

No. 1-11-2801

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE MARRIAGE OF:)
) Appeal from the
) Circuit Court of
RICHARD J. COSIMINI,)
) Cook County
)
)
) Petitioner-Appellant,)
)
) No. 10 D 6615
v.)
)
)
)
JANINE COSIMINI,)
) Honorable
) John Carr,
)
) Respondent-Appellee.)
) Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

Held: Trial court's judgment granting Respondent's petition to remove the minor children to the state of California was not against the manifest weight of the evidence. Judgment affirmed.

¶ 1 In this dissolution of marriage action between Petitioner Richard J. Cosimini and Respondent Janine Cosimini, Janine filed a petition to remove the parties' two minor children from the state of Illinois to the state of California. On September 12, 2011, after two days of

trial, the circuit court granted Janine's petition for removal. Richard filed this timely appeal. We affirm.

¶ 2 BACKGROUND

¶ 3 Richard and Janine were married on April 25, 1998. Two children were born to the parties. Their son K.C. was born on August 10, 1995. Their son P.C. was born on June 7, 2000. Although K.C. was born prior to the parties' marriage, it is undisputed that Richard is his father.

¶ 4 On July 2, 2010, Richard filed a petition for dissolution of marriage. As the case progressed, the parties filed several petitions and counter-petitions for custody. Janine also filed a petition for removal of the minor children to the state of California. Both parties also filed petitions for the appointment of a 604(b) evaluator.¹ By the time of trial, however, Richard had stipulated that it would be in the children's best interests that Janine be awarded their sole custody. The only issue to be tried regarding the minor children was the petition for removal. Janine stipulated that if her petition for removal were to be denied, she would remain in Cook County as the sole custodial parent.

¶ 5 The trial took place on August 25, 2011 and August 26, 2011. The court heard

¹Section 604(b) of the Marriage and Dissolution of Marriage Act provides in relevant part: “The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine, as a witness, any professional personnel consulted by the court, designated as a court's witness.” 750 ILCS 5/604(b) (West 2008)

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testimony from both parties, as well as from Dr. Gerald Blechman, a clinical psychologist who had been appointed by the court to perform an evaluation pursuant to section 604(b).

¶ 6 *Dr. Blechman's Testimony*

¶ 7 Dr. Gerald Blechman, a licensed clinical psychologist, testified that he performed the 604(b) evaluation and prepared a written report in this matter. As part of his evaluation, he interviewed both Richard and Janine, as well as K.C. and P.C. He considered several factors including detailed information regarding the current living conditions, the children's schooling and education, how the children were doing, the status of the marriage and the marital history, whether there was any abuse, and the employment history of each party. Dr. Blechman discussed the children's schooling and their progress, which included P.C.'s special education for his emotional problems.

¶ 8 Dr. Blechman asked Janine her goal regarding this litigation and she told him she wanted custody of the children and to remove them to California. Dr. Blechman learned that Janine had a relationship with a person, Harvey, who was a senior defense instructor. Janine stated that living with Harvey would be an advantage. She also told Dr. Blechman that she believed that her current job in Illinois was potentially dangerous and her job in California would be easier. Janine told Dr. Blechman that on a trip to California her sons were with Harvey and that she and Harvey were looking for places to live. She did not tell Dr. Blechman that Harvey was married to another woman.

¶ 9 Dr. Blechman interviewed Harvey by telephone. He had wanted to interview him in person, but Harvey could not come to Chicago. The telephone interview was brief. Dr.

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Blechman explained that he does not trust the reliability of telephone interviews. He did not ask Harvey his current marital status, living arrangements, whether he had any children, or whether he intended to marry Janine. Dr. Blechman testified that he only wanted to get Harvey's opinion about P.C. Dr. Blechman stated that the fact that Janine had told him she intended to marry Harvey was not part of Dr. Blechman's reasoning in making his recommendations in this matter.

¶ 10 Regarding Richard's relationship with K.C., Richard told Dr. Blechman that K.C. had wanted to go to California with a 24-year old person named Davey and Richard told him he could not. Dr. Blechman testified that, in his interview with Janine, she did not mention Davey. Dr. Blechman had a meeting with Janine and the two boys, but his meeting with Richard involved only P.C. When asked whether his analysis was faulty due to the fact that he did not have an equal sampling with both parents and both children, Dr. Blechman stated: "It was very obvious that [K.C.] and his father had a bad relationship and that wasn't going to change whether I saw [K.C.] with his father or not." During Dr. Blechman's interview with P.C. and K.C., K.C. wanted to tell P.C. that his father had treated him poorly all of his life. K.C. stated, "I'm always the one who has to do the relationship."

¶ 11 Consistent with his report, Dr. Blechman opined that his observations led him to conclude that P.C. had a variant of Asperger's Disorder, an autism spectrum disorder, and that children with Asperger's Disorder are frequently misdiagnosed with ADHD (Attention Deficit Hyperactivity Disorder), unspecified emotional disorder, or conduct disorder. He testified that he reviewed the notes from the IEP program in which P.C. was placed and there was no comment about whether P.C. had Asperger's Syndrome. Dr. Blechman opined that, although Richard was

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well-meaning, he doubted Richard had “the ability to deal effectively with the complexity of the constellation of the interlocking problems that [P.C.] has.” Although Dr. was not certain that P.C. would be getting better treatment in California, his opinion was that the Chicago public school was not adequately addressing P.C.'s problem. He opined that Janine would be more likely to recognize the need for, and follow-up on, treatment while it was doubtful that Richard would do so.

¶ 12 Dr. Blechman also testified regarding the psychological tests that he administered to both Janine and Richard. He opined that Janine had “no discernable current psychiatric symptoms or syndromes.” He also stated that Janine had “no personality disorders that would interfere with parenting.” As to Richard, however, the results were inconclusive. Dr. Blechman explained that the reason was that the “validity scales indicated a defensive form of responding, casting doubt on the usefulness of the clinical profile.” Dr. Blechman stated that, in laymen's terms, it meant that Richard “responded in ways that were intended to either look better than he was or to present himself as not having any human flaws at all.” The psychological implications were that “[i]t meant he was not being straightforward as far as his attribution of problems is concerned.” Dr. Blechman recommended that Janine be allowed to remove the children to California.

¶ 13 *Janine's Testimony*

¶ 14 Janine testified that she was living in a 500 square foot basement apartment in her mother's house with her two sons. Richard and Janine had lived in her mother's house during their entire marriage. Richard had moved in when K.C. was one and a half years old. The

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couple married approximately a year later. Janine stayed at home to raise K.C. and P.C. She returned to work when P.C. started preschool.

¶ 15 At the time of trial, Richard was living in his parents' house which was a 40-minute drive from Janine's mother's house. Janine had not been inside Richard's parents' home for over five years. She testified that Richard's parents did not like her and his mother was angry because Janine had K.C. before the couple was married. Richard was also not happy about her having K.C. and was not around during her entire pregnancy. During the first year and a half of K.C.'s life, Richard “would just show up when he wanted.” He did not help with K.C.'s doctor appointments and he did not financially support Janine or K.C. Janine testified that “[h]e didn't really assist [her] at all.”

¶ 16 Janine also testified that Richard had always had a strained relationship with K.C., and that they would always “butt heads” and argue. One time, when K.C. was 13, the confrontation got physical. Janine testified that Richard “grabbed” K.C. by the neck. She had tried to encourage Richard to improve the relationship and suggested going to activities with K.C. With the possible exception of going to a concert in 2010, Richard did not do so.

¶ 17 Janine testified that she was employed as an Immigration and Customs Enforcement Agent under the Department of Homeland Security. Her annual salary was \$53,000. Her job involved transporting detainees from prison to court, which included criminals such as murderers, child molesters and sex offenders. She carried a gun. She testified that there were times where she felt unsafe at her current job such as when she had to take nine detainees to a location that was not secured to get fingerprinted and had to remove their handcuffs and

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shackles. She also testified that she could be ordered to work overtime if there were not enough volunteers. The overtime would infringe upon the hours she spent with her sons. At the time of trial, Janine had accepted an offer of employment with the Department of Homeland Security in California where she would have no contact with detainees. Her salary would increase by \$2,000 to cover the cost of living and overtime was not required. She testified that she would have more time available to be with her sons. She also stated that the schools in California were better and had more activities.

¶ 18 Janine stated that, under the parties' parenting schedule, P.C. stayed with Richard at his parents' house every other weekend. Richard worked some of those weekends. The visiting schedule did not include K.C. Janine testified that Richard had never asked to see K.C. or P.C. during the week.

¶ 19 Janine testified that P.C. has always had trouble socializing and she first noticed it when he was three years old. Janine read about autism and told Richard she thought P.C. had autism. At that time, Janine took P.C. to a pediatrician and a neurologist. No treatment plan was offered for autism. A medication, Focalin, was prescribed to help him concentrate. Janine stated she did not think the Focalin helped and it "wasn't about focusing." At the end of the school year, they took P.C. off the Focalin and "just never went back." When asked why she did not pursue any other course of treatment for autism, Janine testified that she "didn't know there was something else we can do. Richard was in disagreement that [P.C.] had it. The neurologist said he thought it was [Attention Deficit Disorder] or [Obsessive Compulsive Disorder] other than [P.C.]'s teacher agreeing with me."

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¶ 20 Janine has told P.C.'s teachers that P.C. believes he is being bullied. Janine testified that, when she and Richard separated, she started taking P.C. to a psychiatrist. Although she had asked Richard to participate, he had not.

¶ 21 Janine also testified regarding her relationship with Harvey Deering who lives in California and is retired from the military. Harvey's occupation is senior defense tactics instructor and his salary is \$80,000. Janine stated that Harvey had offered to contribute towards her household expenses in California. Harvey has an adult daughter, and he also has a son who lives with him and who is in the same grade as K.C. The court also heard Janine's testimony regarding her sons' relationship with Mr. Deering and his son.

¶ 22 *Richard's Testimony*

¶ 23 Richard testified that he had been employed as a ramp serviceman lead at United Airlines for 14½ years and earned approximately \$22.55 per hour. Richard received free flights for his immediate family and also received buddy passes for non-family members as part of his job. Richard stated, however, that he would be losing the benefit of free airline tickets because he planned on leaving United to go work for the Cook County Sheriff's Department now that he could no longer “count on” Janine's pension.

¶ 24 Richard testified that most of his visitation is with P.C., and not K.C. His visitation with P.C. was every other weekend from Friday at 4:00 p.m. until Sunday at 7:00 p.m. Richard also testified that he worked approximately two weekends a month and at times, P.C. visited on the weekends that Richard was working. When Richard is not home, his mother father, and brother look after P.C.

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¶ 25 Richard testified that he investigated military schools for K.C., which cost approximately \$40,000 per year, because he believed K.C. needed to “have a little more stability in his life.” Richard's reason for this was his belief that K.C. was “a little bit out of control on his actions” which he based on the fact that 15-year old K.C. was going to rock concerts in Indianapolis, Minnesota and Wisconsin with Davey, a 24-year-old man. He also looked into K.C. attending a Catholic parochial school which would cost approximately \$8,700 per year.

¶ 26 Richard also stated that he was “not 100% convinced that [P.C.] has autism.” He looked into P.C. attending a Catholic parochial school, but conceded it had no special education programs. Richard stated that the teachers work with the children, but he did not know if any mental health professionals were affiliated with the school.

¶ 27 Richard testified that P.C. had difficulty socializing “sometimes” and “not all the time.” He stated that P.C. “socializes perfectly fine at my house.” Richard stated that he was unable to attend PTA meetings because he did not have a car and never got informed about the PTA meetings.

¶ 28 At the conclusion of the two-day trial, the circuit court ruled that Janine had proved her petition for removal and granted the removal of the two minor children to California. The court entered its written judgment on September 12, 2011. Richard filed a notice of appeal on September 23, 2011.

¶ 29

ANALYSIS

¶ 30 Section 609 of the Marriage and Dissolution of Marriage Act (750 ILCS 5/609 (West 2008)) governs petitions for removal. *In re Marriage of Eckert*, 119 Ill. 2d 316, 324

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(1988). Section 609(a) states:

“The court may grant leave, before or after judgment, to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children. The burden of proving that such removal is in the best interests of such child or children is on the party seeking the removal.” 750 ILCS 5/609(a) (West 2008).

Our supreme court has emphasized that the “paramount question” that must be considered in removal actions is the best interests of the children. *Eckert*, 119 Ill. 2d at 325. “A trial court's determination of what is in the best interests of the child should not be reversed unless it is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred.” *Eckert*, 119 Ill. 2d at 328.

¶ 31 As the *Eckert* court explained: “A determination of the best interests of the child[ren] cannot be reduced to a simple bright-line test, but rather must be made on a case-by-case basis, depending, to a great extent, upon the circumstances of each case.” *Id.* at 326. The *Eckert* court listed several factors the trial court should consider in granting removal: (1) the likelihood that the proposed move will enhance the general quality of life for both the custodial parent and the children; (2) the motives of the custodial parent in seeking removal to determine whether removal is merely a ruse intended to defeat or frustrate visitation; (3) the motives of the non-custodial parent in resisting the removal; (4) the visitation rights of the non-custodial parent; and (5) whether a realistic and reasonable visitation schedule can exist if the court allows the move. *Id.* at 326–28. The supreme court has further explained that “[t]he purpose of the factors

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set forth in *Eckert* are not to establish a test in which the parent seeking removal must meet every prong; rather, the *Eckert* factors are to be considered and balanced by the circuit court in arriving at a best interests determination, 'and the weight to be given each factor will vary according to the facts of each case. '” *Collingbourne*, 204 Ill. 2d 498, 523 (2003), quoting *In re Marriage of Smith*, 172 Ill. 2d 312, 321 (1996).

¶ 32 The *Eckert* factors “are not exclusive” in determining the best interests of a child in a removal action. *Id.* “[A] circuit court may validly consider other relevant factors, as dictated by the specific circumstances of each case, in arriving at a best interests determination.” *Id.* “No one factor is controlling.” *Id.*

¶ 33 On appeal, Richard argues that the manifest weight of the evidence does not establish that the removal of the children was in their best interests. Richard emphasizes the following statement by the court:

“But as far as enhancing the general quality of life, I find that the move from the wife's mother is in the best interest of the kids, the schools, the locations in California. I find these things *even though they're somewhat tenuous*, I think the mother's explanation that if things don't work out then she'll get a smaller house. I don't find that to be a real problem in this particular situation because *everybody's got to pursue their dreams*.

And you know what, I got to believe also, and *maybe I'm creating a problem for myself*, but I got to believe that if things do not work out in California she'll be back here. So, you know, that would - it will kind of resolve itself if it

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does not work out there.” (Emphasis added.)

Richard asserts that this statement shows the court was not convinced that the evidence established a sufficient basis for removal. He also asserts that the court granted removal to California on a “potential” occurrence that Janine *may* sign a lease.” (Emphasis added.) Richard also argues that the court seemed to rule that the children's quality of life can be improved by the school system in California, yet “the record is void of any fact that the California schools were any more qualified to handle a special needs child such as [P.C.] *** than the Chicago public school [where] he was already enrolled.” Janine counters that the appellate court should not be put into the position of retrying questions of fact. She notes that “[e]xcept for isolated testimony taken out of context, [Richard's] brief contains no other references to the evidence taken in 580 pages of testimony in Volumes 2, 3, and 4 of the record on appeal.”

¶ 34 As the *Eckert* court explained:

“The trier of fact had significant opportunity to observe both parents and the child and, thus, is able to assess and evaluate their temperaments, personalities, and capabilities. We should not disturb the determination of the trial court unless it has resulted in manifest injustice or is against the manifest weight of the evidence. The presumption in favor of the result reached by the trial court is always strong and compelling in this type of case.’ [Citation.]” *Eckert*, 119 Ill. 2d at 330.

Here, the trial court had significant opportunity to observe both parents. The court also heard testimony from Dr. Blechman. Furthermore, in making his ruling, the trial judge acknowledged

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that the instant case had been “one of the more difficult cases that [he had] had to deal with.” He also opined that he was “disappointed” with both parents, and that neither had “stepped up to the plate completely to take care of the problems that their kids have.”

¶ 35 Before addressing the five *Eckert* factors, the trial judge stated that, pursuant to *Collingbourne*, he would begin with the other relevant factors. The first factor he addressed was Dr. Blechman's report and his testimony regarding his psychological evaluation of Richard. Dr. Blechman indicated that Richard had a significant elevation on the L scale of the MMPI [Minnesota Multiphasic Personality Inventory] which was the “Lie” scale. As the court stated, according to Dr. Blechman:

“This indicates a degree of defensiveness going beyond that seen in child custody cases and points to a deceptive test taking posture. It is fairly unsophisticated defensiveness because it involves denying even relatively common human foibles.

Additionally, there was a significant elevation on the S Scale which is superlative self-evaluation involving a naive denial of moral flaws [.]”

¶ 36 The trial judge also noted that he had the opportunity to review Dr. Blechman's report in detail. The trial court considered Dr. Blechman's evaluation of P.C., who was in a special education program with an Individual Education Program (IEP) in place, and believed it was “imperative” that Janine get a more concrete diagnosis.

¶ 37 The trial court commented as follows:

“[The mother] has done more than a decent job with the kids. You've got two

kids that are – it's hard enough having one kid that's difficult at home or has a problem or some affectation that creates the problem, but she's got two kids that are creating difficulty for her. And especially with [P.C.] who – and that fits in with the doctor's evaluation. The father is just not accepting that the child has a problem.”

¶ 38 The court noted it was disappointed that neither parent had pursued P.C.'s problems with the school, but found that “the mother has been much more in tune with the kids and much more there for the children than the father.” The trial court also stated: “I don't think the father really has during the childhood of these kids really lived up to what he should do. I don't find the father to be particularly creditable in his responses.”

¶ 39 Regarding the father's relationship with K.C., the testimony showed that the relationship had been strained and that the two were estranged at the time of trial. The trial court opined as follows:

“I find it hard to believe that he wouldn't have been a little more proactive in his relationship with [K.C.] instead of waiting for [K.C.] to come to him, instead of waiting for the counselor to go over there and just present himself and sit down with the child. He's his son. And if the son yells or you know whatever it is. You know, I'm sure he's been in that situation before. I just don't find that he stepped up to the plate on that. So that's the other – the side issues that I find that *Collingbourne* mentions.”

¶ 40 The court concluded that removal was in the best interests of the children. The

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trial judge stated: “But as far as enhancing the general quality of life, I find that the move from the wife's mother is in the best interest of the kids, the schools, the location of California.” The court then discussed the *Eckert* factors. In granting Janine's petition for removal, the court additionally noted “this is very difficult, more difficult than any case I've ever had.”

¶ 41 The final judgment for dissolution of marriage, including the granting of removal of the children to California, was entered on September 12, 2011. With regard to the issue of removal, the transcript of the court's findings was attached and incorporated into the final written judgment. In addition, the written judgment contained the following detailed findings of fact:

1. The mother had done more than a decent job with the minor children.
2. The father is not accepting of the fact that the parties' child P.C. has a problem.
3. The father has not during the childhood of the parties' children lived up to what he should do.
4. That the Court does not find the father to be particularly credible in his responses.
5. That the Court does find that the mother has been much more in tune with the children and much more there for the children than the father.
6. That the father became more of a father after the divorce was filed.
7. That the father has not been there as much as he says he has been there for his sons.
8. That the Court finds it hard to believe that the father wouldn't have been

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a little bit more proactive in his relationship with K.C. instead of waiting for K.C. to come to him.

9. That the Respondent's move away from her mother's apartment is in the best interests of the children as is the move to California schools and the location in California to where she and the children are moving.

10. That the 604(b) evaluator, Dr. Blechman's recommendations that the mother have sole custody (which is by stipulated agreement of the parties) of the minor children and that she be granted leave to remove the minor children to California, are appropriate.

11. That the Court does not find any problems with either parent regarding the motives for both parents.

12. That the Court finds that the father and his parents really did not try much to facilitate a relationship between his parents and the parties' children.

13. That with removal of the minor children with the mother to California being granted, the father's relationship with the children can continue.

14. That the Court is allowing the mother to move with the minor children to California.

15. That this Honorable Court shall keep jurisdiction over this matter.

16. That a realistic visitation schedule can be put together and visitation be exercised on a regular basis with the father.

17. That in California the mother's job will be safer, she will now get to

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choose her overtime, and she will be available for the children.

18. That with the removal to California being granted, the father will get to spend more quality time with the child.

¶ 42 “A decision is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based on any of the evidence.” *In re Marriage of Bhati and Singh*, 397 Ill. App. 3d 53, 61 (2009). In determining whether the trial court's finding that removal of the children would be in their best interests is against the manifest weight of the evidence, it is not this court's function to reweigh the evidence. *Smith*, 172 Ill. 2d 312, 324–25. It is not our role to assess the credibility of the witnesses and set aside the trial court's determinations merely because a different conclusion could have been drawn from the evidence. *In re Marriage of Pfeiffer*, 237 Ill. App. 3d 510, 513 (1992). Based on the record, we cannot say the trial court's decision was against the manifest weight of the evidence.

¶ 43 Richard has raised another issue on appeal. He argues that the trial court abused its discretion in basing its ruling in part on Dr. Blechman's report because the report was inconclusive and he did not do a complete investigation. Richard notes that Janine intends to move in with her boyfriend Harvey Deering when she moves to California. He asserts that Dr. Blechman's contact and interview with Mr. Deering was limited at best because the interview was over the telephone instead of in person, and Dr. Blechman did not ask Mr. Deering where he lived, if he had any children, whom he currently lived with, or whether he intended to live with Janine. Again, Richard refers to isolated testimony and fails to consider the totality of the

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testimony. In any event, Dr. Blechman testified that he did not base his recommendation regarding removal on how Janine's children interacted or possibly could interact with Mr. Deering's children.

¶ 44 The purpose of section 604(b) allowing the court to appoint an evaluator is to make information available to “assist” the circuit court regarding issues of custody and visitation. *Johnston v. Weil*, 396 Ill. App. 3d 781 (2009). The court here considered Dr. Blechman's report as a whole. More importantly, the court did not rely solely on Dr. Blechman's report but based its decision on the entirety of the evidence, which included the testimony of both Richard and Janine. With respect to Dr. Blechman's evaluation, the court relied primarily on his professional opinion and evaluation of Richard's personality and P.C.'s special education needs.

¶ 45 The court also heard additional testimony from Janine regarding Mr. Deering, including the fact that he is retired from the military, his occupation is senior defense tactics instructor, his salary is \$80,000, he has an adult daughter, and he also has a son who lives with him and who is in the same grade as K.C. The court also heard Janine's testimony regarding the relationship between her sons and Mr. Deering and his son. We fail to see how this additional information regarding Mr. Deering, or the fact that Dr. Blechman did not first ascertain this additional information, shows that the trial court abused its discretion in considering Dr. Blechman's report.

¶ 46

CONCLUSION

¶ 47 In accordance with the foregoing, we conclude that the trial court's decision granting Janine's petition to remove the minor children to California was not against the manifest

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weight of the evidence. We affirm the judgment of the circuit court of Cook County.

¶ 48 Affirmed.