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2012 IL App (4th) 120005-U

Filed 5/24/12

NO. 4-12-0005

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of)	Appeal from
CHAD D. GROSE,)	Circuit Court of
Petitioner-Appellant,)	Coles County
and)	No. 07D9
MIRI L. GROSE,)	
Respondent-Appellee.)	Honorable
)	Teresa K. Righter,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices McCullough and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court's decision to modify custody was not against the manifest weight of the evidence, we affirm the trial court's judgment.

¶ 2 In November 2007, the trial court dissolved the marriage of petitioner, Chad D. Grose, and respondent, Miri L. Grose. The parties later entered into a joint-parenting agreement. In 2009, both parties filed petitions to modify custody of their minor child. In November 2011, the court found it in the minor's best interest that custody be awarded to Miri.

¶ 3 On appeal, Chad argues the trial court's decision to modify custody was against the manifest weight of the evidence. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Chad and Miri were married in September 1998. One child, Hayden, born in August 2005, was adopted by the parties. In January 2007, Chad filed a petition for dissolution

of marriage. In September 2007, Miri filed a counterpetition for dissolution of marriage. In November 2007, the trial court entered the judgment of dissolution of marriage and reserved all issues relating to property, custody, and child support.

¶ 6 In March 2008, the parties entered into a marital-settlement agreement, a joint-parenting agreement, and a joint-parenting order. The joint-parenting agreement provided Miri would be the primary custodial parent, the parties intended to reside in the same city and school district, and the parties would alternate weeks of custody.

¶ 7 In August 2009, Miri filed a petition to modify custody. Miri stated she and Hayden moved back in with Chad and made efforts at reconciliation. A year later, Chad "kicked [Miri] and the minor child out of the [Mattoon] residence and informed them they were not welcome to return." Miri claimed there had been a change in circumstances such that a modification of custody was in the minor's best interests. She asked the trial court to vacate the joint-parenting order, award custody of the child to her, and order Chad to pay child support.

¶ 8 In September 2009, Chad filed a motion to dismiss the petition to modify custody. In July 2010, the trial court denied the motion to dismiss. The court also entered an order referring the custody issue to mediation. In October 2010, the mediator filed a report indicating the parties had reached an agreement as to some of the disputed issues but were at an impasse as to the remaining issues.

¶ 9 In May 2011, Chad filed a petition to modify custody. Chad claimed a substantial change in circumstances had occurred that necessitated the termination of the joint-parenting agreement and an award of custody to him. Chad alleged Miri maintained a lesbian relationship and lived with her paramour in Rantoul.

¶ 10 In September 2011, the trial court held a hearing on the petitions to modify custody. Chad testified as an adverse witness. He stated Miri moved out in August 2007 and moved back in a year later before moving out for good in August 2009. Approximately a month later, Chad's current wife moved in with her two daughters. They married in October 2010. Chad stated he lived in a three-bedroom modular home with his wife, his daughter, his two stepdaughters, and every other week, his son. The two stepdaughters share a bedroom and Hayden sleeps in a six-foot by six-foot room where the computer used to be located. The nine-month-old baby sleeps in the room with Chad and his wife.

¶ 11 Chad testified to various exhibits, including printouts from several Internet websites. He stated he posted an ad in 2007 on an adult website about looking for females interested in sadomasochistic behavior but it was "just to set [Miri] up to see if she was getting into [his] e-mails." On other online adult personal websites, he indicated he was interested in "fetish," "sexual relations," "online flirting," and was looking for someone who is "very kinky." Another website profile indicated Chad was seeking a woman for "just naughty fun," "1-on-1 sex," and "bondage & spanking." He described himself as a male "looking for a woman who wants to be submissive to a bigger guy." Again, Chad claimed he created the profiles and listed the activities to "set [Miri] up to see if she was in [his] e-mails." Chad stated he met with one woman, who was interested in bondage, that he met online.

¶ 12 Chad denied engaging in a "swinger" lifestyle and claimed he did not put that activity, along with "strippers" and "I love BDSM," on his Facebook page. He also stated he did not actively practice sadomasochism and said he "never really got into it." He stated he had not viewed any explicit pictures or pornography on his computer since he and Miri separated,

although he had "probably gotten forwards" from people on his phone.

¶ 13 Chad stated he had a collection of sex toys and restraints that were kept in a tote underneath the bed, but he got rid of them before he married his current wife. He also testified to a handwritten document titled "S/M Rules for Miri," which laid out his rules that she, for example, start her homework, work to quit smoking, keep the bathroom sink clean, clean the cat's litter box, and "keep your vagina area trimmed and your legs shaved all the time." As punishment for not following the rules, Miri would be required to give Chad "blow jobs" or undergo multiple spankings, anal sex, bondage, and other explicit sex acts. Chad stated he wrote the rules because he "was tired of giving her money when she wouldn't get a job" and wanted her to leave. Chad agreed the rules would not be appropriate values to teach his son.

¶ 14 Autumn Bierbaum, Miri's sister, testified Miri treats Hayden "like a good mother" and "makes sure that his needs are met." April Jendril, Miri's mother, testified Miri had a "good" relationship with Hayden. When she visited with Miri and Chad, she stated he would often be watching television or on the computer. Jendril had also seen pornographic images that Chad had sent to Miri's telephone.

¶ 15 Miri testified she was 33 years old and worked as an early childhood teacher in Rantoul. She lived in a two-bedroom apartment in Mattoon. The visitation schedule for Hayden was every other week, and she was the designated custodial parent under the joint-parenting agreement. At some point, Miri's landlord sought to evict her but she has not been removed from the property. Hayden is in first grade. During weeks Miri does not have custody of Hayden, she stays in Rantoul. Her mom and stepfather live in Rantoul.

¶ 16 Miri stated she married Chad in September 1998 and they separated in January

2007. They got back together before Miri decided to move out in August 2007. The dissolution judgment was entered in November 2007, and the custody order was entered in March 2008.

Miri started living with Chad again in August 2008. Miri stated the day after she found the "S/M rules," which Chad never presented to her, he kicked her out of the house. Chad told her she had 45 minutes to leave. Miri was able to take some of her clothes in suitcases. Chad would not let her return to the residence to retrieve her property or clothes and all of her "stuff was thrown out in one of the [grain] bins on the front part of the property."

¶ 17 Miri stated Chad had sent her pornographic images to her phone on several occasions. They had also engaged in acts of bondage. He would spank her as a form of punishment and make her address him as master. She found it degrading. When she moved back in with Chad in August 2008, he had a tote under the bed that contained paddles, restraints, magazines, handcuffs, blindfolds, a whip, and other items. Miri had concerns not only with Chad viewing pornography online, fearing Hayden might inadvertently see it, but also his masturbation in the computer room.

¶ 18 Miri stated the home she lived in with Chad had three bedrooms, although the room where the computer was located was "extremely small." Miri had disagreements with Chad as to where Hayden should go to school, whether Hayden should continue to attend counseling, and issues concerning his diet. Miri asked the trial court for sole custody of Hayden. She proposed visitation for Chad every other weekend.

¶ 19 On cross-examination, Miri testified to a speeding ticket that indicated her address on the front as Mattoon and on the back as an apartment in Rantoul. Miri stated she is in a lesbian relationship with a woman named Erin. Miri worked a minimum of 25 hours per week

up to 40 hours. On redirect examination, Miri stated she had contacted a Catholic school in Rantoul for Hayden to attend.

¶ 20 Called as a witness by Chad, Christine Kolling, a kindergarten teacher in Mattoon, testified Hayden appeared clean and prepared when Chad brought him to school. When Miri brought Hayden to school, he "cried" and "just seemed unhappy." Miri was a room parent and assisted in several class parties.

¶ 21 Chad testified he helps Hayden with his homework. Chad is a Cub Scout den leader and holds meetings one night every week. He stated Hayden had not been exposed to any online pornography or any items of restraint in the months or years prior to August 2009. On cross-examination, Chad stated he no longer had an interest in sexual activity involving domination. He stated he would like Hayden to attend public school like his stepsisters. Chad's wife was unemployed at the time of the hearing.

¶ 22 In November 2011, the trial court issued its written order. The court found the parties' petitions indicated there had been "a substantial change in circumstances warranting a termination of the joint-parenting agreement." The court noted Chad "unilaterally kicked" Miri out of the shared residence in the presence of Hayden, which "caused great inconvenience and turmoil," Chad moved his current wife and her two daughters into the home approximately one month later, and he had remarried and had another child with his new wife. The court found Miri found employment as a preschool teacher in Rantoul, which made the alternating custody arrangement "impractical."

¶ 23 The trial court found the parties disagreed on issues of schooling, bus riding, extracurricular activities, and Hayden's diet. Further, the parties' testimony indicated "they do not

like each other, they are unwilling to compromise, they are unwilling to discuss, are incapable of considering the other parent's position[,] and are incapable of putting the best interest of their child above their differences, past hurts[,] and animosity." The court found it in the minor's best interest that his sole care and custody be awarded to Miri, subject to reasonable visitation by Chad. This appeal followed.

¶ 24

II. ANALYSIS

¶ 25 On appeal, Chad argues the trial court's decision to award custody of Hayden to Miri was against the manifest weight of the evidence. We disagree.

¶ 26 "A custody determination inevitably rests on the parties' temperaments, personalities, and capabilities, and the witnesses' demeanor." *In re Marriage of Spent*, 342 Ill. App. 3d 643, 652, 796 N.E.2d 191, 199 (2003). A reviewing court accords great deference to the trial court's custody decision since it is in the best position to observe the temperaments and personalities of the parties and assess the credibility of the witnesses. *Spent*, 342 Ill. App. 3d at 652, 796 N.E.2d at 199. As a child custody determination rests largely within the discretion of the trial court, we will not disturb its decision unless it is against the manifest weight of the evidence or it amounted to an abuse of discretion. *In re Marriage of Smithson*, 407 Ill. App. 3d 597, 600, 943 N.E.2d 1169, 1171 (2011).

¶ 27 Section 610(b) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/610(b) (West 2010)) provides as follows:

"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 un-

known 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. *** In the case of joint custody, if the parties agree to a termination of a joint custody arrangement, the court shall so terminate the joint custody and make any modification which is in the child's best interest. The court shall state in its decision specific findings of fact in support of its modification or termination of joint custody if either parent opposes the modification or termination."

¶ 28 Normally under section 610(b), a custody order may be modified if the petitioner shows by clear and convincing evidence that a change of circumstances has occurred and modification is necessary to serve the minor's best interest. *Smithson*, 407 Ill. App. 3d at 600, 943 N.E.2d at 1172. "However, in the case of a joint-parenting agreement, where both parties agree to a termination of the agreement, a trial court may proceed directly to a determination of the child's best interests." *Smithson*, 407 Ill. App. 3d at 600, 943 N.E.2d at 1172; see also *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 178, 768 N.E.2d 834, 838 (2002) (noting that when the parties move to terminate the joint-parenting agreement, "the trial court shall make any modification that is in the children's best interest"). Here, both parties sought to terminate the joint-custody agreement. Thus, the trial court could proceed directly to the question of whether a

modification of custody was in Hayden's best interests.

¶ 29 In deciding custody of a minor child, a trial court is to consider the best interest of the child. 750 ILCS 5/602(a) (West 2010). Section 602(a) of the Dissolution Act provides the following factors a court must consider in its custody determination:

- (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 2010).

"The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." 750 ILCS 5/602(b) (West 2010).

¶ 30 In the case *sub judice*, the trial court indicated the section 602(a) factors did not "weigh heavily in favor of one party or the other" and believed Hayden would likely do "equally well in either his father's custody or his mother's custody." The court did, however, find the fifth and eighth factors weighed in favor of Miri. We find the evidence was sufficient to support the trial court's findings on these two factors.

¶ 31 A large portion of the testimony and evidence before the trial court dealt with Chad's viewing of adult pornography, reading similar material, and his Internet usage. Since he and Miri separated, Chad claimed he had not viewed any pornography on his home computer but only "read stories online." He later stated he viewed pornography on his computer but claimed it was from friends forwarding material to him. Several of Miri's exhibits contained pornographic images from Internet websites visited by Chad. It was also in evidence that Chad sent pornographic images to Miri's cell phone in 2010.

¶ 32 Along with Chad's viewing of pornography, Miri presented exhibits of his use of

personal sites on the Internet in 2007. In his profiles, Chad referred to himself as "your big bear," "hornybigdad," and "papabear0069." The profiles indicated he liked "getting kinky" and was "dominating when it comes to a relationship." He indicated he was looking for a woman for "Just Naughty Fun!," "1-on-1 Sex," and "Bondage and Spanking." He described himself as "looking for a woman who wants to be submissive to a bigger guy." In describing what type of bedroom activities interested him, Chad listed, *inter alia*, sadomasochism, bondage, candle wax, threesomes, handcuffs, nipple torture, and blindfolds. He also listed role-playing scenes he fantasized about, toys he enjoyed using during foreplay or sex, food items he used, and the kind of adult movies he liked.

¶ 33 Further evidence of Chad's mental health was evidenced by a four-page handwritten exhibit titled "S/M Rules for Miri." Tired of Miri spending his money, Chad set forth a list of rules for Miri to follow and the possible punishment she would face if she failed. Such punishment included a "blow job till I fill your mouth with my load," "spanking which will be a min. of 5 smacks per cheek but not more than 20 per cheek," "anal sex which will be done doggy style and with or without restraints," "bondage chair and being used," and "making you clean a room or something till it's to my liking." Also, "anal sex will be required for any money amounts over \$60, along with a blow job before I give it to you anally and I will smack your ass while fucking your ass as well." We also note some of the pornographic stories Chad admitted reading and that were placed into evidence by Miri are shockingly disturbing.

¶ 34 We find the trial court could have found the mental-health factor favored Miri. Although Chad may claim the pornography, sex toys, and sex acts are issues from his past, it is questionable given his, at times, evasive testimony. Chad claimed he only used his computer to

play games like "Farmville" and "Mafia Wars." The evidence indicates otherwise. An exhibit showing Chad's Facebook account from 2010 showed a picture of him, his wife, his two stepdaughters, and Hayden. Among the activities he listed were "going to church," "being with friends and family," "swinger lifestyle," "strippers," and "I love BDSM," which stands for bondage, domination, sadism, and masochism. Chad denied listing the latter three activities.

¶ 35 Chad claimed at the hearing that Miri had accessed his Internet accounts and doctored certain web pages. He also claimed he created some of the online profiles to see if she was "getting into [his] e-mails." The court had ample opportunity to find Chad was not a credible witness on these issues, which, in turn, spoke volumes on his mental state of mind.

¶ 36 Chad also argues Miri was an active participant in the bondage, spanking, and anal sex that went on during the marriage. Chad points out Miri made "lifestyle choices" that might impact Hayden, including being involved in a lesbian relationship. We note "Illinois' approach to child custody determinations is sexual orientation neutral." *In re Marriage of R.S.*, 286 Ill. App. 3d 1046, 1055, 677 N.E.2d 1297, 1303 (1996). Here, Miri's paramour did not testify, and no evidence was presented as to their relationship. Thus, we find no reason to consider the relationship as a factor in the custody determination here.

¶ 37 The trial court could also have found Chad was not as willing and able to facilitate and encourage a relationship between Miri and Hayden. The court found it clear that the parties did not like each other and were unwilling to compromise. The court found Chad "unilaterally kicked" Miri out of the shared residence with Hayden present "and in a manner that caused great inconvenience and turmoil." The evidence also indicates Miri had been traveling from Rantoul and Mattoon to drop off Hayden into Chad's custody and nothing indicates she would not

continue to do so in the future when Chad has his visitation with his son.

¶ 38 The trial court heard the testimony and viewed the evidence. The court was well aware of Chad's computer usage and interests along with Miri's relationships and her housing woes. While nothing indicated Chad and Miri did not love their son, the court had to make a decision on who should receive sole custody considering the parties could not work together, could not compromise, and could not put Hayden's best interests "above their own differences, past hurts and animosity." This is why the trial court is in the best position to make the custody decision—as it can observe the parties and assess the credibility of the witnesses. The court's decision to award sole custody of Hayden to Miri was not against the manifest weight of the evidence.

¶ 39

III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment.

¶ 41 Affirmed.