2014 IL App (1st) 131930-U

Nos. 1-13-1930 & 1-13-2577 (consolidated)

SIXTH DIVISION
December 31, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
TERESA MAGANA,	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 10 D 330932
	)	
DAVID MAGANA,	)	Honorable
	)	Mark J. Lopez,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶1 ***Held***: In a post-dissolution of marriage proceeding, the circuit court did not err by denying the father's motion to continue a hearing and entering a plenary order of protection in favor of the mother. Moreover, the appellate court lacks jurisdiction to consider the father's appeal challenging circuit court orders concerning the finding of indirect civil contempt against the father based on a violation of the parties' joint parenting agreement and modification of that

agreement as the purge for that contempt finding.

¶2 In this consolidated interlocutory appeal, respondent David Magana (1) argues the court abused its discretion by denying his motion to continue a hearing on petitioner Teresa Magana's request for an order of protection and by entering a plenary order of protection in her favor; and (2) appeals the circuit court's orders that found him in indirect civil contempt and modified the parties' joint parenting agreement as a purge of the contempt finding. We affirm the judgment of the circuit court concerning the order of protection and dismiss the appeal concerning the contempt finding based on a lack of jurisdiction.

¶3 I. BACKGROUND

¶4 This consolidated appeal involves post-decree domestic relations proceedings in the circuit court. Specifically, David appeals six post-decree orders stemming from Teresa's petitions for an order of protection and an adjudication of indirect civil contempt.

¶5 In January 2012, the court dissolved the marriage between Teresa and David Magana, who have two minor children. The judgment of dissolution incorporated the parties' joint parenting agreement (JPA), which granted joint custody to the parties and awarded David primary residential custody subject to Teresa's parenting time. David resides in Illinois, and Teresa resides in Wisconsin with her husband.

¶6 The JPA set forth a parenting time schedule and provisions concerning where exchanges of the children would occur. The JPA also enjoined, prohibited and restrained the parties from approaching each other and required them to stay at least 15 feet away from each other or their automobiles. The JPA also provided that the parties would meet at an equidistant location (a McDonald's restaurant in Kenosha, Wisconsin) to exchange the children for parenting time, or

Teresa would be required to pick the children up from David's residence. The JPA also provided that the parties understood:

> "that the parenting schedule provided herein, as well as all other provisions may require future adjustments and changes to provide for the Minor Children's best interests. Both parties also recognize that this Joint Parenting Agreement is a dynamic concept subject to re-evaluation and change, and they agree to review from time to time its provisions concerning its adequacy, feasibility and appropriateness in view of the age, welfare and developmental progress of the Minor Children, their ability to cooperate effectively and consistently with one another, and all other appropriate facts concerning the Minor Children's best interests."

¶7 In June 2012, Teresa filed a petition for adjudication of indirect civil contempt, alleging that David had reneged on the parties' agreement involving an exchange for summer parenting with the minor children and delayed making the children available for Teresa's parenting time.

¶8 On August 28, 2012, a hearing was held on Teresa's contempt petition, and the circuit court reviewed the email communications between the parties at the time of the June 2012 exchange dispute. The court found David in contempt for failing to comply with three provisions of the JPA. The court indicated to the parties that the JPA was written in a convoluted manner and ordered the parties, as a purge of David's contempt, to enter into an order setting forth additional parameters and guidelines regarding parenting time. The court also granted Teresa leave to file a petition for attorney fees. No court reporter was present at the August 28, 2012 proceeding.

¶9 Within 30 days, David filed a motion to reconsider, seeking to vacate the contempt findings and the grant of leave to file an attorney fee petition. David argued that he did not violate the terms of the three provisions of the JPA and the court had misinterpreted and misapplied the JPA provisions. David argued that the contempt finding was ripe for reconsideration under Illinois Supreme Court Rule 304(b)(5) (eff. Feb. 26, 2010) as an order imposing a penalty on a finding of contempt. His motion did not specifically mention the purge or request that the purge be modified.

¶10 In her response, Teresa argued, *inter alia*, that there was no just cause to vacate the August 28, 2012 order and the findings against David did not fall under the purview of Rule 304(b)(5) because the purge against him was not a monetary or other penalty.

¶11 On September 30, 2012, the parties met at the equidistant location—the Kenosha McDonald's—to exchange the children. After an incident occurred between the parties, the police were called to the restaurant and spoke with Teresa and David. On October 5, 2012, Teresa filed an emergency petition for an order of protection. The court found that the petition was not an emergency because the parties would not have contact with each other until the next scheduled exchange of the children on October 12, 2012. The court set the hearing on the petition for October 10, 2012.

¶12 On October 10, 2012, a full evidentiary hearing was held on Teresa's order of protection petition. No court reporter was present at this hearing. Teresa, her husband, and David testified about the September 30 incident at the McDonald's. The Wisconsin police officer did not appear in court to testify on that date. The court entered an interim order of protection naming Teresa as a protected party. The court found that David had engaged in abuse, consisting of harassment, and the court considered the nature, frequency, severity, pattern, and consequences of past abuse

and the likelihood of future abuse to Teresa or any member of her household. The court prohibited David from committing physical abuse, harassment, interference with personal liberty, and stalking. The matter was continued for a hearing date in November to allow David the opportunity to have the Wisconsin police officer testify. However, when the officer again was unable to testify, the matter was continued to December 7, 2012.

¶13 No court reporter was present at the December 7, 2012 hearing. David filed an emergency motion to continue the hearing on the order of protection to enable him to secure the appearance of the Wisconsin police officer. Teresa opposed the continuance request, arguing that David had been provided multiple opportunities to secure his witness's appearance and had failed to do so. The court heard argument on the motion to continue and denied it. The court also converted the interim order of protection into a plenary order of protection.

¶14 The court then conducted a hearing on David's motion to reconsider the August 28, 2012 contempt finding. The court vacated two of the three contempt findings against David but upheld the order regarding his violation of the summer parenting time provision contained in the JPA. The written order of this decision was entered on December 12, 2012. The court also stated that the purge of contempt entered on August 28, 2012, which required the parties to enter into an order setting forth additional parameters and guidelines regarding parenting time, remained in effect.

¶15 On January 7, 2013, David moved the court to reconsider the December 7, 2012 plenary order of protection, arguing that it was entered against him without a hearing and the denial of his continuance request was a violation of fundamental and substantial justice.

¶16 Meanwhile, in accordance with the court's August 28, 2012 order, the parties, by agreement, submitted competing draft orders to modify the parties' convoluted JPA. Their drafts added parenting time parameters and guidelines and referred to or modified various provisions of

the JPA, including holiday and supplemental parenting time, exchange locations, communication between the parties, the scheduling of medical appointments, and conduct during exchanges.

¶17 On April 5, 2013, the court entered a 7-page order modifying multiple provisions of the JPA.

¶18 Within 30 days, David filed a 28-page motion to reconsider, seeking to vacate the April 5, 2013 order. David argued the court did not conduct a hearing prior to modifying the JPA. David also argued, apparently for the first time in this dispute, that the court did not set a proper purge of his contempt finding. In addition, David argued the court modified more than just the one JPA paragraph provision from which the contempt finding stemmed. David's motion specified his criticisms to multiple modifications of the JPA. These criticisms included his complaint that the modifications allowed Teresa to supervise overnight visitation at her parent's residence if her father, who is a registered sex offender, was present and allowed Teresa, her husband, or her mother to supervise any visitation that took place in the presence of or with Teresa's father. David also complained about a modification that prevented the parties from administering "non-prescribed medical treatments (*i.e.*, buzzers, shock treatments, laxatives, etc.) without notifying the other parent and obtaining an agreement in writing from the other parent." David argued there was "no conceivable reason" that his purge should involve a modification of the parties' agreement concerning medical decision-making involving the children.

¶19 In her response, Teresa argued, *inter alia*, that David's objection to the manner in which the JPA was modified was untimely because more than 30 days had passed since the August 28, 2012 order setting the purge. Teresa also argued the court had a complete understanding of the issues between the parties and the best way to address them because the court had entertained numerous petitions and held a number of hearings on issues related to transportation, parenting

time, the parties' conduct, and communications between the parties. Moreover, the court had reviewed hundreds of pages of pleadings, emails and other communications between the parties and heard testimony and other evidence regarding the ongoing issues.

¶20 Concerning Teresa's father, Teresa argued that David had asked Teresa's parents to watch the children without Teresa's supervision in the past and never had qualms about the children visiting Teresa's father. Teresa argued that the JPA modification concerning visitation and her father simply memorialized what had been the parties' practice due to the fact that the charges against Teresa's father were believed to be baseless. Concerning the JPA modifications about medical issues, Teresa argued the court needed to preemptively resolve the issue because David, despite the parties' joint custody as to medical issues, had purchased electrodes that induced a shock as a remedy to a bed-wetting problem of one of the children and never advised Teresa of that medical contraption. Teresa also alleged that, in the past, David had given the child laxatives on an almost daily basis despite the absence of any medical need and the child was being bullied due to routinely soiling his pants at school.

¶21 On May 22, 2013, the parties appeared before the court on multiple issues. After hearing argument, the court denied David's motion to reconsider the plenary order of protection and denial of David's continuance request. The court stated that it had tried to accommodate David but could not keep the record open indefinitely waiting for a busy police officer to make this legal proceeding a priority. David timely filed an interlocutory appeal of this May 22, 2013 ruling, and the appeal was assigned case No. 1-13-1930.

¶22 Concerning David's motion to reconsider the April 5, 2013 order modifying the JPA, the court, instead of setting the matter for a hearing, set a briefing schedule and requested that the

parties prepare memoranda as to their positions regarding the motion to reconsider. Neither party objected to proceeding in this manner.

¶23 On July 16, 2013, the court entered a detailed order denying David's motion to reconsider the April 5, 2013 order. The court noted that it had previously instructed the parties to draft amendments to the JPA to allow the court to review their competing drafts, resolve areas of disagreement, and modify language that caused difficulties between the parties concerning their respective duties and responsibilities as joint parents and the exercise of their parenting time. The court noted that both parties had agreed to proceeding in this manner and raised no objection before the court, and both parties had proposed modifications to more than the particular JPA paragraph cited as the basis of the violation that resulted in the contempt finding. Moreover, neither party requested that any evidentiary hearing be held prior to the court considering and determining appropriate modifications to the JPA. The court also stated that the amendments served the children's best interests and fulfilled the statutory goals pursuant to section 5/102(7) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/102(7) (West 2012)).

¶24 David appealed within 30 days the denial of his motion to reconsider the April 5, 2013 order, and it was assigned case No. 1-13-2577. According to David's notice of appeal, he challenges the trial court's orders dated July 16, 2013, May 22, 2013, April 5, 2013, December 12, 2012, and August 28, 2012. Thereafter, this court consolidated the appeals of case Nos. 1-13-1930 and 1-13-2577.

¶25 II. ANALYSIS

¶26 Teresa filed a motion to strike David's brief and dismiss his consolidated appeal based on his failure to provide a transcript, bystander's report or agreed statement of facts for several proceedings relevant to the issues David raises on appeal. David responds that the missing

transcripts or bystander's reports are not necessary or relevant for this court's consideration of the particular issues on appeal. This court ruled that Teresa's motion would be taken with the case.

¶27 The appellant has the burden to present a sufficiently complete record of the proceedings before the trial court to support a claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Illinois Supreme Court Rules 321 (eff. Feb. 1, 1994) and 323(c), (d) (eff. Dec. 13, 2005) require the appellant to include in the record on appeal a transcript of any hearing pertinent to the issues on appeal or a bystander's report or agreed statement of facts concerning the hearing. In the absence of a transcript or bystander's report, this court will not speculate as to what errors might have occurred below. *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006). Where the record is not complete, "the reviewing court must presume the circuit court had a sufficient factual basis for its holding and that its order conforms with the law." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 157 (2005). Any doubts arising from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392.

¶28 This court also notes that David failed to comply with the provisions of Illinois Supreme Court Rule 342(a) (eff. Jan. 1, 2005). Specifically, David failed to prepare a complete table of contents, with page references, of the record on appeal, which has made it difficult for this court to locate pleadings, orders and transcripts in the record for purposes of reviewing his claims of error. The rules governing civil appeals are not merely suggestions, but are necessary for the proper and efficient administration of the courts. See *First National Bank of Marengo v. Loffelmacher*, 236 Ill. App. 3d 690, 691–92 (1992). We will not sift through the record to find support for an issue, and ill-defined or insufficiently presented issues that do not satisfy the rules are considered waived. *Express Valet, Inc. v. City of Chicago,* 373 Ill. App. 3d 838, 855 (2007).

¶29 A. Plenary Order of Protection

¶30 This court has jurisdiction to consider David's interlocutory appeal of the trial court's order denying his motion to continue the hearing on the order of protection and converting the interim order into a plenary order of protection pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010), which allows an appeal as of right from an interlocutory court order granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction.

¶31 David argues the circuit court abused its discretion by denying his motion to continue the hearing on the order of protection and by converting the interim order into a plenary order of protection. David complains the court converted the interim order into a plenary order of protection without affording him the opportunity to present his material witness, the Wisconsin police officer. David argues he exercised due diligence in attempting to secure the testimony of the officer, who could not be present at the December 7, 2012 proceeding due to a family emergency. David also contends the officer's testimony was material because his police report indicated that Teresa gave him information that was inconsistent with the allegations contained in her petition for an order of protection.

¶32 Trial courts have broad discretion in granting or denying motions for continuances; unless there is manifest abuse of discretion or a palpable injustice apparent in the record on appeal, the judgment of the trial court will not be disturbed. *In Interest of Hill*, 102 Ill. App. 3d 387, 392 (1981). Furthermore, the Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 *et seq.* (West 2010)) provides for entry of (1) an emergency order of protection (750 ILCS 60/217 (West 2010); (2) a 30-day interim order of protection (750 ILCS 60/218 (West 2010)); and (3) a plenary order of protection (750 ILCS 60/219 (West 2010)). A plenary order of protection shall issue if the trial court finds the respondent abused any person protected under the order (750 ILCS 60/214(a) (West

2010)), and the petitioner establishes that the court has jurisdiction, the respondent filed a general appearance or was served with process, and the respondent has answered or is in default (750 ILCS 60/219 (West 2010)). A trial court's exercise of discretion in issuing an order of protection or denying a request for an order of protection will not be overturned absent a clear abuse of discretion. *In re Marriage of Fischer*, 228 Ill. App. 3d 482, 489 (1992). "An abuse of discretion occurs only where no reasonable person would take the view adopted by the trial court." *Shields v. Fry*, 301 Ill. App. 3d 570, 573 (1998).

¶33 We find no abuse of discretion here. The trial court continued the order of protection hearing twice to afford David an opportunity to secure the Wisconsin police officer's testimony, and the court cannot be expected to delay the matter indefinitely. Although David argues that the police officer was a material witness, the record shows that the officer arrived at the scene after the dispute occurred and merely spoke to the parties and witnesses about the incident. Furthermore, without a transcript or bystander's report to give this court adequate background as to what occurred at the various court dates relating to the proceedings on the order of protection, including the October 10, 2012 and December 7, 2012 dates, this court will presume that the trial court did not err in its decision. Accordingly, we hold that the trial judge did not abuse his discretion by denying the motion for a continuance.

¶34 B. Contempt Finding

¶35 David raises three challenges to the trial court's finding of indirect civil contempt against him. First, David argues that the trial court's finding of contempt for his violation of one paragraph of the JPA is not supported by the record. Second, David argues the trial court's modification of the parties' JPA was not a proper purge of the contempt finding because it was punitive in nature and, thus, was actually a finding of indirect criminal contempt without due

process. Finally, David argues, without citation to any relevant authority, that the trial court lacked jurisdiction to enter the April 5, 2013 order modifying the JPA because the court's extensive modifications to the JPA constituted a modification of custody, there was no pending petition seeking a modification of custody, and the trial court did not conduct a hearing on the children's best interests prior to modifying the JPA.

¶36 Before reaching the merits of David's appeal, we must address our jurisdiction to review the issues raised. David contends this court has jurisdiction to review the trial court's finding of indirect civil contempt against him under Illinois Supreme Court Rule 304(b)(5) (eff. Feb. 26, 2010), which provides that an order finding a person in contempt of court and imposing a monetary or other penalty is appealable, without the necessity for a special finding, even though the final judgment does not dispose of an entire proceeding.

¶37 We disagree. According to the record, the trial court set an initial purge on August 28, 2012, in which David was required, along with Teresa, to enter into an order setting forth additional parameters and guidelines regarding parenting time. The court did not, in either the August 28, 2012 order or any of the subsequent related orders, impose a monetary or other penalty on the contempt finding or even state what David's penalty would be if he failed to comply with the set purge. In *In re Marriage of Gutman*, 232 Ill. 2d 145, 153 (2008), the court stated that "[i]t is clear from the language of [Rule 304(b)(5)] that only contempt judgments that impose a penalty are final, appealable orders." Immediate appellate jurisdiction is allowed under Rule 304(b)(5) when both a contempt finding and a sanction are imposed because litigation proceedings could linger for years before a final judgment is entered and the contemnor could face incarceration or forfeiture of property. *Id.*

¶38 A penalty is a punishment imposed on a wrongdoer, especially in the form of imprisonment or a fine. *People v. Vasquez*, 368 Ill. App. 3d 241, 261 (2006). The trial court plainly did not impose a penalty here. After conducting a hearing on Teresa's contempt petition, the trial court found David in indirect civil contempt for violating the JPA and, in order to simplify the JPA provisions and resolve the parties' ongoing conflicts over their parenting time, ordered, as a purge of David's contempt, that both David and Teresa enter into an order setting forth additional parameters and guidelines regarding parenting time. David acquiesced with this procedure and did not contest the purge, which was set in August 28, 2012, until after the trial court modified the JPA on April 5, 2013. Under these circumstances, we find no basis for this court to exercise jurisdiction over David's appeal of the contempt finding.

¶39 III. CONCLUSION

¶40 For the foregoing reasons, we affirm the judgment of the circuit court concerning the order of protection in favor of Teresa. We also dismiss, based on lack of jurisdiction, David's appeal of the circuit court's decision finding him in indirect civil contempt.

¶41 Case No. 1-13-1930 is affirmed; case No. 1-13-2577 is dismissed.