2019 IL App (4th) 190026-U

NOS. 4-19-0026, 4-19-0048 cons.

FILED
June 6, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
RUTH ELIZABETH HUBBARD,	)	Circuit Court of
Petitioner-Appellant,	)	Champaign County
v.	)	No. 10D617
MARK ANTHONY HUBBARD,	)	
Respondent-Appellee.	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justice Turner concurred in the judgment.
Justice Knecht dissented.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when it ordered protected visitation with respondent father despite a finding of endangerment. The appellate court dismissed the appeal from the trial court's indirect civil contempt order because that order was not final and appealable.

¶ 2 In October 2010, the petitioner, Ruth Hubbard, filed a petition for dissolution of marriage. Ruth had been married to respondent, Mark Hubbard, since March 2001, and the couple had two children: Al.H. (born April 23, 2007) and An.H. (born September 23, 2008). Pursuant to the judgment of dissolution of marriage, Ruth had custody of the children and Mark had regular visitation on certain weekends and holidays.

¶ 3 In August 2018, Ruth filed a petition for restriction of parenting time in which she alleged that Mark engaged in conduct which seriously endangered the mental and physical health of the children by failing to prevent Mark's 10-year-old stepson, A.S., from inappropriately

touching An.H. and Al.H. See 750 ILCS 5/603.10(a) (West 2016). In September 2018, the trial court entered an order (1) restricting parenting time and (2) requiring that An.H. and Al.H. be supervised during all future instances of parenting time, which was to continue per the judgment of dissolution.

¶ 4 In October 2018, Ruth filed a motion to reconsider, and Mark filed a motion for indirect civil contempt. (In that motion and in all other trial court proceedings that followed, Mark appeared *pro se*.) In Mark's motion, he alleged that Ruth willfully failed to comply with prior court orders requiring parenting time for Mark.

¶ 5 In December 2018, the trial court denied Ruth's motion to reconsider.

¶ 6 In January 2019, the trial court found Ruth in civil contempt for willfully and contumaciously refusing to allow Mark previously ordered parenting time. After so concluding, the court continued the hearing for a determination of the appropriate sanction. However, Ruth filed a notice of appeal prior to the trial court's imposing sanctions for contempt

¶ 7 Ruth appeals, arguing the trial court erred by (1) permitting A.S. to be present during parenting time with Mark and (2) finding Ruth in civil contempt. We affirm the trial court's judgment restricting parenting time but conclude that we lack jurisdiction over Ruth's appeal from the trial court's contempt order because that order is not final and appealable.

¶ 8 I. BACKGROUND

¶ 9 A. The Dissolution of Marriage

¶ 10 In October 2010, Ruth filed a petition for dissolution of marriage. Ruth had been married to Mark since March 2001, and the couple had two daughters: Al.H. (born April 23, 2007) and An.H. (born September 23, 2008).

¶ 11 In October 2012, the trial court entered a final judgment of dissolution of

marriage. The judgment of dissolution provided that Ruth would have custody of the children and Mark would have regular visitation on the first, third, and fifth weekends of each month, as well as periods of each summer and certain holidays.

¶ 12 B. The Petition To Restrict Parenting Time

¶ 13 In August 2018, Ruth filed a petition to restrict parenting time pursuant to 750 ILCS 5/603.10 (West 2016), claiming Mark's 10-year-old stepson, A.S., had inappropriately touched both An.H. and Al.H. on multiple occasions. The petition alleged that Mark was aware of the inappropriate touching and failed to protect the children.

¶ 14 1. *The Hearing on the Petition*

¶ 15 In September 2018, the trial court conducted a hearing on Ruth's petition. Ruth testified that in August 2018, after returning from Mark's scheduled parenting time, An.H. complained to Ruth that her nipples hurt and that A.S. had been rubbing them. An.H. was embarrassed and confused about the situation and did not know how to talk about it. Ruth stated that she knew this type of touching had occurred on multiple occasions and began sometime after Christmas 2017. Ruth further stated that Mark was informed about the touching by a Department of Children and Family Services (DCFS) agent and Al.H. but he had not taken adequate steps to prevent the behavior. Ruth had not sent the girls to parenting time with Mark since she learned about A.S.'s behavior, and she believed that the touching would continue if the trial court did not restrict parenting time.

¶ 16 Trevor Kendrick, a therapist at the Rock Counseling Group, testified An.H. told her that A.S. touched her chest and that "it hurt." Kendrick explained that An.H. appeared embarrassed and uncomfortable when discussing the touching and An.H. could only tell Kendrick about it by typing it out on a phone and handing it to Kendrick. Kendrick

acknowledged that she did not ask for more details about the incident, such as how the touching occurred or whether it was through clothing.

¶ 17 On cross-examination, Kendrick explained that Ruth, Al.H., and An.H. were all in the room when An.H. told her about the touching. Ruth had told Kendrick that An.H. complained about her nipples hurting because A.S. rubbed them. Shortly thereafter, Al.H. told Kendrick that A.S. used to do the same thing to her but he had stopped. Kendrick stated that An.H. buried her head in her hands when asked to talk about it and her embarrassment was consistent with Kendrick's experience of young girls talking about their body parts. Kendrick also explained that she did not ask follow-up questions because she did not want to influence An.H. in any way in the event a DCFS investigator conducted a forensic interview later. Kendrick indicated that she reported the touching to DCFS.

¶ 18 Mark testified on his own behalf. He stated that he lived with his wife and her two children, A.S., age 10, and E.S., age 12. He stated that all four children played together when they visited. Mark showed a picture of the family to the court and explained that A.S. was by far the smallest—weighing 48 pounds and standing four feet three inches tall—and least mature developmentally. Mark believed that any inappropriate touching would not have been sexual in nature and would have been accidental, likely a result of the physical nature of the children playing together outside.

¶ 19 Mark testified that during the summer, Al.H. told him that A.S. had touched her in the chest. The entire family was traveling in their van at the time, and Mark immediately told A.S. that it was inappropriate to touch a girl in that area and that he should not do it in the future. Mark stated that he did not have the sense that any harm—physical or emotional—had occurred, and he never heard anything further from the children.

¶ 20 Mark had not seen An.H. or Al.H. since the first weekend of August and had rarely been able to talk to them on the phone. Mark testified that his wife and stepchildren had been emotionally harmed by the lack of parenting time and that he believed the girls' continued absence would cause significant damage to their family relationship.

¶ 21 Mark further testified that DCFS was investigating the matter and had interviewed him and his family. According to Mark, the DCFS agent intended to close the case. Based on his interactions and conversations with the agent, Mark believed DCFS was going to conclude the complaint was "unfounded." Mark also believed that the investigation was conducted because "the initial accusation was greatly exaggerated."

¶ 22 On cross-examination, Mark acknowledged that Al.H. told him that A.S. touched her chest, but he believed the DCFS investigation was "exaggerated" because it listed the allegation as "sexual molestation." Mark stated it was not appropriate for a child to touch a 9-year-old girl's breasts but maintained that the complaint was exaggerated because (1) there was no indication the touching occurred more than once, (2) the touching was "not of a sexual or inappropriate nature," and (3) the touching most likely occurred as a result of the kids' playing in a room together.

¶ 23 2. *The Parties' Arguments*

¶ 24 Ruth argued that she had proved that An.H.'s mental and emotional health was seriously endangered by Mark's failure to protect her from inappropriate touching by A.S. Ruth contended that Mark admitted he was told about A.S. touching Al.H. in the chest but did nothing to prevent the behavior from reoccurring. In particular, Ruth and Kendrick testified that An.H. indicated the touching happened on multiple occasions, including during her last visit with Mark. Ruth also argued that Mark's testimony indicated he was more concerned about his wife and

stepchildren than his daughters and that his belief that the claims were exaggerated required the court to place a restriction on his parenting time. Ruth requested the court to require that A.S. not be present during Mark's parenting time.

¶ 25 Mark argued that he appropriately handled the situation and the girls were never in danger when they visited him. He contended that he only ever heard of one instance of touching and that Ruth had prevented all parenting time since August, meaning that Mark never had the opportunity to address the situation, assuming it continued. Mark maintained that Ruth was exaggerating the degree of harm and influencing his daughters. Mark repeatedly stated that the claims were "fantasy" and Ruth was attempting to use the court and DCFS against him. Mark also complained that Ruth refused to speak with him or explain why she was unilaterally denying his parenting time.

¶ 26 3. *The Trial Court's Oral Findings*

¶ 27 At the conclusion of the hearing, the trial court found Ruth proved by a preponderance of the evidence that Mark seriously endangered the mental, emotional, and physical health of An.H. The court found Kendrick's testimony was credible and the totality of the evidence showed that A.S. inappropriately touched An.H. in the chest.

¶ 28 The trial court expressed great concern and dissatisfaction with Mark's contentions that the allegations were "fantasies" created by Ruth as a way to get at him. (The trial court also criticized Ruth for failing to communicate with Mark about the children, contrary to the court's prior orders, and for unilaterally withholding parenting time without explanation, stating such behavior likely contributed to—but did not excuse—Mark's suspicions.) The court believed that Mark's testimony and argument demonstrated that if An.H. or Al.H. complained to him that A.S. had touched them again, Mark's first reaction would be to suspect Ruth or

misconduct rather than protect his daughters. However, the court emphasized that there was no indication that Mark could not safely have parenting time; the only question was if A.S. could safely be around the girls during parenting time. The court believed the best solution would involve allowing all four children to spend time together and bond. The court reserved ruling on the appropriate remedy and ordered the parties to submit proposed orders.

¶ 29 4. *The Trial Court's Written Order*

¶ 30 On September 26, 2018, the trial court entered a written order summarizing its earlier finding that Mark seriously endangered the mental and physical health of An.H. and Al.H. by failing to protect them from A.S.'s inappropriate touching. The court ordered visitation to continue as previously ordered under the judgment of dissolution of marriage but also directed that An.H. and Al.H. were not permitted to have any unsupervised contact with A.S. The court further ordered Ruth and Mark to complete a parenting education class or meet with An.H.'s therapist "to become educated about the child's needs."

¶ 31 C. The Motion To Reconsider and Motion for Contempt

¶ 32 In October 2018, Ruth filed a motion to reconsider, arguing that the trial court's order failed to adequately protect An.H. and Al.H. because it forced them to spend time with A.S. In essence, Ruth argued that spending time with A.S. would harm the girls because it would send the message that what happened to them was appropriate or otherwise unimportant. In her motion, Ruth also requested that the trial court stay enforcement of its September 26, 2018, order.

¶ 33 Later in October 2018, Mark filed a motion for indirect civil contempt, asserting that Ruth willfully failed to provide Mark parenting time on multiple occasions as previously ordered by the court. Mark asked the court to order compensatory visitation and to impose a fine

for prior and potential future violations.

¶ 34 1. *The Hearing*

¶ 35 On December 7, 2018, the trial court conducted a hearing on indirect civil contempt. The court began by summarily denying Ruth's motion to reconsider and her request to stay the September 26, 2018, order. After the court so ruled, Mark first attempted to present a copy of the DCFS abuse and neglect report. Ruth and an attorney for DCFS objected, and the court denied Mark's request to submit the report.

¶ 36 Mark then called Ruth to testify. Ruth admitted that she did not present the children for parenting time on any of the dates required by the trial court's prior orders. On cross-examination, Ruth testified that she believed the denial of parenting time was necessary to protect An.H. and Al.H. from emotional harm by spending time with A.S. Mark testified that he had not had any parenting time with An.H. or Al.H. since the first weekend of August and he had only been able to speak with them on the phone about once a week.

¶ 37 Mark stated that Ruth refused to speak with him about the children and stated only "no" in response to his requests as to whether Ruth would be exchanging the girls for parenting time. Mark also testified that he met with Kendrick to discuss An.H.'s needs as required by the court's order. The court took the matter under advisement.

¶ 38 2. *The Trial Court's Contempt Order*

¶ 39 On January 4, 2019, the trial court issued a written order finding Ruth in indirect civil contempt. Specifically, the court found that Ruth "knowing[ly], willful[ly], and contumacious[ly]" violated that court's prior orders requiring parenting time for three specific weekends in October 2018. The court noted that at no time did it enter an order denying parenting time to Mark. Although Ruth's motion to reconsider the court's order restricting

parenting time stayed enforcement of that order, Ruth was still required to comply with all other court orders. The court stated, "The fact that [Ruth] wished additional restrictions placed on [Mark's] parenting time did not excuse her refusal to allow parenting time to [Mark] in totality." The court found further evidence of Ruth's willful violation in the fact that she refused to communicate with Mark and failed to engage in parenting education or "therapy to facilitate parenting time" as required by the September 26, 2018, order. However, the court did not impose a fine or jail time and did not order Ruth to do or refrain from doing any action. Instead, the court set a hearing date on January 18, 2019, to determine the appropriate remedy.

¶ 40 3. *The Notices of Appeal*

¶ 41 On January 7, 2019, Ruth filed a notice of appeal from the trial court's September 26, 2018, order restricting parenting time. On January 17, 2019, Ruth filed a notice of appeal from the trial court's January 4, 2019, order finding her in civil contempt. This court has consolidated the appeals on our own motion.

¶ 42 II. ANALYSIS

¶ 43 Ruth appeals, arguing the trial court erred by (1) permitting A.S. to be present during parenting time with Mark and (2) finding her in civil contempt. We affirm the trial court's judgment restricting parenting time but conclude that we lack jurisdiction over Ruth's appeal from the trial court's contempt order because it is not a final and appealable order.

¶ 44 A. Ruth's Motion To Strike Portions of Mark's Brief

¶ 45 As an initial matter, we address Ruth's motion to strike various portions of Mark's brief because they present information that is not found in the record. Ruth is correct that litigants may not argue facts outside of the trial court record without permission to supplement the record on appeal. See *Keener v. City of Herrin*, 235 Ill. 2d 338, 346, 919 N.E.2d 913, 918

(2009) ("A party may generally not rely on matters outside the record to support its position on appeal. [Citation.] When a party's brief fails to comply with that rule, a court of review may strike the brief, or simply disregard the inappropriate material."). Nonetheless, we decline to strike the offending portions of Mark's brief. The information Mark presents that is not found in the record is largely irrelevant to our resolution of the case. Accordingly, we will not consider it.

¶ 46 Although Mark is not represented by counsel, Supreme Court rules are mandatory rules of procedure, not mere suggestions (*In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 115, 17 N.E.3d 781), and *pro se* litigants are required to follow their requirements just as any other party before this court. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 78, 987 N.E.2d 1. In the event that these parties are again before this court, any future violations of Supreme Court rules by Mark will be looked on with disfavor and could result in more serious sanctions. See *id*. ¶ 77 (holding that an appellate court has the discretion to strike a litigant's brief or dismiss an appeal for failure to comply with the rules).

¶ 47 B. The Trial Court's Order Restricting Parenting Time

¶ 48 Ruth first argues the trial court abused its discretion by ordering parenting time to continue per the judgment of dissolution even though the court ordered that A.S.'s interactions with An.H. and Al.H. be supervised at all times during Mark's visitation. Ruth contends that the court's order is at odds with its finding that Mark engaged in conduct that seriously endangered An.H.'s mental and physical health when he failed to intervene to prevent inappropriate touching. Ruth asserts that (1) the court's order does not adequately protect An.H. and (2) requiring her to spend time with A.S. will impair her emotional development. We disagree.

¶ 49 1. *The Applicable Law and Standard of Review*

¶ 50 Section 603.10 of the Illinois Marriage and Dissolution of Marriage Act (Act)

allows a trial court to limit or place other restrictions on parenting time if it "finds by a preponderance of the evidence that a parent engaged in any conduct that seriously endangered the child's mental, moral, or physical health or that significantly impaired the child's emotional development." 750 ILCS 5/603.10(a) (West 2016). A trial court's finding that a parent engaged in conduct that seriously endangered a child's mental, moral, or physical health will not be reversed unless it is against the manifest weight of the evidence. *In re Marriage of Mayes*, 2018 IL App (4th) 180149, ¶ 59, 109 N.E.3d 942. However, the trial court's restrictions on parenting time will not be reversed absent an abuse of discretion. *Id.* ¶ 61. "An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *Id*.

¶ 51 The trial court is vested with wide discretion in resolving parenting time issues. *Id.* ¶ 57. It is axiomatic that a trial court's ruling is strongly presumed to be proper "because it had the opportunity to observe the parents and the children and evaluate their temperaments, personalities, and capabilities." *In re Marriage of Betsy M.*, 2015 IL App (1st) 151358, ¶ 60, 46 N.E.3d 373. Liberal parenting time is the rule and restricted parenting time is the exception. *Mayes*, 2018 IL App (4th) 180149, ¶ 56. This rule is based on "the principle that parents have a natural or inherent right of access to their children, and because sound public policy encourages the maintenance of strong family relationships." (Internal quotation marks omitted.) *In re Marriage of Diehl*, 221 Ill. App. 3d 410, 429, 582 N.E.2d 281, 294 (1991).

¶ 52 2. *The Trial Court's Decision Regarding Restriction Was Not an Abuse of Discretion*

¶ 53 In this case, neither Ruth nor Mark contest the trial court's finding that Mark seriously endangered An.H.'s mental and physical health. Instead, Ruth simply claims the trial court's remedy—forbidding unsupervised contact—is inadequate to protect An.H. However,

Ruth provides no explanation for why requiring supervised contact is insufficient. She merely claims Mark cannot provide adequate protection because he did not prevent the inappropriate touching in the first place and he later argued that the allegations were "exaggerated" and "fantasies."

¶ 54 We conclude the trial court did not abuse its discretion. The record shows that Mark addressed the issue as soon as he heard about it by telling A.S. that touching a girl in the chest area is inappropriate and he should never do it again. Mark testified that he resolved this issue in the same manner that his family addresses all instances of inappropriate behavior and this method of rule setting was effective. This is, the children have always felt comfortable bringing concerns to him and his wife following such discussions in the past. Further, to Mark's knowledge, A.S. never inappropriately touched An.H. or Al.H. again.

¶ 55 The record shows that Ruth did not speak with Mark about the girls and did not permit them to visit him. Therefore, Mark may not have had an opportunity to take different steps to prevent further misconduct.

¶ 56 Additionally, the trial court stated it believed Mark would put a stop to any inappropriate touching that occurred under his direct supervision. The court's only concern was that if the girls reported another incident, Mark's first instinct would be to suspect Ruth. However, the court stated that (1) Mark could safely continue having parenting time with the girls and (2) it was simply a matter of choosing the appropriate remedy with regard to contact between the girls and A.S.

¶ 57 The trial court also expressed a strong desire to allow parenting time with all four children present because it believed that was the best thing for the family's growth and well-being. We note that the order required all contact between the girls and A.S. to be supervised

generally, not specifically by Mark. Given the context that the court believed Mark would adequately protect the girls under his direct supervision and that Mark's wife could also supervise the children, the court could have reasonably concluded that this direct supervision it ordered would adequately protect the mental, emotional, and physical health of both An.H. and Al.H.

¶ 58 The trial court is in the best position to determine the appropriate remedy based upon the unique circumstances of each case. See *Betsy M.*, 2015 IL App (1st) 151358, ¶ 60. The record demonstrates the trial court carefully and thoughtfully considered the facts and circumstances of the case and extensively discussed what it believed was the appropriate remedy. Accordingly, we conclude the court's decision regarding the restriction on parenting time was not an abuse of discretion.

¶ 59 C. Indirect Civil Contempt

¶ 60 Ruth next argues that the trial court erred by finding her in civil contempt for willfully failing to comply with the visitation schedule set forth in the judgment of dissolution of marriage. Ruth contends that the contempt order operates as an injunction and therefore this court has jurisdiction over the appeal pursuant to Illinois Supreme Court Rule 307(a) (eff. Nov. 1, 2017). We conclude that we lack jurisdiction over the contempt finding because it is not ripe. That is, the finding of civil contempt, on its own, is not a final, appealable order.

¶ 61 It is well settled that a contempt order may be the subject of an interlocutory appeal if it is an injunction. *In re M.S.*, 2015 IL App (4th) 140857, ¶ 32, 29 N.E.3d 1241; *Bloomington Urological Associates, SC v. Scaglia*, 292 Ill. App. 3d 793, 796-97, 686 N.E.2d 389, 392 (1997). Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017) permits the immediate appeal of any order granting or denying an injunction. The term "injunction" is

construed broadly and includes any order that operates as an injunction regardless of the form of the order. *M.S.*, 2015 IL App (4th) 140857, ¶ 28 (citing *In re A Minor*, 127 Ill. 2d 247, 260-61, 537 N.E.2d 292, 297-98 (1989)). The central feature of an injunction is an order requiring a party to do or refrain from doing a particular thing, "the most common sort of which operate as a restraint upon the party in the exercise of his real or supposed rights." (Internal quotation marks omitted.) *M.S.*, 2015 IL App (4th) 140857, ¶ 28.

¶ 62 In this case, the trial court's order is merely a finding that Ruth willfully and contumaciously disregarded the judgment of dissolution by refusing to allow visitation. The order does not require Ruth to do or refrain from doing anything, nor does it restrain her ability to exercise her rights. Indeed, the order explicitly set a hearing date for the purpose of determining an appropriate remedy. Without a remedy provision, the order finding Ruth in indirect civil contempt is not ripe for review. Accordingly, this court lacks jurisdiction to consider the trial court's finding of indirect civil contempt. See *In re Marriage of Depew*, 246 Ill. App. 3d 960, 967, 616 N.E.2d 672, 677 (1993) ("a contempt order is not appealable until the trial court imposes a sanction").

¶ 63 In closing, we commend the trial court for its patient and thoughtful handling of the serious and sensitive issues this case presented. The court allowed both parties to fully voice their concerns and, more important, listened carefully to those concerns before making a difficult and thoughtful ruling.

¶ 64 III. CONCLUSION

¶ 65 For the reasons stated, we (1) affirm the trial court's judgment regarding the restriction on Mark's parenting time and (2) dismiss Ruth's appeal from the trial court's civil contempt finding.

¶ 66 No. 4-19-0026, Affirmed.

¶ 67 No. 4-19-0048, Appeal dismissed.

¶ 68 Justice Knecht dissenting:

¶ 69 The trial court concluded Mark seriously endangered the mental and physical health of An.H. and Al.H. by failing to protect them from A.S.'s inappropriate touching. The trial court concluded parenting time should be restricted. The trial court also found credible evidence A.S. had touched both girls inappropriately, and the court seemed to accept the touching of nipples occurred on multiple occasions.

¶ 70 Mark did not believe the touching occurred and, if there was touching, it must have been during ordinary active play. He contended it was all exaggerated, a fantasy, and likely contrived by Ruth. To expect Mark to provide adequate supervision to prevent A.S. from future inappropriate touching is not realistic. Further, Mark rejected the possibility there was a sexual component to any touching. It is naïve to think a 10-year-old boy could never harbor sexual interest in girls' breasts. Even if A.S. was simply curious, he invaded the girls' privacy and their bodies, and made them uncomfortable and embarrassed.

¶ 71 The first priority in this case should be to protect both girls from A.S. Then, there should be parenting classes and counseling, and a determination whether A.S. has touched his sister inappropriately. The girls need help in resolving their feelings and understanding of what occurred and need to be certain their father accepts their concerns and will be diligent in protecting them. It is appropriate for Mark to have visitation but, at this juncture, A.S. should not have any contact with the girls.

¶ 72 Mark has interest in building a close-knit family unit with his daughters, wife, and step-children, but the mental and physical health of his daughters is paramount. Nothing in

Mark's testimony showed any appreciation for the effect the touching had on his daughters. All the parties need help in processing what has occurred, and that should occur before A.S. participates in visitation.