

NOTICE

Decision filed 01/31/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-10-0435

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
CHRISTINE M. ATTIG,)	Jackson County.
)	
Petitioner-Appellant,)	
)	
and)	No. 05-D-118
)	
TIMOTHY L. ATTIG,)	Honorable
)	Christy Solverson,
Respondent-Appellee.)	Judge, presiding.

PRESIDING JUSTICE CHAPMAN delivered the judgment of the court. Justices Donovan and Wexstten concurred in the judgment.

RULE 23 ORDER

Held: Where the trial court utilized an incorrect burden of proof in granting the respondent's amended petition to modify the previous child custody judgment to change the minor child's residential guardian, the judgment must be reversed and the cause remanded for a reconsideration of the petition with the appropriate burden of proof.

Christine M. Attig appeals from the trial court's written order of September 7, 2010, granting Timothy L. Attig's amended petition to modify the residential custody of their son, J.A., thereby modifying the original joint-parenting agreement dated November 21, 2005. The modification of residential custody effectively moved their son from his mother's home in the Joliet area to his father's home in Jackson County. At the request of Timothy (Tim) the trial court appointed a guardian *ad litem* (GAL) to represent J.A.'s best interests. The GAL filed two reports with the court—both recommending the modification of residential custody. The hearing on the amended petition to modify was held for three days in August 2010.

On appeal, we are asked to review two issues. First we must determine if the trial court applied the proper standard of proof. The court determined that this modification petition did not raise a question involving custody, and so the level of proof applied was not clear and convincing proof as would be required in a custody case. See 750 ILCS 5/610(b) (West 2008). We agree with Christine that the standard of proof utilized by the trial court was erroneous. We are not able to determine how the trial court would have ruled if the appropriate standard of proof had been applied, and so we must reverse the judgment in this case and remand for the trial court to consider whether the need for a modification of the residential custody determination was proven by clear and convincing evidence.

The second issue involves the trial court's use of the GAL's reports and whether the reports, which Christine claims contained many factual allegations without evidentiary support, can constitute evidence upon which the trial court can base its decision. In order to provide guidance to the trial court upon remand, we address this issue and determine that so long as all the procedural requirements associated with a GAL's report and the use thereof are followed, the trial court has not only the right but the duty to consider the reports. However, the use of the reports are subject to the procedural allowances for notice to the nonmoving party and that party's right to cross-examine the GAL and/or put on testimony or other evidence to counter the statements and recommendations contained within the report. 750 ILCS 5/506(a)(2) (West 2008). In this case, Christine was absolutely afforded all the procedural rights, and therefore the trial court's use of the GAL's reports, despite their inclusion of possible hearsay elements, was not improper.

FACTS

J.A. was born on February 6, 2002. Christine left the Ava, Illinois, marital home in April 2005. As a result of an incident on the day that Christine left the marital home, domestic battery charges were filed against Tim. Christine moved back up north where her

family resided, ultimately ending up in Joliet, Illinois. Christine filed for divorce. Within a few months, the parties reached an agreement on all matters and executed joint agreements, which the trial court entered on November 21, 2005. Christine and Tim were granted joint physical and legal custody of J.A., with Christine being the primary physical parent. The parties stipulated that J.A. would begin formal schooling at the end of August 2007 and that this event could be termed a "substantial change in circumstances," as a result of which either parent could petition the court for a modification of the joint-parenting agreement. The visitation agreement in effect ended in August 2007. After the agreement ended, the parties continued to cooperate with each other on visitation matters. During the period of time between September 2007 and September 2008, J.A. had visitation with his father for a total of 98 days. From September 2008 until September 2009, J.A. had visitation with his father for a total of 80 days. The basic visitation schedule was followed into the following year—the year in which the petition to modify was filed and the hearing was held. However, the schedule was never committed to writing, and in January 2008, Tim filed his petition to modify. In June 2009, Tim amended his petition to also seek a change in J.A.'s physical custody from Christine to Tim.

J.A. was eight years of age at the time of the hearing on the petition to modify. Numerous witnesses testified. All were in agreement that J.A. was a healthy, intelligent child. He performed very well in school and had no behavioral problems. He had a good relationship with both parents. Each parent and each parent's geographic location provided different benefits to J.A. J.A. participated in various extracurricular activities in the Chicago area. With his father's rural residential setting, J.A. was able to engage in various outdoor activities that he enjoyed.

J.A.'s GAL prepared a report and a supplemental report for the court. The GAL also testified at the hearing. The GAL met with and interviewed numerous persons of interest in

the preparation of the two reports.

Tim complained to the GAL that the visitation schedule was not being followed and that he was concerned about what he termed a “lack of visitation.” Although the original plan was to meet in Springfield to pass off/return J.A. to the other parent, on many occasions Tim drove all the way to Joliet. Tim's belief is that Christine is not always truthful when she alleges that J.A. is not available for certain requested visitation periods. On at least one of these occasions, Tim hired a private investigator to track the whereabouts of J.A. and Christine. Christine would drop off J.A. at daycare but then just return home, instead of actually going to work. On one occasion when Tim asked to speak to J.A., he was advised by Christine that J.A. was asleep, but at that moment, the investigator was able to determine the falsity of that claim, because J.A. was sitting up and was awake. Christine denied these claims when asked the GAL about them. The GAL described Tim as friendly and helpful, and she described the interaction he had with J.A. as warm and affectionate. The GAL indicated that she saw no signs of intimidation or coercion that would have led J.A. to state that he wanted to live with his father. The GAL learned that J.A. accompanied his father to the bar that his father owned, but the GAL reported that the business had essentially been sold and that it would soon be a nonissue. J.A. told the GAL about his experiences with the Joliet-area school and activities. He acknowledged that his father drank beer, but not to the point of drunkenness, while J.A. would not answer the same question about his mother. J.A. seemed to have some jealousy-type issues with his stepsister (his father's wife's child) that the GAL believed were connected with them being about the same age. Christine claimed that during the marriage, Tim was involved in some manner with drugs. Tim denied this allegation. The records were searched, and even if he had been involved in those activities, there was no record of criminal charges ever being filed. Christine's live-in partner, however, did have a history of driving infractions stemming from alcohol-related driving. The GAL

noted that upon questioning, Christine claimed to have no knowledge of any criminal charges lodged against her live-in boyfriend. Later, from a review of court records, the GAL found reason to disbelieve Christine's claim of no knowledge, because only three days prior to this interview with the GAL, Christine's boyfriend was arrested for driving on a revoked license. Furthermore, J.A. told the GAL that his mother's boyfriend did not have a driver's license. Based upon many factors, including what she found to be somewhat deceptive behavior on Christine's part, the GAL made the recommendation to the court that the residential status be changed and that Tim be made J.A.'s residential parent.

The trial court orally granted the amended petition to modify at the conclusion of the hearing on August 12, 2010, in order to allow J.A. to be enrolled in his new school. Thereafter, the written order was prepared and filed. Christine appeals.

ISSUES AND ANALYSIS

On appeal, Christine initially contends that the trial court based its decision upon an improper standard of proof.

Section 610 of the Illinois Marriage and Dissolution of Marriage Act (Act) provides guidance for modification-of-custody situations. 750 ILCS 5/610 (West 2008). Subsection (b) of this rule provides, "The court shall not modify a prior custody judgment unless it finds by *clear and convincing evidence*, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child." (Emphasis added.) 750 ILCS 5/610(b) (West 2008).

At the conclusion of the three-day hearing on the petition to modify, the court ruled as follows:

"The Court has reviewed the pleadings and the Guardian ad Litem's report[,] which are recommendations. The Court has heard the testimony and reviewed the exhibits and finds that the petition to modify should be granted. The Court finds that based upon the testimony, it is clear that both of the parties have been active in [J.A.]'s life. Both parents express love for [J.A.] as well as the desire to be the primary residential parent. However, based upon the factors set forth in 750 ILCS 5/602(a), as well as the totality of the circumstances, including but not limited to the desire of the parties and their testimony, along with the desire of the minor [J.A.], the home in which the parties live, work commitments of the parties, the day to day care and after school arrangements for the child, the relationship of the parties and the child, as well as the relationship of the child and his extended family, the adjustments of the parties and the child to home and community, and the willingness of each parent to encourage and continue the relationship between the parents and the child and, most importantly, the stability and best interest of the child, the Court finds that based upon the pleadings, there has been a substantial change in circumstances as well as based upon the other factors the Court has just set forth."

The section of the Act referenced by the trial judge is the section dealing with custody in a more general application. Obviously, in all child custody situations, the best interests of the minor child are of the utmost importance. *Fields v. Fields*, 54 Ill. App. 3d 400, 402, 369 N.E.2d 586, 587 (1977). In this case, the trial court considered the best-interests-of-the-child factors in a totality-of-the-circumstances approach. When the correct burden of proof was provided to the judge, she remarked: "I don't think that we are changing custody here ***. It just [is] a change in the residential parent."

The court misinterpreted the nature of the petition before her. The petition was to modify the custody arrangement, which necessarily included a change in the residential

parent. The original custody determination had been made years earlier, and in that judgment, Christine was awarded residential custody of J.A. To modify that original custody determination requires a higher standard of proof.

On appeal, Tim acknowledges that the trial judge did not utilize the proper burden of proof for custody modification situations—clear and convincing evidence that a change in the circumstances has occurred so that the best interests of the child would now mandate a complete change in residential custody (750 ILCS 5/610(b) (West 2008)).

Upon a thorough review of the transcript and the record on appeal, we are in agreement with both parties that the improper burden of proof was applied by the trial judge in determining that the residential custody should be altered. We are not able to weigh the evidence heard at the trial court level. As the ultimate finder of fact, the trial judge was in the unique position to actually witness the parties and the various witnesses who were called to testify at the hearing. Thus, we are not able to determine the credibility of the witnesses solely upon the transcript. See *Cebzynski v. Cebzynski*, 63 Ill. App. 3d 66, 74, 379 N.E.2d 713, 718-19 (1978). Therefore, we must reverse the trial court's judgment on the petition to modify and remand for an application of the proper burden of proof.

While we have determined that this case must be sent back for further proceedings, Christine asks us to review another issue. We are asked to review the trial court's consideration of the GAL's report. We will address the issue because we are seeking to dispel any confusion of the parties and/or the court about whether this report can be considered as evidence upon the remand.

In this case, the court appointed a GAL for J.A. The GAL made both a written report and a written supplemental report. Section 506(2) of the Marriage and Dissolution of Marriage Act provides guidance about the GAL's report. 750 ILCS 5/506(a)(2) (West 2008). That section states as follows:

"The guardian ad litem shall testify or submit a written report to the court regarding his or her recommendations in accordance with the best interest of the child. The report shall be made available to all parties. The guardian ad litem may be called as a witness for purposes of cross-examination regarding the guardian ad litem's report or recommendations. The guardian ad litem shall investigate the facts of the case and interview the child and the parties." *Id.*

During the hearing, Christine's attorney objected to the trial court's characterization and consideration of the two GAL reports as evidence. What Christine is really objecting to in this case is the fact that the reports contained hearsay evidence. Christine argues that she did not have the opportunity to cross-examine regarding these hearsay statements.

Before we address the nature of a GAL report, we must address Christine's argument that somehow she was precluded from cross-examination. Christine received the GAL's reports before the trial, as contemplated in the statute. Upon a review of the reports, Christine was able to cross-examine the GAL about the reports, including any facts or hearsay evidence included. Furthermore, Christine was able to cross-examine many witnesses presented by Tim in the hearing, and Christine brought in her own witnesses to testify. If there were other witnesses who could have better addressed the hearsay aspects of the GAL reports, Christine had every opportunity to have those witnesses testify—via evidentiary deposition or live during the hearing. To the extent that Christine complains of a due process type of failure in her ability to present cross-examination of the reports, her argument is without merit.

In a child custody case, the trial court is the ultimate fact finder. *In re Marriage of Saheb*, 377 Ill. App. 3d 615, 628, 880 N.E.2d 537, 547 (2007). In determining custody, the trial court listens to all the evidence and, in reaching its decision, is free to disregard certain testimony—even that of expert witnesses. *In re Marriage of Saheb*, 377 Ill. App. 3d at 628,

880 N.E.2d at 547.

A GAL is appointed for the purpose of protecting a minor's interests. *In re Parentage of Griesmeyer*, 302 Ill. App. 3d 905, 914, 707 N.E.2d 72, 78 (1998). Furthermore, as the attorney assigned to ascertain and inform the court of the best interests of the child, the GAL is considered a party to the case. *In re Parentage of Griesmeyer*, 302 Ill. App. 3d at 913, 707 N.E.2d at 78. The GAL's duty is to call the rights of the minor to the court's attention and to present the minor's interests to the court with requests for all the legal protection to which the minor is entitled. *In re Parentage of Griesmeyer*, 302 Ill. App. 3d at 914, 707 N.E.2d at 78.

The plain language of the statute governing GAL usage in a hearing such as the one that took place in this case contemplates the GAL either providing a written report to the court with recommendations about the minor's custodial situation or testifying before the court about those recommendations. 750 ILCS 5/506(a)(2) (West 2008). The GAL is charged with the duty to investigate the facts of the case and to interview the parties as well as the minor child.

Christine argues that the report contained hearsay statements and contained the GAL's personal opinions of credibility upon which the trial court must have relied—and that the reliance deprived her of due process guaranteed by our constitutions (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, §2).

While the trial judge stated on the record that the GAL's reports constituted evidence, Christine contends that the trial judge not only considered the GAL's recommendations but also considered the underlying facts stated by the GAL as evidence. Specifically, the judge stated that she considered the reports and the testimony of the GAL, in addition to all the other evidence offered at the hearing, in reaching her decision to modify the residential custody arrangements for J.A. Evidence is defined as "[s]omething (including testimony,

documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." Black's Law Dictionary 595 (8th ed. 1999). Evidence is "any species of proof legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, and the like." 31A C.J.S. *Evidence* §3, at 67-68 (1996).

The GAL is charged with the task of making a recommendation to the court about the best interests of the minor. 750 ILCS 5/506(a)(2) (West 2008). The statute specifically requires that the GAL make a written report to the court and/or provide testimony on the same topic. The very wording of the statute arguably contemplates the use of potentially inadmissible evidence, because the GAL's recommendation is to be based upon an investigation of facts, an interview of the child and parties, and other evidence received during the course of the GAL's work. The statute was structured with built-in procedural safeguards, *i.e.*, the GAL's report must be made available to the attorneys before the hearing, and the parties must be afforded the right to cross-examine regarding the evidence given. In this case, not only did the reports come into evidence, but the GAL also testified and was vigorously cross-examined by Christine's attorney. Having the reports ahead of time also afforded Christine and her attorneys the opportunity to provide documentary and/or testimonial evidence to counter the statements contained within the GAL's reports.

GALs are allowed to consider otherwise inadmissible evidence in making their recommendations to the court. See *In re Marriage of Karonis*, 296 Ill. App. 3d 86, 91, 693 N.E.2d 1282, 1286 (1998). "[T]he GAL will review or consider all kinds of information regarding the child, both admissible and inadmissible at trial." *Id.* Because the GAL's primary duty is to ascertain and defend the child's best interests, public policy mandates that the GAL review and consider all the information related to the child—whether the information is or is not admissible at a hearing. *Id.* However, in *In re Marriage of Karonis*, the appellate

court noted that there had not been an attempt to cross-examine or counter the inadmissible evidence utilized by the GAL in making the best interests recommendation. *Id.* In upholding the trial court's decision, the appellate court acknowledged that while the GAL used inadmissible evidence, if that evidence had been countered by way of cross-examination to establish that the GAL was thereby biased, the court could have determined if the complaining parent was prejudiced. *Id.* By failing to cross-examine or make an offer of proof on the GAL-bias issue, the appellant father could not claim prejudice. *Id.*

In this case, if the court considered the hearsay statements as evidence, the primary concern about that evidence involves Christine's due process rights. Was Christine afforded due process in this matter? As we previously concluded, Christine cross-examined the GAL about her reports. Christine presented her own witnesses and testimony and clearly had the opportunity to present any evidence required to counter the statements contained within the GAL's reports. Whether Christine took full advantage of this opportunity does not impact the fact that she was afforded all the procedural rights required by the statute. Christine was adequately afforded her due process rights, as the statute and our constitution require.

Christine also alleges that the trial court erred in modifying the custody judgment. Because we reverse and remand this case to the trial court for use of the proper burden of proof, we do not reach this issue.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Jackson County is hereby reversed, and the cause is remanded for further proceedings consistent with this order.

Reversed; cause remanded.