2016 IL App (4th) 160445-U

NO. 4-16-0445

FILED
November 16, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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
	)	Pablo Eves and
	)	Charles G. Reynard,
	)	Judges Presiding.

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

ORDER

¶ 1 *Held*: Based on our review of the record in this case, petitioner established a *prima facie* case the trial court erred in granting respondent's motion to modify visitation. The parenting coordinator violated the terms of a local court rule by recommending an ongoing modification to a visitation provision, and the trial court erred by (1) requiring petitioner to follow this improper recommendation and (2) relying on this recommendation to grant respondent's petition to modify visitation. The trial court's December 31, 2015, order granting respondent's motion to modify the visitation provision is reversed.

¶ 2 On December 31, 2015, the trial court entered an order granting respondent Oric S. Perry's petition to modify his visitation with his children, C.P. and M.P. The result of this change provided Oric and petitioner, Holly N. Perry, C.P. and M.P.'s mother and Oric's former wife, with equal parenting time for the children. Holly appeals, asking this court to reverse the trial court's modification of the visitation schedule.

¶ 3 Oric failed to file an appellee's brief. Based on our supreme court's decision in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33, 345 N.E.2d 493, 494-95 (1976), we have examined the record to see if Holly's arguments are legitimate, because an appellate court should not reverse a trial court's decision simply because Oric failed to file an appellee's brief, especially in a case involving children.

¶ 4 After reviewing the record in this case, it appears the trial court erred in granting Oric's petition to modify visitation. The trial court relied on the parenting coordinator's recommendation to give the parents equal parenting time, even though it told the parties it would not consider the recommendation. Further, the parenting coordinator's recommendation was not allowed under the local rule allowing the appointment of parenting coordinators. We reverse the trial court's December 31, 2015, order allowing Oric's petition to modify the visitation provision.

¶ 5 I. BACKGROUND

¶ 6 Oric and Holly divorced on August 11, 2011. C.P. (born January 18, 2004) and M.P. (born April 10, 2008) were born during the marriage. On February 18, 2010, the trial court entered a mediated memorandum of agreement between the parties regarding custody and visitation of the children. The memorandum of agreement provided Oric and Holly would have joint custody of the children but awarded Holly primary custody.

¶ 7 On September 23, 2014, Oric filed a motion for the appointment of a parenting coordinator. On October 15, 2014, the trial court appointed Karen Anderson as the parenting coordinator for a nine-month period. The order provided Oric and Holly were "precluded from litigating before the Court issues within the purview of the Parenting Coordinator's powers and authority, except under the procedure for filing objections as set forth below." The order also noted the parties had "stipulated that any particular findings and recommendations of the

Parenting Coordinator, whether or not made as the result of an agreement of the parties, may have immediate binding effect even before being filed and ordered to the Court." In addition, the order stated the parenting coordinator could not be required to testify at any court hearing concerning any aspect of his or her actions as the parenting coordinator in this case. The parenting coordinator's records were not subject to subpoena.

¶ 8 On January 12, 2015, the trial court entered a docket entry. As McLean County continues to use a handwritten docket entry system, it is sometimes difficult for this court to decipher these entries. However, it appears the court approved an addendum to the parenting agreement and modified child support. As for the petition for modification of the visitation provision which Oric had filed, the docket entry notes:

> "the concerns raised therein may well have been addressed by the ongoing parenting coordination process. The Court suggests that ongoing visitation concerns should be dealt with by reference to that process and that Resp [*sic*] should contemplate the voluntary dismissal of his petition in favor of addressing his needs through the PC process. No court scheduled at this time."

The trial court was referring to a petition filed by Oric on June 16, 2014.

¶ 9 In a parenting coordinator report dated June 8, 2015, the parenting coordinator stated Oric had requested Holly consider having equal parenting time with the children. Holly points out this report was misdated. Holly states the report was submitted to the court on August 12, 2015.

¶ 10 According to the report, Holly, Oric, and the parenting coordinator met on July 14, 2015, to discuss Oric's proposal to continue the agreed-upon summer visitation schedule

throughout the entire year. The parenting coordinator noted Holly was concerned the continuation of the summer schedule could affect the children's academic performance and sleep schedule. According to the parenting coordinator, "both Holly and her attorney believe Oric's motive for wanting equal time is paying less child support." The parenting coordinator then stated:

> "The parenting coordinator is well aware of both parent's position on equal parenting time. In looking at the equal schedule over summer, there were no major issues with the schedule itself. The only issues occurred over the location of the pick-up and drop-off, which were resolved. The issues addressed by the parenting coordinator in this report and the June 8, 2015[,] Parenting Report to the Court are issues the parents need to work out and do not impact the children's day to day schedule."

The parenting coordinator then outlined some of the benefits of splitting parenting time equally and offered the following recommendation: "I recommend the court seriously consider equal time with both Holly and Oric by continuing the summer schedule year around [*sic*]." It is unclear from the report whether the parenting coordinator believed this recommendation would be immediately enforceable on the parents.

¶ 11 On August 17, 2015, Holly filed an objection to the parenting coordinator's report.

¶ 12 On August 18, 2015, the parenting coordinator sent the trial court an e-mail stating the addition of one overnight visit to Oric's schedule would result in a 50/50 schedule. The entire e-mail stated:

> "Per your request:

The summer exchange time was 8:15 a.m.

The parents alternated weekends from 8:15 Friday to 8:15 Monday

8:15 Monday to 8:15 Wednesday (always Oric's time)

8:15 Wednesday to 8:15 Friday (Always Holly's time)

The proposed schedule would be 50/50 time as agreed upon by the parents.

The schedule used last school year was:

The parents alternated weekends from 8:15 a.m. Friday to 8:15 a.m. Monday (or after school)

8:15 Monday to 8:15 (or after school) Tuesday (Always Holly's)

8:15 (or after school) Tuesday to Wednesday 8:15 a.m. (Always Oric's)

8:15 (or after school Wednesday to Friday at 8:15 a.m. (Always Holly's)

This schedule 64% Holly and 36% time over a two week block of time.

If one overnight was added to Oric's schedule each week, it would come out to a 50/50 schedule over a two week period of time as ordered by the Court."

That same day, Judge Charles G. Reynard responded with, "Thanks!"

¶ 13 That same day, after the parenting coordinator sent the above e-mail to the trial court, the trial court sent the following e-mail to Holly's and Oric's respective attorneys.

"I've been advised of a dispute concerning the Parenting Coordinator's August 8, 2015[,] Report and recommendations. Ms. Mosby-Scott has timely filed the Petitioner's objection to the parenting time recommendation of the Parenting Coordinator. My secretary will be in touch with you both shortly to schedule the hearing on that objection as promptly as possible. An interim concern, though, is that the Court's PC appointment order in this case, entered 10-15-14, required compliance with the PC's recommendations until such time as objections could be resolved. I can understand that this particular provision may have been overlooked, but now that it is recalled, I would direct it to be enforced. Please advise your clients accordingly.

Ms. Mosby-Scott's objection states that the Respondent's Petition for Modification of Visitation Provisions is pending and unresolved. While that statement is technically accurate, the 1-12-15 record sheet entry of the Court should have made it clear that the PC process would address the pending concerns of the parties and that the 'Respondent should contemplate the voluntary dismissal of his petition in favor of addressing his needs through the PC process.' The fact that Respondent's petition has not yet been dismissed is not a significant omission in reference to the parties complying with the Court's orders."

¶ 14 On August 21, 2015, Oric filed a motion to voluntarily dismiss his petition for the modification of visitation provisions. That same day, Oric filed a response to Holly's objection to the parenting coordinator's report to the court. According to his response, the order appointing the parenting coordinator "allows the coordinator to make recommendations to the Court in areas of visitation."

¶ 15 On August 27, 2015, the trial court held a brief hearing on Holly's objections. The court noted it only had 10 minutes for the expedited hearing. Holly's attorney argued the parenting coordinator's recommendation exceeded her authority and constituted a due process violation. Judge Reynard denied Holly's objection without prejudice but set the issue for an evidentiary hearing, stating, "In overruling [Holly'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?" The following docket entry was entered:

> "Hearing in re Parenting Coordinator's Report and Petitioner's objection thereto. Objection heard and overruled. Slight shift in parenting time as recommended by parenting coordinator is ordered. PC tenure extended and confirmed until further order of Court. Court admonishes that no change in custody or primary/secondary designation of authority has been ordered. No change in financial responsibility is ordered or contemplated. Full 'De Novo' hearing requested concerning objection and request is allowed."

¶ 16 On September 14, 2015, Holly's attorney sent the parenting coordinator a subpoena requiring her appearance at a November 16, 2015, hearing. On October 9, 2015, Holly filed an objection to the parenting coordinator's report to the court, stating the court lacked jurisdiction to enter any orders, except via agreement of the parties, because Oric had filed a motion to withdraw his petition to modify the visitation provisions, which was the only petition before the court.

¶ 17 On October 16, 2015, Oric filed a supplemental request for relief, seeking relief in addition to his June 16, 2014, petition to modify the visitation provisions of the original memorandum of agreement. Oric alleged this petition was still pending. According to the petition to modify:

> "[D]ue to the length of time that has elapsed since the Respondent's Petition for Modification of Visitation Provisions was filed (June 16, 2014) the other referenced issues that have been implemented between the parties, agreed upon, or otherwise become issues with the children have now manifested themselves to the point that the Court should enter an Order relative to the various issues indicated above in order to serve the best interest of the minor children."

¶ 18 On October 27, 2015, Holly filed a petition for substitution of judge, seeking the removal of Judge Reynard from the case because of the *ex parte* communication between Judge Reynard and the parenting coordinator. On November 6, 2015, Judge Paul Lawrence held a hearing on the petition for substitution of judge, which he denied. On November 16, 2015, Judge

Lawrence denied a motion to reconsider his ruling. Holly appealed the denial, and we affirmed the court's decision. *In re Marriage of Perry*, 2016 IL App (4th) 150951-U.

¶ 19 That same day, the trial court held a hearing on Oric's petition to modify and his supplemental request for relief. The trial court denied Holly's motion for a stay. With regard to Holly's motion to continue the hearing, Holly argued her motion was not just a motion to continue because in some respects it was also a motion for clarification. This was the first time an objection to a parenting coordinator's recommendation had proceeded this far in the court and it was not clear what the parties were to do. Holly indicated she believed the hearing was to be on her objection to the parenting coordinator's report. According to Holly, the testimony of the parenting coordinator was essential in determining what information was used in preparing her report and making her recommendation.

¶ 20 Holly also argued they were not set for a hearing on Oric's petition for the modification of visitation proceedings, which was filed in 2014. Holly's counsel noted Oric's attorney attached a notice which on its face set his petition for a hearing in response to Holly's motion to continue. However, Holly's attorney indicated he had not received the notice for the hearing until he received Oric's response to his motion to continue. Holly's attorney also noted a motion to withdraw this same petition was still pending and needed to be heard. Holly's attorney noted she could not be expected to proceed on a motion Oric sought to withdraw. In response, the trial court stated:

> "I think I have made it clear on numerous earlier hearings that the hearings on objections to certain recommendations made by parenting coordinators is a *de novo* consideration. That observation would have zero meaning if we were talking about

simply such issues as suggested in argument here, such issues as to whether or not the parenting coordinator's reasoning process was flawed or not. *** The notion that the objection to the parenting coordinator's recommendation is distinguishable from the underlying issues to which it adheres is just a distinction without a difference.

The parties are here to debate whether an additional overnight that relates to continuity with an agreed summertime arrangement is to be maintained during the school year. That has been why we are here all along. The efforts to put the parenting coordinator, to put her report, to put her reasoning on trial is misplaced. It's an argument in search of scandal. That's not what we are about today. Counsel is arguing to prolong this parental dispute. Counsel, as directed by client, has the right to do that. But the Court is not obliged, based upon those tortured arguments, to agree, and the Court does not agree.

We are talking about parenting time with [C.P.] and [M.P.], and the parents can proceed with that. They can present their arguments having relinquished the right to timely advance whatever discovery they thought might be desirable. They've relinquished that in favor of making tortured technical arguments which really do not address meaningful due process. This is depriving nobody of their right to hearing. We've been on notice

by reference to this record sheet, with reference to all communications with counsel, with repeated communication to the parties, that we need to resolve these issues. If you need the Judge to do it, God bless you. The Judge is here.

So the continuance is denied, and I find that the parenting coordinator, pursuant to her appointment order, is not subject to being subpoenaed. That's an issue I suppose that the Appellate Court can address as well, but that's part of the program. We're not here to talk about the Court's appointee going off the charts when the Court is willing to hear the bottom-lined issues from scratch, if the parties, after having had an opportunity to be heard by the parenting coordinator, are dissatisfied with the outcome of a particular recommendation."

The trial court then noted it was going to allow Oric to proceed on the petition for modification of visitation provision filed June 16, 2014. In addition, the court quashed the parenting coordinator's subpoena, noting the parenting coordinator could not be subpoenaed pursuant to the terms of the order appointing the parenting coordinator.

¶ 21 The trial court then heard evidence on the issue regarding the continuation of the summer schedule to the school year, under which Oric received an additional overnight visit with the children. Oric testified he was a security analyst at State Farm. He was married to Rachel Perry. From 2011 to June 2015, Oric had visitation every other Friday through Monday and every Tuesday night to Wednesday morning. The schedule was amended in June 2015 at the

beginning of summer break to provide Oric visitation from Friday after school to Wednesday morning every other weekend and Monday through Wednesday morning every week.

¶ 22 Oric and Holly live approximately 15 minutes from each other but were not in the same school district. Oric testified the new schedule worked very well. He testified travel time and frequency of exchanges were reduced, and the new schedule made for a better household. The kids were opening up more, doing really well in school, and were having a better quality of life. M.P.'s grades had improved, but C.P. was struggling as he had just started junior high school. Oric testified the children seemed more settled. The children were healthy and doing well emotionally with the revised schedule. They did not complain about spending extra time with Oric. The children now spent approximately half of their time at Oric's, and he believed this was in the children's best interest. Oric asked for the modification of the prior schedule to be made permanent.

¶ 23 Holly testified she agreed to try a different summer schedule because Oric had not complied with paying his portion of the children's day care expenses during the summer. By allowing a 50-50 split of the children's time during the summer, the day care conflict would be alleviated. She testified her main concern with extending the summer schedule into the school year was that the children would no longer have a "home base to come home to." She filed an objection to the parenting coordinator's recommendation to continue the summer schedule. However, "in light of the Court's prior orders, [she] acquiesced and continued to follow the summer 2015 schedule through the school year." According to Holly:

> "The kids have an uncertainty of where they're supposed to be on what day. We always have to go over that on what's going on, whose weekend, whose not weekend, whose night. [C.P.]'s

grades have been bad this year, worse than the years prior. [M.P.] was higher in her reading last year and math than what she is this current year. It's gone down.

Overall attitudes haven't been the best. I feel when they're with me they're around the kids that they go to school with and they have children that they play with outside. So the social aspect of it, too. They're missing time being around those children, too."

She also testified the children seemed very tired.

¶ 24 On December 31, 2015, the trial court entered an order on this matter. The court noted it "heard the issue as a *de novo* matter, received evidence and testimony as well as arguments of counsel." The trial court noted:

"1. The Respondent seeks the additional overnight and the Petitioner opposes it. The Parenting Coordinator has recommended the Court's consideration of continuing the summer parenting time schedule agreed to by the parties, which recommendation is essentially supportive of the Respondent's request for relief.

* * *

5. The Respondent testified that the parenting time change, one overnight per week, accomplished by agreement for the summer schedule had proceeded remarkably well. The Parenting Coordinator's report supported this characterization and it appears that the Petitioner is in agreement that it went well. Travel times

> associated with exchanges and the frequency of exchanges decreased. Petitioner admitted the children did enjoy the increased time during the summer. The Petitioner's main concern relating to the summer experience related to whether the children were actually spending more time with their father. But she admitted she did not know. She also indicated that previously she had need of summer child care when the children were with her and the new arrangement permitted her to work more and require less child care."

The court's docket entry stated:"

> "Respondent's Petition for Modification of Visitation Provision is allowed in part and the Petitioner's objection to the Parenting Coordinator's recommendation that the Court consider extending summer parenting time arrangement on year round basis is overruled."

The court's written order noted the parenting coordinator had recommended the court consider the continuation of the summer parenting time.

¶ 25 On February 1, 2016, Holly filed a motion to reconsider. On May 10, 2016, Judge Pablo Eves denied Holly's motion to reconsider.

¶ 26 On June 20, 2016, this court allowed Holly to file a late notice of appeal.

¶ 27 II. ANALYSIS

¶ 28 The facts of this case are fairly ordinary. However, the procedural history of the case and the trial court's rulings are rather perplexing. We note the troubling decisions at issue in

this appeal were made by Judge Reynard and not Judge Eves, who denied Holly's motion to reconsider after Judge Reynard retired at the end of 2015.

¶ 29 As stated earlier, Oric did not file an appellee's brief. Our supreme court has stated:

> "[T]he judgment of a trial court should not be reversed *pro forma* for the appellee's failure to file its brief as required by rule. A considered judgment of the trial court should not be set aside without some consideration of the merits of the appeal." *Talandis*, 63 Ill. 2d at 131, 345 N.E.2d at 494.

Based on the record in this case, whether Judge Reynard's judgment was considered is a matter the parties disagree on. However, assuming he provided a considered judgment, our supreme court also stated:

> "We do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed." *Talandis*, 63 Ill. 2d at 133, 345 N.E.2d at 494.

The record in this case is not simple and the claimed errors cannot be easily decided. However, Holly's brief demonstrates *prima facie* reversible error, which is supported by the record. As a result, we reverse the trial court's December 31, 2015, order modifying the visitation provisions in this case.

¶ 30 Holly's main argument is the trial court erred in granting Oric's motion to modify visitation. Oric bore the burden of establishing the modification was in the children's best interest. *Griffiths v. Griffiths*, 127 Ill. App. 3d 126, 129, 468 N.E.2d 482, 485 (1984). While a trial court is given wide discretion in resolving visitation issues, a reviewing court can reverse a court's decision where the court abused its discretion or a parent or child has suffered a manifest injustice. *In re Marriage of Diehl*, 221 Ill. App. 3d 410, 429, 582 N.E.2d 281, 294 (1991). According to Holly, she suffered a manifest injustice because of the court's ruling and Oric did not present sufficient evidence to establish the modification was in the children's best interest.

¶ 31 We note only two witnesses testified at the hearing on the petition to modify visitation, Oric and Holly. Holly subpoenaed the parenting coordinator for the hearing, but the trial court quashed the subpoena. At the hearing, the court stated:

> "In this case, once again, much more like a mediator, but not entirely like a mediator, the recommendations of the parenting coordinator have assisted the Court only to the extent that there is structure and stability that goes along with the authority of a parenting coordinator to secure a level of conflict that is properly described as a diminished level of conflict in a high-conflict family. *Beyond that the Court has committed repeatedly to the notion that that report is to be accorded no deference and it is not*

> *intended to influence the Court on the ultimate issue.* This is a trial *de novo* and this is a matter about which the parties have been on notice from the Court, notice from the respondent for a considerable period of time. Accordingly, I'll confirm my earlier ruling, though I appreciate the argument made on the *Bates* authority." (Emphasis added.)

However, the court's written order granting Oric's petition to modify visitation did the exact opposite, noting the parenting coordinator's recommendation was supportive of Oric's request for relief. The court also stated the parties agreed the summer schedule had gone well. According to the court, "The Parenting Coordinator's report supported this characterization and it appears that the Petitioner is in agreement that it went well." Based on the court's written order, it appears the trial court did accord deference to the parenting coordinator's report and the report influenced the court on the ultimate issue of whether to increase the amount of Oric's visitation.

¶ 32 Not only did the trial court do what it said it would not with regard to the parenting coordinator's recommendation (a recommendation the court would not allow Holly to challenge before the court by examining the parenting coordinator), the parenting coordinator's recommendation was outside its authority pursuant to the Eleventh Circuit's local rule allowing the appointment of parenting coordinators in McLean County cases. Eleventh Judicial Circuit Local Rule 157(D)(11)). Regardless of the constitutionality of McLean County's local rule allowing the appointment of parenting coordinators—which we need not decide to resolve this appeal—the parenting coordinator exceeded the scope of her authority by recommending to the court a change in the amount of Oric's ongoing visitation with his children. According to Local Rule 157(D)(11):

> "The parenting coordinator shall not be permitted to give a recommendation or opinion concerning the ultimate issue of fact, law, or mixed issue of fact and law as to child parenting responsibility, primary physical residence, or *major parenting time issues*. Recommendations or opinions on lesser issues, as stated above, may be conveyed by the parenting coordinator to the parents and the court." (Emphasis added.) Eleventh Judicial Circuit Local Rule 157(D)(11).

However, the parenting coordinator in this case did exactly that. We do not see how changing the amount of ongoing visitation a parent has with his or her children is not a major parenting time issue. As stated earlier, Oric did not file a brief, and this court is not going to act as his advocate to attempt to explain why the parenting coordinator's actions should somehow be justified.

¶ 33 It is difficult to blame the parenting coordinator for overstepping her bounds. The trial court's order appointing her contained contradictory provisions regarding her authority. For example, one part of the order states: "The Parenting Coordinator may assist with implementation of Court orders, make recommendations to the Court regarding implementation, clarification, modification and enforcement of any temporary or permanent custody or parenting time order." Another part of the order states: "The Coordinator may not change custody, effect a significant change in parenting time or modify primary physical custody, but may make recommendations to the Court in those areas." Still another part of the order states:

> "C. The Parenting Coordinator may not:

1. Have any decision-making authority which is the sole province of the Court.

2. Serve as a custody evaluator in any proceeding involving one or more parties for whom the Parenting Coordinator has provided parenting coordination services.

3. *Be permitted to give a recommendation or opinion concerning the ultimate issue of fact, law, or mixed issue of fact and law as to child custody, primary physical residence, or visitation.* Recommendations or opinions on lesser issues, as stated above, may be conveyed by the Parenting Coordinator to the parents and the Court." (Emphasis added.)

If this is a standardized form for the appointment of parenting coordinators, it needs to be modified to clearly reflect the fact the local rule does not permit a parenting coordinator to make a recommendation to the court or provide his or her opinion "concerning the ultimate issue of fact, law, or mixed issue of fact and law as to child parenting, responsibility, primary physical residence, or *major parenting time issues*." (Emphasis added.) Eleventh Judicial Circuit Local Rule 157(D)(11).

¶ 34 Not only did the parenting coordinator exceed her authority in recommending an equal parenting schedule, the trial court compounded the error by not recognizing this recommendation was outside the scope of the parenting coordinator's authority. The trial court should have quashed this recommendation after it was brought to the court's attention. However, instead of quashing the recommendation, the trial court ordered Holly to follow the parenting

coordinator's recommendation and, as stated earlier, relied on this recommendation to grant Oric's petition to modify visitation.

¶ 35 Based on our review of the record in this case, the errors are too numerous to allow the trial court's December 31, 2015, order modifying visitation to stand, and we reverse the court's order. We also hold the trial court erred in requiring the parents to abide by the parenting coordinator's unauthorized recommendation. Because this matter involves children who have been following this schedule for an extended period of time, we find it appropriate to leave the current schedule in place until an expedited hearing is held on Oric's petition to modify.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we reverse the trial court's December 31, 2015, order, direct the trial court to hold an expedited hearing which complies with its local rules, and enter an appropriate order, either denying or allowing Oric's petition to modify. In the meantime, the current schedule shall remain in effect.

¶ 38 Reversed and remanded with directions.