2022 IL App (2d) 210562-U
No. 2-21-0562
Order filed February 16, 2022

NOTICE: This order was filed under Supreme Court Rule 23(b) and is not precedent except in the limited circumstances allowed under Rule 23(e)(l).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re PARENTAGE OF J.N. and C.N.	)	Appeal from the Circuit Court
	)	of Du Page County.
	)	
	)	No. 18-F-419
	)	
	)	
(Ngochan Thi Doan, Petitioner-Appellee,	)	Honorable
v. Huycuong Tam Nguyen,	)	Louis B. Aranda,
Respondent-Appellant).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Bridges and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court vacated the COVID-19 protocols that the trial court imposed on respondent's parenting time because the court's manner of proceeding violated respondent's right to due process.

¶ 2 Following an evidentiary hearing, the trial court determined that petitioner, Ngochan Thi Doan, interfered with parenting time allocated to respondent, Huycuong Tam[1] Nguyen. In its order, the court addressed concerns that petitioner raised at the hearing but which she had not

[1] Respondent's middle name is listed as "Tan" in certain places in the record. We will use the name that respondent listed on his appellant's brief.

presented via proper pleadings. Specifically, the court required respondent to adhere to specified coronavirus (COVID-19) protocols when exercising his parenting time. Respondent appeals that portion of the order. For the following reasons, we vacate the portion of the order that respondent challenges.

¶ 3 I. BACKGROUND

¶ 4 The parties have two teenage children together. Petitioner lives in Illinois, and respondent lives in Indiana. In September 2019, the court entered an agreed allocation judgment and parenting plan that allocated parenting time between the parties.

¶ 5 In early 2020, respondent traveled to Vietnam to attend a funeral. Due to travel restrictions attendant to the COVID-19 pandemic, respondent was unable to return to the United States until September 2020. Around February 2021, respondent attempted to resume exercising his parenting time. Petitioner refused to allow respondent to do so. Among petitioner's excuses were concerns that respondent was unwilling to follow what she believed were necessary precautions to protect the children against COVID-19.

¶ 6 In April 2021, respondent filed a "verified petition for visitation interference and for attorney's fees and costs and other relief" (petition for visitation interference). Respondent pursued this petition in accordance with section 607.5 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/607.5 (West 2018)). Respondent did not mention COVID-19 in this petition, nor did petitioner do so in her answer to the petition.

¶ 7 In July 2021, petitioner filed a "motion for respondent to get Covid test" (COVID-19 motion). Petitioner alleged that the parties' children were "very concerned about visiting with [respondent] because he is not vaccinated for Covid; he does not take any Covid precautions; and, on information and belief, he is not getting vaccinated." According to petitioner, "[t]he children

are afraid to visit [respondent] at his home in Indiana unless [respondent] gets a Covid test and if [*sic*] he wears a mask when he visits with them." Petitioner asserted that the parties attempted to mediate this issue, but respondent told her that "he will not get a test unless [petitioner] pays for it." As her relief, petitioner requested that the court order respondent "to get a Covid test and share the result with [petitioner] and for [respondent] to wear a mask when he visits with his children." Petitioner did not cite any authority in her motion which would justify granting such relief.

¶ 8 Respondent moved to dismiss the COVID-19 motion pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)).[2] He argued that petitioner failed to cite any authority for her requested relief and failed to plead sufficient factual allegations to allow him to defend himself.

¶ 9 In her response to respondent's motion to dismiss, petitioner asserted that, during mediation, respondent "stated he would not be vaccinated for COVID and saw no need to take a COVID test or wear a mask when visiting with his children." As her authority for requesting the court to order respondent to get a COVID-19 test and to wear a mask around the children, petitioner relied on a provision in the parties' parenting plan that allowed the parties to petition for court relief if there was a material and substantial change in circumstances that affected the children's best interests and welfare.

¶ 10 On September 7, 2021, the court first held a hearing on respondent's motion to dismiss the COVID-19 motion. Respondent reiterated his argument that petitioner did not cite any authority in her motion. Respondent further argued that petitioner was seeking a restriction on his parenting

[2] Although neither party raised the issue, a motion to dismiss another motion is a "procedural nullity." *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 407 (2005).

time without alleging a statutory basis for doing so. Petitioner, in turn, proposed that the court's authority to grant the relief that she requested came from the above-mentioned provision in the parties' parenting plan. The trial court dismissed petitioner's COVID-19 motion, without prejudice, because petitioner did not cite any authority in her motion. The court mentioned that, once petitioner repleaded her motion, the parties' children could express whether they were concerned about visiting with respondent. The court added that it may consider appointing a guardian *ad litem* (GAL) "to discuss the matter with the kids so that the Court is aware what their concerns are and how best to address it." The court stated that, although petitioner's COVID-19 motion involved a novel issue, the court "can certainly address" the children's best interests, including "taking measures to make [them] feel safe, feel comfortable in seeing their dad." In its written order, the court granted petitioner 14 days to file an amended pleading and gave respondent 21 days thereafter to file an answer.

¶ 11 Immediately after ruling on respondent's motion to dismiss petitioner's COVID-19 motion, the court began an evidentiary hearing on respondent's petition for visitation interference. Respondent testified about how petitioner interfered with his efforts to exercise his parenting time. On direct examination, respondent mentioned COVID-19 only in the context of describing the various excuses that petitioner offered for refusing to facilitate his parenting time.

¶ 12 On cross-examination, petitioner's counsel did not question respondent about either his vaccination status or his present opinions about COVID-19 protocols when visiting his children. However, petitioner's counsel elicited testimony from respondent about the parties' respective living arrangements. Specifically, respondent testified that he lived with his sister, his brother-in-law, and his sister's two children; petitioner lived with her husband, her mother, the parties' two children, and two of petitioner's other children. Respondent denied that his son ever mentioned

wanting respondent to get a COVID-19 test. Respondent acknowledged sending a communication to petitioner at some point indicating that he would wear a mask for a visit with the children. At the conclusion of respondent's testimony, the court continued the matter to September 15, 2021, for the remainder of the hearing on respondent's petition for visitation interference.

¶ 13 On September 15, 2021, petitioner testified in opposition to respondent's petition for visitation interference. We will relate only the portions of petitioner's testimony that are relevant to the issue on appeal. Petitioner testified that the parties' children returned to in-person schooling in the fall of 2021, after attending school virtually since the beginning of the pandemic. At school, the children were required to wear masks, social distance, and test weekly for COVID-19. According to petitioner, the parties' children did not do well with virtual schooling, and they were happier now that they were back in-person. Petitioner did not believe that virtual schooling was in the children's best interests.

¶ 14 Petitioner further testified that she asked respondent to take COVID-19 tests and to get vaccinated. She also told respondent that the "kids were mad" (presumably about respondent's positions on these issues). Asked why she was nervous about respondent visiting the children, she expressed health concerns related to respondent not wanting to wear a mask, get vaccinated, take a COVID-19 test, or social distance around the children. Petitioner testified that it would make her, her family, and the parties' children comfortable with respondent exercising his parenting time if the court would order him to "get a Covid test and wear a mask." Petitioner stated that her beliefs about COVID-19 protocols came from mask mandates and what she saw on television. She acknowledged that an executive order issued by Governor Pritzker implementing COVID-19 restrictions stated that custody agreements still must be followed (no copy of any executive order was admitted into evidence).

¶ 15 Petitioner testified that she and respondent tried to mediate these issues in July 2021. During mediation, she asked respondent to get vaccinated, to take a COVID-19 test, and to wear a mask around the children, but respondent did not agree. Respondent said that he wanted her to pay him if he took a COVID-19 test.

¶ 16 In her argument in support of the petition for visitation interference, respondent's counsel focused on how petitioner wrongfully deprived respondent of his parenting time. Petitioner's counsel responded by emphasizing that the parties were at odds over COVID-19 protocols. The court did not ask respondent's counsel to provide a rebuttal argument.

¶ 17 The court granted respondent's petition for visitation interference, finding that petitioner had not complied with the parenting plan. The court ordered petitioner to provide make-up parenting time to respondent and to pay his reasonable attorney fees for having to file this petition. Although there was no pending petition or motion regarding COVID-19 protocols, the court believed that petitioner's and the children's concerns on those matters "should be addressed." The court did not provide a statutory citation, but it appears from the court's remarks that the court believed that its authority to implement COVID-19 protocols came from section 607.5(c)(9) of the Act (750 ILCS 5/607.5(c)(9) (West 2018)), which allows the court, upon finding that a parent has not complied with a parenting plan, to order "any other provision that may promote the child's best interests."

¶ 18 The court then ordered as follows:

> "So in addition to the makeup parenting time and in addition to reasonable attorneys fees be awarded [*sic*] to the Respondent, it is the order of this Court that it take into account the children's best interest and given the concern with the Respondent being unvaccinated for Covid virus, the Respondent is to wear a mask during parenting time when in close contact

> with the children, or at the Respondent's sole election and his sole option, he maybe [*sic*] tested for Covid within 72 hours in advance of each parenting time and provide proof of a negative result or show proof of vaccination. But that will be solely at his option, solely his election to do that, be tested for Covid or get vaccinated. Otherwise, he can simply comply by wearing a mask during parenting time when in close contact with the children. I believe that to be in the best interest of the children. I believe that this statute allows me to enter an order in the children's best interest, take into consideration what's been occurring over this Covid pandemic and continuing with this Delta virus that continues to have a hold on the way we interact with one other [*sic*]."

Paragraph 4 of the written order that the court entered on September 20, 2021—documenting the oral rulings made on September 15—outlined similar protocols but added that such protocols would remain in place so long as either Illinois or Indiana had mask mandates.

¶ 19 Immediately after the court issued its oral ruling on respondent's petition for visitation interference, petitioner's counsel noted that the court's ruling may have rendered moot the amended COVID-19 motion that petitioner intended to file that day.[3] The court continued the case

[3] Petitioner filed a "petition for COVID test and mask" at 4:41 p.m. on September 15, 2021. It is not clear whether petitioner filed that document before or after the court ruled on respondent's petition for visitation interference. In this new petition, petitioner invoked section 603.10 of the Act (750 ILCS 5/603.10 (West 2018)). That statute allows a court to restrict a party's parental responsibilities upon making a finding that such party "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 2018).

for a hearing on a petition for rule to show cause unrelated to the issues in this appeal. Although there was no discussion on the record regarding the appealability of the court's rulings regarding the COVID-19 protocols, the written order that was entered on September 20, 2021, indicated that it was "a final and appealable order pursuant to Illinois Supreme Court Rule 304."

¶ 20 On September 28, 2021, respondent filed a notice of appeal from the court's order of September 20.

¶ 21 II. ANALYSIS

¶ 22 Respondent challenges that portion of the September 20, 2021, order specifying the COVID-19 protocols surrounding his parenting time. He argues that the court placed a restriction on his parenting time without making the necessary findings and without proper notice to him. In the alternative, he argues that equity required imposing the restriction on both parties, not just him.

¶ 23 We first consider our jurisdiction. The trial court did not resolve all pending matters between the parties, so we do not have jurisdiction pursuant to Illinois Supreme Court Rule 303 (eff. July 1, 2017). See *In re Marriage of Crecos*, 2021 IL 126192, ¶ 45 ("[F]or purposes of appellate jurisdiction, unrelated postdissolution matters constitute separate claims, so that a final order disposing of one of several claims may not be appealed without a Rule 304(a) finding."). Respondent asserts that we have jurisdiction "pursuant to Supreme Court Rule 304," and petitioner did not file a brief in this court. Respondent's statement of jurisdiction is unhelpful, as Illinois Supreme Court Rule 304 (eff. Mar. 8, 2016) contains numerous potential bases for appellate jurisdiction.

¶ 24 The trial court did not make "an express written finding that there is no just reason for delaying either enforcement or appeal or both," so we do not have jurisdiction pursuant to Rule 304(a). Rule 304(b) contains six categories of orders that are appealable without such a finding.

Pertinent to this appeal, Rule 304(b)(6) allows for appeals involving "[a] custody or allocation of parental responsibilities judgment or modification of such judgment entered pursuant to the [Act] or Illinois Parentage Act of 2015 (750 ILCS 46/101 *et seq*.)." Our supreme court has construed Rule 304(b)(6) as follows:

> "Section 600(b) of the *** Act defines 'allocation judgment' as 'a judgment allocating parental responsibilities.' 750 ILCS 5/600(b) (West 2016). Section 600(d) then defines 'parental responsibilities' as 'both parenting time and significant decision-making responsibilities with respect to a child.' *Id.* § 600(d). Thus, under the *** Act, an allocation of parental responsibilities judgment is a judgment that allocates 'both parenting time and significant decision-making responsibilities with respect to a child,' and the 'modification of such judgment' would be any decision that modifies either of those two variables." *In re Marriage of Fatkin*, 2019 IL 123602, ¶ 29.

We determine that the portion of the September 20, 2021, order that respondent challenges is appealable pursuant to Rule 304(b)(6). The parties' original parenting plan did not contain any pandemic-related conditions with respect to respondent exercising his parenting time. The September 20 order, however, required respondent to adhere to specified COVID-19 protocols when exercising his parenting time. This was effectively a modification of the parenting plan. See *People v. Harris*, 2015 IL App (2d) 140616, ¶ 17 (a court considers the substance of the order when determining whether a matter is appealable pursuant to Rule 304(b)(6)).

¶ 25 Having confirmed our jurisdiction, we turn to the merits. As mentioned above, petitioner did not file a brief in this court. In this situation, a reviewing court has three options:

> " '(1) it may serve as an advocate for the appellee and decide the case when the court determines justice so requires, (2) it may decide the merits of the case if the record is

> simple and the issues can be easily decided without the aid of the appellee's brief, or (3) it may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record.' " *In re Marriage of Andres*, 2021 IL App (2d) 191146, ¶ 43 (quoting *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009)).

The record here is simple, and the issues can be easily decided without the aid of an appellee's brief.

¶ 26 Respondent maintains that the COVID-19 protocols that the court implemented amounted to a restriction on his parenting time. From this premise, respondent reasons that the trial court was required to apply the serious-endangerment standard of section 603.10(a) of the Act (750 ILCS 5/603.10(a) (West 2018)). We need not reach those issues, as we agree with respondent's other point that the court's manner of proceeding did not give respondent fair notice and thus violated his right to due process. "Due process entails an orderly proceeding wherein a person is served with notice, and has an opportunity to be heard and to present his or her objections, at a meaningful time and in a meaningful manner, in a hearing appropriate to the nature of the case." *Village of Vernon Hills v. Heelan*, 2015 IL 118170, ¶ 31. We review *de novo* claims of procedural due process violations. *Heelan*, 2015 IL 118170, ¶ 31.

¶ 27 Respondent did not mention COVID-19 in his petition for visitation interference, nor did petitioner do so when she answered that petition. Petitioner instead raised the issue in her COVID-19 motion. On September 7, 2021, the trial court dismissed that motion without prejudice. At that time, the court gave petitioner 14 days to file an amended pleading, and the court gave respondent 21 days thereafter to answer the amended pleading. The court suggested that, before it would address COVID-19 protocols, it anticipated hearing from the children and appointing a GAL.

¶ 28 Rather than waiting for the amended pleadings and then appointing a GAL, the court, without prior notice to the parties, and without requesting input from respondent's counsel, imposed COVID-19 protocols in the context of ruling on respondent's petition for visitation interference. By circumventing the process that it said would apply, the court deprived respondent of his opportunity to present evidence and argument on the topic of COVID-19 protocols. Indeed, the evidentiary record was never developed so that the court could make an informed decision on these issues. The court also *sua sponte* identified a statutory basis for ordering COVID-19 protocols. We hold that this violated respondent's right to due process. See *In re Marriage of Suriano*, 386 Ill. App. 3d 490, 494 (2008) (trial court violated a party's right to due process where it *sua sponte* terminated a joint parenting agreement in the course of ruling on a petition for rule to show cause); *In re Custody of Ayala*, 344 Ill. App. 3d 574, 587-88 (2003) (trial court violated a party's right to due process where it set a briefing schedule and a hearing date on a matter but then adjudicated the matter at an earlier date in a party's absence).

¶ 29 Accordingly, we vacate paragraph 4 of the September 20, 2021, order, which specified the COVID-19 protocols that would apply when respondent exercised his parenting time. We express no opinion on the trial court's authority to establish COVID-19 protocols or the propriety of doing so here.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we vacate paragraph 4 of the September 20, 2021, order.

¶ 32 Order vacated.