omitted.) *Department of Public Aid ex rel. Davis v. Brewer*, 183 Ill. 2d 540, 554 (1998). Section 610(a) read as follows: "Unless by stipulation of the parties or except as provided in subsection (a-5), no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health." 750 ILCS 5/610(a) (West 2014).

> "[S]ubsection (a) requires the court to find that the affidavits submitted by the petitioning parent establish a 'reason to believe' that the child's present environment may endanger seriously his physical, mental, moral, or emotional health. If this procedural prerequisite is met, the case then proceeds to an evidentiary hearing where the trial court applies the legal standards contained in subsection (b) [of section 610] to determine whether the modification petition should be granted." *Brewer*, 183 Ill. 2d at 556.

"Every presumption is indulged in the validity of the decree and if its provisions are to be changed, the burden of proof is on the moving party to show why the change should be made." *In re Marriage of Valliere*, 275 Ill. App. 3d 1095, 1100 (1995).

¶ 26 Petitioner overlooks several matters that defeat his request. We first note that petitioner filed the December 10, 2015 motion to hear the April 2014 motion after having been represented by counsel and after petitioner's counsel subsequently withdrew their appearance. On August 25, 2014, petitioner filed a *pro se* motion for leave to amend his April 2014 motion. Petitioner specifically listed both the motion to modify custody and the motion for contempt in his motion for leave to amend. On September 4, 2014, the trial court granted petitioner leave to amend the motion about which he now complains. The record contains a "Notice of Motion" filed on September 11, 2014 for an "Amended Motion to Show Cause and Modification of Custody" but not an amended motion. Then on September 18, 2014, petitioner filed a document titled "Motion to Show Cause" seeking to hold respondent in contempt for telling the child's school that petitioner was not to have visitation. That motion does not request temporary custody.

¶ 27 It is now axiomatic that "appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law

and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). We cannot review the trial court's judgment denying petitioner's request to hear his motion for temporary custody on an emergency basis without the benefit of petitioner's allegations of fact which he argues constitute the emergency. *Brewer*, 183 Ill. 2d at 556. We therefore presume that the trial court's order denying the emergency motion was proper.

¶ 28 Additionally, on January 20, 2015, petitioner became represented by counsel. Petitioner's attorney sought and was granted leave to file an amended pleading in place of petitioner's *pro se* April 2014 motion. The motion to amend specifically references petitioner's "Emergency Motions for Contempt of Court and Modification of Custody." The amended pleading filed by counsel was not filed as an emergency motion, did not incorporate petitioner's *pro se* April 2014 motion, and did not request temporary custody of the child. "Generally, the rule is that [w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn. [Citations.]" (Internal quotation marks omitted.) *Canel & Hale, Ltd. v. Tobin*, 304 Ill. App. 3d 906, 912 (1999). The exception to that rule, which is not applicable here, is that "[a] verified pleading remains part of the record despite any amendments to the pleadings and any admissions not the product of mistake or inadvertence become binding judicial admissions. [Citations.]" (Internal quotation marks omitted.) *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 102. The filing of the amended motion in effect superseded the original motion. *Sharp v. Kennedy*, 12 Ill. App. 2d 353, 362 (1957). Petitioner waived any argument concerning the April 2014 motion when petitioner's counsel filed the amended motion in May 2015.

¶ 29 Regardless, we find the trial court did not err in denying petitioner's motion for a temporary change in custody of the child pending resolution of the motion for a permanent change in custody.

> "When deciding issues pertaining to custody, the trial court has broad discretion, and its judgment is afforded great deference because the trial court is in a superior position to judge the credibility of witnesses and determine the best interests of the child. [Citations.] Accordingly, a reviewing court will not disturb a trial court's decision to modify the terms of a custody agreement unless its decision is against the manifest weight of the evidence and constitutes an abuse of discretion. [Citations.] In determining whether a judgment is contrary to the manifest weight of the evidence, the evidence will be reviewed in the light most favorable to the appellee. [Citation.] If multiple inferences can be drawn from the evidence, a reviewing court will accept those inferences which support the court's order. [Citation.]" *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45.

¶ 30 The trial court did not abuse its discretion in finding that the allegations in petitioner's emergency motion for temporary custody failed to provide "reason to believe" the child's environment seriously endangered her physical, mental, moral, or emotional health. *Brewer*, 183 Ill. 2d at 556. The motion complained of the incident on Easter weekend in 2014, but the pleadings state respondent did not deliver the child to petitioner because petitioner agreed the child could stay with respondent until he realized his mistake as to the date and tried to change his mind. The motion also complained of the instance in October 2013 when respondent failed to turn over the child for visitation which the trial court found was attributable to the fact the visitation order was capable of two different interpretations as to the weekend in question.

¶ 31 Petitioner also alleged respondent made false allegations of sexual abuse of the child resulting in lost visitation time. In fact a major concern raised in the April 2014 motion is alleged conduct by respondent that resulted in lost visitation time. The motion mentions an alleged attack on petitioner while he was holding the child, but the record contains evidence that incident resulted from petitioner's conduct and that he fell rather than being pushed down by respondent. Although there were visitation disputes, the trial court did not abuse its discretion in finding the visitation disputes did not seriously endanger the child's mental, moral, or emotional health. Petitioner's only other assertions in support of meeting his burden of proof are concerns about the child's performance in school and an allegation that "visitation interference greatly, adversely affects the child's mental, moral and emotional well-being, contrary to the child's best interest, because visitation interference is a crime." There are no allegations to demonstrate that a connection exists between alleged visitation interference and the child's performance in school. The record does contain evidence that respondent received citations for criminal visitation interference, but petitioner's conclusory allegations of the effect on the child are not sufficient to lead this court to conclude that the trial court abused its discretion in finding that the parties' ongoing visitation disputes are seriously endangering the child's mental, moral, or emotional health.

¶ 32 The trial court did not abuse its discretion in finding petitioner failed to meet his burden to establish a reason to believe that the child's environment seriously endangered her physical, mental, moral, or emotional health because petitioner's claims were vague and speculative. The court was not required to proceed to an evidentiary hearing to apply the legal standards contained in subsection 610(b) to determine whether the modification petition should be granted. *Brewer*, 183 Ill. 2d at 556.

¶ 33 We also find that the trial court could properly deny the motion under former section 603 of the Dissolution Act. Under section 603, "[t]he trial court may award temporary custody under the best-interest-of-the-child standard set forth in [former] section 602 of the Act ***." *In re Marriage of Fields*, 283 Ill. App. 3d 894, 901 (1996). "The determination of custody is within the discretion of the trial judge and will not be disturbed on review unless it appears that manifest injustice was done or that the court has abused its discretion." *Anagnostopoulos v. Anagnostopoulos*, 22 Ill. App. 3d 479, 482 (1974).

> "Section 602 does not require a trial court to make specific findings, but rather to consider all relevant factors including (1) the wishes of the child's parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interrelationship of the child with his parents, siblings, or any other person who could 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 persons involved; and (6) the physical violence or threat thereof by the child's potential custodian, whether directed against the child or directed against another person but witnessed by the child. Section 603(a) requires that the record contain sufficient evidence on the specified factors and requires that the court consider all six factors. [Citation.]" *Levy v. Skilling*, 136 Ill. App. 3d 727, 729 (1985).

¶ 34 Petitioner's motion does not plead sufficient facts to permit the trial court to consider the specified factors. Petitioner failed to plead any facts concerning the child's wishes, her relationship with respondent or anyone in respondent's household, or respondent's physical and mental health. Petitioner alleged the child was exhibiting bad behavior in school that she allegedly did not exhibit when she stayed with him for extended periods of time. Petitioner also alleged there were isolated instances when the child became bruised—one of which was

allegedly attributable to petitioner. The trial court noted that permanent custody was still pending before the court. The court ordered evaluations and was awaiting the results. We find the trial court properly exercised its discretion to maintain stability for the child while awaiting information that would permit it to consider all of the factors pertaining to the best interest of the child. See *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 410 (1994) ("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."); *In re Marriage of Carlson*, 101 Ill. App. 3d 924, 932-33 (1981) (reversing portion of judgment that awarded physical custody to one party where "the evidence presented at the hearing relating to the section 602 factors was insufficient"). The trial court's denial of petitioner's motion for temporary custody was not an abuse of discretion.

¶ 35 The motion that is the subject of this appeal was withdrawn by the filing of an amended motion and therefore petitioner waived any argument concerning the trial court's ruling on that motion. Even if the motion was not withdrawn the trial court could have properly denied the motion because petitioner failed to meet his burden of proof to establish the child's environment seriously endangered her or that the best interest of the child favored awarding temporary custody to petitioner.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 38 Affirmed.