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2012 IL App (3d) 120607-U

Order filed December 31, 2012

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
JARED EITENMILLER,	)	of the 10th Judicial Circuit,
	)	Tazewell County, Illinois,
Petitioner-Appellant,)	
	)	Appeal No. 3-12-0607
and	)	Circuit No. 08-D-547
)	
JACQUELINE EITENMILLER,)	
n/k/a JACQUELINE ROBERTSON,	)	Honorable
	)	Paul P. Gilfillan,
Respondent-Appellee.	)	Judge, Presiding.

Consolidated with:

JARED EITENMILLER,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Petitioner-Appellant,	)	Tazewell County, Illinois,
)	
	)	Appeal No. 3-12-0608
v.	)	Circuit No. 12-OP-76
)	
JONATHAN ROBERTSON,	)	Honorable
	)	Paul P. Gilfillan,
Respondent-Appellee.	)	Judge, Presiding.

Consolidated with:

JARED EITENMILLER,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Petitioner-Appellant,	)	Tazewell County, Illinois,
)	

	)	Appeal No. 3-12-0609
v.	)	Circuit No. 12-OP-129
)	
JACQUELINE EITENMILLER,)	
n/k/a JACQUELINE ROBERTSON,	)	Honorable
	)	Paul P. Gilfillan,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
 Presiding Justice Schmidt and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held:* In a child custody and order of protection proceeding, the trial court did not err in: (1) awarding full custody of the minor child to the child's mother; (2) finding that the grounds for orders of protection against the mother and her new husband had not been established and denying or dismissing those orders on that basis; and (3) granting the mother's petition for removal of the minor child to Hawaii. The appellate court, therefore, affirmed the trial court's judgment.

¶ 2 Father, Jared Eitenmiller, and mother, Jacqueline Robertson, f/k/a Jacqueline Eitenmiller, were married in 2006 and divorced in 2010. They both sought full custody of their minor child, L.E. Mother also sought to remove the child to Hawaii, where she was stationed in the military. During the course of custody proceedings, father obtained an order of protection against mother's new husband, alleging that new husband had sexually abused the minor child. A related order of protection was sought against mother, but a ruling on that issue was reserved by the trial court. After a consolidated hearing on all pending matters, the trial court awarded full custody of the minor child to mother, denied or dismissed the orders of protection, and granted mother's petition for removal. Father appeals all three aspects of the trial court's ruling. We affirm.

¶ 3 **FACTS**

¶ 4 Father and mother were married in 2006 and had one child, born in October 2007. In May 2008, while mother's and father's home was in or nearing foreclosure, mother entered military service. Father stayed behind and cared for the child. Later that year, father filed for dissolution of marriage, which was not contested, and which was granted in 2010. Both parties have since moved on with their lives. Father remarried in December 2010 and had two more children, and mother remarried in April 2011.

¶ 5 Mother was deployed to Korea for one year in March 2009, and in April 2010, was deployed to Hawaii, where she resided at the time of the proceedings in this case. Mother's enlistment in the military ends in May 2013, and she will remain stationed in Hawaii until that time. Initially, after mother left for the military in May 2008, the minor child lived with father in Illinois. However, in April 2010, the trial court entered an order of joint custody and since that time, the child has lived for six months in Hawaii with mother and for the following six months in Illinois with father. During those six-month periods, the minor child would communicate with the noncustodial parent and his or her family approximately three times per week using Skype sessions. Although those sessions were usually not problematic when the child was in Hawaii, problems occasionally arose when the child was in Illinois with father, and the child would often communicate with mother for only a few minutes per session.

¶ 6 The child had a close and loving relationship with mother, with father, with father's new wife and children, with the paternal grandmother and her husband (paternal grandparents), and with the maternal grandparents, although the child's contact with maternal grandparents was eliminated during the proceedings in this case by father. In addition, both parents were physically and mentally healthy; had stable households, which were suitable for the minor child

to reside in; had stable employment; and lived in communities that provided positive opportunities for the child. Many members of the child's extended family live in Illinois and no members of the child's extended family live in Hawaii, although both sets of grandparents have previously traveled to Hawaii and have visited with the child in that location.

¶ 7 Mother married new husband in April 2011. New husband was also in the military, and mother and new husband lived in military housing that was provided for through a private contractor. A few months after the marriage, the minor child returned to Hawaii to spend six months with mother. That was the first time that the child and mother's new husband had lived together in the same household.

¶ 8 In December 2011, after the six-month period had ended, the minor child returned to Illinois to spend six months with father. A few weeks later, problems allegedly developed. The child allegedly began acting out in a sexual manner, was having nightmares, was angry and clingy, and was having bed wetting or urination problems. The problems relating to inappropriate sexual behavior were observed by father's new wife, by new wife's sister-in-law, and by paternal grandparents. In addition, the child allegedly made statements to paternal grandmother indicating that mother's new husband had sexually abused her. Those statements, or ones that were similar in nature, were also made by the minor child in later sessions with two different counselors.

¶ 9 Father obtained an order of protection against mother's new husband in January 2012, and later, after the child allegedly claimed that mother was present for some of the sexual abuse, also sought an order of protection against mother, which the trial court reserved its ruling on.

Because mother and new husband were both in the military, the allegations were extensively

investigated by the military.

¶ 10 An evidentiary hearing was held on approximately six days over a prolonged period of almost two years. The trial court had difficulty scheduling hearing dates because of mother's location and military schedule. A guardian *ad litem* (GAL) was appointed to represent the minor child's interests. At the hearing, the trial court heard testimony from mother, father, mother's brother, both maternal grandparents, paternal grandmother, father's new wife, new wife's sister-in-law, and mother's new husband. A written report by the GAL was presented, which was rather critical of father and whether father had acted in the child's best interests. In addition, at or near the end of the hearing, the GAL presented an oral report in which he recommended that mother be granted full custody, that the orders of protection be dismissed, and that mother be allowed to remove the child to Hawaii. The trial court also heard expert testimony from two licensed social workers (counselors) who had provided counseling to the minor child after the allegations of sexual abuse were made. Both counselors testified as to the minor child's hearsay statements and opined that the child had been the victim of sexual abuse but recognized that there were other possible causes of the minor's troubling behavior. In all, the trial court heard extensive testimony about each of the parents, their relationship with each other, their marital and money problems, their current living arrangements, their relationship with the minor child, the opportunities available to the child in each of the parent's current locations, their employment, their new spouses' relationship with the child, their relationship with the grandparents, the grandparents' relationship with the minor child, the allegations of sexual abuse, and the circumstances surrounding the allegations of sexual abuse.

¶ 11 At the conclusion of the hearing, in a very detailed written decision, the trial court issued

its ruling. The trial court found that: (1) the minor child's hearsay statements regarding the sexual abuse were not admissible in the order of protection proceedings and were not of significant weight in the custody proceedings; (2) mother's testimony was credible and father's was not; (3) mother's decision to join the military and to live in Hawaii was a joint decision of both mother and father; (4) father's and paternal grandmother's disdain for mother was evident throughout the trial court proceedings; (5) mother had made reasonable efforts to communication between the minor child and father in the past when the child resided with her and would continue to do so in the future if she were given full custody; (5) father had not made reasonable efforts to facilitate communication between the child and mother when the child resided with him in the past and would continue to do so in the future if he was granted full custody; (6) father had discouraged the relationship between mother and the minor child; (7) there was a risk of further alienation of mother's parental relationship with child if father was granted full custody; (8) father's motives in opposing removal were as much about defeating mother as they were about benefitting the child; and (9) it was in the best interest of the minor child to grant full custody to mother; and (9) it was in the best interest of the minor child to allow removal of the child to Hawaii. Based upon those findings and others, the trial court awarded full custody of the minor child to mother, denied or dismissed the orders of protection, and granted mother's petition for removal. Father appealed all three aspects of the trial court's ruling.

¶ 12

ANALYSIS

¶ 13 On appeal, father argues first that the trial court erred in granting full custody of the minor child to mother. Father asserts that the trial court's ruling was against the manifest weight of the evidence or constituted an abuse of discretion because the trial court: (1) weighed the

relevant factors incorrectly in making its custody decision; and (2) improperly ignored or gave little weight to strong credible evidence, which showed that the minor child had been sexually abused by mother's new husband. Father asks, therefore, that we reverse the trial court's ruling on custody and that we grant full custody to him. Mother argues that the trial court's ruling was proper and should be affirmed.

¶ 14 A determination of child custody rests within the sound discretion of the trial court and will not be reversed on appeal unless it is against the manifest weight of the evidence or constitutes an abuse of discretion. *In re Custody of Sussenbach (Sussenbach)*, 108 Ill. 2d 489, 498-500 (1985); *Shinall v. Carter*, 2012 IL App (3d) 110302, ¶ 30. A trial court's ruling on a matter of child custody is given great deference on appeal because the trial court is in a better position than the reviewing court to observe and evaluate the witnesses firsthand and to determine the best interests of the child. See *Shinall*, 2012 IL App (3d) 110302, ¶ 30; *Prince v. Herrera*, 261 Ill. App. 3d 606, 612 (1994) (a child custody decision rests on the temperaments, personalities and capabilities of the parties and the trial court is in the best position to evaluate those factors). In reviewing such a decision, the appellate court will not reweigh the evidence or make its own assessment of credibility and will not set aside the trial court's determination merely because a different conclusion could have been reached from the evidence. See *In re Marriage of Pfeiffer (Pfeiffer)*, 237 Ill. App. 3d 510, 513 (1992) (addressing a best-interest determination in the context of a removal petition).

¶ 15 In determining child custody, the primary consideration is the best interest and welfare of the child. *Shinall*, 2012 IL App (3d) 110302, ¶ 40. The trial court must consider all relevant factors, including the statutory factors listed in section 602(a) of the Illinois Marriage and

Dissolution of Marriage Act (Act) (750 ILCS 5/602(a) (West 2010)), which are: (1) the parents' wishes; (2) the minor child's wishes; (3) the minor child's interactions with parents, siblings, and others who may affect the child's best interest; (4) the minor child's adjustment to his home, school, and community; (5) the mental and physical health of all individuals involved; (6) physical violence, or threat thereof, by the minor child's potential custodian, whether directed at the minor child or another person; (7) the occurrence of ongoing or repeated abuse, whether directed at the minor child or another person; (8) the willingness of each parent to facilitate a relationship between the minor child and the other parent; (9) whether one of the parents is a sex offender; and (10) the terms of a parent's military family-care plan, if one exists. *Shinall*, 2012 IL App (3d) 110302, ¶ 40. The trial court need not make a specific finding as to each of the factors listed above as long as the record indicates that evidence was presented during the custody hearing from which the trial court could consider the factors in making its decision. *In re A.S.*, 394 Ill. App. 3d 204, 213 (2009).

¶ 16 In the present case, as noted above, father asserts first that the trial court should have weighed the factors differently in making its custody determination. However, as mother correctly points out, the amount of weight to be given to each of the custody factors is a decision to be made by the trial court, not the reviewing court, and the reviewing court will not reweigh the applicable factors on appeal. See *Pfeiffer*, 237 Ill. App. 3d at 513. Although in his brief on appeal, father emphasizes the allegations of sexual abuse, there was ample evidence presented to the trial court at the hearing from which it could conclude that the statements were not credible or were not entitled to significant weight. The trial court had before it mother's and new husband's denials of the alleged sexual abuse, the absence of any testimony from the child at the custody

hearing, inferences about the possibility that the child was coached to make the allegations, and the lack of any physical evidence to corroborate the allegations of sexual abuse. In addition, the trial court had before it evidence from which it could find that the child had a close and loving relationship with mother; that father and paternal grandmother wanted to hinder that relationship; and that mother would facilitate a relationship between the child and the grandparents and between the child and father, but father would not do the same. The trial court was also presented with the GAL's report, which recommended that full custody of the minor child be given to mother. Based on the evidence presented, we cannot conclude that the trial court's custody decision was against the manifest weight of the evidence or constituted an abuse of discretion. See *Sussenbach*, 108 Ill. 2d at 498-500; *Shinall*, 2012 IL App (3d) 110302, ¶ 30. Accordingly, we reject father's argument on this issue and find that the trial court's custody award was proper.

¶ 17 As his second point of contention on appeal, father argues that the trial court erred in finding that the grounds for the two orders of protection had not been established and in denying or dismissing the orders of protection on that basis. Father asserts that the trial court incorrectly applied section 8-2601 of the Code of Civil Procedure (Code) (735 ILCS 5/8-2601 (West 2010)), rather than section 5/606(e) of the Act (750 ILCS 5/605(e) (West 2010)), in determining whether the minor child's hearsay statements about the alleged sexual abuse were admissible, and because of that error, incorrectly excluded the statements. Father asks, therefore, that we reverse the trial court's ruling on this issue and that we remand this case for the trial court to give full consideration to the orders of protection. Mother argues that the trial court applied the correct statute and that its decision to exclude the statements and to dismiss or deny the orders of

protection was proper.

¶ 18 In resolving this issue, there are two standards of review of which we must be mindful.

The first is the standard of review that applies to an order of protection. A trial court's determination of whether abuse has occurred so as to warrant the issuance of an order of protection will not be reversed on appeal unless it is against the manifest weight of the evidence. *Best v. Best*, 223 Ill. 2d 342, 350 (2006). A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident from the record or if the finding itself is arbitrary, unreasonable, or not based upon the evidence presented. *Best*, 223 Ill. 2d at 350. The second standard of review is the one that applies to the admissibility of evidence. It is well settled that a trial court's ruling on the admissibility of evidence, such as the minor child's hearsay statements in the present case, will not be reversed on appeal unless an abuse of discretion has occurred. *In re Leona W. (Leona W.)*, 228 Ill. 2d 439, 460 (2008). The threshold for finding an abuse of discretion is high and will not be overcome unless it can be said that no reasonable person would have taken the view adopted by the trial court. *Leona W.*, 228 Ill. 2d at 460.

¶ 19 The primary question involved in the admissibility of the minor child's hearsay statements of sexual abuse is whether section 8-2601 of the Code or section 606(e) of the Act governs the admissibility of those statements. Section 205 of the Illinois Domestic Violence Act of 1986 provides that the rules of civil procedure govern any proceeding to obtain, modify, reopen, or appeal an order of protection, regardless of whether the proceeding is commenced alone or in conjunction with another civil or criminal proceeding. 750 ILCS 60/205(a) (West 2010). Under the rules of civil procedure, specifically section 8-2601 of the Code:

"An out-of-court statement made by a child under the age of 13 describing

any act of child abuse or any conduct involving an unlawful sexual act performed in the presence of, with, by, or on the declarant child, or testimony by such of an out-of-court statement made by such child that he or she complained of such acts to another, is admissible in any civil proceeding, if: (1) the court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (2) the child either: (i) testifies at the proceeding; or (ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement." 735 ILCS 5/8-2601(a) (West 2010).

¶ 20 On the other hand, section 5/606(e) of the Act provides:

"Previous statements made by the child relating to any allegations that the child is an abused or neglected child within the meaning of the Abused and Neglected Child Reporting Act [(325 ILCS 5/1 *et seq.* (West 2010))] *** or an abused or neglected minor within the meaning of the Juvenile Court Act of 1987 [(705 ILCS 405/1-1 *et seq.* (West 2010))] *** shall be admissible in evidence in a hearing concerning custody of or visitation with the child. No such statement, however, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect." 750 ILCS 5/606(e) (West 2010).

¶ 21 Citing this court's decision in *Daria W. v. Bradley W.*, 317 Ill. App. 3d 194 (2000), father argues that the governing statute was section 606(e) of the Act. See *Daria W.*, 317 Ill. App. 3d at 198-200 (this court applied section 606(e) of the Act in an order of protection proceeding that

also involved a question of visitation to determine the admissibility of a child victim's hearsay statements about sexual abuse by one of the parents). However, as mother correctly notes, the ruling in *Daria W.* was premised upon the fact that the allegations of sexual abuse were made against one of the parents. See *Daria W.*, 317 Ill. App. 3d at 199. In this case, the allegations were made against a person who is not one of the child's parents, but, rather, is the mother's new husband. Thus, we believe that section 606(e) of the Act is not applicable in the order of protection proceeding and that section 8-2601 of the Code is the appropriate statute to be applied to determine if the statements are admissible.

¶ 22 Furthermore, since section 8-2601 requires either that the child testify or be determined to be unavailable by the court with corroborative evidence—neither of which occurred in the instant case—we conclude that the trial court did not commit an abuse of discretion in excluding the minor child's hearsay statements about the alleged sexual abuse by mother's new husband. See *Leona W.*, 228 Ill. 2d at 460. Based on the evidence presented, and with those statements excluded, we find that the trial court's determination, that the grounds for the orders of protection had not been established, was not against the manifest weight of the evidence. See *Best*, 223 Ill. 2d at 350. The trial court's ruling dismissing the orders of protection, therefore, must be affirmed. See *Best*, 223 Ill. 2d at 350.

¶ 23 As his final point of contention on appeal, father argues that the trial court erred in granting mother's request to remove the child to Hawaii. Father asserts that removal should not have been granted because it was not in the minor child's best interest. Mother argues that the trial court's ruling was proper and should be affirmed.

¶ 24 Under section 609(a) of the Act, a trial court may grant a custodial parent's petition to

remove a minor child from Illinois if removal is in the child's best interest. 750 ILCS 5/609(a) (West 2010); *In re Marriage of Eckert (Eckert)*, 119 Ill. 2d 316, 324 (1988); *Shinall*, 2012 IL App (3d) 110302, ¶ 45. The burden of proof is on the party seeking removal. 750 ILCS 5/609(a) (West 2010); *Eckert*, 119 Ill. 2d at 325. There is no simple bright line test for determining when removal is in a child's best interest. *Eckert*, 119 Ill. 2d at 326. Rather, in ruling upon a removal petition, the trial court should hear all relevant evidence and should weigh that evidence, on a case-by-case basis, while considering such factors as: "(1) whether the move would enhance the quality of life of the parent and the child; (2) whether the custodial parent's motivation to move is intended to defeat or frustrate the noncustodial parent's visitation rights; (3) what motives the noncustodial parent has for challenging removal; (4) what visitation rights the noncustodial parent has; and (5) whether a realistic and reasonable visitation schedule can exist if the court allows the move." *Shinall*, 2012 IL App (3d) 110302, ¶ 46. The trial court's best-interest determination in a removal proceeding will not be reversed on appeal unless that determination is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred. *Eckert*, 119 Ill. 2d at 328.

¶ 25 Having reviewed the evidence in the present case, we find that the trial court's ruling was not against the manifest weight of the evidence and did not result in a manifest injustice. In terms of the above factors, the evidence showed that removal would improve mother's and the minor child's quality of life by providing a more stable living environment than was experienced when custody of the child was changed every 6 months. The trial court also made a specific factual finding that mother's motives for removal were proper and that father's motives in fighting removal were not proper. That finding was supported by the evidence indicating that

mother frequently had problems communicating with the minor child when the child resided with father and that father had eliminated the child's contact with the maternal grandparents. Mother, however, had not acted in a reciprocal fashion, and the trial court noted that to be the case and noted that mother would facilitate a relationship between father and the minor child if removal was granted. Finally, it was apparent that a reasonable visitation schedule could be created and that it would be facilitated by mother as the parties had engaged in an alternating custody arrangement over the past few years while the case was pending.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Tazewell County.

¶ 27 Affirmed.