

the children's needs, Emilie obtained a temporary child support order that directed James to, *inter alia*, pay her \$600 per month in child support. A month later, that order was stayed when by the agreement of the parties, an order awarding James the temporary custody of the children was entered. In March 2008, Emilie moved from Freeport to Marion, and in September 2008, she filed a petition to modify the terms of the temporary custody order. Emilie's petition to modify alleged that James was refusing to honor the agreed terms of the temporary custody order and was generally engaging in a pattern of manipulative conduct. In November 2008, the trial court entered a judgment of the dissolution of the marriage, explicitly reserving "the issues of child custody, visitation, and support." In March 2010, the cause proceeded to a hearing on those issues, and the following evidence was adduced.

James's girlfriend, Christel Graham, testified that she was 27 and that she and her three-year-old son lived in Herrin with James, Alaina, and James K. Christel testified that James was a good dad and that everyone in the home got along well. Christel described an instance where Emilie had argued with James in front of the children "over past issues," and she further described two instances where Emilie had called upon James to assist her in disciplining James K. Christel stated that based on her personal observations, Alaina and James K. did not listen to Emilie. Christel also stated that Alaina and James K. would return from visits at Emilie's house looking "totally disheveled" and not bathed. Christel indicated that the children sometimes returned from overnight visits wearing the same clothes in which they had left, and on other occasions, Emilie failed to dress the children warmly enough. Christel testified that if James were awarded the primary custody of Alaina and James K., she would help him support and care for them. Christel acknowledged that James K. attended school five days a week and that Alaina attended daycare five days a week, even on days when James was off work. She further acknowledged that Emilie had Alaina and James K. every weekend and that, as a general rule, James only spent a few hours each weekday

morning and evening with them.

James testified that he was 33, lived in Herrin, and worked as an engineer for the coal-mining industry. He testified that after Emilie had taken the kids to Freeport in May 2007, he visited them twice that summer. He testified that in October 2007, James K. had called him from Freeport asking if he would come and get him. When James subsequently spoke with Emilie, she claimed that she could not "handle" the kids. James stated that "she had quit taking her medicine" and that she was crying, upset, and "almost hysterical." James drove to Freeport and took possession of the children, but Emilie's father made him sign a document agreeing to return them in a week. James testified that in January 2008, Emilie had called him crying and upset. The police had been called to her house, and she told him that he needed to take possession of the kids again. James stated that Emilie had told him that he "could have them." James again took possession of the children, and the following month, an order was entered granting him temporary custody. Alaina and James K. have been living with him ever since.

James testified that he earned \$54,000 in 2009 and that his employer's insurance covered Alaina and James K. James indicated that the hours per week that he worked varied but that he rarely had to work evenings or weekends. James testified that his home was spacious enough for all who lived there, and he described his daily routine with the children. James testified that he, Alaina, James K., Christel, and Christel's son got along well as a family and that James K. was doing well in kindergarten. James stated that he sometimes kept Alaina home from daycare when he did not have to work, but he explained that she often wanted to go anyway and that he had to pay for it whether she went or not.

James testified that he had tried to work with Emilie regarding visitation since she had moved back to southern Illinois in March 2008. James indicated that Emilie often called him needing help disciplining James K. James stated that James K. was required to take daily

medication for a digestive condition, and he stated, "[T]here [had] been problems where he [hadn't] gotten it when [he'd] been with his mother." James indicated that there had also been problems with James K. wetting the bed while under Emilie's care. James testified that Alaina and James K. sometimes returned from visits with Emilie appearing dirty and wearing seasonally inappropriate clothing. James testified that Emilie's home was dirty and in disarray. James testified that on one occasion when Emilie had the kids, James K. had been left unsupervised near a busy street in Carterville.

James testified that he wished to have the custody of his children every day during the school week because he felt that he was better suited to meet their daily needs. James stated that joint custody would be "fine" with him, and he would be able to work with Emilie if joint custody were awarded. James asserted that he and Emilie had had "no problems getting along as far as the kids are concerned."

James denied that Emilie had only agreed to give him temporary custody until she was able to reestablish herself in the Marion area. He also denied watching "a lot of pornography" on the computer that he had in his basement office. He acknowledged, however, that when he and Emilie were married, he would sometimes retreat to his office when they were having problems. James admitted that he sometimes sent Emilie "vulgar" text messages to "antagonize her," and he also admitted that Emilie's mother and Lana Walker had observed him and Emilie interact with Alaina and James K.

Lana Walker testified that she worked at the daycare center that Alaina attended and James K. used to attend. Lana testified that she knew James and Emilie and that, on weekends, Emilie sometimes watched her four-year-old daughter, Hannah, sometimes overnight. Lana stated that Emilie's home was "kid[-]friendly," Emilie was "always doing stuff" with the kids, and Hannah loved being there. Lana testified that she and Emilie had attended a class on child discipline together at a local community college, after both had

experienced problems in that area, and that Emilie's disciplinary skills had improved since taking the class. Lana testified that whenever Emilie dropped Alaina and James K. off at daycare, they would cry and complain and ask if she was going to pick them up. When James dropped them off, on the other hand, the situation was "completely different," and the children did not "cling to him" or anything. Lana stated that parents are encouraged to volunteer for various activities at the daycare, and Emilie does "[e]very chance she gets."

Emilie's mother, Juliet Asche, testified that she was around Emilie and James "quite a bit" while they were married and that she would periodically visit them, sometimes staying "up to a month." Juliet stated that Emilie had been Alaina's and James K.'s primary caregiver since they were born and that Emilie facilitated all the family's extracurricular activities. Juliet indicated that James rarely participated in those activities and that he would often forgo opportunities to be involved with the children. Juliet stated that whenever she visited Emilie and James, James spent most of his time in the basement either sleeping or on the computer. Juliet further stated that whenever she went to the basement to help with the laundry, she would always announce to James that she was coming downstairs. Juliet described instances where she or Emilie would ask James to help with the children and he would decline their requests. Juliet testified that she had never seen James take care of the children by himself, and she had concerns about him being their custodial parent. Juliet acknowledged that she had few opportunities to see James interact with the children since he and Emilie had separated in May 2007.

Emilie testified that she was 29, lived in Herrin, and worked part-time at a local landscape nursery. She testified that she had been the children's primary caregiver since they were born and that James had never taken care of the kids by himself. Emilie stated that the kids presently stayed with her every week from Friday night to Monday morning and that she sometimes saw them during the week. She testified that whenever she asked James for extra

time with the kids, he always asked what was he "going to get for it." Emilie recalled that when she asked James to get the children's clothes out of storage after she had moved back to southern Illinois, he told her that he would only do it if she performed oral sex on him. On another occasion, after promising to give Emilie some support money, James broke his promise when she refused "to sleep with him for the money." Emilie stated that James had repeatedly indicated that if she would have sex with him, he would "get back together" with her. James also sent Emilie sexually explicit text messages, and in some of those messages, he claimed that he was masturbating. Emilie indicated that James's inappropriate text messages and propositions were ongoing problems that had occurred even recently.

Emilie testified that her greatest concern about James having custody of their children was his "very serious problem with pornography." She stated that while they were married, James spent most of his free time in his office/computer room viewing pornography and masturbating. She indicated that on weekends, James would sometimes spend six to eight hours per day in his office. She further indicated that James did not try to hide his behavior from her and that while they were married, she "was to accept it." She testified that James's obsession with pornography had ultimately destroyed their marriage. Emilie stated "In my ideal world[,], we would be together, there would be no pornography, and and we both raise our kids." Emilie testified that she had gone to counseling "multiple times" because she feared that James's pornography problem was her fault. When she suggested to James that he seek counseling, he told her that there was not a problem and "all men" did what he did. Emilie stated that she finally decided to move out with the kids after James K. had "walked in on it twice."

Emilie recalled that when she and James were attempting to reconcile and she would be at his house and deny his requests for sex, he would announce, in the presence of the children, that he was going to go downstairs "to go jack it." Emilie testified that she did not

think that the children knew what James was talking about, however, and that she did not believe that the children were aware of his pornography problem. She also acknowledged that James K. was only three when he "walked in on it" and that she did not believe that James would intentionally expose either of the children to pornography. Nevertheless, Emilie did not want the children to "think that [pornography is] okay." Emilie stated that although she had not personally witnessed James view pornography since the summer of 2008, she had seen circumstantial evidence suggesting that he had masturbated in his basement office as recently as August or September of 2009.

Emilie testified that in addition to her fears that Alaina and James K. might be exposed to pornography at James's house, she was also concerned about James's lack of involvement with the children. She indicated that James rarely took the kids to their medical and dental appointments and that he did not participate in activities with them. Emilie testified that she encouraged James to attend the children's parties and programs but that he rarely did. Emilie testified that James K. had learned to swim when he was six and that she threw him a sixth birthday party at the Herrin pool. James K. wanted James to be there, but when she called him, he "said that he was taking a nap" and "had to go to the store."

Emilie acknowledged that in January 2008, the police had come to her apartment in Freeport one morning after the neighbors had reported that she was screaming at the kids. Emilie admitted that although "that morning was out of the ordinary," she had been "yelling at the kids in an inappropriate manner." After that, Emilie agreed to let James "keep the kids" until she relocated to southern Illinois, at which point "they would return to [her]." Emilie explained why she had agreed to the order awarding James temporary custody of the children: "Because at the time I thought that that was the best thing to do for the kids." She further explained that she "was not making it" in Freeport on her own. She asserted, however, that if she had been receiving child support from James at the time, she would have

been able to "make it." Emilie indicated that James had never paid her any child support and that he told her that he did not believe that she was entitled to it because she "chose to leave."

Emilie acknowledged that she and James had gotten along "relatively well" at the children's parties and functions that he had attended, that she wanted James to be involved in the children's lives, that the children loved him very much, and that she did not "necessarily have a problem with joint custody." She indicated, however, that she wanted to raise the kids in a stable environment with no pornography. Emilie testified that she volunteered in James K.'s classroom every Wednesday and tried to attend all the children's parties and programs. Emilie further indicated that she spent as much time with the children as she possibly could and that she and the children attended a local church together. Explaining that her boss was "a hands-on mom, too," Emilie also stated that her job allowed her a flexible schedule with regard to when she needed to be with the kids. Emilie testified that she wanted the children to live with her and that she wanted James to have them every other weekend with additional visitation time "as he wanted throughout the week."

In rebuttal, James testified that he used to watch pornography during the time that he and Emilie's marriage was "breaking down," but he denied that either of the children had ever "walked in on [him]." With regard to a specific instance that Emilie's mother had described as an occasion on which he had refused to help with the kids, James stated that he had "absolutely no idea what she was talking about." When asked about his vulgar text messages to Emilie, James insisted that the messages were sent "[j]ust to bug her" and were no way indicative of his overall "behavior." When asked about the possibility that his children might access Emilie's cellular phone and view the text messages that he sends her, James stated that it was "her responsibility" to ensure that that did not happen.

Less than a week after the hearing, the trial court entered a docket order awarding Emilie child support and the sole custody of Alaina and James K. The order also set forth

a visitation schedule for James. Stating that it had considered the relevant statutory factors and the testimony presented at the hearing, the court determined that it was in the children's best interest that they be placed with their mother. Specifically, the court found as follows:

"[James's] apparent obsession with the observation of pornographic material and self-induced sexual stimulation, intentionally and irresponsibly sending sexually graphic text messages to [Emilie] to, in his words, 'antagonize her,' prohibits the court from finding that [James] is a fit and proper person to have custody of the minor children."

The court further found that James's "intentional antagonization and attempts to induce [Emilie] to give sexual favors for extra time with the children precludes the court from awarding joint custody."

Following the trial court's entry of a formal order setting forth James's visitation schedule and support obligations, James filed a motion to reconsider the court's custody and support determinations. The court subsequently denied James's request to reconsider custody, but it granted his request that his "per pay period" child support obligation be reduced from \$501 to \$484. The present appeal followed.

DISCUSSION

Arguing that Alaina and James K. were already established in a suitable home and noting there was no evidence that either child was aware of the pornography, masturbation, propositions, or text messages referred to at the custody hearing, James argues that the trial court abused its discretion in awarding Emilie the custody of the children. We disagree.

When determining which parent in a failed marriage should have custody of a minor child, "[t]he paramount consideration *** is the best interests of the child." *In re Marriage of Diehl*, 221 Ill. App. 3d 410, 423 (1991). Section 602(a) of the Illinois Marriage and Dissolution of Marriage Act directs that when making such a determination, "[t]he court shall consider all relevant factors including:

- (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 siblings[,] 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 as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;
- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
- (9) whether one of the parents is a sex offender; and
- (10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed." 750 ILCS 5/602(a) (West Supp. 2009).

"The factors enumerated in section 602(a) are not an exclusive list of factors," and "the trial court is not required to make specific findings for each factor as long as the record reflects that evidence of the factors was considered by the trial court before making its decisions." *In re Marriage of Diehl*, 221 Ill. App. 3d 410, 424 (1991).

A custody determination "necessarily depends on the temperaments, personalities, and capabilities of the parties involved," and "[t]he trial court is in the best position to decide the custody issue because the judge is the one who observes the parties involved and the

demeanor of the witnesses and hears and resolves conflicts in the testimony." *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 1031 (1993). Accordingly, "[t]here is a strong and compelling presumption in favor of the trial court's determination" (*In re Marriage of Petraitis*, 263 Ill. App. 3d at 1031), and as a reviewing court, we will not reverse a trial court's custody determination "unless it is against the manifest weight of the evidence or a clear abuse of discretion" (*In re Marriage of Archibald*, 363 Ill. App. 3d 725, 738 (2006)). "A judgment is against the manifest weight of the evidence when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary[,] or not based on the evidence." *In re Custody of K.P.L.*, 304 Ill. App. 3d 481, 488 (1999). An abuse of discretion occurs where the trial court "acts arbitrarily without conscientious judgment or, in view of all the circumstances, exceeds the bounds of reason and ignores recognized principles of law so that substantial injustice results." *In re Marriage of Archibald*, 363 Ill. App. 3d at 739.

Correctly noting that when a court determines the best interest of a child, it is improper for the court to "consider conduct of a present or proposed custodian that does not affect his relationship to the child" (750 ILCS 5/602(b) (West 2008)), James suggests that because there was no testimony that the children were aware of the pornography, masturbation, propositions, or sexually explicit text messages referenced at the hearing, the trial court improperly considered that evidence when arriving at its custody determination. We disagree.

While it is true that "[p]arental conduct that does not adversely affect the child is not to be considered in the custody determination" (*In re Marriage of Stone*, 164 Ill. App. 3d 1046, 1053 (1987)), evidence of a parent's "allegedly immoral conduct" is relevant to the extent that it might affect the child's environment (*In re Marriage of Phillips*, 244 Ill. App. 3d 577, 583-84 (1993)). We further note that as a matter of public policy and common sense, children should be protected from "exposure to pornography and its attendant ills." *People*

v. Studio 20, Inc., 314 Ill. App. 3d 1000, 1006 (2000); see also *People v. Ward*, 215 Ill. 2d 317, 328 (2005) (noting that "common sense suggests that *** the legislature intended the statute [prohibiting the distribution of pornographic material to minors] to have broad application").

Here, although James intimated that his viewing of pornography was limited to the time during which his and Emilie's marriage was "breaking down," Emilie's testimony on the matter cannot be ignored. Accepting Emilie's testimony as true, as the trial court obviously did, the court could have reasonably concluded that James had a serious problem with pornography and "self-induced sexual stimulation" and that his obsessions were so serious that they cost him his marriage and took precedence over his paternal responsibilities. It also appears that the trial court shared Emilie's concern that the more time the children spent at James's house, the greater the likelihood that they might be exposed to pornography or masturbation. In either case, the evidence was relevant with regard to the children's best interest. We further agree with Emilie's suggestion that their arguable connection to James's pornography problem and mental health aside, the evidence regarding the text messages and propositions reflected negatively on James's willingness to facilitate the children's relationship with Emilie and was also relevant to the court's determination that joint custody was not a feasible option. See *In re Marriage of Swanson*, 275 Ill. App. 3d 519, 524 (1995) ("Joint custody requires an unusual level of cooperation and communication from both parents"). In any event, the evidence at issue was relevant to the trial court's custody determination and was thus properly considered by the court. We also find that the cases James cites in support of his argument to the contrary are distinguishable from the present situation.

In *In re Marriage of Ivey*, 261 Ill. App. 3d 200, 202 (1994), the parties to the custody dispute "elected to make a significant issue of each other's past and present sexual appetites,"

which "diminished each party equally and offered little assistance to the court." For her part, the mother attempted to portray the father as addicted to pornography, and she presented evidence that he had "one, possibly two, X-rated movies [that] he kept in his attic and a number of Playboy magazines." *In re Marriage of Ivey*, 261 Ill. App. 3d at 201-02. After noting that "[n]o evidence was presented that the children had ever been exposed to this material" and that the mother's boyfriend had "testified that he, too, has viewed pornographic material," the *In re Marriage of Ivey* court stated that the evidence presented on the matter amounted to "little more than a transparent attempt to paint the father as a deviant for purposes of litigation." *In re Marriage of Ivey*, 261 Ill. App. 3d at 202.

Here, the evidence suggesting that James was or is addicted to pornography was far more extensive than that presented in *In re Marriage of Ivey*, and the court heard testimony indicating that James K. had twice been exposed to it. Moreover, accepting Emilie's testimony regarding the pornography, masturbation, propositions, and text messages as true, we conclude that the evidence supported the court's intimation that James's behavior was, in fact, deviant.

In *In re Marriage of Craig*, 326 Ill. App. 3d 1127, 1129 (2002), during the parties' divorce proceedings, "[v]arious witnesses testified as to incidents of inappropriate conduct exhibited by [the minor child's mother]." The mother's "'moral indiscretions'" apparently involved "'exhibitionism and sexual behavior,'" and some of the questionable conduct was apparently memorialized in "'incriminating photographs.'" *In re Marriage of Craig*, 326 Ill. App. 3d at 1129-30. When granting the custody of the parties' child to the mother, the trial court found that although the mother's behavior was both troubling and immature, it did not affect her relationship with the child. *In re Marriage of Craig*, 326 Ill. App. 3d at 1130. The trial court further indicated that while the child's father had used the mother's behavior to publicly humiliate her and had done so on at least one occasion in the presence of the child,

she had nevertheless "established a willingness and an ability to facilitate and encourage a close and continuing relationship between [the child] and his father." *In re Marriage of Craig*, 326 Ill. App. 3d at 1130.

Although the inappropriate conduct at issue in *In re Marriage of Craig* was only vaguely described, it is apparent that to the extent to which the conduct might have had an effect on the child's environment, it was no way comparable to James's conduct in the present case. Moreover, despite her strong personal objections to James's behavior, Emilie has demonstrated that she continues to encourage him to maintain a close and meaningful relationship with their children. Under the circumstances, we cannot find that the trial court erred in considering the evidence of James's inappropriate conduct when determining that it was in the children's best interest that Emilie be named their custodial parent.

James also argues that the trial court's custody determination was against the manifest weight of the evidence because Alaina and James K. were already established in his home and "there were no allegations that they were being improperly cared for." As Emilie notes on appeal, however, the evidence before the trial court demonstrated that Alaina and James K. "were just as much, if not more, established" in her home, and she was the parent who spent quality time with the children and was intimately involved in their lives.

"In determining the best interest of the child, the court must consider the particular facts and circumstances of each case" (*In re Marriage of Stuart*, 141 Ill. App. 3d 314, 318 (1986)), and here, we cannot conclude that the trial court's custody determination was against the manifest weight of the evidence or constituted an abuse of its discretion. Accordingly, we affirm its judgment.

CONCLUSION

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

Affirmed.