2018 IL App (2d) 170308-U
No. 2-17-0308
Order filed January 4, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF LEANN BILTGEN IRLBECK, Petitioner-Appellee, and JAMES P. IRLBECK, Respondent-Appellant.	)))))))))))	Appeal from the Circuit Court of Lake County. No. 13-D-1118 Honorable Donna Jo R. Vonderstrasse and Raymond D. Collins, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment and opinion.

ORDER

¶ 1 *Held:* The trial court properly awarded guardian *ad litem* (GAL) fees: the original dissolution petition, which permitted the court to appoint a GAL, was pending at all pertinent times, and we had to presume that the court properly decided that the GAL had not actually been discharged during any such period.

¶ 2 Respondent, James P. Irlbeck, appeals an order denying his postdissolution-of-marriage petition. We affirm.

¶ 3 We set out the history of the case as needed to address the issue on appeal. On June 17, 2013, petitioner, LeAnn Biltgen Irlbeck, petitioned to dissolve the parties' marriage. The parties

had three children, D.J.I., C.R.I., and C.L.I. On April 16, 2014, the trial court, per Judge Vonderstrasse, appointed Cynthia Lazar guardian *ad litem* (GAL) (see 750 ILCS 5/506(a)(2) (West 2014)). On May 2, 2014, the court appointed Cathy Wifler in Lazar's place. On July 16, 2014, the court entered an agreed order (Parenting Order) that gave petitioner custody of the children. The court also stated that the GAL was discharged "subject to fee determination."

¶ 4 On October 6, 2014, respondent filed a "Motion to Discharge [the] GAL." The motion did not refer to the July 16, 2014, order that appeared to have already done so. That day, the court set December 5, 2014, for status on the motion and ordered that the proceeds from the recent sale of the parties' wine collection be escrowed with Wifler until further order.

¶ 5 On September 23, 2015, respondent moved to "[r]eview and [m]odify" the Parenting Order (Motion to Review). He asked the court to modify his visitation and order his therapeutic visitation with C.L.I. to proceed with the therapist whom the parties had chosen.

¶ 6 On October 20, 2015, petitioner responded to the motion and filed a "Motion to Reappoint [GAL]." Her motion alleged that, although the court had discharged Wifler, the parties had remained unaware of this action, as shown by their continued contact with her and their acquiescence in the order placing the wine-sale proceeds under her control. On November 9, 2015, after a hearing, the court entered an order stating in part that Wifler was "reappointed as GAL in this matter." The order set January 15, 2016, for a hearing on respondent's Motion to Review. The record does not contain a report of the hearing that preceded the entry of this order.

¶ 7 On November 19, 2015, respondent moved to dismiss voluntarily (see 735 ILCS 5/2-1009 (West 2014)) his Motion to Review and to discharge the GAL. On December 2, 2015, the court set December 22, 2015, for a hearing on respondent's motion and ordered the GAL to perform no further services meanwhile. Later, the court continued the hearing to January 26,

2016. On December 18, 2015, Wifler petitioned for fees for services that she had provided since April 16, 2014. On December 22, 2015, petitioner responded to respondent's motion. She did not contest the voluntary dismissal of the Motion to Review but did contest the motion to discharge the GAL.

¶ 8 On January 26, 2016, the trial court, Judge Collins now presiding, held a hearing on respondent's motions. No report of the proceedings is in the record. The court granted respondent's motion to dismiss voluntarily his Motion to Review but ordered that Wifler "shall remain as the GAL" to monitor ongoing reunification therapy between respondent and C.L.I.

¶ 9 On March 8, 2016, respondent filed a "Motion to Adjudicate *** Fees of [GAL]" (Motion to Adjudicate). It contended that the GAL could receive no fees for the periods between her discharge and her reappointment and after the voluntary dismissal of the Motion to Review.

¶ 10 On April 12, 2016, the trial court entered the dissolution judgment. As pertinent here, it incorporated the Parenting Order; continued Wifler's appointment as GAL; and continued the Motion to Adjudicate for a hearing. Later, the court set June 1, 2016, for a hearing on the Motion to Adjudicate.

¶ 11 On May 27, 2016, petitioner filed a "Petition for Adjudication of Indirect Civil Contempt ***" (Contempt Petition). It alleged that respondent had wrongfully refused to contribute to various expenses and that he had violated the Parenting Order.

¶ 12 On June 1, 2016, the trial court held a hearing on respondent's Motion to Adjudicate. Respondent said that Wifler had been discharged on July 16, 2014, and reappointed on November 9, 2015. He noted that Wifler had performed services between those dates and had billed the parties for them, but he objected to paying any fees for the time between her discharge and her reappointment. Also, because the court's order of December 2, 2015, barred the GAL

from performing further services until the date of the hearing on the Motion to Adjudicate, he objected to paying any GAL fees for that period. Finally, given the voluntary dismissal of his Motion to Review, entered January 26, 2016, he objected to any GAL fees based on services performed after that date, at least up to when a petition involving the children was filed.

¶ 13 Petitioner responded that "[t]here was a court order entered on January 26, 2016 reappointing—or not reappointing but confirming *** Wifler's continued appointment as [GAL] in the case. Over counsel's objection, despite his motion, you heard all of the arguments at that time." As respondent had not moved to reconsider the order, he could not contest being responsible "for fees on something which is a valid pending court order." Petitioner stated further, "the [GAL] was reappointed, so [Y]our Honor is aware, to basically in part deal with the reunification therapy between [respondent and C.L.I.]." Respondent replied that there was "no motion pending regarding reunification therapy one way or another" and that no motion relating to that subject had been filed since July 16, 2014.

¶ 14 The court noted that "the GAL was allegedly discharged on July 16th of 2014. Again ***, there was some confusion as to whether she was discharged or not," and she had "continued to work to help the parties and their children out" during this time. Wifler stated, "Everyone, all of the parties, were working as if I was still on the case." She agreed with the court that, even after the order ostensibly discharging her, she and both parties continued to act as though she were still the GAL. The court reiterated this account and stated:

> "So my ruling, which I believe was last time, July 16, 2014 until January 26th of 2016, those fees are going to be awarded based on the ruling of the court that both sides were using Ms. Wifler's advice and her opinions on the children to try to get this case to a conclusion ***."

¶ 15 On the court's request for clarification, Wifler stated that she was not asking for any fees "between January 26, 2016 and up to today." She then stated, "[T]here may not have been an active petition pending in 2015 after the parenting agreement was entered; however, Judge Vonderstrasse made it very clear to me in chambers that I was to be involved in the reunification." She noted that she had found the therapist for the reunification therapy and had advised the court on the disbursement of money from the escrowed wine-collection-sale fund. The court concluded, "So the fees from her appointment until January 26th are valid. I think the court has the authority to order them [to] be paid."

¶ 16 That day, the court entered an order stating that (1) respondent's Motion to Adjudicate was denied; (2) the GAL would retain any fees paid to date; (3) no more GAL fees were due; and (4) respondent had until June 7, 2016, to respond to the Contempt Petition, with a hearing set for June 15, 2016. The court did not find that there was no just reason to delay the enforcement or appeal of any part of the order (see Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016)).

¶ 17 On June 15, 2016, the court entered an order that decided the Contempt Petition; set a hearing on petitioner's "Petition for Rule re child reimbursement issues" for July 29, 2016; and granted petitioner 14 days to file a "Petition/Motion re [therapy between respondent and C.L.I.]," allowed respondent 14 days to respond, and set a hearing for July 29, 2016.

¶ 18 On June 29, 2016, petitioner filed a "Motion to Compel Execution of Authorization to Release Information, Petition to Modify Parenting Agreement and Order and for Other Relief" (Petition to Modify), which included a request for an award of attorney fees.

¶ 19 On July 1, 2016, respondent filed a notice of appeal from the order of June 1, 2016.

¶ 20 On July 29, 2016, the trial court entered an order stating that (1) respondent was not required to authorize the release of information; (2) therapy was suspended until further order;

and (3) petitioner had 17 days to file a petition for attorney fees based on the Petition to Modify, respondent had 17 days thereafter to respond, and a hearing was set for September 9, 2016.

¶ 21 On August 18, 2016, petitioner filed her fee petition. On September 9, 2016, the trial court entered an order stating that the fee petition was "entered and continued generally and [would] be heard upon notice of motion by [petitioner]."

¶ 22 We dismissed respondent's appeal from the denial of his Motion to Adjudicate, explaining that it did not contain a Rule 304(a) finding and that, as of September 9, 2016, petitioner's fee petition was still pending. *In re Marriage of Irlbeck*, 2017 IL App (2d) 160514-U (summary order).

¶ 23 Thereafter, the court resolved the fee petition and also entered a Rule 304(a) finding as to the denial of the Motion to Adjudicate. Respondent refiled a notice of appeal.

¶ 24 On appeal, respondent contends that the court erred in denying his Motion to Adjudicate. According to respondent, *In re Marriage of Petrik*, 2012 IL App (2d) 110495, a case involving solely postdissolution proceedings, controls this case and barred the trial court from appointing a GAL for the period between July 16, 2014, when it approved the Parenting Order and discharged the GAL, and November 19, 2015, when respondent's Motion to Review was pending and the court reappointed the GAL. Respondent contends that, under *Petrik*, the court lacked any authority to appoint a GAL for the period between July 16, 2014, and September 23, 2015 (when the Motion to Review was filed), because in that interim no petition relating to the children was pending. Respondent also contends that fees could not be assessed for the period from September 23, 2015, through November 8, 2015, because, although the court could have appointed a GAL for that period (the Motion to Review having been filed), it did not actually do so until November 9, 2015. Next, respondent contends that no GAL fees could be awarded for

the period from November 19, 2015, through December 2, 2015, because, although there was both a pending child-related petition (the Motion to Review) and a proper reappointment of the GAL, respondent's motion for a voluntary dismissal of the Motion to Review effectively meant that there was no proceeding pending within the meaning of *Petrik*.

¶ 25 Finally, respondent notes that, because the court's December 2, 2015, order directed Wifler to perform no further services, and Wifler had not performed any services after that date or sought any corresponding fees, no GAL fees could be awarded based on anything occurring after December 2, 2015.

¶ 26 In sum, respondent challenges the denial of the Motion to Adjudicate insofar as it allowed the GAL to retain fees that she had been paid for services performed (1) from July 16, 2014, through September 22, 2015 (based on *Petrik*); (2) from September 23, 2015, through November 8, 2015 (apparently based on the lack of a proper court appointment); and (3) from November 19, 2015, thereafter (based on the filing of the motion to dismiss voluntarily the only pending child-related petition).

¶ 27 Petitioner has not filed an appellee's brief, but we may decide the appeal on the merits. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). Insofar as the trial court's actions were based on its exercise of its discretion to appoint a GAL, we review for an abuse of that discretion. See *Petrik*, 2012 IL App (2d), 110495, ¶ 19. Insofar as this appeal raises questions of law, of course, our review is *de novo*. See *In re Marriage of Dhillon*, 2014 IL App (3d) 130653, ¶ 23.

¶ 28 We start with our opinion in *Petrik*. Although respondent contends that it is on all fours with this case, we disagree. Respondent seriously misreads *Petrik*. *Petrik* involved GAL fees allegedly incurred in a purely postdissolution setting, but here the fees at issue were all based on

matters that occurred before the dissolution judgment was entered. This defeats respondent's reliance on *Petrik* to obtain relief.

¶ 29 In *Petrik*, the trial court dissolved the parties' marriage in 2007. The judgment awarded the wife sole custody of the children. The parties filed petitions for rules to show cause against each other. The husband also petitioned to modify visitation. The trial court appointed a GAL (O'Connell). In June 2008, by an agreed order, the parties resolved or withdrew all their pending petitions and stated that they had told O'Connell that there were no pending issues that he had not addressed. They agreed that they would file no additional petitions relating to the children without first going to mediation and that they would use O'Connell as an ongoing mediator in the case. In November 2008, the trial court awarded fees to O'Connell, leaving no petitions or other matters pending before the court. *Id.* ¶¶ 3-5.

¶ 30 On March 17, 2009, O'Connell moved to compel the parties to cooperate with him in investigating the children's well-being. *Id.* ¶ 6. On March 27, 2009, with no postdissolution petitions pending, the trial court reappointed O'Connell as GAL and ordered the parties to cooperate with him. *Id.* ¶ 7. On November 23, 2009, after O'Connell filed a report, the wife petitioned to modify visitation. *Id.* ¶ 9. The husband then moved to discharge O'Connell as GAL and strike his report, arguing that O'Connell had been effectively discharged by the June 2008 agreed order and that it had been improper to reappoint him on March 27, 2009, because there were no pending petitions at the time. *Id.* ¶ 10. At the hearing on the motion, the trial court noted that a circuit court rule stated that the final order disposing of the issues resulting in the appointment of the GAL acted as a discharge of the GAL. *Id.* ¶ 12. However, the trial court continued, the March 27, 2009, order had reappointed O'Connell. The court denied the husband's motion to discharge O'Connell; again reappointed O'Connell as GAL and directed

him to address the parties' pending petitions; and stated that he would no longer act as mediator, as he had done, in violation of the circuit court rule, between June 11, 2008, and March 26, 2009. *Id.* After a hearing in November 2010, over the husband's objection, the court awarded O'Connell fees for his work as GAL after March 27, 2009. *Id.* ¶ 14.

¶ 31 On appeal, the husband argued in part that the trial court abused its discretion in reappointing O'Connell as GAL on March 27, 2009, as no postdissolution proceedings were pending then. We agreed. We noted that whether to appoint a GAL is within a trial court's discretion. *Id.* ¶ 19. But, we continued, the court's discretion has limits, which the trial court there had exceeded. A trial court has no authority to modify a dissolution judgment *sua sponte* when no postdissolution petitions to modify are pending. *Id.* ¶ 21. And under the Illinois Marriage and Dissolution of Marriage Act (Act), the court may appoint a GAL "only to assist the court in resolving pending proceedings. *** '[T]he Act authorizes a court to appoint an attorney to serve as GAL 'in any *proceedings* involving the support, custody, visitation *** or general welfare of a minor or dependent child.' " *Id.* ¶ 22 (quoting 750 ILCS 5/506(a)(2) (West 2008)). (Emphasis in original.) The statute did not authorize a trial court to appoint a GAL "to investigate out-of-court disputes that are not the subject of pending proceedings." *Id.* Thus, because the June 2008 order had discharged O'Connell, and no proceedings involving the minors were pending on March 27, 2009, the trial court had abused its discretion in reappointing him on the latter date. *Id.* ¶ 26.

¶ 32 Here, respondent notes that, between July 16, 2014, when the trial court approved the Parenting Order and discharged the GAL, and September 23, 2015, when he filed his Motion to Review, "no petition regarding custody and visitation was pending." Therefore, he concludes, GAL fees could not be awarded for this period, because *Petrik* forbids it: just as the appointment

of a GAL was unauthorized by the Act because there were no petitions relating to the children pending, so here, respondent argues, GAL fees could not be awarded for the period from July 16, 2014, through September 22, 2015, because there were no "petitions" relating to the children before the trial court.

¶ 33 The flaw in respondent's reasoning is plain. Section 506(a) of the Act does not speak of pending "*postdissolution petitions*" involving "the support, custody, visitation *** or general welfare of a minor or dependent child." 750 ILCS 5/506(a) (West 2014). It speaks of pending "*proceedings* involving the support, custody, visitation *** or general welfare of a minor or dependent child." *Id.* (Emphasis added.) In *Petrik*, as of March 7, 2009, there were no such pending proceedings, because the original dissolution proceeding, which had involved child custody, etc., had ended in a final judgment, and no *post*dissolution proceeding involving this subject matter was pending. Here, however, from July 16, 2014, through September 22, 2015—and, in fact, April 12, 2016—there was a pending proceeding related to the children. That proceeding was the original dissolution proceeding itself, which remained pending until the trial court entered the original dissolution judgment.

¶ 34 Thus, *Petrik* does not support respondent's argument that the trial court lacked the inherent authority to appoint a GAL for the period from July 16, 2014, through September 22, 2015. Neither does it support his argument that the court lacked the authority to appoint a GAL for any period from September 23, 2015, through December 2, 2015 (the remainder of the period at issue). Therefore, respondent's contention that *Petrik* requires us to disturb the court's decision to deny his Motion to Adjudicate is simply incorrect. The "pending proceeding" argument does nothing to invalidate any of the GAL fees charged for any period at issue,

because there *was* a pending proceeding that began on June 17, 2013, and did not end until April 12, 2016.

¶ 35 There might have been another ground for reversing the trial court's denial of the Motion to Adjudicate. If so, however, it was up to respondent to advance that ground in his brief (see Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (contentions of error not raised in an appellant's brief are forfeited)) after having raised it in the trial court (see *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1149 (2005) (party may not seek reversal on theory not raised in trial court)).

¶ 36 We note an oddity in respondent's argument. In contesting the award of GAL fees for the period from July 16, 2014, through September 22, 2015, he relies on *Petrik* for the proposition that the trial court lacked the inherent authority to appoint a GAL for that period, but he does not directly contest the court's finding, expressed at the hearing on the Motion to Adjudicate and apparently at the hearing of January 26, 2016, that the GAL had not really been discharged on July 16, 2014. Nor does respondent directly contest the trial court's stated ground for awarding GAL fees for that period—that whatever the phraseology of the July 16, 2014, order, the court and the parties continued to treat Wifler as still being the GAL and accepted the benefits of her work on behalf of the minors' welfare and the court.

¶ 37 Indeed, almost three months after the entry of the order, respondent himself moved to discharge the GAL, implying in his own filing that she had not been discharged by the July 16, 2014, order. (Respondent did not follow up on the motion, but we decline to speculate why.) Moreover, lacking any report of the hearing on January 26, 2016, at which the court apparently decided that Wifler had not really been discharged on July 14, 2014, and given the ambiguous

tenor of the events that had preceded it, we must assume that the court had a reasonable basis for its conclusion. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 38 Given respondent's failure to articulate in detail any basis other than *Petrik* for disturbing the award of GAL fees for the period from July 16, 2014, through September 22, 2015, and the dubiousness of doing so *sua sponte* on this complicated and somewhat mystifying record, we must affirm the court's denial of the Motion to Adjudicate as it related to this period.

¶ 39 The denial of the Motion to Adjudicate as it related to the other periods at issue is simpler to uphold. At all times, the petition for dissolution was pending, regardless of what else might have been on file; thus, *Petrik* did not affect the validity of any GAL fees awarded. If we are unable to disturb the trial court's conclusion that Wifler had not really been discharged by the July 16, 2014, order, then we must assume that the entry of the "reappointment" order of November 9, 2015, was superfluous. And, with the reappointment order in place and the dissolution judgment not yet entered, there was no ground whatever to contest any fees awarded from November 9, 2015, on. Thus, the judgment denying the Motion to Adjudicate must stand.

¶ 40 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 41 Affirmed.