



filed a motion for extension of time to file her opening brief. The brief was ultimately filed on January 3, 2013. There were no other deviations from the briefing schedule, and the case was promptly placed on the March oral argument docket. After oral argument was held on March 5, 2013, Toni filed a motion to supplement the record, which was taken with the case, and we now issue this disposition as expeditiously as possible. For the following reasons, we affirm.

¶ 3

### FACTS

¶ 4 On January 11, 2012, Shane filed a petition to determine the existence of the father and child relationship and an emergency petition for temporary relief in the circuit court of Fayette County, in which he alleged that although he and Toni were unmarried, they signed a voluntary acknowledgment of paternity pursuant to section 5(a)(3) of the Illinois Parentage Act of 1984 (750 ILCS 45/5(a)(3) (West 2010)). Shane requested temporary and permanent custody of T.H. On January 23, 2012, Toni filed an answer, a counterpetition for temporary custody, and a motion to transfer venue to Williamson County based on improper venue and on grounds of *forum non conveniens*. According to a docket entry made by the Honorable Allan F. Lolie that same day, the circuit court planned to hear the motion to transfer venue to Williamson County prior to the temporary relief hearing that was set for January 26, 2012. However, there is no docket entry, order, transcript of the January 26, 2012, hearing, or bystander's report in the record to indicate that the motion to transfer venue was ever called, heard, or ruled upon.<sup>1</sup> A docket entry by Judge Lolie dated January 26, 2012, states that the parties agreed to paternity and a temporary order was entered making a finding of paternity and ordering the parties to split custody of T.H. until the permanent hearing could be held.

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<sup>1</sup>After oral argument, Toni filed a motion to supplement the record on appeal with the transcript of the January 26, 2012, hearing. For the reasons stated below, this court denies the motion.

¶ 5 A hearing was held on the cross-petitions for custody of T.H. on May 22, 2012, May 23, 2012, and June 11, 2012, before the Honorable S. Gene Schwarm. After hearing all of the evidence, Judge Schwarm entered a detailed opinion and order on July 11, 2012, in which he awarded the parties joint custody of T.H. and ordered that the primary physical residence of T.H. would be with Shane, with a visitation schedule to be worked out between the parties such that T.H. was spending 60% of his time with Shane and 40% of his time with Toni. On September 25, 2012, Judge Schwarm entered a joint custody order which incorporated the findings made in the July 11, 2012, opinion and order. On October 25, 2012, Toni filed a notice of appeal. Additional facts will be set forth throughout the remainder of this order.

¶ 6 ANALYSIS

¶ 7 Toni first argues on appeal that the circuit court erred in denying her motion to transfer venue to Williamson County. However, as set forth above, there is nothing in the record, and no bystander's report or agreed statement of facts, sufficient to show that the circuit court ever called, heard, or denied Toni's motion. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). It is well settled that:

"[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 8 Applying these well-established principles to the case at bar, we have nothing in the record before us upon which to review any ruling by the circuit court denying Toni's motion to transfer venue. Although, following oral argument before this court, Toni filed a motion to supplement the record on appeal with a transcript of the January 26, 2012, hearing, this

court denies the motion. Toni's counsel on appeal briefed the issue of improper venue, knowing full well that she had no record of the motion being called, heard, or denied. The steps she took after oral argument in securing the transcript, including contacting trial counsel and checking with the circuit clerk and court reporter, are steps that a reasonably diligent attorney would have made at the briefing stage of this appeal at the latest. Incidentally, we also note that Toni failed to include an order denying the motion to transfer venue in her notice of appeal, calling into question our subject matter jurisdiction to review the order. See, e.g., *Yaw v. Beeghly*, 109 Ill. App. 3d 627, 631 (1982). Accordingly, we will proceed to review the circuit court's decision that T.H.'s primary residence is to be with Shane.

¶ 9 A child custody decision will not be overturned on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 1031 (1993). A judgment is considered to be contrary to 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). "In determining whether a judgment is contrary to the manifest weight of the evidence, the reviewing court views the evidence in the light most favorable to the appellee." *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177 (2002). "We will affirm the trial court's ruling if there is any basis to support the trial court's findings." *Id.* "The trial court's custody determination is afforded 'great deference' because the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child." *Id.*

¶ 10 Section 602 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602 (West 2010)) enumerates the factors for the trial court to consider prior to making a custody ruling. In his detailed and thorough opinion and order dated July 11, 2012, the circuit court judge set forth each factor and set forth in detail his analysis of each factor. It is important

to note that the circuit court ordered the parties to have joint custody, and Toni is not appealing that portion of the circuit court's order. Toni only argues that the circuit court's decision that T.H.'s primary residence will be with Shane was against the manifest weight of the evidence. We note that this decision must be reviewed in light of the fact that the parties were granted joint custody, with visitation to be split between the parties with 60% of time spent with Shane and 40% with Toni. So we are really making a determination of whether this split in time is against the manifest weight of the evidence.

¶ 11 In its opinion and order, while applauding both parents in their love and care for T.H., the circuit court specifically noted that the following factors supported its determination to make T.H.'s primary residence with Shane: (1) the close bond between Shane and T.H., (2) Shane's attention to the medical needs of T.H., and (3) Shane's superior support system for the care of T.H. Our review of the evidence in the record reveals that these findings are not against the manifest weight of the evidence. With regard to the close bond between Shane and T.H., the evidence reveals that Shane was the primary caretaker for T.H. for the vast majority of his life as an infant and toddler, staying home with him as an infant while Toni worked, getting up in the middle of night to care for T.H., and taking T.H. to most of his well-child and doctor's visits. Many witnesses testified as to the close bond and interaction between T.H. and Shane, including an expert family therapist, Melanie Schaafsma, who provided unrebutted expert testimony that Shane and T.H. were "supremely bonded" based on her observations of the two together.

¶ 12 With regard to Shane's attention to the medical needs of T.H., Shane testified extensively regarding his concerns with T.H.'s medical needs, giving specific examples of his diligence in obtaining needed medical care for T.H. and following up as necessary, as well as consistently administering T.H.'s prescriptions. At the same time, the circuit court made a specific finding in its opinion and order that Toni and her mother testified

inconsistently regarding their noticing and acting on an allergic reaction T.H. had to medication immediately prior to the temporary hearing, and that this inconsistent testimony raised issues as to whether Toni adequately responds to T.H.'s medical needs, as well as issues regarding credibility. There was also testimony in the record regarding Toni's failure to consistently administer prescriptions in accordance with doctor instructions and her reluctance to follow up on recommendations of physicians that T.H.'s circumcision required an additional surgery.

¶ 13 There is also ample evidence in the record to support the circuit court's finding that Shane has a superior support system for the care of T.H. Shane testified that when T.H. is in his care, he and T.H. follow a very consistent schedule which allows Shane to maximize his quality time with T.H. and minimize the time that T.H. is in the care of others. Shane works nights, and Shane's mother, who is unemployed outside the home, will stay at his house with T.H. at night while Shane is working. On the other hand, while Toni testified that her father George, who is temporarily unemployed, will consistently care for T.H. while she works during the day, historically, childcare for T.H. during Toni's working hours has been inconsistent and sporadic.

¶ 14 In her brief, Toni argues that because the circuit court specifically found that Toni was better able to facilitate a close relationship with Shane than Shane was able to facilitate with Toni, this court should reverse the circuit court's decision to award primary residential custody to Shane. We disagree. This is only one factor to be considered, and although the circuit court found Shane lacking in this regard, it obviously believed that Shane would make efforts to improve in this area, as the circuit court granted the parties joint custody, and Toni does not appeal that portion of the circuit court's order. As the circuit court demonstrated through its detailed analysis of all of the statutory factors, it found some areas where Toni excelled and some areas where Shane excelled. In awarding primary residential custody to

Shane, the circuit court balanced the factors overall and found Shane's superior attention to T.H.'s medical needs, his superior support network, and his supreme bonding with T.H. to be the factors having the most bearing on primary residential custody. We will not disturb the circuit court's findings.

¶ 15

#### CONCLUSION

¶ 16 For the foregoing reasons, the September 25, 2012, joint parenting order, which incorporated the circuit court of Fayette County's July 11, 2012, opinion and order and, *inter alia*, granted primary residential custody of T.H. to Shane, is affirmed.

¶ 17 Affirmed; motion to supplement the record on appeal denied.

¶ 18 JUSTICE CATES, dissenting:

¶ 19 Because the trial court lacked subject matter jurisdiction, I respectfully dissent from the majority's opinion. The record reveals that on January 11, 2012, Shane filed a "Petition To Determine The Existence Of The Father And Child Relationship" in Fayette County, Illinois. In his petition, Shane stated that "he, and the child's natural mother have signed an Acknowledgment of Paternity in accordance with the rules adopted by the Department of Healthcare and Family Services \*\*\*." Toni, the natural mother, admitted this allegation in her answer to Shane's petition. While the parties had never been married, they had agreed to the existence of the parent-child relationship.

¶ 20 Shane also sought, in his petition, custody of the parties' minor child. As previously stated, Shane filed his petition in Fayette County, the county to which he had just moved a few weeks earlier. The petition made no allegations regarding the residency of the minor child. In fact, the pleadings filed by Shane requested emergency relief because, "your affiant fears that once Toni \*\*\* is served with the paternity petition, she will withhold the child from

him."

¶ 21 In response to Shane's pleadings, Toni timely filed a motion to transfer venue and a motion to transfer venue *forum non conveniens*. In this motion, Toni stated, under oath, that venue was inappropriate in Fayette County because the child resided in Williamson County.

¶ 22 The first question that arises, therefore, is whether the venue provision of the Illinois Parentage Act of 1984 (750 ILCS 45/9 (West 2010)) or the venue provision of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/601(b) (West 2010)) applies, given that these provisions are quite different. As this court previously decided in *In re A.S.*, 394 Ill. App. 3d 204, 916 N.E.2d 123 (2009), under strikingly similar circumstances, venue should be determined pursuant to the Illinois Marriage and Dissolution of Marriage Act and not the Illinois Parentage Act of 1984. *In re A.S.*, 394 Ill. App. 3d at 208, 916 N.E.2d at 127. Under the Illinois Marriage and Dissolution of Marriage Act, section 601(b)(1)(ii) clearly states that a child custody proceeding is commenced by a parent filing a petition for custody of the child "in the county in which he is permanently resident or found." 750 ILCS 5/601(b)(1)(ii) (West 2010).

¶ 23 "A court's jurisdiction in a dissolution of marriage action is conferred only by statute, and it must act within the statutory grant and may not rely upon its general equity powers." *In re Marriage of Brown*, 225 Ill. App. 3d 733, 737-38, 587 N.E.2d 648, 651-52 (1992); see also *Strukoff v. Strukoff*, 76 Ill. 2d 53, 60, 389 N.E.2d 1170, 1172-73 (1979); *In re Marriage of Garrison*, 99 Ill. App. 3d 717, 721-21, 425 N.E.2d 518, 521 (1981). Orders entered by a court lacking subject-matter jurisdiction are void, and subject-matter jurisdiction cannot be conferred by consent of the parties. *In re Marriage of Brown*, 225 Ill. App. 3d at 737-38, 587 N.E.2d at 651-52; see also *In re Marriage of Burkhardt*, 267 Ill. App. 3d 761, 643 N.E.2d 268 (1994) (if the mode of procedure prescribed by statute is not strictly pursued, no jurisdiction is conferred on the circuit court); *Chrastka v. Chrastka*, 2 Ill. App. 3d 722, 725-26, 277

N.E.2d 729, 731 (1971) (venue requirements mandatory and material, being jurisdictional in nature); see generally *Wheaton National Bank v. Aarvold*, 16 Ill. App. 3d 193, 195, 305 N.E.2d 541, 542 (1973).

¶ 24 There is no evidence in the record to suggest that the minor child was residing or was "found" in Fayette County. Therefore, it was error for the trial court to ignore the plain language of section 601(b)(1)(ii) and proceed with adjudicating the issue of custody in Fayette County. Clearly, the court was under an obligation to transfer the matter to Williamson County or, at a minimum, give the parties a hearing on the issue as to where the child was permanently residing or could be "found." Having failed to transfer venue, I believe all the proceedings thereafter are void. Instead of affirming the trial court, which had no subject-matter jurisdiction to hear the merits of the case, I would reverse the decision of the trial court and remand for further proceedings.