FIFTH DIVISION
March 20, 2015

No. 1-14-2776, 1-14-2818 cons.

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
In re CUSTODY OF D.H.	)	Circuit Court of
	)	Cook County
(Joseph Hathaway,	)	
	)	
Petitioner-Appellant,	)	Nos. 02 D 80402 cons.
	)	10 D 5802
v.	)	
	)	
Anne Wickert,	)	Honorable
	)	Debra B. Walker,
Respondent-Appellee).	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where the trial court's findings regarding custody were not against the manifest weight of the evidence; the trial court did not abuse its discretion in conducting the trial; and the trial court did not err in denying the motion to stay pending appeal.

¶ 2 Petitioner Joseph Hathaway (Joseph) appeals a trial court order denying his petition to

modify custody pursuant to section 610(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610(b) (West 2014)) and ordering Anne Wickert (Anne) to resume sole custody of the parties' son, D.H. On appeal, Joseph asserts: (1) certain of the trial court's findings were against the manifest weight of the evidence; (2) the trial court made numerous errors that denied him a fair trial; and (3) the trial court abused its discretion when it denied his motion to stay the judgment pending appeal. The Public Guardian also appeals, asserting certain findings were against the manifest weight of the evidence. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 D.H. was born to the parties on April 7, 2002. Joseph and Anne never married. On November 7, 2002, Joseph filed a petition to establish parentage and for joint custody of D.H. in the circuit court of Cook County. The court declared Joseph the biological father of D.H. and through an agreed order entered December 23, 2002, Anne was awarded sole custody with Joseph being granted visitation. On December 23, 2004, the parties entered into a subsequent agreed order modifying their custody agreement wherein Anne maintained sole custody of D.H. with Joseph having unsupervised visitation rights. For the next 10 years the parties litigated matters pertaining to visitation and custody of D.H. A Public Guardian was appointed to represent D.H. throughout the proceedings.

¶ 5 A. Temporary Change in Custody

¶ 6 A detailed chronological account of the procedural history of this protracted litigation is both relevant to and necessary for an understanding of the issues presented. On July 13, 2012, Joseph filed an emergency petition for an order of protection and temporary custody alleging that on June 11, 2012, Anne "thrashed [*sic*] childs [*sic*] room at 11pm at night scaring [*sic*] him to run

& hide – swearing at him & over turning mattress & throwing all his electronics across the room child made a [*sic*] emergency text to dad." Anne was not notified of the court proceedings and therefore was not present in court. The trial court found D.H. was the victim of emotional abuse and ordered that Joseph be granted temporary custody of D.H. The court further ordered that Anne shall have supervised visitation with D.H.

¶ 7 On July 16, 2012, Anne filed an emergency motion to rehear the petition for an order of protection. In the petition, Anne alleged she did not receive notice and that she was disciplining D.H. after finding bullets in D.H.'s room. Anne discovered that the bullets came from Joseph's home in Darien, Illinois. Anne denied swearing at D.H. or throwing objects.

¶ 8 On July 19, 2012, the trial court denied Anne's motion; however, the emergency order of protection was terminated on August 14, 2012. The following day, the trial court awarded Joseph temporary custody of D.H. until further order of court. The court also ordered Anne and D.H. attend therapy together with Dr. Michael Smith (Dr. Smith).[1]

¶ 9 B. Joseph's Petition for Change in Custody

¶ 10 On February 22, 2013, Joseph filed a petition to modify the December 2004 parenting agreement, requesting sole custody of D.H. The petition alleged a change in circumstances justifying custody modification, namely Anne's "harassment and intimidation" of D.H. after she found bullets in his room, her inability to control her anger in D.H.'s presence, and her inability to foster a relationship between D.H. and Joseph.

¶ 11 1. Trial Court's In Camera Interview of D.H.

¶ 12 On November 25, 2013, the trial court posed questions to D.H., then 11 years old, in camera. D.H. testified to the following.

[1] Subsequently, the trial court ordered that Joseph attend sessions with Dr. Smith as well.

¶ 13 When he was four years old, Joseph enrolled him in hockey and took him to practice a "couple of times" and also attended games. D.H. recalled that when he was eight years old he had supervised visits with Joseph. The following year, when D.H. was in fourth grade, he would go to Joseph's home and they would swim, watch movies, or feed ducks in the park.

¶ 14 D.H. was in his mother's care during this time. Anne would take him to school, prepare his meals, help him with his homework, take him to hockey practice and attend games. For fun they would ride bikes in the park, read, and take walks in the forest preserve. While D.H. was with Anne he received As and Bs in school and was on the honor roll.

¶ 15 At the end of fourth grade, D.H. began having unsupervised overnight visitation with Joseph. D.H. recalled that Anne would tell him "bad things" about Joseph, however, he did not specify what exactly Anne said. Conversely, D.H. stated that Joseph never said "bad things" about Anne and when they were together Joseph would not engage her in arguments. D.H. informed the court that he could not express how much he enjoyed being with his father because he was afraid he would hurt his mother.

¶ 16 In the summer of 2012, D.H. had recently completed fourth grade and would spend his time between his mother's house and his father's house. When he was with Anne, D.H. attended summer camp, which he "hated." At his father's house, he would "just hang around the house with him and we [would] go swimming and stuff."

¶ 17 On July 11, 2012, D.H. was watching television in his room at 10 p.m. when Anne came in and "tore his room apart" looking for his "DS."[2] Anne "flipped" his bed, slammed drawers open, opened cabinets, went through his desk, and threw stuffed animals around his room. Anne eventually found the DS and "stormed out of the room, slammed the door shut." She did not

[2] We understand D.H.'s reference to a "DS" to mean a Nintendo DS handheld gaming device.

help him put his room back together which made him angry. When asked if anything else happened that night, D.H. informed the court that Anne unplugged his television. He acknowledged, however, that he was not allowed to watch television late at night because his usual bedtime was at 8:30 p.m.

¶ 18 D.H. informed the court that he thought Anne was drunk at the time. When asked why he thought that, D.H. replied, "Because she never acted like that before. Like, only when she drinks does she act like that." Later in the interview D.H. clarified that he had observed Anne drink red wine after dinner that evening while they watched television together. D.H. did not recall if his mother found anything else in his room or if he had done anything to upset her when she "tore his room apart." According to D.H., "She pretty much just exploded that one night."

¶ 19 After the bullets incident, D.H. went to live with Joseph at his home in Darien along with RaeLyn, Joseph's fiancée, Katelyn their two-year-old daughter, and Gabrielle, Joseph's daughter from a previous marriage. D.H. indicated he had a good relationship with both RaeLyn and Katelyn. In the fall of 2012, D.H. started fifth grade at a new school, which was difficult because "everything was different," but he did not have trouble making friends. D.H. informed the court that he did not have the opportunity to visit with his old friends when he was with his father and he missed them, but that he would see them when he visited Anne. His grades at this time were in the B and C range.

¶ 20 While the temporary custody order was in place, D.H. would see Anne on Wednesdays and every other weekend. According to D.H.: "Wednesdays didn't really work for me because I'd have all that homework and she'd always be like–anything that wasn't done in my folder, like stuff that we didn't have to do, she'd make me do it. So that was five pages, and then she'd print off more on Wednesdays which was annoying because I needed a break." On the weekends,

Anne would have D.H. complete his homework assignments on Fridays so that he would be able to have fun with his friends and go outside the rest of the weekend.

¶ 21 Regarding Anne's behavior towards him currently, D.H. testified: "I guess she's gotten a little better with the anger thing and how she's teaching me to cook food and stuff." He also enjoys playing with the dog Anne purchased while she was going through cancer treatment. When asked what he did not like about Anne, D.H replied, "Sometimes when she drinks." D.H. explained, "I mean a little [drinking] is okay, but when she gets so drunk that she gets, like, cloudy, then no. When her judgment is completely cloudy, then no." D.H. recalled a specific incident where, during the summer after fifth grade, he stayed overnight at a friend's house because Anne had too much to drink. When asked by the court what he wished his father would do differently, D.H. responded nothing.

¶ 22 When asked about completing homework, D.H. replied: "I never have homework at home. I always finish it in school. There's never not one day where I come home and have to do homework." When asked about how he studies for tests, D.H. responded, "I'll do it at homework club. I'll do it in class, or the next day of the test, I'll do it. I'll start studding [*sic*] in my third period homeroom. Then I'll pretty much study all the free time that I have ***." His parents also help him study. D.H. reported that he currently has As, Bs, and two Cs.

¶ 23 D.H. further informed the court that he feels like both his mother and father love and care about him. He is able to call either of his parents at any time. It does not bother either parent when the other parent calls him. Anne, according to D.H., does not encourage him to call Joseph, but Joseph encourages him to call Anne and to pick up the phone when she calls. When asked if he had three wishes what would those wishes be, D.H. responded with only one wish, that his "[p]arents stop fighting, like my mom stop encouraging fighting."

¶ 24 During the in camera interview the trial court did not ask D.H. with which parent he wished to reside, nor did D.H. indicate his preference of his own volition.

¶ 25 2. Jo Anne Smith's 2014 Custody Evaluation

¶ 26 The trial court appointed Jo Anne Smith (Ms. Smith), a licensed clinical social worker, to conduct an evaluation pursuant to section 604(b) of the Act (750 ILCS 5/604(b) (West 2014)) concerning issues of custody, parenting time, and the best interest of D.H. On April 16, 2014, Ms. Smith submitted a 37-page custody evaluation to the court. The evaluation was based on multiple interviews and documents. Specifically, Ms. Smith interviewed: Anne five times; Joseph five times; and D.H. three times. Ms. Smith also conducted individual interviews of: RaeLyn; Gabrielle, Joseph's eldest daughter; Mark, Anne's eldest son; Nora Pfeifer, one of Anne's friends; Steven De Cramer, Anne's brother; Michael Koukas, Joseph's friend; Dr. Banegas, D.H.'s prescribing psychiatrist; Dr. Michael Smith, D.H.'s therapist; Dr. Maureen Stress (Stress), D.H.'s neuropsychologist; Erin Hatch, D.H.'s school counselor; Dr. Gail Grossman, D.H.'s psychologist; Dr. Kyle Henneke, a consulting psychologist regarding the psychological evaluations of Joseph and Anne; and Camille Helkowski, MED, LCPC, Anne's therapist. She also conducted in-home observations of Anne and Joseph with D.H. and reviewed a multitude of medical and court documents including prior psychological examinations of Joseph and Anne.

¶ 27 Ms. Smith recommended that Anne resume full custody of D.H. and that D.H. have limited contact with Joseph during the school year "so that [D.H.] can focus on his education and extracurricular activities that provide him with structure." In Ms. Smith's professional opinion, Joseph and Anne were incapable of working together to parent D.H. and accordingly, joint custody should not be considered by the court. Ms. Smith indicated that although D.H. wished to reside with Joseph, "at this time his emotional, developmental and education needs are

paramount and should be the focus" and that Anne would be better able to provide these for D.H. In this regard, Ms. Smith opined that Anne's more structured parenting style better served D.H.'s best interest than Joseph's "lax" parenting style. She further stated that neither parent encouraged a close relationship between D.H. and the significant adults in his life. In that same vein, Ms. Smith recommended a parent coordinator be utilized to work with Anne and Joseph. Ms. Smith also addressed Anne's "volatility" which she believed was "situational around this case."

¶ 28 C. Pretrial

¶ 29 The trial court initially set the matter for a December 2013 trial. The trial court on December 4, 2013, struck the December trial dates and continued the matter for trial beginning May 5, 2014, on the basis that the section 604(b) evaluation was not complete. On January 10, 2014, by agreed order, the trial was scheduled to commence on May 12, 2014. Depositions of all witnesses were ordered to be completed by April 28, 2014.

¶ 30 On April 16, 2014, Ms. Smith filed her section 604(b) evaluation with the court.

¶ 31 Joseph filed a petition on April 18, 2014, for an evaluation pursuant to section 604.5 of the Act (750 ILCS 5/604.5 (West 2014)) as he had recently received Ms. Smith's section 604(b) evaluation. On April 21, 2014, the trial court granted Joseph leave to obtain a section 604.5 evaluation concerning issues of custody, visitation, and the residential parent. In addition, the court ordered "[a]ny 604.5 report shall be tendered to all parties on or before May 5, 2014[.]" The trial court also extended the witness deposition date to May 5, 2014.

¶ 32 On April 23, 2014, Joseph filed an emergency motion to extend discovery deadlines and to continue the trial because he received a copy of the section 604(b) evaluation "only three and half weeks prior to the May 12, 2014 trial date" and was "not reasonably able to obtain any such [section 604.5] evaluation and report by this deadline [May 5, 2014]." In addition, Joseph

asserted that on April 23, 2014, Ms. Smith informed him that the earliest date she would be available for a deposition was May 7, 2014; accordingly Joseph also requested the court extend the witness deposition date to May 9, 2014, to allow him to take her deposition. Joseph further requested that the dates for the parties to exchange witness and exhibit lists be extended to May 19, 2014, and that the deadline of any section 604.5 evaluation be extended to June 2, 2014. In addition, Joseph requested the trial commence on June 9, 2014, rather than May 12, 2014.

¶ 33 On April 25, 2014, the trial court denied his motion to continue the trial. It did, however, grant Joseph's motion to extend discovery deadlines in part by granting him until May 7, 2014, to depose Ms. Smith.

¶ 34 On May 5, 2014, Joseph filed his witness list as well as a motion *in limine* in which he sought, in pertinent part, to exclude any evidence pertaining to his prior convictions and RaeLyn's "prior DUI."[3] At a hearing on May 12, 2014, the trial court denied Joseph's motion.[4] Upon a motion to reconsider, however, the trial court granted the motion *in limine* with regard to the prior convictions.

¶ 35 D. Trial

¶ 36 The trial commenced on May 12, 2014. During the 14 days of trial, Anne represented herself *pro se*. Joseph was represented by counsel and called eight witnesses: (1) himself; (2) RaeLyn Saalman (RaeLyn); (3) Dr. Michael Smith (Dr. Smith), D.H.'s therapist; (4) Dr. Gail Grossman (Dr. Grossman), D.H.'s psychologist; (5) Jo Anne Smith (Ms. Smith), the court-

[3] Joseph's motion *in limine* states that RaeLyn was arrested for a misdemeanor DUI (driving while under the influence) in 2001 and Joseph asserts on appeal that he sought to exclude RaeLyn's "DUI arrest." Ms. Smith reported, however, that RaeLyn "received a DUI misdemeanor in 2001 and had to complete a 6 month driving course while her driver's license was suspended for 3 months." Accordingly, we will refer to RaeLyn's DUI as a conviction herein.

[4] No order of May 12, 2014, is included in the record on appeal.

appointed evaluator; (6) Steven Bailey (Steven), Joseph's stepson from his previous marriage; (7) Michael Koukas (Koukas), Joseph's friend; and (8) Anne. Anne was the sole witness in her case in chief. The Public Guardian called no additional witnesses.

¶ 37 1. Joseph

¶ 38 Joseph testified as follows. At the time of trial he was 49 years old and a self-employed real estate investor. He resided in Darien, Illinois with his fiancée RaeLyn, their four-year-old daughter Katelyn, and D.H.

¶ 39 When D.H. came to live with him in July 2012, he was "an emotional wreck." Joseph attempted to discipline him by giving him time-outs in his room, but Joseph admitted, "I really didn't know what to do." With Dr. Smith's guidance, however, Joseph began to see that he had to forgive D.H. for making mistakes and that D.H. "really needs more structure."

¶ 40 D.H. currently attends Eisenhower Junior High School (Eisenhower) as a sixth grade student. In March, Joseph met with the school counselor Erin Hatch (Hatch) to set up a "504" plan for D.H. The plan will be put in place next school year. Currently, D.H. has "two Bs and all As"; however, in fifth grade D.H. had Bs and Cs and "was getting some Ds."

¶ 41 D.H. has been on medication for attention deficit hyperactivity disorder (ADHD) since first or second grade and that a month and a half ago, D.H. "finally opened up" and told Joseph that he was doing his homework assignments in study hall on the morning when they were due. Joseph encouraged him to do his homework in advance so he would not be behind. This new practice has improved his grades. In addition, Joseph joined an ADHD support group, Children and Adults with Attention Deficit and Hyperactivity Disorder (CHADD), "a few weeks ago."

¶ 42 Joseph and RaeLyn now use a "weekly chart" to keep D.H. organized. The chart includes doing homework assignments, making the bed, putting dishes in the dishwasher, vacuuming the

living room once a week, and taking out the garbage. The chart also includes "a spot for his attitude *** whether it is good or bad." D.H. gets "checks or minuses" each day and "if he gets three stars in a day, then he gets a small treat." If D.H. gets three negative marks in one day, he has an hour of "alone time" where he has to go to his room with no electronics. On cross-examination Joseph indicated that D.H. has a television with a cable box, a video game system, and a tablet computer in his room at Joseph's house. He also clarified that RaeLyn made the chart and it was first implemented in late January 2014.

¶ 43 D.H. and RaeLyn are "very close" and that she is "like a mother figure" to him. D.H. will tell RaeLyn his feelings more so than he will tell Joseph and he is "able to communicate really well with her." RaeLyn also assists D.H. with his homework on nights when Joseph comes home late. D.H. is also "very close" with his half-sister Katelyn. The Public Guardian also elicited testimony from Joseph that he was the residential parent of Gabrielle, his eldest daughter with his ex-wife Dawn Bailey (Dawn), who lived with him from the time she was born until August 2013. According to Joseph, Gabrielle has a "very close" relationship with D.H.

¶ 44 In addition, Joseph testified to numerous occasions where he observed Anne become angry or upset in D.H.'s presence. Beginning in January 2013, D.H. would "get very irritated" and did not want to go on visitation with Anne. In one incident, knowing he had visitation with Anne, D.H. went over to a friend's house. Anne arrived at Joseph's home and no one was there. She telephoned Joseph and he informed her that D.H. was at his friend's home. Anne asked for the address so she could retrieve him, but Joseph declined to give it to her, saying he would pick up D.H. When he and D.H. returned home, D.H. hid in his room instead of leaving with Anne. Anne called the police.[5] D.H. refused to go with Anne despite Joseph talking to him and trying

[5] We note that Anne testified she called the police when she arrived at Joseph's home and

to get him to leave with her. D.H. did not have visitation with Anne that day.

¶ 45 Joseph further testified that on three occasions in August 2013, D.H. reported to him that Anne consumed too much alcohol and "could not drive and it embarrassed him." Joseph also testified that in 2005, when D.H. was three years old, Anne referred to RaeLyn as his "whore girlfriend" in front of D.H.

¶ 46 During his case in chief, Joseph introduced into evidence without objection a July 12, 2012, email authored by Anne. Joseph then published a portion of the email to the court, specifically reading that Anne wrote, "I might remind you that you are a twice convicted felon with a recent history of multiple failed drug tests, years of supervised visitation, and a perjured affidavit who is living with an [*sic*] porn actress who has a history of drunk driving arrests, and that is just to start." The trial court noted that Joseph violated his own motion *in limine* by introducing evidence of his and RaeLyn's prior convictions, but reserved ruling on whether Anne could cross examine the witnesses regarding their prior convictions.

¶ 47 The following day, Joseph filed a motion to reconsider that he violated his motion *in limine* as he did not intend to present the contents of the email for the truth of the matter asserted, but to demonstrate that Anne was disparaging and could not facilitate a relationship between Joseph and D.H. The trial court denied the motion, finding that it would consider Joseph's prior convictions as they related to the best interests of D.H. The trial court further noted that: (1) it was already aware of Joseph's prior convictions from prior court proceedings; (2) Joseph's prior convictions were already in evidence through Ms. Smith's section 604(b) evaluation; and (3) this matter was a bench trial. In addition, the court expressed that Joseph's admission to these prior felonies "bolsters his credibility." The trial court issued no ruling with regard to the admissibility

---

no one was there.

of RaeLyn's prior conviction.

¶ 48 During cross-examination, Anne questioned Joseph regarding the email, expressly asking him if he was in fact a "twice convicted felon." No objection was made and Joseph responded, "Yes." Joseph further testified that in 2008 he submitted a false affidavit with the court in regards to a failed drug test.

¶ 49 On cross-examination, Joseph also testified that when D.H. contacted him on July 12, 2012, he did not know that Anne had found bullets in D.H.'s room. Joseph did not communicate with Anne to find out what happened and he was not aware at the time that Anne had taken away D.H.'s electronics and telephone privileges. D.H. later admitted to Joseph that he had taken the bullets from his house. Joseph denied that the box of bullets came from his home in Darien and said he kept them at his home in Indiana.

¶ 50 Joseph testified that he did not agree with D.H. taking medication for ADHD and that he was told by D.H.'s primary care physician Dr. Blade that D.H. did not have to take his medication on weekends when he was with Joseph so long as his behavior was fine. Joseph acknowledged, however, that Dr. Blade had prescribed the medicine for D.H. to take seven days a week. Joseph was not aware that there were withdrawal side effects from one of the medications D.H. was taking. Joseph also testified that he learned about CHADD from his attorney after Ms. Smith's report was released.

¶ 51 Joseph also testified that in April 2014 he told D.H. that "Smith's report came out and it wasn't good for us. It recommended that you go back and live with your mother." He explained to D.H. "no matter what happens, that the judge has to make the decision. No matter what happens I'm not going to go anywhere."

¶ 52 During the Public Guardian's examination of Joseph, he testified that in July 2012 his

friend Mike Koukas was in possession of RaeLyn's 9mm handgun and Dawn's shotgun. Joseph admitted he was in possession of bullets at that time. Joseph also testified that he facilitates a relationship between D.H. and Anne by encouraging D.H. to visit and speak to Anne on the telephone. Regarding giving D.H. his medication, Joseph stated, "Unless he has an assignment or homework to do, I don't see it necessary for him to have it on weekends."

¶ 53 On re-direct, Joseph testified that he did not contact Anne after the bullets incident because of her volatile behavior towards him in court. He further indicated he did not ask her if she had trashed D.H.'s room "[b]ecause I was in fear for his [D.H.'s] safety." When asked why he informed D.H. about the section 604(b) report, Joseph testified that D.H. was asking questions about it.

¶ 54 On May 14, 2014, during Joseph's re-direct examination, his counsel sought to enter into evidence an email that she received the previous evening from her client. The email, dated May 13, 2014, was from Anne to the principal of Eisenhower and Joseph. The trial court denied Joseph's request to admit the email stating it had ordered Joseph the previous day not to communicate with anyone while he was a sworn witness regarding his testimony or his intended testimony, including his counsel, and, despite this admonishment, Joseph forwarded his counsel Anne's email. The trial court further stated that the use of this email was "unknown information that [Anne] didn't see before today that you were going to use, which is kind of like trial by ambush." In an offer of proof, Joseph's counsel represented that, in the email, Anne questioned why D.H. had high marks in two classes where he had turned in assignments late and was missing additional assignments. Anne expressed her concern that a "different set of rules" applied to D.H. Joseph's counsel argued these statements indicated that Anne was not happy with D.H.'s success in school.

¶ 55 In addition, during Anne's re-cross-examination of Joseph, he testified that he was in possession of a tape-recorded argument between Anne and D.H.[6] The trial court requested that counsels submit a memorandum of law regarding the admissibility of the tape recording under the eavesdropping statute (720 ILCS 5/14-2(a)(1)(A) (West 2014)). On June 9, 2014, Joseph filed a "memorandum in support of admitting evidence at trial of recorded conversations between respondent and minor child." On June 12, 2014, the Public Guardian also filed a memorandum of support. On June 18, 2014, the trial court issued a written order in which it denied Joseph's request to admit the tape recording. Specifically, the trial court found that the case of *People v. Clark*, 2014 IL 115776, which held a portion of the eavesdropping statute to be unconstitutional, did not apply to the instant matter and that "the Illinois Supreme Court and the Illinois legislature intend that private conversations in private places should not be recorded without the consent of the party being recorded, which is what occurred herein."

¶ 56 Additionally, the trial court questioned whether Joseph would be able to lay foundation for the admission of the tape-recorded conversation and allowed Joseph's counsel to *voir dire* Anne on that issue. Anne stated that beginning in spring 2014 D.H. threatened to record her, but she was not aware of any instances where he actually recorded any of their conversations. Ms. Smith had informed her that Joseph had brought a tape-recorded conversation between Anne and D.H. to his exit interview. Ms. Smith asked Anne if she wanted to hear the recording, but Anne declined to listen to it.

[6] We note that Anne also elicited testimony from Dr. Smith regarding the tape-recorded argument, which, due to scheduling issues, occurred while Joseph was still a sworn witness. In his testimony, Dr. Smith indicated in the tape recording Anne was demeaning and threatening towards D.H.

¶ 57 Joseph's counsel asked Anne if she could recall what occurred on December 11, 2013.[7] Anne did not have any specific recollections of what occurred on that day, she would, however, pick D.H. up from school on Wednesdays in December and D.H. typically had his phone with him. She also could not recall telling D.H. on December 11, 2013, that she was leaving the state if she did not get custody of him. The trial court declined to reconsider its position and acknowledged that this line of questioning also constituted an offer of proof.[8]

¶ 58 2. RaeLyn Saalman

¶ 59 RaeLyn Saalman, Joseph's fiancée, testified to the following facts. She has known Joseph for nine years and currently resides with him, their daughter Katelyn, and D.H. at his home in Darien. She met Joseph when she moved to Chicago in 2005 and rented her first apartment from him. Prior to moving to Chicago, RaeLyn lived with her eldest daughter, Sabrina, in Los Angeles, California for 13 years where she was an "aspiring actress." RaeLyn denied working in "pornographic" or "X-rated films." RaeLyn further denied telling Ms. Smith that she participated in "Playboy movies through Skinemax." On cross-examination, RaeLyn testified she acted in two Playboy produced movies and that seven movies she acted in were R rated and three movies were unrated. Many of these movies had erotic titles. On re-direct, however, RaeLyn clarified that the movies required "brief nudity" on her part, but that she never engaged in sexual acts on film.

¶ 60 RaeLyn further testified that in July of 2012, D.H. came to live at her residence. At first he was "really nervous and upset, frustrated at the slightest question *** [and] would go to his

[7] It is apparent from counsel's line of questioning that December 11, 2013, was the date the argument was recorded.

[8] During Anne's direct examination, Joseph's counsel made another offer of proof that the tape recording would impeach Anne's testimony that she did not tell D.H. that she intended to leave the state if not given custody of him.

room and slam the door." After working with Dr. Smith for the last eight months, D.H. no longer "throw[s] things down like he did before" or "huff[s] around." RaeLyn testified D.H. now has "a good attitude" and a "very good" relationship with Katelyn. RaeLyn testified her relationship with D.H. has always been "good."

¶ 61 Regarding assisting D.H. with homework, RaeLyn testified she is "more of a help" than Joseph. She typically assists D.H. with homework two times a week or if there is a big project she will assist because she's "more patient." In addition, she "bridge[s] the gap between Joe and Miss Hatch when Joe is not home" regarding issues with D.H. in school. On cross-examination, RaeLyn testified that D.H. does not always attend homework club either because he has a headache or does not feel well.

¶ 62 D.H. has a "big flat-screen TV," a video-game system, two telephones, a tablet computer, and two bicycles. If he is to be disciplined he typically loses "screens" for one day. RaeLyn defined "screens" as television, phone, or computer. If he fights with Katelyn or has a bad attitude he is sent to his room. Sometimes D.H. is grounded. On cross-examination, RaeLyn admitted that D.H. has "a history of lying."

¶ 63 According to RaeLyn, when D.H. returns from visitation with Anne he is "very short," has a rude tone, and is "really stressed." It takes him a day to calm down. On cross-examination, RaeLyn agreed that a reason for this behavior was that D.H. had a hard time navigating between two homes and because of the conflict between Anne and Joseph.

¶ 64 On re-direct examination, RaeLyn further testified that Anne has called her either a "porn star," "gold digger," "whore," or "slut" in front of D.H. approximately three times. However, on re-cross-examination, RaeLyn testified that one of the instances where Anne called her names in front of D.H. occurred when D.H. was three years old and inside of a vehicle outside of earshot.

¶ 65 3. Dr. Michael Smith

¶ 66 Dr. Smith testified he is a clinical psychologist who has been involved in this matter since August 2012 when he was appointed by the court. D.H. is his patient and he sees Joseph "[i]n connection with [D.H.]'s parenting." He also saw Anne, but does not see her currently because she indicated to him that "it was really hard for her and was not productive for her to attend sessions."

¶ 67 In his initial sessions with D.H. and Joseph, Dr. Smith focused on D.H.'s difficulty in school and "attempted to put a basic program in place to help him improve the structure at home in order to get his homework in and do better academically." According to Dr. Smith, Joseph's home was "[f]airly unstructured." The plan involved "having kind of a set scheduled time for him to do kind of academic work and to have a set place for that to happen, have positive consequences if he was able to do that and kind of some negative consequences if he wasn't able to." Joseph was in agreement with these suggestions; however, "[t]he goals for [D.H.] continued to be minimally met." At the time of trial, Dr. Smith characterized Joseph's home to be "[m]ore structured" than it was when he first started working with D.H. and Joseph.

¶ 68 Dr. Smith further testified that during sessions with Anne, D.H., and Joseph, Anne spoke disparagingly to Joseph and, during two different sessions, made some "offhand comments about RaeLyn" while D.H. was present including that RaeLyn was a "porn star." In August 2013, Anne decided not to continue sessions with him.

¶ 69 When asked whether, in his opinion, Anne is able to encourage a relationship between D.H. and Joseph, Dr. Smith responded, "In my experience, [Anne] has stated that that's not her goal." Dr. Smith, however, indicated he believes that Joseph has the ability to encourage a relationship between D.H. and Anne. Dr. Smith's reports regarding his treatment of D.H., along

with email correspondence between him and Anne, were entered into evidence.

¶ 70 On cross-examination, Dr. Smith testified that during many sessions with D.H. and Anne, D.H. was happy to see Anne, was pleasant, and that the sessions went well. It was during his treatment of D.H. that Anne was diagnosed with cancer. Anne discussed with Dr. Smith how to discuss her cancer with D.H.; however, that was not included in Dr. Smith's reports. Additionally, Dr. Smith indicated, based on his conversations with D.H., that D.H.'s visits with Anne have improved since September 4, 2013.

¶ 71 Dr. Smith did not know when the current behavioral chart was first put in place, but he did know that it had been part of his continued discussions with Joseph.

¶ 72 Dr. Smith also testified that D.H. has a history of not telling the truth. According to Dr. Smith, "Many of the lies are related to what was noted yesterday was that at times his solution to the conflict and not wanting to kind of really disappoint or be on the bad side of [Anne or Joseph] is to lie." In addition, "[a]nother function that lying has for [D.H.]—is—is—is really more typical of he thinks that he's going to get out of something. *** Which is really typical for [an] 11 year old."

¶ 73 During the Public Guardian's cross-examination, Dr. Smith testified that he and D.H. discussed the section 604(b) evaluation. D.H. was "distressed" and stated that if he had to live with Anne he would run away. Dr. Smith believed that it was a possibility that D.H. might run away, but he did not think "it would be a sustained run away." On re-cross-examination, Dr. Smith stated it was Joseph who told D.H. about Ms. Smith's custody recommendation. According to Dr. Smith, Joseph telling D.H. this information was "not optimal" as the information D.H. received regarding the section 604(b) evaluation theoretically could have been skewed in one direction by Joseph.

¶ 74 4. Dr. Gail Grossman

¶ 75 Dr. Gail Grossman (Dr. Grossman) testified to the following facts. She is a child psychologist who first became involved in this matter in 2005 when she was appointed by the court to conduct a section 604(b) evaluation regarding D.H. She had no further contact with the parties until she was appointed by the court in 2011 to conduct six "reunification sessions" between D.H. and Joseph due to a rift in their relationship. After those six sessions were completed, she continued her work with D.H. and Joseph on a monthly basis until November 2012 for a total of 24 sessions. As requested by the Public Guardian, Dr. Grossman prepared reports at regular intervals regarding D.H. and Joseph's progress in therapy. Three of Dr. Grossman's reports from July 2011, October 2011, and August 2012, were entered into evidence.

¶ 76 During Dr. Grossman's initial individual session with D.H. in 2011, D.H. told her that he thought his relationship with his father was "pretty good" but that he was "annoyed" with him at the time because of Joseph's choice not to tell him about the birth of Katelyn. D.H., however, wanted to resolve these issues and spend time with Joseph. At the end of six sessions, Dr. Grossman recommended that Joseph have unsupervised visitation with D.H.

¶ 77 According to Dr. Grossman, in 2011 Anne told her that she did not want Joseph to be involved in a relationship with D.H. She also observed Anne speak negatively about Joseph in front of D.H.

¶ 78 Based on her professional opinion and involvement with this case, Dr. Grossman opined that Joseph is capable of fostering a relationship between D.H. and Anne, whereas Anne is not capable of fostering a relationship between D.H. and Joseph. On re-direct examination, however, Dr. Grossman testified that she believed that both parents have contributed to D.H.'s difficulties due to the ongoing litigation and his awareness of their acrimony and she believes

D.H. holds both parents responsible.

¶ 79 Regarding D.H.'s wishes, Dr. Grossman stated, "[D.H.] has communicated to me in 2012 that he wanted to continue to live with dad and that he was much happier there. There was less chaos, less—less fighting, less drama, and he reported that he simply could not imagine living with mom, although he wants to have time with mom. He said he would run away."

¶ 80 On cross-examination, Dr. Grossman testified that D.H. has admitted to "lying about many things" to Anne, Joseph, his therapists, and his teachers, but that she had never caught D.H. lying to her in one of their sessions. Dr. Grossman also indicated she had not seen D.H. since November 2012.

¶ 81 5. Jo Anne Smith, LCSW

¶ 82 Ms. Smith testified that she is a licensed clinical social worker with a master's degree in social work. She is currently employed in private practice at the University of Illinois and Governors State University, and also conducts assessments for the Illinois Department of Children and Family Services (DCFS). She provides individual, couples, and family therapy as well as section 604(b) evaluations and parent capacity assessments. She has been employed in private practice since 1996 and has been conducting section 604(b) evaluations since 1990.

¶ 83 She has previously conducted 37 section 604(b) evaluations and four section 604.5 evaluations and has participated in training on how to conduct such evaluations. All of these evaluations were for "high conflict" cases. Ms. Smith defined "high conflict" as a matter where the parties were unable to come to an agreement regarding parenting and needed the court to assist.

¶ 84 In May 2013, she was appointed by the court to conduct a section 604(b) evaluation in the current matter. Over an 11-month period she gathered documents and conducted interviews

to prepare the evaluation. Ms. Smith did not interview Steven, Joseph's ex-wife Dawn's son, but did know that Joseph was a parental figure in Steven's life through the documents she reviewed. D.H. also stated to her that he wished to remain in his father's custody and to have visitation with his mother. Despite these wishes, ultimately Ms. Smith recommended that Anne receive full custody of D.H. with Joseph having visitation due to Anne's home being a more stable, structured environment.

¶ 85 Ms. Smith testified that she based her conclusion that Joseph did not provide enough structure for D.H. on D.H.'s academic performance during the year, his report card, reports from Hatch, the fact D.H. was not turning his homework in, and his medication issues. Ms. Smith indicated that at the time she conducted her evaluation, Joseph was not working with D.H. on his homework. D.H. did not have a designated homework time, nor did he have a designated place to do his homework. It was her opinion that D.H. struggled in school while in Joseph's custody and that Joseph was not proactive in helping D.H. succeed in school. Ms. Smith testified that she did not have D.H.'s May 9, 2014, grades at the time she conducted her assessment, but that those grades of As and Bs did not affect her recommendation of custody because it was merely a recent and not a sustained change.

¶ 86 Ms. Smith acknowledged in her testimony that Anne has "poor impulse control" and "struggles with her emotions," but despite these behaviors Anne is the fitter parent, as these behaviors are situational. Ms. Smith testified that Anne's inability to contain her emotions regarding Joseph put D.H. "at risk" and that her statement to D.H. about moving out of town if she did not resume custody is another risk factor, which she did not include in her report, but did consider.

¶ 87 On cross-examination, Ms. Smith testified that Anne's symptoms of depression and

paranoia were directly related to the ongoing litigation and the conflict between Anne and Joseph. When she observed D.H. at Anne's home he was not scared and appeared comfortable. Ms. Smith further testified that Anne's supervision of Joseph's visits with D.H. from the time he was three until he was nine-and-a-half was an attempt to encourage a relationship between D.H. and Joseph.

¶ 88 In addition, Ms. Smith testified that D.H. does not like to be yelled at by either parent, and does not like to be told "no." D.H. also knows how to, at times, manipulate situations so that Joseph will get angry and D.H. will get his way. For example, in regard to the bullets incident, Ms. Smith testified that D.H. has lied in the past to get Anne in trouble with Joseph, that Joseph concurred with D.H. in lying, and this can reinforce lying behavior in children.

¶ 89 Ms. Smith testified that Joseph questioned whether D.H. has ADHD and does not believe that D.H. needed to take medication. Joseph did not inform Ms. Smith prior to her report that he was a member of CHADD. Ms. Smith also testified that based on her review of the information she was provided, Joseph has been unable to follow court orders regarding visitation and D.H.'s contact with Anne. Through her investigation Ms. Smith further found that Joseph has a history of undermining Anne's relationship with D.H. and it was her professional opinion that Joseph was not respectful to Anne as D.H.'s mother.

¶ 90 During her cross-examination by the Public Guardian, Ms. Smith testified D.H. needs "[c]onsistency, predictability, structure, consequences, both positive and negative" from both households. Ms. Smith also stated that Joseph is not encouraging of D.H.'s and Anne's relationship because of his failure to make D.H. available for scheduled visitations on several occasions.

¶ 91 6. Steven Bailey

¶ 92 Steven Bailey, Joseph's stepson from his previous marriage to Dawn, testified to the following facts. He first met Joseph 26 years ago when Joseph began dating his mother. When he was seven, Dawn and Joseph were married and they moved to Berwyn, Illinois. Joseph signed Steven up for hockey and taught him how to swim, catch a ball, throw a ball, and ride dirt bikes and ATVs. Joseph was a good stepfather who helped him with his homework and disciplined him appropriately. When he was in sixth grade, Joseph and Dawn separated and ultimately were divorced. Joseph, however, continued his relationship with Steven.

¶ 93 Steven further testified that he has known Anne and D.H. for 11 or 12 years. He has a good relationship with D.H. He could not recall observing Anne interact with D.H. in the last two years; however, he did recall a 2011 incident at Joseph's Indiana home over Fourth of July weekend where Anne became "really upset because of the way [D.H.] was acting." Anne began "yelling and screaming" and calling Joseph "[a]n asshole, a jerk." D.H. was present "at the beginning until he ran off and tried to hide."

¶ 94 Steven also testified to hearing Anne call RaeLyn a "whore" at some point in 2004.

¶ 95 Steven further testified as to D.H.'s relationships with Joseph and RaeLyn. At Easter in 2014, Steven observed D.H. and Joseph cook together, "roughhouse," and "throw around the ball." He also observed Joseph helping D.H. with his homework as well as RaeLyn and D.H. joking with each other.

¶ 96 7. Michael Koukas

¶ 97 Michael Koukas (Koukas), Joseph's friend, testified next. He and Joseph have been friends for 40 years and he was introduced to Anne in 2000 by Joseph. While Anne was dating Joseph, Koukas used cocaine with them twice. Then, in 2008 when he was doing a remodel of a

skylight in her home, Anne asked if he "had anything on him" and he replied he had cocaine. He then asked her if she wanted to use cocaine and she replied "definitely." Anne suggested they set up the cocaine on the kitchen table, but Koukas preferred to use the bathroom vanity. Koukas laid the cocaine out on the bathroom vanity and they each took turns "doing lines" of cocaine. On cross-examination, however, Koukas testified he was not aware that Anne did not have a kitchen table in her home at that time or that she did not have a vanity in either of her two bathrooms. He clarified that they used cocaine on the "ledge of the sink."

¶ 98 Koukas also testified regarding a vacation he took in summer of 2004 to Henry, Illinois with his family, Joseph's family, as well as Anne and D.H. Anne became agitated and left early with D.H. Koukas could not recall why Anne was upset or what she said, but recalled she was raising her voice and "talking like you shouldn't around kids." D.H. was "shocked and quiet" at Anne's behavior.

¶ 99 Koukas was present at Joseph's Indiana home for the Fourth of July 2011 when he observed Anne get "irratible and aggravated and agitated" and scream obscenities at Joseph. Koukas could not recall what obscenities she was screaming. On cross-examination, he stated he could not recall anything else that occurred that weekend.

¶ 100 Koukas also testified that he has been holding firearms for Joseph's family members. He has had Dawn's shotgun at his home in Rockford, Illinois since 2007 and has been similarly storing a Makarov 9-millimeter handgun for RaeLyn since 2010.

¶ 101 8. Anne Wickert

¶ 102 a. Adverse Testimony

¶ 103 Anne Wickert testified as an adverse witness to the following facts. At the time of trial she was 53 years old and employed as a speech therapist. For the first ten years of his life, she

raised D.H. by herself and was the primary disciplinarian. Prior to 2011, Joseph would not seek out visitation with D.H. on a consistent basis.

¶ 104 During Fourth of July weekend 2012, Joseph had custody of D.H. for five days. During that time D.H. was not given his medication. When he returned to her care, D.H. was experiencing side effects of not taking one of his medications. Namely, D.H. was not sleeping well, was anxious and nervous, and had very exaggerated emotions. In addition, at this point in time, D.H. had not had many overnight visitations with Joseph and was having a hard time transitioning between Joseph's home and Anne's home.

¶ 105 Regarding the events of July 11, 2012, Anne testified that she was scared and upset upon discovering a box of bullets in D.H.'s room. She did not flip his mattress, swear at him, or slap him. She did, however, ground him, which D.H. did not like. Unbeknownst to her at the time, while she was downstairs, D.H. went into her bedroom to obtain his phone and texted Joseph. Anne did not know if D.H. was scared at the time, but "[h]e'd never really been in trouble for something that big before."

¶ 106 Anne testified that D.H. had 39 missing homework assignments during the 2013-2014 school year and that D.H. told her he does not do homework at Joseph's house, but does his homework at homework club. Anne recently helped D.H. complete a late English project that was eventually turned in five days late. The project was completed during her visitation and without any medication, as Joseph did not send any with D.H. Anne acknowledged that D.H. has been more consistent with completing late homework assignments in this last quarter of sixth grade.

¶ 107 Regarding D.H.'s May 9, 2014, grades, Anne testified that they were the best he has achieved in two years, although she was perplexed as to how D.H.'s grades reflected that he had

an A- in science and a B in social studies when the report did not include a break-down of the individual grades for tests and homework assignments. Anne noted, however, that D.H.'s grades have changed since May 9, 2014, and that his grades have gone "significantly downhill" in the last two weeks. D.H.'s final sixth grade transcript indicated he had one A, two Bs, and three Cs.[9]

¶ 108 Regarding D.H.'s tendency to lie, Anne testified that D.H. has "told a lot of people a lot of lies" and that "[D.H.] doesn't hesitate to lie if he thinks that it's going to keep his father's attention, get his father's attention, or get him some kind of material possession."

¶ 109 When asked whether she told D.H. that she would be leaving the state if she did not get custody of him, Anne stated, "I don't believe I told [D.H.] I was leaving of [*sic*] the state. I believe I told his father and his father told [D.H.]. I could be mistaken. And I believe what I said was that I would always be there for him one way or another is what I said."

¶ 110 Regarding her alcohol use, Anne testified that she occasionally consumed alcohol in D.H.'s presence, including last year at a friend's home, but never had more than two or three drinks. Anne also admitted to using cocaine and marijuana "many many years ago."

¶ 111 Anne admitted to having called RaeLyn a "porn actress" and making deprecating statements to Joseph in text messages. Anne also admitted that she does not respect Dr. Grossman, particularly because she did not assist D.H. with all of his issues, but merely focused on the reunification of Joseph and D.H. in 2011. She also acknowledged that she stopped attending sessions with Dr. Smith, D.H., and Joseph, as D.H. was not responding positively towards her after his sessions with Dr. Smith.

¶ 112 Anne testified she wants D.H. to have a father "but I'd like for him to have a father's [*sic*] who's there consistently so that he's not constantly disappointed." She believes she can facilitate

[9] We note that the transcript named Joseph and RaeLyn as D.H.'s "Parent/Guardians." Anne is not listed on the transcript.

a relationship between Joseph and D.H., as she did it for ten years even when the litigation between the parties was contentious. She asserted she is willing and able to encourage such a relationship, but admitted the assistance of a parent coordinator would be helpful. Anne, however, acknowledged that she denied Joseph visitation on D.H.'s fifth birthday in 2007. She also testified that from September 2013 to the present, while in Joseph's custody, D.H. did not attend 26 visitations with her.

¶ 113 b. Anne's Testimony in her Case in Chief

¶ 114 In her case in chief, Anne testified to the following. In October 2003, Joseph filed a petition for custody. In December 2004, Anne was awarded sole custody of D.H. and Joseph was given visitation that he did not consistently exercise. In July 2005, however, D.H. went on a week-long vacation with Joseph. Anne attempted to contact D.H. multiple times while he was on vacation with Joseph, but was never allowed to speak with D.H. When D.H. returned, he was upset and told Anne that he thought she had died. D.H. was three-and-a-half years old at the time.

¶ 115 In August 2005, Anne filed a petition for child support. In September of that year, Joseph indicated to Anne that he was "very very angry" and "would teach her a lesson [she] would never forget." A few days later she received a telephone call from DCFS that she had been accused of sexually abusing D.H. During the course of the investigation, Dr. Grossman was appointed by the court to conduct a section 604(b) evaluation. Anne underwent a series of psychological examinations and had to defend her professional license due to these allegations. Anne expressed that much of her paranoia stems from these unfounded allegations made against her by Joseph and his family, but that it does not affect other aspects of her life.

¶ 116 In October 2005, she was cleared of the sex abuse allegations. Thereafter, Joseph was

ordered to take a drug test and failed. As a result, Joseph had supervised visitation with D.H. In 2008, Joseph was granted unsupervised visitation with D.H. He had seven or eight unsupervised visits until a court ordered drug test indicated that he tested positive for cocaine. In response to the failed drug test, Joseph filed an affidavit with the court attesting that due to a shoulder injury, he had used a Lidocaine patch that was prescribed to his daughter. After being informed by the Public Guardian that using someone else's controlled substance was a felony, Joseph recanted his affidavit and was again ordered to have supervised visitation with D.H. Anne voluntarily supervised these visits.

¶ 117 In fall 2011, after an incident of bullying, Anne enrolled D.H. at St. John's Lutheran School (St. John's), a private school. D.H. excelled there and was provided with accommodations to assist him in succeeding academically.

¶ 118 In January 2012, the court ordered that Joseph have unsupervised overnight visitation with D.H. Initially, D.H. was upset by this news and when his father would come to pick him up he would not want to go with him. Anne encouraged D.H. to go on visitation with his father.

¶ 119 In April 2012, D.H. resumed spending some weekends with Joseph and also spent four days of vacation with him over Memorial Day weekend. Despite Anne informing Joseph of D.H.'s sports practices, viola lessons, and therapy appointments, Joseph did not take D.H. to these activities. According to Anne, Joseph did not want to integrate himself into D.H.'s life.

¶ 120 Prior to Fourth of July weekend in 2012, Anne expressed to Joseph that she would like to see D.H. during his five-day vacation with Joseph, as she believed D.H. was having a hard time transitioning and would be comforted by seeing her. D.H. had a baseball game that weekend and Anne suggested that Joseph bring D.H. back to Chicago for the game and she could see him there. According to Anne, in front of D.H., Joseph took D.H.'s baseball schedule, crumpled it

into a ball, and told her that nobody would tell him he had to do anything. D.H. did not say anything, but was "tensed up" and shaking. Thereafter, on July 5, 2012, Anne called D.H. but Joseph would not let her speak with him. Joseph yelled into the phone that "[D.H.] was scared of me and didn't want to talk to me." Anne could hear D.H. talking in the background of the telephone conversation, so she was aware that Joseph made these statements in D.H.'s presence. Anne, however, was able to speak with D.H. on the telephone the following day. She could tell that he had not been taking his medication because he was acting anxious and nervous, which were withdrawal side effects from one of his medications.

¶ 121 On July 8, 2012, D.H. came back from vacation. According to Anne, D.H. had a hard time sleeping. On July 11, 2012, Anne found the box of bullets in D.H.'s bedroom. D.H. told her that he obtained the box of bullets from Joseph's bedside table in Darien and that Joseph had a handgun in his closet there. As a result of this conversation, Anne searched D.H.'s room looking for a gun but did not find one. She grounded D.H. and took away his electronics privileges and cellular phone.

¶ 122 On July 12, 2012, Anne called the Public Guardian and left a voicemail regarding what had occurred the previous evening. The Public Guardian never called her back. That day, Anne was also informed by a camp counselor that Joseph had come to camp and had spoken with D.H. Anne asked D.H. why Joseph had come to camp and D.H. replied that Joseph wanted to know why he took the bullets. D.H. informed him that he thought the bullets were cool. Joseph then responded that D.H. "got him in trouble."

¶ 123 On July 13, 2012, Anne went to pick D.H. up from camp, but Joseph had already come to get him with the emergency order. Anne called Joseph multiple times before he finally answered, screaming into the phone, "you will never abuse my son again, you f*** b***, you

will never abuse my son again." Anne could hear D.H. playing in the background. She denied abusing him. Despite an order granting Anne supervised visitation, it was not until August 15, 2012, that Joseph allowed Anne to have her first visit with D.H. This visit occurred at Dr. Smith's office.

¶ 124 On February 15, 2013, Anne was granted unsupervised visitation with D.H. Their first visit on February 16, 2013, went very well. On February 22, 2013, Joseph filed the petition to modify custody. Over the phone, Joseph informed Anne about the petition and told her that D.H. knew about it, that D.H. did not want to live with her, and that he and RaeLyn were going to be D.H.'s new parents. Thereafter, Anne was denied visitation for seven days in March. On cross-examination, however, Anne stated that she was denied visitation in March 2013 because D.H. did not want to have visitation with her.

¶ 125 In April, Anne was able to have visitation with D.H. Their relationship was going well until May 24, 2013, when Joseph took D.H. to Kansas City for a wedding and dropped D.H. off at her house late on May 26, 2013, after being in the car for 10 hours. D.H. went to dinner with Anne, but refused to spend the night with her. Joseph did not return D.H. for visitation with Anne the following day as they had previously agreed. Anne informed the court that a few weeks prior to this incident she had had cancer surgery.

¶ 126 Regarding D.H.'s medication for ADHD, Anne testified he began taking medicine when he was in second grade. Anne gave D.H. his medication each day as prescribed. In summer 2012, while D.H. was in Joseph's custody, Joseph did not start D.H. on his medication before the first day of school despite Dr. Banegas' recommendations to do so. During fifth grade, D.H. had issues with the dosage and administration of his medication. In May 2013, Dr. Banegas added a 5 mg "boost" of a different medication to assist D.H. in completing his homework. Joseph did

not give D.H. this boost consistently and stopped D.H.'s medications all together over the summer of 2013.

¶ 127 In September 2013, D.H. began sixth grade at the local public school. Anne called to introduce herself to Hatch, D.H.'s counselor, but Hatch would not speak with her because Joseph had not listed Anne on D.H.'s enrollment forms. Anne faxed a court order to Hatch indicating she was D.H.'s parent and she was thereafter able to communicate with the school.

¶ 128 Intermittently throughout the year, Hatch would communicate with Anne about D.H. According to Anne there seemed to be "a lot of confusion about his medication: that the medication didn't seem to be working; that they didn't think he was getting his medication." In September 2013, D.H. was to have his medication boost administered by the school nurse after lunch. Joseph did not send the medication to the school and D.H. did not like going to the nurse to take it. In October 2013, D.H.'s medication dosage was increased and he was given an "extended release" version to last him through the school day without need for the boost.

¶ 129 In February 2014, D.H. went to the neuropsychologist, Dr. Stress, for an examination. On certain days he was to take a portion of the exam while on his medication. Twice D.H. attended the examination without having been given his medication and the test had to be rescheduled. Dr. Stress diagnosed D.H. with "moderate to severe mixed attention deficit disorder." Later in the month, Anne received an email from Hatch in which she stated D.H. was in two study halls but was not getting his work done and was falling asleep in class.

¶ 130 D.H. did not see Dr. Banegas, who prescribed him his ADHD medicine, again until March 2014. At the appointment, where Anne was also present, Joseph and D.H. told Dr. Banegas that "everything was fine; that there were no problems with homework *** no problems at school; no problems with attention in the afternoon." Dr. Banegas decided to continue D.H.'s

medication "as is" and see D.H. again in the fall. The medication was to be given consistently during the school year, even on weekends, but was not required to be administered in the summer.

¶ 131 Anne also testified regarding D.H.'s extracurricular activities. In second grade D.H. began playing the viola, however, while in Joseph's custody D.H. was not taking viola lessons consistently and he eventually stopped playing the viola. In November 2013, D.H. asked Anne if he could start viola lessons again. In January 2014, he resumed taking viola lessons with his former teacher in Chicago during her visitation time.

¶ 132 D.H. played hockey since he was five years old and participated in baseball every summer. In addition, D.H. also tried a number of sporting activities such as golf, lacrosse, soccer, rugby, and swimming. According to Anne, if D.H. expressed an interest in a sport, she encouraged him. In the summers of 2013 and 2014, however, D.H. was not involved in any structured activities. On cross-examination, Anne admitted that she initially was opposed to D.H. participating with the swim team this year until she was informed by the school that it was only for one week and would not interfere with her parenting time.

¶ 133 Anne admitted to yelling and disciplining D.H. and expressed regret over what she had said.

¶ 134 Anne further testified she did not meet Koukas until after D.H. was born, likely in 2007 or 2008. Koukas did come to her home in 2008 to do some plastering work, but he was not on vacation with them in Henry, Illinois in 2004. Anne refuted Koukas's testimony regarding their use of cocaine at her home, and testified that she did not have a kitchen table and she did not have any bathroom vanities because her house is 100 years old, but instead had pedestal sinks with no ledges.

¶ 135 c. Cross-Examination of Anne

¶ 136 Regarding D.H.'s medication, Anne testified that in 2011, when D.H. was in Anne's custody, two or three times he would not take his medication because he wanted to see if he outgrew his ADHD. In addition, at that time, D.H. was taking a second medication that had some negative side effects that D.H. did not like. She further testified that she has asked Joseph for some of D.H.'s medication but Joseph's response was that D.H. does not take medication on the weekends. RaeLyn, however, once voluntarily gave her four "boost" pills because D.H. was having so much trouble completing homework.

¶ 137 During the Public Guardian's cross-examination, Anne testified that she facilitated a relationship between D.H. and Joseph. She "bent over backwards to accommodate [Joseph] when he showed an interest at [*sic*] being in D.H.'s life." She never petitioned the court for supervised visitation, and clarified that it was the court that ordered Joseph's visitation be supervised after he failed multiple drug tests. Anne also admitted that D.H. does not like it when she speaks negatively about Joseph or calls RaeLyn a "porn star." Anne indicated that if she is not given custody of D.H. she "at some point" is planning to leave the state.

¶ 138 The Public Guardian also asked Anne about DCFS investigations regarding Joseph. Anne testified that when D.H. was four years old, D.H. told his classmates during a preschool show and tell that Joseph had guns in his closet. This prompted a DCFS investigation of Joseph.

¶ 139 On re-direct, Anne testified that there was another DCFS investigation regarding Joseph where he had left Gabrielle at home alone when she was younger. Joseph had admitted to the DCFS that he left Gabrielle home alone, but that she was in the care of an elderly next-door neighbor.

¶ 140 9. Rebuttal Witnesses

¶ 141 On June 30, 2014, Joseph filed a motion for leave to call rebuttal witnesses: (1) Dawn; (2) Gabrielle; and (3) himself.[10] He asserted that Dawn and Gabrielle "could not have reasonably been anticipated as necessary witnesses by [him] prior to trial due to the inaccurate and erroneous nature of Anne's assertions of fact elicited in her case-in-chief testimony." Specifically, Joseph sought to have Dawn testify regarding their custody arrangement for Gabrielle and his relationship with Steven. Joseph also sought to have Gabrielle testify that Koukas was present on the 2004 trip to Henry, Illinois and regarding her recollection of the DCFS investigation about her care.

¶ 142 The trial court determined it would not allow Dawn or Gabrielle to testify in rebuttal. The court found the potential testimony regarding his custody arrangement with Dawn to be irrelevant and the testimony regarding his involvement with Steven to be cumulative. Regarding Gabrielle's potential testimony, the court also found that any testimony regarding the Henry, Illinois trip would be irrelevant and it was not initially raised by Anne in her case in chief. The court similarly found that Anne did not elicit testimony regarding Joseph's prior DCFS investigations, but rather that Anne testified regarding the incident with Gabrielle only after the Public Guardian questioned Anne about prior DCFS investigations against Joseph. The trial court, however, did allow Joseph to testify in rebuttal.

¶ 143 In rebuttal, Joseph testified that he enrolled D.H. in viola lessons in Darien; however, D.H. did not like his new teacher and did not want to participate in viola anymore.

¶ 144 Regarding summer activities, Joseph enrolled D.H. in baseball in 2013; however D.H. quit after three weeks because he did not like it, the kids were "cliquish," and one child was picking on him. This summer, D.H. would participate in what Joseph described as "structured"

[10] Joseph filed a supplemental Rule 213(f) disclosure statement identifying these individuals as supplemental witnesses.

activities, such as "four wheeling" and fishing with him.

¶ 145 C. Trial Court's Decision

¶ 146 On August 15, 2014, in a 39-page written order, the court denied Joseph's petition to modify custody and terminated his temporary custody. The court ordered Anne to resume sole care, custody and control of D.H. and ordered a visitation schedule for Joseph. In explaining its rationale, the court made specific findings of fact as well as credibility determinations. The court expressed it did not find RaeLyn or Koukas to be credible witnesses and further indicated that "at times" Joseph's testimony lacked credibility. The court found Anne's testimony to be credible.

¶ 147 In assessing the section 602(a) factors relevant to this appeal, the court concluded the following. It stated that D.H.'s wishes should not be determinative of custody due to his age and tendency to manipulate situations. Further, at times it appeared that he had been coached by Joseph. Regarding the interaction and interrelationship of the child with his parents, siblings, and any other person who may significantly affect the child's best interest, the court found that despite Joseph's "very lax parenting style," this factor "slightly favors Joseph, given his larger family, or is neutral to either party." It further found that D.H. is resilient and adaptive and the structure and involvement in his life that Anne provides causes the factor regarding his adjustment to home, school, and community to favor Anne. It also found Anne's inability to hide her feelings about Joseph and his loved ones negatively impacts D.H., but that the stable and structured environment that Anne provides can better assist D.H. with his emotional issues and ADHD and, accordingly, the mental and physical health factor favored Anne.

¶ 148 Regarding the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent, the trial court found this factor "slightly" weighs in favor of Anne. The court recognized that there is a "pattern of

alienation on behalf of both parties and both make negative remarks about the other to D.H." Anne's reactions, however, "seem to be situational relating to the litigation and do not permeate other areas of her life." The trial court pointed to "[s]tark evidence of parental alienation" which included Joseph listing RaeLyn as D.H.'s step-mother on D.H.'s registration at school and not listing contact information for Anne. Additionally, the court noted that Joseph defied its order for D.H. to have supervised visits with Anne for six to eight weeks after the change in custody due to the bullets incident.

¶ 149 Conversely, the trial court found that "[Anne's] actions repeatedly have shown that she has encouraged D.H. to visit with his father. Per Dr. Smith, Anne is able to discuss visits appropriately and give Joseph credit for his efforts to have D.H. visit, but she does get angry easily and responds with sarcastic comments." Further, Anne "historically encouraged the visits and offered to serve as supervisor when Joseph said he could no longer afford the agency."

¶ 150 The court expressed it had "more concern over the ability of Joseph to recognize and encourage the relationship between D.H. and Anne than vice versa" because "Anne's lack of facilitation is comprised of words, such as sarcastic, caustic, and deprecating comments, whereas Joseph's actions such as violating court orders and lying to the Court are more grave indicators of his inability to facilitate a relationship." (Emphasis in original.) Specifically, the court found:

> "Joseph does not tell Anne in advance if D.H. is not at practice or at home for visitations. Additionally, after Joseph took D.H. back from visitation with Anne on December 28, 2013 Anne called and texted both D.H. and Joseph but did not receive a response for over six days. Additionally, Joseph is consistently late for visitation drop offs and did not allow Anne make up time when he was 15 hours late for one visitation. On January 4, 2014, there was a violation of a court order where Joseph did not return D.H. to Anne and

> Joseph accused Anne of abusing D.H., in front of D.H. Furthermore, as discussed in Anne's e-mail dated July 6, 2012, Joseph would not allow frequent phone contact between Anne and D.H., refused to give D.H. back to Anne mid-visit as court ordered, and was not giving D.H. his medication. Anne alleges that Joseph has told D.H. that he will get custody of him so that D.H. can live with Joseph, RaeLyn, and Katelyn.
>
> While Joseph and his family have consistently accused Anne of physical and sexual abuse, Anne has never accused Joseph of abusing D.H. In recent years, neither party has been supportive of the other party's relationship with D.H. Joseph tries to replace Anne with RaeLyn and Anne is sarcastic and nasty to everyone. In prior years, Anne attempted and did facilitate a relationship between D.H. and Joseph."

¶ 151 After weighing all the factors, the court ultimately ordered that Anne have full custody, explaining that despite each party expressing their negativity towards each other, Joseph fails to take the initiative to address D.H.'s ADHD and provide structure in his home. The court determined that "Anne is better able to provide structure, consistency, predictability, and supervision for D.H."

¶ 152 E. Emergency Motion to Stay

¶ 153 Thereafter, Joseph filed an emergency motion to stay judgment pending appeal pursuant to Illinois Supreme Court Rule 305(b) (eff. July 1, 2004). At hearing on the motion, Joseph argued that basis of the motion was that the Eisenhower school had a 504 plan in place that was to be implemented during the upcoming school year and that private schools were not mandated to follow 504 plans. In response, Anne informed the court that D.H. had already started school at St. John's where he had attended fourth grade and that he was happy and had no issues with changing schools. In addition, Anne registered D.H. for hockey with his former Chicago team

and he already started the conditioning clinic. In reply, Joseph asserted D.H. recently informed him he was not happy and not adjusted to the new school. At the time of the hearing, the Public Guardian did not have an opportunity to speak with D.H., accordingly the trial court continued the hearing for the Public Guardian to speak with him.

¶ 154 According to the Public Guardian D.H. was happy to be at St. John's where he knew most of the children in his class; however, he preferred to be at Eisenhower because he found the curriculum at St. John's to be "too easy" and wanted to be with his Darien friends. The Public Guardian also spoke to the principal at St. John's who indicated that although they did not have the personnel resources, they would try to do as much as they could to implement D.H.'s 504 plan. The Public Guardian opined that D.H. should be at the Eisenhower school.

¶ 155 The trial court denied the motion, reiterating its determination that residing with Anne was in D.H.'s best interest. The trial court further stated that the small class sizes and limited number of teachers at St. John's would be more effective for D.H. than the large class sizes and the 504 plan at Eisenhower.

¶ 156 On September 12, 2014, Joseph filed his notice of appeal. The Public Guardian's appeal was subsequently consolidated with Joseph's appeal.

¶ 157 II. ANALYSIS

¶ 158 Prior to discussing the arguments Joseph and the Public Guardian raise in their appeals, we address the timeliness of our decision. This case is designated as "accelerated" pursuant to Illinois Supreme Court Rule 311(a) (eff. Feb. 26, 2010) because it involves a matter affecting the best interests of a child. With respect to such cases, Illinois Supreme Court Rule 311(a)(5) (eff. Feb. 26, 2010) provides in relevant part that "[e]xcept for good cause shown, the appellate court shall issue its decision within 150 days after the filing of the notice of appeal." In this case,

Joseph and the Public Guardian filed their notices of appeal on September 12, 2014. Thus, the 150-day period to issue our decision expired on February 9, 2015. We note, however, that on October 30, 2014, Joseph filed a motion for an extension of time to file his opening brief. We granted his request and set a revised briefing schedule, allowing him until November 28, 2014, to file his brief. Joseph filed his brief on November 10, 2014. The Public Guardian, however, on November 3, 2014, also requested an extension of time to file its brief. We granted the motion, and provided the Public Guardian until December 1, 2014, to file its opening brief, which was subsequently filed that day. Anne's response brief was not filed when it was due on December 22, 2014. Thereafter, on January 15, 2015, on this court's own motion, we took the matter for consideration on the appellants' briefs and the record only. Since this case was not ready for disposition until January 15, 2015, we find good cause for issuing our decision after the 150-day deadline. See *In re Marriage of Wanstreet*, 364 Ill. App. 3d 729, 732-33 (2006) (noting that granting parties' requests for extension of time to file their briefs allowed the parties the opportunity to develop and present their positions).

¶ 159 On appeal, Joseph asserts: (1) certain of the trial court's findings were against the manifest weight of the evidence; (2) the trial court made numerous errors that denied him a fair trial; and (3) the trial court abused its discretion when it denied his motion to stay the judgment pending appeal. The Public Guardian also appeals, asserting certain findings were against the manifest weight of the evidence, namely that: (1) the trial court did not give enough weight to D.H.'s wishes; (2) the trial court did not give enough weight to Anne's emotional instability; (3) the evidence did not establish that Anne fostered a relationship between D.H. and Joseph; (4) the mental and physical health factor did not favor Anne in light of the evidence; (5) the trial court discounted Joseph's improvement in providing structure for D.H.; and (6) Ms. Smith's section

604(b) was one-sided. Anne has not filed a brief in response; however, we may consider the merits of this appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). Accordingly, we first turn to consider whether the trial court's judgment was against the manifest weight of the evidence.

¶ 160 A. Whether the Custody Order Was Against the Manifest Weight of the Evidence

¶ 161 A trial court's determination of modification of child custody rests largely within its discretion, and we will not disturb its decision on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004). Against the manifest weight of the evidence means that the opposite conclusion is apparent or that the finding is unreasonable, arbitrary, or not grounded on the evidence. *In re Marriage of Hefer*, 282 Ill. App. 3d 73, 80 (1996). In determining whether a judgment is contrary to the manifest weight of the evidence, the evidence will be reviewed in the light most favorable to the appellee. *In re Marriage of Bates*, 212 Ill. 2d at 516.

¶ 162 Section 610(b) of the Act (750 ILCS 5/610(b) (West 2014)) governs the modification of a custody judgment:

> "The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child." *Id.*

Therefore, to modify a custody order, a petitioner must show by clear and convincing evidence

that (1) a change of circumstances of the child or his custodian has occurred, and (2) a modification is necessary to serve the best interest of the child. *In re Marriage of Smithson*, 407 Ill. App. 3d 597, 600 (2011). The clear-and-convincing-evidence standard requires more proof than a preponderance-of-the-evidence standard, but it does not require the degree of proof necessary to convict a person of a crime. *In re Marriage of Knoche and Meyer*, 322 Ill. App. 3d 297, 306 (2001). Stability and continuity are major considerations in custody decisions, and a presumption exists in favor of the present custodian. *In re Marriage of Spent*, 342 Ill. App. 3d 643, 652 (2003); *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 414 (1994) ("Under section 610 there is a strong presumption in favor of the present custodian."). Accordingly, the party seeking to modify custody (in this case Joseph) bears the burden of proof. *In re Marriage of Wechselberger*, 115 Ill. App. 3d 779, 785-86 (1983).

¶ 163 The factors in determining the best interest of the child are governed by section 602 of the Act, which provides in pertinent part:

> "(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
>
> (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;
>
> (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;

(7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;

(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 that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed." 750 ILCS 5/602(a) (West 2014).

¶ 164 "The custodial decision rests on temperaments, personalities and capabilities of the parties and the trial judge is in the best position to evaluate these factors." *Prince v. Herrera*, 261 Ill. App. 3d 606, 612 (1994). In addition, "[t]he trial court is in the best position to decide the custody issue because the judge is the one who observes the parties involved and the demeanor of the witnesses and hears and resolves conflicts in the testimony." *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 1031 (1993). Therefore, the court has broad discretion in making a custody determination. *Prince*, 261 Ill. App. 3d at 612. We note that if the evidence before the trial court did not clearly favor either party, this court cannot say that the trial court's decision to place permanent custody of the child with one of the parents was against the manifest weight of the evidence. *Id.* at 613. We now turn to address Joseph and the Public Guardian's arguments regarding the propriety of the custody order.[11]

¶ 165 1. D.H.'s Wishes

[11] We note that Joseph presents no argument regarding a change of circumstances under section 610(b) of the Act; thus we will only address the trial court's judgment regarding the best interests of D.H.

¶ 166 Joseph contends that the trial court disregarded D.H.'s wishes regarding custody as it did not consider the negative statements D.H. made about Anne during his in camera interview with the court, particularly with regards to her behavior on the evening of July 11, 2012. In addition, Joseph asserts the trial court failed to consider the testimony of Dr. Smith, Dr. Grossman, and Ms. Smith wherein all three witnesses testified that D.H. expressly stated he wished to reside with Joseph. The Public Guardian raises similar arguments.

¶ 167 Under section 602(a)(2) of the Act, the court shall consider "the wishes of the child as to his custodian." 750 ILCS 5/602(a)(2) (West 2014).

¶ 168 As noted, Joseph and the Public Guardian suggest D.H.'s desire to remain with his father should have been given more weight by the trial court. We disagree. If children are of sufficient maturity, their choice in custody matters is an important element to be taken into account, but is not controlling or binding upon the court. See *Filipello v. Filipello*, 130 Ill. App. 2d 1089, 1096-97 (1971) (children who were 9 and 12 years old were not old enough or capable enough to choose the parent with whom they should live). Here, the trial court did not ask and D.H., at age 11, did not expressly state during his in camera interview that he wished to remain with Joseph, but indicated that he loved both of his parents and wanted them to stop arguing. We also acknowledge that D.H. told Dr. Grossman he wished to reside with his father in 2012 after the bullets incident and that Dr. Grossman, however, testified she has not spoken with D.H. since November 2012. D.H. also stated to Dr. Smith and Ms. Smith in 2014 that he wished to reside with Joseph. Notably, each of these professionals also testified that D.H. had a tendency to lie and "tends to manipulate situations" to his benefit, which we consider to be yet another indication that D.H. was not mature enough for his decision to be determinative of custody. The record demonstrates that the trial court considered D.H.'s wishes regarding custody as expressed

to these professionals, but determined that it was in D.H.'s best interests that he reside in Anne's home, which is a more stable and structured environment. The stability of the child's environment is an important factor in determining the child's best interests and, as Joseph was only granted temporary custody of D.H., the presumption weighs in favor of Anne. *In re Marriage of Spent*, 342 Ill. App. 3d at 652. Accordingly, we decline to disturb the trial court's findings on this issue.

¶ 169 2. The Interaction and Interrelationship of D.H. With Anne

¶ 170 The Public Guardian asserts that the trial court "discounted the evidence showing that Anne's interactions with [D.H.] have historically been replete with unpredictable bouts of emotional aggression."[12]

¶ 171 Under section 602(a)(3) of the Act, the court shall consider "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." 750 ILCS 5/602(a)(3) (West 2014).

¶ 172 The Public Guardian's argument fails to consider the fact that the trial court was presented with evidence that the hostility between Anne and Joseph is mutual and that the behavior of both parties has a negative effect on D.H. The trial court recognized this when it found that Anne's hostility was "situational" and noted that her "inability to hide her feelings about Joseph and his loved ones negatively impacts everyone, including D.H." As noted by many witnesses, Anne's anger and resentment was brought on by Joseph acquiring temporary custody of D.H. and her subsequent dealings with him regarding the litigation. Anne admitted that she speaks disparagingly about Joseph in front of D.H. and acknowledged that this is inappropriate.

[12] Joseph does not join in this argument on appeal.

¶ 173 The evidence, however, also demonstrated that D.H. loved Anne, enjoyed spending time with her, and was at ease in her presence. Like a typical preadolescent, D.H. would act out when Anne would appropriately discipline him by grounding him or taking away his electronics. Despite these incidents, the evidence demonstrated that D.H. and Anne's relationship continued to improve over time.

¶ 174 Anne testified that she would be able to encourage and facilitate a relationship between D.H. and Joseph and the trial court, notably, found Anne's testimony to be credible. As the trial court is in the best position to judge the temperaments, personalities, and capabilities of the parties, we must defer to its conclusion as to these factors. See *In re Marriage of Felson*, 171 Ill. App. 3d 923, 926 (1988) (stating a custody decision "necessarily rests on the temperaments, personalities and capabilities of the parties, and the demeanor of the witnesses who testify at trial"—all of which the trial judge is in the best position to evaluate); *In re Marriage of Spent*, 342 Ill. App. 3d at 652. Therefore, we cannot say that the trial court's finding in this instance was against the manifest weight of the evidence.

¶ 175 3. D.H.'s Adjustment to His Home, School, and Community

¶ 176 The Public Guardian asserts that the trial court "unduly minimized Joe's attempts and success at instilling more structure for [D.H.]." The Public Guardian acknowledges that Joseph's parenting style was "less structured than Anne's" when D.H. first resided with Joseph in July 2012, however, as Dr. Smith testified, the structure in Joseph's home improved over time. In addition, at the time of trial D.H. had a set schedule, a behavioral chart, and a 504 plan in place.[13]

¶ 177 Under section 602(a)(4) of the Act, the court shall consider "the child's adjustment to his

[13] Joseph does not raise this argument on appeal.

home, school and community." 750 ILCS 5/602(a)(4) (West 2014).

¶ 178 We find the trial court properly construed the evidence of the structure provided for D.H. in Joseph's home. The evidence demonstrates that D.H. and Joseph began working with Dr. Smith on structuring study time and having consistent rules and consequences for breaking the rules in August 2012, but at the time of trial in May 2014 these goals for D.H. were "minimally met." Despite Dr. Smith's consistent recommendations that D.H. have more structure, Joseph testified he did not implement the behavioral chart until the end of January 2014. In addition, D.H. began attending fifth grade while residing with Joseph in the fall of 2012. Despite his declining grades, Joseph did not meet with school authorities regarding a 504 plan until March 2014, at the end of sixth grade.

¶ 179 Further, the evidence at trial demonstrated that Joseph not only neglected to implement Dr. Smith's suggestions regarding structure during the academic year, but that D.H. also no longer participated in structured summer activities while residing with Joseph. Anne testified that when she had custody, D.H. participated in camp, baseball, and played viola throughout the summer months. In contrast, Joseph testified that in summer 2014 he enrolled D.H. in a week-long swim team program and planned to go "four wheeling" and fishing with him, two activities Joseph described as "structured." Based on the record, we cannot say that the trial court discounted Joseph's attempts at providing structure for D.H.; however, the structure implemented by Anne was more in D.H.'s best interest. Thus, the trial court's findings regarding this factor were not against the manifest weight of the evidence.

¶ 180 4. The Mental and Physical Health of Anne

¶ 181 Joseph contends that the trial court did not consider Anne's recent alcohol use or her emotional instability when rendering its custody determination. The Public Guardian similarly

asserts that the trial court erred in favoring Anne for this factor as it "omitted all mention of Anne's drinking and its impact on [D.H.]."

¶ 182 Under section 602(a)(5) of the Act, the court shall consider "the mental and physical health of all individuals involved." 750 ILCS 5/602(a)(5) (West 2014).

¶ 183 In support of his argument that the trial court did not consider Anne's alcohol use, Joseph cites the cases of *In re Marriage of Oertel*, 216 Ill. App. 3d 806 (1991), and *Neeld v. Neeld*, 96 Ill. App. 3d 40 (1981). Both of those cases, however, dealt with parents who were admitted alcoholics and had undergone professional treatment for their alcoholism, but continued to consume alcohol against the advice of their treating physicians. *Oertel*, 216 Ill. App. 3d at 815; *Neeld*, 96 Ill. App. 3d at 44. The *Oertel* and *Neeld* courts also detailed numerous incidents wherein the children were endangered by the parent's consumption of alcohol. *Oertel*, 216 Ill. App. 3d at 816; *Neeld*, 96 Ill. App. 3d at 42-43. These incidents were corroborated by nonparty testimony. *Oertel*, 216 Ill. App. 3d at 816; *Neeld*, 96 Ill. App. 3d at 48. Joseph has failed to establish that Anne was diagnosed with alcoholism or point to any nonparty witness testimony regarding an incident where D.H. was endangered due to Anne's alcohol consumption.

¶ 184 We also disagree with the Public Guardian's argument that the trial court "omitted all mention of Anne's drinking and its impact on [D.H.]." The custody judgment detailed witness testimony regarding Anne's drinking and past drug use and also indicated that D.H. did not like it when Anne drinks. The record supports the trial court's finding that Anne did not have a history of substance abuse, as there was no testimony or documentary evidence which indicated that Anne had any real issues with alcohol. To the contrary, the evidence demonstrated that it was Joseph who had failed multiple court ordered drug tests, which impacted his visitation rights with D.H., and had experienced alcohol abuse in the past. In addition, the evidence

demonstrated that both parties consumed alcohol in D.H.'s presence in contravention of court orders.

¶ 185 Joseph also asserts that Anne's emotional instability can justify a modification of custody. In support of this assertion, Joseph relies upon *In re Marriage of Johnson*, 245 Ill. App. 3d 545 (1993). That case, however, is not applicable to the present matter as the court considered whether to modify custody under section 610(a) of the Act and not section 610(b), which is at issue in this matter. *Id.* at 550. In addition, the facts in *Johnson* are dissimilar to the facts of the present case. There, the evidence demonstrated that the mother had frequent emotional outbursts and physically abused one child. *Id.* at 552. She also intentionally drove to the father's workplace, knowing her three children were there, and pointed the loaded handgun at their father in the presence of the children. *Id.* at 548. Accordingly, we decline to disturb the judgment of the trial court based on Joseph's reliance on *Johnson*.

¶ 186 5. Anne's Inability to Encourage a Relationship with Joseph

¶ 187 Both the Public Guardian and Joseph assert that the trial court failed to properly consider the evidence supporting his position that Anne had an inability to encourage the relationship between D.H. and his father.

¶ 188 In deciding custody under the best-interest-of-the-child standard, the court shall consider "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)(8) (West 2014).

¶ 189 The Public Guardian asserts the cases of *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, *Mullins v. Mullins*, 142 Ill. App. 3d 57 (1986), and *In re Marriage of D.T.W.*, 2011 IL App (1st) 111225, support its argument that a parent who consistently attempts to undermine a child's relationship with another parent should not be awarded custody. Each of

those cases, however, are distinguishable from the case at bar. First, in each of the cases cited, we affirmed the custody determination of the trial court, whereas here Joseph seeks a reversal of the trial court's judgment. As previously noted, reversal of a trial court's custody determination is a difficult bar to overcome and cannot be disturbed unless the opposite conclusion is apparent. *In re Marriage of Hefer*, 282 Ill. App. 3d at 80. In each case, the appellant failed to demonstrate that the trial court made such an egregious error. *In re Marriage of Debra N.*, 2013 IL App (1st) 122145, ¶ 56; *Mullins*, 142 Ill. App. 3d at 81; *In re Marriage of D.T.W.*, 2011 IL App (1st) 111225, ¶ 128. Second, the evidence presented in each of the cited matters differs from the evidence presented in the present case. In *Marriage of Debra N.*, when awarding custody to the father, the trial court found the mother lacked credibility and "engaged in a pattern of interference and manipulation" including "a pattern of conduct designed to harass [the father], to limit his parenting time, summer, vacation and holiday time with [the child], and to potentially alienate [the child] from a healthy relationship with her father and his family." *In re Marriage of Debra N.*, 2013 IL App (1st) 122145, ¶ 39. Similarly, in *Mullins*, the evidence at trial established that the mother consistently interfered with the father's visitation, made false sexual abuse allegations to authorities, and encouraged the children to call their step-father "dad" and use his last name at school. *Mullins*, 142 Ill. App. 3d at 62, 70. *In re Marriage of D.T.W.* is also inapposite, as there the evidence demonstrated that the mother engaged in "alienating behavior" that "worsened during the two-year course of the custody proceedings." *In re Marriage of D.T.W.*, 2011 IL App (1st) 111225, ¶ 105. In particular, the mother exhibited an unwillingness to obey court orders in regards to visitation and filed multiple lawsuits against the father and his loved ones. *Id.* ¶¶ 91-100. As noted by the court-appointed professional, as a result of this severe alienation one child exhibited unusual behavior such as questioning his father about how

much he loved his sibling and also produced a journal with questionable entries. *Id.* ¶¶ 32, 46.

¶ 190 Here, the trial court found this factor weighed "slightly in favor of Anne." The trial court's finding is supported by evidence from the record which indicates that since the temporary custody order had been in place Joseph frequently interfered with Anne's visitation with D.H. In July 2012, he refused to allow her parenting time until her first session with Dr. Smith in August 2012 despite a court order requiring him to do so. Thereafter, both parties testified to numerous incidents wherein Anne came to Joseph's home in Darien to pick up D.H. and was denied visitation. In addition, there was evidence that Joseph did not allow Anne to have frequent phone contact with D.H. and that he did not allow make-up time for Anne's lost visitation. Although there was some testimony that Anne had, in the past, denied Joseph visitation of D.H., the evidence also established that for a number of years Anne supervised Joseph's visitations with D.H., thus encouraging and fostering that relationship. Moreover, the record demonstrates that Anne has never sought supervised visitation between Joseph and D.H. and has also never accused Joseph of abusing D.H. Although D.H. told the court during his in camera interview that Anne has discouraged a relationship with Joseph, the instances reported occurred in the past. Accordingly, the trial court's finding that this factor weighs "slightly" in favor of Anne was not against the manifest weight of the evidence.

¶ 191 6. Ms. Smith Not a Qualified Evaluator

¶ 192 Joseph next contends that the trial court's determination was against the manifest weight of the evidence because it relied on Ms. Smith's section 604(b) evaluation when she was not qualified to make such an evaluation. Specifically, Joseph asserts that Ms. Smith lacked expertise in "high-conflict custody cases and only testified in court as a custody evaluator once before." Further, Joseph asserts Ms. Smith "gathered evidence in an unfair, biased manner as she

took relevant information from Respondent and did not verify it with Petitioner." The Public Guardian makes similar arguments; particularly that Ms. Smith's evaluation was "one-sided" and should be disregarded.

¶ 193 Section 604(b) of the Act provides a mechanism for court appointment of an independent evaluator on custody and visitation issues. It provides in pertinent part:

> "(b) 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, designated as a court's witness. Professional personnel consulted by the court are subject to subpoena for the purposes of discovery, trial, or both. " 750 ILCS 5/604(b) (West 2014).

Consequently, under the terms of section 604(b), the evaluator is the court's witness and it is the duty of the court-appointed evaluator to conduct an independent investigation and provide the court and each party with her findings. In addition, any party may call the evaluator to testify at trial. *Id.*

¶ 194 Our supreme court has noted the importance of section 604(b) evaluations in child custody cases:

> "Child custody proceedings epitomize the need for maximum disclosure of information in the goal of reaching justice. The paramount consideration and guiding principle in determining child custody is the best interests of the child ([citations]), considering all relevant factors. 750 ILCS 5/602(a) (West 2006). Therefore, the circuit court exercises broad discretion in admitting relevant evidence that may assist the court in arriving at a custody determination ([citation]), and the court should hear and weigh all available

> relevant evidence ([citation]). Section 604(b) 'allows the court to seek the advice of professional personnel in order to supplement the evidence provided by the parties.' [Citation.] As defendants' supporting *amicus* observes, courts consider section 604(b) reports to be evidence of record, and consider such reports prepared by mental health professionals as prepared by any other professional personnel. [Citations]." *Johnston v. Weil*, 241 Ill. 2d 169, 180 (2011).

¶ 195 Here, Ms. Smith was professional personnel and, accordingly, could testify regarding the section 604(b) evaluation she prepared at the trial court's request. See *id.* Ms. Smith testified she was a licensed social worker who is employed by Governors State, University of Illinois-Chicago, and the DCFS. Together with this case, she has conducted 38 section 604(b) evaluations and four section 604.5 evaluations. She has attended training sessions on conducting section 604(b) evaluations. Ms. Smith testified that all of the cases in which she prepared a section 604(b) evaluation were "high conflict" cases and had testified in court as a qualified expert "a lot of times" prior to the current matter. She had been qualified and testified as an expert specifically regarding a section 604(b) evaluation in one case prior to this one. We note that the statute does not require the court-appointed evaluator to testify at trial, but instead "may" be examined as a witness. 750 ILCS 5/604(b) (West 2014). Her evaluation provided relevant information that assisted the court in making its custody determination. See *Johnston*, 241 Ill. 2d at 180. Thus, the trial court did not abuse its discretion in considered Ms. Smith's section 604(b) evaluation in determining what was in D.H.'s best interest.

¶ 196 In addition, we note that despite Joseph and the Public Guardian's contentions, the trial court did not "follow" the recommendations of Ms. Smith. In rendering its custody determination, the trial court considered all of the evidence presented, including the testimony of

the witnesses and the documents referenced in Ms. Smith's section 604(b) evaluation. The trial court is not bound to abide by the recommendations of the evaluator, and, "is the ultimate fact finder in a child custody case, not the expert witness." *In re Marriage of Saheb*, 377 Ill. App. 3d 615, 628 (2007). Notably, the court rejected Ms. Smith's recommendation that Joseph be given less parenting time. In fact, the trial court increased Joseph's parenting time to make it "nearly equal[]" between the two parties. Because we review the judgment of the trial court, we need not determine whether the recommendations of the evaluator herself are "one-sided" or biased. See *In re Marriage of Milovich*, 105 Ill. App. 3d 596, 610 (1982) (the trial court is not bound by the evaluator's opinion because custody is a judicial determination). Accordingly, we find the trial court did not err in considering the section 604(b) evaluation as one of many considerations in its determination of what is in D.H.'s best interest.

¶ 197 For all the reasons stated above, we conclude that the trial court's decision that Anne shall resume residential custody of D.H. was not against the manifest weight of the evidence.

¶ 198 B. Trial Errors

¶ 199 Joseph next asserts that the trial court denied him a fair trial. Specifically, Joseph contends the trial court erred in: (1) denying him a trial continuance; (2) admitting or excluding certain evidence; and (3) providing legal advice to Anne. We address each of his contentions in turn.

¶ 200 1. Continuance

¶ 201 On appeal, Joseph contends the trial court erred in denying him a continuance to obtain an expert evaluation pursuant to section 604.5 of the Act (750 ILCS 5/604.5 (West 2014)). Joseph asserts that although the trial court granted his request to obtain a section 604.5 evaluation, he could not have reasonably obtained the evaluation before the court-ordered

deadline and, thus, when the trial court denied his request for a continuance it, "for all practical purposes, served as a denial of Petitioner's request for a 604.5 evaluation."

¶ 202 Section 604.5 of the Act provides in pertinent part:

> "(a) In a proceeding for custody, visitation, or removal of a child from Illinois, upon notice and motion made within a reasonable time before trial, the court may order an evaluation concerning the best interest of the child as it relates to custody, visitation, or removal. The motion may be made by a party, a parent, the child's custodian, the attorney for the child, the child's guardian ad litem, or the child's representative. The requested evaluation may be in place of or in addition to an evaluation conducted under subsection (b) of Section 604." 750 ILCS 5/604.5(a) (West 2014).

A determination of whether an expert evaluator should be appointed is within the discretion of the trial court. *In re Marriage of Bhati and Singh*, 397 Ill. App. 3d 53, 68 (2009). In addition, the trial court's determination of whether to grant a request for a continuance is also within the sound discretion of the trial court and will not be disturbed absent a "manifest abuse" of that discretion. *In re Marriage of Knoche & Meyer*, 322 Ill. App. 3d 297, 308 (2001). A trial court abuses its discretion when "its ruling is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the trial court or where its ruling rests on an error of law." *In re Marriage of Iqbal*, 2014 IL App (2d) 131306, ¶ 44.

¶ 203 Moreover, Illinois Supreme Court Rule 901(a) (eff. Feb. 26, 2010) specifically provides: "Child custody proceedings shall be scheduled and heard on an expedited basis. Hearings in child custody proceedings shall be held in strict compliance with applicable deadlines established by statute or by this article." With respect to continuances in child custody proceedings, Rule 901(c) further provides: "Parties, witnesses and counsel shall be held accountable for attending

hearings in child custody proceedings. Continuances shall not be granted in child custody proceedings except for good cause shown and may be granted if the continuance is consistent with the health, safety and best interests of the child. The party requesting the continuance and the reasons for the continuance shall be documented in the record." Ill. S. Ct. R. 901(a) (eff. Feb. 26, 2010).

¶ 204 We also note that our supreme court rules require that all child custody proceedings under the Act "shall be resolved within 18 months from the date of service of the petition or complaint to final order." Ill. S. Ct. R. 922 (eff. July 1, 2006). The custody proceeding in this case was brought and held pursuant to section 610 of the Act, and thus was subject to the 18-month deadline of Rule 922. Accordingly, because the petition was filed in February 2013, the deadline for the final order was August 2014.

¶ 205 Here, Joseph received Ms. Smith's section 604(b) evaluation, which recommended Anne be given full custody of D.H., on April 16, 2014. Two days later, he filed a motion to obtain a section 604.5 evaluation. His motion asserted that the request was being made "reasonably in advance of trial" and did not request a trial continuance. The trial court granted his request; however, it ordered the evaluation be completed on May 5, 2014, a week prior to the date the trial was scheduled to commence. The record does not indicate that Joseph objected to the completion date of the 604.5 evaluation at the time. Five days later, Joseph filed his motion for a continuance wherein he primarily requested that the court extend the deadline for Ms. Smith's deposition and for him to submit his witness and exhibit list. According to Joseph's motion, "[s]hould this court allow the extension of these dates, he requests the deadline of any 604.5 Report be extended to June 2, 2014." Despite his contentions on appeal, the record does not reflect that Joseph asserted he was unable to obtain a section 604.5 evaluation prior to the

scheduled trial date of May 12, 2014.

¶ 206 The record does, however, demonstrate that the trial court was acutely aware of the time limitations provided by Rule 922. The trial, although first scheduled for December 2013, was postponed until May 2014 due to Ms. Smith needing more time to complete her section 604(b) evaluation. In addition, due to its voluminous docket, the trial court was unable to hold a trial over 14 consecutive days. The trial concluded on July 21, 2014, after which the court had a limited time to render its 39-page custody judgment order. On the other hand, Joseph had 15 months to request and obtain a section 604.5 evaluation, but instead waited to make such a request until after he received Ms. Smith's evaluation. See 750 ILCS 5/604.5(a) (West 2014). Perhaps the report was not favorable to Joseph; however, this by itself was is not a sufficient reason to conduct an additional evaluation. *In re Marriage of Bhati*, 397 Ill. App. 3d at 69. Accordingly, we conclude the trial court did not abuse its discretion in failing to grant Joseph a continuance to obtain the section 604.5 evaluation.

¶ 207 2. Evidence

¶ 208 Joseph further asserts the trial court abused its discretion by not admitting: (1) the tape-recorded conversations of Anne; (2) Anne's email regarding D.H.'s school; and (3) rebuttal testimony from Dawn and Gabrielle. In addition the petitioner asserts the trial court erred in admitting evidence regarding Joseph and RaeLyn's prior convictions.

¶ 209 Generally, evidentiary rulings are within the sound discretion of the trial court and will not be overturned absent a clear abuse of discretion. *In re Tasha L.-I.*, 383 Ill. App. 3d 45, 53 (2008). In order to warrant a reversal, an evidentiary ruling must have been substantially prejudicial and affected the outcome of the case. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 44. "[T]he burden is on the party seeking reversal to establish prejudice."

Bachman v. General Motors Corp., 332 Ill. App. 3d 760, 785 (2002). We also note that it is a well established rule that there is a presumption in a bench trial that the trier of fact relied only on proper evidence in reaching its decision on the merits. *In re J.A.*, 316 Ill. App. 3d 553, 566 (2000).

¶ 210 a. Tape Recordings

¶ 211 Joseph contends it was an error for the trial court not to admit the tape recorded conversation between Anne and D.H. where Anne's language was "derogatory, demeaning, and inappropriate to D.H." Joseph further argues it was error not to allow a tape recorded conversation between Anne and RaeLyn wherein Anne disparaged RaeLyn. Joseph asserts that our supreme court's decision in *People v. Clark*, 2014 IL 115776, held the eavesdropping statute (720 ILCS 5/14-2(a)(1)(A) (West 2014)) unconstitutional and, therefore, no longer prevented him from admitting the tape recordings as evidence against Anne during the custody trial. Joseph argues that the trial court abused its discretion in excluding the tape recordings based on its determination that our supreme court "still believes that private conversations in private places should not be recorded without the consent of the other party."

¶ 212 We note that we may affirm on any basis appearing in the record, whether or not the trial court's reasoning was correct. *Messenger v. Edgar*, 157 Ill. 2d 162, 177 (1993).

¶ 213 As Joseph has failed to argue on appeal that the exclusion of the tape recording was prejudicial to him, we need not consider whether the trial court correctly interpreted the *Clark* decision. See *Bachman*, 332 Ill. App. 3d at 785 (the burden is on the party seeking reversal to establish prejudice). Additionally, based on our review of the record, the tape recordings were cumulative evidence. During trial, Joseph and the Public Guardian presented other documentary and testimonial evidence outside of the tape recordings that Anne had previously behaved in a

demeaning and inappropriate manner. Specifically, Dr. Smith testified Anne acted in a derogatory manner towards Joseph and called RaeLyn a "porn star" in D.H.'s presence. RaeLyn similarly testified to having been called such names. Further, Anne admitted she called RaeLyn such names in front of D.H. and that she also, at times, inappropriately yelled at D.H. The tape recordings were thus cumulative evidence and as such it was within the trial court's discretion to exclude them. See *In re Adoption of C.D.*, 313 Ill. App. 3d 301, 314-15 (2000) (declining to determine the admissibility of certain evidence under the business records exception to the hearsay rule because the exhibits contained information of which the court was already aware through other evidence presented and, thus, would have merely been cumulative). Based on the record before us, we cannot say that the trial court abused its discretion in this instance.

¶ 214 b. Email

¶ 215 Joseph next contends that the trial court erred in sanctioning him by excluding the May 13, 2014, email authored by Anne. Joseph acknowledges that he forwarded this email to counsel while he was a sworn witness and that he was ordered by the court not to do so, but argues the email should have been admitted as evidence of Anne's disparaging remarks.

¶ 216 The trial court can prohibit parties from communicating with their attorneys when they are testifying in a matter. *Stocker Hinge Mfg. Co. v. Darnel Industries, Inc.*, 61 Ill. App. 3d 636, 647-48 (1978). Trial courts possess the inherent authority to enter sanctions for a party's failure to obey valid orders. *Smith v. City of Chicago*, 299 Ill. App. 3d 1048, 1054 (1998). "In reviewing the propriety of any sanction, we give great deference to the broad discretion vested in the trial court. This discretion, however, is not absolute. Sanctions, be they for the violation of a statute, rule, or order, must be reasonable in light of the attendant facts and circumstances of the case." *Id.*

¶ 217 In support of his argument, Joseph primarily relies on criminal cases involving the trial court's exclusion of a witness' *entire* testimony after another witness had discussed his or her testimony with them. See *In re H.S.H.*, 322 Ill. App. 3d 892, 894 (2001); *People v. Wiatr*, 119 Ill. App. 3d 468, 473-74 (1983). Joseph's argument on appeal is not that the trial court improperly excluded his testimony regarding the email, but that the trial court erred when it excluded the email as a sanction against him for violating a court order. Accordingly, the cases relied on by Joseph do not support his argument.

¶ 218 Here, while he was still a sworn witness, Joseph forwarded Anne's email to his counsel late in the evening on May 13, 2014. The next day counsel sought to admit the email as evidence of Anne's inability to encourage a relationship between Joseph and D.H. and for her inability to promote D.H.'s educational success. The trial court had, on multiple occasions, ordered Joseph not to communicate with anyone, including counsel, about his testimony or his intended testimony while he was on the witness stand. Against this express order, Joseph forwarded his counsel the email he received from Anne. After accepting an offer of proof from counsel regarding the email, the trial court excluded it from being offered as evidence at trial. In rendering this ruling, the trial court found that Joseph directly undermined her order and that the contents of the email were cumulative evidence. Based on the record, we conclude that the exclusion of the email was a reasonable and appropriate sanction in light of the circumstances of the case. See *cf. Smith*, 299 Ill. App. 3d at 1054 (holding that a sanction of a directed verdict in favor of the defendants where the plaintiff's witnesses discussed their testimony with another witness during trial was not a reasonable sanction in light of the facts of the case). Accordingly, we cannot say the trial court abused its discretion in this instance.

¶ 219 c. Rebuttal Witnesses

¶ 220 Joseph next asserts the trial court improperly denied him leave to call Dawn and Gabrielle as rebuttal witnesses where Anne had testified to information "not previously disclosed and not reasonably anticipated by Petitioner, such as Petitioner's custody arrangement with [Dawn] and a DCFS report about [Gabrielle] when she was eight."[14]

¶ 221 If a defendant presents in its case in chief an affirmative matter to support its defense, the plaintiff then has the right to introduce evidence in rebuttal as to such affirmative matter. *Chapman v. Hubbard Woods Motors, Inc.*, 351 Ill. App. 3d 99, 106 (2004). The trial court has the discretion to admit or exclude rebuttal evidence, and a reviewing court will not disturb the trial court's decision absent an abuse of discretion. *Id.* Regarding rebuttal evidence in particular, abuse occurs only when a party is prevented from impeaching a witness, rehabilitating the credibility of an impeached witness, or responding to new points raised. *Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412, ¶ 50.

¶ 222 Here, the trial court did not abuse its discretion. First, Dawn's potential testimony regarding the custody arrangement she had with Joseph would have been cumulative, as evidence regarding the arrangement was previously introduced through Ms. Smith's evaluation and the testimonies of Joseph and Steven. Further, the trial court expressly noted that it did not consider prior custody arrangements or the parenting of the parties' other children because it was

[14] Despite setting forth the law regarding Illinois Supreme Court Rule 213(f) (eff. Jan. 1, 2007) and sanctions under Illinois Supreme Court Rule 219 (eff. Jul. 1, 2002) in his appellate brief, Joseph does not argue that the trial court denied Joseph leave to call Dawn and Gabrielle as rebuttal witnesses as a discovery sanction. Instead, Joseph asserts that the rebuttal testimony of Dawn and Gabrielle would have impeached Anne, rehabilitated persons Anne discredited, and responded to new issues raised by Anne in her case in chief. Joseph's brief does not set forth how Dawn and Gabrielle's testimonies would have impeached Anne or which individuals would have been rehabilitated; accordingly we consider those arguments to be forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). We will, however, address Joseph's argument that the trial court erred in denying him leave to call Dawn and Gabrielle as rebuttal witnesses because they would have testified regarding new issues raised by Anne in her case in chief.

irrelevant to its custody determination. See *Healy v. Bearco Management, Inc.*, 216 Ill. App. 3d 945, 958 (1991) ("Rebuttal evidence must address material issues and not collateral matters, or it is properly denied."). Second, the trial court correctly ruled that Anne did not elicit testimony regarding Joseph's DCFS investigations in her case in chief, as the record discloses that the testimony at issue was elicited by Anne on re-direct in response to questions asked by the Public Guardian in its cross-examination of her. See *cf. Hoem v. Zia*, 239 Ill. App. 3d 601, 618 (1992) (holding the trial court erroneously restricted rebuttal testimony regarding matters that defendants' experts raised for the first time in their case in chief). Accordingly, we conclude the trial court did not err in its exclusion of Dawn and Gabrielle as rebuttal witnesses.

¶ 223 d. Prior Convictions

¶ 224 Joseph asserts that the trial court erred in admitting his and RaeLyn's prior convictions. Joseph admits that references to these convictions were included in an email from Anne that he sought to have, and was, admitted into evidence, but that the evidence regarding the convictions and arrest were highly prejudicial to him, not relevant to the credibility of the witnesses, and so remote in time. Joseph contends that he "essentially had to choose either to exclude Respondent's disparaging, inappropriate statements or to admit his prior convictions and his witness' prior arrest."[15]

¶ 225 We find that Joseph may not be heard to complain on appeal about the admission of his prior convictions because it was he who first introduced such evidence into the proceedings.

[15] We note that although Joseph contests the admission of RaeLyn's conviction on appeal, that the trial court did not expressly rule that it was admissible. In addition, Anne did not elicit any testimony regarding RaeLyn's conviction. Thus, we decline to address this aspect of Joseph's argument. Further, Joseph asserts on appeal that the trial court misapplied the "doctrine of curative admissibility." We decline to address this argument as he has failed to cite any relevant civil authority in contravention of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013).

Under the doctrine of invited error, a party " 'may not request to proceed in one manner and then later contend on appeal that the course of action was in error.' " (Internal quotation marks omitted.) *LaSalle Bank, N.A. v. C/HCA Development Corp.*, 384 Ill. App. 3d 806, 820 (2008) (quoting *People v. Harvey*, 211 Ill. 2d 368, 385 (2004)). "Illinois courts have applied the invited error doctrine in numerous cases to bar a party from claiming error in the admission of improper evidence where the admission was procured or invited by that party." *In re Kenneth D.*, 364 Ill. App. 3d 797, 803 (2006). "As such, when a party 'procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, she cannot contest the admission on appeal.' " *Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶ 92 (quoting *People v. Bush*, 214 Ill. 2d 318, 332 (2005)).

¶ 226 Moreover, "[i]t is fundamental to our adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding. [Citation.] A party cannot complain of error which he induced the court to make or to which he consented. [Citations.] The rationale of this rule is obvious. It would be manifestly unfair to allow one party a second trial upon the basis of error which he injected into the proceedings. [Citations.]" (Internal quotation marks omitted.) *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000).

¶ 227 In this case, the record establishes that Joseph sought to exclude evidence of his prior convictions through a motion *in limine*, which was granted by the trial court. It is also apparent, however, that during his case in chief Joseph elicited testimony regarding his prior felony convictions. Specifically, Joseph sought to admit an email from Anne in which she made comments regarding his prior felony convictions. The email was entered into evidence with no objections. Joseph then published the email to the court, reading aloud the portion of the email

in which Anne wrote, "I might remind you that you are a twice convicted felon ***." Pursuant to the above authority, Joseph cannot maintain his challenge on appeal in light of his actions below. See *Fleming*, 2012 IL App (1st) 103475-B, ¶¶ 93-94 (finding the plaintiffs' arguments on appeal that evidence was admitted in violation of both the Dead-Man's Act and the general rule against hearsay were waived under the doctrine of invited error where plaintiffs elicited the testimony in their case in chief that they sought to exclude).

¶ 228 In addition, the record demonstrates that when this testimony was elicited, the trial court reserved ruling on whether Anne could cross-examine Joseph regarding his prior convictions. Despite the fact that the trial court denied his motion to reconsider that he violated his own motion *in limine*, when Anne asked him on cross-examination whether he was in fact a "twice convicted felon," Joseph responded, "yes" without any objection.

¶ 229 In denying Joseph's motion to reconsider, the trial court essentially reversed its ruling on the motion *in limine* and determined that it would allow testimony regarding Joseph's prior convictions. Accordingly, it was incumbent upon Joseph to object to any evidence of his prior convictions. The law is well established in civil cases that the denial of a motion *in limine* does not preserve an objection to disputed evidence later introduced at trial. *Illinois State Toll Highway Authority v. Heritage Standard Bank and Trust Co.*, 163 Ill. 2d 498, 502 (1994). "The moving party remains obligated to object contemporaneously when the evidence is offered at trial." *Id.* Absent the requisite objection, the right to raise the issue on appeal is waived. *Id.* Thus, we find that Joseph has waived this issue. See *Krklus v. Stanley*, 359 Ill. App. 3d 471, 486 (2005) (holding that the plaintiff waived her argument on appeal that the trial court improperly admitted evidence of her husband's smoking habit where, after denying her motion *in limine*, she raised the issue for the first time in her case in chief and later failed to object when the evidence

was introduced at trial).

¶ 230 3. Legal Advice

¶ 231 Joseph also asserts the trial court erred by giving Anne legal advice during the trial. Joseph specifically asserts that although Anne was *pro se*, on numerous occasions, the trial court argued her evidentiary basis for her, instructed her how to ask witnesses questions, and told her what questions or type of questions to ask the witnesses. He argues that the assistance the trial court provided Anne demonstrated the court was biased against him.

¶ 232 Generally, a trial judge is afforded wide latitude in his or her conduct of a trial. *Simmons v. City of Chicago*, 118 Ill. App. 3d 676, 685 (1983). "[T]he trial court must not depart from its function as a judge and may not assume the role as an advocate for either party." *In re Tamesha T.*, 2014 IL App (1st) 132986, ¶ 26. The trial court is given wider latitude in examining witnesses in a bench trial, where the risk of prejudice is less and the court's inquiries are compatible with its role as fact-finder. *Id.*; *In re Marriage of Click*, 169 Ill. App. 3d 48, 53 (1988) ("a trial judge is allowed greater latitude to comment during a bench trial than might be acceptable during a jury trial").

¶ 233 We can find no support in the record for Joseph's claims. One portion of the record cited by Joseph refers to a sidebar wherein the court discussed with the parties the inadmissibility of privileged communications between D.H. and Dr. Smith. In two other portions of the record cited by Joseph, the court instructs Anne that when questioning a witness she cannot make statements, but "can say isn't it true that da-da-da-da-da." Neither of these situations illustrates a trial court advocating on a party's behalf or asserting bias, nor does Joseph indicate how these incidents prejudiced him.

¶ 234 Our review of the record reveals that the court treated both Anne and Joseph fairly

throughout the trial. At the beginning of the trial, Anne was appropriately admonished by the court that she would be treated as a lawyer. See *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 528 (2001) ("*Pro se* litigants are presumed to have full knowledge of applicable court rules and procedures ***."). The court also gave due consideration to Anne's *pro se* status, but was never reluctant to sustain Joseph's objections when necessary. See *Grover v. Commonwealth Plaza Condominium Association*, 76 Ill. App. 3d 500, 511 (1979) ("The relevance objections were properly sustained and, though made by the court, were balanced by the court's sustaining of many of defendants' relevance objections."). Thus, the record demonstrates that the trial court acted appropriately in order to facilitate and expedite this lengthy trial. Accordingly, there is no evidence that the trial court advocated on Anne's behalf or failed to remain impartial. See *In re Marriage of Click*, 169 Ill. App. 3d at 53 (finding that the court's comments and rulings during a bench trial failed to indicate bias or prejudice against the petitioner).

¶ 235 C. Denial of Joseph's Motion to Stay

¶ 236 Lastly, Joseph asserts the trial court erred in denying his motion to stay the judgment pending appeal as D.H. had been in his custody for two years, had learning issues which were being addressed by the Eisenhower school through a 504 plan, and D.H. would be uprooted from his friends, community, and environment.

¶ 237 Illinois Supreme Court Rule 305(b) (eff. July 1, 2004) governs stays of nonmoney judgments and other appealable orders pending appeal. A stay pending appeal is intended to preserve the status quo and the fruits of a meritorious appeal where they might otherwise be lost. *In re A.P.*, 285 Ill. App. 3d 897, 901 (1997). The standard of review for motion to stay is well established:

"A trial court is afforded discretion in issuing stay orders. [Citation.] The party

> seeking a stay bears the burden of proving adequate justification for it. [Citation.] The movant must present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay. [Citation.] Neither a trial court nor an appellate court must stay the enforcement of a judgment which is pending on appeal. [Citation.]" *In re A.J.*, 269 Ill. App. 3d 824, 830 (1994).

Ultimately, the decision whether to grant a stay is within the trial court's discretion, and we will not disturb the denial of a motion to stay unless it constituted an abuse of that discretion. *Kenny v. Kenny Industries, Inc.*, 406 Ill. App. 3d 56, 65 (2010). An abuse of discretion occurs only where " 'the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court' [Citation.]" *Id.* The party seeking the stay bears the burden of proving adequate justification for it. *Id.*

¶ 238 We find that Joseph failed to satisfy the burden of justifying the issuance of a stay order and thus we cannot say the trial court abused its discretion in denying the motion to stay. After a lengthy trial, the court ultimately determined that it was in D.H.'s best interest to be in Anne's custody. In particular, the trial court stressed the importance of structure in D.H.'s life and that Anne was able to provide D.H. with the structure he needed to succeed. At the time of the issuance of the ruling on the motion to stay, the trial court was fully aware of D.H.'s learning issues as well as the fact that he had already started school at St. John's. In rendering its ruling, the trial court stated that the smaller class sizes and limited number of teachers at St. John's would provide D.H. with a better learning environment than at Eisenhower. Additionally, Anne and the Public Guardian expressed to the trial court that St. John's would be able to provide accommodations for his learning issues. Accordingly, we conclude the trial court did not abuse its discretion in denying Joseph's motion to stay.

¶ 239 CONCLUSION

¶ 240 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 241 Affirmed.