

**This Order Is Not Precedential
And is Not To Be Cited**

No. 2--00--1286

FILED

AUG 17 2001

LOREN J. STROTZ, CLERK
APPELLATE COURT 2nd DISTRICT

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<u>In re</u> MARRIAGE OF)	Appeal from the Circuit Court
JAIME LOPEZ-CERVANTES,)	of Kendall County.
)	
Petitioner-Appellee,)	
)	No. 00--D--19
and)	
)	
MARY LOPEZ-CERVANTES,)	Honorable
)	Thomas E. Hogan,
Respondent-Appellant.)	Judge, Presiding.

RULE 23 ORDER

Petitioner, Jaime Lopez-Cervantes (Jaime), initiated these proceedings in the circuit court of Kendall County seeking the dissolution of his marriage to respondent, Mary Lopez-Cervantes (Mary). Following a hearing on the petition, the trial court entered a judgment of dissolution and awarded custody of the parties' two sons, 10-year-old Matthew and 5-year-old Michael, to Jaime. On appeal, Mary argues that the trial court improperly based its custody decision on the report of the guardian ad litem for the children. She also contends that the trial court should have granted her motion for a new trial to present evidence that because of a pending workers' compensation claim she was financially able to provide for the children's needs. We affirm.

Because the parties are familiar with the background of this appeal, we omit a detailed summary of proceedings below and will discuss the relevant facts in connection with the issues to which

they pertain. The general principles governing custody decisions in dissolution proceedings are well established. Section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602(a) (West 2000)) provides that the trial court shall determine custody in accordance with the best interest of the child upon consideration of all the relevant factors, including various factors enumerated in the statute. A determination of custody will not be overturned unless the trial court's decision is against the manifest weight of the evidence. In re Marriage of Karonis, 296 Ill. App. 3d 86, 88 (1998).

We first consider Mary's argument concerning the report of the guardian ad litem for the children. Mary contends that the trial court relied heavily on the report in awarding custody to Jaime. According to Mary, this was error because the guardian ad litem improperly based her recommendation on Mary's cohabitation with her boyfriend and her apparent lack of financial resources. Mary argues that it was improper to consider her cohabitation because it was not shown to have an impact on the best interests of her children. Mary also argues that the guardian ad litem's conclusion that she lacked the financial means to care for the children is factually incorrect.

We note that the record on appeal does not contain any report of proceedings for the hearing on the petition for dissolution. It is well established that the appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and any doubts that may arise from the incompleteness of the record will be resolved against the

appellant. Foutch v. O'Bryant, 99 Ill. 2d 389, 391-92 (1984). However, if the errors of which the appellant complains can be resolved from the record as it stands, the failure to provide a proper report of proceedings will not defeat the appellant's claims. McGee v. State Farm Fire & Casualty Co., 315 Ill. App. 3d 673, 679-80 (2000). Here, for the most part, Mary's argument concerns the trial court's application of the law to the facts, rather than the sufficiency of the evidence as a whole or any discrete factual determinations. To the extent that the trial court's conclusions of law can be ascertained from the common-law record, a transcript of the testimony presented at the hearing on the petition for dissolution is not essential for review. However, any doubts arising from the absence of a report of proceedings must be resolved against Mary.

While Mary seems to insinuate that the trial court simply adopted the guardian ad litem's report in lieu of an independent inquiry into the best interests of the children, the record shows that the court considered the report along with the evidence presented at trial in reaching its decision. A trial judge is presumed to know the law (People v. Rhoden, 299 Ill. App. 3d 951, 960-61 (1998)) and to base his or her decision on competent evidence (Wildman, Harrold, Allen & Dixon v. Gaylord, 317 Ill. App. 3d 590, 597 (2000)). We find nothing in the record to overcome these presumptions.

Moreover, Mary grossly mischaracterizes the guardian ad litem's report. The report clearly indicates that Mary and her boyfriend did not live together at the time of the guardian ad

litem's investigation. The only reference in the report to cohabitation appears in the recommendation that the children should spend their summers with Mary provided that there should be no cohabitation between Mary and her boyfriend. Indeed, the only reference to any sexual conduct appears in connection with the guardian ad litem's summary of her interview with Jaime. The report mentions that Jaime advised the guardian ad litem of his suspicion that Mary's boyfriend was spending the night in Mary's home while the children were present, but the report does not indicate that the guardian ad litem accepted these suspicions as true or formed her custody recommendation on this basis.

As far as Mary's boyfriend is concerned, the principal focus of the report is not on issues of sexual conduct, but on the relationship between Mary's boyfriend and her children. According to the report, Mary had indicated that her boyfriend was very involved with her sons and they seemed to enjoy his presence. On the other hand, Jaime reported that the children had complained that they do not like Mary's boyfriend and would prefer to spend time with Mary, not her boyfriend, when they visit with her. The parties' older son, Matthew, told the guardian ad litem that he had complained to Mary about the constant presence of her boyfriend, and Mary responded that he had better get used to it because her boyfriend would probably be around for a long time. This information is germane to the custody determination under section 602(a)(3) of the Act, which directs the court to consider "the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly

affect the child's best interest." (Emphasis added.) 750 ILCS 5/602(a)(3) (West 2000).

Mary's relationship with her boyfriend is only one of many subjects the report addresses. As Jaime correctly observes, the report touches on a variety of other subjects relevant to the determination of the children's best interests, including the wishes of the children and the parties as to custody, the interrelationship and interaction of the children with each parent and with each other, the children's adjustment to the home and school environment, violence or the threat of violence by the potential custodians, and the willingness of each parent to foster a relationship between the children and the other parent. Finally, as Jaime notes, nothing in the report suggests that the guardian ad litem considered Mary's financial status in formulating her recommendation. Accordingly, we find no error.

Mary next argues that the trial court erred in denying her motion for a new trial to present evidence concerning what she characterizes as a "lucrative" workers' compensation claim. Mary contends that this evidence relates to her financial status and is therefore germane to the issue of custody. The trial court did not err in denying the motion. Motions for new trials in nonjury cases are governed by section 2--1203 of Code of Civil Procedure (735 ILCS 5/2--1203 (West 2000)). This court has observed that a motion for a new trial under section 2--1203 " 'is committed to the trial court's discretion [citation], and where based on newly discovered evidence, it must appear that due diligence was used to discover the evidence for trial and that the evidence is so conclusive that

it would probably change the result.' " Rybak v. Dressler, 178 Ill. App. 3d 569, 589 (1988), quoting In re Marriage of Rosen, 126 Ill. App. 3d 766, 775 (1984). Rosen observed that " '[i]t cannot be the practice of courts to allow important matters to go to trial, and because one party is not satisfied with the results of it, let [that party] go out and try to get facts which will enable him [or her] to do better at another trial, and rely upon such after-ascertained matters as a basis for a new trial.' " Rosen, 126 Ill. App. 3d at 775, quoting Chicago & Alton R.R. Co. v. Raidy, 203 Ill. 310, 317 (1903).

We note that after the hearing on the petition for dissolution Mary retained a new attorney who represented her in connection with the motion for a new trial and represents her on appeal. At the hearing on the motion for a new trial, that attorney stated that "[n]either attorney chose to bring forward" evidence of the workers' compensation claim at the hearing on the petition for dissolution. Accordingly, this is not newly discovered evidence that Mary failed to uncover despite a diligent inquiry; it is evidence that Mary was aware of and that she deliberately chose not to present. Moreover, in the absence of a report of proceedings of the hearing on the petition for dissolution, it is impossible to say whether this evidence could have affected the outcome of the case.

For the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed.

Affirmed.

McLAREN, J., with GEIGER and CALLUM, JJ., concurring.