2016 IL App (2d) 160672-U
No. 2-16-0672
Order filed November 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF JASON LLOYD, Petitioner-Appellant, and JENNIFER BENSON, Respondent-Appellee	))))))))))	Appeal from the Circuit Court of Du Page County. No. 04-D-0143 Honorable Neal W. Cerne, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying a motion to substitute for cause, nor did it abuse its discretion in denying a motion to modify the allocation of parental responsibilities. We affirm.

¶ 2 On June 7, 2004, the trial court dissolved petitioner's, Jason Lloyd's, and respondent's, Jennifer Lloyd's, marriage. On January 27, 2016, petitioner moved to modify the allocation of parental responsibilities, arguing that custody of the parties' then 12-year-old daughter, Cassady, should change such that he would be her residential custodian. The court denied petitioner's

motion. Further, prior to that ruling, the court dismissed petitioner's motion to substitute the judge for cause. Petitioner appeals both decisions. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 27, 2016, pursuant to section 610.5 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610.5 (eff. Jan. 1, 2016)), petitioner filed his motion to modify the allocation of parental responsibilities, seeking residential custody of Cassady. Petitioner alleged that, since entry of the parties' 2004 joint parenting agreement, there had been a substantial change in circumstances within respondent's household, including domestic turbulence between respondent and her current husband, Tim, in front of Cassady. Petitioner alleged that respondent had not shown a proper commitment to her parental responsibilities and that Cassady was specifically requesting to change her residence to petitioner's home. Petitioner alleged that residential placement with him was in Cassady's best interests. Petitioner also requested that the court appoint a guardian *ad litem* (GAL), and the court subsequently appointed Jennifer Wiesner.

¶ 5 Also at issue between the parties was an alleged child support arrearage. As relevant to this appeal, on April 12, 2016, pursuant to section 2-1001(a)(3) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(3) (West 2014)), petitioner filed an amended motion to substitute the trial judge for cause. The amended motion alleged that the trial judge had made prejudicial remarks concerning the arrearage and predetermined the outcome before the presentation of evidence. Specifically, the motion alleged that, although the State had originally claimed that petitioner owed more than $18,000 in child support, it had since acknowledged a mistake. Nevertheless, petitioner noted that the State still claimed he owed $490, but he did not. When before the court on January 28, 2016, petitioner informed the court that he did not owe $490 and

that, if respondent (who was apparently not present), would simply acknowledge that he did not owe that money, there would be no need to proceed. As that had not occurred, counsel stated that "we'll jump through the hoops and we'll show all the payments." According to the motion, the trial judge then replied, "No. The only hoop is to pay the $490 and you're done." Petitioner alleged that this comment reflected actual prejudice, in that the judge had already decided that petitioner owed $490 before petitioner had presented any evidence.

¶ 6 On April 12, 2016, petitioner presented the amended motion, and the trial judge reviewed and disagreed that the statements in the motion were accurate. The judge confirmed with petitioner's counsel that, per his recollection, on January 28, 2016, no one was able to represent respondent's position and opinion on the accuracy of the amount. The judge stated that there was, therefore, no finding made at that time with respect to the amount owed, no hearing on that issue, and no agreement presented, so, to the extent that the motion to substitute for cause so alleged, it was incorrect. (Indeed, it appears from an order in the record that, also on April 12, 2016, the court heard evidence and found that the total arrearage was $232, including interest, which respondent had waived.) The judge told petitioner's counsel that he was denying the motion to substitute because it did not allege prejudice. Further, the judge disagreed that, pursuant to section 2-1001(a)(3), he was required to transfer the motion to another judge, noting that case law reflected that the motion did not need to be transferred where it did not "even come to the level of alleging a prejudice" and was, therefore, facially deficient.[1]

¶ 7 On August 15, 2016, the court heard evidence on petitioner's motion to reallocate parental responsibilities. Prior to the hearing, and as it reflected respondent's wishes, the court

[1] We note that, other than the transcript reflecting that the motion was denied, no written order denying the motion appears in the record.

discharged respondent's counsel, but it declined to postpone the hearing and, therefore, respondent represented herself *pro se*. Petitioner presented Wiesner as his first witness. The court had not asked Wiesner to prepare a written report or recommendation; therefore, she testified to her recommendation and referenced her notes in support thereof. Specifically, Wiesner testified that she recommended that petitioner's motion be granted and that Cassady live with him as residential parent. Wiesner testified that she met with Cassady, petitioner, petitioner's wife, and petitioner's son, Glen, who is in fifth grade and lives with petitioner. In addition, Wiesner spoke with respondent, respondent's husband Tim, and Cassady's therapist.

¶ 8 Wiesner testified that Cassady resents Tim because he hit her when she was younger and she feels that respondent defers to Tim when discipline is necessary. She explained that Cassady felt that respondent allows Tim to handle punishment, he yells at her and will not stop yelling, and she stated that Tim and respondent tell her she is wrong, they do not let her speak, she is excessively punished for small infractions, and they make her feel like she is a "bad girl." Wiesner testified that Cassady seemed tense, anxious, and worried that her mother and Tim might be listening to the conversation and that she would get in trouble for what she said. Further, Wiesner testified that Cassady reported witnessing a physical altercation between respondent and Tim, where respondent was "raging out," beating her fists on Tim's chest and, on other occasions, screaming and pounding on walls in the bathroom. Wiesner testified that she is concerned that Cassady is seeing conflict modeling that is inappropriate and, at times, bordering on violent, and she was concerned that Cassady had forwarded a text to her from respondent, asking "why are you doing this to us, why are you lying about me and Tim and things like that[?]" However, Wiesner testified that there was no abuse, and, upon the court's questioning, she later *reiterated* that she found no abuse.

¶ 9 There was a period when Cassady had started pinching herself and causing herself to bleed. In Wiesner's view, both petitioner and respondent handled the issue appropriately, and Cassady started counseling. The counselor gave Cassady a rating system for her emotions and feelings. Cassady told Wiesner that petitioner understood the system and helped her calm down, while respondent would simply tell her to stop and would degrade her and send her to her room with punishments. Cassady claimed to Wiesner and her counselor that she related better to her father. Wiesner testified that respondent had agreed to attend counseling with Cassady to help with their communication issues.

¶ 10 Wiesner further testified that Cassady was typically an "A" or "B" student, but, the past year, her grades dropped. Respondent had explained that the first-semester drop might be attributed to a concussion Cassady received in cheerleading, and the second-semester drop was likely due to the time she spent on her numerous activities, including a theater group and a dance class. Cassady, in turn, had explained that her grades dropped because she was "stressed out." Wiesner noted that, if Cassady lived with petitioner, she would be entering eighth grade in a brand new school. Wiesner testified that Cassady had experienced social issues at her current school, and she would have a fresh start at a new school. Wiesner advised Cassady that social issues were likely to occur regardless of which school she attended, and Wiesner felt that Cassady adequately understood this fact.

¶ 11 Cassady told Wiesner that she wished to live with petitioner. Wiesner testified that she discussed with Cassady that the "grass is not always greener on the other side," but that she believed that Cassady's wishes were well-reasoned. Wiesner testified that Cassady appears relaxed and comfortable at petitioner's house. Cassady has a good relationship with her half-brother Glen and with petitioner's wife. Wiesner recommended a change in residential custody,

in sum, noting that the following specific factors favored changing residential custody to petitioner: (1) Cassady's wishes; (2) petitioner's style of discipline; (3) Cassady's adjustment to home and school, namely, the decline in grades and self-harm (which, she clarified, was handled appropriately and was *not* a controlling factor that she considered); (4) that, while both parties are capable of meeting Cassady's daily needs, she believed that petitioner was more capable of meeting Cassady's emotional needs; (5) that respondent is a musician and writes music that Cassady interprets as being about her, and summer vacations are planned around her band's tour, which reflects that respondent might not be willing to place Cassady's needs above her own; and (6) that, while there were no findings or allegations of abuse, "a long time ago," Tim had hit Cassady and she never forgot that.

¶ 12 Petitioner testified, in part, that he recently moved into a new home and lives there with Glen and Cassady, when she is there. He helps Cassady with her homework and would enroll her in the nearest middle school. Further, petitioner testified that he does not disparage respondent and that he would facilitate parenting time between Cassady and respondent. On cross-examination, petitioner explained that a woman with whom he had been corresponding (and who was also texting Cassady about missing her and wanting to have "girl talk") was not his girlfriend and that she was a friend whom he had known since he was age 14. At the time of the hearing, petitioner and his current wife had separated. Petitioner testified that he did not involve Cassady in the custody issues or talk about it with her. He stated that he sent Cassady a text from his friend, wherein the friend expressed that he (petitioner's friend) had finally received custody of his daughter, only because she was interested. Further, petitioner stated that he took Cassady to the Elgin police station to file a police report against respondent because Cassady was crying and upset about something she witnessed. Respondent asked petitioner why

he created a Facebook account for Cassady without respondent's consent and then told Cassady to hide the passwords from her; petitioner responded that he did not hide the passwords. Respondent disagreed, noting that the GAL gave them to her.

¶ 13 Respondent's mother and father testified in part that respondent, Tim, and Cassady have a good relationship; they had been on vacations together and saw no problems; that Tim and respondent have a calm relationship; and that it was best for Cassady to remain in the school district she had been in for eight years and for her to live with respondent, who provides a solid, loving environment with guidelines and boundaries.

¶ 14 Respondent testified that she loves Cassady "with her whole heart." Respondent explained that she thinks that it is better for Cassady to live with her and stay in her current school system, "a very good school system," where she is "very well adjusted" and has many friends. She testified that Cassady has lived with her for her entire life and that it could be very traumatic for Cassady to start at a new school, where she knows no one, and to adjust to a new home. Respondent believes that petitioner is manipulative.

¶ 15 Reviewing the 17 factors listed in section 602.7 of the Act (750 ILCS 5/602.7 (eff. Jan. 1, 2016)), the court denied petitioner's motion to modify. We summarize the court's findings as follows:

1. Wishes of each parent: Both parents wish to have the majority of time with Cassady.

2. Wishes of the child: Cassady expressed to Wiesner that she desires to live with petitioner for the majority of time.

3. Amount of time in the past two years that each parent has spent in caretaking role: For two years prior to the motion, and since the joint custody agreement was entered and Cassady was one year old, respondent has been her primary caretaker. "I agree with comments

that [respondent] said earlier that she has been the primary caretaker for the entire child's life. I mean, that's a huge factor."

4. Past course of conduct between the parties with respect to caretaking functions: The parties communicated appropriately, and respondent was the primary caretaker.

5. The interaction and relationship of the child with both parents: Overall, Cassady gets along well with both parents, as well as with her half-brother Glen.

6. Adjustment to home and school: Cassady is well adjusted to her home and school. There is no evidence reflecting what caused Cassady to commit self-harm, and the court expressed its disagreement with Wiesner to the extent she suggested the court was in a position to determine what led Cassady to commit such conduct. However, the court found that the important thing to note was that respondent made arrangements for Cassady to see a counselor, a decision with which petitioner cooperated, but the court found that respondent "acted appropriately in that, and the issue is being addressed."

7. Physical and mental health: As there was minimal evidence on this issue, the court found it had to presume everyone was physically and mentally healthy.

8. The child's needs: The court agreed with respondent that Cassady needed stability. "I think that's key for any child. I think that's a huge, huge need of this child. She needs a stable household. I think it is a concern that [petitioner] is not – is not living with his wife at this time. And that, in my mind, that's not consistency. That's a change.

9. Distance between residences and cost of transporting the child: The parties live fairly close to one another, so this was not a factor.

10. Restriction on parenting time: Not appropriate.

11. Physical violence or threat of physical violence: There was no indication of any physical violence or threat of physical violence. The evidence showed that any such allegations thereof in the past were unfounded, and the GAL was quite clear that there is no finding of abuse.

12. Willingness and ability of each parent place the child's needs ahead of his or her own: There is no difference between the parties with respect to their willingness and ability to place Cassady's needs above their own. They both care for her and only want the best for her.

13. Willingness and ability of each parent to facilitate and encourage a close relationship between the other parent and the child: There is no evidence that the parents are at odds with each other or are not facilitating a proper relationship between Cassady and the other parent.

14. Abuse against child: The court again found no abuse.

15. Whether a party is a convicted sex offender: Neither party is a sex offender.

16. Military family care plan: Neither parent is in the military.

¶ 16 The final factor, number 17, concerns any other fact that the court expressly finds to be relevant. On that factor, the court found as follows:

> "What I find to be relevant is that, for a change of custody, in my mind, *** or a change of majority of parenting time, you really have to show that something is going on that's of serious endangerment to the child.
>
> The only thing that seems to be about [petitioner's] position is that the child wants to live with him and that her grades are suffering. The grades suffering, I am not sure – you know, we don't know why. And it could just be a hiccup. Everyone agrees that the child has been an A/B student and has done well. Well, that's because, frankly, she's been under the care of [respondent] for the majority of her life.

> So, to now come in and ignore all that [and] the first 13 years of her life and say now, because she's had a hiccup, all of a sudden now we have to take away the child for the majority of the time from [respondent] doesn't make sense to me when we all – when everyone agrees that the child has done well under her tutelage for the last 13 years and then, just to do a knee-jerk – in my mind, a knee-jerk reaction and not knowing why we are having this situation, I think is a drastic and severe reaction to what's going on.
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> ***
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> Just because the minor child is 13 years old and says she want to go live with someone else, I agree it's a factor. In can be a strong factor. I don't see it as a controlling factor. She has done well under the care of [respondent] and her stepfather. And there is no reason in my mind to upset that cart."

¶ 17 Petitioner appeals.

¶ 18 II. ANALYSIS

¶ 19 We note first that respondent has not filed an appellee's brief responding to petitioner's arguments. Nevertheless, we may address the merits of the appeal, because the record is simple and the claimed error can be easily decided without the aid of an appellee's brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 20 A. Motion for Substitution of Judge for Cause

¶ 21 Petitioner argues first that the court erred in denying his motion for substitution of judge for cause without first transferring the motion to another judge. Petitioner asserts that his motion met the requirements of section 2-1001(a)(3), and he argues that the court's failure to transfer the matter to another judge for hearing resulted in no independent assessment of the motion and no

assurance of due process. We review this issue *de novo*. *Danhauer v. Danhauer*, 2013 IL App (1st) 123537, ¶ 23. For the following reasons, we reject petitioner's argument.

¶ 22 Petitioner is correct that section 2-1001(a)(3) provides that a trial judge facing a petition for substitution must refer the petition to a "judge other than the judge named in the petition." 735 ILCS 5/2-1001(a)(3)(iii) (West 2014). However, the right to have the petition heard by another judge is not automatic. *Petalino v. Williams*, 2016 IL App (1st) 151161, ¶ 35. In "order to be entitled to a hearing before another judge on whether a substitution for cause is warranted, the motion must allege grounds that, if taken as true, would justify granting a substitution for cause." *Alcantar v. Peoples Gas Light & Coke Co*., 288 Ill. App. 3d 644, 649 (1997). A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests with the party asserting bias, who must present evidence of personal bias stemming from an extrajudicial source and evidence of prejudicial trial conduct. See *Petalino*, 2016 IL App (1st) at ¶ 36; see also *In re Marriage of Hartian*, 222 Ill. App. 3d 566, 569 (1991).

¶ 23 In this case, respondent did not adequately allege the bias or prejudice required to transfer the motion to another judge. See *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 248 (2006). Specifically, petitioner alleged that, before he had presented any evidence, the judge had already decided that petitioner owed $490, where his counsel represented that "we'll jump through the hoops and we'll show all the payments," and the court then replied, "No. The only hoop is to pay the $490 and you're done." Petitioner alleged that this comment reflected actual prejudice. We agree with the trial judge that this allegation, taken as true, fails to make a threshold showing of bias or prejudice requiring the motion to be transferred to another judge. First, it in no way alleges bias stemming from an extrajudicial source. See *Petalino*, 2016 IL App (1st) at ¶ 36. Second, reviewed in context, the court's comments fail to demonstrate prejudicial trial conduct.

Id. Rather, petitioner's counsel characterized the steps that remained with respect to establishing the existence of the child support deficiency, and the court disagreed with the characterization. The court made no findings or rulings on that issue. As the trial judge noted, the motion for substitution mischaracterized his comment as a *finding* or a pre-determination that the deficiency amount was $490, a characterization belied by the record, which reflects a subsequent finding, after evidence was heard, that the deficiency totaled $232. Indeed, where even "erroneous findings and rulings by the circuit court are insufficient reasons to believe that the court had personal bias or prejudice for or against a litigant" (*In re Marriage of Hartian*, 222 Ill. App. 3d at 569), the allegation here, which does not reflect any finding, cannot sufficiently establish personal bias or prejudice against petitioner. The trial court properly denied respondent's motion for substitution of judge for cause without first transferring the matter for a hearing before a different judge.

¶ 24 B. Modification of Allocation of Parental Responsibilities

¶ 25 Petitioner argues next that the trial court's decision to deny his motion to reallocate parental responsibilities was contrary to the manifest weight of the evidence and constitutes an abuse of discretion. Petitioner relies heavily on Wiesner's assessment of the case and her recommendation that the motion be granted. He argues that the evidence reflected domestic turbulence in respondent's home, that respondent had not shown a proper commitment to her parental responsibilities, that Cassady was mature and wished to change her residence, that petitioner is a fit and proper parent to receive residential custody, and that residential placement of Cassady in his home is necessary to serve her best interests. We disagree.

¶ 26 We note that, effective January 1, 2016, the phrase "allocation of parental responsibilities" has replaced the phrase "custody" throughout the Act. See P.A. 99-90, § 5-15

(eff. Jan. 1, 2016). Nevertheless, petitioner does not suggest that the standards applicable to reviewing "custody" decisions have been altered by the change in nomenclature. In that regard, "[t]he standard of review for modification of a child custody order after a dissolution judgment becomes final is whether the modification is against the manifest weight of the evidence or an abuse of discretion." *In re Marriage of Kading*, 150 Ill. App. 3d 623, 631 (1986). A decision is contrary to the manifest weight of the evidence only where the opposite decision is clearly apparent. *In re Marriage of Engst*, 2014 IL App (4th) 131078, ¶ 24. A court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable. *McClure v. Haisha*, 2016 IL App (2d) 150291, ¶ 20.

¶ 27 In addition to the standard of review, we remain mindful of two other principles when reviewing the court's decision here. First, there exists a strong presumption in favor of the custodial parent when the court is presented with a motion to modify custody. See *In re Marriage of Hefer*, 282 Ill. App. 3d 73, 78 (1996); see also *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 414 (1994). Second, Wiesner's recommendations are not controlling. *Prince v. Herrera*, 261 Ill. App. 3d 606, 615 (1994) (custody recommendations of psychiatrist and social services workers not controlling). A recommendation concerning the custody of a child is just that, a recommendation, and the trial court is free to evaluate the evidence presented and accept or reject the recommendation. *Id*. at 615-16. See also 750 ILCS 5/506(a) (eff. Jan. 1, 2016) (concerning the court's appointment for the child an attorney, GAL, or child representative, "In no event is this Section intended to or designed to abrogate the decision making power of the trier of fact. Any appointment made under this Section is not intended to nor should it serve to place any appointed individual in the role of a surrogate judge.").

¶ 28 We cannot conclude here that the trial court abused its discretion or that the opposite decision is clearly apparent. As petitioner points out in his brief on appeal, Wiesner reviewed the statutory factors in section 602.7 of the Act and found that only five favored a change of residential custody: (1) Cassady's wishes; (2) course of conduct relating to caretaking functions; (3) Cassady's adjustment to home, school, and community; (4) petitioner's ability to address Cassady's emotional needs; and (5) the "occurrence of abuse against the child or other household member." The trial court heard all of the evidence and considered the drop in Cassady's grades, her overall stress level, the allegations of tension within respondent's home, the self-harm, and the other issues petitioner has raised, but it reasonably rejected them as not outweighing the presumption in favor of retaining the status quo.

¶ 29 Specifically, the trial court methodically reviewed the evidence and section 602.7's factors. It found as a "huge factor" that respondent has been Cassady's primary caretaker for the majority of her life. It factored that, although the self-harm incident happened, Wiesner did not consider that incident as a controlling factor in her recommendation and she noted that it was appropriately addressed through counseling. The court found that there was no evidence explaining why the self-harm started, but it found relevant that respondent, the current caretaker, handled the issue in an appropriate manner. Moreover, the court found that Cassady needs stability and petitioner's wife, with whom Cassady had a positive relationship, was no longer living in his home. Further, the court considered that, despite the allegation that Tim had hit Cassady in the past or that Tim and respondent would argue, there was no evidence to find that abuse was a concern and, in fact, that Wiesner specifically found no abuse. In addition, the court acknowledged that the evidence reflected that Cassady had recently had a "hiccup" in a few areas. With respect to grades, however, the court correctly found that there was no evidence

reflecting the reason for their decrease (although there was some speculation that the drop in grades could have resulted from the combination of stress, a concussion, and the demands of extracurricular activities). In any event, the court found that, despite the reasons for the "hiccup" in grades, all agreed that, for the majority of her life, Cassady had been a strong student and had, overall, thrived (all while in respondent's custody). Finally, the court considered Cassady's wishes, but it also found that her best interests would not be served by drastic and severe reactions to the raised issues. The court's finding in this regard is reasonable and an opposite conclusion is not clearly apparent, considering that moving homes and schools can be difficult for a child (see, *e.g.*, *Hefer*, 282 Ill. App. 3d at 78 ("requiring children to leave familiar surroundings and establish new relationships with friends and community members often burdens children with stress and pressure")), and Wiesner had noted that she had discussed with Cassady that social issues were likely to occur, even at her new school, and the concept that the "grass is not always greener on the other side."

¶ 30 In light of the standards of review, the presumption in favor of the current custodian, and the evidence presented, we cannot find that the trial court erred in denying petitioner's motion.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 33 Affirmed.