

No. 2—10—0867  
Order filed March 3, 2011

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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MARSE VISNEVAC,	)	Appeal from the Circuit Court
	)	of Lee County.
Petitioner-Appellant,	)	
	)	
v.	)	No. 09—F—23
	)	
JENNIFER MARCINEK,	)	Honorable
	)	Daniel A. Fish,
Respondent-Appellee.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices Hutchinson and Burke concurred in the judgment.

**ORDER**

*Held:* Where father had few visits with his children during first five years he was in prison, and children demonstrated substantial anxiety and distress following visits to father in prison, trial court did not abuse its discretion in denying father's petition for further visitation at prison.

The petitioner, Marse Visnevac, and the respondent, Jennifer Marcinek, have two children together: Marse, born January 16, 2000; and Taylor, born November 25, 2002. The petitioner is now in prison as the result of several felony convictions. He filed a petition for visitation with his children at the prison. The trial court denied the petition following a hearing, and the petitioner appealed. We affirm.

The petitioner was convicted of manufacture or delivery of cocaine (two counts), and possession of heroin. He had previously been incarcerated for burglary and possession of a stolen vehicle. His projected release date from prison is November 10, 2015.

Before he entered prison on May 10, 2003, the petitioner lived with the respondent and his children. His son Marse was three years old when the petitioner went to prison; his daughter Taylor was about six months old. At the time of the hearing in this case, Marse was ten years old and Taylor was seven. The respondent did not dispute that the petitioner had a close relationship with Marse before his incarceration.

Beginning in 2004, the petitioner's children visited him at the prison occasionally. The respondent testified at trial that she had records of six visits between February 2004 and November 2007. According to her records, she brought the children on the first two visits in 2004, and in the next few years the children were brought twice by the petitioner's aunt Nora Visnevac and twice by a family friend, Karina Klima. Nora Visnevac testified that she recalled bringing the children for visits on four or five occasions, and Karina Klima recalled taking them to visit the petitioner a "few" times. The last visit was in November 2007.

In April 2009, the petitioner filed a petition for visitation. There was some initial delay while the petitioner's paternity of the children was formally established through a verified acknowledgment of paternity. In May 2010, the petitioner requested that a guardian *ad litem* (GAL) be appointed for the children. The trial court denied the request, stating that a GAL was not necessary to protect the children's interests in the matter, which was one of visitation and not custody, and noting that the petitioner (who was appearing *in forma pauperis*) would be unable to contribute to the cost of a GAL and therefore that cost would fall solely on the respondent.

The matter proceeded to a two-day hearing on July 14 and 29, 2010. The initial day of testimony included the evidence summarized above. Explaining why she stopped the children's visits after November 2007, the respondent testified that, beginning in about 2005, Marse would exhibit unusual behavior for some time following his visits with the petitioner, such as crying easily, refusing to go into the basement (that normally he entered without fear), and not wanting to play with his friends. Taylor would be withdrawn the day following the visit, and also showed signs of anxiety such as bed-wetting. Taylor began asking the respondent repeatedly whether she would have to go on visits or have phone calls with the petitioner, and whether she would have to visit the petitioner's aunts' houses (where the phone calls with the petitioner usually occurred). The respondent testified that she did not connect the children's behavioral changes to the visits until the fall of 2007, when she was assisting at Marse's classroom shortly after a visit and his teacher asked her why Marse was so unusually withdrawn. Also in 2007, according to the respondent, the children began telling her that they did not like going to see the petitioner, that they were frightened by the barbed wire and heavy metal doors they encountered at the prison, and by being searched. They also told her that they were sometimes frightened by the petitioner, although they did not provide any explanation of this. The respondent stated that, while the visitation petition was pending, she asked Marse if he would like to visit his father, emphasizing that she would not be at all upset if he would like to do so. Marse responded that he did not want to visit and did not really know the petitioner, who was more like a stranger to him.

The respondent testified that she stopped the visits because of these effects on the children, and added that it was difficult for her to reconcile the visits with her teaching the children that prison was a place they did not ever want to be. She stated that she did not speak negatively about the

petitioner to the children or suggest that showing affection or loyalty to the petitioner would hurt her. Since she stopped the visits, Marse was more focused in school and his grades had improved (he now got As and Bs), and Taylor's bed-wetting stopped as soon as Taylor learned that she would not be visiting the petitioner any more. The respondent agreed that the petitioner had been a caretaker for the children during the time before he went to prison, although she felt he was not necessarily always a good caretaker, citing one occasion on which the petitioner took Marse (who was 11 months old at the time) to a drug house with him to transact business. The respondent also acknowledged continuing efforts by the petitioner to maintain contact with the children, including sending birthday presents, cards and letters about six times a year. She testified that Marse always threw the letters away unopened, but she removed them from the trash and saved them for him for the future. Taylor read her letters from the petitioner and then threw them away; again, the respondent took them out of the trash and saved them.

The respondent presented two witnesses, her aunt and uncle Maryann and Dennis Marcinek, who testified that they used to see the children on some of the weekends when the children would visit the petitioner, because their home was near the prison. Maryann testified that, when Marse was 5 years old, he would tell her that he did not like to go on the visits because he was bored and the prison was scary. Maryann stated that the visits made Marse "sad" because he was close to the petitioner, and that Marse would be "low-key" (which was unusual for Marse) afterwards. Dennis testified that he had never talked with either of the children about their father or their visits, but once when he and Marse were fishing together, Marse was so markedly withdrawn that Dennis asked his wife what was up, and Maryann told him to ask the respondent, who told him that the children had just been visiting the petitioner.

In addition to Nora Visnevac and Karina Klima, Mildred Rowe (the petitioner's aunt) and Elaine Kajar testified for the petitioner. All of these witnesses testified that the petitioner and the children had a good relationship, that the petitioner and Marse were especially close before he went to prison, and that during all of the time that the children spent with them (many of them watched the children regularly; the respondent is a registered nurse) they never observed the children upset about, or heard them complain about, visiting or receiving phone calls from the petitioner. They testified that they always told the children that they did not have to do anything they did not want to do with the petitioner, whether it was visiting or talking on the phone with him. On cross-examination, both Mildred Rowe and Karina Klima acknowledged that they had seen Taylor become very upset when they mentioned that the children would likely be going with a particular cousin to visit the petitioner, but they ascribed this to the children's dislike of the cousin, who was disliked by many of the children in the family. All of these witnesses testified that they would be willing to assist with transporting the children for visits.

The petitioner testified last. He stated that he did not want his children to visit him if they did not want to, but he believed that stopping the visits was the respondent's choice, not the children's. He believed that the respondent had begun alienating his children's affections from him at the same time that she began a new romantic relationship in 2007. In accord with the preferences of both parties, the children did not appear, either to testify or for *in camera* interviews with the court.

At the close of the evidence, the trial court denied the visitation petition, stating that the petitioner's contact with all of his family, not just his children, was limited due to the simple fact of his imprisonment. The trial court stated that the respondent had the right to do what she believed

was appropriate “in caring for her children and protecting them and bringing them up,” and that if she believed that it was in their best interests not to take the children to the Department of Corrections, then she was “free to do so.” The court then continued:

“Likewise I believe the evidence here has amply established that they are afraid and that it has impacted them both physically and emotionally when visiting the prison. I know that’s not what Mr. Visnevac wants to hear but there’s been no evidence offered to convince me otherwise, professionally or individually, that it’s in their best interests to attend prison. Certainly the surroundings and circumstances of visiting prison is probably not in any child’s best interests. Certainly the Court would be open to consideration if there was [*sic*] extenuating circumstances and presentation of evidence and/or expert testimony that it is in the child’s best interests, but I have not heard that here. I’ve only heard layman testimony and it all points to the fact it is not in their best interests and may seriously jeopardize their emotional and physical well-being in the sense of the reaction at least with the bed-wetting.”

The order entered on that date stated that the respondent had “presented ample evidence that the parties’ children are afraid of visiting” the petitioner and made two findings: first, that it was not in the best interests of the children to visit the petitioner in prison; and second, that visiting the petitioner would seriously endanger the children’s physical, mental, moral and emotional health.

The petitioner filed a timely notice of appeal. On appeal, he argues that: (1) the trial court should have entered a default judgment against the respondent when she failed to appear for a progress call ten days after she was served; (2) the trial court erred in not appointing a GAL; and (3) the trial court erred in finding that visits with him in prison were not in the best interests of the children and substantially endangered their mental, physical, moral and emotional health. All of

these rulings are matters within the trial court's discretion. *See Wilkin Insulation Co. v. Holtz*, 186 Ill. App. 3d 151, 155 (1989) (entry of default judgment); *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 182 (2002) (appointment of a GAL); *Frail v. Frail*, 54 Ill. App. 3d 1013, 1015 (1977) (visitation). Accordingly, we will reverse only if the trial court has abused that discretion. A trial court abuses its discretion when its ruling is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the trial court, (*People v. Anderson*, 367 Ill. App. 3d 653, 664 (2006)), or where its ruling rests on an error of law (*Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 24 (2009)).

We note as a preliminary matter that the respondent has filed no brief responding to the petitioner's assertions. However, as the issues are relatively straightforward, we may consider the arguments without the appellee's brief pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (a reviewing court should decide the merits of an appeal where the record is simple and the claimed error is such that a decision can be made easily without the aid of an appellee's brief).

We find no error in the trial court's decision not to enter a default judgment against the respondent based upon her failure to appear at the July 8, 2009, progress call. The petitioner filed his petition on April 9, 2009. Thereafter the clerk of the circuit court set a date approximately 90 days after the date of filing for a progress call (*i.e.*, July 8), at which the parties were to appear and advise the court of the status of the case. However, the respondent was not served with the summons and petition until June 29, 2009. Although the summons with which the respondent was served advised her of the progress call, it also gave her 30 days (or until July 29) to file her appearance, and therefore she had no obligation to appear before that date. Supreme Court Rule 181(a) (eff. Feb. 10,

2006) (a defendant may file her appearance at any time within the 30-day period provided in the summons, which begins to run on the day after service of the summons). As the respondent was not required to file her appearance until after the date of the progress call, her failure to appear at the progress call was not grounds for entry of a default judgment. *See* 735 ILCS 5/2—1301(d) (West 2008) (if a party has not appeared within the time allotted, the court may enter a default judgment).

The petitioner’s second argument on appeal is that the trial court abused its discretion in denying his request to appoint a GAL. “[T]here is no express statutory requirement that a trial court appoint a GAL or child representative in every parentage proceeding.” *In re Marriage of Nienhouse*, 355 Ill. App. 3d 146, 152 (2004), citing *In re Marriage of Koenig*, 211 Ill. App. 3d 1045, 1051 (1991); *Klawitter v. Crawford*, 185 Ill. App. 3d 778, 788 (1989). The Illinois Parentage Act of 1984 (the Parentage Act) provides that, “[i]f any party is a minor, he or she may be represented by” either his or her parent or guardian, or a guardian *ad litem* appointed by the court. (Emphasis added.) 750 ILCS 45/7(c) (West 2008). Neither Marse nor Taylor was a party to the petitioner’s action, which was brought under the Parentage Act. Even if they had been, the Parentage Act permits but does not require the appointment of a GAL. Moreover, the trial court’s consideration of the fact that this action is for visitation rather than custody was proper. Under section 14 of the Parentage Act (750 ILCS 45/14(a)(1) (West 2008)), courts are to consider the provisions of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/101 *et seq.* (West 2008)) in making their determinations of issues (including visitation) that are raised in parentage proceedings; and section 601 of the Marriage Act specifically authorizes the court to appoint a GAL for the child in a custody proceeding, but makes no reference to the need for such an appointment in other proceedings involving the child (750 ILCS 5/601(f) (West 2008)).

The petitioner argues that the trial court should nevertheless have appointed a GAL because the respondent had “an interest and desire” in preventing the children from visiting with him, because she wished to cement her new romantic relationship with someone else. A trial court may have a duty to appoint a GAL if there is a clear conflict between the interests of the custodial parent and the minor whose visitation rights with the noncustodial parent are at stake. *See McDonald v. McGowan*, 163 Ill. App. 3d 697, 699 (1987). Here, however, there is no evidence supporting the petitioner’s argument that the respondent sought to prevent visitation in order to advance her own interests, regardless of her children’s wishes or interests. Although the respondent testified that “prison is not a place I want them to come,” she explained that that was because she believed that the visits were “an emotional, physical, and mental strain on them” because the experience of visiting the petitioner in prison, “[t]he way they’ve described the barbed wires, the facility, Mr. Visnevac himself being frightening to them,” was “just too much for them.” This testimony, coupled with the undisputed fact that the respondent did not oppose visitation in the past, demonstrates a proper concern for the children’s interests rather than a preoccupation with personal interests. As the trial court heard no evidence suggesting the children's interests were not properly represented, it was under no obligation to appoint a GAL (*Marriage of Nienhouse*, 355 Ill. App. 3d at 152), especially as the petitioner was unable to contribute to the cost of such an appointment.

Finally, we note that, if the petitioner were concerned that the trial court was not hearing the children’s true desire for visitation, he could have requested that the trial court interview the children *in camera* outside the presence of the parties. The children were old enough to be able to articulate their own feelings, and an interview outside the presence of their parents generally would not be unduly traumatic for children. Indeed, the trial court inquired whether either party desired such an

interview to take place, but both parties stated that they did not wish such an interview. Under these circumstances, the trial court did not abuse its discretion in declining to appoint a GAL.

Having disposed of the petitioner's challenges to the trial court's pretrial rulings, we turn to the petitioner's central contention on appeal, that the trial court erred in finding, after the hearing, that the children's physical, mental, moral and emotional health would be seriously endangered by ordering visitation at the prison. (As this is the standard that must be met in order to restrict parental visitation (750 ILCS 5/607(a) (West 2008)), we put aside the trial court's findings related to the children's best interests.) The petitioner first attacks this finding on the basis that the trial court raised the issue of serious endangerment *sua sponte*, as the respondent did not expressly request such a finding in the pleadings and motions she filed. We must reject this argument, because the "serious endangerment" standard is the law that must be applied when one parent seeks visitation and the other parent seeks to restrict visitation. 750 ILCS 5/607(a) (West 2008). In this situation, the trial court correctly determined that, in order to resolve the issue raised by the petitioner himself in his petition—whether his children should visit with him at the prison—it was required to determine whether the respondent's cessation of such visitation was justified on the ground that it would seriously endanger the children's physical, mental, moral or emotional health. Thus, in this case, the trial court did not *sua sponte* raise an argument that was never advanced by the parties; rather, it merely applied the correct standard to resolve the issues raised by the parties themselves.

The petitioner also attacks the trial court's finding that visits would seriously endanger the children's physical, mental, moral and emotional health. In a bench trial, the trial court sits as the trier of fact, hearing the witnesses and reviewing the direct presentation of the evidence, and it therefore is in the best position to make credibility determinations and factual findings. *In re*

*Marriage of Matchen*, 372 Ill. App. 3d 937, 946 (2007). We therefore will not reverse the judgment in a bench trial unless it is against the manifest weight of the evidence; that is, unless "the opposite conclusion is clearly evident or the [factual] finding is arbitrary, unreasonable, or not based in evidence." *Samour, Inc. v. Board of Election Comm'rs of the City of Chicago*, 224 Ill. 2d 530, 543 (2007).

The petitioner attacks the trial court's finding that visitation would have a substantial deleterious effect on the children's physical health on the ground that the court relied on the "unsupported testimony" of the respondent that Taylor suffered bed-wetting that appeared to be linked to visits with the petitioner. However, testimony need not be corroborated in order to be considered, and unless it is inherently contradictory or unreliable, a factfinder may rely on uncorroborated testimony in reaching its decision. *See, e.g., People v. Siguenza- Brito*, 235 Ill. 2d 213, 228 (2009) (if it is positive and credible, the testimony of a single witness is sufficient to support a criminal conviction). Here, the trial court accepted as credible the respondent's testimony regarding Taylor's bed-wetting, and we see nothing in the record suggesting that this credibility determination was against the manifest weight of the evidence. *Samour*, 224 Ill. 2d at 543. Moreover, the respondent's testimony that Taylor displayed substantial anxiety about the prospect of visits with the petitioner was confirmed by Mildred Rowe and Karina Klima, although they ascribed her crying and upset demeanor on two occasions to a different aspect of the planned visit. Thus, the trial court's finding that visitation would seriously endanger the physical health of at least one of the children was not against the manifest weight of the evidence. *Id.*

Moreover, as the petitioner himself points out, visitation may be restricted upon a finding that any one of the four aspects of the children's health—physical, mental, moral or emotional—will be

seriously endangered. 750 ILCS 5/607(a) (West 2008). Thus, regardless of whether visitation would endanger the children's physical health, a finding of serious endangerment as to any of the other three aspects of the children's health would be sufficient to support the denial of the petitioner's petition for visitation. The record in this case supports the trial court's characterization of "ample" evidence that the children were increasingly afraid and anxious about visiting their father at the prison, and thus that visitation would have a substantial negative impact on the children's emotional health. We therefore refuse to disturb this finding on appeal.

In arguing that the trial court abused its discretion in denying his visitation petition, the petitioner relies on *Frail*, a case which established the principle that a parent does not automatically lose the right to visit with her children upon incarceration. In that case, the imprisoned mother had been the custodial parent for the children before her imprisonment and had a close relationship with them, and the record reflected that visits could be held in a "non-prison environment" that was available at the Dwight Correctional Center. *Id.*, 54 Ill. App. 3d at 1015-16. Based upon both of these factors, the trial court denied the father's petition to modify the parent's divorce decree, and the appellate court upheld the trial court's determination.

Although the principle espoused in *Frail* had been widely confirmed, the result it reached appears to be unique in prison visitation cases. *In re Parentage of Sims*, 308 Ill. App. 3d 311, 313 (1999) (listing similar cases and noting that "[t]he *Frail* case seems to be the only reported case in Illinois allowing visitation with a parent at a correctional center"). For while the "[i]mprisonment of a parent need not always cause visitation between that parent and his or her child[ren] to be barred or restricted, \*\*\* a parent's imprisonment also does not create an automatic right to visitation at a prison." *Id.* (citations omitted). The issue of visitation in a prison setting is a fact-intensive

determination that looks at several factors including the nature of the relationship between the parent and children, the impact of the visits on the children (including the travel time involved), and the facilities available for visits at the particular correctional institution. *See id.* at 313-14; *Woods v. Woods*, 147 Ill. App. 3d 772, 774-75 (1986); *In re Marriage of Griffiths*, 127 Ill. App. 3d 123, 1125 (1984). Indeed, the appellate court in *Frail* commented that “courts recognize that the welfare of the children is the paramount consideration in determining whether the visitation rights of the non-custodial parent should be denied.” *Frail*, 54 Ill. App. 3d at 1015. The trial court in this case clearly considered the welfare of Marse and Taylor as the most important consideration in its decision. Moreover, the strength of the petitioner’s relationship with his children, an important factor under the case law, is minimal in this case. Although by all accounts Marse had a close relationship with the petitioner prior to his incarceration, in the seven years since then Marse has seen the petitioner only about a half dozen times. The petitioner’s relationship with Taylor is even more attenuated—as she was a baby when the petitioner entered prison, those sporadic contacts spread over seven years are likely to be the sole ones that she can remember. In light of all of these factors, the trial court’s decision was not an abuse of discretion.

The petitioner also contends that the trial court was biased against him because he was a prisoner and appeared *pro se*. However, the only evidence of this bias that he can point to is that the trial court began its ruling by focusing on the fact of the petitioner’s incarceration, and allegedly allowed the respondent’s attorney to lead the witnesses she questioned during the hearing. We have reviewed the record carefully and find no evidence of bias against the petitioner. The trial court’s mention of the petitioner’s incarceration was not inappropriate, as the children’s reaction to that incarceration was the primary factor mitigating against the usual presumption in favor of visitation.

Moreover, the petitioner himself concedes that the trial court “made some allowances” for him and “even sustained most of [his] objections.” Our own examination of the record reveals a careful regard on the part of the trial court for the petitioner’s rights. Thus, we reject the petitioner’s assertion of bias.

The remaining arguments raised by the petitioner on appeal are either addressed through, or are mooted by, our resolution of the arguments laid out above, with the exception of one final argument. The petitioner contends that the written order issued by the trial court on July 29, 2010, conflicted with its verbal ruling in two respects. First, he contends that the trial court did not verbally find that visitation with him at the prison would seriously endanger the children’s physical, mental, moral and emotional health, but only that it “may seriously jeopardize their emotional and physical well-being.” Examining the trial court’s remarks as a whole, we find that the written order, in which the trial court found that visitation “would endanger seriously the children’s physical, mental, moral, and emotional health,” is consistent with its verbal ruling. Accordingly, as the language of the written order does not conflict with the verbal ruling, and was approved and entered by the trial court as an expression of its ruling, the written order must stand. The petitioner’s second contention is that this finding in the written order is unduly broad, because the order states that *any* visitation with the petitioner (not merely visitation at the prison) would seriously endanger the children’s health. We agree that the trial court’s verbal remarks reflect that it intended only to find that visiting the petitioner at the prison would seriously endanger the children’s health, and do not reflect any intent to restrict the petitioner’s visitation rights once he is released from prison. That question is best left until such time as the petitioner is released from prison and seeks to renew his visitation. Therefore, pursuant to Supreme Court Rule 615(b) (eff. Jan. 1, 1967), we modify

paragraph 4 of the order entered July 29, 2010, to read: “Visitation with the petitioner at the prison would endanger seriously the children’s physical, mental, moral, and emotional health.”

For all of the foregoing reasons, the judgment of the circuit court of Lee County is affirmed as modified.

Affirmed as modified.