2016 IL App (3d) 160339-U

Order filed October 24, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

DEAN SZOBAR, JR.,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
Petitioner-Appellant,	)	LaSalle County, Illinois.
	)	
	)	Appeal No. 3-16-0339
v.	)	Circuit No. 13-F-140
	)	
	)	The Honorable
CRYSTAL CRUMB,	)	Michael C. Jansz,
	)	Judge presiding.
Respondent-Appellee.	)	

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: In a proceeding to modify parental decision-making responsibilities, the trial court did not err in denying the father's request for temporary sole custody. The appellate court, therefore, affirmed the trial court's judgment.

¶ 2 Petitioner, Dean Szobar, Jr., and respondent, Crystal Crumb, had a daughter, A.S., together. After the parties were awarded joint custody of A.S., Szobar filed a motion for temporary sole custody. The trial court found that even though there was some evidence of a substantial change in circumstances, it was not in the best interests of A.S. for parental

responsibilities to be changed and denied Szobar's request. On appeal, Szobar argues that the trial court erred in denying his motion because he provided evidence that it was in the best interests of A.S. for him to be awarded temporary sole custody. We affirm.

¶ 3 FACTS

¶ 4 On October 24, 2013, the trial court entered a joint parenting agreement concerning A.S. in which joint custody was awarded to the parties and primary residential care of A.S. was awarded to Crumb. On September 18, 2015, the trial court entered an agreed order revising visitation and other matters.

¶ 5 On November 23, 2015, Szobar filed an emergency motion for temporary sole custody, which he subsequently amended on January 6, 2016. Within his first amended emergency motion for temporary sole custody, Szobar argues that A.S.'s current environment is harmful to her well-being and that it is in her best interest for Szobar to have temporary sole custody and for Crumb to have restricted visitation. He further alleges that: (1) while in Crumb's care, A.S. received a black eye and bruises, scrapes, and cuts along the side of her face; (2) Crumb's home has a backyard filled with empty beer cans; (3) one of the parties living in Crumb's home was arrested for underage drinking by a minor; and (4) no one in Crumb's home has a valid driver's license. Szobar also filed a proposed parenting plan on May 5, 2016.

¶ 6 On June 2, 2016, Crumb filed a motion to dismiss alleging that Szobar's motion should be dismissed because his request for modification of the prior parenting responsibility order violated section 610.5 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) due to it being filed within less than two years of the order allocating parental responsibilities. 750 ILCS 5/610.5(a) (West Supp. 2015) (providing that no motion to modify an order allocating parental responsibilities may be made earlier than two years after its date unless the child may be

seriously endangered or the child's emotional development may be significantly impaired). Also on June 2, 2016, a hearing occurred on Crumb's motion to dismiss and Szobar's first amended emergency motion for temporary sole custody. The trial court denied Crumb's motion to dismiss, finding that the agreed order entered on September 18, 2015 does not qualify as the kind of allocation judgment that is contemplated by the recently revised IMDMA. No appeal is made concerning the trial court's decision to deny this motion, and so we do not address it here.

¶ 7 During the hearing on Szobar's motion, Szobar testified that Crumb lived in a house with her sister, her four-year-old nephew, and her mother's ex-boyfriend. He further testified that Crumb, her sister, and her mother's ex-boyfriend did not have valid driver's licenses. Szobar also testified that the backyard of the home contained an unfenced pool, piles of beer cans, and hard alcohol bottles on the steps.

¶ 8 Additionally, Szobar testified that when he arrived at Crumb's home to pick up A.S. on September 25, 2015, A.S. had a black eye, a big bruise over her right eye, and scrapes going down the right side of her face. Crumb had explained that A.S. fell off a picnic table. Szobar did not seek medical attention for A.S.'s wounds. Szobar also testified that A.S. does not want to return to Crumb's home when he has her in his care and that he spends all of his time with her when she is with him. Szobar testified that A.S. repeatedly has diaper rash and heat rash, and that Crumb, although she takes A.S. to the doctor when necessary most of the time, has not taken A.S. to the dentist.

¶ 9 With regard to the wounds noticed by Szobar on September 25, 2015, Crumb testified that A.S. fell off a picnic table's bench while in her presence and that she had told A.S. to get off the bench and tried to remove her from the bench before she fell. In her written response to Szobar's motion, Crumb denied that A.S. suffered a black eye, bruises, scrapes, and a cut on her

face while in Crumb's care. However, during her testimony, Crumb was shown a picture of A.S. with wounds on her face and she indicated that the bruise on the eye occurred while A.S. was in her care. Crumb also testified that A.S. is never in the backyard by herself.

¶ 10 Additionally, Crumb testified that the liquor bottles Szobar saw in the backyard were empty and were going to be used for wine that her mother's ex-boyfriend makes and that the beer cans were there for recycling purposes. With regard to her lack of a valid driver's license, Crumb testified that she receives rides from her mother and a neighbor. Crumb further testified that A.S. is in her actual physical presence most of the time when she has her and that she always treats A.S.'s rashes or marks.

¶ 11 At the close of the hearing, Crumb requested a directed finding in her favor. The trial court found that even though there was some evidence of a substantial change in circumstances, there was no evidence presented at the hearing indicating that a modification was necessary to serve the best interests of A.S. As a result of this finding, the trial court determined that Szobar had not met the relevant requirements for modifying decision-making responsibilities and therefore denied Szobar's motion and entered a directed finding in favor of Crumb.

¶ 12 ANALYSIS

¶ 13 On appeal, Szobar argues that the trial court erred in denying his first amended emergency motion for temporary sole custody because, contrary to the trial court's ruling, he provided sufficient evidence that it was in the best interests of A.S. for him to be awarded sole custody including: (1) he spends all of his time with A.S. when she is with him; (2) he asks all the questions and talks to the doctor when he and Crumb take A.S. to the doctor; (3) Crumb never took A.S. to the dentist; (4) he believes that schools other than the one Crumb wants A.S. to go to may be better for her; (5) all of his family has reliable transportation and valid driver's

licenses while Crumb and the people she lives with do not have valid driver's licenses and her mother does not have a reliable vehicle; and (6) A.S. has been injured while in the custody of Crumb, and Crumb failed to notify him of the injury.

¶ 14 The revised IMDMA is effective as of January 1, 2016, and applies to "all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered" and "all proceedings commenced after its effective date for the modification of a judgment or order entered prior to the effective date of this Act." 750 ILCS 5/801 (West Supp. 2015). Here, Szobar filed his original emergency motion for sole custody on November 23, 2015 and filed his first amended emergency motion for temporary sole custody on January 6, 2016. A hearing on the matter occurred on June 2, 2016, at which time the trial court ruled on Szobar's motion. Thus, we apply the current version of the IMDMA to this matter.

¶ 15 Section 602.5 of the IMDMA provides that the trial court "shall allocate decision-making responsibilities [formerly referred to as 'custody'] according to the child's best interests." 750 ILCS 5/602.5(a) (West Supp. 2015). In determining the best interests of the child, "the court shall consider all relevant factors." 750 ILCS 5/602.5(c) (West Supp. 2015).

¶ 16 Pursuant to section 610.5(c) of the IMDMA, in relevant part:

> "[T]he court shall modify a parenting plan or allocation judgment when necessary to serve the child's best interests if the court finds, by a preponderance of the evidence, that on the basis of facts that have arisen since the entry of the existing parenting plan or allocation judgment or were not anticipated therein, a substantial change has occurred in the circumstances of the child or of either parent and that a modification is necessary to serve the child's best interests." 750 ILCS 5/610.5(c) (West Supp. 2015).

Thus, the trial court has authority to modify a parenting plan or allocation judgment pursuant to section 610.5(c) of the IMDMA if: (1) a substantial change has occurred since the existing

parenting plan or allocation judgment was ordered; and (2) the modification is necessary to serve the child's best interests. *Id.*

¶ 17 Szobar argues that substantial change has occurred because A.S. has suffered harm and is at risk of suffering harm in the future. Specifically, Szobar argues that A.S. has already suffered an eye injury. He further argues that the trial court found that due to this injury, a substantial change in circumstances had occurred. Crumb, however, argues that the trial court did not make such a finding. We find that the record is unclear as to whether the trial court made a determination concerning the existence of a substantial change in circumstances. The record shows that the trial court found that there was "some evidence" of a change of circumstances in that A.S. was injured while in Crumb's care. However, the trial court also found that Crumb was living at the same address before the initial joint parenting agreement was entered and that there was no evidence that anything at Crumb's residence had changed since that time. Because we later find in this order that the trial court's determination with regard to A.S.'s best interests was not against the manifest weight of the evidence, we need not make a determination concerning whether present harm warranting a substantial change in circumstances was found by the trial court.

¶ 18 In addition to arguing present harm, Szobar argues that lack of transportation could lead to serious physical, mental, and emotional damage to A.S and that the lack of transportation and Crumb's apathy to medical issues concerning A.S. have the potential to adversely affect A.S. In this regard, Szobar relies on *In re Marriage of Padiak*, 101 Ill. App. 3d 306 (1981) and *In re Marriage of Rogers*, 2015 IL App (4th) 140765. These cases, however, involved situations very different from the current matter, and we find them readily distinguishable.

¶ 19 For instance, in *Padiak*, the court found that the father presented substantial evidence that "there was a strong possibility of future endangerment" if the minor remained in the custody of her mother based on testimony from a psychologist indicating that the minor was "showing signs of beginning some neurotic types of conflicts" due to the minor's present environment and testimony of the mother concerning instability in her life. *Padiak*, 101 Ill. App. 3d at 312. Here, no evidence was presented concerning Crumb's stability or psychological harm to A.S.

¶ 20 Szobar also cites to *Rogers* for the proposition that "changes that 'affect the welfare of the child' includes changes that have the potential to adversely affect the child, even if the child has yet to suffer the adverse effects of those changes." *Rogers*, 2015 IL App (4th) 140765, ¶60. Szobar argues that these changes included Crumb's lack of transportation for A.S. and Crumb's apathy to the medical issues of A.S. In *Rogers*, custody of a minor was transferred from the mother to the father after the mother had multiple psychiatric-related hospitalizations and failed to seek follow-up medical help. Additionally, there was testimony by third parties that the mother had, on multiple occasions, failed to properly supervise the minor. We find that the facts in the current matter are dissimilar from those in *Padiak* and *Rogers* and do not support a finding of potential harm constituting a substantial change in circumstances.

¶ 21 With regard to the second prong of section 610.5(c) of the IMDMA and the trial court's determination of whether modification is necessary to serve A.S.'s best interests, Szobar argues that the trial court misinterpreted the statute to mean that it must find evidence as to why the child would be better served with the other parent (or, as the trial court stated, "why the child should be with dad"). Crumb, however, argues that it is clear from the record that the trial court understood the relevant standard. We agree with Crumb in that the trial court was not substituting a different standard but rather explaining how the trial court can weigh the evidence

to determine best interests of the child. The trial court, when reviewing the two-step test for modifying parental responsibilities, explicitly stated, "I didn't hear any evidence about how it was in the child's best interest to be with dad." The trial court then elaborated that it did not hear anything about living arrangements of Szobar or specifically what Szobar and A.S. do together.

¶ 22 A determination by the trial court concerning custody, now referred to as "allocation of significant decision-making responsibilities," will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004); 750 ILCS 5/602.5 (West Supp. 2015). When reviewing this determination by the trial court, we view the evidence in the "light most favorable to the appellee," and if multiple inferences can be made based upon the evidence, we "will accept those inferences that support the court's order." *Bates*, 212 Ill. 2d at 516. Specifically with regard to matters concerning custody, the trial court's decision is given "great deference… since the trial court is in the best position to judge the credibility of the witnesses and determine the needs of the child." *In re Custody of Sussenbach*, 108 Ill. 2d 489, 499 (1985).

¶ 23 The record shows that the trial court weighed the evidence presented to it. For instance, the trial court stated that it took into account the fact that Crumb's testimony (concerning whether A.S. had an injury to her face while in Crumb's care) was inconsistent with her verified pleading filed in response to Szobar's motion. The trial court also found that there was likely no subsequent injuries since September 2015 because no pictures of other injuries were introduced as evidence. Furthermore, the trial court noted that children three years of age are too young to know what is in their best interest.

¶ 24 Additionally, although Szobar testified that his daughter told him that Crumb leaves her in the backyard and in the garage alone, he also testified "I do not know" when asked if his

daughter plays in the backyard of Crumb's home alone. Crumb, however, testified that A.S. is never in the backyard by herself. Moreover, even though Szobar questioned Crumb's credibility concerning her explanation of how A.S. was injured, he did not provide any evidence as to how A.S. was injured except for Crumb's testimony.

¶ 25 We give deference to the trial court's determination that it was not in the best interests of A.S. for parental responsibilities to be modified. *Id*. Having reviewed all of the evidence in the present case, we hold that it was not against the manifest weight of the evidence for the trial court to grant Crumb's motion for a directed finding and deny Szobar's first amended emergency motion for temporary sole custody.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of LaSalle County.

¶ 28 Affirmed.