

NOTICE

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2012 IL App (5th) 120077-U  
NO. 5-12-0077  
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).

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<i>In re</i> MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
TRACEY N. DOWD,	)	Clinton County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 10-D-147
	)	
MICHAEL DOWD,	)	Honorable
	)	William J. Becker,
Respondent-Appellee.	)	Judge, presiding.

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JUSTICE GOLDENHERSH delivered the judgment of the court.  
Presiding Justice Donovan concurred in the judgment.  
Justice Wexstten dissented in part.

**ORDER**

- ¶ 1 *Held:* The trial court's judgment awarding custody of the minor children to respondent and denying petitioner retroactive child support is not contrary to the manifest weight of the evidence; the trial court properly denied petitioner's removal petition as moot where custody was awarded to respondent.
- ¶ 2 Petitioner, Tracey N. Dowd, appeals the judgment of the circuit court of Clinton County dissolving her marriage to respondent, Michael Dowd. Tracey argues (1) that the trial court's decision awarding primary physical custody of the parties' two minor children to Michael is contrary to the manifest weight of the evidence, (2) that the trial court failed to consider the statutory factors in determining the best interests of the children, (3) that the trial court's decision denying Tracey retroactive child support was contrary to the manifest weight of the evidence, and (4) that the trial court improperly denied Tracey's petition for leave to remove the children. For the reasons that follow, we affirm.

¶ 3

## FACTS

¶ 4 The facts necessary to our disposition of this appeal are as follows. Michael and Tracey Dowd were married on July 27, 1991. Two children were born to the marriage, namely, M.D., born on September 27, 1999, and B.D., born on September 23, 2003. The parties resided in Albers, Illinois. At the time of the dissolution proceedings, Michael was 44 years old and was employed as an aviation radiologist in Cahokia, Illinois. Tracey was 42 years old and was employed as a registered nurse in St. Louis, Missouri.

¶ 5 In August 2010 Tracey met Mike Greeno and began a sexual relationship with him. At first, Michael encouraged this relationship. The relationship developed into something more serious and Tracey decided to divorce Michael and marry Greeno, who lived in Paducah, Kentucky. On December 2, 2010, Tracey obtained an emergency order of protection against Michael. On December 16, 2010, Tracey filed a petition for dissolution of marriage and a petition for temporary relief requesting temporary custody of the children. On December 21, 2010, the trial court entered an agreed order which, *inter alia*, (1) ordered the parties not to harass, stalk, or intimidate each other, (2) awarded temporary custody of the children to Tracey and provided Michael with visitation every other weekend, and (3) awarded Tracey possession of the marital home.

¶ 6 On April 18, 2011, Tracey filed a petition for leave to remove the children from Illinois, seeking leave to remove the children to Kentucky and alleging that she intended to move in with, and later marry, Greeno. On April 29, 2011, the trial court entered an order appointing Marsha Holzhauser guardian *ad litem*. The court declined to address Tracey's petition for removal because custody had not yet been determined.

¶ 7 On August 1, 2011, Holzhauser submitted her report. Holzhauser met with Michael and the children at Michael's home in New Baden and with Michael separately in her office. She also met with Tracey and the children on two occasions, once in the marital home in Albers

and once in her office. Michael was the primary financial support for the family, while Tracey was the primary caretaker of the children. Holzhauer's report indicated that most of Michael's extended family is in the Clinton County area and that Tracey's extended family lived near Vandalia. Holzhauer noted that Tracey had filed a petition seeking leave to remove the children to Kentucky. She also noted that Tracey appeared to have included the children in on most of her thoughts and decisions about moving to Kentucky and that the children had expressed their desire to move to Kentucky with their mother. Holzhauer believed that the children had been promised many things if they moved to Kentucky, something she considered inappropriate. Holzhauer concluded that the sole reason Tracey wanted to move to Kentucky was to be with Greeno, whereas all of the children's family, school, activities, friends, and roots are in Clinton County. Holzhauer opined that although Michael appeared "somewhat aloof" and "not as 'hands on' as Tracey regarding the children," it would be in the children's best interest to award custody to Michael.

¶ 8 Trial began on August 1, 2011. Tracey testified as follows. She was the primary caregiver for the children and she does many activities with them. Both children were active in sports. Michael shows the children no affection. He shows favoritism to M.D., but has no relationship with B.D. and spends almost no time with him. The children are frightened of Michael because he constantly yells at them and belittles them. When he gets home from work he takes a shower and then gets on the computer, mostly looking at pornography. The computer is in the living room and the children were present while Michael was looking at pornography. Tracey allows Michael to see the children whenever he wants, but they frequently did not want to go and see him.

¶ 9 Tracey testified that the children had resided in Albers all of their lives. M.D. was bullied at school, by both other children and the school principal. The children hated school in Albers and were looking forward to going to school in Kentucky. She admitted that she

never went to the school over the bullying and never considered sending M.D. to another school. The children have no friends in Albers.

¶ 10 Tracey stated that she first met Greeno on August 21, 2010, at a mutual friend's wedding. The following month she began a sexual relationship with him, with Michael's knowledge and encouragement. Tracey testified that she was in love with Greeno and that they were planning to get married on August 19, 2011. They saw each other every other week or so, and they talked on the phone and sent text messages to each other numerous times throughout the day.

¶ 11 Tracey described Greeno as very family-oriented. She stated that M.D. and B.D. have a wonderful relationship with Greeno and that he enjoys spending time with the children and doing activities with them. M.D. talks to him on the phone numerous times each day.

¶ 12 M.D. first learned that Tracey was seeing Greeno several weeks before Thanksgiving 2010. Tracey testified that Michael had called M.D. and told her that Tracey was sleeping with a man from another state. M.D. first met Greeno on November 27, 2010. Tracey and M.D. went to Paducah, Kentucky, to go shopping. They stayed with Greeno for several days. B.D. met Greeno in December 2010. Greeno came for a visit around Christmas 2010, staying with Tracey's family in Vandalia, Illinois. Tracey testified that the children had asked if Greeno could come up and spend Christmas with them. Greeno bought them presents, including bicycles. Greeno also bought a cell phone for M.D. Tracey testified that while Greeno was visiting, M.D. suggested that Tracey and Greeno get a hotel room so that they could have some time together.

¶ 13 Tracey stated that M.D. and B.D. love Greeno. Tracey testified that B.D. had stated that Michael did not love him and that he was happy that he would have a daddy who loved him. M.D. asked Greeno to come to Albers for her parish awards ceremony. B.D. was always asking when they could see Greeno.

¶ 14 Tracey testified that she and the children would be much more financially secure in Kentucky. Greeno had a good job and a much larger and nicer house, and the children would each have their own rooms. The school they would attend was much nicer than the one in Albers and it had much more to offer, both academically and in terms of extracurricular activities. There were more recreational and cultural opportunities in Paducah. Tracey would have more job opportunities in the Paducah area, but would not have to work if she did not want to because of Greeno's financial position.

¶ 15 Tracey also testified to the events giving rise to the order of protection entered against Michael. Michael had been continually texting M.D. and telling her that Tracey was destroying their marriage. M.D. was very upset by this and she wanted Michael to stop texting her. On November 26, 2010, Tracey and M.D. went shopping in Fairview Heights, Illinois. Michael followed them there and confronted Tracey in a store. According to Tracey, M.D. suggested that they go shopping in Paducah, Kentucky. Michael followed them there and confronted them in a mall about their marriage. Tracey testified that M.D. then suggested that Tracey see an attorney to make Michael stop stalking and harassing them. M.D. went with Tracey to an attorney's office and M.D. spoke to the attorney about getting an order of protection. Tracey testified that at the time she sought the order of protection she feared that Michael could become physically abusive, even though he had never been physically abusive before. Tracey filed a verified petition for an order of protection on December 2, 2010.

¶ 16 When questioned by Holzhauer regarding the appropriateness of involving M.D., an 11-year-old child, in her relationship with Greeno, the dissolution proceedings, and the order of protection, Tracey testified that M.D. was very mature and thought like a 20-year-old.

¶ 17 Michael Dowd testified that he was very involved in the children's lives. He coached M.D.'s baseball team and helped with B.D.'s baseball team when work permitted. Michael

admitted that he sometimes works overtime and weekends. He took B.D. to all but a few of his Boy Scouts meetings and helped him build a car for the pinewood derby. Michael testified that most of his relatives lived in and around Albers. He acknowledged that he had several "run-ins" with the school principal but denied that the children hated going to school in Albers. Michael testified that he did the majority of the household chores prior to the parties' separation. He admitted yelling at the children occasionally, but denied belittling them. Michael testified that during the separation he wanted to see the children more often than he did, but that Tracey would not permit it. Michael also admitted blocking Greeno's phone number from M.D.'s cell phone because he believed that it was inappropriate for Greeno, a 56-year-old man, to be calling and texting his 11-year-old daughter.

¶ 18 Michael denied leaving pornographic magazines or movies lying around where the children could find them. He admitted looking at adult websites on the computer in the living room, but stated that he did so only after the children had gone to bed.

¶ 19 With respect to the events surrounding the order of protection, Michael testified that he went to Paducah because he was worried about M.D. He had met Tracey and M.D. in Fairview Heights on November 26, 2010. Tracey did not tell him that she was planning to take M.D. to Paducah the following day. On November 27, 2010, Michael attempted to contact M.D., and then Tracey, but was unable to do so. Using a cell phone feature, Michael determined that M.D.'s phone was in Paducah. He drove to Paducah, where he was eventually able to speak to M.D. on his cell phone. M.D. stated that she was in a mall shopping and was by herself in a store in the mall. Tracey and Greeno were also in the mall.

¶ 20 Mike Greeno testified that he was employed in Metropolis, Illinois, as a facilities manager. He lives in Paducah, Kentucky. He had been married twice and had two adult children. He met Tracey in August 2010, and they began dating the following month. They saw each other every other week and spoke or texted on the phone frequently. The

relationship became romantic around the second week of November. Greeno testified that he loved Tracey and was looking forward to having her and the children living with him. He first met M.D. in November 2010, when Tracey and M.D. came to Paducah to go shopping. He first met B.D. in December 2010, when he met Tracey and the children in Mt. Vernon, Illinois, for dinner.

¶ 21 Greeno testified that he had a good relationship with Tracey's children. He and Tracey have done many activities with them, including going to the zoo, going to the park, picnicking, and sledding. He purchased a cell phone for M.D. and talks to her frequently. They talk about M.D.'s school subjects and her interests. She talks a lot about her friends and what she has been reading. M.D. mentioned that she does not like school in Albers because other children bully her and because she has had problems with the principal.

¶ 22 Marsha Holzhauser testified that she recommended that custody of the children be given to Michael. She acknowledged that Tracey and the children would be better off financially if they moved to Kentucky and that the children did not like living in Albers. She also acknowledged that the children liked Greeno and that Tracey would not have to work if she and the children moved to Kentucky. Holzhauser recommended that Michael be given custody because the children had lived their whole lives in Albers and because most of their extended family lived in the area. Holzhauser believed that by requesting removal Tracey was putting her interests ahead of the best interests of the children, particularly given the relatively short duration of her relationship with Greeno.

¶ 23 The trial court awarded custody of the children to Michael. The trial court stated that it was impressed with Holzhauser's testimony and analysis, and it adopted her testimony as the basis for its decision regarding custody. The court agreed that Tracey's decision to uproot the children and move them to Kentucky as a result of her relationship with Greeno, a man she had known for a relatively short time, was motivated more by her interests than the best

interests of the children. The court found Tracey's petition for removal to be moot given the custody decision. Tracey appeals.

¶ 24

#### ANALYSIS

¶ 25 We first address Tracey's argument that the trial court failed to consider the relevant statutory factors in determining the best interests of the children. She contends that the trial court did not indicate on the record or in its order that it had considered the relevant statutory factors, and that it failed to make any specific findings of fact relating to any of the statutory factors.

¶ 26 Section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602(a) (West 2010)) requires the circuit court to determine custody according the best interests of the children after considering all of the relevant factors, including:

- "(1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings[,] and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school[,] and community;
- (5) the mental and physical health of all individuals involved;
- (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
- (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986 \*\*\*;
- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; [and]
- (9) whether one of the parents is a sex offender[.]" 750 ILCS 5/602(a) (West

2010).

¶ 27 A trial court is not required to make specific findings of fact with respect to the section 602(a) factors provided that evidence was presented from which the court could consider the relevant factors prior to making its decision. *In re Marriage of Diehl*, 221 Ill. App. 3d 410, 424, 582 N.E.2d 281, 290 (1991); *In re Marriage of Stribling*, 219 Ill. App. 3d 105, 107, 579 N.E.2d 6, 8 (1991). The record in the present case demonstrates that the trial court heard and considered evidence of the relevant statutory factors prior to rendering its decision.

¶ 28 Both Tracey and Michael testified that they were seeking custody of the children, and Tracey testified that the children wanted to be with her. The court heard testimony regarding the interaction and interrelationship of the children with their parents, their relatives, and Greeno. In its order, the court noted that Tracey and several members of her family testified that M.D. disliked the school in Albers and that B.D. was shy and had few friends, but found that this testimony was offered to persuade the court that Tracey and the children should be in Kentucky as opposed to testimony of any real and actual problem. The court noted that Michael had considerable family in the Albers/Clinton County area but found that this also was not an adequate basis for awarding custody to him. The court also noted that Tracey and several members of her family testified that Michael is relatively quick to anger, and found that while Michael was more likely to become agitated more quickly than Tracey, the testimony on this factor did not persuade the court that this factor is such that it would have major weight in determining custody. The court also heard detailed evidence relating the circumstances surrounding the entry of the order of protection against Michael.

¶ 29 Although the trial court did not explicitly state that it had considered the relevant section 602(a) factors, it is apparent from the foregoing that the trial court heard evidence which enabled it to consider the relevant section 602(a) factors.

¶ 30 Tracey next argues that the court's finding that awarding custody to Michael was in the best interests of the children was contrary to the manifest weight of the evidence. She contends that the trial court failed to properly consider the stability of the children with their primary caretaker or Michael's "immoral conduct" in the home. She maintains that both Holzhauser and the trial court focused almost exclusively on Tracey's desire to move to Kentucky with the children.

¶ 31 As noted above, section 602 requires that when determining custody, the trial court must consider all relevant factors including, but not limited to, those enumerated therein. *In re Marriage of Martins*, 269 Ill. App. 3d 380, 389, 645 N.E.2d 567, 573 (1995). "A trial court has broad discretion in making custody determinations, and a reviewing court should only reverse if the determination is against the manifest weight of the evidence or it appears a manifest injustice has occurred." *In re A.S.*, 394 Ill. App. 3d 204, 212, 916 N.E.2d 123, 131 (2009) (citing *In re Marriage of Feig*, 296 Ill. App. 3d 405, 408, 694 N.E.2d 654, 656 (1998)). A custody determination is only "against the manifest weight of the evidence" where the opposite conclusion is clearly apparent or where the determination is unreasonable, arbitrary, or not based on the evidence. *In re Estate of K.E.S.*, 347 Ill. App. 3d 452, 461, 807 N.E.2d 681, 688 (2004). A trial court's custody determination must be given great deference because the trial judge has had the opportunity to observe the witnesses as they testify and is therefore in a superior position to determine the best interests of the child (*In re Marriage of Quindry*, 223 Ill. App. 3d 735, 737, 585 N.E.2d 1312, 1314 (1992)), and there is a strong and compelling presumption that the trial court's custody determinations are correct (*In re Marriage of Willis*, 234 Ill. App. 3d 156, 161, 599 N.E.2d 179, 183 (1992)).

¶ 32 In the present case, the trial court heard evidence of the relevant section 602 factors prior to making its decision. The court also considered the report and testimony of Holzhauser, to which the court gave considerable weight, going so far as to adopt Holzhauser's

findings and opinions as the basis for its decision. Holzhauer believed that although Michael's conduct was unusual, it was not so significant as to warrant awarding custody to Tracey. Holzhauer's opinion, with which the court agreed, was that Tracey decided to divorce Michael and move with the children to Kentucky as a result of her encounter and subsequent relationship with Mike Greeno, a man Tracey had known for a relatively short period of time. The court agreed with Holzhauer's opinion that Tracey's decisions were driven more by her own interests than the best interests of her children.

¶ 33 We cannot say that the trial court's decision to award custody to Michael was unreasonable, arbitrary, or not based upon the evidence, nor is it clearly apparent that Tracey should have been awarded custody. The trial court's judgment is not contrary to the manifest weight of the evidence.

¶ 34 Tracey next argues that the trial court erred in failing to award her retroactive child support for the period during which she had temporary custody of the children. We disagree.

¶ 35 A trial court may award retroactive child support if such award is fit, reasonable, and just. *In re Marriage of Rogliano*, 198 Ill. App. 3d 404, 410, 555 N.E.2d 1114, 1118 (1990). "The decision to award retroactive child support rests within the sound discretion of the trial court." *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119, 806 N.E.2d 701, 711 (2004).

¶ 36 In the present case, the agreed order entered on December 21, 2010, awarding temporary custody of the children to Tracey, was silent on the issue of temporary child support. At trial, Michael testified that since December 1, 2010, he had paid the mortgages on the marital residence and various utility bills, as well as miscellaneous medical bills and school lunch expenses for the children. He had also helped pay for groceries, clothing, and miscellaneous items for the children, and had paid Tracey \$1,050 in cash to pay other bills. Under these circumstances, we cannot find that the trial court abused its discretion in not awarding retroactive child support for the eight-month period during which Tracey had

temporary custody of the children.

¶ 37 Tracey's final argument on appeal concerns the denial of her petition for leave to remove the children to Kentucky. She contends that the trial court improperly ruled on evidence relating to custody and evidence relating to removal at the same time. We disagree. Reviewing the record, we find that the trial court first ruled on the issue of custody, then denied the removal petition on the grounds that it was moot. Section 609 of the Act provides that the trial court may allow the custodial parent to remove a minor child from Illinois if removal is in the child's best interests. 750 ILCS 5/609 (West 2010). Because Tracey was not awarded custody of the children, the trial court properly denied the removal petition as being moot.

¶ 38 **CONCLUSION**

¶ 39 For the foregoing reasons, we affirm the judgment of the circuit court of Clinton County.

¶ 40 Affirmed.

¶ 41 JUSTICE WEXSTTEN, dissenting in part:

¶ 42 I disagree with my colleagues on the issue of whether the trial court's decision to award custody of M.D. and B.D. to Michael was contrary to the manifest weight of the evidence. Despite the fact that the trial court is given broad discretion when making custody determinations (*In re A.S.*, 394 Ill. App. 3d at 212), and its decision is given great deference because of its opportunity to observe the witnesses (*In re Marriage of Quindry*, 223 Ill. App. 3d at 737), I still believe that the trial court's order awarding custody to Michael was against the manifest weight of the evidence because its rationale does not appear to be sufficiently based on the evidence (*In re Estate of K.E.S.*, 347 Ill. App. 3d at 461).

¶ 43 In its September 26, 2011, order awarding custody to Michael, the trial court summarized testimony given by the parties. It then discussed testimony given by the appointed guardian *ad litem*, Marsha Holzhauser, as follows:

"The court was particularly impressed with [Holzhauer's] testimony and adopts her testimony as the basis for its opinion. In short Ms. Holzhauser believed that [Michael's] conduct unusual as it may be was not such that custody should be awarded to [Tracey]. Ms. Holzhauser's testimony and the court's opinion is that [Tracey] simply decided to uproot her family and move them to Kentucky as a result of her encounter and subsequent relationship with Mr. Greeno. The evidence suggested that she had only known Mr. Greeno since the late summer of 2010. Within that short time she had concluded that the marriage should terminate [and] that the children should be moved from the only place that they had ever lived and from near their maternal relatives in Vandalia area to Roanoke[,] Kentucky.

The guardian ad litem, on cross examination by [Tracey's] attorney[,] acknowledged that she had considered all of the factors stressed by [Tracey] in making a recommendation to award custody to [Michael]. The court was impressed with that testimony, and her analysis of the situation. She concluded that [Tracey's] decision to uproot the family and move to [Kentucky] as a result of her contact and subsequent relationship with Mr. Greeno was driven more by her interests than the children's best interests. [Holzhauer] was concerned that the move will cause instability for the children, and she was unfavorably disposed to the manner in which the decision to move the children was made and the relatively unknown quantity Mr. Greeno is. The court agrees."

¶ 44 Reviewing the transcript, Holzhauser's testimony reveals significant inconsistencies between her admissions and her final custody recommendation. To illustrate, during direct

examination, Holzhauer acknowledged that Tracey had been the primary caregiver for the children throughout the parties' marriage. She also admitted that the children told her they were unhappy living in Albers and that they wanted to move to Kentucky with their mother. Further, Holzhauer stated that the children liked Greeno and had fun with him. She also admitted that the children's home in Albers "is a wreck" and that "it's got to have a lot of work." In contrast, Holzhauer stated that she had no doubt that Greeno's house is "a lot nicer" than the house in Albers and that the school district there was likely much better. She recognized that financially, the children would be better provided for if they resided with Tracey and Greeno and that Tracey would be able to spend more time with the children because she would no longer have to work. Yet, Holzhauer ultimately concluded that to award custody to Tracey and relocate the children to Kentucky would not be in the children's best interest. She believed that the children had been promised things to induce them to want to move with Tracey to Kentucky. When questioned about this belief on direct examination, Holzhauer admitted that she did not have any "specifics," but rather, it was merely her "belief," based on her viewpoint that, to the children, "the grass is always greener on the other side."

¶ 45 Holzhauer also placed significant weight on the fact that the children's "roots" were in Albers and that all that was in Kentucky was "Greeno." She concluded that Tracey only wanted to move to Kentucky to continue her relationship with Greeno and, therefore, had failed to put the children's best interests ahead of her own. However, she admitted that the children had informed her that they were not happy in Albers and wanted to move. Holzhauer did not have any information regarding the extent of the children's involvement with their extended family in the area and what negative impact, if any, there would be if they relocated with Tracey to Kentucky. At most, she indicated that the children had spent time with Tracey's relatives. Yet, Holzhauer did not interview any of the children's extended

family members comprising the children's "roots," to aid in determining her custody recommendation. Holzhauer also questioned the expediency of Tracey's decision to relocate to Kentucky and move in with Greeno. She considered him, as the trial court coined the phrase, "a relatively unknown quantity." Yet, the record also reveals that Holzhauer did not interview Greeno either.

¶ 46 In sum, the trial court stated that it adopted Holzhauer's testimony as the basis for its decision to award custody of the children to Michael. Holzhauer discounted the fact that the children expressed their desire to relocate with Tracey, who they seemed more attached to and who had always been their primary caretaker, rather than remain with Michael in Albers, that the children were unhappy living in Albers, and that Kentucky would likely be a better environment for them. Instead, her recommendation appears to be based on her unsubstantiated beliefs and insufficient information.

¶ 47 Also notable is Holzhauer's testimony that if it were not for Tracey filing the petition for removal, custody would have been a close call, and Tracey's statement during her direct examination that she would remain residing in Illinois if she had to. This begs the question as to why Holzhauer could not have recommended that custody be awarded to Tracey but her petition for removal denied, if her main concern was with "uprooting" the children from Albers, rather than with Tracey's ability to competently care and provide for her children. Further, no consideration appeared to be given regarding whether Michael was pursuing any romantic relationships and whether, by doing so, he was putting his own interests ahead of his children's best interests.

¶ 48 For these reasons, I would reverse the trial court's decision to award custody to Michael as being against the manifest weight of the evidence, because it relied upon Holzhauer's testimony, which appears to be based on insufficient information and evidence. I would therefore remand this cause to the trial court for a rehearing. This should allow

ample opportunity for additional necessary information to be gathered concerning custody recommendations. Along with the rehearing on the award of custody, I would also remand for a rehearing on Tracey's petition for leave to remove the children.