

NOTICE

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NO. 4-10-0822

Order Filed 3/14/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of)	Appeal from
CHRISTINE E. HAGEMAN,)	Circuit Court of
Petitioner-Appellee and)	McLean County
Cross-Appellant,)	No. 02D87
and)	
TODD E. HAGEMAN,)	Honorable
Respondent-Appellant and)	David W. Butler,
Cross-Appellee.)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

Held: Where the evidence presented at trial supported a finding that a substantial change of circumstances had occurred since the entry of the last child-custody order, but that the children's best interests would not be served by a change of custody, the trial court did not err in denying the petition to modify.

I. BACKGROUND

Petitioner, Christine Hageman, and respondent, Todd Hageman, were married in 1987. They had four sons: Foster, born April 24, 1995; Brody, born December 14, 1997; Nathan, born February 4, 2000; and Jonas, born May 14, 2002. We will refer to the parties by their first names for ease and clarity. In February 2002, Christine filed a petition for a dissolution of marriage from Todd seeking, *inter alia*, custody of the four boys. The divorce proceedings followed an incident of domestic violence on October 30, 2001. At the time, Foster was six, Brody was three, Nathan was almost two, and Christine was pregnant with Jonas. Todd was intoxicated and began fighting with Christine, who

fought back while holding Nathan in her arms. Foster and Brody stood by and witnessed the incident. Christine fled with the boys. Todd eventually pleaded guilty to two charges stemming from the incident and was sentenced to two years' probation. Christine was awarded temporary custody with Todd initially receiving supervised visits, though by December 2002, he had been awarded unsupervised but limited visitation.

In January 2003, the trial court entered a judgment of dissolution on grounds only, reserving issues related to the children. In March 2003, Todd began accusing Christine of interfering with his scheduled visitation. Often Christine would report that the children were sick or they just did not want to attend. As a result, issues related to visitation were frequently litigated by the parties.

Throughout 2004 and 2005, Todd's visits with the boys were, for the most part, unremarkable. Though Foster, in particular, often missed visits due to his unwillingness to attend. He had been diagnosed with post-traumatic stress disorder (PTSD) as a result of the October 2001 domestic-violence incident. He and Brody began receiving counseling at For Children's Sake, a clinic designed to assist victims of domestic violence with their mental-health needs.

In July 2006, the court entered a final judgment, awarding Christine sole custody and Todd a visitation schedule, which, over the course of four months, was increased until he received all four boys every Wednesday from 4 p.m. to 7 p.m. and every other weekend from Friday at 4 p.m. to Sunday at 7 p.m. He also received summer and holiday visitation.

In August 2008, Todd filed a petition to modify custody, alleging Christine was interfering with his visitation and that she was unable and unwilling to facilitate Todd's

relationship with the boys. He requested full custody. The trial in this matter began in December 2009 and continued over the course of 15 separate hearing dates through August 2010. The trial court heard extensive testimony from a number of witnesses, reviewed a voluminous amount of documents and other exhibits, and announced its final decision on August 19, 2010, denying Todd's petition.

The evidence presented at trial generally revealed that Foster, who was 15 at the conclusion of these proceedings, had a deteriorating relationship with Todd. Despite intensive counseling, Foster has remained adamant about not wanting a relationship with his father. He has chosen, for the most part, not to participate in visits. In 2008 and 2009, he visited his father a maximum of five times each year. The two youngest boys, Nathan and Jonas, regularly participate in visits with Todd and seem to have a good relationship with him. However, the middle child, Brody, is, as the court described, "in a state of flux." The concern of the parties, professionals, and the trial court has been focused on Brody's relationship with Todd and ultimately, Foster's influence on that relationship. It appears that Brody's relationship with his father has been gradually deteriorating. Brody has begun expressing an unwillingness to attend visits with Todd and, most recently, has ultimately chosen not to attend. As a result of this trend, the gist of this litigation was to implement a plan to salvage Brody's relationship with Todd, and to prevent possible future deterioration of Nathan's and Jonas's relationship based solely on the influence of their older brothers.

Both Christine and Todd have remarried. Christine married Wes, whose last name was not readily available in the record, and together they had twin daughters, Kay and Victoria. Todd married Heather and together they had two boys, Cameron and Grant. We

summarize the specific trial evidence which we feel is most pertinent to our decision.

A. Respondent's Case In Chief

1. Teachers' Testimony

Todd called as witnesses six teachers from the elementary school who had taught either Brody, Nathan, or Jonas. In general, they each testified that the boys were good students with no behavioral problems and that Todd was a concerned, involved, reasonable, and pleasant parent. They said the same of Christine. One of Brody's teachers noted that Brody suffered from attention deficit hyperactivity disorder (ADHD), but described him as a "bright kid" and a "great reader." They also confirmed Todd's complaint that the boys had a fair amount of excused absences (up to 20 in one year) and tardies (up to 15 in one year) from school, purportedly due to illness. (Todd had accused Christine of allowing the children to miss an unreasonable amount of school.)

Dr. Mary Kay Scharf, the boys' principal, testified to several incidents in 2008 when she caught Brody trying to avoid boarding the bus to Todd's house. He would either stand in the wrong line, hide in the bathroom, or walk home without permission to avoid going to visitation. Dr. Scharf said she had witnessed Todd's interactions with his children and saw nothing that would cause her any concern. She said her interactions with him have always been appropriate.

2. Todd's Character Witnesses

Karen Arnold, Todd's mother-in-law, testified that she has known Todd for approximately five years, though she has only seen Foster a couple of times since Todd and Heather have been married. The last time she saw Foster was Christmas 2008. She did not notice anything unusual in his interaction with Todd. He seemed very respectful of

everyone and accepted his gifts gracefully.

Arnold described Todd as a “very loving father” toward Brody, Nathan, and Jonas. She has never witnessed him acting inappropriately. She could not recall Brody showing any signs of apprehension or fear of Todd. Arnold said she and Heather have a close relationship and she would know if there were any problems in Heather's and Todd's relationship. She visits the family a couple of times a week and has never seen Todd lose his temper, raise his voice, or become agitated.

Steve Crutcher testified that he works with Todd at State Farm and has been his Alcoholics Anonymous (AA) sponsor for eight years. He and Todd meet for lunch once a month, see each other at AA meetings, and attend the same church. They also both volunteered to help with vacation bible school. Crutcher described Todd as “very dedicated” to his children and to AA. His children are well behaved and well groomed.

William Ducett testified that he met Todd at a Christian men’s retreat in September 2002. They remain part of the same “reunion group,” which meets three times a month. Ducett described Todd as an “excellent father.” He said he was “very calm, very kind, just an excellent parent.” He said he has no concern regarding Todd's relationship with his children, as they seem very comfortable and their behavior is appropriate, though he has only seen Foster once or twice. The boys are loving, affectionate, and respectful. Ducett said he has never seen any sign of anger from Todd.

Sister Rita Ann Bregenhorn testified that she has known Todd for approximately 10 years. She sees Todd with Brody, Nathan, and Jonas at church at least twice a month on his visitation weekends. They interact very well. She has also witnessed the interaction at vacation bible school for a couple of hours at a time. The boys seem

happy and "very comfortable" with him. She has seen Todd redirect their behavior, but never raise his voice. She thought the three older boys seemed to love their younger half-brothers. Sister described Heather as "very good, very calm" with the boys. She would have no concerns about Todd being awarded custody.

3. Heather's Testimony

Heather testified that she and Todd married in July 2004. She said Foster came to visit only three times in 2009. During the Christmas 2008 visit, Foster seemed eager to get to know Cameron, but was apprehensive about staying overnight. He did stay, but he left around 9:30 a.m., saying he could not stay any longer. He interacted well with Brody, Nathan, and Jonas and was polite and courteous.

Heather said Foster came for a visit the day before Thanksgiving 2009. He seemed to be in a good mood and was interacting well with everyone. Foster and Todd went to the basement to "start jamming" on their drums and guitar. Heather did not observe any apprehension on Foster's part. He seemed happy. She said Jonas and Nathan have a "great relationship" and a "really close bond" with Todd. Brody, Nathan, and Jonas get along well with their younger half-brothers.

Most recently, Brody attends almost every Wednesday visit but very few weekend visits. He acts appropriately and seems very happy when he visits, though there have been a few occasions when he has run away. On one weekend visit, Brody seemed "apprehensive right off the bat." He wanted to visit his friend, who lived down the street. Heather and Todd approved, but when they called his friend's house, Brody was not there. He had gone home to Christine's house.

Heather testified that when the boys visit, they know they must get their

homework done first before they are allowed to play. Todd goes through their backpacks and gets them started on their work. When the work is done, they usually all play games together. Heather was concerned that many times the boys seemed to fake being sick. Frequently, they would say they had a fever. Heather would take their temperature only to find nothing abnormal. She also complained that Christine frequently brought the boys to visitation at least 20 minutes late. Pursuant to the July 2006 custody order, Todd is entitled to approximately 85 visits per year. Since the entry of the order, Heather has seen a reduction in the frequency of visits for Foster and Brody. In 2006 and 2007, Foster visited approximately 25 times each year. In 2008 and 2009, he visited a maximum of five times each year. In 2006, Brody visited approximately 35 times, and in 2007, he visited 89 times. In 2008 and 2009, his attendance dropped to approximately 60 times each year. And, most recently in 2010, he has expressed his desire to stop visits all together. Nathan and Jonas both regularly attend visits and stay overnight.

Heather testified that she has witnessed Foster physically impede the other boys from getting out of the car or exiting Christine's house. Two or three years ago, Foster would "do anything" to avoid a visit. Now, she sees much of the same from Brody. He runs away, resists visits, and takes the wrong bus. However, according to Heather, once he gets in the door, he has a good time. Heather said Brody has told her that Foster is physically abusive to him. Foster hits and shoves him, while taunting him about visits. In June 2009, Nathan also reported that Foster had slammed him against the wall and yelled at him regarding visits with Todd, telling him it was "stupid to want to go to dad's." Jonas also said that Foster pressured him not to visit Todd.

Heather testified that at Christmas 2006, their family had a meeting about

what to do with their presents since Foster was not there. The children got to throw out ideas about what they thought they should do and then it was submitted for a vote. The majority decided that they would open everything, but hold one present back so when Foster came, they would have something to open with him. It was reported to Christine that Todd told the boys they could not open their presents until Foster visited. According to Heather, the plan was not designed in any way to coerce or manipulate Foster.

In May 2009, Brody, Nathan, and Jonas ran the opposite direction of the house when Christine dropped them off for visitation. Heather and Todd had the boys write essays about their behavior, apologizing and explaining what they would do to correct their behavior. Each boy wrote that Foster bullied them about visits. This was the first time that Heather and Todd realized that Foster's bullying was "seriously affecting" Nathan and Jonas. With Brody, they had been concerned for approximately one year.

4. Todd's Testimony

Todd testified that he works at State Farm from 6:30 a.m. to 2:45 p.m. He described Foster, who was 14 at the time, as "somewhat lethargic and introverted." He said he has "rather long hair, and he tends to hide behind his hair." Todd said Foster has not really found anything that interests him. He tries various things, but when he does not find much success, he quits until the next thing comes along. He does not have many friends and does not socialize much. Todd described him as a "kid that's carrying a heavy load." Todd thought that "illness" has probably been the main focus of Foster's attention.

Todd said that Brody, age 12, was a "social kid." He said he and Brody are "very close" with a "supportive and open" relationship. Todd described Brody as "very compliant and helpful." Brody has relayed to Todd that he is afraid of Foster. When Foster

is not around, Brody is more relaxed and seems to have fun with Nathan, Jonas, Cameron, and Grant.

Todd described Nathan, age 10, as "kind of a live wire." He is the most active and enjoys acting out cartoons and playing charades. Nathan consistently visits midweek as well as weekends. He interacts "wonderfully" with his siblings. Jonas, age 7, is prone to silliness. Todd described him as "eager to please." He also consistently visits midweek and weekends.

Todd said in the fall of 2008, he went to Christine's to pick up Foster for visitation and he saw the words "f*** you" written on the bricks on the side of the home in 12" pink letters. Todd rang the doorbell and Foster came outside, but he refused to go to visitation. Christine came to the door. In response to a question as to whether Christine saw what was written, Todd said: "You couldn't miss it." Foster did not act surprised and Christine did not acknowledge the words.

Todd complained that Christine does nothing to encourage Foster to attend visitation. Her involvement has significantly decreased since the July 2006 custody order had been entered. Todd said Brody was not visiting at all on the weekends, and he did not know why. He said Brody's reluctance started in February 2008 when he took the wrong bus from school. Todd thought that was the first time he had intentionally tried to avoid visitation. Todd sees Brody being negatively influenced by Foster and, beginning in February 2008, he has started to act like him as well.

Todd testified that Brody, Nathan, and Jonas currently do well in school, but he is concerned that Foster's attitude will "trickle down" to the younger boys. Currently, according to Todd, at Christine's house, if Foster does not want to do his homework, he does

not have to. If he does not want to go to school, he does not have to. Todd does not want those ideals passed onto the younger ones. The boys know when they come to Todd's house, the first thing they have to do is homework.

Todd said Brody does not appear anxious or nervous unless Foster is "right there." Todd is also concerned the boys tend to fake illnesses, they do not have proper hygiene, and they wear tattered clothing. He also reported that Christine was regularly late in bringing the boys to visitation.

In Todd's opinion, he would be a better custodial parent. With regard to Foster, he would be better able to teach him coping skills and socialization skills. With regard to the younger three boys, Todd said he and Heather have a "very faith-based environment," they try to do things as a family as much as possible, and they have structure in the home. They have routines for homework, showers, meals, and church. He believes he would be much better at facilitating visitation between the boys and Christine. He feels he would make better decisions regarding medical and school issues. And, finally, he said he has a very healthy marriage and a supportive spouse.

On cross-examination, Todd admitted he began using alcohol and marijuana in high school. As a teenager, he engaged in substance-abuse treatment. When he turned 21, he started drinking again and married Christine at the same time. Todd admitted that Christine started keeping a journal, which Todd would read, apparently with Christine's knowledge. In the journal, she wrote about being sexually abused as a child. Todd admitted that he frequently asked Christine questions about the entries in her journal and, specifically, about the sexual abuse, though he knew she did not like it.

Todd recounted that in September 2001, Christine went to the hospital for

severe depression and was admitted for four days. Todd stopped drinking for a few weeks and then started again on October 30, 2001. That night, he confronted Christine, who was with the boys in their room. He ended up breaking Christine's finger and destroying the telephone. She was pregnant with Jonas at the time. Christine left the home with the boys while he cleaned up the "crime scene." Foster was six, Brody was four, and Nathan was one. Todd admitted that the boys were exposed to domestic violence "at a very young and impressionable age."

Todd admitted that in October 2006, he disclosed to Foster that Christine had been sexually abused as a child. In the moment, Todd did not realize that Foster would be disturbed by Todd's revelation.

5. Dr. Osgood's Testimony

Dr. Judy Osgood testified as Todd's expert witness. Over Christine's objection, Dr. Osgood had been ordered to prepare a custody evaluation. She had read the reports of Christopher Cashen, the children's most recent therapist. Dr. Osgood said she was aware that Brody, Nathan, and Jonas have reported that Foster bullies them into refusing visits. In Dr. Osgood's opinion, any efforts made by Christine to facilitate visitation or a relationship between Foster and Todd and Brody and Todd have not been successful.

Dr. Osgood testified that Foster has had trouble with his siblings, school, depression, and anger. She said she finds it "very disturbing" that Foster would write a profanity in large letters on Christine's home as a message for Todd. She reported that on one occasion, Foster laid on the driveway while refusing to get into Todd's vehicle for visitation, and on another, he retrieved a lawn chair from the garage and placed it next to Todd's vehicle, while refusing to get in the van. Dr. Osgood said that Foster had told his

therapist that he was not willing to let go of his hatred toward Todd. In her opinion, Brody acted very differently in front of Foster. Based on her own observations, Dr. Osgood thought it was unusual for Christine to represent that Foster did not have any behavioral issues.

In describing the individual child's bond with each parent, Dr. Osgood testified that, in her opinion, Foster was very bonded to Christine and Wes. Brody, Nathan, and Jonas were very bonded to both parents. Osgood specifically asked Brody if he was fearful of Todd and he said "not really." All three boys said Wes yelled at times and was "mean." Jonas was upset by one incident where Wes grabbed Jonas by the arm with force and dragged him by the arm to time out. Jonas was "practically in tears" describing the incident. None of the children had any complaints about Heather. They seemed very comfortable with her.

Dr. Osgood testified that it was her understanding that Foster was doing well in school. However, in her opinion, Brody was being negatively influenced by Foster. She said: "There's been some physical abuse, some intimidation, so that certainly makes him a victim. *** I'm very concerned about the direction Brody appears to be headed in terms of the potential to become alienated from his father." Brody is definitely healthier away from Foster. She has concerns that Foster's problems with his father and with attending school may have a "trickle-down effect" to Brody, Nathan, and Jonas.

Dr. Osgood described Todd as a recovering alcoholic who has been very honest about the problems that his drinking created. He has been sober for approximately eight years. He has "stabilized" his personal life, and the prior risk factors are no longer present. She saw no limitations on Todd's ability to be a sole custodial parent. In her

opinion, the parties cannot have joint custody, as there is no communication between them. Dr. Osgood recommended the use of a facilitator to assist in the relationship between Christine and Todd and Foster and Todd.

Dr. Osgood's primary recommendation was that the parties have joint custody of the three younger boys with Todd getting an increase in parenting time. Secondly, Dr. Osgood opined that Christine should have sole custody of Foster and Todd have sole custody of Brody, Nathan, and Jonas. Such an arrangement would be in the children's best interests, as the younger siblings would have the verbal harassment and stress removed from their lives. Foster has no relationship with Todd and has no desire to have a relationship with him and he has "the potential to sabotage the relationships with his younger brothers." The younger three boys are at a "very high" risk to become alienated from Todd under the current circumstances.

B. Petitioner's Case In Chief

1. Testimony of Foster's Teachers

Christine called five of Foster's teachers, who all testified that he was cooperative, quiet, pleasant, and worked well with others. They had never witnessed him bully any other student. He earned mostly As and Bs.

2. Testimony of Foster's Psychiatrist

Dr. Charles Hawley, a psychiatrist who has treated Foster since September 2002, testified that he diagnosed him with PTSD. He had been referred by his pediatrician as a result of reported nightmares, school refusal, irritability, and gastrointestinal problems. Dr. Hawley noted that in August 2003, Foster was anxious and worried about upcoming visits with Todd. Foster stopped visiting for a few months to try to alleviate the problems.

In December 2003, Foster reported that the "biggest stressor" in his life was having to resume visits with Todd. In October 2004, Foster indicated to Dr. Hawley that he was going to refuse any further visits.

In 2006, Foster was suffering "very, very severe physical symptoms." The doctors authorized Foster to remain out of school. Several medical doctors worked with him, but determined there was no physiological basis for Foster's complaints. In January 2007, the doctors recommended that Foster return to school, but Christine did not agree. Christine reported that Foster used a wheelchair and screamed in pain. She decided to take him from his then-pediatrician's office, Dr. Dewey, to the emergency room. Dr. Dewey reported in her notes, reviewed by Dr. Hawley, that she had her hand on Foster to guide him, but she provided no help in getting in out of the wheelchair, which, according to her, proved that he could bear weight and stand if he desired.

Dr. Hawley noted that Foster's medical records indicated that he frequently and intentionally pushed his stomach out with the valva maneuver (a constriction of abdominal muscles). The physical examination of Foster indicated he had no physical ailment, he was fine, and should be in school.

Dr. Hawley agreed that Foster could suffer the onset of new symptoms of his PTSD if Foster was forced to have contact with Todd. Dr. Hawley recalled reviewing Dr. Dewey's examination notes from October 3, 2007. Dr. Dewey reported that she had a discussion with Christine regarding whether Christine tends to portray visits between Todd and Foster in a positive light. According to Dr. Dewey, Christine looked at her "angrily" and said she did not "paint it as a bad thing but she did not talk it up either."

In Dr. Hawley's opinion, as it relates to Foster's diagnosis of PTSD and the

next steps to be taken in terms of his relationship with Todd, it is a significant factor that Todd has successfully completed treatment. A goal of reunification with Todd was worthy of exploration. Dr. Hawley did not see any potential problem in increasing contact between Todd and Foster if, in fact, there was no further risk of harm to Foster, and Todd had addressed and conquered his issues that were factors eight years earlier.

3. Testimony of Doctor

Dr. Adam Ebreo, a doctor of osteopathy, testified that he has been the physician for Foster, Brody, Nathan, and Jonas since the end of 2008. He saw Foster in September 2008 for a cough, which he diagnosed as a pertussis cough resulting from a bacteria. He prescribed an antibiotic. Dr. Ebreo provided a note for Foster to be homeschooled. Over the course of a few months, the cough did not improve even with antibiotics. A chest x-ray was negative and several specialists had no diagnosis. Dr. Ebreo and a consulting pulmonologist believed Foster's cough was considered a "habit cough." His cough finally resolved and he went back to school.

Dr. Ebreo said that all four boys were "pretty healthy" and were not making an unusual number of trips to the doctor's office, though he testified that in 2009, he saw Foster 11 times. He believed Christine has always acted appropriately.

4. First Counselor's Testimony

Christine called Elizabeth Casper, Foster's and Brody's counselor with For Children's Sake. Casper met with both boys between the summer of 2006 and the summer of 2008. Her agency counsels mothers and children who have experienced domestic violence.

Casper said that in 2006, Foster had concerns about visiting Todd due to

Todd's anger issues. She believed there had been some progress made with Foster's visits, though he remained reluctant to stay overnight. In October 2006, Foster experienced a set back when Todd disclosed to Foster that Christine had suffered sexual abuse when she was a child. This information "bothered him a great deal;" he "was very upset" and "didn't want to go back to visits." It was around that time that Foster developed physical symptoms.

Beginning in the summer of 2006, Brody had expressed reluctance in spending the night at Todd's house. Christine agreed that Brody could visit more often during the day rather than making him stay overnight. Another set back occurred during the spring 2007 when Foster and Todd were moving furniture. Todd became very upset and started yelling and swearing. Brody witnessed the incident and became very frightened. He locked himself and the other boys in the bedroom. Soon after this incident, Brody began expressing his unwillingness to visit Todd.

According to Casper, Brody reported that Foster would become angry when they returned from visits, but there were no reports of bullying incidents. At Christmas 2006, Brody reported to Casper that they were not allowed to open any gifts until Foster returned to Todd's for visits. Casper said that Foster and Brody reported that Christine did not impede visitation. She seemed involved and concerned with the boys' counseling and routinely asked for suggestions about how to get the boys out of the van at Todd's.

On cross-examination, Casper admitted that it was Todd who had advised that he had disclosed Christine's past sexual abuse to Foster. Casper said she did not recall specifically how the topic had come up. If, in fact, Foster had asked Todd if either he or Christine had ever been abused, as Todd suggested, then, in Casper's opinion, Todd should have answered for himself and not for Christine.

Casper testified that Brody has always expressed reluctance about staying overnight at Todd's, stating that he was not comfortable doing so. After July 2006, both Foster and Brody had increased the amount of time they were spending with Todd. Since then, Foster's time has substantially changed. Brody attended more frequently then, too. Casper said she feels Foster is in need of long-term counseling services and preferably with the same counselor in order to develop a trusting relationship. He is "clearly a troubled young man."

5. Second Counselor's Testimony

Christopher M. Cashen, a licensed clinical professional counselor, testified that he began seeing Foster in August 2008. Foster has expressed a fear of Todd due to witnessing multiple incidents of domestic violence toward Christine and being the victim of his abuse as well. He reported being locked in a closet and having box springs held over his and his younger brother's head by Todd. Foster has progressed "pretty well" during counseling, though he remains very angry at his father. His fear has lessened, but his anger is greater than when they first began sessions. Foster has become more social and more talkative and has improved on his eye contact. In Cashen's opinion, it would have a negative impact on Foster to force him to see Todd. Foster had recently expressed to Cashen that he does not want to live with Todd and does not want to visit him. Foster thought that if Todd did not force the issue, there may be hope of a relationship sometime in the future.

Cashen testified that on January 29, 2009, Foster told him that a few days earlier, he and Todd got into a verbal altercation. Todd told Foster that it was his fault that visits did not go well, and that he was ruining it for everyone else. Todd tried to physically

pull Foster out of the van. When that did not work, Todd gave Foster a dirty look and went into the house. Cashen opined that such events re-traumatize Foster, as he is exposed to the same stimulus that initially triggered his PTSD.

Cashen reported that on July 27, 2009, Foster went to Todd's and got a guitar for his birthday. Foster was happy, though he had no plans to return. In September 2009, Foster reported that he continued to be transported to Todd's house, but he refused to go inside. He denied that he bullies his brothers. By November 2009, Foster reported sleeping well and having no nightmares. However, on December 8, 2009, Foster had learned of the custody proceedings from the guardian *ad litem*. At that point, Foster experienced another setback. Cashen thought it would be in Foster's best interest to have a good relationship with Todd. However, in order to do that, Todd should never raise his voice at Foster, taunt him, or accuse him of sabotaging his brothers' visitation. Todd should acknowledge Foster's feelings and convey to him that they are valid and legitimate.

Cashen said he first saw Brody in September 2008. He said Brody is unable to articulate why he does not want to visit, he just knows he is uncomfortable. Cashen testified that, when he asked Brody if he did not like his father or if he was afraid him, Brody "stated that he doesn't like his father more than he is afraid of him." Brody said Todd usually got mad on Sundays and "was usually ok" on Wednesdays. Brody reported that when he becomes afraid, he runs away.

As of December 2008, Brody reported that he still did not want to spend the night at Todd's. He said that "half of him likes his father and half of him dislikes him." In October 2009, Brody said he took the wrong bus after school on purpose. One time, he had the flu and he went home sick from school. Todd accused him of faking it to avoid

visitation. Cashen said Todd should never yell and should be cautious in expressing his anger in an inappropriate fashion, as it seems to cause the boys to want to avoid visits. Brody admitted writing the letter accusing Foster of bullying him, but he insisted it had not really happened. He claimed the letter was not his idea.

Cashen diagnosed Brody with an adjustment disorder with anxiety. He reported that on January 12, 2010, Christine scheduled an emergency session for Brody because he had asked her if it was normal to wish that he not be alive. Brody had cut his arm with a piece of glass, though Cashen described it as "quite superficial."

Cashen met with Foster on January 12, 2010, as well. Foster told Cashen that he had recently gone to Todd's house because his brothers wanted him to go. He went for them. He reported that things went "okay" but he commented that Todd "'was his father, but not his dad.'" Foster said Todd presents himself "'one way to the rest of the world, but behind closed doors, he's a completely different person.'" Cashen testified that when he saw Foster in March 2010, he had cut his hair, was playing rugby, and was getting along well with his teammates. Foster admitted his grades had suffered recently (he was getting 2 Fs, 1 D, 1 C, and 2 Bs) and that Christine had been implementing consequences as a result.

As of January 12, 2010, Brody reported to Cashen, without much explanation, that he did not want to go to Todd's for visitation anymore. He said that his father angers easily and recently accused him of being on "Team Foster," the meaning of which Brody did not understand.

6. Christine's Counselor's Testimony

Laurie Bergner, Christine's counselor, testified that she saw Christine between October 2005 and October 2007, then again beginning in the fall 2009. Christine has

always worked "very hard to get the children to see [Todd] as much as possible." On April 18, 2007, all of the counselors, parties, and attorneys met to discuss Todd's disclosure to Foster about Christine's childhood sexual abuse. The group was trying to come up with a solution on how to cope with the situation. Christine has always been very cooperative. Bergner and Christine regularly discuss to what extent Christine should go in forcing Foster to visit with Todd.

7. Supervisor of First Counselor's Testimony

Adena Meyers, a supervisor at For Children's Sake in July 2006, testified that Elizabeth Casper worked with Foster and Brody. Meyers recalled working with other counselors involved in this case in trying to fashion a visitation recommendation for the court. Their cumulative recommendation was to treat Foster and Brody differently from Nathan and Jonas.

8. Petitioner's Testimony

Christine testified that she lives with her husband, Wes, the four boys, and twin daughters, Kay and Victoria, who are five years old. She described Foster and Brody as "pretty close." She said when she and Todd were married, Foster and Brody witnessed bizarre behavior from Todd when he was intoxicated. On one occasion, he laid outside in the yard during a severe thunderstorm. The kids watched him and were very scared due to the amount of lightning. Christine said her family does not go to church regularly but they do live by Christian morals and values.

Christine admitted that she had been held in contempt of court regarding visitation. She explained that often she would leave Foster at home to avoid him negatively influencing the other boys during the drop off at Todd's residence. Foster would never get

out of the van, then Brody would not want to either. If Foster was not in the vehicle, Brody was more likely to attend visits. However, she was found in contempt of court for failing to take Foster.

In 2005, Foster decided to travel to Great America amusement park with Todd and the boys on the condition that he could call Christine whenever he wanted. He called her once and said everything was fine, but when he wanted to call again, Todd told him he could not call. Foster had trouble sleeping and was bothered by the situation. Christine considered this incident a setback.

In summer of 2007, Foster said Todd yelled at him when they were trying to move some furniture. This was another setback. In September 2007, Foster and Brody got out of the van for visitation, but as soon as Christine started to back out of the driveway, Foster and Brody ran away. During the Christmas 2007 visit, Todd washed the children's feet to demonstrate what the disciples had done for Jesus. When the boys returned to Christine's, they said they did not want to go back because they "thought that was kind of odd."

Christine said she encourages the boys to visit Todd and believes it is healthy for a child to have a good relationship with their father. Christine asked Brody, Nathan, and Jonas about the letters they wrote in which they had stated that Foster bullied them. They each denied the bullying and said Todd told them what to write.

In response to questioning by the trial court, Christine testified that Foster was approximately 11 years old when he first refused to attend visits. She said Brody was approximately 10 years old when he started to refuse. The court asked Christine why she did not physically pick them up and take them into Todd's house. She said Wes had done

that before and, that night, they ran from Todd's house in the dark. She also said the psychologist had recommended that they not physically pull the children from the van. The court concluded that either Christine was unwilling to physically make the children go to visits or was unable to do so. Either way, something had to change because, as the court noted, Brody has now expressed a desire not to have a relationship with Todd. Next will be Nathan and then Jonas. The court asked Christine what she proposed to do. She stated she had tried "very hard" to have the boys maintain a relationship with Todd. The court interrupted her by saying: "The fact is you're unable to. By your own admission, you can't do it."

Christine denied that she talks to the boys about the abuse she suffered at the hands of Todd. She said the boys do not say that the domestic-violence incident is the reason they do not want to go. The court addressed Christine and noted that it had to "find a way to get Brody from [Christine's] house to [Todd's] house. And right now, you're sort of out of the loop because you have no influence over him whatsoever." The court asked Christine what she thought Brody would do if Todd was awarded temporary custody until he started to attend visits. Christine was not sure, but knew it would "be hard for him." The court stated: "We have got to do something to get him going to visitation. And I am open to suggestions. You know these boys better than anybody. If you have any suggestions, now's the time." Christine stated she could not "think of anything at this point." The court "cleared the proofs."

On May 5, 2010, the trial court conducted an *in camera* interview of Foster, who was then 15. The court let Foster talk about whatever it was he wanted the court to know. Foster said it was "hard to be with" Todd because of the past and because of the rules

he sets during visits. For example, Foster said, that one of Todd's rules is "you have to believe in God." Foster said Wednesday visitation was "usually okay" but Todd usually lectures Foster for an unreasonable length of time. He said weekends start off okay, but by Sunday, Todd "just completely wants to be left alone and yells at people a lot." Foster thought maybe shortening weekend visitation could help. Foster said he would like to have a choice about visitation and decide on his own whether to go or not. He thought it would "probably help" if he was not forced to visit.

Foster admitted it "would be enjoyable" to have a better relationship with his dad. He said he was not afraid that Todd would physically hurt him, he just could not forgive him for the traumatic event he witnessed in October 2001. He said he has talked to his dad about the incident and all his dad said was that his mom hit too. The judge told Foster that it is important to have a relationship with both parents. Foster said he has his "step-dad for that." He said he likes Wes and has talked to him about the violence because it is a lot easier to talk to Wes. Foster says he tells Brody to do whatever he wants to in terms of whether to go or not to go to visitation. Foster said he thinks Brody is not going to visitation for the same reasons that he does not want to go. Finally, he told the judge that he believed that "splitting up the family will make things worse on everyone."

The trial court then met *in camera* with Brody, who was now 12. He said on visitation days he "either will take the bus to dad's, or take the bus home to mom's, and then sometimes she would bring me over there." When he goes to visits at Todd's, he first does his homework, then he can play. He said visits are "okay." He likes seeing Cameron and Grant, but sometimes "it's like--difficult or kind of not comfortable" because his dad will "get upset" and sometimes "raise his voice." Brody said sometimes the expressions on his

dad's face makes him uncomfortable. He said his dad does not normally yell at him or his brothers but he will yell at Heather. Brody said he does not like sleeping there because he is uncomfortable and does not want to be there. He sometimes hears noises in the house which makes him afraid. Brody said he likes Heather and enjoys playing board games and video games over there. He said his "dad can sometimes be okay."

The judge asked Brody why he had not been going to visits much anymore. Brody said: "I don't know, it's just kind of hard to explain. But, like, when I do go there, it's okay." He said he just makes him uncomfortable because he does not "really like it there a lot." He does not like when his dad yells or gets upset, which he does when somebody gets hurt, or they get a little wild. Brody said he would like weekend visits to be shorter, spending just part of the days on Saturday and Sunday, not overnight. Wednesday could remain the same. Brody said he "sort of" remembers the domestic-violence incident and holds that against his dad and has never really forgiven him for that. He said he remembers some of the "little details" about it but "some of the bigger details" he has learned from Foster.

The judge asked Brody if he enjoyed the time with his dad and Brody said "sometimes, yeah." The judge then asked Brody if he missed his dad when he does not see him and Brody said "not a lot." Brody said that once he gets there, visits "sometimes" are okay but "usually on Sundays, dad always seems to get mad, always." Brody denied that Foster tries to influence him. He said what he had written in the letter was not true. He just assumed his dad would be mad at him if he told him the truth--that he just did not want to go, so he blamed Foster. Brody said he told the guardian *ad litem* that Foster bullied him into not going because he "knew that whatever I told [her] was somehow, it was going to

get to dad."

On May 21, 2010, the parties presented the trial court with their closing arguments. The court informed the parties that it would not immediately rule but would issue its final decision at a later date. The court noted that section 602(c) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/602(c) (West 2008)) provided that a court shall presume that the maximum involvement and cooperation of both parents is in the children's best interests. Thereafter, the court stated:

"But I do know that something has to be done today. So, what I am going to do is, I am going to enter a temporary order for the change of custody. *** A temporary order for the change of custody of the three youngest boys, not Foster, but the three younger.

Now, before I go any further in the order, I don't want petitioner or respondent to read anything into that, as to what the court's final judgment is going to be. The reason I'm doing this is, it's time to make up some visitation for dad. He needs to start seeing these boys or he will never be able to develop a relationship, or repair a damaged relationship. But by granting temporary custody to him, we can enforce this. He can seek police intervention. If those boys don't come home from mom's, he can go get them with the police. ***

Now, I am going to order that he have visitation with Foster, same as before. Every other weekend and Wednesday

after school. ***

* * *

[Christine] is going to have the same visitation that was ordered for [Todd], every other weekend and Wednesday after school."

The trial court essentially ordered that Brody, Nathan, and Jonus will be in Todd's temporary custody for the summer, with visitation to Christine. Foster will remain in Christine's custody with visitation to Todd on the weekends that he has the other three boys. The court ordered Todd to obtain an anger-management evaluation and to follow any recommendations. He was not to lecture the boys and to control his temper in their presence. The court described the boys as "eggshell" children, in that they are more sensitive to Todd's moods than others would be.

On August 19, 2010, the trial court convened the parties for its final decision. In open court, the court announced that it was governed by section 610 of the Dissolution Act (750 ILCS 5/610(b) (West 2008)), which provides that a court shall not modify custody unless it finds by clear and convincing evidence that modification is necessary to serve the best interests of the children. The court noted that after the initial custody judgment was entered in July 2006, visitation "went well," but then it began to deteriorate with Foster. It had since begun to deteriorate with Brody. The court noted that "one of the problems here " is that the marriage dissolved due, in part, to Todd's substance abuse and verbal and physical abuse toward Christine. Though "everyone in this courtroom" respects Christine's feelings, the "problem has been *** that mom has not facilitated the healing process of the two older boys that have been affected *** by dad's abuse of mom in the past."

The trial court noted that there did not appear to be "strong evidence of bullying," but it was obvious that Foster certainly would have an influence over his brothers. The court's goal was to prevent the "domino effect where one by one the three younger boys follow the example of Foster and stop coming to visitation." The court also believed the "crux of this case" was Christine's act of driving the boys to Todd's house, and then either because she could not or she would not get the boys out of the van, she essentially reported to Todd: "They are out in the van. Good luck getting them out."

The trial court found that there had been a substantial change in circumstances since the entry of the custody order in July 2006. Since then, Christine has been unable to facilitate a relationship between Foster and Brody with their father and visitation attendance for Foster and Brody has significantly changed. The court noted that, after finding a change of circumstances, it was to consider whether a change would be in the children's best interests. The court discussed its analysis of the 10 statutory factors, finding that most favored Christine maintaining custody. The only factor that favored an award of custody to Todd was his apparent willingness and ability to better foster a relationship with Christine. The court stated as follows:

"Court finds that the best inference from the evidence is that in the early years after this custody order, mom could have done considerably more to influence the older boys to go to visitation. I think she had very little interest in that. As time has gone by, I think she's found it harder but has lost some of her influence over the children. Nonetheless, there's no one that has more influence over these boys than mom. And while

I think it's an accurate finding to say that there has been a substantial change in circumstances since the last custody order, I do not believe that mom is totally without the ability to encourage a relationship between dad and the boys, and nor do I believe that she is not totally unwilling. I think she had a greater ability than what she used in the past. I think there have been some improvements in that regard. So what I'm finding is that mom can facilitate a relationship between the boys and dad."

The trial court found that, "while there is a significant problem here that needs to be addressed," it would not be in the children's best interests to change custody. The court awarded Todd the same visitation as was awarded in July 2006. However, the court added a provision that, should any child, excluding Foster, miss more than one visit during the school year, a day would be added to Todd's summer vacation for every day missed. This appeal followed.

II. ANALYSIS

We have before us an appeal and a cross-appeal of the trial court's judgment. Todd appeals the court's best-interest finding, and Christine appeals the court's substantial-change-of-circumstances finding. After a careful review of the record, we conclude that both decisions should be affirmed, and we commend the court for its careful and thorough consideration of the issues and the particular nuances involved in this case. The evidence presented at trial supports the conclusion that (1) there has been a substantial change of circumstances since the entry of the last custody order in this case, but (2) a change of

custody would not be in the children's best interests. We therefore affirm the court's judgment, as well as the underlying findings supporting that judgment.

A decision on child custody rests largely within the broad discretion of the trial court, and that decision will not be disturbed on appeal unless it is against the manifest weight of the evidence or unless the trial court abused its discretion. *In re Marriage of Spent*, 342 Ill. App. 3d 643, 652 (2003). Great deference must be accorded to that decision since the trial court is in a far better position to judge the credibility of witnesses and observe the temperaments and personalities of the parties. *In re Marriage of Stopher*, 328 Ill. App. 3d 1037, 1041 (2002). We will affirm the trial court if there is any basis to support the court's judgment. *In re Marriage of Divelbiss*, 308 Ill. App. 3d 198, 207 (1999).

To modify a custody order, a petitioner must demonstrate by clear and convincing evidence (1) a change of circumstances of the child or his custodian has occurred and (2) a modification is necessary to serve the best interests of the child. See *In re Marriage of Smithson*, No. 4-10-0677, slip op. at 4 (Jan. 31, 2011), ___ Ill. App. 3d ___, ___. The "clear and convincing" standard is intended to favor the present custodial parent in order to promote stability and continuity in the child's custodial and environmental relationships. *In re Marriage of Nolte*, 241 Ill. App. 3d 320, 325 (1993). Changed circumstances alone do not necessarily warrant a modification of custody. *Nolte*, 241 Ill. App. 3d at 325-326.

In announcing its decision, the trial court referred to the factors set forth in section 602 of the Dissolution Act (750 ILCS 5/602 (West 2008)), factors which the court was required to consider in determining what custody arrangement would be in the children's best interests. Those factors are:

"(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his sibling and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community;

(5) the mental and physical health of all individuals involved;

(6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;

(7) the occurrence of ongoing or repeated abuse *** whether directed against the child or directed against another person;

(8) the willingness and ability of each parent to facilitate and encourage a close continuing relationship between the other parent and the child; and

(9) whether one of the parents is a sex offender." 750 ILCS 5/602(a) (West 2008).

The trial court noted that five of the factors either did not apply or did not favor one parent over the other. Three favored Christine. Those were: (1) the second

factor (the wishes of the children), as all four boys seemed to prefer to remain with their mother; (2) the third factor (the children's interaction and interrelationship with his parent and siblings), as all four boys seemed to interact well with their mother, Wes, and their siblings, including their half-sisters; and (3) the fourth factor (the children's adjustment to home, school and community), as there did not seem to be any adjustment problem with any of the boys and all seemed to be doing well at school while in their mother's custody. Despite the consideration of all of these factors, the crux of this case rested with the eighth factor (the willingness and ability of the parent to facilitate and encourage a close relationship between the children and the other parent). The court found this factor favored Todd, as the evidence demonstrated that Christine was either unable or unwilling to foster the children's relationship with their father.

This case involves a highly contested visitation and custody proceeding spanning two years and was no less contentious prior to the filing of the petition to modify. Unfortunately for the boys, this case has been fraught with tremendous hostility and ill feelings between the parents. At least from Christine's perspective, the dissension centers around the October 2001 incident of domestic violence. Foster, who was six, and Brody, who was three, witnessed the incident with understandably traumatic results. The severity of the incident and the traumatic consequences following are not a matter of contention. The problem becomes one of effectively and productively coping, adjusting, and healing from the event.

There is no question that Foster has been the most adversely effected. He has maintained his steadfast feeling that he does not wish to have a relationship with his dad, at least not now. All agree that forcing the issue will probably produce nothing but negative

results. Thus, we conclude that the manifest weight of the evidence established that custody of Foster shall remain with Christine.

As the trial court correctly noted, the immediately future is critical for Brody. He is currently at the age that Foster was when he made his decision to refuse visitation, and he has, in fact, headed down that path. The court admirably hoped to salvage Brody's relationship with his father before it was too late. Though contrary to the recommendations of the guardian *ad litem* and Dr. Osgood, the court determined that Brody's best interests would not be served by forcing him to live with his father when he is apparently extremely uncomfortable staying there. The court noted that it greatly respected Cashen's testimony, as well as his efforts in working with Brody to learn to cope and to address his feelings of resentment and general dislike for Todd. As Cashen opined, Brody should not be forced to visit, let alone live with, a person who is documented abusive even years later, particularly when the seemingly unexplained anxiety in the child still exists. The evidence presented at trial suggested that it would not be in Brody's best interest to place him in the custody of his father.

There is little evidence affecting Nathan and Jonas and any resulting visitation issues. They regularly attend visits with Todd and apparently have a good relationship with him, Heather, and their half-brothers. If the parties proceed in this case as outlined by the trial court, there should be little concern that Nathan and Jonas would be led down the path that Foster has blazed. We find the court's judgment that Nathan and Jonas should remain in Christine's custody as well was not against the manifest weight of the evidence.

After the significant amount of time and money spent in this proceeding and the tremendous amount of headaches and heartaches that have befallen those interested,

it seems rather counterproductive that, for the most part, the July 2006 custody order remains unchanged. However, a closer look into this case and into the trial court's order indicates that much has been learned by the parties and there is hope that this knowledge will have a beneficial impact on this family. Hopefully, Christine has understood the court's message that she must do everything in her power, for the sake of her children, to move past the domestic-violence incident and her hatred for Todd. That is not to say that she should not continue toward her goal of personal healing and coping with the burden that she carries as a result of her experiences. But, for her children, she must portray visitation with their father as a positive experience, so as to do her part to foster their relationship.

Further, Todd hopefully understands the trial court's message for him to curtail the behaviors that his sons find unnerving. He must do everything in his power to control his temper in the presence of the boys. To have any hope in salvaging his relationship with Foster and Brody and to prevent any deterioration of his relationship with Nathan and Jonas, he must empathize with their unique situations. They should not come away from visitation with a feeling of unease because dad got upset. As Cashen explained, Todd should be careful to not raise his voice, not taunt, or not accuse them of sabotage. Todd should acknowledge the boys' feelings and convey to Foster and Brody, in particular, that their feelings are real, valid, and legitimate.

If both parties are able to adjust their attitudes and resulting behavior, the children can experience a healthy relationship with both parents. The trial court carefully and methodically considered all matters relevant to the custody and visitation decision in this case and entered an order accordingly. On this record, we find no reason to disturb those findings. We find the court's decision was not against the manifest weight of the

evidence or an abuse of discretion. On the contrary, the record reveals a conscientious judge's attempt to apply the law to a difficult case and entered an order that did just that.

See *Divelbiss*, 308 Ill. App. 3d at 212.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.