2018 IL App (2d) 180283-U
No. 2-18-0283
Order filed September 5, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re PARENTAGE OF J.R.G., a Minor,	)	Appeal from the Circuit Court of Du Page County.
	)	No. 09-F-143
	)	Honorable
(Michelle W., Petitioner-Appellant, v. Michael G., Respondent-Appellee)	)	Thomas A. Else, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Hudson and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The default orders modifying the allocation of parental responsibility in favor of father are not void, and the trial court did not abuse its discretion in denying mother's petition to vacate the orders.

¶ 2 Petitioner, Michelle W., and respondent, Michael G., had a tumultuous relationship that culminated in the birth of their son, J.R.G., in Florida. A few months later, Michelle moved with the infant to Illinois, where she initiated parentage and custody proceedings.

¶ 3 When J.R.G. was seven years old, Michelle removed him from the area, taking elaborate steps to conceal their whereabouts. In Michelle's absence and after her attorney withdrew, Michael obtained two orders awarding him "physical possession" of J.R.G., with the right to

make "religious, educational, and extracurricular" decisions. A year later, the police found Michelle and J.R.G. in Bellevue, Washington, and transported the child to Michael's home in Coral Gables, Florida.

¶ 4 Michelle petitioned to vacate the orders under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)), but her petition was denied. On appeal, Michelle argues that (1) she did not receive proper notice of Michael's petition to reallocate parenting responsibilities, and therefore the trial court lacked personal and subject matter jurisdiction to enter the orders and (2) the court abused its discretion in denying her petition to vacate the orders. We affirm.

¶ 5 I. BACKGROUND

¶ 6 The following facts relevant to the disposition of Michelle's section 2-1401 motion are not disputed, except as noted. The parties began their on-and-off romantic relationship in October 2005, when Michelle resided in Illinois and Michael resided in Florida. In June 2007, Michelle moved near Michael, the parties rekindled their relationship, and J.R.G. was born on May 31, 2008. A few months later, Michelle took J.R.G. and moved to Illinois.

¶ 7 On March 10, 2009, Michelle initiated these proceedings by petitioning the circuit court of Du Page County to establish Michael's parentage. On November 4, 2010, the circuit court of Broward County, Florida, awarded the parties a judgment for parentage, which was enrolled in the circuit court of Du Page County. Michelle was awarded custody, and she pursued orders of protection and extensions of those orders against Michael. On October 10, 2012, the Florida court relinquished jurisdiction, and all matters were consolidated in this action. On December 1, 2014, Tom Kenney was appointed guardian *ad litem* (GAL).

¶ 8 On April 20, 2015, the trial court entered an order establishing a reunification plan for visitation purposes. The goal was to foster J.R.G.'s relationship with Michael, whom he barely knew. The court ordered the parties to participate in psychological therapy with the child in their respective states. The parties' relative participation in those services is disputed.

¶ 9 In November 2015, Michelle moved with J.R.G., who was by then seven years old, to Bellevue, Washington, where she took elaborate steps to conceal their whereabouts. Michelle did not petition the trial court for leave to remove J.R.G., and she did not notify the court or Michael of her change of address. Michelle obtained a different birth certificate for J.R.G. and enrolled him in school under an alias she had given for him in Illinois. She changed her name and obtained new social security numbers for her and J.R.G., allegedly under a domestic violence program. Michelle did not inform Michael, his counsel, or the trial court of her relocation.

¶ 10 Upon Michael's petition for a rule to show cause, the trial court issued a mittimus for contempt against Michelle on January 8, 2016, for her failure to cooperate with the reunification plan.

¶ 11 On January 25, 2016, Michael filed a petition to modify the allocation of parental responsibilities, citing sections of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) that govern reallocation of parenting responsibilities (750 ILCS 5/610.5 (West 2016)); obtaining leave to remove the child (750 ILCS 5/609 (West 2014) (now 750 ILCS 5/609.2 (West 2016))); and allocation of parental decision making (750 ILCS 5/602.5 (West 2016)). Michael alleged that Michelle, motivated by a general hostility toward him, was defying the court by not cooperating with the reunification program, concealing the child's whereabouts, and interfering with his relationship with his son. Michael asserted that he would provide a

nurturing home environment in Florida and facilitate a good relationship between Michelle and J.R.G. The petition's prayer for relief requested the majority of parenting time, exclusive parental responsibility, child support equal to 20% of Michelle's income, and other equitable relief.

¶ 12 The trial court heard and granted Michael's petition on February 1, 2016, giving him "physical possession of [J.R.G.] without prejudice." The order stated that Michelle had received notice but had failed to appear. The court ordered Michelle to contact the GAL to facilitate the immediate turnover of J.R.G. to Michael. At a status hearing on February 29, 2016, the court reiterated that, in Michelle's absence, Michael was awarded "parental rights of medical, religious, educational, and extracurricular activities of [J.R.G.]" Michelle's right to parenting time was reserved. Michael was awarded custody for purposes of all state and federal statutes, with leave to relocate J.R.G. to Florida. The court entered another order on March 18, 2016, clarifying that "any law enforcement agency may take possession of [J.R.G.]" and should notify the GAL so he may be turned over to Michael according to the February 29, 2016, order.

¶ 13 About a year later, on January 27, 2017, child protective services located and removed J.R.G. from his classroom at school, and Michelle was notified that afternoon. The next day, J.R.G. was released to Michael and relocated to his home in Florida.

¶ 14 Two weeks later, on February 9, 2017, Michelle filed a motion to vacate the default judgment, vacate the order for contempt, and transfer the matter to Washington State. Michelle alleged that she did not receive notice of the orders reallocating parenting responsibility to Michael or notice of the underlying motion. Michelle stated that, after she moved to Washington in November 2015, she received no further communication or notices related to the proceedings "since her mail was not being forwarded by the UPS store in Lombard, where she previously had

a post office box." Michelle conceded that Michael sent notice of his motion to that post office box.

¶ 15 On July 28, 2017, Michelle filed an amended petition to vacate the February 1, 2016, and February 29, 2016, orders. The petition recited a long history of protective orders entered against Michael and alleged that he injured J.R.G. during several overnight visits. The petition also alleged that she took J.R.G. to Washington State "due to the increased threats Michelle was receiving from Michael and the constant fear for Michelle and [J.R.G.'s] safety in Illinois." Michelle denied receiving notice of Michael's petition to reallocate parental responsibility, despite the February 1, 2016, order stating that she had. The amended petition alleged that Michael failed to comply with section 609.2(e) of the Dissolution Act, which governs notice to a non-relocating parent.

¶ 16 Michelle's petition argued that the orders should be vacated under section 2-1401 of the Code of Civil Procedure because Michael did not have a meaningful relationship with J.R.G., Michael did not comply with the reunification plan established by the court, and Michael had a long history of abusing the child and threatening Michelle. She claimed that she acted with due diligence in the underlying proceeding, despite not appearing or responding in any way to Michael's petition, because she did not receive notice of the petition or the subsequent default orders. Michelle also asserted that she acted with due diligence in petitioning to vacate the orders because she filed her petition less than two weeks after J.R.G. was turned over to Michael. Michelle requested that the trial court vacate the default orders entered on February 1, 2016, and February 29, 2016; and order Michael to contribute to her attorney fees.

¶ 17 In August 2017, Michelle moved back to Illinois, residing and seeking employment in Cook County. On March 15, 2018, the trial court denied Michelle's 2-1401 petition and entered

final judgment for Michael. The court found that Michelle lacked diligence, a meritorious defense, and credibility:

> "The facts are that [Michelle] removed the child from the State of Illinois without leave of court and took extensive measures to conceal herself and the child from this Court. There was no due diligence in this case. [Michelle] did not file a motion or pleading to vacate the orders that were entered by this Court until as [Michael's counsel] pointed out, she was caught.
>
> In the interim she tried – she – as I pointed out, she lied both to the Courts in Washington and Florida as to what transpired in this case. She took such – and I would say impressive steps to conceal herself. Most people wouldn't have been able to know how to do that to the extent that [Michelle] did. She is accomplished in this area, in my opinion. But having concealed herself from the Court, she certainly cannot be heard at this time to complain that she didn't have notice.
>
> With respect to meritorious defenses, the Court finds that there are none. As a matter of fact, the Court reviewed the common law record in this case before entering these orders and the, I was not aware at that time of the extent to which [Michelle] – to the extent to which she went to conceal herself. If anything, her testimony before this Court has convinced the Court even more that the orders that were entered were appropriate. I can only describe [Michelle] as a cold-blooded and calculating liar."

¶ 18 Michelle filed a timely notice of appeal on April 13, 2018.

¶ 19 II. ANALYSIS

¶ 20 Michelle unsuccessfully petitioned to vacate the orders reallocating parenting responsibilities in favor of Michael. See 735 ILCS 5/2-1401 (West 2016). On appeal, Michelle

argues that (1) the underlying orders are void for lack of personal and subject matter jurisdiction because she did not receive proper notice of Michael's petition and (2) the court abused its discretion in denying her petition to vacate the orders.

¶ 21 Michelle petitioned to vacate the orders about a year after they were entered. Typically, relief under section 2-1401 requires that a petitioner file, from 30 days to 2 years after the entry of the judgment, a petition alleging: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting the defense or claim; and (3) due diligence in filing the petition. 735 ILCS 5/2-1401 (West 2016); *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). A petitioner must prove these elements by a preponderance of the evidence, and the trial court found that Michelle failed to do so. See *Juszczyk v. Flores*, 334 Ill. App. 3d 122, 126-27 (2002).

¶ 22 Michelle argues that the court lacked personal and subject matter jurisdiction to reallocate parental responsibilities and, therefore, the orders may be attacked at any time, regardless of noncompliance with section 2-1401. Michelle is correct that an order, judgment, or decree entered by a court without jurisdiction over the subject matter or the parties is void and may be attacked, directly or indirectly, in any court at any time. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002). A petitioner may file a petition under section 2-1401 to attack a judgment as void (*Sarkissian*, 201 Ill. 2d at 105), but such a petition is not subject to the requirements of section 2-1401 (*In re Estate of Barth*, 339 Ill. App. 3d 651, 663 (2003)).

¶ 23 To assess the section 2-1401 petition, we must resolve whether it was seeking relief from a "void" judgment, as Michelle claims. The question of "voidness," in turn, requires us to determine whether the trial court had subject matter jurisdiction, as "whether a judgment is void or voidable presents a question of jurisdiction." *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 27. In *LVNV Funding*, our supreme court stated explicitly: "[W]hether a judgment is void in a

civil lawsuit that does not involve an administrative tribunal or administrative review depends solely on whether the circuit court which entered the challenged judgment possessed jurisdiction over the parties and the subject matter." *LVNV Funding*, 2015 IL 116129, ¶ 32. Accordingly, to determine whether there was a "void" judgment, we consider the legal question of whether the trial court had jurisdiction over Michael's petition to reallocate parenting responsibility, which we review *de novo*. See *Forest Preserve Dist. of Cook County v. Chicago Title and Trust Co.*, 2015 IL App (1st) 131925, ¶ 48 (citing *McCormick v. Robertson*, 2015 IL 118230, ¶ 18).

¶ 24 We agree with Michael that the trial court had jurisdiction over the subject matter and the parties when it granted his petition to reallocate parenting responsibilities. The proceedings on Michael's post-decree petition do not constitute a new action but rather a continuation of the existing parentage proceedings. See *In re Marriage of Kozloff*, 101 Ill. 2d 526, 530-31 (1984) (post-decree petitions in domestic relations matters do not constitute new actions but are merely continuations of the proceeding, and a substantive ruling on one petition will preclude a "change of venue as of right" on another). First, Michelle submitted to the personal jurisdiction of the court when she initiated the parentage proceedings. See *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 18 (personal jurisdiction may be established by voluntary submission to the court's jurisdiction). Second, the trial court retained subject jurisdiction to decide Michael's petition. See 750 ILCS 5/601.2(a) (West 2016) ("A court of this State that is competent to allocate parental responsibilities has jurisdiction to make such an allocation in original or modification proceedings"). Because the trial court had personal and subject matter jurisdiction, the challenged orders are potentially voidable, not void.

¶ 25 Because the February 1, 2016, and February 29, 2016, orders are, at most, voidable, Michelle was required to comply with section 2-1401 for setting aside a nonvoid order. Most

notably in this case, Michelle had to establish due diligence in presenting her defense to Michael's petition. See *Sarkissian*, 201 Ill. 2d at 103-04. As Michelle's section 2-1401 petition presents a fact-dependent challenge to the orders, we review the court's denial of the petition for an abuse of discretion. See *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 51. A trial court abuses its discretion where the court's decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court. *CitiMortgage, Inc. v. San Juan*, 2012 IL App (1st) 110626, ¶ 21.

¶ 26 Michelle alleges several technical defects in Michael's petition and notice and in the timing of the hearings on the petition. However, she has yet to offer a reasonable explanation for abandoning the proceedings, removing J.R.G. without leave of court, and deliberately concealing her identity and whereabouts, making it virtually inevitable that a default would be entered against her. Due diligence requires the petitioner to show that "he acted reasonably, and not negligently, when he failed to initially resist the judgment." *Airoom, Inc*., 114 Ill. 2d at 222. Section 2-1401 relief will not be granted unless a party shows that through no fault or negligence of his or her own, the error of fact or the existence of a valid defense was not made to appear to the trial court. *Airoom, Inc*., 114 Ill. 2d at 222. In other words, a proceeding under section 2-1401 "is not intended to give the litigant a new opportunity to do that which should have been done in an earlier proceeding or to relieve the litigant of the consequences of [his] mistake or negligence." *In re Marriage of Himmel*, 285 Ill. App. 3d 145, 148 (1996). The trial court did not abuse its discretion in denying Michelle's section 2-1401 petition, as the evidence shows her deliberate concealment of J.R.G. and abandonment of the proceedings.

¶ 27 Because we determine that the trial court did not abuse its discretion in finding that Michelle failed to exercise due diligence in presenting her defense, we need not address whether

it is, in fact, meritorious. See *Airoom, Inc*., 114 Ill. 2d at 221-22. We have thoroughly reviewed and considered Michelle's remaining arguments for reversal and determine that they lack merit.

¶ 28 III. CONCLUSION

¶ 29 For the preceding reasons, we affirm the judgment of the circuit court of Du Page County denying Michelle's petition to vacate the orders reallocating parenting responsibilities in favor of Michael and allowing relocation of J.R.G. to his home in Florida.

¶ 30 Affirmed.