2017 IL App (3d) 160669-U

Order filed March 1, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

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| *In re* MARRIAGE OF | ) | Appeal from the Circuit Court |
| | ) | of the 12th Judicial Circuit, |
| L.M.F., | ) | Will County, Illinois. |
| | ) | |
| Petitioner-Appellee, | ) | |
| | ) | |
| and | ) | Appeal No. 3-16-0669 |
| | ) | Circuit No. 14-D-694 |
| S.P.F., | ) | |
| | ) | |
| Respondent-Appellant. | ) | Honorable Victoria M. Kennison, |
| | ) | Judge, Presiding. |

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JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Holdridge and Justice McDade concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The appellate court lacks jurisdiction to review issues IV through VII in respondent's brief. (2) The trial court did not abuse its discretion by denying respondent's request to call rebuttal witnesses during trial. (3) The trial court did not abuse its discretion by allowing petitioner's father to testify after being present in the courtroom during the trial proceedings. (4) The trial court did not abuse its discretion by finding the guardian *ad litem*'s report credible.

¶ 2 Petitioner, L.M.F., filed her petition for dissolution of marriage under the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq.* (West 2014)) on April

21, 2014. After a lengthy bench trial, the Will County circuit court issued its judgment adopting petitioner's proposed findings, making numerous additional findings based upon the trial record, and imposing several orders in petitioner's favor.

¶ 3 Respondent S.P.F.'s notice of appeal asserts three ways in which the trial court purportedly abused its discretion: (1) barring respondent from offering rebuttal witnesses, (2) allowing petitioner's father to testify after being present in the courtroom during trial, and (3) assigning credibility to the guardian *ad litem*'s report. However, respondent's brief raises several additional issues for review and numerous prayers for relief unassociated with the issues stated in the notice of appeal. We address both the procedural adequacy and substantive merits of respondent's appeal.

¶ 4 BACKGROUND

¶ 5 The parties first married on July 26, 2002, divorced August 5, 2008, remarried January 13, 2012, and separated in March 2014 before petitioner filed for a second divorce. They had three children during the first marriage and a fourth child between the two marriages. The oldest child, B.E.F., is autistic. The second child, B.S.F., suffers from a congenital musculoskeletal abnormality, bilateral radioulnar synostosis. B.A.F., the third child, has no physical or mental disabilities. The youngest child, B.C.F., has speech and developmental delays that appear to be improving. B.E.F. and B.S.F. are enrolled in individual education programs.

¶ 6 Petitioner is a special education teacher who specializes in working with autistic students. She earned a BA in international business, an MBA in finance, a teaching degree, a special education degree, and a certification to work with autistic students. Respondent worked as a project manager for Mechanical, Inc., where he earned approximately $90,000 annually. He was terminated from this position in December 2013. He was unemployed from December 2013

until late 2014 when he gained employment with Five Star Motors. Respondent worked at Five Star for less than a year and earned $21,505. Since July 2015, respondent has worked for Auction Access where he earns approximately $70,000 annually. However, respondent either failed to file tax returns in 2014 and 2015, or did not provide petitioner with this information during discovery.

¶ 7 Respondent is unable to work in the construction industry due to six herniated disks in his back and a shoulder injury sustained in August 2014. Prior to the shoulder injury, however, respondent had a history of pain medication abuse. He was arrested with his children present for felony delivery of a controlled substance in December 2013.

¶ 8 The parties disagree as to which parent has taken the lead in making decisions for the well-being of their children. Accordingly, the trial court appointed a guardian *ad litem* (GAL) to investigate and submit recommendations regarding parenting responsibilities and custody.

¶ 9 The GAL testified that his procedure was to have the parties and their witnesses contact his office to schedule an interview. He spoke with the parties and their children on multiple occasions. He also spoke with one of the children's therapist, one of their babysitters, and the maternal grandparents. Respondent's third-party witnesses (three in total) never contacted the GAL as instructed.

¶ 10 During one meeting with the GAL, respondent showed several photographs and videos of the children and the children's clothing. He alleged the photographs and videos demonstrated petitioner's neglect of the children's hygiene and well-being. Respondent refused to provide the GAL with copies of the photographs or videos. The GAL concluded that he had "ample observational evidence" to doubt the authenticity of respondent's photographs and videos. Further, the GAL noted that respondent placed undue pressure on the children by questioning

them about their mother and involving them in the custody litigation. The GAL opined that respondent staged the photographs and videos to gain leverage in these proceedings.

¶ 11 In his report, the GAL found that petitioner was the children's primary decision-maker in the 17 months prior to his investigation. The children received regular care from a physician and therapists. The children's maternal grandparents actively participated in their upbringing. The GAL opined that respondent caused instability in the children's lives. The children informed the GAL that respondent had women living with him; their "babysitters" would sleep over in "dad's condo." Respondent's behavior during the GAL's investigation was irrational and adversarial. The GAL described respondent's demeanor as "win at all costs."

¶ 12 Both parties sought sole allocation of decision-making responsibilities for the children. Cooperative decision-making alternatives were impractical due to the level of conflict between the parties. Accordingly, the GAL recommended sole allocation to petitioner; he recommended that respondent receive nonovernight visits on Wednesdays and every other weekend. The GAL also recommended that respondent enroll in parenting education classes and undergo a psychological evaluation before being eligible for overnight custody visits. Finally, he discouraged the parties from engaging in direct contact except in emergency situations.

¶ 13 On September 16, 2014, the trial court ordered respondent to pay temporary child support of $108 per week—the equivalent of 40% of a 40-hour-per-week job paying $8.25 an hour. The court also ordered respondent to complete a job search diary and pay 50% of the children's medical care costs.

¶ 14 In February 2015, the court found respondent in contempt for failing to pay the ordered child support and medical care costs. He was taken into custody by the Will County sheriff after

failing to pay the set purge amount. In December 2015, petitioner, again, filed for indirect civil contempt against respondent for the same reasons; her petition was pending at the time of trial.

¶ 15 In the meantime, respondent failed to adequately respond to discovery requests or disclose witnesses pursuant to Illinois Supreme Court Rules 213 (eff. Jan. 1, 2007) and 214 (eff. July 1, 2014). Thus, petitioner filed a motion to bar respondent from offering undisclosed evidence or testimony on October 23, 2015. The trial court conditionally granted the motion on January 14, 2016; respondent had 14 days to disclose evidence and witnesses to avoid the sanctions. Respondent failed to comply with the court's order.

¶ 16 On the first day of trial, the court granted a reciprocal motion to sequester witnesses. During petitioner's case-in-chief, respondent cross-examined her witnesses, including petitioner herself. At the close of petitioner's case, on April 18, 2016, respondent sought to offer "rebuttal witnesses" to refute petitioner's testimony. Petitioner cited the court's January 14, 2016, order and objected to respondent offering any witness testimony or documents into evidence. The court sustained petitioner's objection, ruling that even respondent himself could not testify because no witnesses were properly disclosed in discovery.

¶ 17 The next day, respondent orally moved the court to reconsider sustaining petitioner's objection and for a trial continuation; the court denied both motions. Respondent, having no admissible evidence or testimony to offer, rested his case. On April 26, 2016, respondent filed a written motion to reconsider asking the court to reopen the proofs. Although the court initially denied respondent's motion, it vacated the judgment *sua sponte* and called a conference on May 12, 2016. At the conference, the court advised the parties that respondent would be allowed to testify. No other witnesses were allowed. The court set additional trial dates for June 2016.

¶ 18 When the trial resumed, respondent attempted to admit documents as "rebuttal evidence." These documents were not produced in discovery so the court excluded them. During direct examination, respondent could not remember details or dates relevant to his testimony; at least 30 times in one day, respondent referred to his notes (text messages) to refresh his recollection.

¶ 19 Among numerous other topics, respondent testified about construction on a property in Mokena, Illinois. Petitioner was awarded this property as part of the parties' first divorce in 2008. In 2010, between the marriages, petitioner began constructing a home on the property. Petitioner testified that her father was assigned as the general contractor for the project. However, respondent testified that he was responsible for hiring subcontractors and supervising the construction. He claimed that petitioner's father was listed as the general contractor on bank documents, but did not function as the general contractor. Respondent further claimed that he was never compensated for his efforts on this premarital construction project.

¶ 20 Respondent did not request reimbursement from the marital estate in any pleading. He also neglected to submit a pretrial memorandum. In fact, respondent's interrogatory answers indicated that he did not purchase or contribute toward any real estate or personal property on behalf of another person. The trial court interpreted respondent's interrogatory responses to deny any interest or claim to reimbursement for the construction project.

¶ 21 After respondent rested, petitioner called her father as a rebuttal witness. Petitioner's father was present in the courtroom each day of trial. Respondent objected to his testimony, citing the court's order to sequester witnesses on the first day of trial. Because the reimbursement issue was never raised in pleadings or a pretrial memorandum, the court concluded that petitioner had no reason to know her father would be a witness. Therefore, respondent's objection was overruled.

¶ 22 Petitioner's father testified that he and his daughter established a corporation together for the construction project. He, not respondent, was the general contractor responsible for reviewing bids and hiring subcontractors. In a recess during petitioner's father's testimony, petitioner's counsel acknowledged that the testimony was irrelevant because respondent never made any claim for reimbursement. After the witness was excused, respondent, again, requested leave to call rebuttal witnesses to refute petitioner's father's testimony. The court denied his request.

¶ 23 The trial court issued its judgment on September 30, 2016. The judgment granted petitioner primary custody and sole decision-making responsibilities. Respondent was granted supervised visits with the children once per week and every other weekend. He was also ordered to complete a parenting course and undergo a psychological evaluation before the court would consider amending the custody arrangement.

¶ 24 Additionally, respondent was ordered to pay petitioner $1713 per month in child support (calculated 40% from a gross salary of $70,000, net $51,411). The judgment also ordered respondent to pay 40% of any additional income from all other sources. The parties would split the children's medical expenses.

¶ 25 Finally, the judgment addressed outstanding debts and liabilities between the parties. Respondent owed nearly $43,000 for past child support and unpaid expenses for the children. The court also ordered respondent to pay $39,225 for interim property disbursement paybacks, his share of outstanding marital debts, statutory attorney fees, and statutory penalties for failing to comply with discovery requests and court orders. These debts were deemed in the nature of maintenance and, therefore, not dischargeable through bankruptcy.

¶ 26 Respondent timely filed his notice of appeal, which asserted three procedural errors during trial. In his brief, however, respondent also takes issue with the trial court's findings and judgment.

¶ 27 ANALYSIS

¶ 28 We first address which of respondent's claims we have jurisdiction to review. Respondent's notice of appeal states, *inter alia*: "A Judgment for Dissolution of Marriage was entered on September 30, 2016 and the Appellant appeals the following, including, but not limited to, 1) Court allowed a witness who attended every day of the trial to testify after a Motion to Exclude Witnesses was granted by the Court; 2) Appellant was not allowed to call rebuttal witnesses; 3) GAL report was admitted after inconsistencies were brought to the attention of the Court." Respondent's brief raises many additional issues. It argues that some of the trial court's findings were against the manifest weight of the evidence,[1] the court abused its discretion in finding that respondent did not understand or appreciate the special needs of his children, the court abused its discretion in ordering respondent to compensate petitioner for the children's medical expenses, which he contested, and the court abused its discretion in denying respondent the right to testify regarding his 2010 personal injury settlement.

¶ 29 Petitioner argues that respondent's notice of appeal raises only three issues; therefore, pursuant to Illinois Supreme Court Rule 303(b)(2) (eff. Jan. 1, 2015), this court has no jurisdiction to review the additional issues raised in respondent's brief. Respondent argues that petitioner was not prejudiced by any technical defect in the notice of appeal. He also argues that

[1] The findings and orders that respondent challenges in his brief include: he failed to show pictures of the children to the Department of Children and Family Services or the GAL during the investigation; petitioner was awarded the personal property at the marital residence; respondent's child support obligation was increased without finding a substantial change in the circumstances; petitioner was in charge of decision-making for the children prior to the divorce proceedings; petitioner was awarded the 2014 GMC vehicle, which she bought, with respondent receiving no equity in the vehicle; the parties' obligations were found to be in the nature of maintenance and not dischargeable through bankruptcy.

the "including, but not limited to" language in the notice informed petitioner that every occurrence in the trial court was fair game for appeal. No.

¶ 30 Rule 303(b)(2) requires notices of appeals to "specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. Jan. 1, 2015). A notice of appeal confers jurisdiction on the reviewing court to consider only the judgments or parts of judgments specified in the notice. *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011). Jurisdiction is conferred when the notice, considered as a whole, fairly and adequately sets out the judgment at issue and the relief sought. *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433-34 (1979); *Nussbaum v. Kennedy*, 267 Ill. App. 3d 325, 328 (1994).

¶ 31 Although we recognize that notices are to be liberally construed to confer jurisdiction upon the reviewing court (*In re Marriage of O'Brien*, 2011 IL 109039, ¶ 22), issues not raised in the notice are reviewable only where they are "a step in the procedural progression leading to the judgment" specified in the notice. (Internal quotation marks omitted.) *Id.* ¶ 23; see also *Burtell*, 76 Ill. 2d at 434-35. Reviewing courts lack jurisdiction to address issues not raised in the notice that "were not preliminary determinations necessary to the court's judgment" on issues raised in the notice. *In re Marriage of Micheli*, 2014 IL App (2d) 121245, ¶ 60 (holding that the court lacked jurisdiction to review ownership of a diamond where the cross-appeal specified only maintenance, stock options, and attorney fees).

¶ 32 In the instant case, respondent's notice raises three procedural issues that preceded the court's judgment—the court's rulings on petitioner's witness who was present during trial, respondent's rebuttal witnesses, and the admissibility of the GAL report. All but one of the additional issues raised in respondent's brief, described above, challenge the trial court's findings

within the judgment itself. The remaining issue—the trial court not allowing respondent to testify regarding his 2010 personal injury settlement—is unrelated to any of the issues within the notice. The "procedural progression" exception is thus inapplicable.

¶ 33 A notice of appeal challenging one issue after a judgment for dissolution of marriage does not confer appellate jurisdiction for the entire judgment and proceeding. Accordingly, we have no jurisdiction to review issues IV through VII in respondent's brief.

¶ 34 The three issues raised in respondent's notice of appeal challenge the trial court's discretionary determinations during trial. Accordingly, we review whether the court abused its discretion in preventing respondent from calling rebuttal witnesses, allowing the testimony of petitioner's father, or assigning credibility to the GAL's report. Abuse of discretion "means clearly against logic; the question is *** whether the circuit court acted arbitrarily, without employing conscientious judgment, or whether, in view of all the circumstances, the court exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted." *State Farm Fire & Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083 (2000).

¶ 35 I. Rebuttal Witnesses

¶ 36 Respondent first contends that the trial court abused its discretion in denying his request to present "rebuttal witnesses" to impeach petitioner and her witnesses at trial, as well as to respond to so-called "new points" raised during petitioner's case-in-chief. In support of his argument, respondent's brief restates, verbatim, portions of his statement of facts and cites to a single paragraph from one case, *Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412, ¶ 38.

¶ 37 This paragraph in *Klingelhoets* merely sets forth the standard of review (abuse of discretion) and factors to consider when appellate courts address a trial court's imposition of discovery sanctions. Although it is true that the trial court imposed significant sanctions against respondent for his failure to comply with discovery rules, he has not challenged the imposition of these sanctions in this appeal. Instead, he argues that the trial court should have allowed rebuttal witnesses to testify in two specific instances during the trial. *Klingelhoets* is inapposite, and we decline to consider the propriety of the trial court's sanctions.

¶ 38 The record indicates that respondent's counsel attempted to call rebuttal witnesses on two separate occasions during the trial—after petitioner's testimony during her case-in-chief and after petitioner's father's testimony on rebuttal. Most importantly, respondent never actually called a rebuttal witness and never made an offer of proof indicating, with particularity, who the rebuttal witnesses were and what the substance of their testimony would be.

¶ 39 Without an offer of proof, we cannot review the propriety of the trial court's determination. See *Snelson v. Kamm*, 204 Ill. 2d 1, 23-24 (2003); *In re Marriage of Velasquez*, 295 Ill. App. 3d 350, 356 (1998) ("The purpose of the offer of proof is to disclose the witness and the nature of the offered testimony for the information of the trial judge and opposing counsel, and to allow the reviewing court to consider whether the exclusion was erroneous and harmful."). Respondent's counsel's failure to make an offer of proof is fatal to this claim. Therefore, we affirm the trial court's determination preventing respondent from calling rebuttal witnesses during trial.

¶ 40 II. Testimony of Petitioner's Father

¶ 41 Next, respondent argues that the trial court abused its discretion by allowing petitioner's father to testify during her rebuttal. It is undisputed that the court granted the parties' reciprocal

motions to sequester witnesses. It is also undisputed that petitioner's father was present in the courtroom each day of trial.

¶ 42 The substance of petitioner's father's testimony concerned his role as general contractor during the construction project on petitioner's property in Mokena, Illinois. Respondent testified that he, not petitioner's father, hired the subcontractors and acted as the general contractor. By being present for respondent's testimony, respondent argues petitioner's father was "prepared to refute each and every allegation" raised in respondent's testimony. As respondent argues in his brief: "This can be seen no other way, but prejudicial to [respondent] in that the circuit court abused its discretion and awarded [respondent] no reimbursement for his efforts in being the general contractor."

¶ 43 Again, respondent's brief supports his argument by copying sections of his fact statement and citing to a single case, *Friedman v. Park District of Highland Park*, 151 Ill. App. 3d 374, 390 (1986). The *Friedman* court reviewed whether a trial court erred in excluding an expert witness from the courtroom; the instant case presents the exact opposite fact pattern. However, *Friedman* holds that the "enforcement of a rule to exclude witnesses, made at the outset of a trial, is within the trial court's discretion." *Id.* (citing *Gatto v. Curtis*, 6 Ill. App. 3d 714, 736 (1972)).

¶ 44 Petitioner argues that any error in allowing her father to testify was harmless. Citing section 503(c)(2)(B) of the Act (750 ILCS 5/503(c)(2)(B) (West 2016)), petitioner contends that reimbursements are not available for nonspouses who contribute to nonmarital property—petitioner and respondent were not married at any point during the construction project.

¶ 45 We need not explore the rabbit hole of whether respondent may or may not have a claim for reimbursement under the statute. Respondent never pled such a claim, failed to disclose any discovery in support of such a claim, and affirmatively denied making improvements to any

relevant property in his interrogatory responses. Therefore, neither petitioner nor her counsel could have envisioned the issue arising during respondent's testimony, or the need for petitioner's father to testify. For all we know, respondent may have asserted this claim precisely because petitioner's father was in the audience and assumedly prohibited from testifying. Respondent cannot now claim prejudice regarding a claim he never pled, never disclosed, and affirmatively denied during discovery. Any testimony regarding the construction project was irrelevant and harmless as a matter of law. We find no abuse of discretion.

¶ 46 III. GAL Report

¶ 47 Finally, respondent claims that the trial court abused its discretion by assigning weight to the GAL's report. Respondent argues that the GAL violated Illinois Supreme Court Rule 907(c) (eff. July 1, 2006) by not contacting respondent's three identified third-party witnesses. Therefore, the court should not have assigned weight to the GAL's report.

¶ 48 The trial court is in the best position to review the evidence and to weigh the credibility of the witnesses. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004). Where the evidence permits multiple reasonable inferences, the reviewing court will accept the inferences that support the court's order. *Id.* at 516. Custody determinations afford particularly great deference to the trial court because it is " 'in a superior position to judge the credibility of the witnesses and determine the best interests of the child.' " *Id.* (quoting *In re Marriage of Gustavson*, 247 Ill. App. 3d 797, 801 (1993)).

¶ 49 Respondent cites no case law in support of his argument. Rule 907(c) requires a GAL to "take whatever reasonable steps are necessary to obtain all information pertaining to issues affecting the child, including interviewing family members and others possessing special knowledge of the children's circumstances." Ill. S. Ct. R. 907(c) (eff. July 1, 2006). The GAL

met with respondent on multiple occasions, sometimes for several hours. Petitioner's witnesses had no problems arranging meetings with the GAL. Respondent provided the GAL with the contact information for one witness, respondent's father, and never provided contact information for any of the other witnesses. It is undisputed that the GAL's normal procedure was to have the witnesses call his office to schedule an interview.

¶ 50 Respondent asserts, essentially, that the GAL failed to do his job because respondent's witnesses failed to schedule an interview. Respondent had the opportunity to cross-examine the GAL at trial to discredit his investigation and report. Apparently, the trial court did not believe respondent effectively impeached the GAL's credibility. We must afford great deference to the trial court's credibility determinations. We see nothing in the record to undermine this deference. Nor do we find any evidence in the record to suggest the GAL or trial court's findings were arbitrary or patently unreasonable. Accordingly, we affirm the trial court's credibility determinations regarding the GAL's report.

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 53 Affirmed.