2016 IL App (4th) 150951-U

NO. 4-15-0951

FILED
June 23, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| In re: MARRIAGE OF | ) | Appeal from |
| HOLLY N. PERRY, | ) | Circuit Court of |
| Petitioner-Appellant, | ) | McLean County |
| and | ) | No. 09D589 |
| ORIC S. PERRY, | ) | |
| Respondent-Appellee. | ) | Honorable |
| | ) | Paul G. Lawrence, |
| | ) | Judge Presiding. |

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court did not err in denying appellant's petition for substitution of judge for cause.

¶ 2 On October 27, 2015, appellant, Holly N. Perry, filed a petition for substitution of Judge Charles G. Reynard for cause. On November 6, 2015, a different judge, Paul G. Lawrence, heard arguments on Holly's petition. On November 16, 2015, the trial court entered an order denying Holly's petition and finding no just reason to deny enforcement or appeal pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Holly appeals, arguing the trial court erred in denying her petition for substitution. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Holly and Oric S. Perry divorced on August 1, 2011. They had two children during the marriage, C.P. (born January 2004) and M.P. (born April 2008). Custody and

visitation of the children were controlled by a memorandum of agreement entered on February 18, 2010.

¶ 5 On June 16, 2014, Oric filed a petition for modification of visitation, requesting a change in the holiday visitation schedule and other notification provisions. On September 23, 2014, Oric filed a motion for appointment of a parenting coordinator, citing his and Holly's failure to adequately cooperate and communicate with regard to the children. The trial court granted Oric's motion on October 15, 2014. The trial court appointed a parenting coordinator, Karen Anderson, on October 15, 2014, for a period of nine months.

¶ 6 Anderson filed a report with the trial court on August 12, 2015, recommending "the court seriously consider equal time with both Holly and Oric by continuing the summer schedule year round." The report noted Holly was "concerned about academic progress, a consistent sleep schedule, and that Holly and her attorney believe Oric's motive for wanting equal time is paying less child support." On August 17, 2015, Holly filed an objection to the August 12 report. On August 18, 2015, the parenting coordinator sent Judge Reynard an e-mail explaining the addition of one overnight to Oric's schedule would result in a 50/50 parenting schedule. Later that day, Judge Reynard responded to Anderson's e-mail with, "Thanks!"

¶ 7 The trial court held a hearing on Holly's objection on August 27, 2015. Holly's counsel argued the parenting coordinator's report exceeded her authority and constituted a due-process violation. Judge Reynard denied Holly's objection, stating: "In overruling the petitioner's objection without prejudice to supporting it with fuller evidentiary presentation, the Court is saying that the—I think it's a single overnight. Is that right counsel, we're talking about one overnight change in shifting parenting time?"

¶ 8 On October 27, 2015, Holly filed a petition for substitution of judge for cause. Holly attached the e-mail exchange between the parenting coordinator and Judge Reynard.

¶ 9 On November 6, 2015, Judge Lawrence heard arguments on Holly's petition for substitution. Relying on Local Rule 157, and specifically paragraph 11, Holly argued Judge Reynard's communication with Anderson on August 18, 2015, constituted an improper *ex parte* communication. On November 16, 2015, Judge Lawrence denied Holly's petition for substitution of judge.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 For purposes of our analysis, it is important to remember this court is only addressing the denial of Holly's petition for substitution of judge for cause. Section 2-1001(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(3) (West 2014)) allows for the substitution of a judge for cause. Cause for substitution can include bias and/or prejudice on the judge's part. However, "[w]here bias or prejudice is invoked as the basis for seeking substitution, it must normally stem from an extrajudicial source, *i.e.*, from a source other than from what the judge learned from her participation in the case before her." *In re Estate of Wilson*, 238 Ill. 2d 519, 554, 939 N.E.2d 426, 447 (2010).

¶ 13 We will not disturb a trial court's denial of a petition for substitution of judge for cause unless the denial was against the manifest weight of the evidence presented. *In re Marriage of Schweihs*, 272 Ill. App. 3d 653, 659, 650 N.E.2d 569, 573 (1995). A decision is against the manifest weight of the evidence if "the opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based on any of the evidence." *In re Marriage of Matchen*, 372 Ill. App. 3d 937, 946, 866 N.E.2d 683, 691 (2007).

¶ 14 Holly argues the facts in this case establish Judge Reynard engaged in an *ex parte* communication with the parenting coordinator, directly seeking out information from the parenting coordinator and using that information to overrule Holly's objection to the parenting coordinator's report. According to Holly, Judge Reynard was prejudiced against her because of his *ex parte* communication with the parenting coordinator. Holly contends Judge Reynard displayed "clear antagonism" toward her at a hearing on her objection to the parenting coordinator's report. She relies on the following statement from Judge Reynard at that hearing: "I'm going to hold somebody in contempt if you don't get control of your tempers, because this is a dispute that is going to get resolved by the Court, and we are not going to cause any more discontinuity to your child's life than you are yourselves creating." Holly argues Judge Reynard's threat of contempt resulted from information the judge learned during his alleged improper communication with Anderson.

¶ 15 Our supreme court has stated judges are presumed to be impartial. *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 31, 958 N.E.2d 647. A party petitioning for a substitution for cause bears the burden of overcoming this presumption "by showing prejudicial trial conduct or personal bias." *Id.* The court noted it had relied on the following description of bias provided by the United States Supreme Court (*id.*):

> "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or

> even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." (Emphases in original.) *Liteky v. United States*, 510 U.S. 540, 555 (1994).

We cannot say the trial court's decision to deny Holly's petition for substitution for cause was against the manifest weight of the evidence pursuant to this high standard.

¶ 16 Our supreme court stated, pursuant to *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (1989), "a judge reviewing a for-cause challenge against another judge should assess the constitutional due process implications raised whenever substitution is sought and guard against the 'risk of actual bias' by applying the *Caperton* standard to the facts of the case." *O'Brien*, 2011 IL 109039, ¶ 33, 958 N.E.2d 647. According to our supreme court, in *Caperton*, "the United States Supreme Court held that when a party contends that the failure to recuse violates due process, an objective inquiry must be made to determine not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral or whether there is an unconstitutional potential for bias." *Id.* ¶ 32. We cannot say Judge Lawrence erred under this standard either.

¶ 17 Judge Reynard's e-mail communication with the parenting coordinator was the primary basis for Holly's argument Judge Reynard should have been removed for cause. According to Canon 3 of the Illinois Code of Judicial Conduct (Illinois Supreme Court Rule 63(5)(a-d) (eff. July 1, 2013)):

"(5) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(c) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(d) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so."

Holly argues Judge Lawrence erred in finding the parenting coordinator was court personnel. However, Judge Lawrence stated he was not sure if the parenting coordinator qualified as court personnel.

¶ 18 Instead, Judge Lawrence noted the October 15, 2014, order allowed the parenting coordinator to communicate with the trial court. Judge Lawrence further stated Holly had not presented him with any authority showing the parenting coordinator's communication with the court was improper. Further, even assuming the communication between Judge Reynard and the parenting coordinator was an improper *ex parte* communication and violated Rule 63, this would not be enough in itself to remove Judge Reynard for cause.

¶ 19 We need not decide whether the parenting coordinator qualifies as court personnel. Even if the communication between Judge Reynard and the parenting coordinator was improper pursuant to Rule 63, Holly did not establish Judge Reynard displayed actual prejudice against her or that the average judge in his position would not have been neutral. *O'Brien*, 2011 IL 109039, ¶ 32. Our supreme court has rejected the notion a judge can be removed for cause based merely on an appearance of impropriety. *Id.* ¶ 43.

¶ 20 Judge Reynard's remark he was going to hold someone in contempt if the parties did not get control of their tempers does not establish Judge Reynard had any actual prejudice toward Holly. As the trial court correctly noted, even assuming Judge Reynard was upset and directed the threat of contempt to Holly only, this does not establish he had any prejudice or bias against Holly. Further, Judge Reynard's failure to inform the parties of his communication with the parenting coordinator bears little weight considering the court order appointing the parenting coordinator appeared to allow this. Neither party objected to that provision at the time the order was entered.

¶ 21 As for the October 2014 order appointing the parenting coordinator, Holly argues Judge Reynard did not have the authority to allow *ex parte* communication between himself and the parenting coordinator. Further, even if Judge Reynard had this authority, Holly argues the October 2014 order had expired when the *ex parte* communication in this case occurred. In addition, Holly contends the October 2014 order improperly delegated the trial court's decision-making authority to the parenting coordinator. However, these arguments go to the legal merits of Judge Reynard's actions. Even if this court were to agree with Holly on all of these points, this would not establish Judge Reynard had any actual prejudice toward Holly.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the trial court's denial of Holly's petition for substitution of judge for cause.

¶ 24 Affirmed.