

No. 1-13-3423

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
FIRST DISTRICT

<i>In re</i> PARENTAGE OF S.B., a Minor,)	Appeal from the Circuit Court
)	of Cook County.
)	No. 10 D 79256
)	Honorable
(Maria K., Petitioner-Appellant, v. Scott B., Respondent-Appellee).)	Michael Bender,
)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court awarding the respondent permanent sole custody of the minor child was affirmed where: the court properly considered the relevant statutory factors; the issue of permanent custody was properly before the court; the court did not err in refusing to reopen the proofs; and the petitioner's ineffective assistance of counsel claim failed to meet *Strickland* requirements.

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The petitioner, Maria K., appeals from the circuit court order which granted permanent sole custody of S.B., a minor, to the respondent, Scott B. The petitioner argues that the court failed to consider the factors set forth in section 602 of the Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602 (West 2010)) when it awarded sole custody to the

respondent, and therefore, its decision was not in the best interests of S.B.. She further contends that: the court erred when it awarded permanent custody where the respondent had only filed a petition seeking temporary custody; the court erred when it denied the petitioner's request to re-open proofs to conduct an evidentiary hearing on the merit of the abuse complaint she filed with the Department of Children and Family Services (DCFS); and she received ineffective assistance of counsel during the custody hearing. For the reasons that follow, we affirm.

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On February 17, 2010, the petitioner filed her "Petition to Determine the Existence of the Father-Child Relationship," stating that the respondent voluntarily acknowledged he was the father of S.B., born on May 18, 2009. The petition requested that the court award the parties joint care and custody of S.B. and order the respondent to pay child support in an amount consistent with statutory guidelines. On March 16, 2010, the petitioner sought temporary and permanent child support for S.B. while the custody matter was pending.

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On March 31, 2010, the respondent filed a "Petition for Temporary Custody and Temporary Support," requesting that he be awarded the temporary care and custody of S.B. The respondent alleged that the petitioner refused to allow him to reasonably visit and care for S.B.. He alleged that the petitioner's home was in foreclosure, and he resided with his parents, who would also help babysit S.B.. On the same date, the respondent filed a "Petition for Custody and Support." Although the prayer for relief requested "temporary" custody and

support, other documents and transcripts in the record refer to the respondent's second March 31, 2010 petition as the petition seeking permanent custody of S.B.. On April 16, 2010, the petitioner filed a "Petition for Temporary and Permanent Custody, and To Set a Visitation Schedule," in which she requested that she be awarded temporary and permanent sole custody and that the respondent be awarded visitation.

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Michael Fields, a clinical psychologist, was appointed by the court to conduct a custody evaluation pursuant to section 604(b) of the Act (750 ILCS 5/604(b) (West 2010)). Dr. Fields noted that the petitioner was under a great deal of stress with the custody battle and her impending foreclosure. However, he determined that the petitioner did not have any significant psychopathology, and he recommended that the petitioner remain sole custodial parent since that was the existing arrangement.

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On January 28, 2011, the respondent moved for a best-interests evaluation of S.B. pursuant to section 604.5 of the Act (750 ILCS 5/604.5 (West 2010)). Dr. Gerald Blechman, a licensed clinical psychologist, performed the evaluation and made the following conclusions: S.B. was attached to both parents; the petitioner demonstrated compulsive, histrionic and narcissistic personality disorders; the petitioner's mental health issues compromised her parenting ability; the petitioner did not behave in a manner that valued the respondent as a parent and she acted in a way to minimize and interfere with the respondent's parenting; and, the respondent demonstrated that he was mentally stable and provided S.B. with a stable,

nurturing home environment. Dr. Blechman recommended that it was in S.B.'s best interest to award sole custody to the respondent, that a visitation schedule be set for the petitioner, and that the petitioner seek psychological counseling to address her mental health issues.

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Between December 8, 2011, and October 5, 2013, the court conducted the best-interests hearing to determine S.B.'s custody. The petitioner presented Sara Cruz, her mother and S.B.'s grandmother, who testified regarding her active and loving involvement in the lives of her grandchildren. Cruz denied that the petitioner showed any signs of mental instability and stated that she was good mother.

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The petitioner testified that she resided in a condominium on the north side of Chicago with her 8-year old son, M.K., born from her previous marriage, and with S.B. She testified that she first met the respondent in 1999 through their employment, and in 2008, after her divorce from M.K.'s father, she began to see the respondent on a social bases. On one occasion, August 28, 2008, she had sex with the respondent and became pregnant with S.B. She stated that the respondent initially wanted her to abort the pregnancy, but after S.B. was born, he "did a quick turn around" and visited and bonded with the baby. When S.B. was two months old, the respondent moved into the petitioner's condominium in Chicago and helped with the expenses and parenting responsibilities. She admitted that she was not steadily employed, that she was behind in her mortgage at the time the respondent moved in, that her home was now in foreclosure, and that her mother was paying most bills for her and S.B.

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On March 5, 2010, the petitioner removed the respondent from the home by hiring someone to deliver all of the respondent's belongings to his mother's home in Glen Ellyn. The petitioner claimed she did this because the respondent failed to pay two months' utility bills, but her testimony was unsupported by the evidence. She admitted that, after March 5, 2010, she unilaterally decided when the respondent could visit S.B. and that she would not let him take her to his parents' home anymore. She also admitted that she knew that the respondent filed for "temporary and permanent custody" from "day one."

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The petitioner agreed that the respondent had a good relationship with S.B. and that she encouraged them to have a good relationship. She also admitted that the respondent paid her \$1,000 in monthly child support after she removed him from the home but before the court entered any child support order. She further admitted that she petitioned the court to enter a child support order, claiming that he was not paying her any support, and that after a hearing, the court ordered the respondent pay \$480 per month. She admitted that the respondent complied with every court order and never missed a support payment.

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Regarding transportation, the petitioner stated that she has a car, but that she never departed from a four or five block radius of her home. She believed the respondent should be responsible for transporting S.B. between Chicago and the western suburbs.

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Dr. Fields testified consistently with his written report, recommending that S.B. remain with the petitioner. On cross-examination, Dr. Fields admitted that he did not factor in the petitioner's financial distress in determining whether she had an ability to provide for S.B., and he admitted that he did not document any collateral sources that he used to verify any of the facts he considered in making his determination. On cross-examination, he could not recall speaking with S.B.'s representative, who advised him that she had concerns regarding the petitioner's inability to focus and misleading statements.

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Dr. Blechman testified consistently with his report, recommending that the respondent be awarded sole permanent custody of S.B. for the reasons explained in his report.

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The respondent's mother, Dorothy B., testified that she had been babysitting S.B. every Friday in her Glen Ellyn home since S.B. was born. She stated that, on March 5, 2010, the petitioner arrived at her home unexpectedly to pick up S.B.. The petitioner was upset and had brought all of the respondent's personal items with her. Dorothy called the police to make sure someone evaluated whether the petitioner was stable enough to take S.B. She testified that she subsequently received phone calls from the petitioner in which she "ranted" in an incoherent manner. However, Dorothy stated that she was willing to continue communicating with the petitioner for the sake and benefit of S.B. She also described S.B. as a happy, healthy child, and she described S.B.'s relationship with the respondent as positive and loving as he was an active and participant father.

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The respondent, who was steadily employed, testified that, after finding out that the petitioner was pregnant, he let his home in Yorkville go into foreclosure and agreed to move in and assist the petitioner, whose condominium and two other investment properties were in foreclosure. The respondent stated that he applied for a loan modification and made three mortgage payments for the petitioner in the fall of 2009. He testified that, after the modification was denied in early 2010, the petitioner proposed an illegal scheme in order to qualify for the loan modification program. He stated that he refused to participate in the plan. Shortly thereafter, on March 5, 2010, the petitioner suddenly showed up at Dorothy's home with all of his belongings. After that, the respondent moved into his father's home in Wheaton and then moved into a home in Wheaton which he rents.

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The respondent testified that he complied with all child support and visitation orders and had been amenable to working with the petitioner on the care and wellbeing of S.B. despite her efforts to make visitation difficult, including her refusal to help in the transportation of S.B. between Chicago and the western suburbs. He described his relationship with S.B. as positive and loving, describing his involvement in her preschool and other activities. He stated that he wanted sole custody because he was mentally and financially stable and he would not interfere with S.B.'s relationship with the petitioner whereas the petitioner is in financial distress, mentally unstable, and interferes with his relationship with S.B.¹

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In February 2012, S.B.'s representative passed away unexpectedly, and the court appointed a

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Following closing arguments on October 5, 2012, the trial court ordered the parties to submit their recommended custody orders by October 26, 2012, for the court to review before issuing its final custody decision.

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On October 18, 2012, the petitioner reported to DCFS that the respondent had been sexually abusing S.B. since birth and through, at least, November 2011. While DCFS conducted its investigation, the court ordered that neither parent have contact with S.B. and placed her into the temporary custody of the respondent's mother, Dorothy B. Both parties then filed petitions for temporary supervised visitation during the pendency of the investigation.

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On December 10, 2012, the court heard the temporary visitation petitions and stated in its order that the petitioner recalled testifying on December 8, 2011, under the questioning by the deceased child representative, that she feared that the respondent was abusing S.B. The trial court further stated in its order that the transcripts did not support the petitioner's recollection, discrediting her abuse allegations. The court then ordered that the respondent's visitation did not need to be supervised.

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On December 12, 2012, an agreed order was entered in which the parties agreed that the

new representative. The proceedings then continued after several delays related to the change of child representatives.

DCFS records connected to the abuse investigation would be tendered to the trial court when completed. On January 24, 2013, the DCFS records were tendered to the court, sealed under a protective order, and they are not part of the record on appeal. However, it is undisputed that DCFS investigators determined that the sexual abuse claims against the respondent were unfounded.

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On March 15, 2013, the trial court entered its final parentage and custody judgment, awarding sole custody to the respondent. The court stated that the petitioner's actions with regard to the false sexual abuse allegations against the respondent "have operated to seriously endanger [S.B.'s] mental, emotional, and psychological well-being" and "subjected [her] to invasive sexual abuse testing in disregard of the child's wellbeing." The court found the petitioner's testimony regarding the abuse allegations to be "incredible and inconsistent." The court also noted that, had the petitioner truly feared that the respondent was abusing S.B., she took no steps to protect the child as evidenced by the fact she placed S.B. in the respondent's care during his usual parenting times and failed to report the abuse in a timely fashion. The court also placed great weight on Dr. Blechman's opinions and recommendations. Further, the court ordered that the petitioner's visitation be supervised by Dorothy until further court order, pending the petitioner's submission to psychological testing with Dr. Kerry Smith and to any subsequent recommended treatment.

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On April 15, 2013, the petitioner moved for reconsideration of the court's March 15 custody

order and to re-open proofs. In the motion, the petitioner argued that she was deprived of the opportunity to rebut the DCFS report and that she should be allowed to cross-examine the DCFS caseworkers at an evidentiary hearing.

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On October 1, 2013, the court granted the petitioner's motion in part only to clarify that it did not remove S.B. from her care solely based on the DCFS report, but rather because she seriously endangered the child's mental, emotional, and physical wellbeing by either failing to timely report the alleged abuse or by subjecting the child to unnecessary and invasive sexual abuse exams. The court also clarified that it independently found the abuse allegations against the respondent to be incredible, based on the evasiveness of the petitioner's testimony, the lack of physical evidence, and the fact that no mental health professional opined that S.B. exhibited symptoms of a sexually abused child. Additionally, the court noted that it had: considered all the factors under section 602 of the Act; found the petitioner unable to focus on the questions and issues posed to her regarding the care and custody of S.B.; and, found that the respondent was the parent most willing to facilitate a relationship with the other parent. This appeal followed.

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At the outset, we note that the respondent did not file an appellee brief in this matter. However, when an appellee fails to file a brief, reversal is not automatic. See *Capitol Mortgage Corp. v. Talandis Const. Corp.*, 63 Ill.2d 128, 131 (1976). Here, we are capable of addressing the issues raised in the petitioner's appeal because the record is simple and the

claimed errors can be easily decided without the benefit of the appellee's brief. See *id.* at 33.

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First, we reject the petitioner's argument that the court failed to consider the factors set forth in section 602 of Act when it awarded sole custody to the respondent as the record simply does not support her contention. Section 602 of the Act sets forth the factors to be considered when determining the best interest of the child in a custody matter. These factors include: (1) the wishes of the parents; (2) the wishes of the child; (3) the interaction and interrelationship of the child with his 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) any physical violence or threats of physical violence whether or not directed at the child; (7) the occurrence of ongoing or repeated abuse whether or not directed against the child; (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 if applicable. 750 ILCS 5/602 (West 2010).

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Here, the trial court explicitly considered each of these factors when it awarded permanent sole custody to the respondent and visitation rights to the petitioner. The court noted that both parents wanted sole custody, that S.B. was too young to state her wishes, and that the

evidence established that the respondent was the parent most willing to foster S.B.'s relationship with the other parent. The court also placed great weight on Dr. Blechmann's opinion that the petitioner had mental health issues which interfered with her ability to parent, and the court noted its own observations that she was evasive and unfocused while providing, at times, incredible testimony. Further, and most significantly, the court found that the petitioner's allegations of sexual abuse were unbelievable and unfounded based on her inconsistent testimony and the lack of any medical or psychological evidence that S.B. was abused. DCFS concluded the same after it conducted an investigation into the abuse. The court determined that, under either scenario, it was not in S.B.'s best interests to place her in the petitioner's custody where she endangered the physical and emotional well-being of S.B. by either failing to timely report the abuse she claimed began at birth and continued for three years or by subjecting S.B. to unnecessary sexual abuse exams based on her false allegations against the respondent. Given these facts, we cannot find that the trial court failed to consider the relevant statutory factors.

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We also cannot agree with the petitioner that the trial court's best-interests determination is against the manifest weight of the evidence. 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 (2003). Because the trial court is in a far better position to observe the demeanor of the parties and assess the credibility of the witnesses, we afford great deference to the trial court's best interests findings. *Id.* "A trial court's

determination as to the best interests of the child will not be reversed on appeal unless it is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred." *In re Parentage of J.W.*, 2013 IL 114817, ¶ 55. A judgment is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent. *Id.*

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In this case, the trial court's best-interests determination is amply supported by the evidence, namely that the petitioner's conduct endangered S.B.'s physical and emotional wellbeing and that her psychological issues impaired her ability to parent S.B. The court placed great weight on Dr. Blechmann's opinions and recommendations and found the petitioner was not a credible witness. The testimony of Dr. Blechmann and the remaining witnesses, including the respondent and Dorothy, therefore, supported the trial court's conclusion that the respondent was the financially and psychologically stable parent and the parent most likely to foster a relationship between the other parent and S.B.. Under these facts, we cannot find that the trial court's best-interests determination is against the manifest weight of the evidence.

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We next reject the petitioner's argument that the court erred when it awarded permanent custody where the respondent only filed a petition seeking temporary custody. This claim is totally belied by the record, which contains petitions filed by both parties seeking permanent sole custody of S.B., numerous pleadings and orders referring to the respondent's request for permanent custody, and references throughout the proceedings describing the matter as one

related to permanent custody.

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Next, we find that the court did not err when it denied the petitioner's request to reopen the proofs so that she could cross-examine DCFS investigators. "Generally, in considering a motion to reopen proofs, the trial court should take into account whether there is some excuse for the failure to introduce the evidence at trial, whether the adverse party will be surprised or unfairly prejudiced by the new evidence, and whether there are the most cogent reasons to deny the motion." *In re Marriage of Suarez*, 148 Ill. App. 3d 849, 858 (1986). "If evidence offered for the first time in a posttrial motion could have been produced at an earlier time, the court may deny its introduction into evidence." *Chicago Transparent Products, Inc. v. Am. Nat. Bank & Trust Co. of Chicago*, 337 Ill. App. 3d 931, 942 (2002). The decision to deny motions to reopen proofs is within the sound discretion of the trial court and will not be disturbed on review absent a clear abuse of that discretion. *Suarez*, 148 Ill. App. 3d at 858.

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In this case, the petitioner could have sought to admit evidence related to the abuse long before her April 2013 posttrial motion for reconsideration of the judgment. The abuse investigation had been on-going from October 18, 2012, through January 24, 2013, when DCFS tendered its final report to the court. The petitioner did not move to reopen the proofs at any point during that time. She also did not move to reopen the proofs between January 24, 2013, and March 15, 2013, when the court issued its final custody decision. Moreover,

the petitioner fails to articulate how cross-examining DCFS investigators would refute the trial court's stated concerns that she failed to report the alleged abuse in a timely fashion and voluntarily placed S.B. in the respondent's care during the time she stated she suspected the abuse was occurring. Further, the trial court had "cogent reasons" to deny the motion, namely that it had independently determined that it was not in S.B.'s best interest to be placed in her custody regardless of the veracity of the abuse claims. Accordingly, we cannot say that the trial court abused its discretion in denying the petitioner's posttrial motion to reopen the proofs so she could cross-examine DCFS investigators.

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Finally, the petitioner claims that her trial counsel erred when he failed to object to the admission of the DCFS records related to its investigation of the alleged abuse. We disagree.

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The petitioner correctly states that, in a termination of parental rights proceeding, parents are entitled to effective assistance of counsel. *In re M.F.*, 326 Ill. App. 3d 1110, 1119 (2002). However, the case at bar did not involve a termination of the petitioner's parental rights, and the petitioner cites to no authority in which the *Strickland* standard (see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)) has been applied to private counsel in a best interest hearing under the Act. Regardless, the petitioner fails to meet the prejudice prong of the two-prong *Strickland* test. See *In re M.F.*, 326 Ill. App. 3d at 1119 (stating *Strickland's* two-prongs: (1) a counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's unprofessional error, the result of the proceeding

would have been different). The petitioner argues that counsel erred by failing to object to the admission of the DCFS report on the basis the report constituted inadmissible hearsay and was unreliable. Even if counsel erred in failing to object to admission of the DCFS report, we cannot say that the result of the proceeding would have been different where the trial court explicitly stated that its decision was not based on the DCFS report or its conclusions, but rather upon its independent conclusion that the petitioner's testimony was inconsistent and her abuse claims were incredible. Accordingly, the petitioner's ineffective assistance of counsel claim fails.

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Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

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Affirmed.