

No. 1-13-1674

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except under the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In Re MARRIAGE of:)	Appeal from
)	the Circuit Court
JACQUELINE M. GOLDIN,)	of Cook County
)	
Petitioner-Appellee,)	
)	
and)	No. 10 D 7010
)	
NEIL M. MORGANSTEIN,)	Honorable Lisa Ruble Murphy
)	Judge Presiding
Respondent-Appellant.)	

JUSTICE MASON delivered the judgment of the court.
Justices Neville and Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD:* Trial court's custody determination affirmed where evidence at hearing overwhelmingly supported award of sole custody to petitioner. Respondent's motions to preclude admission of expert evaluations were properly rejected.

¶ 2 On May 21, 2013, respondent-appellant, Neil M. Morganstein, filed a notice of appeal from a Judgment for Dissolution of Marriage and Custody Judgment both entered by the trial court on April 26, 2013. Neil designated his appeal for accelerated disposition pursuant to Illinois Supreme Court Rule 311 (eff. Feb. 26, 2010) as it involved child custody issues.

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Notwithstanding that designation, Neil proceeded to file multiple motions to supplement the record and for extensions of time to file his brief, finally filing his brief on October 1, 2013, more than five months after designating his appeal for accelerated disposition. Neil did not seek leave to file his overdue reply brief until December 20, 2013..

¶ 3 Upon review of Neil's brief, it is apparent that child custody is just one of a myriad of issues he seeks to pursue on appeal, among them rulings regarding the admissibility of expert reports, rulings related to child support, visitation, maintenance and distribution of marital property and the parties' responsibility for attorneys' fees. It is not until page 41 of Neil's 65-page brief that the issue of child custody is addressed. The record on appeal is well over 2,500 pages and reveals a two and one-half year history of acrimonious litigation in which virtually every point, no matter how minor, was hotly contested.

¶ 4 Further complicating matters, Neil's brief fails to comply with Illinois Supreme Court Rule 341 (eff. July 1, 2008) in a number of respects: it fails to contain a statement of the facts necessary to an understanding of the case with appropriate citations to the record (Rule 341(h)(6)) and advances many arguments unsupported by any citation to authority (Rule 341(h)(7)). Although, given the nature of the case, we denied a motion to strike Neil's brief, it would have been entirely appropriate to do so.

¶ 5 To address in any meaningful detail all of the issues raised by Neil would inevitably delay a decision on the child custody issue. Therefore, we elect to limit this opinion to the propriety of the trial court's custody order and the admissibility of expert reports relating to that issue. The other issues raised by Neil on appeal will be addressed in a separate order at a later date.

¶ 6 The parties were married on February 23, 2008. Neil's former wife, petitioner-appellee, Jacqueline Goldin, filed a petition for dissolution of the marriage on July 14, 2010. The parties have one child, a son born on July 1, 2009. The parties' son, JM, is currently four years old and has been diagnosed with a neurological condition known as apraxia, characterized by the inability to perform coordinated movements. JM is developmentally delayed and regularly requires a variety of professional therapies including physical, speech, occupational and developmental therapy. JM is currently a special education student at a school for speech and language impairment. After a 2-day trial on November 7 & 8, 2012, which focused primarily on the issues of custody and visitation, the court awarded sole custody of JM to Jacqueline.

¶ 7 ANALYSIS

¶ 8 Neil first contends that the trial court erred in admitting what he refers to as two "contaminated" custody evaluations. Citing section 604.5(d) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/604.5(d) (West 2010)), Neil first contends that the trial court erred in admitting the report of Dr. Kerry Smith, who was designated by Jacqueline to perform a custody evaluation. Section 604.5 of the Act provides that in any custody proceeding, upon notice and motion, the court may order an evaluation concerning the best interest of the child. The professional to conduct the evaluation is proposed by the moving party. Section 604.5(d) provides:

"Within 21 days after the completion of the evaluation, if the moving party or person intends to call the evaluator as a witness, the evaluator shall prepare and mail or deliver to the attorneys of record duplicate originals of the written evaluation. The

evaluation shall set forth the evaluator's findings, the results of all tests administered, and the evaluator's conclusions and recommendations. If the written evaluation is not delivered or mailed to the attorneys within 21 days or within any extensions or modifications granted by the court, the written evaluation and the evaluator's testimony, conclusions, and recommendations may not be received into evidence." 750 ILCS 5/604.5(d).

¶ 9 Shortly after filing the petition for dissolution, Jacqueline filed a motion proposing that Dr. Smith perform a custody evaluation for JM. Dr. Smith was appointed on November 9, 2010, and her evaluation was completed on July 25, 2011. Although the record reveals that Jacqueline faxed the report to Neil's counsel on July 29, Neil claims that a page was missing and that he did not receive a complete copy of the report until October 28, 2011. The page Neil claimed was missing was the last page of Dr. Smith's evaluation--a single paragraph containing Dr. Smith's visitation recommendations. The trial court ultimately determined that even if Neil had not received the complete report until October, he suffered no prejudice and that the report would be admitted. Neil was also offered the opportunity to depose Dr. Smith prior to trial, which he failed to do.

¶ 10 Although Neil claims we should review the trial court's decision to admit Dr. Smith's evaluation *de novo*, it is clear that such decisions are reviewed under the abuse of discretion standard. The decision whether to admit or exclude evidence is left to the sound discretion of the trial court and will not be reversed absent a clear showing of abuse of that discretion resulting in manifest prejudice to the defendant. *People v. Lucas*, 151 Ill. 2d 461, 489 (1992). An abuse of

discretion will only be found where " 'the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *People v. Wheeler*, 226 Ill. 2d 92, 133 (2007) (quoting *People v. Caffey*, 205 Ill. 2d 52, 89 (2001)). We find no abuse of discretion in the trial court's decision to admit Dr. Smith's evaluation.

¶ 11 Despite Neil's claim that he did not receive a complete copy of the evaluation within the 21-day period set out in section 604.5(d), it is clear that the statute contemplates that the trial court, in its discretion, may extend or modify that period. In the context of this case, where Neil indisputably had the entire report over a year before the trial, the trial court's conclusion that he was not prejudiced by any delay in receiving a complete copy of the report is manifestly correct.

¶ 12 Neil also asserts error in the trial court's admission of the report of Dr. Phyllis Amabile. On February 6, 2012, Dr. Amabile was appointed as the court's expert pursuant to section 604(b) of the Act, 750 ILCS 5/604(b) (West 2010), which provides:

"The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine, as a witness, any professional personnel consulted by the court, as a court's witness."

¶ 13 As far as we can discern from his brief, the gist of Neil's argument on this issue is that contrary to the trial court's order that Dr. Smith's evaluation should not be provided to Dr. Amabile in connection with her report to the court regarding custody, Jacqueline, her attorney, and Joel Levin, JM's child representative, did provide Dr. Amabile with information from Dr. Smith's evaluation. Therefore, Neil reasons, Dr. Amabile's report, which, like Dr. Smith's

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evaluation, recommended that sole custody be awarded to Jacqueline, was influenced by Dr. Smith's findings and should not have been admitted.

¶ 14 Without attempting to address all of the points raised by Neil (many of them unsupported by any citation to the record), we do not find in the record evidence of Jacqueline and her attorney's "willful intent to violate" the court's order regarding Dr. Smith's evaluation, Levin's complicity in that effort, or a "fraud upon the court" committed by Dr. Amabile. We also do not find any support for Neil's claim that Dr. Amabile withheld information from her file from him. Following completion of Dr. Amabile's report, the trial court directed that the contents of her file be turned over to counsel for both parties. The record reflects that Dr. Amabile informed Neil that she had reviewed certain notebooks provided to her by Jacqueline and had returned those notebooks to Jacqueline so that they were no longer in her possession. Although Neil complains that Dr. Amabile returned Jacqueline's notebooks to her "so Neil would be prevented from reviewing them," he does not explain why he could not have obtained the notebooks from Jacqueline and it is obvious that he could have. Particularly since the trial court advised Neil in advance of trial that if he wanted to depose or cross-examine Dr. Amabile, it was his obligation to subpoena her and Neil failed to do so, the trial court did not abuse its discretion in admitting Dr. Amabile's report.

¶ 15 Finally, Neil challenges the trial court's decision to award sole custody of JM to Jacqueline. Under section 602(a) of the Act, 750 ILCS 5/602(a) (West 2010), "[t]he court shall determine custody in accordance with the best interest of the child." As are relevant here, section 602(a) sets out a non-exclusive list of factors to be considered by the court in determining the

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child's best interest:

- "(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;

* * *

- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child[.]" 750 ILCS 5/602(a).

¶ 16 "The determination as to which party to a failed marriage shall receive custody of their child is one of the most difficult tasks of a trial court. Such a decision necessarily rests on the temperaments, personalities and capabilities of the parties, and the demeanor of the witnesses who testify at trial." *In re Marriage of Felton*, 171 Ill. App. 3d 923, 926 (1988). As in any case involving findings made after trial, the trial court is in a superior position to assess the demeanor and credibility of witnesses. *Id.*; see also *In re Marriage of D.T.W.*, 2011 IL App (1st) 111225, ¶ 81 ("The trial court has broad discretion in determining custody and we will not disturb that determination on appeal unless it is against the manifest weight of the evidence."). There exists a "strong and compelling presumption" in favor of a trial court's custody determination. *In re Marriage of Felton*, 171 Ill. App. 3d at 926.

¶ 17 In this case, the evidence adduced at trial overwhelmingly supports the trial court's decision to award sole custody to Jacqueline. Both experts, Dr. Smith and Dr. Amabile, concluded that awarding sole custody to Jacqueline was in JM's best interest. Those conclusions are well supported by their detailed and extensive reports. Although Neil was granted leave to designate a section 604.5 evaluator of his own, he failed to do so. Levin, JM's child representative, supported an award of sole custody to Jacqueline. JM's therapists attested to Jacqueline's consistent involvement in JM's various therapies and that she was attuned to JM's needs. Although the experts and other witnesses attested to Neil's involvement in JM's life and the positive role he plays, no witness at trial advocated that Neil be awarded sole custody.

¶ 18 Further, it is significant that Neil recognizes that joint custody is not feasible as the only relief he requests on appeal is an award of sole custody to him. On this point, the trial court concluded that this was "one of the rare cases where the parties are truly incapable of co-parenting" and noted that the parties understood their inability to co-parent given that neither party suggested that joint custody was a workable solution. Based on our examination of the record, the trial court's custody decision is supported by the manifest and, in fact, overwhelming weight of the evidence and it is, therefore, affirmed.

¶ 19 As noted above, the remaining issues raised by Neil on appeal will be addressed in a separate order. We consider this order a final disposition of the custody issue as well as the issues relating to the admissibility of the expert reports. Therefore, pursuant to Illinois Supreme Court Rule 367 (eff. Dec. 29, 2009) any petition for rehearing directed to the issues resolved herein is due within 21 of the date of this order. The time limitations in Illinois Supreme Court

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Rule 315(b) (eff. Feb. 10, 2006) for any petition for leave to appeal to the Supreme Court also apply.

¶ 20 Affirmed, in part; ruling on remaining issues remains under consideration.