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2014 IL App (3d) 140147-U

Order filed July 18, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

KAREN HAMILTON,)	Appeal from the Circuit Court
)	of the Twelfth Judicial Circuit,
)	Will County, Illinois
Petitioner-Appellant,)	
)	
v.)	Appeal No. 3-14-0147
)	Circuit No. 08-F-510
)	
)	
SCOTT PETERSEN)	Honorable Brian E. Barrett,
)	Judge, Presiding.
Respondent-Appellee.)	
)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 Held: (1) Trial court's reference in its oral ruling to testimony from another proceeding that was not included in the record did not rebut the presumption that trial court considered only competent evidence in reaching its decision where it was not clear that the trial court based its decision on that testimony, and any possible consideration of such testimony was harmless error given the other record evidence supporting the trial court's decision; (2) trial court's decision to award sole residential custody of the parties' minor child to the father was not against the manifest weight of the evidence.

¶ 2 The petitioner, Karen Hamilton (Karen), appeals from an order of the circuit court awarding sole residential custody of the parties' minor child, B.P., to the respondent, Scott Petersen (Scott). On appeal, Karen maintains that the trial court erred by improperly considering evidence and testimony that was presented in another proceeding and was not included in the record. Karen also argues that the trial court's custody judgment was against the manifest weight of the evidence.

¶ 3 **FACTS**

¶ 4 B.P. was born on November 17, 2007. Karen and Scott are B.P.'s biological parents. From the time he was born, B.P. lived with Karen and her two other children from a previous marriage, A.H. and K.H. At the time of trial, Karen lived in Bolingbrook, Illinois with her husband Steven Thacker (Steven), whom she had married in August 2010. A.H., who was thirteen years old, also lived with Karen and Steven.¹ Scott lived in Gurnee, Illinois, approximately one hour and fifteen minutes from Karen's home. At the time of trial, Scott was unmarried. Karen and Scott have no other children together.

¶ 5 On May 5, 2008, Karen filed a *pro se* "Petition to Determine the Existence of the Father and Child Relationship & For Support." In that Petition, Karen asked for full custody of B.P., alleging that Scott had moved to Michigan for a job and had "not created a strong bond" with B.P. A few months later, Scott, through counsel, filed a motion asking the court to require DNA testing of the parties establish paternity of B.P. Upon establishing his paternity through a DNA test, Scott filed a petition for visitation in which he claimed that Karen had refused him visitation for more than four months. Scott asked for joint custody of B.P. with reasonable visitation.

¹ K.H., who was 20 years old by the time of trial, had become emancipated and had moved out of the family home.

¶ 6 On October 10, 2008, the trial court entered an order granting Scott temporary visitation on alternating weekends without prejudice to Scott's right to seek custody of B.P. The trial court also appointed Dr. Mark L. Goldstein as a 604(b) evaluator in this matter.

¶ 7 On January 15, 2010, Dr. Goldstein filed a "Child Custody Evaluation" report with the trial court. In that report, Dr. Goldstein recommended that: (1) Karen should be the primary residential parent, contingent upon her undergoing individual counseling; (2) Karen and Scott should share joint legal custody of B.P; and (3) Scott should have expanded visitation with B.P. In explaining his recommendations, Dr. Goldstein testified that, although there was no evidence that either parent suffered from any "significant, impairing psychological disorder," "both parents appear to have some emotional issues." For example, Dr. Goldstein noted that he had concerns about Karen's "significant dependency on others" and her "instability," noting that she had moved a number of times and had been involved with a number of men. In addition, Dr. Goldstein noted that Karen's anxiety was a concern "because a parent who has anxiety *** can in fact have [a] deleterious impact on the child and the raising of the child." These concerns led Dr. Goldstein to make his residential custody recommendation contingent upon Karen's receiving counseling. Dr. Goldstein also noted that Scott "appear[ed] to have some level of intolerance and insensitivity in his personality structure" and that he "may have had episodic issues with anger." Although Dr. Goldstein noted that there had been one episode of domestic violence, he found that there did not appear to be any pattern of domestic violence.

¶ 8 Dr. Goldstein filed updates to his report with the trial court on June 14, 2010, January 11, 2011, and October 13, 2011. In the first two updates, Dr. Goldstein reaffirmed the recommendations he made in his initial report. However, after reviewing additional documents (including phone records, e-mails, and texts exchanged by Karen and Scott), Dr. Goldstein

expressed concern that B.P might be alienated from his father if Karen were awarded sole custody of B.P. Before preparing his third and final update, Dr. Goldstein re-interviewed Karen, Scott, B.P., and Karen's daughter A.H. In his third update, Dr. Goldstein again opined that Scott and Karen should share joint legal custody of B.P. with Karen continuing to serve as the primary residential parent. However, Dr. Goldstein recommended that, "if the court sees fit not to allow joint custody and to recommend sole custody, *** [Scott should] be awarded sole legal custody."

¶ 9 At trial, Karen testified that B.P was a happy, energetic, and loving child who was "thriving." She stated that the environment in her house was "fun" and that the family enjoyed having dinner together, going on vacations, and fishing on the river behind their house. Karen also testified that B.P was involved in several activities while under her care, including T-ball, flag football, computer classes, and part-time preschool. She stated that B.P had an "excellent" relationship with his sisters (although he did fight with A.H. at times) and that B.P got along "amazing" [*sic*] with her husband. She claimed that things would be better between her and Scott after the litigation and stated that, if she were awarded residential custody, she would want B.P to have "open visitation" with Scott. Karen further testified that, pursuant to Dr. Goldstein's recommendation, she had undergone counseling every week or two from September or October of 2011 until September 2012, at which point she no longer had insurance to pay for the counseling. She opined that it would be better for B.P. if she retained residential custody because "it is what he knows, it is what he loves, it is where he belongs, it is his home."

¶ 10 During cross-examination, Scott's counsel asked Karen several questions about an order of protection that was sought by Karen and entered against Scott on July 20, 2012 by Judge Barrett, the trial judge who presided over the custody trial in this case. Karen testified that, on or around July 11, 2012, her husband told her that B.P. had claimed that Scott had threatened B.P.,

Karen, and Karen's family. Police Detective Tracy Pugliese, a Gurnee police officer who investigated the alleged incident, testified at trial that Karen alleged that "the father of [B.P.] had placed a shotgun to the child's head and made statements that he was going to kill him and his family." Karen testified that, after her husband told her about B.P.'s allegations, she decided to call a child specialist and set up an appointment with a counseling center. She claimed that she did not seek an emergency order of protection right away because she "wanted a professional to assess the situation and see if there was validity to it." She added that she wanted an expert opinion because "[y]ou can't take everything a five year old says seriously" and she "didn't want to look like an idiot jumping to conclusions." After interviewing Karen, Karen's husband, and B.P., the counselor at the counseling center informed Karen that her boss would contact DCFS.

¶ 11 Monique Boozer, the DCFS employee who investigated the incident, testified that she visited Karen's house within 24 hours of receiving the case. Boozer interviewed B.P., Karen, Karen's husband, and A.H. Boozer testified that, "based on the information [Karen] provided," Boozer "suggested, not demanded, not ordered [Karen] to get an order of protection if [Karen] believed the information [Karen] gave [Boozer] was accurate." Boozer testified that she does not always give this admonition about individuals obtaining an order of protection. However, Boozer also stated that she did not contact the Gurnee police department about the incident. Karen testified that Boozer felt "there was validity to it and suggested that I went up to file a police report and file for an order of protection." After her discussion with Boozer, Karen sought the order of protection against Scott and filed a police report with the Gurnee police department. Karen obtained the order of protection eight days after she claimed that she first heard about Scott's alleged threats to B.P.

¶ 12 Detective Pugliese testified that she interviewed Karen about the alleged incident by phone for 30-45 minutes on July 20, 2012. One week later, Pugliese interviewed Scott at the Gurnee police department. She testified that Scott cooperated during the interview and denied the allegations against him. Pugliese then set up and observed a forensic interview with B.P., which took place on August 10, 2012. Pugliese stated that, prior to observing B.P.'s interview, she "did not feel that there was enough information to substantiate the allegation." Moreover, she testified that, after she observed B.P.'s interview, her belief that there was not enough information to substantiate the allegations increased. Thereafter, Pugliese asked to have another conversation with Karen, but Karen stated that she did not want to at that time. Karen never followed up with Pugliese.

¶ 13 Karen testified that, approximately one to one and a half months after the alleged incident took place, B.P. was interviewed at the Gurnee police department and the interview was videotaped. Karen stated that she dismissed the order of protection afterwards because the "video tape did not show enough."

¶ 14 Karen acknowledged that Scott lost visitation time as a result of the order of protection. For example, Karen admitted that the weekend after she obtained the order of protection was going to be Scott's weekend to see B.P. However, Karen stated that she provided Scott with make-up visitation on "maybe three" occasions. When asked on cross-examination whether she had a vacation planned prior to obtaining the order of protection, Karen stated "[v]ery well could have been. We have trips planned all the time." She also admitted that she turned down Scott's request for make-up visitation when the family had prearranged trips planned.

¶ 15 Scott testified that the "wild accusations" asserted against him were untrue, that the Gurnee police department found no basis for the allegations after conducting an investigation,

and that the DCFS investigation came back unfounded. He stated that he missed two months of visitation as a result of the order of protection. However, he testified that, although he requested make-up visitation through his attorney, he was never able to get any make-up visitation for the time missed as a result of the order of protection.

¶ 16 Scott testified that Karen had previously obtained an order of protection against him in Michigan, which was also dismissed. Karen testified that she sought that order of protection in 2008 because Scott "got physical" with her and took B.P. to his mother's house. She claimed that the incident left her with bruises on her arms and legs. Karen testified that she had also obtained an order of protection against her previous husband to remove him from the home.

¶ 17 Scott testified that he believed that B.P. should live with him because "it's important for a son to have a strong bond with his father" and because he wanted his son to know "who I really am and not what his mother has determined to say what I am." He claimed that he had "no say in any of [B.P.'s life] at this point" and that he was not consulted regarding B.P.'s schooling or activities. Scott further testified that, "[a]nytime [he] asked for some time during the week to go out to dinner or something like that," he was "always declined [because] [t]here [were] always plans." Scott stated that he could take care of B.P. because he has a flexible work schedule that allows him to work from home or in different branches of PNC Bank.

¶ 18 Scott testified that B.P. is always happy to see him when he picks B.P. up for weekend visitation. He stated that B.P. "comes running up, usually a big hug, that sort of thing," and he agreed that B.P. feels comfortable right away when he picks him up. Karen's husband Steven acknowledged that B.P. is "always" excited on Fridays to go with Scott for a visitation. Scott testified that, during a typical weekend visitation, he and B.P. play together, go to parks, play T-ball, play catch, and the like.

¶ 19 At trial, Scott also discussed his plan for B.P. if Scott were awarded residential custody. Scott stressed that he would have a flexible work schedule during the daytime hours while B.P. was in preschool. He stated that, in the evenings, he would like to go outside and play with B.P., go to the park, ride bicycles, and work on homework. He also stated that, if B.P. lived with him, B.P. would have the opportunity to "start building *** stronger friendships with kids in the neighborhood *** instead of making new friends every time he comes up."

¶ 20 Scott further testified as to specific instances where he felt Karen was "alienating" him out of his son's life. For example, Scott asserted that he has not had input into the types of medical treatment B.P. receives and claimed that Karen did not notify him on two occasions when B.P. was taken to the emergency room.

¶ 21 Karen testified that Scott's suggestion that she does not foster a relationship between Scott and B.P. is "one-hundred percent incorrect." She stated that her approach throughout the proceeding was to seek joint custody. Karen further testified that B.P. has had three major medical tests and procedures during his lifetime, all of which Scott was either present for or notified of in advance. She also stated that she provided Scott access to information regarding B.P.'s preschool from the beginning and told Scott in advance that she was enrolling B.P. in a computer program. Karen testified that she "had no idea" what Scott was referring to when he testified that she interferes with his visitation. Karen stated that she and Scott would swap visitation weekends and that she agreed to provide Scott with additional visitation, including full weeks, weekends, and back-to-back weekends.

¶ 22 After considering the evidence presented, the trial court awarded Scott sole residential custody of B.P. and granted Karen visitation on alternating weekends and holidays plus a midweek visit of no more than three hours. In reaching this ruling, the trial court stated that it

had "reviewed the history of the file, the law on the matter and the evidence, and taken into consideration the testimony, exhibits, the arguments, and the demeanor of witnesses." The court also noted that it had reviewed Dr. Goldstein's reports and "all other aspects of this trial and history of this case" and had "take[n] into account" the statutory factors for determining the best interest of the child listed in section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2012)).

¶ 23 Turning to an analysis of those statutory factors, the trial court concluded that the first two factors (the parents' and the child's wishes as to custody) did not weigh in either party's favor because both parents wanted custody of B.P. and the evidence showed that B.P. seemed happy and did well in both parents' residences. The court found that three of the remaining factors (the occurrence of ongoing or repeated abuse, whether one of the parents is a sex offender, and the terms of a parent's military family-care plan) did not apply because there was no evidence of abuse and neither parent was a sex offender or a member of the armed forces.

¶ 24 The court found that two of the remaining statutory factors favored Karen. Specifically, the court found that the third factor ("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") favored Karen because B.P. had a relationship with his stepfather and stepsisters and "interact[ed] well" with them. Moreover, the court found that the fourth factor ("the child's adjustment to his home, school and community") also favored Karen because B.P. was "already accustomed to the area that he lives in" and "seems to be doing well there." For example, the court noted that B.P. was enrolled in daycare near Karen's home and participated in activities such as baseball and football. However, although the court concluded that this factor favored Karen, it stressed that B.P.'s residing with Karen was "based on the temporary order" and was

"just a temporary situation." The court also observed that B.P. was "young" (five years old) and "was not in school yet."

¶ 25 The court found that the remaining three factors listed in section 602(a) favored Scott. It ruled that the fifth statutory factor ("the mental and physical health of all individuals involved") favored Scott because Dr. Goldstein's report and testimony and the other evidence presented "show[ed] that [Karen] fail[ed] to recognize not only the desire for [Scott] to have a relationship [with B.P.], but its beneficial effect that regardless of these parents' distrust and dislike for each other that there is a benefit of having a father-child relationship." The court concluded that Dr. Goldstein's opinion and the other evidence presented demonstrated that Karen was "unable or unwilling to put the full effort forward to encourage and facilitate that matter."

¶ 26 For similar reasons, the trial court found that the eighth statutory factor ("the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child") favored Scott. In so ruling, the court relied upon Dr. Goldstein's opinions that Karen "show[ed] the effects of alienation on the child from [Scott]" and that "if sole custodianship was awarded, it should go to [Scott]" because Scott was "better off to encourage and facilitate" a relationship between B.P. and the noncustodial parent.²

¶ 27 The court also found that the sixth statutory factor ("the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person") favored Scott. Although the court found no evidence of actual physical violence, the court found it "striking" and "troubling" that Karen agreed to Scott's request to meet

² However, the trial court rejected Dr. Goldstein's suggestion that the court could make one party the sole legal custodian and the other party the sole residential custodian. The court found that this arrangement would not be "workable."

with her new husband and other members of her family "[o]nly if the police are present." The court found this to be a "situation where [Karen is] demanding control of [the] interaction between father and child," and noted that Karen's demand that the police be present during family meetings could leave negative impressions on a five-year-old child.

¶ 28 Finally, in considering "other relevant factors," the trial court addressed what it characterized as "the elephant in the room," namely, "the order of protection that was filed." The trial court concluded that this matter weighed in favor of Scott. In support of this conclusion, the court stated:

"We have a situation where a five year old child went and made a complaint [that Scott] had put a gun to his head and said that he was going to kill everybody in the family. How he was going to do it. It was rather specific. He was going to go in a specific order. He was going to use this weapon. He was going to do it and kill everybody.

The Court did review the victim-sensitive interview out of the Gurnee Police Department, and I find that it was just wholly untrue. This was precipitated by [Karen]. There was a counselor that came in at the hearing. Also troubling. I recall that hearing. I did the hearing for the order of protection. In that order of protection, there was evidence of and she stated, well, we have plans for the weekend. In testimony here, she said we did that because we wanted to make sure that [Scott] wasn't going to see [B.P.], to protect [B.P.]. That isn't consistent from the hearing of

the order of protection to the hearing on this trial, and that is certainly trouble to go [sic] this Court.

There is testimony by [Karen] that she did not do this. That she was just trying to take into consideration the best interest of [B.P.]. That [B.P.] made this accusation and, you know, also testimony that upon reviewing the VSI herself, the order of protection was withdrawn.

Certainly at that time, [Scott] *** had lost visitation. There was an order for makeup visitation which had never been complied with. That is the factor that weighs heavily on this Court."

¶ 29 In announcing its custody ruling, the trial court stated that "[b]ased on the evidence presented, the testimony of *** Dr. Goldstein," and "all of the evidence and the [section 602] factors," "it is the Court's finding that the sole custodian of the minor child, [B.P.], should be *** Scott." The court awarded Karen visitation on alternating weekends, holidays "per the Will County guidelines," and midweek visitations of no more than three hours starting at 5:00 p.m. on days chosen by the parties. The court concluded its analysis by reiterating its belief that Scott is "better able to encourage and facilitate a relationship of the child with the noncustodial parent." This appeal followed.

¶ 30 **ANALYSIS**

¶ 31 1. The Trial Court's Consideration of Evidence Outside the Record

¶ 32 On appeal, Karen argues that the trial court erred by considering evidence from a separate proceeding that was not introduced into evidence in the custody proceeding. Specifically, Karen contends that the trial court relied upon its own recollection of the testimony that Karen gave

during the hearing on the order of protection "to impeach Karen with an alleged prior inconsistent statement made at the order of protection hearing." In support of this argument, Karen cites the following language from the transcript of the trial court's oral custody ruling:

"I recall that hearing. I did the hearing for the order of protection. In that order of protection, there was evidence of and she stated, well, we have plans for the weekend. In testimony here, she said we did that because we wanted to make sure that [Scott] wasn't going to see [B.P.], to protect [B.P.]. That isn't consistent from the hearing of the order of protection to the hearing on this trial, and that is certainly trouble to go [*sic*] this Court."

¶ 33 A determination made by the trial judge based upon private investigation or private knowledge, untested by cross-examination or the rules of evidence, may result in the denial of due process of law. *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962); *People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 14. However, "not every circumstance in which extraneous or unauthorized information reaches the court requires reversal or a new trial." *People v. Banks*, 102 Ill. App. 3d 877, 882 (1981). Reversal is required only when the trial court's reliance on matters outside the record is prejudicial to one of the parties. *Id.* Accordingly, "[r]eliance on information found [outside] the record is not reversible error where there is no evidence that it either misled or entered into the trial court's determination." *Id.* A denial of due process results "only where the trial court has used the information to contradict important evidence offered by" the party against whom the court rules. *Id.* at 882-83; see also *People v. Jeffries*, 26 Ill. 2d 248 (1962). Moreover, in a bench trial, "there is a presumption that a trial judge considered only

competent evidence in reaching its decision and this presumption is rebutted only when the record affirmatively demonstrates the contrary." *Cunningham*, 2012 IL App (3d) 100013, ¶ 14.

¶ 34 In this case, the trial court referenced certain testimony that Karen allegedly gave during the the order of protection hearing. However, it is not clear that the court based any aspect of its decision (in whole or in part) upon Karen's testimony in the order of protection proceeding. The court merely made a passing reference to Karen's testimony in that proceeding, noted that it was inconsistent with certain testimony Karen gave in the custody proceeding, and then stated "that is certainly trouble to go [*sic*] this Court." The meaning of this statement is not entirely clear, and the trial court did not explicitly base its finding that the order of protection issue favored Scott on its consideration of Karen's prior testimony. To the contrary, the court appeared to base that finding on its consideration of evidence presented during the custody hearing, including Detective Pugliese's testimony and the victim-sensitive interview of B.P.

¶ 35 Moreover the court expressly stated that its ultimate custody ruling was based on the "evidence presented, the testimony of *** Dr. Goldstein," and "all of the evidence and the [section 602] factors." A review of the court's oral ruling in its entirety confirms that the trial court based its custody decision on the evidence of record. Accordingly, Karen cannot rebut the presumption that the trial court relied only upon competent evidence in reaching its decision. See, e.g., *People v. Collins*, 21 Ill. App. 3d 800, 805-06 (1974) (affirming defendant's conviction despite the trial court's reference to matters outside the record where the defendant failed to show that the court actually considered evidence outside the record in rendering its decision); *People v. Cepolski*, 79 Ill. App. 3d 230, 242 (1979) (affirming defendant's conviction despite trial court's improper comment regarding a matter outside the record where the court based its finding of guilt on evidence presented during the trial and where the trial court's comment was merely "a

parenthetical reference which, though unhappily interposed in the court's statement of reasons for his ruling, did not demonstrate that the court was influenced thereby in finding the defendant guilty").

¶ 36 However, even assuming *arguendo* that the trial court erroneously relied in part upon Karen's testimony in the order or protection proceeding, such error would have been harmless. As discussed in greater detail below, there was sufficient competent evidence presented during the custody proceeding to justify the court's decision to award Scott residential custody of B.P. Karen's testimony during the order of protection hearing was relevant to only one of several factual findings made by the trial court that contributed to the court's custody decision. Specifically, that testimony was arguably relevant to the court's finding that the allegations Karen made against Scott in the order of protection proceeding were false. However, the court's custody decision would stand even without that finding. The court could have reasonably decided to award residential custody to Scott based upon Dr. Goldstein's testimony and the other evidence of record even without considering the order of protection issue. Moreover, even as to that issue, Karen's testimony in the order of protection proceeding was not determinative. There was evidence in the record aside from Karen's testimony suggesting that Karen's allegations against Scott were false, including the victim-sensitive interview and Detective Pugliese's testimony. Accordingly, any improper consideration of Karen's testimony in the order of protection hearing would not have affected the outcome of the custody proceeding and would not warrant reversal of the trial court's custody decision. See, *e.g.*, *Gregory v. Bernardi*, 125 Ill. App. 3d 376, 378 (1984) (fact that the Board of Review of the Department of Labor erroneously based two factual findings on matters outside of the record did not warrant reversal where the two findings at issue did not affect the Board's decision); *People v. Rippatoe*, 408 Ill. App. 3d

1061, 1069 (2011) (trial court's improper reliance upon its own recollection of defense counsel's performance in other matters, in ruling on defendant's claim for ineffective assistance of counsel, was not prejudicial because the complete record, absent the judge's inappropriate musings, demonstrated that counsel provided competent representation); *In re Marriage of Willis*, 234 Ill. App. 3d 156, 159 (1992) (trial court's erroneous admission of videotape "d[id] not require reversal, since it did not adversely affect the outcome of the case"); *In re Custody of Mark Thompson*, 83 Ill. App. 3d 97, 101 (1980) ("If the [trial court's custody] decision was proper, even though the court may have considered improper evidence in reaching that decision, we will affirm.").³

¶ 37 2. The Trial Court's Award of Residential Custody to Scott

¶ 38 Karen argues that the trial court erred in awarding sole residential custody to Scott. We disagree.

¶ 39 In determining custody, the paramount issue is the best interest of the child, and the trial court is required to consider all relevant factors, including, but not limited to, those listed in section 602 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602 (West

³ This distinguishes the case at bar from *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962) and *People v. Steidl*, 177 Ill. 2d 239, 265-66 (1997), the cases upon which Karen principally relies. In *Wallenberg*, the trial judge relied upon his own personal knowledge to contradict the defendant's testimony on a matter that was critical to the defendant's alibi defense. In *Steidl*, the trial court based its ruling on the defendant's claim for ineffective assistance of counsel *entirely* upon its personal recollection of counsel's performance in other cases. In each of those cases, unlike the instant case, it was clear that the trial court relied heavily upon matters outside the record in making its decision and that the defendant was prejudiced thereby.

2012)). *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103 (2002). Because the trial court is in a better position than a reviewing court to observe the parties and assess the credibility of the parties and other witnesses, the reviewing court must afford great deference to the trial court's best interest findings. *Seitzinger*, 333 Ill. App. 3d at 106. Thus, the trial court's factual findings will not be disturbed on appeal unless they are against the manifest weight of the evidence or constitute a clear abuse of discretion. *Id.* A trial court's custody judgment is against the manifest weight of the evidence "when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary or not based upon the evidence." *In re Marriage of Hefer*, 282 Ill. App. 3d 73, 80 (1996).

¶ 40 In the instant matter, the trial court weighed the statutory factors and determined that it was in the best interest of the child that Scott have sole residential custody. The court found that three of the statutory factors had no relevance and two other statutory factors (the parents' and child's wishes regarding custody) favored neither party because both parents wanted custody of B.P. and the evidence showed that B.P. seemed happy and did well in both parents' residences. The court found that two of the remaining statutory factors favored Karen. Specifically, the court found that "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" favored Karen because B.P. had a relationship with his stepfather and stepsisters and "interact[ed] well" with them. Moreover, the court found that the "the child's adjustment to his home, school and community" also favored Karen because B.P. was "already accustomed to the area that he lives in" and "seems to be doing well there." For example, the court noted that B.P. was enrolled in daycare near Karen's home and participated in activities such as baseball and football. However, although the court found that this factor favored Karen, it stressed that B.P.'s residing with Karen

was "based on the temporary order" and was "just a temporary situation." The court also observed that B.P. was "young" (five years old) and "was not in school yet."

¶ 41 The court found that the remaining three statutory factors ("the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child," "the mental and physical health of all individuals involved," and "the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person") favored Scott. The court also found that a nonstatutory factor, *i.e.*, the circumstances underlying Karen's filing of an order of protection against Scott, also favored Scott because the allegations Karen raised against Scott in the order of protection proceedings were "wholly untrue" and were "precipitated by [Karen]."

¶ 42 With the exception of the trial court's finding regarding the threat of physical violence, we find that the court's factual findings and its ultimate custody decision were amply supported by the record.

¶ 43 There is evidence in the record suggesting that Scott would be more willing and able to facilitate and encourage a relationship between B.P. and the other parent. Specifically, Dr. Goldstein opined that Karen "show[ed] the effects of alienation on the child from [Scott]." Accordingly, Dr. Goldstein concluded that "if sole custodianship was awarded, it should go to [Scott]" because Scott was "better off to encourage and facilitate" a relationship between B.P. and the noncustodial parent.

¶ 44 Karen argues that Dr. Goldstein's opinions on these matters should be "discounted" because they were based entirely on e-mails provided by Scott, which Karen characterizes as "one-sided information." We disagree. Although Scott sent Dr. Goldstein copies of e-mails between the parties before Dr. Goldstein prepared his first and second updates to his report, Dr.

Goldstein did not base his final opinions on those e-mails alone. Before preparing his third and final updated report, Dr. Goldstein re-interviewed both Karen and Scott. Accordingly, Dr. Goldstein's opinion that Scott was more willing and able to encourage a relationship between B.P. and the other parent was not based entirely on one-sided information. In any event, Karen's counsel cross-examined Dr. Goldstein extensively regarding the e-mails and the basis of his opinions, and it was the trial court's province to determine what weight to assign Dr. Goldstein's opinions. We cannot say that the trial court's decision to credit Dr. Goldstein's opinions on this matter was against the manifest weight of the evidence.

¶ 45 In addition, Scott testified as to specific instances where he felt Karen was "alienating" him out of his son's life. For example, Scott stated that he has not had input into the types of medical treatment B.P. receives and claimed that Karen did not notify him on two occasions when B.P. was taken to the emergency room. Karen disputed Scott's testimony and testified regarding several instances in which she had involved Scott in major decisions regarding B.P., was flexible with visitation, and apprised Scott of B.P.'s scheduled activities. Karen suggests that the trial court should have credited her testimony over Scott's and discounted Dr. Goldstein's opinion. However, it is axiomatic that credibility determinations are best left to the trial court which has the ability to observe the demeanor of the witnesses. *Seitzinger*, 333 Ill. App. 3d 106. After observing Scott and Karen as they testified, the trial court chose to credit Scott's testimony that Karen was alienating him out of B.P.'s life (and the opinions of Dr. Goldstein to the same effect) over Karen's conflicting testimony. We cannot say that these credibility determinations were against the manifest weight of the evidence.

¶ 46 The trial court's findings regarding the mental health of the parties is also supported by the evidence. Dr. Goldstein expressed concerns about Karen's "significant dependency on

others" and her "instability," noting that she had moved a number of times and had been involved with a number of men. In addition, Dr. Goldstein noted that Karen's anxiety was a concern "because a parent who has anxiety **can in fact have [a] deleterious impact on the child and the raising of the child." For these reasons, Dr. Goldstein made his recommendation that Karen retain residential custody of B.P. contingent upon Karen's receiving counseling. Although Karen received some counseling pursuant to Dr. Goldstein's recommendation, she was not undergoing counseling at the time of trial. Moreover, while Dr. Goldstein opined that Scott "appear[ed] to have some level of intolerance and insensitivity in his personality structure" and that he "may have had episodic issues with anger," he did not suggest that Scott receive counseling as a condition for visitation or custody. Further, the trial court found that Dr. Goldstein's report and testimony and the other evidence presented showed that Karen failed to recognize Scott's desire to have a relationship with B.P. and the beneficial effect of a father-child relationship. The court concluded that Dr. Goldstein's opinion and the other evidence presented demonstrated that Karen was "unable or unwilling to put the full effort forward to encourage and facilitate that matter." Although Karen disputed these conclusions, we cannot say that the court's finding that the evidence of the parties' mental health favored Scott was against the manifest weight of the evidence.

¶ 47 There was also sufficient evidence to support the trial court's finding that the allegations raised against Scott in the order of protection hearing were false and were precipitated by Karen. Detective Pugliese testified that, after interviewing Karen, Scott, and B.P., she "did not feel that there was enough information to substantiate" Karen's allegations regarding the alleged threats made by Scott. After she observed B.P.'s victim-sensitive interview, Pugliese's belief that there was not enough information to substantiate the allegations "increased." Thereafter, Pugliese

asked to have another conversation with Karen, but Karen stated that she did not want to at that time. Karen never followed up with Pugliese. During her testimony, Karen admitted that B.P.'s victim-sensitive interview "did not show enough" to justify an order of protection. Scott testified that that the "wild accusations" asserted against him in the order of protection proceeding were untrue. The trial court also heard evidence of Karen's history of obtaining orders of protection against Scott and her prior husband.

¶ 48 Karen testified that the allegations regarding Scott's threatening behavior originated with B.P., not Karen. She also testified that, before seeking the order of protection, she attempted to determine the veracity of B.P.'s allegations by discussing the matter with a child counselor and a DCFS investigator (Boozer) who concluded that the charges were "valid" and suggested that she seek an order of protection. However, after viewing B.P.'s victim sensitive interview, Detective Pugliese's testimony, and the testimony of Karen and Scott, the trial court determined that the allegations were baseless. We cannot say that this conclusion is against the manifest weight of the evidence. Moreover, contrary to Karen suggestion, DCFS did not conclude that the allegations against Scott were valid. Boozer merely testified that, "*based on the information [Karen] provided,*" Boozer "suggested, not demanded, not ordered [Karen] to get an order of protection *if [Karen] believed the information [Karen] gave [Boozer] was accurate.*" (Emphasis added.) Boozer also testified that she did not contact the Gurnee police department about the alleged incident. Thus, at a minimum, there is evidence supporting the conclusion that Karen brought charges against Scott that she should have known were false. Although Karen testified otherwise, credibility determinations are best left to the trial court which has the ability to observe the demeanor of the witnesses. *Seitzinger*, 333 Ill. App. 3d 106. After hearing all the evidence (including B.P.'s victim-sensitive interview) and watching all the witnesses testify, the

trial court chose not to believe Karen's testimony that she had no reason to doubt the veracity of the allegations when she filed the order of protection. We cannot say that this credibility determination was against the manifest weight of the evidence.⁴

¶ 49 Karen argues that the trial court erred in finding that the statutory factor regarding threats of physical violence favored Scott. We agree. The court concluded that this factor favored Scott because Karen agreed to Scott's request to meet with her husband Steven and other members of her family "[o]nly if the police are present." The court found that Karen's demand that the police be present during family meetings could leave negative impressions on a five-year-old child. However, as Karen notes, there is no evidence that B.P. was aware of this suggestion by Karen. Nor is there evidence that B.P. would be present during any future meeting between Scott and Steven. Moreover, there was no evidence of any threats of violence made by Karen against Scott, B.P., or anyone else. Thus, the trial court's finding that this factor favored Scott is against the manifest weight of the evidence.

⁴ While discussing the order of protection issue, the trial court erroneously found that "[t]here was an order for make-up visitation which had never been complied with." The parties agree that the trial court never entered any such order. However, Scott testified that he missed two months of visitation as a result of the order of protection and that he never received any make-up visitation for this lost time. Although Karen disputed that claim, the trial court was entitled to credit Scott's testimony over Karen's. Moreover, Karen admitted that: (1) Scott lost visitation time as a result of the order of protection; (2) Karen denied Scott's request for make-up visitation when her family had preplanned trips scheduled; and (3) Her family "ha[s] trips planned all the time."

¶ 50 However, we disagree with Karen's argument that this factor favored her because of the prior orders of protection she sought against Scott. Based on the evidence presented, the trial court could have reasonably concluded that the allegations Karen made during the order of protection proceeding before Judge Barrett were unfounded and that Karen had a history of filing orders of protection against Scott and her prior husband. Thus, the "physical violence" factor is neutral and favored neither party. The trial court's erroneous finding that this factor favored Scott does not affect the outcome of this case because there is ample evidence aside from this factor to support the court's custody determination.

¶ 51 Karen also argues that the trial court did not assign proper weight to the fact that B.P. has lived with her for five years and has become adjusted to his home and community. Karen concedes that the trial court found that this factor weighed in her favor. However, she argues that the trial court improperly "discounted" the importance of this factor by noting that B.P. lived with Karen pursuant to a "temporary" custody order. Ultimately, Karen's argument is that the trial court did not give greater weight to a factor which she believed weighed more heavily in her favor. While Karen may argue that this factor should have weighed more in her favor, the trial court chose to weigh the factors differently, and its decision to do so was not against the manifest weight of the evidence. Although a trial court may consider the period of time that a child has spent with a parent by virtue of a temporary custody order, "there is no presumption in favor of the existing custodian under section 602." *Hefer*, 282 Ill. Ap. 3d at 78. Thus, the trial court was not required to treat B.P.'s adjustment to his current home with Karen as dispositive.⁵

⁵ Karen relies upon *Hall v. Hall*, 226 Ill. App. 3d 686, 689 (1991), but that case is distinguishable. In *Hall*, the trial court reversed the trial court's award of custody to the father because the child had become adjusted to a stable home environment while living with her

¶ 52 Karen also asserts that the trial court failed to consider Dr. Goldstein's initial recommendation that Karen retain residential custody because B.P. was "functioning adequately" while living with Karen and "if it ain't broke, don't try to fix it." Contrary to Karen's assertion, the trial court made clear that it considered Dr. Goldstein's report and recommendations in reaching its custody decision.

¶ 53 Based upon the totality of the record, we find that the trial court's custody determination was not against the manifest weight of the evidence, nor did it constitute an abuse of discretion.

¶ 54 **CONCLUSION**

¶ 55 For the foregoing reasons, the judgment of the circuit court of Will County granting sole residential custody of the parties' minor child to the appellee is affirmed.

¶ 56 Affirmed.

mother. *Id.* at 691. However, the court found that this factor "tipped the scales in favor of awarding custody to [the mother]" in *Hall* only because "all other discernible relevant factors [were] evenly balanced." In this case, by contrast, two of the statutory factors plus the order of protection issue favor Scott. The trial court was entitled to assign greater weight to those factors.