2016 IL App (2d) 150916-U
No. 2-15-0916
Order filed February 8, 2016
Modified upon denial of rehearing June 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| *In re* the CUSTODY OF COOPER H., | ) | Appeal from the Circuit Court |
| | ) | of McHenry County. |
| a Minor. | ) | |
| | ) | |
| | ) | No. 13-FA-333 (cons.) |
| | ) | |
| | ) | Honorable |
| (Rachel Gavle, Petitioner-Appellee v. | ) | Mark R. Gerhardt, |
| Joseph M., Respondent-Appellant.) | ) | Judge, Presiding. |

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's judgment granting mother sole custody and denying father's request for removal was not against the manifest weight of the evidence; the court's decision denying father's petition to change minor's last name was against the manifest weight of the evidence; and, the trial court's allocation of GAL fees was not an abuse of discretion.

¶ 2 This appeal began as an inquiry into a sensitive and bitterly fought child-custody matter. After a petition for rehearing however, it also became about the professionalism of one of the parties' attorneys. We filed our original Rule 23 Order in this case on February 8, 2016. Thereafter, one of the parties filed a petition for rehearing, which generated a separate proceeding for direct criminal contempt of this court. We have resolved the contempt proceedings by a separate order filed contemporaneously with this disposition. We have also

considered the arguments in the petition for rehearing independent of the contempt matter; rehearing is denied, however, we have modified our disposition to clarify our directions to the trial court on partial remand.

¶ 3 Rachel Gavle and Joseph M. are the biological parents of Cooper H., born May 1, 2012. Joseph appeals from the trial court's orders, which (1) granted sole custody of Cooper to Rachel, (2) denied Joseph's petition to remove Cooper from Illinois to Kansas, (3) denied Joseph's petition to change the minor's last name, and (4) denied in part, and granted in part, Joseph's request to reallocate attorney fees for the minor's guardian ad litem (GAL).

¶ 4 We note that our recitation of the facts is limited because the appellant, Joseph, has submitted only transcripts from the final hearing dates. We are able to resolve the issues in this appeal despite these omissions, though we lack context for some of the events described in the record.[1]

¶ 5 Rachel and Joseph met in California in October 2008 and the two began dating shortly thereafter. Rachel was previously married to David Gavle, with whom she has two daughters, Kirsten and Sophia. At the time Rachel and Joseph began dating, Rachel was involved in ongoing dissolution proceedings in Texas concerning her marriage to David Gavle, as well as her custody of Kirsten and Sophia. (Rachel continues to use her first married name, Gavle.)

¶ 6 In April 2011, Rachel and Joseph were engaged and moved from California to Kansas, where Joseph was from. In July 2011, following a domestic violence incident, Rachel was arrested for domestic battery and Joseph was arrested for criminal deprivation of property for taking Rachel's cellular phone. (The charges were apparently resolved.) Cooper was conceived

[1] As we explain in our separate order, this paragraph became a subject of dispute concerning both the record's existence and our ability to examine it.

the following month. In September 2011, Joseph obtained an order of protection against Rachel and Rachel returned to her parents' home in California.

¶ 7 In April 2012, the parties were wed in California, and in May 2012 Cooper was born in California. Shortly after Cooper's birth, Joseph was asked to leave Rachel's hospital room following an outburst; he left the hospital altogether. Thereafter, Rachel omitted Joseph's name—M.— from Cooper's birth certificate, and instead put down her maiden name—H. After the incident at the hospital, Joseph returned to Kansas alone while Rachel and Cooper remained in California. At some point (the record is not clear when), David Gavle and Kirsten and Sophia relocated to McHenry County, Illinois. In July 2012, Rachel took Cooper and relocated from California to McHenry County as well. Rachel did not consult with Joseph before relocating to Illinois.

¶ 8 In October 2012, Joseph filed in Kansas for the annulment of the marriage on grounds of mistake of fact, namely, that he did not know that Rachel would not return with him to live in Kansas at the time they were married. See Kan. Stat. Ann. § 23-2702 (West 2012). Within the annulment proceeding, Joseph also asked the Kansas court to determine Cooper's parentage.

¶ 9 On November 21, 2013, a Kansas district court entered an agreed order in the case. The order indicates that the parties agreed to annul the marriage, and further agreed that Joseph was Cooper's father and that Cooper's birth certificate should be amended to reflect Joseph's paternity. The Kansas court, also by agreement, reserved the issue of child support.

¶ 10 On November 26, 2013, Rachel filed a petition in the circuit court of McHenry County, asking the court to determine Cooper's parentage and Joseph's paternity. She later filed for sole custody. Joseph also filed a petition seeking sole custody and an emergency petition to set visitation. In March 2014, the court ordered that Rachel have temporary custody of Cooper and

established a visitation schedule for Joseph. In May 2014, Joseph petitioned the court to appoint a GAL for Cooper, and the trial court appointed attorney Rhonda Rosenthal as Cooper's GAL, her retainer and any subsequent fees to be split by the parties.

¶ 11 The following month, Rachel petitioned the court to reallocate the GAL fees. Rachel averred that she was unemployed, had negligible income, and had $3,400 in monthly living expenses. Joseph filed a response, in which he averred that he worked for a company in "[a]rchitectural product sales" and earned approximately $45,000 per year. The court granted Rachel's motion and allocated GAL fees 75% to Joseph and 25% to Rachel.

¶ 12 In August 2014, Joseph filed an amended petition in which he sought: (1) sole custody of Cooper; (2) removal of Cooper from Illinois to Kansas; and (3) to change Cooper's last name, from H. to M. Thereafter, Rachel moved to allocate 100% of the GAL fees to Joseph, and Joseph moved that GAL fees be reallocated by percentages commensurate with the parties' respective incomes.

¶ 13 The trial court held hearings on seven separate court dates concerning the issues of custody, removal, and the minor's name. On June 9, 2015, the court entered a final order concerning GAL fees (which we discuss in greater detail below). That same day, the court also entered a seven-page "memorandum decision" concerning custody, visitation, and Cooper's name. The court determined that joint custody would not be feasible between the parties due to their significant level of acrimony. Accordingly, the court found that it was in Cooper's best interest to grant Rachel sole custody and established a visitation schedule for Joseph. The court's decision also denied Joseph's petition to remove as moot (see 750 ILCS 5/609(a) (West 2012) (only a custodial parent may petition to remove a child)), and denied Joseph's request to change Cooper's last name to M. The court also entered a written order directing Rachel's attorney to

prepare "a judgment consistent with the court's memorandum decision" (capitalization altered) to be shown to Joseph's attorney and entered by the court on June 24, 2015. On June 24, 2015, the court entered a six-page "custody judgment" drafted by Rachel's counsel, which both restated and incorporated the court's June 9 memorandum decision.

¶ 14 Joseph filed a motion to reconsider and on July 21, 2015, the court entered an order that continued the hearing on Joseph's motion. On August 24, 2015, the court granted Joseph's motion to reconsider in part and modified its custody judgment (removing erroneous statements concerning parentage and child support). However, the trial court denied Joseph's motion to reconsider with respect to the issues relevant in this appeal. Joseph timely filed a notice of appeal, and then timely filed an amended notice of appeal in the trial court. See Ill. S. Ct. R. 303(b)(5) (eff. Jan. 1, 2015).

¶ 15 We first address an issue that arose during the briefing stage in this appeal. Joseph filed a motion seeking leave to correct an alleged error in his amended notice of appeal. Rachel countered by filing a motion asking us to strike Joseph's motion. We deny both motions as moot.

¶ 16 A valid notice of appeal is a prerequisite to appellate jurisdiction, and for a notice of appeal to be valid it need only advise the prevailing party of the nature of the appeal. *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011). Here, Joseph apparently used a form notice of appeal available in the circuit court of McHenry County for his amended notice of appeal. The notice indicates that the appeal is taken from the "Judgment entered: _____" and also the "Order entered: _____." (The blank lines are for dates.) The form notice's distinction between "judgments" and "orders" is, to say the least, idiosyncratic; it is certainly not dictated by supreme court rules. See Ill. S. Ct. R. 303(b)(2) (eff. Jan. 1, 2015).

¶ 17 Nevertheless, Joseph, in his amended notice of appeal, indicated that he wished to appeal

the judgment entered on July 21, 2015. That was an erroneous reference to the court's order to continue the hearing on Joseph's motion to reconsider, and if that were all, we might have reason to question our appellate jurisdiction. But that is not all. Joseph's amended notice also refers to the *orders* entered on June 9, 2015 and August 24, 2015—the date the order concerning GAL fees was entered and the date the final modified custody judgment was entered, respectively. Were there any doubt, on the line labeled "Relief sought from Reviewing Court: _____" Joseph wrote, "Reverse Judgment, Order the following: sole custody of the child to Defendant and grant him leave to remove the child to Kansas; change the child's last name to [M.] Reverse Order allocating GAL fees, order division based upon the parties' incomes." That was sufficient notice to Rachel concerning the nature of the appeal. *General Motors Corp.*, 242 Ill. 2d at 176. Thus, there is nothing for Joseph to correct and nothing for Rachel to strike. We now turn to the merits.

¶ 18 Joseph's primary contention is that the trial court erred when it awarded Rachel sole custody of Cooper. We note that Joseph does not challenge the court's determination that joint custody of Cooper was not feasible. Instead, Joseph argues that the trial court's written judgment indicates that it did not "properly" consider the evidence, and that, by comparison to other published cases such as *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, and *In re Marriage of Ricketts*, 329 Ill. App. 3d 173 (2002), it was proven that it was in Cooper's best interest to award Joseph sole custody. According to Joseph, the trial court's contrary conclusion "shows a severe lack of sound judgment."

¶ 19 Our standard of review is well settled. Decisions concerning child custody are dictated by the evidence concerning the child's best interests. The trial court is in a superior position to examine that evidence and determine the child's best interests, and we will not alter its child-

custody decision unless it was contrary to the manifest weight of the evidence. *In re Parentage of J.W.*, 2013 IL 114817, ¶ 55. A judgment is against the manifest weight of the evidence only when the *opposite* conclusion is clearly apparent or if the court's decision was not based on the evidence presented. *Id.* In other words, "if the evidence before the trial court did not clearly favor either party, this court cannot say that the trial court's decision to place permanent custody of [a child] with one of the parents was against the manifest weight of the evidence." *In re Marriage of D.T.W. & S.L.W.*, 2011 IL App (1st) 111225, ¶ 82.

¶ 20 As an initial matter, we reject Joseph's attempts to compare this case to the facts alone in other published decisions. Such arguments from analogy, based only on the facts of a given cited case, are generally unhelpful "[i]n light of the subtleties presented by child custody cases and the *sui generis* nature of cases involving parental rights generally ***." *In re Scarlett Z.-D.*, 2014 IL App (2d) 120266-B, ¶ 65. Thus, we confine our review to the evidence presented in this and only in this case.

¶ 21 The trial court's memorandum decision indicates it considered a number of statutory best-interest factors in awarding sole custody of Cooper to Rachel. See 750 ILCS 5/602(a) (West 2012). First and foremost, the trial court found that Cooper is bonded with his mother and his two sisters, Kirsten and Sophia, of whom Rachel has joint custody. When Rachel does not have custody of the girls, they are in the custody of their father, David Gavle, who lives nearby. In addition, the court found that Cooper (then 3, now 4) was adjusted to his home, school, and community.

¶ 22 Against those findings, the court found that there had been threats of physical violence by both Rachel and Joseph against each other, which cut in neither party's favor. The court also considered a report prepared by a psychologist in March 2012 in connection with Rachel's

divorce from David Gavle. (The report was introduced into evidence as an exhibit to the GAL's final report to the court.) In the report, the psychologist offered a negative opinion of Rachel's emotional stability and opined that she had "dependent personality tendencies ***." Though the court referred to the report in its decision, it accorded the report no apparent weight, perhaps because it had been prepared three years earlier, before Rachel and Joseph were married and before Cooper was born. The court also noted that Rachel "believes that she has no obligation to cooperate in facilitating visitation between [Joseph] and Cooper." The record bears out this statement. There are several instances where Joseph either drove from Kansas or flew to Milwaukee to visit Cooper; Rachel was often late with Cooper or would not show up altogether. On at least one occasion, police officers were called due to Rachel's highly disruptive conduct when handing over Cooper to Joseph for visits.

¶ 23 The court stated that it was "seriously troubled" by Rachel's "protestations, blatant interference, and lack of cooperation in fostering a relationship between Cooper and [Joseph]," but that the court "believed that this can be remedied by adequate parenting time for [Joseph,]" as set out later in the court's order establishing visitation. The court noted that "[Rachel's] shortcomings do not outweigh the other factors which weigh in [her] favor, including Cooper's strong relationship with his sisters, his bond with his mother, and his integration in the community." After carefully reviewing the record, we cannot say that the trial court's decision to award sole custody to Rachel was against the manifest weight of the evidence. Because we affirm the trial court's decision concerning custody, we need not consider Joseph's arguments concerning removal. *In re Marriage of Eckert*, 119 Ill. 2d 316, 327-29 (1988).

¶ 24 We note that the trial court's decision states that it found "it is in Cooper's best interest for [Joseph] to have visitation with [Cooper] to, in part, counter[act] the negative influence of

[Rachel] ***." We find this sentence in the court's decision troubling because it suggests that Joseph's visitation rights are somehow a compromise. We emphasize that under the circumstances of this case, Joseph was entitled to court-ordered visitation. 750 ILCS 5/602(c) (West 2012); *In re Parentage of J.W.*, 2013 IL 114817, ¶ 40. Moreover, we admonish Rachel that Joseph's court-ordered visitation time, like any other court order, may be enforced through indirect civil contempt proceedings if necessary. See *In re Marriage of Charous*, 368 Ill. App. 3d 99, 107 (2006); *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280 (2006); *In re Marriage of Spent*, 342 Ill. App. 3d 643, 653 (2003).

¶ 25 Next, we consider Joseph's arguments concerning his petition to change Cooper's last name from Rachel's maiden name, H., to Joseph's last name, M. The trial court, citing the only relevant factor set forth in 735 ILCS 5/21-101 (West 2012) ("[t]he child's adjustment to his or her home, school, and community" vis-à-vis his or her surname), determined that it was in Cooper's best interest that he retain the last name of H. Specifically, the court stated that Cooper's "adjustment to his home, school, and community, does not strongly indicate that it is clear and convincing that the child adopt the last name of [M.]" However, there was no evidence presented to support that statement. It was thus contrary to the manifest weight of the evidence because it was not based on any of the evidence and further because the opposite result is clearly warranted. See *In re Parentage of J.W.*, 2013 IL 114817, ¶ 55.

¶ 26 In the Anglo-American legal tradition, a child will presumptively bear his or her father's surname, so long as the father has not abandoned the child. *In re Marriage of Presson*, 102 Ill. 2d 303, 312 (1984); *In re Mattson*, 240 Ill. App. 3d 993, 997 (1993); *Dattilo v. Groth*, 222 Ill. App. 3d 467, 469 (1991); see also *In re Marriage of Omelson*, 112 Ill. App. 3d 725, 730 (1983) (noting the tradition of using paternal surnames since at least the Norman Conquest) (citing *In re*

*Marriage of Schiffman*, 28 Cal. 3d 640, 646 (1980)). Here, Joseph has not abandoned Cooper; he has consistently attempted to maintain a bond with his son and fought in court to do so. Moreover, according to the GAL, Rachel reported that she deliberately omitted Joseph's name from Cooper's birth certificate and gave Cooper the last name of H. following her quarrel with Joseph in the hospital after Cooper was born. In other words, the record evidence shows that Rachel made the unilateral decision to give Cooper neither her surname nor Joseph's surname. The record also shows that Rachel, in addition to having omitted Joseph's paternity from Cooper's birth certificate, and having challenged Joseph's paternity in two separate state court proceedings (the second challenge coming just *days* after she acknowledged Joseph's paternity in an agreed order in the first proceeding), has engaged in a deliberate and hostile campaign to alienate Joseph from his son's life. Thus, it is difficult not to see Rachel's selection of her maiden name for Cooper's last name—particularly when there has never been any real doubt of Joseph's paternity—as anything but an attempt to further and continually alienate Joseph.

¶ 27 On this record, Rachel presented no evidence to rebut the presumed use of Joseph's last name. That is, no evidence was presented that Cooper (again, only 3 at the time of the hearing) was adjusted to his home, school, or community on the basis of his current surname *at all*. As our supreme court has stated, a noncustodial parent like Joseph is "necessarily *** at a disadvantage in maintaining a strong relationship with the child," and the maintenance of the noncustodial parent's name "goes far toward demonstrating his continuing interest in and identity with the child." *In re Marriage of Presson*, 102 Ill. 2d at 312; see also *In re Mattson*, 240 Ill. App. 3d at 997 (holding that, since the father did not have physical custody of his child, "the common name [was] one of the few bonds he [was] able to maintain with her"); *In re Marriage of Schiffman*, 28 Cal. 3d at 646 ("identification with the paternal surname may give the child a

healthy sense of family as well as ethnic and religious identity and also maintain her or his rightful link with an absent or noncustodial father"). Accordingly, we determine that it was in Cooper's best interest to for the trial court to change his surname from H. to M. to reflect Cooper's identity as Joseph's biological son. The portion of the trial court's order denying Joseph's petition to change Cooper's name is reversed, and on remand the trial court should enter any additional orders necessary to effectuate the change of Cooper's surname.

¶ 28 Last, we address Joseph's argument concerning the allocation of GAL fees. We review the trial court's order awarding attorney fees for an abuse of discretion. *Shen v. Shen*, 2015 IL App (1st) 130733, ¶ 96. An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, or unreasonable. *Id*.

¶ 29 Based on Rachel's averment that she was unemployed, and Joseph's averment that he was gainfully employed, early on in the case the trial court allocated 75% of GAL fees to Joseph and 25% to Rachel. However, throughout the case, the trial court heard evidence that Rachel had been receiving substantial financial support from her parents, in the amount of $170,000 for attorney fees and living expenses. In her fourth and final petition for GAL fees, attorney Rhonda Rosenthal averred that the total for her work as GAL, including modest expenses, was $37,227 (billed at a flat rate of $320 per hour for both in-court and out-of-court time). After a brief hearing on Rosenthal's final fee petition, the court determined that the money Rachel received constituted "income" for the purpose of allocating attorney fees (see generally *In re Marriage of Rogers*, 213 Ill. 2d 129, 137 (2004)), but declined to reallocate GAL-attorney fees based on the parties' incomes. Instead, the court ordered that Joseph, who had paid $25,500 to Rosenthal, had no further financial obligation to her, and that Rachel, who had paid $3,976, would be responsible for the Rosenthal's stated balance of $8,359. That arrangement would result in an

allocation of approximately 67.4% to Joseph and 32.6% to Rachel.

¶ 30 Joseph asks us to essentially reverse the allocation percentages based on the parties' respective incomes, but income alone is not dispositive of the allocation of GAL fees. See *McClelland v. McClelland*, 231 Ill. App. 3d 214, 228 (1992) (proper allocation of GAL fees should be based on the totality of the circumstances); see also *Gibson v. Barton*, 118 Ill. App. 3d 576, 583 (1983) (stating that, income notwithstanding, "the party necessitating the guardian's appointment should bear the greater part if not all of the expenses"); *In re Marriage of Adams*, 92 Ill. App. 3d 797, 804 (1981) (finding that a 50-50 allocation of GAL fees, despite disparities between the parents' incomes, was not an abuse of discretion). In addition, we note that there is little reason to credit the parties' financial averments, upon which Joseph relies heavily. Rachel, for example, neglected to include as income her parents' financial support, and Joseph, despite his averment that he earned only $45,000 a year, successfully paid the GAL $25,500 between August 2014 and June 2015. Under the circumstances, we cannot say that the allocation selected by the trial court was an abuse of discretion.

¶ 31 Before concluding, however, we are compelled to state that we are troubled by the amount of the hourly wage that Rosenthal requested and the court allowed—$320 an hour, which yielded more than $37,000 in attorney fees. The record contains several orders signed by the trial court finding the GAL fees reasonable. We have no transcripts for any hearings concerning Rosenthal's fees other than the final hearing and we have no indication from those orders or the final hearing as to the criteria the trial court considered in rendering its determination. Nonetheless, it remains that those orders have not been challenged on grounds of reasonableness or necessity.

¶ 32 While the Marriage Act and supreme court rules provide that an appointed GAL in a

contested custody case must be an attorney (750 ILCS 5/506(a) (West 2012); Ill. S. Ct. R. 907 (eff July 1, 2006) (Committee Comments)), it does not follow that those lawyers appointed as GALs should necessarily charge customary in-court legal fees for what is not customarily in-court legal work. A GAL should be the court's "eyes and ears," and if necessary a legal advocate for the child's best interests. *In re Mark W.*, 228 Ill. 2d 365, 374 (2008); *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 416 (1994).

¶ 33 In the petition for rehearing, Joseph's counsel has alleged that our treatment of GAL-attorney fees was "gratuitous, unwarranted and perhaps revealed some of [the Court's] own biases in this case." Once again, counsel has failed to carefully read this Court's disposition. While it is true that the orders in this record reflect that counsel for both parties stipulated to the amount of the fees requested by the GAL-attorney, on appeal an argument was raised concerning the allocation of those fees between the parties. It was urged that Joseph could not afford to pay the amount allocated to him due to his limited income and that Rachel was better able to pay a larger portion. Naturally implicit in that type of argument is the actual amount of the fees requested. Our use of the word "exorbitant" fees may have been too harsh, but the issue remains that GAL-attorney fees are often another hurdle to be overcome by parties as they struggle to support the children of a broken marriage. We recognize that the services of a GAL are valuable to the trial court, and we encourage the bench and bar to be vigilant that GAL-attorney fees are reasonable as well as necessary and in the minor's best interests. See *In re Austin W.*, 214 Ill. 2d 31, 46 (2005) ("The best interests of the child is the paramount consideration to which no other takes precedence").

¶ 34 In sum, we reverse the trial court's order denying Joseph's petition to change Cooper's last name, and remand this case with directions that the trial court enter any additional orders

necessary to effectuate the change of Cooper's last name. In all other respects, the judgment of the Circuit Court of McHenry County is affirmed.

¶ 35 Affirmed in part; reversed in part, and remanded with directions.