2017 IL App (4th) 160215-U

NO. 4-16-0215

FILED
March 3, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

TYLER S. BICKERS,	)	Appeal from
Petitioner-Appellant,	)	Circuit Court of
v.	)	Champaign County
KATHY L. MURPHY,	)	No. 04F213
Respondent-Appellee.	)	
	)	Honorable
	)	Holly F. Clemons,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court affirmed the judgment of the trial court, concluding its decision to impose a day-care-contribution arrearage was not against the manifest weight of the evidence.

¶ 2 In April 2008, the trial court ordered petitioner, Tyler S. Bickers, to pay respondent, Kathy L. Murphy, $500 per month (retroactive to March 19, 2008) toward the child-care costs for the parties' two minor children, T.B. (born January 29, 2003) and I.B. (born July 29, 2005). In October 2014, petitioner filed a petition to determine his child-support and day-care-contribution arrearages. In June 2015, petitioner filed a motion to correct the docket entry ordering him to pay $500 per month for day-care costs to reflect that he was ordered to pay 33% of the day-care expenses. That same month, the court denied the motion to correct the docket entry. In July 2015, petitioner filed his affirmative defenses to his day-care-expenses arrearage. In October 2015, the court found petitioner failed to prove his affirmative defenses and reserved

ruling on the amount of the day-care arrearage. In March 2016, the court entered an order setting petitioner's day-care arrearage at $12,856.51 and terminated his obligation to pay for day-care expenses.

¶ 3 Petitioner appeals, arguing the trial court erred in denying his affirmative defense of windfall to his day-care-expenses arrearage. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The parties were never married but share two children in common. Petitioner has been responsible for varying amounts of child support for those children since 2004.

¶ 6 A. Order for Day-Care Expenses

¶ 7 In March 2008, respondent filed a petition for day-care expenses. Following an April 2008 hearing, the trial court found the total monthly day-care cost was $1,549.16 and a contribution by petitioner of $500 per month—which was between 32% and 33% of the monthly cost—was an equitable allocation of day-care expenses. The court entered a docket entry which stated, in part, "Petitioner is ordered to contribute $500.00 per month retroactive to 3/19/08 as and for a contribution towards the children's daycare expenses."

¶ 8 In July 2010, the parties stipulated that respondent and the two minor children would move to Bloomington, Indiana. In August 2010, the trial court entered an order memorializing the parties' stipulation that respondent and the two children would now be moving to Missouri due to a change in respondent's employment status.

¶ 9 B. Petitioner's Motions

¶ 10 In October 2014, the Child Support Enforcement Division of the Champaign County State's Attorney's Office filed support calculation worksheets for child support and day-care expenses. This prompted petitioner to file numerous motions.

¶ 11 1. *Motion To Correct Docket Entry*

¶ 12 In June 2015, petitioner filed a motion to correct the April 2008 docket entry, which reflected petitioner was to pay $500 per month for day-care expenses rather than one-third of $1,500. At the hearing on the motion to correct the docket entry, counsel for petitioner asked the court to consider the transcript of the April 2008 hearing, in which the court stated it found a payment between 32% and 33% of the total monthly costs to be equitable. The court considered the transcript and the docket entry and determined the order clearly required petitioner to pay $500 per month for day-care expenses and denied petitioner's motion.

¶ 13 2. *Petition To Determine Arrearages*

¶ 14 In October 2014, petitioner filed a petition to determine arrearages. In July 2015, petitioner filed his affirmative defenses to the support arrearages. In October 2015, the trial court held a hearing on the petitions. Petitioner testified the children switched to a new day care sometime after the April 2008 order requiring the $500 monthly contribution. According to petitioner, he paid half of the day-care expenses in 2008 and 2009. Petitioner testified respondent and the children moved in 2010 and, to his knowledge, the children no longer attended day care. Contradictorily, petitioner acknowledged he knew of an incident in 2011 in which T.B., who has autism, was kicked out of his day care. Petitioner further testified he requested receipts but respondent never provided verification of day-care expenses. Petitioner did not pay any money for day care after respondent and the children moved in 2010.

¶ 15 Respondent testified she and the children moved to Missouri in August 2010. According to respondent, the parties never agreed that petitioner would stop paying for day care after she moved. Respondent testified she worked from 9 a.m. to 6 p.m. and required day care for her children to accommodate her work hours. Respondent had no family or friends to watch

the children following their move. Respondent further testified she was not ordered to provide receipts for day-care expenses. Respondent acknowledged she and petitioner discussed the 2011 incident which led to T.B. getting kicked out of his day care. Finally, respondent testified the day-care expenses after she moved always exceeded $500 per month.

¶ 16 The trial court found petitioner failed to prove his affirmative defenses of equitable estoppel and windfall. The court noted the 2008 docket entry requiring petitioner to pay $500 per month contained no requirement that respondent provide documentation of the costs of day care. The court found petitioner's testimony disingenuous in that he initially denied knowing about day care for the children after they moved, but he later acknowledged he knew of the 2011 incident in which T.B. was kicked out of his day care. The court also noted there was no showing of deceit by respondent in hiding or lying about the day-care expenses. Finally, the court credited respondent's testimony that, having moved to a new city with no support system, she needed day care for the two children. The court took the amount of the arrearage under advisement.

¶ 17 In March 2016, the court entered an order setting petitioner's day-care arrearage at $12,856.51 and terminated his obligation to pay for day-care expenses as of January 1, 2015.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 As an initial matter, we note respondent failed to file an appellee's brief.

> "[T]he supreme court set forth three distinct, discretionary options a reviewing court may exercise in the absence of an appellee's brief: (1) it may serve as an advocate for the appellee and decide the case when the court determines justice so requires, (2) it may

> decide the merits of the case if the record is simple and the issues can be easily decided without the aid of the appellee's brief, or (3) it may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record." *Thomas v. Koe*, 395 Ill. App. 3d 570, 577, 924 N.E.2d 1093, 1098-99 (2009).

The record in this case is simple, and we conclude the issues can be easily decided without the aid of an appellee's brief. Accordingly, we turn to the merits of petitioner's argument.

¶ 21 On appeal, petitioner argues the trial court erred in denying his affirmative defense of windfall to his day-care-expenses arrearage. We turn first to the standard of review.

¶ 22 "The standard of review of a support order is whether it is an abuse of discretion, or whether the factual predicate for the decision is against the manifest weight of the evidence." *In re Marriage of Bates*, 212 Ill. 2d 489, 523, 819 N.E.2d 714, 733 (2004). The allocation of day-care expenses between the parties is within the discretion of the trial court. *In re Aaliyah L. H.*, 2013 IL App (2d) 120414, ¶ 22, 1 N.E.3d 80.

¶ 23 Petitioner argues his obligation to contribute $500 per month toward day-care costs was conditioned upon respondent incurring a minimum of $500 in day-care expenses each month. According to petitioner, this "condition precedent" is designed to prevent respondent from receiving a windfall in the event day-care costs were less than $500 a month. Petitioner asks this court to reverse the trial court's order regarding the day-care-contribution arrearage because respondent did not provide verification of the day-care costs incurred, which might mean respondent received a windfall if those costs were less than $500 a month.

¶ 24 To support his "condition precedent" argument, petitioner relies on *In re Marriage of Corkey*, 269 Ill. App. 3d 392, 645 N.E.2d 1384 (1995). The *Corkey* court defined a condition precedent "as an event which must occur or an act which must be performed by one party *** before the other party is obligated to perform." *Id.* at 398, 645 N.E.2d at 1389. If the condition precedent is not satisfied, the obligations of the parties end. *Id.*

¶ 25 Petitioner argues respondent failed to provide verification of day-care expenses after she moved in August 2010. While this might be true, the day-care-contribution order did not require respondent to provide proof of day-care expenses, nor did it contain language regarding a condition precedent, and we decline to read into it such a requirement. Moreover, respondent testified, following the move, that (1) the children were in day care; (2) she had no friends or family to watch the children; (3) in 2011, she discussed with petitioner T.B. getting kicked out of day care; and (4) her day-care expenses always exceeded $500 per month during the time at issue. Accordingly, we cannot say the trial court's conclusion that this argument lacked merit was against the manifest weight of the evidence.

¶ 26 Petitioner argues the lack of evidence regarding the amount of day-care expenses could also lead to a windfall for respondent if the monthly day-care costs were less than $500. This ignores respondent's testimony that her day-care expenses always exceeded $500 per month. Petitioner presented no evidence to suggest the day-care costs were actually less than $500 per month. Moreover, the trial court is in the best position to determine the credibility of the witnesses, and we cannot say the court abused its discretion in crediting respondent's testimony. Accordingly, we conclude the court's determination that respondent would not receive a windfall was not against the manifest weight of the evidence.

¶ 27 Petitioner also relies on *In re Marriage of Takata*, 304 Ill. App. 3d 85, 709 N.E.2d 715 (1999). In *Takata*, the husband was ordered to maintain health insurance for the children at a cost of $57.50 biweekly. *Id*. at 93, 709 N.E.2d at 721. The husband failed to maintain insurance and the wife asked for the full amount of the unpaid insurance premiums. *Id.* The trial court awarded the wife 25% of the unpaid premiums because it was concerned the full amount would constitute a windfall to the wife, who had insured the children through public aid at no cost. *Id.* at 93-94, 709 N.E.2d at 721. The court "found nothing in the statute to indicate that the legislature intended 'to create a kind of civil penalty that would compensate someone' for money they have not spent." *Id.*

¶ 28 Petitioner contends the appellate court in *Takata* affirmed the trial court's judgment. However, the appellate court actually held as follows: "[W]e decline to add to the statute the requirement that an obligee parent must purchase insurance in order to seek the dollar value of the premiums from the obligor parent who neglected to provide insurance. We *reverse* [the trial court's] decision awarding [the wife] $3,223.50 for unpaid insurance premiums and award [the wife] $12,894.03, the full amount of unpaid premiums including interest." (Emphasis added.) *Id.* at 95-96, 709 N.E.2d at 723. Accordingly, we find petitioner's citation to *Takata* unpersuasive.

¶ 29 For the foregoing reasons, we conclude the trial court's decision to impose the day-care-contribution arrearage against petitioner was not against the manifest weight of the evidence.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the trial court's judgment.

¶ 32 Affirmed.