2016 IL App (1st) 162858-U

SIXTH DIVISION
JUNE 30, 2017

No. 1-16-2858

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF RUTH VILLEGAS MEDELLIN,	)	Appeal from
	)	the Circuit Court of
Petitioner-Appellee,	)	Cook County.
	)	
and	)	Nos. 13 D 4946
	)	15 D 3655
CARLOS MARTINEZ DUNCKER,	)	
	)	Honorable
Respondent-Appellant.	)	Regina A. Scannicchio,
	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: This court lacks jurisdiction to review respondent's challenge to a non-final order denying a motion to dismiss. The trial court's parental allocation judgment is otherwise affirmed, as respondent failed to provide an adequate record to review that judgment.

¶ 2 Respondent-appellant Carlos Martinez Duncker appeals (1) the denial of his motion to dismiss petitioner Ruth Villegas Medellin's petition for dissolution of marriage seeking custody of the parties' children, as well as (2) the judgment of parental responsibility granting petitioner decision-making authority for the parties' children. We find that we lack appellate jurisdiction

with respect to denial of the motion to dismiss. We affirm the parental allocation judgment due to the inadequate record on appeal.

¶ 3 BACKGROUND

¶ 4 This appeal arises from an action initiated by petitioner, alleging that respondent wrongfully removed the parties' children from their native country of Mexico in violation of her parental rights.[1] Petitioner and respondent, both Mexican citizens, were married in Mexico in 2002. The parties had two children together during their marriage, who were born in Mexico in 2003 and 2005. Petitioner and respondent lived together with the children in Mexico for the next several years.

¶ 5 In 2011, respondent initiated proceedings in a Mexican court which resulted in three orders, entered in 2011 and 2012, which (1) granted him a divorce from petitioner; (2) granted him sole custody of the children; and (3) terminated petitioner's parental rights (the Mexican termination order). Petitioner claims that she did not receive notice of those proceedings before those orders were entered.

¶ 6 In March 2012, respondent removed the children from Mexico without notifying petitioner and brought them to the United States. Respondent subsequently remarried, and resided with the children and his second wife in Chicago.

¶ 7 Following the removal of the children, petitioner initiated proceedings in the Mexican court seeking to nullify the three Mexican orders. The parties engaged in additional Mexican

[1] Two prior appeals by respondent in this matter have been dismissed for lack of jurisdiction. See *Medellin v. Duncker*, 2016 IL App (1st) 150576-U (dismissing appeal from child support order and related contempt order); *Medellin v. Ramirez*, 2015 IL App (1st) 141987-U (dismissing appeal from civil contempt order for failure to pay petitioner's attorney's fees). The trial court orders challenged in those appeals are not at issue in this appeal.

court proceedings, but they disagree as to the legal effect of those court proceedings. According to petitioner, all three of the prior Mexican orders were nullified by Mexican appellate courts. Respondent maintains that the 2012 Mexican termination order remains in effect.

¶ 8 In May 2013, petitioner filed a petition in the circuit court of Cook County (Hague petition), premised on the Hague Convention on the Civil Aspects of International Child Abduction (Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. 11670, 1343 U.N.T.S. 89). The Hague petition sought an order directing the return of the children to Mexico, in order for a Mexican court to determine custody.

¶ 9 On December 27, 2013, the circuit court of Cook County entered an order granting petitioner "temporary possession" of the children. The children have resided with petitioner in Chicago since that time. In 2014, respondent and his wife moved to Texas.

¶ 10 On April 21, 2015, petitioner moved to voluntarily dismiss the Hague petition, as she had obtained asylum in the United States and no longer sought return of the children to Mexico. On the same date, petitioner also filed a petition for dissolution of marriage in which she requested sole custody of the children.

¶ 11 On August 19, 2015, respondent filed a "Motion to Dismiss and For Return to the Status Quo Ante" in the circuit court of Cook County (motion to dismiss) asserting two grounds for dismissal, based on the Mexican court proceedings. First, he sought dismissal pursuant to section 2-619(a)(3) of the Illinois Code of Civil Procedure (Code), which permits dismissal if "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2014). He also asserted that the 2012 Mexican termination order operated as a "prior judgment" barring the action brought by petitioner. 735 ILCS 5/2-619(a)(4) (West 2014).

¶ 12 Respondent's motion to dismiss was denied on November 20, 2015, as the trial court concluded that sections 2-619(a)(3) and (a)(4) of the Code were inapplicable.

¶ 13 On April 14, 2016, respondent filed for bankruptcy in the United States Bankruptcy Court of the Northern District of Texas. As a result, the circuit court of Cook County stayed matters concerning division of property in the dissolution proceedings pending before that court, but did not stay matters concerning parental responsibilities.

¶ 14 On August 8, 2016, petitioner filed a petition for allocation of parental responsibilities in the circuit court of Cook County. On the same date, she also filed a "motion to deem allegations admitted" based on respondent's failure to answer her petition for dissolution of marriage. The circuit court of Cook County deemed the allegations of the dissolution petition as admitted to the extent they did not concern issues stayed by the bankruptcy pending in Texas.

¶ 15 On August 8 and 9, 2016, the trial court in the dissolution proceedings conducted a trial concerning allocation of parental responsibility and parenting time, at which it heard testimony from the parties and the children's guardian *ad litem*. Respondent contends that on August 9, he "was prohibited, by oral order of court, from presenting any evidence or testimony related to the Mexican court's termination of [petitioner's] parental rights." However, the appellate record before us contains no transcript, bystander's report, or agreed statement of facts from the trial in the circuit court of Cook County.

¶ 16 On September 23, 2016, the circuit court of Cook County entered a written parental allocation judgment, setting forth factual findings based on the witness testimony and other evidence at trial, and which also expressly incorporated "[t]he August 9, 2016 Transcript of this Court's ruling after trial." The court found that petitioner had provided for the needs and well-being of the children for the past two years and had a positive relationship with them. The court

also found that the children had a strained relationship with respondent, and that respondent failed to "offer any evidence whatsoever" as to why it would be in their interest for him to have decision-making authority. After discussing the relevant factors under the Illinois Marriage and Dissolution of Marriage Act, (see 750 ILCS 5/602.5 (West 2016)), the court concluded that it was in the children's best interest for petitioner to have sole decision-making authority and designated petitioner as residential parent, subject to respondent's supervised parenting time.

¶ 17 On October 21, 2016, respondent filed a notice of appeal. Following the parties' briefing, petitioner filed a motion to strike respondent's reply brief, which was taken with the case.

¶ 18 ANALYSIS

¶ 19 First, we briefly address petitioner's motion to strike respondent's reply brief. That motion complains that the reply, other than its attempts to distinguish cases cited by petitioner, "[f]ails to cite a single case or statute in support of [respondent's] argument" and does not cite the appellate record, in violation of Illinois Supreme Court Rule 341. See Ill. S. Ct. R. 341(h)(7), (j) (eff. Jan. 1, 2016). However, "we will strike a brief in whole or in part only where the violation of the [Supreme Court Rules] is so flagrant as to hinder or preclude review" of the arguments. *Beitner v. Marzahl*, 354 Ill. App. 3d 142, 145 (2004). We do not find that the alleged deficiencies in the reply brief are so egregious as to hinder our review, and thus we decline to grant the motion to strike. See *Borsellino v. Putnam*, 2011 IL App (1st) 102242, ¶ 87.

¶ 20 Turning to the substance of the appeal, respondent raises three arguments, all related to the 2012 Mexican termination order. First, he challenges the trial court's November 2015 order denying his motion to dismiss the dissolution petition, claiming the court erred in "refusing to apply comity" to the Mexican termination order. He also challenges the parental allocation judgment on the grounds that (1) the court abused its discretion by "refus[ing] to allow [him] to

present evidence related to the termination of Petitioner's parental rights in Mexico"; and (2) the parental allocation judgment was erroneous because petitioner's "parental rights had been permanently terminated by the courts in Mexico."

¶ 21 Before we may address the merits of the claims of error, we are obligated to consider the issue of appellate jurisdiction and dismiss if jurisdiction is lacking. See *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011).

¶ 22 Respondent asserts that we have jurisdiction under Supreme Court Rule 304(b)(6), which authorizes an appeal from a "custody or allocation of parental responsibilities judgment or modification of such judgment." Ill. S. Ct. R. 304(b)(6) (eff. Mar. 8, 2016).

¶ 23 Petitioner acknowledges, and we agree, that Rule 304(b)(6) confers appellate jurisdiction to review the parental allocation judgment. However, petitioner asserts that we lack jurisdiction to address respondent's challenge to the November 2015 denial of his motion to dismiss, because it was not a final order. Respondent's reply maintains that Rule 304(b)(6) confers jurisdiction over the denial of the motion to dismiss, insofar as it "pertains to the Allocation of Parental Responsibilities." He argues that the trial court's "refusal to dismiss that portion of the case related to the allocation of parental responsibilities was a necessary precursor to" the entry of the parental allocation judgment, such that Rule 304(b)(6) applies.

¶ 24 Unless a Supreme Court Rule or statute provides appellate jurisdiction, this court only has jurisdiction to review appeals from final judgments. *Van Der Hooning v. Board of Trustees of University of Illinois*, 2012 IL App (1st) 111531, ¶ 6. "An order is final and appealable if it terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate part thereof. [Citation.]" *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008). "Where an order resolves less than all the claims brought

by a party, the order is not final and appealable. [Citation.]" *Shermach v. Brunory*, 333 Ill. App. 3d 313, 316-17 (2002). "A trial court's denial of a motion to dismiss is an interlocutory order that is not final and appealable. [Citation.]" *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 132 (2008).

¶ 25 Respondent does not dispute that the order denying his motion to dismiss was not final. Further, he cites no authority suggesting that Rule 304(b)(6) extends to non-final orders in proceedings related to allocation of parental responsibilities. To the contrary, Rule 304 governs "Appeals from *Final* Judgments That Do Not Dispose of an Entire Proceeding." (Emphasis added.) Ill. S. Ct. R. 304 (eff. Mar. 8, 2016). When interpreting a supreme court rule, the "plain and ordinary meaning" of its language is the best indicator of the drafters' intent, and "[w]here the language is clear and unambiguous, we must apply the language used without further aids of construction. [Citation.]" *In re Rogan M.*, 2014 IL App (1st) 132765, ¶ 22. *Rogan M.* rejected an appellant's argument that Rule 304(b)(6) conferred jurisdiction to review the denial of a petition to relocate a child outside the state, since "simply because removal is related to custody does not mean we should consider a removal order to be a custody judgment *** for the purposes of jurisdiction."

¶ 26 The same principle applies here. We will not broaden Rule 304(b)(6) to encompass non-final orders simply because they relate to the eventual parental allocation judgment. Accordingly, we lack jurisdiction to review respondent's challenge to the order denying his motion to dismiss the dissolution petition, and we dismiss that portion of the appeal.

¶ 27 We turn to respondent's challenges to the parental allocation judgment, which consist of two related arguments: (1) that the court erred at trial by barring him from presenting evidence

related to the Mexican termination order; and (2) that the court abused its discretion in awarding petitioner any decision-making authority in light of the Mexican termination order.

¶ 28 A deferential standard of review applies to either claim. "The admission of evidence in a trial is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." (Internal quotation marks omitted.) *Matthews v. Avalon Petroleum Co.*, 375 Ill. App. 1, 9 (2007). With respect to custody determinations, "the trial court has broad discretion, and its judgment is afforded great deference because the trial court is in a superior position to judge the credibility of witnesses and determine the best interests of the child." (Internal quotation marks omitted.) *In re Marriage of Debra N. and Michael S.*, 2013 IL App (1st) 122145, ¶ 45. The custody determination will not be disturbed unless it is against the manifest weight of the evidence. *In re Marriage of D.T.W. and S.L.W.*, 2011 IL App (1st) 111225, ¶ 81.

¶ 29 However, as a threshold matter, the record must be sufficient to permit appellate review. "[T]o support a claim of error, the appellant has the burden to present a sufficiently complete record. [Citations.] An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005). "Without an adequate record preserving the claimed error, the reviewing court must presume the circuit court had a sufficient factual basis for its holding and that its order conforms with the law. [Citations.] Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." (Internal quotation marks omitted.) *Id.*

¶ 30 Respondent does not dispute the absence of any record of the proceedings before the trial on parental allocation issues, but asserts that the appellate record is sufficient because it

"includes respondent's motion for Summary Judgment," which attached copies of Mexican court orders and the report from respondent's retained expert on Mexican law.

¶ 31 We disagree. First, the record on appeal is simply devoid of the claimed evidentiary ruling at trial in the circuit court of Cook County regarding the Mexican termination order, let alone any corresponding argument or reasoning offered by the court. As a result, we must presume that any such ruling by the circuit court conformed with the law. See *Webster v. Hartman*, 195 Ill. 2d 426, 433-34 (2001) (where lack of transcript prevents reviewing court from "know[ing] what evidence or arguments were presented" at a hearing, "we will presume that the trial court heard adequate evidence to support its decision and that its order granting defendant's motion *** was in conformity with the law.").

¶ 32 The same principle precludes us from disturbing the parental allocation judgment. The trial court's September 2016 written order contained detailed factual findings as to why it was in the children's best interest to allocate decision-making authority to petitioner. Those findings were based on the testimony and other trial evidence which are not in the record. As we lack the ability to review the evidence considered by the trial court, "we cannot review the claimed error to determine whether the trial court's factual findings were against the manifest weight of the evidence." *Corral*, 217 Ill. 2d at 157. Thus, the insufficiency of the appellate record compels us to affirm the parental allocation judgment of the trial court.

¶ 33 Finally, we note that petitioner's brief requests the imposition of sanctions against respondent for "continuing to file frivolous appeals." Supreme Court Rule 375(b) permits sanctions if an appeal is frivolous or "not taken in good faith, for an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994). Although we recognize that respondent has filed prior appeals that

were determined to lack jurisdiction, we are not convinced that his arguments were made in bad faith or for an improper purpose. Thus, we decline petitioner's request to impose sanctions.

¶ 34 For the foregoing reasons, (1) respondent's appeal is dismissed to the extent it challenges the denial of his motion to dismiss; (2) the parental allocation judgment is affirmed; and (3) petitioner's request for sanctions is denied.

¶ 35 Appeal dismissed in part and affirmed in part; request for sanctions denied.