2019 IL App (3d) 180475-U

Order filed June 18, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

KYLE JOURDAN,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Petitioner-Appellee,	)	Rock Island County, Illinois.
	)	
v.	)	Appeal No. 3-18-0475
	)	Circuit No. 08-F-23
	)	
CHIOMA EZEUGWU,	)	Honorable
	)	Walter D. Braud,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The dismissal of that part of the mother's petition seeking to modify parenting time and child support was reversed because she alleged changed circumstances and those changes did not require the affidavit applicable to petitions to modify decision-making responsibilities filed within two years of the prior order. The award of attorney fees to the father's attorney was upheld.

¶ 2 The appellant mother, Chioma Ezeugwu, appealed from a judgment of the trial court that dismissed her petition to modify the parenting plan, custody, and child support and ordered the mother to pay attorney fees to the attorney of the appellee father, Kyle Jourdan.

¶ 3 FACTS

¶ 4 The mother and the father were never married, but they had a child together, born in 2007. In 2008, the father filed a petition to establish paternity, custody, and visitation with respect to the child. As we noted in a prior appeal, the trial court originally entered an agreed order establishing child custody, visitation, and child support. *Jourdan v. Ezeugwu*, 2017 IL App (3d) 170059-U. Those orders have been challenged and modified over the last decade; the last trial court order regarding custody was entered on January 18, 2017, where the trial court denied the mother's petition to modify custody. We affirmed in an unpublished order dated June 20, 2017. *Id.*

¶ 5 On February 20, 2018, the mother filed a "Petition to Modify the Parenting Plan/Petition to Modify Custody and Child Support." In the petition, the mother alleged that the child was failing in her adjustment to home, school, and community. She alleged that the child was falling asleep in class, failing to turn in assignments, disrespectful to school staff, and often at the school playground after hours without a parent present. The mother also alleged that the child's needs had changed and that the visitation schedule did not foster a relationship between the child and the mother's new baby, the child's half-sibling. The mother filed an amended petition on July 20, 2018, which also alleged that the child's mental and physical health were in danger, that the child had been assigned to the school counselor due to her behaviors and academic shortfalls, and that the father had denied the mother her July 4 holiday visitation. The mother also added allegations regarding child support, seeking that it be recalculated in accordance with section 505 of the

Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/505 (West 2018)). The mother also filed an "Emergency Petition for a Rule to Show Cause," contending that the father did not allow her July 4 holiday visitation.

¶ 6 The father filed a motion to dismiss, contending that the pleadings were defective because they did not comply with the requirements of section 610.5(a) of the Act (750 ILCS 5/610.5(a) (West 2018)). At a hearing on August 3, 2018, the trial court granted the motion to dismiss, finding that the mother made the motion within two years of the prior order and did not file the affidavit required by section 610.5(a) of the Act. The trial court also *sua sponte* modified the January 18, 2017, order, finding that there was a scheduling conflict between the July 4 holiday and the parties' July vacation schedule and that the father was not in contempt of the January 18 order when he did not allow the July 4 visit. The trial court also granted the father's motion for attorney fees incurred defending the prior appeal. The mother appealed. The mother also appeals the February 17, 2017, denial of her motion to substitute judges.

¶ 7 ANALYSIS

¶ 8 The mother argues that the trial court erred in dismissing her petition for a modification of parenting time and child support. She also argues that the trial court erred in assessing attorney fees against her, modifying the January 18 order, and denying her motion to substitute judges.

¶ 9 As an initial matter, we note that the father did not file an appellee brief. We will nevertheless address the issues the mother has raised on appeal because the issues can be decided without the aid of the appellee's brief. *Department of Public Aid ex rel. Pinkston v. Pinkston*, 325 Ill. App. 3d 212, 214 (2001).

¶ 10 The trial court dismissed the mother's petition for failure to comply with section 610.5(a) of the Act. That section requires an affidavit for the modification of parental decision-making responsibilities when a petition seeking a change of decision-making is filed within two years. 750 ILCS 5/610.5(a) (West 2018). Thus, to the extent that the mother sought to modify parental decision-making responsibilities, formerly known as custody, that dismissal is affirmed. The mother's petition, however, also sought to modify the parenting plan; she sought an order granting her "the majority of the parental time." Section 610.5(a) of the Act provides that: "Parenting time may be modified at any time, without a showing of serious endangerment, upon a showing of changed circumstances that necessitates modification to serve the best interests of the child." *Id.* Since parenting time may be modified at any time, and the mother alleged changed circumstances such that a modification would serve the best interests of the child, we reverse the dismissal of the petition as to parenting time.

¶ 11 Child support may be modified upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a)(1) (West 2018). The mother alleged a substantial change in circumstances because she was now responsible for her younger child and she sought to apply the amendments to section 510(a)(1) of the Act enacted by Public Act 99-764 (eff. July 1, 2017). While the amendment to section 510(a)(1) of the Act "does not constitute a substantial change in circumstances warranting a modification," the mother's financial responsibility for a child born after the child support decree sufficiently alleges a substantial change in circumstances. Thus, we reverse the dismissal with respect to the issue of child support.

¶ 12 In considering the mother's motion to show cause and her petition to modify visitation with respect to the July 4 holiday, the trial court found that there was a contradiction in the January 18, 2017, order which necessitated a modification in order to avoid future conflicts

between the parties. The mother argues that the trial court erred in modifying the January 18 order. A petition for a rule to show cause is the method for notifying the court that a court order may have been violated. The burden is on the petitioner to show a violation; once this showing is made, the burden shifts to the alleged contemnor to show the violation was not willful. *In re Marriage of LaTour*, 241 Ill. App. 3d 500, 508 (1993). The trial court found that there was no willful violation since the holiday and July vacation schedules in the January 18 order were contradictory and unclear. The trial court properly exercised its discretion to modify the visitation schedule.

¶ 13 The mother argues that the trial court erred in assessing attorney fees, contending that the fee petition was not timely and the father's attorney should not be reimbursed for *pro bono* services. The petition for attorney fees was filed on July 31, 2017, seeking to recover attorney fees incurred by the father in defending the appeal. As noted above, our unpublished order was entered on June 20, 2017, and the mother's petition for rehearing was denied on July 26, 2017. The mandate was issued on October 3, 2017. Thus, the father's petition for fees was timely. See 750 ILCS 5/508(c)(5)(B) (West 2018) (deadlines for filing a petition for fees is tolled if a notice of appeal is filed, in which instance a petition shall be filed no later than 30 days following the date jurisdiction on the issue appealed is returned to the trial court).

¶ 14 We review a trial court's award of attorney fees under section 508(a) of the Act (750 ILCS 5/508(a) (West 2018)) for an abuse of discretion. *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶ 58. The father's attorney testified that she charged the father a reduced rate of $125 per hour on the approximately eight hours that she spent on the appeal, for a total amount of $1201.06. The attorney testified that she charged the father a reduced rate because of the mother's litigious nature, and there were some hearings in the past where she did not charge the

father. The mother argued that the appeal was not frivolous or in bad faith and she should not have to pay the father's attorney when the attorney picks and chooses when to charge him.

¶ 15 A court may order fees and costs in connection with the defense of an appeal of any order or judgment under the Act. 750 ILCS 5/508(a)(3) (West 2018). The trial court found that the amount of the fees on appeal were reasonable, and that the mother had the financial resources to pay, and granted the father's attorney fees in the amount of $1201.06. We find no abuse of discretion in that decision and affirm that portion of the trial court's order.

¶ 16 The mother also appeals the denial of her petition to substitute judges. That petition was filed on January 18, 2017, the same day that the trial court entered its order denying the mother's petition to modify custody.[1] It was denied on February 17, 2017. The mother filed a notice of appeal on that same day. The appeal was dismissed by this court on March 20, 2017, for failure to comply with Supreme Court Rule 303 and failure to pursue the appeal (*Jourdan v. Ezeugwu*, No. 3-17-0127 (2017) (unpublished minute order)). However, the denial of a petition for substitution of judge is not a final order but, instead, is an interlocutory order that is appealable on review from a final order. *In re Marriage of Nettleton*, 348 Ill. App. 3d 961, 969 (2004); see *Woodson v. Chicago Board of Education*, 154 Ill. 2d 391, 397 (1993) (collateral estoppel applies when a final order has been dismissed for lack of prosecution).

¶ 17 A party may petition to have a substitution of a judge for cause. 735 ILCS 5/2-1001(a)(3) (West 2018). "Cause" has been defined by Illinois courts as actual prejudice; that is, either prejudicial trial conduct or personal bias. *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 30. To meet the statute's threshold requirements, and trigger the right to a hearing before another judge on the question of whether substitution for cause is warranted, a petition for substitution must

[1]The mother's appellate brief incorrectly states that the petition was filed on January 18, 2018.

allege grounds that, if true, would justify granting substitution for cause. *In re Estate of Wilson*, 238 Ill. 2d 519, 553 (2010). A judge's prior rulings almost never constitute a valid basis for a claim of judicial bias or partiality; bias or prejudice must normally stem from an extrajudicial source. *Id.* at 554.

¶ 18 In this case, the mother alleges that she would not receive a fair and impartial hearing from Judge Braud. The cause alleged in the mother's affidavit, relevant to Judge Braud, and considered in conjunction with the orders in the case, was that he denied her motion to reconsider, dismissed her motion to explain, struck her notice of appeal as improper, and found the case to be ripe and scheduled it for a three-hour hearing within 60 days. We find, though, that all of those actions were proper under the law. The mother sought reconsideration of an order that had been entered on a rule to show cause. However, she had already filed a motion to reconsider that order, which was considered and denied by another judge, so her motion was actually an improper second motion for reconsideration. See Ill. S. Ct. R. 274 (eff. Jan. 1, 2006) ("A party may make only one postjudgment motion directed at a judgment order that is otherwise final."). The mother's December 15, 2016, motion was a motion to explain the April 1, 2014, order denying her motion to vacate child support and visitation orders entered on December 5 and 10, 2013. Judge Braud dismissed the mother's motion to explain as a remedy not recognized by law. We agree, the order that the mother was challenging was entered 2½ years earlier and was essentially another motion for reconsideration, which was untimely and improper under Rule 274. With respect to the notice of appeal, although the trial court stated in the January 5, 2017, order that it was a final order, it thereafter struck the mother's notice of appeal on the basis that it was not a final order because the petition for custody was still pending. While it is not entirely clear why Judge Braud initially stated that it was final order, he correctly

struck the notice of appeal because the petition for custody was still pending. See Ill. S. Ct. R. 303(a) (eff. Jan. 1, 2015); R. 304(a) (eff. Mar. 8, 2016). Lastly, we have already found that the procedure utilized in the circuit court in finding the case to be ripe and setting it for a hearing did not deny the mother due process. *Jourdan*, 2017 IL App (3d) 170059-U, ¶ 15. All of those actions were in the purview of the court and do not indicate a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 555. Since the mother failed to allege any grounds that would justify granting a substitution for cause, the denial of the petition is affirmed.

¶ 19 The mother's motion for an expedited decision is denied as moot.

¶ 20 CONCLUSION

¶ 21 The judgment of the circuit court of Rock Island County is affirmed in part and reversed in part. The matter is remanded for further proceedings in accordance with this order. Motion to expedite denied as moot.

¶ 22 Affirmed in part and reversed in part.

¶ 23 Cause remanded.