2015 IL App (2d) 140943-U
No. 2-14-0943
Order filed January 28, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF RENITA ROBYN ROGNE, Petitioner-Appellant, and ADAM ROGNE, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 13-D-1695 Honorable Neal W. Cerne Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court, with opinion.
Justices Burke and Spence concurred in the judgment and opinion.

ORDER

¶ 1 Held: The trial court's judgment granting the respondent primary residential custody of the parties' two minor children was not against the manifest weight of the evidence, where the court appropriately considered the best interest factors listed in section 602 of the Act; however, the trial court erred in failing to consider the right of first refusal pursuant to section 602.3 of the Act, where the respondent's use of a babysitter during times that the petitioner was available to care for the children was brought to the court's attention through testimony and argument.

¶ 2 Petitioner, Renita Rogne, appeals from the judgment dissolving her marriage to respondent, Adam Rogne. She contends that the trial court's judgment awarding Adam primary residential custody of the parties' two minor children was against the manifest weight of the

evidence. She also argues that the court erred in failing to consider whether to grant her the right of first refusal pursuant to section 602.3 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602.3 (West Supp. 2013)). The " 'right of first refusal' means that if a party intends to leave the minor child or children with a substitute child-care provider for a significant period of time, that party must first offer the other party an opportunity to personally care for the minor child or children." 750 ILCS 5/602.3(b) (West Supp. 2013). For the reasons that follow, we affirm the custody judgment. However, because we conclude that the trial court abused its discretion in failing to consider the right of first refusal, we reverse in part and remand.

¶ 3 I. BACKGROUND

¶ 4 Renita and Adam were married on September 16, 2000, in Mora, Minnesota. They had two daughters during the marriage, I.R., born in 2002, and L.R., born in 2005. On August 14, 2013, Renita petitioned for dissolution of marriage. At that time, Renita was pregnant; however, Adam was not the father. Renita sought sole custody of the children.

¶ 5 On August 29, 2013, Renita filed a petition for temporary sole custody and child support. She alleged that she had been the children's primary caregiver. On October 9, 2013, Adam also filed a petition for temporary sole custody of the children. He alleged that, following the parties' separation in November 2012, they had agreed to a shared parenting schedule, under which the parties had equal parenting time. He further alleged that it was in the children's best interests that he be awarded sole custody. The trial court ordered Adam to pay temporary child support of $750 per month, but declined to award temporary sole custody to either parent, leaving the shared parenting schedule intact.

¶ 6 The trial court appointed Terra Howard as guardian *ad litem* (GAL) for the minors and ordered her to complete a custody evaluation. On March 3, 2014, she filed her written

evaluation, recommending that the court award the parties joint legal custody but designate Adam as the primary residential custodian.

¶ 7 The matter proceeded to a bench trial on July 24, 2014. Consistent with her report, the GAL testified that she believed that it was in the children's best interests for Adam to be awarded primary residential custody. She explained that Adam supported the children emotionally and financially, and that he placed their needs before his own. In addition, both children, but particularly I.R., had expressed a preference to live with Adam.

¶ 8 The GAL testified that she had "real concerns" about the "girls and their emotional health" if they were to live with Renita full time. She did not believe that Renita put the children first in her decision-making. According to the GAL, when L.R. was at Renita's house, Renita would "grill" her "about what goes on with Adam." In addition, I.R. was "afraid to express how she feels [to Renita], because she has been punished on numerous occasions for expressing how she feels." The GAL testified that I.R. spent all of her time in her room when she was at Renita's house.

¶ 9 The GAL also had concerns about Renita's boyfriend, Louis Longoria, who was living with Renita and was the father of her new baby. The GAL testified that the children had "picked up on" Louis's negative attitude toward Adam. According to the GAL, Louis did not like it when Adam called on the phone and did not want pictures of Adam in the house.

¶ 10 The GAL testified that Adam and Renita had shared custody of the children since their separation. When Adam had the children, he used a babysitter for after-school care and for full-time care during summer breaks. Renita did not use a babysitter, because she was not working. According to the GAL, Renita had offered to watch the children while Adam was at work, but

Adam had chosen to use a babysitter. The GAL believed that it was better for the children to be with a babysitter than to be with Renita on a full-time basis.

¶ 11 The GAL testified that, despite her concerns about the children living with Renita full time, she believed that both Adam and Renita were fit and proper parents and were positive influences in the children's lives.

¶ 12 Jenean Poley testified that she was a licensed clinical professional counselor who began seeing I.R. and L.R. in February 2014. Her initial impression was that L.R. was coping well emotionally but that I.R. struggled with anger. After additional sessions with the children, Poley observed that L.R. was very close with her new half-sister and that Renita and L.R. had "a lot of fun together." However, according to Poley, I.R. did not like her new half-sister. Poley clarified that I.R. did not dislike her half-sister "as a person"; rather, she disliked that Renita was still married to Adam when she had a baby with another man. Although at times I.R. was "very confused about how she was feeling" and about "who she wanted to live with," during multiple sessions she had expressed wanting to live with Adam. According to Poley, I.R. felt "very comfortable" with Adam, while she felt that she was not free to express her emotions in front of Renita. Poley described that a counseling session with Adam was "very fun and light," with I.R. being "very silly and affectionate." However, during a session with Renita, I.R. was not "very talkative" and "appeared uncomfortable." According to Poley, L.R. had not expressed any preference regarding with whom she wanted to live. Poley testified that I.R. and L.R. liked Louis and had fun with him. They also liked Abby Weinstein, who was Adam's fiancé. Poley testified that, based on her observations of the parties and their children, she believed that Adam's home would be a "better fit for the girls."

¶ 13 Hanna Mills testified that Adam hired her to babysit I.R. and L.R. two-to-three days per week from morning until late afternoon. Usually, she watched the girls at Adam's house, but occasionally she watched them at Abby's house. She estimated that she had watched the girls at Abby's house on four occasions.

¶ 14 Janelle Troupe testified that she was Renita's mother and lived in Minnesota. Prior to 2007, Adam and Renita had lived in Minnesota, where Renita operated an in-home daycare. During the time that Renita operated the daycare, she was I.R. and L.R.'s primary caregiver. Troupe did not have any concerns about Renita's parenting of the girls. Troupe also had observed the girls "get[ting] along great" with Louis.

¶ 15 Called as an adverse witness in Renita's case-in-chief, Adam, who was 34 years old at the time of trial, testified that he lived in a two-bedroom apartment in Naperville, Illinois, in the same school district where the parties lived prior to their separation. Adam testified that he and Renita had moved a number of times with the children due to changes in his employment. In 2007, he worked for his parents' construction company, and the parties lived in Minnesota. In 2008, they moved to Texas so that Adam could take a job with Republic Airways. They remained in Texas for six months and then moved to Wisconsin, where Adam's job was transferred. In 2012, they moved to Illinois, where Adam obtained a job with United Airlines. Following each move, Renita was the children's primary caregiver until she found employment.

¶ 16 Adam testified that he began dating Abby on December 1, 2012, and introduced her to I.R. and L.R. at the end of January 2013. Adam and Abby became engaged in the spring of 2013. Abby lived in Deerfield, Illinois, about 45 minutes from Adam's apartment. On most weekends when the girls were with Adam, they would spend at least some time at Abby's home.

Adam believed that it was in the girls' best interests to remain in Naperville. If Renita were awarded sole custody, however, Adam would consider moving to Deerfield, where Abby lived.

¶ 17 According to Adam, Renita had offered to watch the children after school so that he would not have to hire a babysitter. The parties tried that arrangement, but Adam ended it because it was inconvenient and because the girls were "always sad" to go to Renita's house. Adam admitted that he had stopped bringing the girls to church following the parties' separation.

¶ 18 Abby testified that she began dating Adam in December 2012 and met his daughters at the end of January 2013. According to Abby, Adam stayed at her house whenever he did not have the girls. The girls came to Abby's house "occasionally," which was less than every other weekend. Abby testified that the girls complained when they had to go to their mother's house.

¶ 19 Louis testified that he lived with Renita in Aurora, Illinois. He worked as a sales director for a marketing firm, which was his fifth position since moving to Illinois in December 2012. Louis testified that he first met the girls in September 2012 in Texas, and he believed that he had developed a very good relationship with them. He testified that he and Renita brought the girls to church every Sunday when they were with them. He denied that he did not allow the girls to have photos of Adam. He also testified that he encouraged the girls to have a daily phone call with Adam when they were at Renita's house.

¶ 20 Louis acknowledged that initially I.R. was not excited about Renita having a baby, but he believed that things had changed. According to Louis, I.R. had taken on the big sister role and would hold the baby on her own initiative.

¶ 21 Renita, who was 31 years old at the time of trial, testified that she lived in Aurora with Louis and their daughter. She chose Aurora because it was more affordable than Naperville. Following the new baby's birth, she decided to stay at home. She believed that she should have

residential custody of I.R. and L.R., because Adam used a babysitter and transported the girls back and forth between his house and Abby's house. In addition, Renita believed that the girls' relationship with Adam was "more of a friendship than an [*sic*] actual parenting." Renita explained that she tried to have rules and to raise the girls to be responsible.

¶ 22 Renita testified that, although I.R. was not happy about Renita's pregnancy, I.R. got along very well with the new baby, as did L.R. When the girls were with Renita, she played video games and board games with them and took them to parks. She also helped with their homework during the school year. She assigned typical chores, such as walking the dog and cleaning bedrooms. The girls also got along very well with Louis and would laugh and be silly with him.

¶ 23 Renita testified that she and Adam had brought the girls to church during their marriage and had agreed to raise them as Christians. Following the parties' separation, Renita brought the girls to church whenever they were with her for the weekend.

¶ 24 Renita testified that, at the GAL's suggestion, she began watching the girls after school on Adam's parenting days. However, Adam stopped that arrangement after only one week, because he complained that it involved too much driving. Renita offered to drive the girls back and forth, but Adam refused. Renita also offered "numerous times" to watch the girls full time during the summer so that Adam did not have to use a babysitter, but Adam declined.

¶ 25 Renita explained that I.R. and L.R. had changed schools a number of times due to the parties' moves. Renita acknowledged that she lived outside of the girls' school district in Naperville. She testified that, when she moved into her current home, which she was renting, she did not know that it was just outside of the school district border. She planned to move before the end of the upcoming school year to be within the girls' school district.

¶ 26 Renita rested her case, and Adam called her as an adverse witness. Adam impeached Renita with her deposition testimony, in which she testified that she moved to Aurora because she could not find an affordable home where dogs were permitted in the girls' school district.

¶ 27 Adam testified that, in November 2012, he and Renita agreed to a shared parenting schedule, with each of them having the children half of the time. By the spring of 2013, Adam no longer believed that the shared parenting schedule was in the children's best interests. According to Adam, communication with Renita was difficult, in part because Louis would not allow Renita to talk to Adam on the phone. Although communication improved after the court appointed the GAL, the parties still did not communicate very well.

¶ 28 Adam believed that the children had an "awesome" relationship with Abby. According to Adam, I.R. told Abby "things that she wouldn't tell anybody." Adam further testified that because Chicago was United Airline's hub, there was little chance that he would be transferred.

¶ 29 During closing arguments, Renita asked the court to award the parties joint legal custody and appoint her as the primary residential custodian. Adam asked the court to award him sole legal custody. Alternatively, he asked for primary residential custody.

¶ 30 Following closing arguments, the trial court indicated that it would take the case under advisement and issue a written decision. However, the court indicated that "this is going to be a joint custody arrangement." The court stated that it "would never order a split custody arrangement where the children would spend half the time with one parent and half the time with the other." The court believed that such arrangements were never in children's best interests.

¶ 31 On August 22, 2014, the court issued its judgment of dissolution. The court awarded the parties joint legal custody and awarded Adam primary residential custody. The court found that the GAL's investigation was "exhaustive" and that she was "very credible and insightful." It

further found that I.R. had expressed a clear desire to live with Adam, and that both children appeared to be more comfortable with Adam than with Renita. The court found that the girls' current school district was "the most stable schooling" that they had experienced, and that Adam had no plans to move out of the school district. The court found that Adam and Renita were willing to facilitate and encourage relationships between the children and the other parent and that any communication difficulties had been normal for parties going through a divorce.

¶ 32 The court awarded Renita parenting time on alternating weekends from Friday at 5 p.m. to Sunday at 5 p.m. and on Wednesdays from 5 to 7 p.m. The court also awarded each parent three weeks of vacation with the children during the summer break from school.

¶ 33 Renita timely appealed.

¶ 34 II. ANALYSIS

¶ 35 On appeal, Renita challenges the court's decision to award Adam primary residential custody. She also contends that the court erred in failing to consider whether to award her the right of first refusal pursuant to section 602.3 of the Act.

¶ 36 A. Custody

¶ 37 Renita argues that the court's award of primary residential custody to Adam was against the manifest weight of the evidence. She contends that, although the court was concerned with providing the children with stability, it ignored evidence that she provided greater stability than Adam. She further contends that the court failed to consider Adam's use of a babysitter, Renita's availability to care for the children full time, and L.R.'s relationship with her half-sister. She asks that this court reverse the custody decision and award her primary residential custody. Alternatively, she asks that we remand to the trial court for entry of an award of shared residential custody.

¶ 38 Adam responds that the court's custody decision was not against the manifest weight of the evidence. He contends that Renita improperly focuses on evidence of his past instability, including the moves that his job changes precipitated. He maintains that, under the parties' current circumstances, he provides the children with greater stability than Renita. He further contends that Renita forfeited the issue of shared residential custody by failing to raise it below.

¶ 39 Section 602 of the Act requires courts to determine custody "in accordance with the best interest of the child." 750 ILCS 5/602 (West 2012). Courts are to consider "all relevant factors," including the 10 factors listed in the statute. 750 ILCS 5/602 (West 2012). Pertinent to the issues on appeal, those factors include: "the wishes of the child's parent or parents as to his custody"; "the wishes of the child as to his custodian"; "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"; "the child's adjustment to his home, school and community"; and "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) (West 2012). This court will not overturn a custody judgment unless it is against the manifest weight of the evidence. *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶ 33. A judgment is against the manifest weight of the evidence when the opposite conclusion is apparent or the findings are unreasonable, arbitrary, or not based on the evidence. *Lonvick*, 2013 IL App (2d) 120865, ¶ 33.

¶ 40 It is clear that the trial court thoroughly considered the evidence and made specific findings regarding the relevant section 602 factors. The court found that both parties desired custody of the children. In addition, the court found that I.R. expressed a clear desire to live with Adam, and that both children appeared to be more comfortable with Adam than with Renita. The court also found that there was no evidence of physical abuse by either party, that both

parties were "good parents," and that both parties were willing and able to facilitate close and continuing relationships between the children and the other parent.

¶ 41 The two factors that the court found to be the most significant were the children's adjustment to their home, school, and community, and their interactions and interrelationships with their parents and others. Specifically, the court found that the children had attended five schools because of the parties' frequent moves, and that their current school in Naperville was "the only stable place they've been." The court indicated that ensuring that the children had a stable living situation was "a huge factor" in its decision. Although Renita argues that the court failed to consider the instability that Adam's frequent moves precipitated during the marriage, the court in fact addressed this concern. In explaining its custody decision, the court acknowledged that Renita "was concerned that [Adam] was going to move up to Deerfield." The court then said, "I agree with her," and stated that if Adam moved outside of the girls' school district, "that would be a substantial change" in circumstances, which might warrant modifying custody. Thus, contrary to Renita's argument, the court considered the parties' history of frequent moves when it awarded residential custody to Adam. In placing residential custody with Adam, the court was avoiding yet another change in schools.

¶ 42 Furthermore, while Renita argues that Adam's employment history is "not stable," she ignores that neither she nor Louis have exhibited greater stability in employment. Renita consented to each move that the parties made and changed jobs each time. Louis, who has become Renita's primary source of financial support, had four positions in Illinois prior to obtaining his current position with a marketing firm. Adam testified that, because Chicago is United Airline's hub, there was little chance that he would be transferred.

¶ 43 Renita's argument that she would provide greater stability because she was the children's primary caretaker also misses the mark. Generally, in making custody determinations, there is a presumption in favor of the present physical custodian. See *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 180 (2002) (discussing the presumption in favor of the present custodian). However, that presumption is inapplicable under the circumstances of this case. Most recently during the pendency of this proceeding, the parties exercised equal parenting time under their shared parenting agreement. Thus, neither party enjoyed the presumption that comes from being the present physical custodian. Moreover, although Renita was the children's primary caretaker when she operated the in-home daycare and during her periods of unemployment following each move, the evidence showed that both parties participated in caring for the children during the marriage. Thus, we reject Renita's argument that the court "failed to factor in Renita's role as the children's primary caretaker and the stability she provided."

¶ 44 Regarding the children's interactions and interrelationships with their parents and others, the court found that "it was obvious that the oldest daughter *** was not comfortable being with her mom and Luis [*sic*]." This finding was supported by the GAL's report and testimony, as well as by Poley's testimony. The GAL testified that I.R. spent all of her time in her room at Renita's house and that she felt afraid to express herself around Renita. Similarly, Poley testified that I.R. felt "very comfortable" with Adam but did not feel free to express her emotions in front of Renita. According to Poley, I.R. was "very silly and affectionate" during a session with Adam, but was not "very talkative" and even "appeared uncomfortable" during a session with Renita. It is apparent from the trial court's findings that it carefully considered this evidence.

¶ 45 Renita also contends that, in assessing the children's relationships with others, the trial court failed to consider L.R.'s relationship with her new half-sister. Although the court did not

make specific findings regarding L.R.'s relationship with her half-sister, we cannot conclude that the custody determination was against the manifest weight of the evidence. There was testimony that L.R. had developed a relationship with her half-sister. While it is beneficial to L.R. to facilitate and encourage this relationship, the court properly focused on other arguably more important concerns, including providing stability by preventing another change in schools.

¶ 46 Renita argues that, even if this court does not reverse the custody award in favor of awarding her primary residential custody, it should reverse the award in favor of an award of shared residential custody. Although she acknowledges that she did not request this relief in the trial court, she contends that the trial court's policy against awarding shared residential custody "stifled any request [she] would have made at the trial." While we agree with Renita that a trial court should not have a categorical rule against awards of shared residential custody—which have been upheld in some cases (see *In re Marriage of Divelbiss*, 308 Ill. App. 3d 198, 210 (1999))—we disagree that such an award was in the children's best interests in this case.

¶ 47 Specifically, Renita contends that a shared residential custody arrangement would better serve the children's interests, because Adam would not have to leave the children with a babysitter. We reject this argument for two reasons. First, courts generally disfavor shared or alternating residential custody, because it promotes instability and a sense of transience, rather than permanency. *In re Marriage of Deem*, 328 Ill. App. 3d 453, 456 (2002). In this case, given the children's history of transience, the trial court was particularly concerned with ensuring stability. We cannot say that this concern was misplaced. Second, we believe that Renita's arguments regarding Adam's use of a babysitter are more appropriately addressed in the context of the right of first refusal, which issue we address below.

¶ 48 Based on the foregoing, we conclude that the trial court's custody decision is not against the manifest weight of the evidence. "The trial court's custody determination is afforded 'great deference' because the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child." *Ricketts*, 329 Ill. App. 3d at 177 (quoting *In re Marriage of Gustavson*, 247 Ill. App. 3d 797, 801 (1993)). Having thoroughly reviewed the record and the trial court's findings, we cannot say that the opposite conclusion is apparent or that the trial court's findings were unreasonable, arbitrary, or not based on the evidence.

¶ 49 B. Right of First Refusal

¶ 50 Renita next argues that the trial court failed to consider whether to grant her the right of first refusal pursuant to section 602.3 of the Act. She maintains that, in light of Adam's use of a babysitter during times when she is available to care for the children, a parenting schedule with no right of first refusal is manifestly unjust.

¶ 51 Adam responds that Renita forfeited this issue by failing to raise it below. Alternatively, he contends that the court's failure to grant Renita the right of first refusal was not error. In support of this contention, he relies upon the GAL's testimony that it was better for the children to be with a babysitter than to be with Renita on a full-time basis.

¶ 52 In her reply brief, Renita argues that, although she did not use the exact phrase "right of first refusal," she testified that she desired to care for the children during times that Adam planned to leave them with a babysitter. She also addressed Adam's use of a babysitter during her closing argument, in support of her request for primary residential custody. She maintains that this was sufficient to raise the issue before the trial court.

¶ 53 Generally, issues not raised in the trial court are forfeited and may not be raised for the first time on appeal. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85. The rationale

for this rule is that " '[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.' " *Jackson v. Board of Election Commissioners of the City of Chicago*, 2012 IL 111928, ¶ 34 (quoting *People v. Givens*, 237 Ill. 2d 311, 324 (2010)).

¶ 54 At trial, in support of her request for primary residential custody, Renita introduced evidence of Adam's use of a babysitter and of her offers to watch the children. While the better practice would have been specifically to seek the right of first refusal in the alternative, we decline to deem the issue forfeited. The overarching goal of child custody proceedings is to resolve disputes in the children's best interests. Ill. S. Ct. R. 900(a) (eff. Sept. 1, 2013). Moreover, there is a legislative presumption that "the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child." 750 ILCS 5/602(c) (West 2012)). Given the interests at stake and that Adam's use of a babysitter was brought to the court's attention through testimony and argument, we decline to find forfeiture here. See *Kimble v. Illinois State Board of Education*, 2014 IL App (1st) 123436, ¶ 80 (noting that waiver, or forfeiture, is an admonition to the parties rather than a limitation on this court's jurisdiction, and that it may be relaxed in order to maintain a uniform body of precedent, or where the interests of justice so require).

¶ 55 Section 602.3 of the Act, which became effective on January 1, 2014, provides that courts awarding joint custody under section 602.1 of the Act or visitation under section 607 of the Act "may consider, consistent with the best interest of the child as defined in section 602, whether to award one or both of the parties the right of first refusal." 750 ILCS 5/602.3(a) (West Supp. 2013). The " 'right of first refusal' means that if a party intends to leave the minor child or children with a substitute child-care provider for a significant period of time, that party must first

offer the other party an opportunity to personally care for the minor child or children." 750 ILCS 5/602.3(b) (West Supp. 2013). Either the parties may reach an agreement regarding the right of first refusal, or, if the court determines that a right of first refusal is in the children's best interests, it can enter an order containing certain provisions, listed in the statute, including the length and kind of child-care needs invoking the right. 750 ILCS 5/602.3(b) (West Supp. 2013).

¶ 56 As the statute provides, a trial court "may" consider whether to grant either party the right of first refusal. 750 ILCS 5/602.3(a) (West Supp. 2013). "The word 'may' ordinarily connotes discretion." *Bigelow Group, Inc. v. Rickert*, 377 Ill. App. 3d 165, 169 (2007) (citing *Krautsack v. Anderson*, 223 Ill. 2d 541, 554 (2006)). Thus, based on the plain language of section 602.3, we conclude that it is within a trial court's sound discretion whether to consider granting the right of first refusal. A trial court abuses its discretion where no reasonable person would take the view adopted by the trial court. *In re K.E.B.*, 2014 IL App (2d) 131332, ¶ 31.

¶ 57 *In re Marriage of Dobey*, 258 Ill. App. 3d 874 (1994), which was decided before the Act provided for a right of first refusal, involved circumstances similar to those in this case. There, the mother worked full-time during the week and used a babysitter while she was at work. *Dobey*, 258 Ill. App. 3d at 875. The father worked on a barge but had 20 consecutive days off every two months. *Dobey*, 258 Ill. App. 3d at 875. The trial court awarded the mother sole custody of the parties' minor child, and awarded the father visitation on the weekends that he was home. *Dobey*, 258 Ill. App. 3d at 876. The appellate court reversed, holding that a traditional visitation schedule was manifestly unjust under the circumstances. *Dobey*, 258 Ill. App. 3d at 878. The court reasoned that it "fail[ed] to see how one could reasonably argue that [the child's] interests [were] better served by having a babysitter care for him 40 hours a week,

instead of his father." *Dobey*, 258 Ill. App. 3d at 878. The court noted that there was no finding that visitation with the father would be detrimental to the child. *Dobey*, 258 Ill. App. 3d at 878.

¶ 58 Because the trial court did not address the issue, it would be premature for this court to determine that granting Renita the right of first refusal was in the children's best interests. However, under the circumstances of this case, we conclude that it was an abuse of discretion not to consider whether to grant Renita the right of first refusal. As we discussed above, there was testimony and argument regarding Adam's use of a babysitter during times that Renita was available to care for the children. Adam used a babysitter for after-school care and for full-time care during summer breaks. Renita, who decided to stay at home following her daughter's birth, was available to care for the children during this time. Given these facts, it was unreasonable for the trial court not to consider whether to grant Renita the right of first refusal.

¶ 59 Adam argues that the court's failure to grant Renita the right of first refusal was not error, citing the GAL's testimony that it was better for the children to be with a babysitter than to be with Renita on a full-time basis. We decline to address the merits of this issue before the trial court has had an opportunity to rule on it.

¶ 60 On remand, the trial court, in its discretion, may proceed on the evidence and arguments previously introduced, hear additional arguments, or allow both new evidence and arguments. If the court determines that it is in the children's best interests to grant Renita the right of first refusal, it should then enter an order in accordance with section 602.3(b) of the Act (750 ILCS 5/602.3(b) (West Supp. 2013)).

¶ 61 III. CONCLUSION

¶ 62 For the reasons stated, we affirm in part and reverse in part the judgment of the circuit court of Du Page County, and we remand for further proceedings.

¶ 63 Affirmed in part and reversed in part; cause remanded with directions.