

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
JUSTIN J. APPEL,)	of Jo Daviess County.
)	
Petitioner-Appellant,)	
)	
v.)	No. 01-D-49
)	
CAREN A. APPEL,)	Honorable
)	William A. Kelly,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's determination granting temporary custody of the parties' daughter to Caren was not against the manifest weight of the evidence.

¶ 2 In this post-dissolution proceeding, the petitioner, Justin Appel, appeals from the trial court's January 16, 2013, order granting temporary custody of the parties' daughter, Jillian, to the respondent, Caren. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 13, 2001, Justin filed a petition for dissolution of marriage. During the marriage, the parties had a daughter, Jillian, born April 30, 1999. On August 23, 2001, a judgment for dissolution of marriage was entered that granted Justin sole custody of Jillian.

¶ 5 On September 25, 2012, Caren filed a petition for temporary custody of Jillian. The stated ground for the petition was that Justin was sentenced to incarceration for a period of not less than 90 days as a result of a felony conviction for driving under the influence of alcohol. Caren argued that Justin would not be able to provide any support or a stable living environment for Jillian during the period of his incarceration.

¶ 6 On January 16, 2013, a hearing was held on the petition for temporary custody. Caren testified that she lived alone in a two-bedroom apartment in Fairbury. She had lived there for about two and a half months. Prior to that, she lived with her parents. She was a high school business education teacher and had taught in the same district for 12 years. She had a bachelor's degree in agricultural business and a master's degree in curriculum and instruction from Illinois State University. Jillian was her only child. Caren acknowledged that she had agreed to give Justin sole custody of Jillian upon the dissolution of their marriage. Caren testified that Justin was controlling and intimidating and that she had regretted that decision.

¶ 7 Caren further testified that she had always taken all her visitation with Jillian. She had agreed to cut visitation short on occasion when Jillian had activities to attend. Jillian had never spent more than two weeks at a time with her. She acknowledged that Jillian was involved in many different activities but believed that Jillian could still participate in most of those activities in Fairbury. Fairbury was about 45 minutes from her sister's and her parents' homes. Jillian was close with Caren's sister and parents. Caren was worried that the choices that led to Justin's DUI

conviction were not a good influence on Jillian. She was also worried that classmates at school would harass Jillian because her father was incarcerated.

¶ 8 Caren testified that Jillian's relationship with Justin was very important and that if she were granted temporary residential custody of Jillian, she would continue to encourage a close relationship between Jillian and Justin. Finally, Caren testified that she would not be seeking temporary custody of Jillian if she did not believe that Jillian wanted that. She acknowledged that Jillian would be switching school for her last semester of eighth grade and that Jillian knew few people in Fairbury.

¶ 9 Following her testimony, Caren's counsel requested that the trial court take judicial notice that: (1) Caren had no child support obligation, (2) the child custody arrangement had not been modified in 11 years; and (3) as a result of Justin's third DUI conviction, he had been sentenced to 180 days' imprisonment to be reviewed after 90 days.

¶ 10 Following the denial of his motion for a directed verdict, Justin testified that he lived on a farm in Lanark with Jillian and his wife, Sandra. He had lived there since 2004. He had been a farmer since 1993. Jillian was currently in the eighth grade in Lanark and was doing excellently in school. Jillian was involved in volleyball, track, Girl Scouts, Junior Ambassadors, 4-H Club, student council and activities at church. Justin had married Sandra in 2009. Jillian had a good relationship with Sandra. Sandra was from Colombia and was certified there as a nurse and a dental hygienist. She was currently working toward certification in this country. Sandra was not present at the hearing, she was visiting her family in Colombia. She was due to return in the next couple weeks.

¶ 11 Justin further testified that he was to serve his work release in Mount Carroll, which was about 10 minutes from Lanark. He would be released at 6 a.m. and have to return by 7 p.m. His arrest that resulted in his conviction occurred in September 2010. Since that time, he had completed

75 hours of treatment and attended weekly self-help groups. He had been diagnosed as bipolar and was currently on medication. He believed it was in Jillian's best interest to remain living in their home in Lanark during his term of work release because there was no guarantee that she would be able to adapt to a new home and excel to her current level. There were periods of time when Caren did not exercise her right to visitation. Visitation had been off and on since the divorce. He could not remember a time when Caren had exercised her right to two full weeks in the summer. Caren had never been responsible for Jillian's day-to-day needs. He had no concerns over Sandra watching Jillian at night during his time in jail. On cross-examination, Justin acknowledged that his work release could be revoked and that a violation of his probation could result in more jail time.

¶ 12 Susan Appel testified that she was Justin's mother. She lived a mile and a half away from Justin. She lived with her husband and Justin's father, Gordon. Justin had been managing the family farms since 1992. The middle school Jillian was currently attending was about seven miles from her home. The high school in Lanark that Jillian would attend was about three blocks from Susan's home. Susan testified that she had been participating in Jillian's care from the beginning. She had been Jillian's Girl Scout leader since kindergarten. She also participated with Jillian in 4-H and had helped with Jillian's sports activities. Jillian slept at her home about two times per month. Justin had a very good relationship with Jillian. He was very involved and had helped Jillian with projects for Girl Scouts and 4-H. Jillian was very intelligent and mature. Jillian had been diagnosed with attention deficit disorder but did not take medication. Jillian and Sandra had a good relationship and she had no concerns with Sandra taking care of Jillian overnight during Justin's work release.

¶ 13 Gordon Appel testified that he was Justin's father. He was retired but had worked for the State for 24 years as a teacher, counselor, principal, superintendent, assistant regional superintendent

and as a regional superintendent. Jillian was his granddaughter. He had seen her since her birth just about daily. He had taught her to fish and she had helped him build fences. Jillian was very intelligent, mature, and had very good social skills. Gordon testified that Jillian could relate to people of all ages and that Jillian had a very good relationship with her father.

¶ 14 During closing, Caren's attorney asked the court to award temporary custody to Caren immediately so that Jillian would attend her last semester of school at the same location. The trial court asked whether custody should revert back to Justin once he had completed his periodic imprisonment. Caren's attorney indicated that if a full custody petition was filed at that time, that determination should be made then. Caren's attorney noted that Justin's sentence including periodic imprisonment and probation was two years. Caren's attorney ultimately asked that temporary custody be granted until further order of the court and that Justin and his family be allowed reasonable visitation.

¶ 15 Justin's attorney noted that the periodic imprisonment was not set to commence until March 28. He argued that Jillian was in a stable home environment with a loving father, stepmother, and two grandparents. He noted that Caren had never provided full-time parenting for Jillian. During work release Justin would still be able to see Jillian off to school and he would be there when she returned home from school. Justin would still be able to provide for Jillian's day-to-day needs. Finally, he argued that he did not think it was in Jillian's best interest to uproot her after living with her father for over 13 years, disrupt her last semester of eighth grade, and expose her to a new environment where she would have to make new friends, go to a different school, and completely change her life.

¶ 16 Following arguments, the trial court found all the testimony to be credible. The trial court noted that Justin and his family had provided a good environment for Jillian in which she had flourished. The trial court noted that Jillian was at a pivotal point in her life and it did not want to disrupt Jillian’s life any more than necessary. However, the trial court found that either parent could provide a good home environment for Jillian and that in light of Justin’s pending periodic imprisonment, it was in Jillian’s best interest to live with her mother. The trial court granted Caren’s petition for temporary custody. Caren was granted residential placement of Jillian until further order of the court. Justin was granted visitation rights. Thereafter, Justin filed a timely notice of appeal.

¶ 17

II. ANALYSIS

¶ 18 Section 610(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610(b) (West 2010)) allows for the modification of a prior child custody order if there has been: (1) a change of circumstances and (2) modification is necessary to serve the best interests of the child. *In re Marriage of Smithson*, 407 Ill. App. 3d 597, 600 (2011). When deciding issues pertaining to custody, the trial court has broad discretion, and its judgment “is afforded ‘great deference’ because ‘the trial court is in a superior position to judge the credibility of witnesses and determine the best interests of the child.’ ” *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004) (quoting *In re Marriage of Gustavson*, 247 Ill. App. 3d 797, 801 (1993)). Accordingly, a reviewing court will not disturb a trial court’s decision to modify the terms of a custody agreement unless its decision is against the manifest weight of the evidence. *Bates*, 212 Ill. 2d at 515. A judgment is considered to be against the manifest weight of the evidence when the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based upon the evidence. *In re Marriage of Karonis*, 296 Ill. App. 3d 86, 88 (1998). “We will affirm the trial court’s ruling

if there is any basis to support the trial court's findings." *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177 (2002).

¶ 19 In *Naylor v. Kindred*, 250 Ill. App. 3d 997, 1000 (1993), the natural father filed a petition for change of custody after the natural mother became incarcerated. Following her incarceration, the natural mother had signed a statement granting temporary guardianship of the children to her mother and her sister. *Id.* The trial court granted the father's petition to change custody and the natural mother appealed, arguing that an incarcerated custodial parent should remain the nominal custodian of the child and should be able to designate a temporary custodian. *Id.* at 1008.

¶ 20 The reviewing court rejected this argument, holding that it is impossible for a parent to act as a child's custodian when incarcerated. *Id.* at 1009. The reviewing court explained:

“[A]n incarcerated parent, much like a deceased parent, is no longer able to care for, supervise, provide a home, prepare food, obtain medical treatment, or be involved in the daily life of the child. In short, an incarcerated parent cannot fulfill the role of a physical custodian of the child. Although incarceration may not absolutely prevent a parent from fulfilling the role of the child's legal custodian, it does impair this ability. The parent is not readily available to give advice or console the child, or to be an example. Further, the incarcerated parent is not readily available to consent to medical treatment and decide other issues generally reserved to legal custodians.” *Id.*

The reviewing court further stated:

“We note our holding does not mandate that in every case an incarcerated custodial parent will, upon the petition of the noncustodial parent, lose custody of the child. The proposed modification must still be in the best interests of the child. There may be situations

in which the custodial parent has been incarcerated, but it still would not be in the best interests of the child to modify the custody award. For example, where the term of incarceration is minimal in duration, or the custodial parent has remarried and the custodial parent and his or her new spouse have made a good home for the child in which the child could appropriately live during the custodial parent's incarceration, a trial court might conclude a modification was not in the child's best interests. *Id.* at 1016.

¶ 21 In the present case, we acknowledge that Justin is subject to work release, as opposed to full-time incarceration, and that he has made a good home in which Jillian could appropriately live during his periodic imprisonment. Nonetheless, we cannot say that the trial court erred in granting temporary custody to Caren. There is a presumption in the law that a natural parent has superior right to the custody of a child as compared to the claim of a third person. *Id.* at 1009 (citing *In re Custody of Peterson*, 112 Ill. 2d 48, 51 (1986)). The evidence shows that Caren had exercised her visitation rights with Jillian since the divorce and had a close relationship with her daughter. The trial court found that both parents could provide a stable home environment for Jillian. While Justin is on work release, he will be unavailable to care for his daughter during non-working hours. In light of the presumption in favor of the natural parent, we cannot say that an opposite conclusion is apparent or that the trial court's findings appear to be unreasonable, arbitrary, or not based upon the evidence. See *Karonis*, 296 Ill. App. 3d at 88. The trial court's decision was not against the manifest weight of the evidence because there is a basis in the record to support it. See *Ricketts*, 329 Ill. App. 3d at 177.

¶ 22

III. CONCLUSION

¶ 23 For the reasons stated, we affirm the decision of the circuit court of Jo Daviess County.

¶ 24 Affirmed.