2015 IL App (2d) 150772-U
No. 2-15-0772
Order filed December 28, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re Marriage of DAVID H.B., Petitioner-Appellant, and LINDA E.B., Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 08-DV-810 Honorable Kevin G. Costello, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in precluding certain evidence regarding respondent's current mental state, and, even if it had, petitioner failed to demonstrate that the preclusion of the evidence prejudiced his case. The trial court's decision to award respondent sole custody of the parties' children was not against the manifest weight of the evidence.

¶ 2 Petitioner, David H.B., appeals the judgment of the circuit court of McHenry County granting the petition of respondent, Linda E.B., seeking sole custody of the parties' children. On appeal, petitioner argues that the trial court abused its discretion in refusing to admit certain evidence about respondent's current mental state. Petitioner also argues that the trial court's

ultimate decision to change the children's custody and award respondent sole custody was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We begin by summarizing the pertinent facts appearing in the record. In August 1997, the parties married. During the course of the marriage, the parties adopted two daughters, J.B. and R.B. In 2008, the parties initiated dissolution proceedings. On June 8, 2010, the trial court entered a judgment of dissolution of marriage. Before and during the course of the dissolution proceedings, respondent believed that petitioner was sexually abusing the children, so she fled the state and secreted the children. The sexual abuse charges were determined to be unfounded. Petitioner was granted sole custody of the children. The trial court noted that both parties had cut off communication between the parties' children and the other party, but held that, on balance, respondent's actions had been more significant and that the factor involving a party's willingness to foster a close and continuing relationship between the children and the other parent favored petitioner. In addition, the court noted that it had preliminarily ordered counseling, but respondent was not willing to continue with the counseling as ordered. Nevertheless, the trial court believed that counseling would be helpful for the parties and the children, but stopped short of actually ordering the parties undertake postdissolution counseling in its final order.

¶ 5 In August 2013, respondent filed a petition to modify custody and visitation, seeking to address the children's educational deficits. In October 2014, respondent filed an amended petition to modify the dissolution judgment seeking sole custody of the children and maintaining the focus on remedying the children's educational deficits. The amended petition attached the July 2014 report from Dr. Leonard Koziol about testing he performed with R.B. Dr. Koziol

determined that R.B. had limited language skills and functioned intellectually between borderline and low average. Dr. Koziol concluded that R.B.'s testing supported diagnoses of attention deficit hyperactivity disorder, dyslexia, and specific mathematics disorder. Dr. Koziol recommended psychotropic medication evaluation and specific services to address R.B.'s reading and mathematical deficits.

¶ 6 As the matter progressed to the hearing on the amended petition to modify, petitioner discharged his counsel and determined to proceed *pro se*. On March 4, 2015, respondent filed a motion *in limine* seeking to preclude petitioner "from calling any witness, offering any exhibits or any testimony regarding facts or events existing prior to [the date of the judgment of dissolution] that are not related to the educational and healthcare needs of the parties' minor children." The trial court denied respondent's motion *in limine*, but based on *Johnson v. Johnson*, 34 Ill. App. 3d 356, 367 (1975), it:

> "admonishe[d] the litigants that prior to the admission of evidence such must be relevant and material. The proponent of the evidence must show facts existing prior to the divorce decree and have the proper foundation showing relevancy and materiality to the matter pending before the court, which is the amended petition to modify custody."

Additionally, respondent established that petitioner had not disclosed any expert witnesses. The trial court held that none of petitioner's witnesses, including medical professionals, would be allowed to offer expert opinion testimony.

¶ 7 The matter advanced to hearing. Cathleen Riley, a school psychologist with Prairie Grove School District No. 46, testified that she evaluated R.B. to determine her academic level and whether she exhibited a learning disability. As part of the evaluation, Riley considered October or November 2012 MAP testing. Riley indicated that the MAP testing showed that R.B.

was reading significantly below where she was expected to perform.

¶ 8 Between October and December 2012, Riley visited petitioner's home to observe a lesson petitioner taught R.B. Riley testified that petitioner wrote some words on a board and asked R.B. to read them. R.B. was able to read some of the beginning words, but was then unable to read the remaining words and remained unable to read the remaining words after petitioner reviewed them. Riley opined that she did not believe that R.B. understood the lesson. Riley also observed R.B. undertake an online reading lesson. Riley noted that the lesson was not interactive and R.B. was unable to ask questions of the presenter. Riley did not offer an opinion about R.B.'s ability to understand the online lesson. Riley also questioned R.B. about a typical school day. Riley opined that, based on R.B.'s description, R.B. was not receiving sufficient instructional time.

¶ 9 Riley discussed other testing in which R.B. participated. The testing showed that R.B.'s intelligence was measured to be in the borderline range and significantly lower than expected for R.B.'s age; Riley believed that the testing could mean that R.B. had lower processing skills. Riley discussed R.B.'s comprehensive test of phonological processing, which covered her ability to sound out words. R.B.'s results were low, in the first decile in the all of the subtests. Based on these extremely low results, Riley opined that R.B. was not a good candidate for home schooling. Nevertheless, Riley did not recommend that R.B. discontinue homeschooling, but she recommended a more structured learning environment, tutoring from tutors qualified to deal with R.B.'s particular learning issues, and a definitive determination whether R.B.'s performance was due to cognitive issues, learning disabilities, or insufficient instruction.

¶ 10 Riley testified that, based on her meetings with the parties, she believed that petitioner minimized R.B.'s problems and did not grasp the significance of the gap between R.B.'s performance and the performance of a typical grade-level peer. Riley characterized petitioner as

defensive in responding to the information about R.B.'s learning deficits, and she believed petitioner's belief that R.B. was making good progress was unwarranted. According to Riley, by contrast, respondent was more receptive to Riley's recommendations and was open to introduce R.B. to educational programs at Prairie Grove. Respondent was willing to persist in home schooling, but emphasized meeting R.B.'s educational needs.

¶ 11 Riley opined that she did not believe that R.B. had made any significant progress between the 2012 testing and the date of the hearing. Riley's opinion was based on the subsequent testing and opinion of Dr. Koziol.

¶ 12 On cross-examination, Riley reiterated her opinions. She agreed that the lesson she observed during the visit to petitioner's home was very short. She also agreed that petitioner did not reject her recommendations out of hand, but reiterated that he was defensive about the recommendations. Riley also testified on cross-examination that R.B.'s scores on intelligence tests administered in 2012 and 2014 remained the same. She conceded that the same scores did not mean she had not progressed in her studies, but the same scores between the two time periods did mean that R.B. had not gained any ground in the gap between her actual performance and the performance expected of a typical grade-level peer.

¶ 13 Nancy Yeschek, director of the "Celebrate Recovery" program, testified that her program is designed to assist adults and children recover from the effects of divorce. Yeschek testified that respondent has attended the program for about seven years. The program begins with a meal including the adults and the children, and then they separate. Yeschek directs the children's portion of the program following the meal, which consists of a lesson on a topic such as forgiveness or denial. The children are further divided, and the older children (ages 8-12) can share more intimately and privately.

¶ 14 J.B. is in a small group and R.B. is in a large group for motor skills. Yeschek testified that, when R.B. first began attending at about age five, she chose not to talk and was very clingy to J.B. As R.B. grew a little older, Yeschek noticed that she struggled with reading, but she believed that R.B. was very bright. Yeschek testified on cross-examination that petitioner was supportive of the children's participation in the program and the relationships they have formed with others attending the program. Yeschek also noted, on cross-examination, that R.B.'s medication (for attention deficit hyperactivity disorder) seems to have increased R.B.'s confidence and focus, and she related that, for the first time, R.B. was able to sit the entire time she was having her hair braided during a session.

¶ 15 Next, Lisa Stankus, director of the Road to Learning tutoring center in Lake Zurich, testified that Road to Learning provides tutoring services for individuals as young as five and extending through adults who are struggling with reading, spelling, and writing. Road to Learning features the Orton-Gillingham method to teach reading to persons with dyslexia. There are a number of programs within the Orton-Gillingham method, and Road to Learning uses the Barton reading and spelling method.

¶ 16 Stankus testified that, in June 2014, she first met the B. family when R.B. was tested for her suitability to participate in the Barton program. At the time of this testing, R.B. was 10 years old, and she did not qualify for the program because of difficulties in discriminating between sounds and holding them in her memory. Instead of the Barton program, Stankus suggested the Lindamood-Bell reading program, "LIPS," which focuses on phonemic awareness and the early skills of being able to hear sounds. R.B. was enrolled, and Stankus observed that petitioner and respondent "worked really well together" in enrolling R.B. Beginning in July 2014, R.B. started the LIPS program, and by the middle of August 2014, she finished the program.

¶ 17 Following her successful completion of the LIPS program, R.B. began working in the Barton program. By the beginning of October 2014, R.B. completed the first level and began the second level of the Barton program. At around the time R.B. began the second level of the Barton program, Stankus administered a test measuring R.B.'s oral fluency. Instead of reading at an age-appropriate fifth-grade level of 104 words per minute, R.B. scored 11 correct words per minute, which corresponded to a low first-grade level.

¶ 18 Stankus testified that, in January 2015, R.B. began level three of the Barton program and, at the time of the hearing, was still working through level three. Also in January 2015, R.B. was again tested and was reading 24 words per minute. Stankus testified that Road to Learning seemed to suit R.B., who frequently hugged her tutors and did not walk past Stankus's office without a smile and a wave.

¶ 19 Stankus testified that she recently learned that petitioner had engaged Liz Wood as a tutor or homeschool consultant for R.B. While Road to Learning does not recommend outside tutors out of a concern that the child will be subjected to inconsistent teaching methods, it will attempt to coordinate with them. Stankus testified that, if Prairie Grove were open to teaching the Barton method, Road to Learning would be able to coordinate with them.

¶ 20 Stankus testified that R.B.'s learning issues may include language development, fine motor skill weakness, and an attention deficit disorder. Stankus testified that such needs are beyond what Road to Learning provides, but it can support R.B. in reading, writing, and spelling.

¶ 21 On cross-examination, Stankus testified that R.B. can be exposed to vocabulary at her grade level, but she cannot read or spell that level of vocabulary. Instead, R.B. is currently mastering one-syllable words; more complex words, such as those in directions, require them to be read to R.B. Stankus also testified on cross-examination that R.B. was progressing well in her

reading, and her outside tutor had been very responsive in reporting R.B.'s progress to Road to Learning.

¶ 22 Petitioner testified as an adverse witness. He testified that, during the marriage, both he and respondent homeschooled the children; following the June 2010 judgment of dissolution, he has homeschooled the children. J.B. was able to read before she was three years old. R.B. could not read following kindergarten. Petitioner indicated that he was concerned, but he did not engage any tutors at that time.

¶ 23 Petitioner testified that, in the past, he used the A Beka reading program. It consisted of written materials, DVDs, and an online program. Petitioner testified that he used A Beka as a supplement to what he was teaching the children. Petitioner also used a series entitled "Southwestern Advantage," which focused on English, grammar, and composition. Petitioner also checked out materials from the public library.

¶ 24 Petitioner testified that, currently, the children participated in Heartland, which is a homeschooling cooperative. J.B. was in eighth grade and was taking pre-algebra, general science, grammar and composition, World War II history, and Junior Writing Club. Petitioner stated that J.B.'s history course was then focusing on the Pacific Theater, but was unable to describe what topics were being covered in the other subjects. Petitioner explained that his attention was currently focused on the custody modification hearing.

¶ 25 Petitioner testified that R.B. was in fifth grade and was taking a drawing class, an introduction to simple machines using Legos, hands-on math in which he was the classroom assistant, knitting, and violin.

¶ 26 Petitioner testified that R.B. was currently being tutored in math by Liz Wood, a tutor he engaged shortly before the hearing commenced. Petitioner explained he did not begin the math

tutoring earlier based on Dr. Koziol's recommendation that R.B. focus foremost on reading. Wood also provides R.B. tutoring in reading. Regarding his own homeschooling efforts, petitioner testified that he was currently teaching social studies and had recently covered the differences between economic systems.

¶ 27 Petitioner described a typical school day for the children. He awakens them at 8 a.m. J.B. generally does not immediately dress, but petitioner tries to have both children dressed by the 9 a.m. start of their school day. J.B. will do homework on her own while R.B. is being individually instructed. From 9 a.m. to noon, the children are supposed to predominantly work on school and are not allowed to do recreational activities. Petitioner testified that he attempted to teach the children for at least six hours a day, although this time apparently included driving time, taking them to Road to Learning and other destinations.

¶ 28 Petitioner explained that he was hesitant to enroll R.B. in Prairie Grove even part-time because he felt that, when he toured it with the children, it was cold and did not present him with satisfactory details or plans for R.B.'s education there. Petitioner testified that he also did not like Prairie Grove because he wants to play a larger role in their education, and the options presented at Prairie Grove did not involve him directly; additionally, petitioner wishes to sit in on and be a part of the class so he can become a more effective teacher.

¶ 29 Petitioner explained that among the reasons he particularly approves of Wood as a tutor, she works with him and helps him to become a better teacher. Petitioner testified that the homeschooling education he provides to his children is academically comparable to the education they would receive in a public school. Petitioner testified that he did not plan to pull R.B. out of Road to Learning right away.

¶ 30 Petitioner testified that Dr. Koziol either diagnosed R.B. with or presumed that she had

attention deficit hyperactivity disorder, and R.B. is now receiving medication for the condition. Petitioner concurs with Dr. Koziol's diagnosis and testified that, had R.B. received medication as early as 2012, she would be more academically proficient today. Petitioner denied that he decided not to treat R.B.; rather, petitioner testified that he decided to obtain treatment only after she had been formally diagnosed.

¶ 31 Petitioner explained that he was aware that R.B. had learning issues, but did not know definitively that they included attention deficit hyperactivity disorder. Now that he is sure of the proper diagnosis, he intends to teach R.B. differently. Petitioner clarified that he did not simply purchase educational materials based on the children's purported grade level, but based the materials on their actual progress, especially as R.B. was unable to read. Petitioner did not use A Beka solely for reading instruction, but used a number of different computer and physical materials, including Jump Start, Bookworm Adventures, and the like. Finally, petitioner explained that he viewed himself as a sort general educational contractor, and the Heartland cooperative, tutoring, and Road to Learning were all components (subcontractors) of his homeschooling endeavor.

¶ 32 Petitioner admitted that he did not have training, certification, or licenses for teaching learning disabled or dyslexic students. Petitioner was worried that he would be cut out of the educational process if he enrolled his children in Prairie Grove, and family involvement would be ended. Petitioner also found that the school was emotionally cold with abundantly visible security. Finally, he worried that, in a public school, R.B. would be bullied over her learning issues and end up hating school. Instead, he believed that R.B. was currently very enthusiastic about learning, and his goal was to give her the tools and passion to be a self-starting and self-motivated learner.

¶ 33 Respondent testified on her own behalf during her case-in-chief. Following the 2010 dissolution, in 2011, she recognized that R.B. was having problems with her academics. Respondent testified that she brought the problems she perceived to petitioner's attention, but it took him a few months before he finally agreed to take R.B. for MAP testing at Prairie Grove.

¶ 34 Respondent testified that Prairie Grove gave them a list of tutors. Respondent briefly interviewed three of them, took their information and rates, and presented the list to petitioner along with the request that he choose a tutor. Respondent testified that, to her knowledge, petitioner did not at that time choose a tutor. In 2012, petitioner agreed to enroll R.B. in Prairie Grove for half-days, but later, he changed his mind and did not enroll R.B. there. Petitioner did not explain to respondent his change of heart.

¶ 35 Respondent introduced a February 2013 letter from petitioner to respondent's then-attorney. In it, petitioner stated that he was still considering choosing a tutor, R.B. was making great progress with her reading, and R.B. was "whizzing" through books that had previously given her difficulty. Respondent commented on some of the assertions in the February 2013 letter, disagreeing that R.B. was making great progress or that she was whizzing through any books.

¶ 36 Respondent testified that her employment as a registered nurse allowed her some flexibility with her schedule. She could stop working on Tuesdays and Fridays in order to homeschool the children on those days. Respondent testified that she planned, should she be given sole custody, to enroll R.B. in Prairie Grove for half days. In the afternoon, respondent would continue having R.B. attend Road to Learning. Respondent also planned to take an active role in homeschooling R.B., and she would involve petitioner in educational decisions for the children. Respondent testified that she would be willing to facilitate the children's relationship

with petitioner. She believed that they had been able to cooperate in making medical decisions for the children, noting particularly that the parties agreed to evaluate R.B. regarding the suspected attention deficit hyperactivity disorder and to place her on medication for the condition. Respondent testified that, since R.B. began to take Adderall for her condition, she had an easier time staying on a task and an easier time with memorization. Respondent testified that, despite her belief that the parties could cooperate, she was worried that petitioner would discontinue R.B.'s involvement with Road to Learning and make Wood the primary tutor.

¶ 37 Respondent testified that, in her opinion, R.B. needed structured, consistent, and professional education. The homeschool program as described to the court did not sufficiently address R.B.'s learning disabilities, and petitioner did not know how to compensate for R.B.'s learning disabilities. Respondent testified that she would be amenable to the suggestions offered by Prairie Grove and would adjust R.B.'s instruction and curriculum accordingly.

¶ 38 On cross-examination, respondent conceded that, on February 14, 2013, R.B. successfully read a beginning reader in the "Happy and Honey" series without mistakes and relatively quickly. Respondent opposed engaging Liz Wood as an additional tutor, because she believed Wood would be R.B.'s third reading tutor, which was too many. Respondent figured that, between teachers, tutors, and extracurricular instructors, R.B. dealt with at least 10 people variously instructing her education. Enrolling R.B. in the Prairie Grove program would decrease the number of instructors trying to teach R.B. Finally, respondent conceded that she did not object to Liz Wood continuing as a math tutor for the children.

¶ 39 On cross-examination, respondent averred that petitioner did not discuss with her his decision to hire Wood as a reading tutor. That testimony was impeached, however, when petitioner showed respondent an email in which he described his discussion with Wood and

requested respondent's input. Respondent also testified on cross-examination that her residence was outside of the Prairie Grove district; if the children were not able to attend Prairie Grove on an out-of-district basis, then she would enroll them in the school district in which she resided. Finally, respondent reiterated that her schedule was flexible and that she would arrange it to facilitate homeschooling combined with half-day public schooling for R.B.

¶ 40 In petitioner's case-in-chief, Carol Fetzner, a licensed clinical counselor, testified that, in 2007, she began counseling the children. Beginning then and extending for over two years, Fetzner counseled the children and the parties weekly. In January and February 2015, petitioner brought the children to Fetzner once again. Fetzner was successful in interviewing J.B., learning that J.B. worried about being separated from her friends and that her circumstances would be upset as a result of the then pending modification hearing. Fetzner used the sessions to build a rapport with R.B., eventually earning sufficient trust or comfort for R.B. to begin to share her concerns. R.B. expressed that she did not want to go to a public school and have her current friendships disrupted, and she did not want to see respondent more than required by the current visitation schedule.

¶ 41 Petitioner notes that respondent successfully objected to many of his questions during his examination of Fetzner. Petitioner highlights that respondent interposed a relevancy objection and complained that petitioner was trying to "get the history of the case in" without proper foundation when petitioner queried Fetzner on how she first came to treat the children. In sustaining the objection, the trial court observed that respondent's case had covered the children's academic challenges and progress, while petitioner appeared to be addressing the relative merits of the parties' parenting styles, so the trial court expressed confusion about petitioner's goals for the examination of Fetzner. Petitioner further highlights a successful

relevancy objection to inquiry into Fetzner's November 2013 therapeutic session with R.B.

¶ 42 Petitioner points out that, on April 2, 2015, Peggy Gerkin, the guardian *ad litem*, submitted a third report to the trial court. Attached to the report of the guardian *ad litem* was Fetzner's treatment summary report, which summarized January and February 2015 sessions with the children. In her treatment summary report, Fetzner noted that she began seeing petitioner and the children because respondent accused petitioner of sexually abusing the children, and, at that time in 2007, respondent persisted in the belief. Fetzner wondered in her report, noting that respondent had refused to continue to attend Fetzner's counseling with the other family members, whether respondent persisted in her distorted belief system. As support for her concern, Fetzner noted that, in November 2013, petitioner and R.B. reported that respondent was concerned that R.B. and petitioner were keeping secrets because respondent discovered R.B. with a large amount of cash. Fetzner used this incident to support her concern over the possibility that respondent continued with her distorted thinking about petitioner.

¶ 43 Petitioner also examined Stankus as part of his case-in-chief. She noted that petitioner had been receptive to her suggestions and feedback. Particularly, she voiced concerns over structure in the children's schedules, reading books to R.B. that were interest appropriate, and maintaining consistency and communications with tutors for the children.

¶ 44 Respondent was adversely examined. Petitioner began his questioning with an inquiry about whether respondent informed the guardian *ad litem* about her concern that petitioner was going to try to have Yeschek arrested during a Celebrate Discovery session. Respondent admitted that she had shared the concern with the guardian *ad litem*. Petitioner attempted to ascertain the basis of respondent's concern, but the trial court sustained a relevancy objection.

¶ 45 Respondent testified that, prior to the dissolution of the parties' marriage, she had

participated in homeschooling the children. At the time of the dissolution, R.B. was in speech therapy and J.B. was behind in math. Presently (at the time of the hearing), the children had friends in the neighborhood, the church, and in the homeschooling cooperative; petitioner supported these relationships.

¶ 46 At the time of the hearing, respondent was providing contracted services to home-nursing providers. From time to time, respondent had to ask petitioner to take R.B. to the Road to Learning program when she could not.

¶ 47 Petitioner presented respondent with a number of contracts he required her to execute in exchange for allowing respondent to see the children outside of the time provided in the judgment of dissolution of the parties' marriage. In spite of these contracts, petitioner established that he never precluded respondent's visitation with the children, even if she showed up without previously arranging a visit. Petitioner established that he "always accommodates [respondent's] requests for changes to the [visitation] schedule." Respondent agreed that petitioner allowed the children to regularly attend Celebrate Recovery with her even when it occurred on his parenting day and that he supports the relationships the children had established with other Celebrate Recovery participants.

¶ 48 Respondent testified that, despite invitations from petitioner to attend various events with him and the children, she has not attended, sometimes because they occurred during her scheduled work. Respondent admitted that, during some of her weekends, she had not had time to read to R.B. Respondent also had declined invitations to attend R.B.'s musical lessons, citing other obligations. Respondent testified that, notwithstanding her ability to play two musical instruments, she had not ascertained whether R.B. can read music; rather, given R.B.'s reading challenges, she assumed that R.B. cannot read music.

¶ 49 Respondent testified that, in November 2014, petitioner presented her with a brochure containing information about homeschool cooperatives. Petitioner had included a handwritten note asking respondent's opinion about adding another full day for the children at the Grace Lutheran homeschool cooperative.

¶ 50 Respondent testified that she did not own a computer at her residence, and respondent agreed that, at petitioner's residence, each child had her own computer. Respondent testified that, were she to be responsible for homeschooling the children, she would use paper and pencil methods, utilizing the uncompleted portions of the various materials petitioner had already obtained. Respondent reiterated that her educational plan for the children, should she gain sole custody, included a half-day of public school for R.B., where she would receive support for her learning issues, and afternoons spent at Road to Learning. Additionally, if the public school were amenable, she would continue to take R.B. to Heartland on Fridays. Finally, respondent remained willing to allow Liz Wood to continue to provide math tutoring to the children. Respondent conceded that her plans required that petitioner provide transportation on the days respondent could not because she was working. Respondent believed that she would continue to work four days a week and alternate Saturdays.

¶ 51 Respondent testified that, if she were granted custody, she would do whatever was necessary to get the children a proper education, including sacrificing part of her career. Respondent averred that she would be open handed in allowing the children to have visitation with petitioner. If a computer proved necessary for the children's studies, respondent would take every step to provide one. She noted that she resides across the street from the public library, which has computers the children could use.

¶ 52 Michelle Leichty testified that she knew the parties from the Rainbow's End homeschool

cooperative, and she currently taught the Junior Writing Club at Heartland. Leichty testified that she had a degree in journalism. J.B. was currently in her Junior Writing Club program. Leichty testified that J.B. was an excellent writer, wrote good papers, returned her assignments on time, and participated well in the class with insightful comments to her classmates. On cross-examination, Leichty conceded that she did not have a degree in teaching, but maintained that she had been teaching writing at Heartland for three years, and had read many papers.

¶ 53 Leichty commented that she had not seen respondent at Heartland very often, and her most recent observation of respondent there was about three years ago. Leichty testified that, in contrast, petitioner had sat in on her class, and he had spoken to her about some of J.B.'s difficulties with certain assignments.

¶ 54 Liz Wood testified that she had earned a bachelor's degree in English and a master's degree in special education. She held teaching certifications in Illinois and Pennsylvania. Additionally, she had endorsements as a learning behavior specialist, in mental retardation, in learning disabilities, and for high school language arts for English. She testified that she had trained in the Barton reading program for dyslexic students. At the time of the hearing, she had been tutoring R.B. for between six and eight lessons in math and reading.

¶ 55 Wood testified that she engaged to tutor R.B. at a rate of $30 per hour. Wood learned that petitioner was having financial issues, and she agreed to provide her services without charge until June 2016, when the subject of fees would be revisited, or when petitioner believed he would again be able to pay. Wood testified that she had also provided tutoring for others before without requesting payment.

¶ 56 Wood testified that she was providing R.B. with four one-hour tutoring sessions each week. She planned to increase R.B.'s tutoring to eight hours a week during the upcoming

summer and the next school year. Wood testified that she would also be acting as petitioner's consultant and give him suggestions for homework and extra activities with a view toward improving R.B.'s memory. Wood also noted that she had agreed to coordinate her tutoring with Road to Learning.

¶ 57 Wood testified that petitioner always attended R.B.'s tutoring sessions. Wood had met respondent twice when respondent attended a tutoring session. Wood noted that respondent would always be welcome to attend.

¶ 58 On cross-examination, Wood conceded that she was not certified in the Barton method, but had been trained and was finally eligible to seek certification in the Barton method. Wood testified that she had passed the state examination to provide special education in math. Wood also testified that she was qualified to create an individualized educational program and would informally create one for R.B. Wood testified that, if R.B. attended a half-day of public school, then she would still be able to tutor her.

¶ 59 Wood further testified on cross-examination that she communicated with Road to Learning after every session with R.B. According to Wood, R.B. was "flying" through her math lessons and R.B.'s visual memory for patterns was the key to that success. Wood was still assessing R.B.'s academic level, but R.B. had not yet reached her ceiling.

¶ 60 Katherine Eeg testified that she was a teacher at Heartland. She had six children enrolled at Heartland, and one of her children was in a class with J.B., while another child was in a class with R.B. Eeg was currently teaching a grammar class for fourth, fifth, and sixth graders, and previously, she had taught reader's theater.

¶ 61 Eeg testified that R.B. was in her class during the last school year. When R.B. began the class, Eeg was worried about R.B.'s reading ability. According to Eeg, R.B. did well with the

short sight words, but she had difficulty on longer words and did not try to sound them out. R.B.'s reading did not improve. Eeg suggested to petitioner that he use the same book she used with her six children. Petitioner responded positively to Eeg's feedback about R.B. and asked if Eeg would help R.B. using the book.

¶ 62 Eeg testified that, in November 2013, she started to work with R.B. During a lesson, R.B. would lose interest after about 15 minutes. R.B. did not make a lot of progress while Eeg worked with her. Eeg testified that, in August 2014, she stopped working with R.B. because petitioner had procured other professional help for R.B.

¶ 63 Eeg testified petitioner maintained a continual interest in R.B.'s activities and progress while in Eeg's class. Eeg testified that, by contrast, she never saw respondent at Heartland. Instead, she met respondent at a soccer game and exchanged phone numbers, but never received a call from respondent.

¶ 64 On cross-examination, Eeg admitted that she was not certified in special education. Eeg conceded that the book she was using with R.B. was not designed for children with dyslexia. Eeg also believed that R.B.'s vocabulary was appropriate for her grade level and she understood oral instruction, but R.B. simply could not read.

¶ 65 Caroline Rukin testified that, in 1996, she became friends with petitioner and respondent's family. After the parties' divorce, Rukin maintained her friendship with petitioner and the children. Rukin testified that she homeschooled her six children at her home. Three of Rukin's children were close in age to J.B. and R.B.

¶ 66 Rukin testified that, sometimes, J.B. and R.B. would attend her children's homeschool classes. Rukin testified that petitioner sought her advice for help with R.B.'s reading difficulties, which Rukin had personally observed. Rukin advised petitioner to be patient because there was

variability in the time it takes for children to begin to read.

¶ 67 On cross-examination, Rukin testified that she did not have a degree in education, but she did have children with special education needs. Rukin testified that J.B. and R.B. attended her homeschool classes between March and November 2010, mostly in June 2010.

¶ 68 Petitioner testified on his own behalf. Petitioner testified that, beginning in 1993, he was self-employed as a software developer, and he set up and maintained networks and repaired computers. He had the flexibility to work at home or onsite as he determined; he set his working hours and was able to take time off as needed to devote to other issues. Educationally, he had not completed college, but he had completed three semesters at the University of Illinois studying physics.

¶ 69 Regarding his homeschooling of the children, petitioner testified that, in January 2013, he discontinued the A Beka program and, most recently, had been using programs from "Adapted Mind" and the Khan Academy. Petitioner testified that he believed he was on the right track for R.B. with Road to Learning and Liz Wood's tutoring. Notwithstanding his satisfaction in the current program, petitioner stated that he was open to additions, changes, and tweaks to the program. Petitioner emphasized that he was concerned about R.B.'s reading issues and deficits and took the education of his children seriously. Petitioner testified that he stumbled upon the Barton reading program when he was looking for other ideas to try with R.B., and he wished that he and respondent would have discovered the Barton program earlier. In petitioner's opinion, he did not believe that the public school would do anything differently than he other than spending more time reading with R.B.

¶ 70 In petitioner's opinion, reading was R.B.'s primary issue; once she unlocked the ability to read, she would begin to progress in all of her academic subjects. Petitioner testified that he

encouraged his children to love learning, to investigate things of interest to them, and to use whatever they have to learn. He hoped both children will be self motivated and self actuated learners. Petitioner noted that the children knew things beyond their grade level, such as basic economics and information about astronomical topics.

¶ 71 Petitioner was critical and fearful of a public schooling for the children. Petitioner testified that, in the public school, the instructor was required to teach to the mean of the class. He believed that the public school would not be able to target R.B.'s particular needs directly even though it would provide some special education classes. Petitioner testified that he did not believe that public schooling would allow the type of parental involvement he currently had with the children while homeschooling them. In petitioner's opinion, public schooling would disconnect the family from the children's learning process. Petitioner noted that his homeschool cooperative, Heartland, requires a parent to attend the sessions with the children.

¶ 72 Petitioner testified that, through homeschooling, R.B. has developed social confidence that she would not have developed in the public school. According to petitioner, the other students in the homeschool cooperatives in which they have participated have encouraged R.B., and R.B. has not encountered teasing or bullying. Petitioner was particularly concerned that placing her into the unknown situation of public schooling would destroy R.B.'s current enthusiasm for learning.

¶ 73 On cross-examination, petitioner testified that, despite R.B.'s inability to progress at grade level, some of the teaching methods he employed in homeschooling her were effective. Petitioner conceded that his teaching methods in reading were not effective. After R.B.'s initial evaluation by Prairie Grove, petitioner employed tutors, namely Kathy Wentz and Eeg. At the time he retained the tutors, petitioner did not realize that R.B. had a learning disability; according

to petitioner, R.B. experienced "excruciating" difficulty reading.

¶ 74 Petitioner explained on cross-examination that he decided not to enroll R.B. in Prairie Grove after all because Prairie Grove did not tell him specifically what they intended to do to help R.B. Instead, Prairie Grove only told him that he should place R.B. in their school and it would deal with R.B.'s issues.

¶ 75 Petitioner was confronted on cross-examination with his statement that he had not taught J.B. math for about three months on a typical day even though she had tested as behind in math. Petitioner admitted that he had not regularly taught her math during that time, but petitioner explained that he was devoting his time to trial because he was acting *pro se*. According to petitioner, the trial "blew everything apart."

¶ 76 Peggy Gerkin, the guardian *ad litem*, testified that, after hearing all of the testimony and considering all of the evidence, her opinions expressed in her reports remained the same. In her third report, Gerkin recommended that R.B.'s homeschooling be discontinued in favor of public school, which would provide the structure and services necessary to allow R.B. to obtain an education. She also recommended at least annual testing for both children and, if J.B. were not at grade level, then homeschooling should also be discontinued in favor of public school. Gerkin also criticized both parents for not recognizing R.B.'s issues at any time in 2010, 2011, or 2012. Gerkin also opined that petitioner was in denial about the seriousness of R.B.'s issues with his letter to respondent's then attorney, stating that R.B. was making great progress, illustrating the depth of petitioner's self-delusion. Moreover, Gerkin believed that petitioner's response to R.B.'s learning issues was not swift and proper and caused unnecessary delays in addressing R.B.'s needs. As of the third report, however, Gerkin believed that both parents were aware of R.B.'s problems, but neither knew what to do about them, and the parties fundamentally

disagreed about how to address R.B.'s issues.

¶ 77 Gerkin recommended that both parties participate in educational decisions. She did not recommend that either parent should receive sole custody over the other, but recognized that joint parenting was problematic given the history in the case. Regarding respondent's previous behavior, Gerkin testified that respondent was not currently speaking ill of petitioner or otherwise attempting to disrupt the children's relationship with petitioner. Moreover, respondent appeared to accept the gravity of R.B.'s learning issues and to be more amenable to addressing them directly. Gerkin also recommended that, regardless of the custody decision, each parent should receive equal parenting time.

¶ 78 The trial court granted respondent's petition and modified the custody arrangement, granting respondent sole custody of the children. In issuing its order, the court expressly noted that it had carefully considered all of the evidence and exhibits adduced over the course of the hearing. We reproduce the trial court's summary of evidence and its analysis and decision. First, the evidentiary summary:

> "The focal point of the hearing was the issue of whether the educational needs of the children, most notably [R.B.], are being met by [petitioner].
>
> The children, both of whom were born in China and adopted at a very early age by the parties, have been home schooled all their lives; first by [respondent] prior to the divorce, and then by [petitioner] since then.
>
> It became apparent at an early age that [R.B.] was having difficulty reading. [Respondent] raised concerns about that to [petitioner] in 2011. Eventually, [petitioner] agreed to have her tested. The testing was performed by the Prairie Grove School in October, 2012, and the results disclosed in December, 2012.

Cathleen Riley, school psychologist for Prairie Grove, testified as to the testing process and results. The testing showed that [R.B.'s] reading was significantly below normal (in the 3% range). Her IQ score was 72, also below normal. [R.B.] also showed signs of being ADHD. As part of the testing process, Ms. Riley visited [petitioner's] home to observe [petitioner's] teaching. She testified that his teaching methods did not appear effective and opined that the home schooling instruction given to [R.B.] was not sufficient. She testified regarding concerns over the lack of structure in the children's school day (*i.e.*, [R.B.] told her she had her afternoons free).

Ms. Riley discussed [R.B.'s] test results with [petitioner] and [respondent] and made certain recommendations. Those recommendations included enrolling [R.B.] at Prairie Grove so she could be eligible for special education services, and formal tutoring. Initially, [petitioner] agreed to enroll [R.B.] at Prairie Grove, then changed his mind. Ms. Riley testified how [petitioner] spoke at length about his aversion to public schools, which appears to have stemmed from his own difficulties in the public school system.

[Petitioner] decided not to follow Prairie Grove's recommendations and instead chose to attempt to address [R.B.'s] reading deficiencies himself. Notably, the evidence established that [petitioner] has no teaching certification or credentials. In fact, he does not even have a college degree (he has approximately three semesters of credits). He works out of his home as a computer programmer. He has no training in special education.

[Petitioner] was convinced that he was making progress with [R.B.] On February 15, 2013, he wrote a letter *** to [respondent's] previous attorney, Randall Baudin ([respondent] had threatened litigation over [R.B.'s] education), stating that [R.B.] was

making 'unprecedented' progress and was 'whizzing through books'. Significantly, those statements were made a year and a half **before** [R.B.] was tested and found to be reading eleven (11) words per minute, a low first grade level.

The educational plan for [R.B.] remained essentially unchanged until the summer of 2014, after [respondent] filed her original Petition to Modify Custody and the GAL was appointed. David did hire Katherine Eeg to work with [R.B.] on her reading. However, Ms. Eeg utilized a traditional reading program that was not tailored to [R.B.'s] reading deficiencies and her yet undiagnosed (but suspected) learning disability. Ms. Eeg made little progress with [R.B.]

[Petitioner] did agree in June of 2014 to send [R.B.] to a formal tutoring center, The Road to Learning. [R.B.] failed the initial screening there because she was so far behind. She went through a remedial program that she eventually passed, which allowed her to commence instruction. She was diagnosed with dyslexia. When [R.B.] began Road to Learning, she was reading eleven (11) words per minute, a low first grade level. In her most recent testing, after several months of tutoring, she is reading 24 words per minute. That is still well below the normal reading level of 115 words per minute for children of her age.

During the same time period, the parties agreed to have [R.B.] evaluated by a psychologist, Dr. Leonard Koziol. Dr. Koziol's test results showed an IQ of 72, poor working memory, very limited sight vocabulary, reading disorder, and symptoms of ADHD. He indicated that [R.B.] 'functions within the borderline to low-average range of intelligence.' He diagnosed dyslexia, a math disorder, and ADHD. He stated that [R.B.] required an organized reading program, math intervention (she had only basic counting

ability) and recommended a psychotropic medication evaluation to address the ADHD.

Eventually, the parties complied with Dr. Koziol's recommendations for a psychotropic medication evaluation and sent [R.B.] to Fareha Malik, M.D. Dr. Malik prescribed Adderall for [R.B.] That medicine does appear to help [R.B.] focus.

[Petitioner] has recently hired Elizabeth Wood to tutor [R.B.] Because finances are an issue, Ms. Wood has agreed to tutor [R.B.] for free, at least for now. Ms. Wood is a certified special education teacher. Currently, Ms. Wood tutors [R.B.] four hours a week in math and reading. [Petitioner] testified that he sees Ms. Wood as a consultant and that he would defer to Ms. Wood on decisions as to [R.B.'s] academic future. He has not ruled out removing [R.B.] from Road to Learning and relying exclusively on Ms. Wood. Lisa Stankus, Director of Road to Learning, testified to coordination concerns with private tutors such as Ms. Wood.

Although [R.B.'s] education is supplemented by outside sources (Road to Learning, Ms. Wood, one-day-a-week home school cooperative Heartland), the majority of her education (at least four hours a day) is governed by [petitioner]. Ms. Stankus was critical of [petitioner's] reading methods with [R.B.], stating the nature of the books is too young (babyish) for a fifth grader like [R.B.] She also emphasized that [R.B.] needs a highly structured learning environment.

In regard to [J.B.'s] education, she has tested average or above in all subject areas, except math, where she is below grade level. Despite that deficiency, [petitioner] admitted he has not taught [J.B.] math in over three months and could not describe what she is currently studying in math. Recently, [J.B.'s] only math instruction has come from the one-day-a-week visits to Heartland.

[Respondent] testified that if she was granted custody of the children, she would place [R.B.] in public school, likely for half days. She is not [averse] to continuing some kind of home schooling and involving [petitioner] in that. She would continue with Road to Learning. In regard to [J.B.], she would have her tested in all subject areas. If she was at grade level or above, [respondent] would continue with home schooling. If not, she would enroll her in public school." (Emphasis in original.)

¶ 79 The trial court then presented its analysis and decision:

"To modify custody, it must be established by clear and convincing evidence that there has been a change in circumstances of the child and that a change in custody is necessary to serve the best interest of the child.

Thus, the first issue for the Court to determine is whether there has been a change in circumstances with the children. [Respondent] contends that the change in circumstances is [petitioner's] negligence in educating the children. The Court agrees that the children's educational regimen and their educational progress (or lack thereof) constitutes a substantial change in circumstances under the circumstances. Prior to the Judgment of Dissolution, the children were home schooled; however, their primary teacher was [respondent]. When [petitioner] gained custody in the divorce, he became the instructor. That was a significant development in the education of the children, especially as to [R.B.] [Petitioner] had not training, experience, or certification as a teacher before he assumed the role of the children's instructor. [Petitioner's] lack of credentials became especially problematic when it became clear that [R.B.] is a special needs child.

[Petitioner's] inadequacies as an instructor go beyond his lack of credentials.

Children require structure in their education regimen. [Petitioner] provides very little. This was noted by Ms. Riley when she observed his teaching and confirmed by [petitioner] himself who testified that his 'home school' does not have a start time or set times for class subjects. The children may spend the entire 'class day' in their pajamas. They spend a significant part of the day watching non-interactive videos, and [petitioner] does not appear to place the proper emphasis on fundamentals. He points with pride to the fact that [R.B.] knows the name of an 18th century economic treatise, yet glosses over the fact that she is a fifth grader who reads at a first grade level and can only do simple arithmetic. He vacillates between teaching curriculum which is way above [R.B.'s] level (*i.e.*, anatomy) to having her read kindergarten type books (conversely Road to Learning provides books with suitable content and appropriate vocabulary for [R.B.'s] reading level). He has not taught [J.B.] math in three months. The lack of structure is highly problematic for [R.B.], who as a special needs student requires a highly structured learning environment according to several professionals who testified.

Additionally, to be an effective teacher, one needs to be an effective communicator. [Petitioner] simply is not, at least verbally. The written transcript of this hearing will not convey the consistent, lengthy pauses (some exceeding a minute) in between questions when [petitioner] was examining witnesses. While some of that is undoubtedly due to [petitioner] being *pro se* and not familiar with the litigation process, a significant portion of it is attributable to [petitioner's] personality. He struggles to convey concepts verbally. This is not due to a lack of intelligence. He understands the procedures and articulated himself well in his written closing argument. Regrettably, that skill is of little assistance to [R.B.] as effectively she cannot read.

Understandably, much of the focus of the hearing was on [R.B.'s] learning issues. However, [petitioner's] shortcomings as an instructor also apply to [J.B.] His ineffective teaching methods result in [J.B.] not reaching her full potential as a student.

[Petitioner] argues that there has been no change in circumstances because [R.B.'s] learning difficulties are innate and biological. In other words, [R.B.] has always had a learning disability and thus there can be no change in circumstances as to her education. [Petitioner's] logic is flawed. When the parties divorced [R.B.] was six, the age when children are just beginning to read. A six-year-old who cannot read is not unusual; an eleven-year-old who cannot read is a travesty. Furthermore, if [R.B.'s] issues are biological as [petitioner] contends, and she is simply of below average intelligence and will remain so throughout her life, that does not mean she should not have the opportunity to learn from teachers trained to help her maximize her abilities.

For all of the above reasons, the Court finds that there has been clear and convincing evidence that there has been a change in circumstances of the children of the parties based on facts that have arisen since the Judgment of Dissolution. Thus, the Court must then determine if modification of custody is necessary to serve the best interests of the children.

Under [section 602 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602 (West 2014))], the Court is to consider certain enumerated factors set out in that subsection. However, the Court's consideration is not limited to the listed factors, but is to include all relevant factors.

The Court shall first address and analyze the factors listed in [section 602].

Statutory Best Interest Factors

1. The wishes of the child's parent or parents as to his/her custody.

Here, both parties seek sole custody of the children. The Court finds this factor does not favor either party.

2. The wishes of the child as to his custodian.

According to the GAL, both [J.B.] and [R.B.] wish [petitioner] to retain custody. [J.B.] wrote a letter to the GAL explaining her reasons for wanting to remain with her father. It appears that a significant factor in [J.B.'s] position is her desire to not go to public school. Diluting the significance of the children's positions is the fact that [petitioner] has openly discussed the court case with them. The Court finds this factor favors [petitioner].

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.

It is clear to the Court that both [petitioner] and [respondent] provide loving environments for the children. The two children are extremely close. [R.B.] is especially dependent on [J.B.] The Court finds this factor does not favor either party, however, [it strongly] favors keeping the two children together.

4. The child's adjustment to his home, school, and community.

The children have resided with [petitioner] for the past five years. Changing custody would require a significant adjustment by the children as to their school, especially as to [R.B.], as [respondent] is committed to placing her in public school. The fact that both parties reside in Crystal Lake lessens the significance of any adjustment as to community if custody was modified. The Court finds this factor favors [petitioner].

5. The mental and physical health of all individuals involved.

Here, there is no evidence of any mental or physical health issues for [petitioner], [respondent], or [J.B.] [R.B.] has a significant learning disability. The Court finds this factor favors [respondent] as she is more willing to seek professional intervention to address [R.B.'s] disability.

6. The physical violence or threat of physical violence by the child's parental custodian, whether directed against the child or directed against another person.

Here, there was no evidence of physical violence or threat of same by either party. Therefore, the Court finds this factor does not favor either party.

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.

During the pendency of the divorce, [petitioner] obtained a Plenary Order of Protection against [respondent]. That Order eventually expired without incident and there was no evidence of ongoing or repeated abuse since then. Under the circumstances, the Court finds this factor does not favor either party.

8. The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

[Petitioner] placed great emphasis at the hearing on his alleged open-ended parenting time policy with [respondent]. He testified that he often invites [respondent] to outings with the girls, however, his encouragement for family outings is a little misplaced as the parties are divorced. In actuality, [respondent's] parenting time has gone down

since the divorce. Originally, [petitioner] allowed [respondent] visitation every weekend even though her Court ordered visitation was only every other weekend. However, once [respondent] sought to lower her child support, he enforced the Court ordered every other weekend visitation.

[Petitioner] testified that he encourages the children to be close to their mother. However, he has continued a consistent dialogue with the children about [respondent's] Petition to Modify Custody which undoubtedly has put a strain on the relationship between the girls and [respondent].

The Court finds this factor does not favor either party.

9. Whether one of the parents is a sex offender.

This factor is not applicable.

10. The terms of a parent's military family-care plan.

This factor is not applicable

As referenced before, the Court's consideration of the best interests of the children is not limited to the statutory factors analyzed above, but rather is to include all relevant factors. *In re Marriage of Fahy*, 208 Ill. App. 3d 667, 695 (1st Dist. 1991). Here, a significant, even overriding factor is the deficiencies in the home school education of the children by [petitioner]. The importance of education cannot be overstated and has been commented on throughout history by scholars, from Plato ('The direction in which education starts a man will determine his future in life.') to Benjamin Franklin ('An investment in knowledge pays the best interest.') Here, to allow these children's education to continue on its present course is to have them go through life with one arm tied behind their back.

[Petitioner] denies there are deficiencies in his home schooling approach and, in fact, claims that purely from an academic standpoint, [R.B.] is better served being home schooled by him than in a public school. He even goes so far as to say that [R.B.] can be 'autodidactic,' meaning self-taught, with all of her issues (dyslexia, ADHD, reading level in the [third] percentile, working memory in the [second] percentile). That statement and others like it by [petitioner] ([R.B.] is whizzing through books) are so divorced from the realities of [R.B.'s] situation as to border on being delusional.

The GAL has concluded that [R.B.] is intelligent and is being held back by her learning disabilities, which can be overcome with the help of trained professionals. However, even if the level of R.B.'s intelligence is debatable, there is no debating the fact that her educational needs are not currently being met, nor have they ever been met since [petitioner] gained custody.

[Petitioner] points to the changes he has made in [R.B.'s] education, such as hiring tutors like Road to Learning and Elizabeth Wood, and allowing [R.B.] to go on ADHD medication to demonstrate his commitment to [R.B.'s] education. While these changes are indeed positive, they must be examined in context.

Numerous neutral observers (*i.e.*, GAL, Cathleen Riley, Dr. Malik) have described [petitioner] as resistant to change and/or defensive in the area of the children's education. [Respondent] had to prod [petitioner] for a significant time before he would agree to have [R.B.] tested, even when it was becoming apparent she had significant learning issues. When he finally did have [R.B.] tested, he chose to ignore all of the school's recommendations. [Petitioner's] refusal to get [R.B.] any professional help led to [respondent] filing a Petition to Modify Custody seeking court intervention. A GAL

was appointed who made it clear from the outset that [R.B.] needed professional help. While [petitioner] is a caring father who undoubtedly would like to see his daughter succeed, his eventually obtaining professional tutors was likely motivated in significant part by [respondent's] Petition to Modify Custody.

While [petitioner] has obtained professional tutors for [R.B.], he is still her primary instructor. Elizabeth Wood is tutoring four hours a week; Road to Learning, three. That leaves the majority of [R.B.'s] instruction time to [petitioner] (at least four hours per day). Thus, most of [R.B.'s] education is being provided by an unqualified instructor. The supplemental tutoring is not sufficient to overcome that.

Furthermore, there is no guarantee that the supplemental tutoring will continue. According to the GAL, [petitioner] sees [respondent's] Petition to Modify Custody as a hurdle to be overcome, and once that is accomplished, he will resume total control of educational decisions for [R.B.] As [petitioner] is convinced his home school program is working, he may choose to remove professional tutors once the prying eyes of the Court are removed.

Even if [petitioner] wishes to continue with professional tutoring, financially it may not be possible. He cannot afford to pay Elizabeth Wood. Out of kindness, she has agreed to tutor [R.B.] for free; there is no guarantee that altruism will continue. Even if it does, [petitioner] may be tempted to drop Road to Learning and leave [R.B.'s] reading instruction to Ms. Wood to save costs. Such a decision would be problematic as Road to Learning is the only tutor specifically trained to address [R.B.'s] dyslexia.

Even if [petitioner] decides to, and is financially able to continue [R.B.'s] current tutoring program, it should be a supplement to [R.B.'s] education, not the core. [R.B.]

needs full-time instruction by trained professionals. If the parties cannot afford that in a private school setting, the only viable option is a public school. [Petitioner] claims he has not ruled out a public school for [R.B.] in the future. The Court does not find that testimony credible. It is clear to the Court that [petitioner] has been so jaded by his own public school experiences that it is highly unlikely he will ever voluntarily place either of the children in a public school.

As referenced above, [J.B.'s] educational needs are not being met either. That is a significant factor in considering best interests. Her test scores suggest she is college material, but if her current educational course remains unaltered, she may well be ill-equipped for college. She also deserves the best opportunity to succeed in life.

[Respondent], conversely to [petitioner], is open to placing the children in a public school. In fact, she is committed to it for [R.B.]

For all of the above reasons, under the unique circumstances of this case, the Court finds that [respondent] has proven by clear and convincing evidence, upon the basis of facts that have arisen since the Judgment of Dissolution, that a change has occurred in the circumstances of the children and that after consideration of all relevant factors, including those set out in [section 602 (750 ILCS 5/602 (West 2014))], that modification is necessary to serve the best interests of the children. Sole custody of the minor children, [J.B.] and [R.B.], shall be awarded to [respondent], effective immediately.

The Court is cognizant of the adjustments this modification to custody will entail in the lives of the children, and it is the Court's goal to ease this transition as much as possible. [Respondent] has proposed essentially a 50/50 parenting time arrangement.

That strikes the Court as appropriate and in the children's best interests under the circumstances.

To ease [R.B.'s] educational transition, [respondent] proposes, with the school's input, that [R.B.] go a half day to the public school. That makes sense as a transition. It is the Court's fervent hope that the transition will be relatively short and that [respondent] will give strong consideration to placing [R.B.] in a public school full-time in the near future and phase out the home school program entirely. [Respondent], like [petitioner], is not a trained special education teacher like [R.B.] needs. Likewise, the Court hopes that [respondent] will consider placing [J.B.] in a public school regardless of her test scores. She has lost precious time and would likely benefit from a structured, professional education. It should be noted that the Court's comments should not be construed as a criticism of home schooling as an institution, but rather a conclusion that, under the unique circumstances of this case, home schooling does not appear to be in the best interests of the children, certainly at least as to [R.B.]

The Court decision to modify custody is not made lightly or without consideration of less drastic measures. The GAL recommends that the Court order regular testing of the girls and monitor their education. The Court is concerned that under such a scenario, the parents' constitutional rights would be infringed. The GAL also suggests that [respondent] be given sole decision making as to the children's education, but all other custody powers remain with [petitioner]. [Respondent's] counsel also suggests that as an alternative to her request to change custody, citing [section 608(a) (750 ILCS 5/608(a) (West 2015))] as authority to do so. The Court does not agree that [section 608(a)] provides a mechanism to parse custody decision making in such a fashion.

> Section [608(a)] states:
>
> > 'Except as otherwise agreed by the parties in writing at the time of the custody judgment or as otherwise ordered by the Court, the custodian may determine the child's upbringing, including but not limited to his education, healthcare, and religious training, unless the Court, after hearing, finds, upon motion by the noncustodial parent that the absence of a specific limitation of the custodian authority would clearly be contrary to the best interests of the child.' [750 ILCS 5/608(a) (West 2014).]

Unfortunately, Section 608(a) is silent as to what limitations may be placed on the custodian, whether custodial powers may be divided between the parties, and what role, if any, the court is to play in that process. Even assuming *arguendo* that Section 608(a) would allow division of custodial duties, such a division may lead to further conflicts between the parties and may not be in the best interests of the children. Furthermore, a school may not recognize such an arrangement (*i.e.*, an out-of-district 'educational' custodian seeking admission of the child). In sum, the Court is not convinced that a transfer of custodial 'education' decision-making only to [respondent], with [petitioner] retaining all other custodial powers is statutorily allowable or in the best interests of the children.

Furthermore, the Court agrees with the GAL's assessment that joint custody is not a viable option here. The parties clearly cannot agree as to the children's education. There are also significant residual bad feelings from the divorce that inhibit a joint parenting process.

The Court's frank criticisms of [petitioner's] education of his children are not

> meant to embarrass or belittle him. Rather, they are necessary to make a clear record of those deficiencies, the significant adverse effect those educational decisions have had on the best interests of the children, and the overwhelming need to address those issues immediately. [Petitioner] is a loving, caring, and in his own way, well-meaning parent, but he is not the qualified teacher his children need. Unfortunately, he is not equipped to address the educational needs of his children and is unwilling to take the necessary steps to ensure those needs are met by others. Thus, the Court is compelled to intervene. It is truly regrettable it has come to this."

¶ 80 Following the entry of the trial court's decision, petitioner filed a timely motion to reconsider. On June 30, 2015, the trial court denied respondent's amended motion to reconsider, specifically noting that, at the hearing on respondent's petition to modify custody, overwhelming evidence was presented demonstrating that petitioner was not meeting the children's educational needs. Petitioner timely appeals.

¶ 81 II. ANALYSIS

¶ 82 On appeal, petitioner argues that the trial court abused its discretion in refusing to allow him to question respondent about her current mental state. Petitioner also contends that the trial court's decision to award respondent sole custody of the children was against the manifest weight of the evidence. We consider each point in turn.

¶ 83 A. Respondent's Current Mental State

¶ 84 In his initial argument on appeal, petitioner contends that the trial court abused its discretion in refusing to admit evidence or permit inquiry regarding respondent's current mental state. The admissibility of evidence is within the trial court's discretion, and the trial court's

determination will not be disturbed absent an abuse of that discretion. *In re Marriage of Agers*, 2013 IL App (5th) 120375, ¶ 14.

¶ 85 Petitioner argues that evidence of respondent's current mental state was relevant under section 602 of the Act, particularly under the factors dealing with the mental health of the parties and the willingness of the parent to facilitate a relationship between the children and the other parent. 750 ILCS 5/602 (West 2014). We agree with petitioner that, in a general sense, such evidence is relevant and admissible. We turn, then, to petitioner's specific contentions.

¶ 86 Petitioner points to three instances where he believes the trial court improperly precluded mental-state evidence. First, petitioner asked Fetzner how she first came to treat the children. Fetzner replied that she first saw the children in 2007. When Fetzner continued her answer, respondent objected that the answer was a narrative, and this was sustained, with the trial court striking the narrative portion of Fetzner's answer. Petitioner then asked why the children were brought to see Fetzner. Respondent objected on the ground of relevance, arguing that what respondent did in 2007 was not relevant to the modification of custody. Petitioner argued that the question established respondent's current relationship with Fetzner, as well as the history of Fetzner's relationship with the children. The trial court sustained the objection.

¶ 87 We hold there was no abuse of discretion regarding this line of questioning. Respondent's mental state in 2007 may have some relevance to her mental state at the time she filed her petition to modify and at the time of the hearing, but the questioning would have to tie it together. Petitioner's question of how Fetzner came to be involved was unobjectionable, being obviously preliminary. Fetzner's reply, that she started seeing the children in 2007, gave background information. Fetzner's volunteered response as to why she became involved was narrative, and the objection was properly sustained. When petitioner asked why Fetzner saw the

children, he was unable to articulate a reason that would tie respondent's mental state in 2007 to her mental state at times relevant to the hearing, and specifically, that her mental state remained aberrant at that point. Moreover, petitioner did not indicate that respondent had a current relationship with Fetzner or any other basis whereby Fetzner could have judged respondent's current mental state. Thus, the questioning of Fetzner about the children's original treatment was not, in fact, relevant to the issue of respondent's current mental state, and the trial court did not abuse its discretion in sustaining the objection. Finally, the trial court did not preclude further inquiry, assuming petitioner would have been able to demonstrate relevance; rather, petitioner moved on to another topic of inquiry.

¶ 88 We also note that, before the hearing, respondent moved *in limine* to preclude inquiry into facts or events that existed before the entry of the judgment of dissolution. The trial court denied the motion *in limine*, but it admonished the parties, pursuant to *Johnson*, 34 Ill. App. 3d at 367, that a proponent of evidence had to make sure that he or she established the proper foundation in order to introduce evidence about facts or events existing before the entry of the judgment of dissolution.[1] Based on the trial court's admonition, we perceive that petitioner did not attempt to establish a foundation that would show why the children's initial treatment by Fetzner would shed light on her current mental state; moreover, petitioner did not attempt further inquiry or otherwise attempt to demonstrate the necessary relevance, such as through an offer of proof (although petitioner did make offers of proof at other times during the hearing).

[1] Petitioner seeks to distinguish *Johnson*. Based on our resolution of each of the issues raised by petitioner, we need not address whether the court's reliance on *Johnson* was appropriate.

Accordingly, we hold that the trial court did not abuse its discretion with regard to this line of inquiry.

¶ 89 Next, petitioner contends that the trial court abused its discretion in precluding Fetzner's testimony about the results of a counseling session with R.B. prompted by an incident in which respondent discovered that R.B. was holding a large amount of cash. This line of inquiry followed the questions about Fetzner's therapeutic treatment of the children.

¶ 90 Petitioner initially attempted to elicit how the children handled the divorce. This line of inquiry prompted a number of objections from respondent. The trial court eventually excused Fetzner and held a sidebar colloquy with petitioner, respondent, and the guardian *ad litem*. The trial court noted that petitioner appeared to be posing questions to Fetzner designed to elicit information about his parenting even though respondent's petition and her case-in-chief focused on academic and educational issues. The trial court asked petitioner what was the relevance of how the children felt about the divorce to the issue of academics brought out in the petition to modify and during respondent's case-in-chief. Petitioner stated that he was focusing on the factors enumerated in section 602 (and the trial court reminded petitioner that it would consider not only the enumerated factors, but anything else relevant to the children's best interests), and explained that he believed the inquiry of Fetzner touched on persons who affected the children's best interests in that, according to petitioner's informal offer of proof, he preserved the counseling relationship between Fetzner and the children while respondent wished to sever that relationship. Petitioner also indicated that Fetzner would comment on respondent's willingness to facilitate a relationship between the children and petitioner. Respondent expressed skepticism that Fetzner was qualified to offer such commentary because she had not seen respondent since before the divorce was finalized. The trial court agreed with the sentiment and noted it was not

foreclosing the inquiry, but expressed doubt that petitioner would be able to establish a foundation, and it expressly noted that petitioner's invocation of the section 602 factors was proper. The examination then continued.

¶ 91 Fetzner testified that, in November 2013, petitioner brought R.B. in specifically to discuss the incident in which respondent discovered R.B. with a large amount of cash. Petitioner established his reasons for requesting the counseling session in considerable detail, noting that respondent had become alarmed at finding that R.B. had a large amount of cash in her possession. Petitioner also sought to learn why R.B. had the cash and to address any impact on R.B. from the incident. Petitioner established that Fetzner believed he had not questioned or coached R.B. before the counseling session; Fetzner asked questions of R.B. to learn about the circumstances of the incident and later shared R.B.'s responses with petitioner. Petitioner asked Fetzner what R.B. told her, and respondent's objection to the hearsay nature of that question was initially sustained, but petitioner argued that Fetzner was a mental health counselor even if she had not been properly disclosed as an expert witness able to give her opinions, and the trial court allowed the answer. Fetzner testified that R.B. stated that she stole the money from petitioner's wallet, and R.B. was aware that respondent thought she was keeping secrets with petitioner from respondent. Respondent objected, contending that what respondent thought conveyed through R.B. to Fetzner was not relevant. The trial court sustained the objection.

¶ 92 Petitioner does not directly argue how this specific answer, that in 2013, R.B. was aware that respondent thought she was keeping secrets, is relevant to respondent's current mental state. Likewise, petitioner does not directly argue the effect of precluding this evidence or how it affected his case. Instead, petitioner argues only that, in general, a party's current mental state is relevant to the modification of custody. This level of argument is plainly insufficient. Petitioner

did not make an offer of proof, although, on appeal, petitioner wishes us to infer the precise argument he does not actually make, which we believe to be that the incident showed that respondent was harboring delusional thoughts about petitioner, much as she falsely believed that petitioner had abused the children when, prior to the divorce, she absconded with the children and hid them from petitioner. While we might be willing to agree that Fetzner's testimony about R.B.'s awareness that respondent believed she was keeping secrets with petitioner could be potentially relevant, we note that petitioner did not call any witnesses who testified about respondent's current mental state, and he did not make any offers of proof addressing respondent's current mental state. Thus, even if the excluded testimony were potentially relevant, petitioner did not actually seek to close the loop and actually make it relevant. Accordingly, we cannot say that the trial court abused its discretion as to this testimony.

¶ 93 Finally, petitioner argues that the trial court abused its discretion by precluding him from inquiring of respondent her reasons for believing that he was going to have Yeschek arrested at the Celebrate Recovery program. In his case-in-chief, petitioner was conducting an adverse examination of respondent. Petitioner began questioning respondent about the accuracy of statements she made to the guardian *ad litem*, including whether respondent told the guardian *ad litem* that she was worried petitioner would have Yeschek arrested before a particular Celebrate Recovery meeting. After establishing that the guardian *ad litem* had accurately reported the content of the phone call, petitioner then asked whether respondent believed that her conclusion that he would have Yeschek arrested was a rational understanding or rational inference from the facts as respondent knew them. Respondent objected, arguing that her belief about petitioner was not relevant. Petitioner argued that, in the guardian *ad litem*'s report, she had impugned his character, and it reflected a currently irrational mental state. The trial court sustained the

objection on the ground of relevance, holding it was not relevant to the issue of the children's best interests.

¶ 94 Petitioner was allowed to make an offer of proof. The offer of proof consisted of petitioner asking respondent whether, pursuant to the facts as she knew them, a belief that he might have Yeschek arrested was a rational inference, to which respondent responded, "Yes." Petitioner then concluded the offer of proof without further inquiring into the basis of respondent's belief.

¶ 95 Once again, petitioner does not actually provide specific argument as to why this question or potential line of inquiry is relevant, remaining satisfied with the general contention that evidence pertaining to a party's current mental state is relevant. In order for the question to be relevant under the general standard, respondent's inference that petitioner was going to have Yeschek arrested would have to be, in fact, irrational. The irrationality of that belief is not necessarily evident on its face, because respondent did not seek to demonstrate that the belief was either completely unwarranted based on the circumstances that existed at that time or was otherwise unfounded or perhaps based on respondent's unfair view of his character and capabilities. We do not know if petitioner had caused other people to be arrested previously, had threatened to have people arrested, or had never made such a threat. Once again, the line of questioning seems potentially relevant, but because of the insufficient nature of petitioner's offer of proof, it cannot realize its potential of relevance. Accordingly, we again determine that we cannot say that the trial court abused its discretion in precluding this evidence.

¶ 96 We also note that, even if each of the questions or lines of inquiry were erroneously precluded, petitioner did not develop his argument sufficiently to demonstrate that any of the preclusions resulted in prejudice to his case. While a trial court enjoys substantial discretion

over evidentiary rulings, a party is not entitled to reversal based on the trial court's erroneous evidentiary rulings unless the error substantially prejudiced that party and affected the outcome of the case. *Kovera v. Envirite of Illinois, Inc.*, 2015 IL App (1st) 133049, ¶ 55. The party seeking reversal of the trial court's decision bears the burden of establishing such prejudice. *Id.*

¶ 97 Here, petitioner has contended only that the trial court erred in excluding the evidence. Petitioner has not contended that he was prejudiced as a result of the errors, let alone carried his burden of demonstrating substantial prejudice affecting the outcome of the case. Accordingly, petitioner cannot establish the grounds necessary for us to reverse the trial court even if it erred in excluding the complained-of evidence or lines of inquiry, and we reject petitioner's contention.

¶ 98 B. Award of Sole Custody to Respondent

¶ 99 Petitioner next contends that the trial court's decision to award sole custody of the children to respondent was against the manifest weight of the evidence. Section 610 of the Act allows modification of custody, absent agreement, only if the trial court finds, by clear and convincing evidence, based upon facts that have arisen since or were not known at the time of the prior judgment, that modification is necessary to serve the children's best interests. 750 ILCS 5/610 (West 2014); *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004). Section 610 prescribes a two-step process to modify custody: first, there must have been a change in circumstances, and second, modification is necessary to serve the best interests of the children. 750 ILCS 5/610(b) (West 2014); *In re Marriage of Debra N. and Michael S.*, 2013 IL App (1st) 122145, ¶ 47. The trial court's decision regarding the modification of a custody judgment will not be disturbed unless it is against the manifest weight of the evidence. *Marriage of Bates*, 212 Ill. 2d at 515. In reviewing whether the trial court's judgment is against the manifest weight of

the evidence, the reviewing court considers the evidence in the light most favorable to the appellee; where that evidence permits a number of reasonable inferences, the reviewing court will accept those inferences that support the trial court's order. *Id.* at 516. Finally, the trial court's decision is accorded this level of deference because the trial court is in a superior position to judge the credibility of the witnesses and to determine the best interests of the children. *Id.* With these standards in mind, we consider petitioner's contentions regarding the trial court's decision to modify the custody order.

¶ 100 Petitioner first contends that the trial court's determination that there was a change in circumstances was against the manifest weight of the evidence. In support, petitioner argues that the children have always been homeschooled and R.B. has always faced learning disabilities. According to petitioner, the existence of these facts predated the dissolution and cannot constitute a statutory change in circumstances. We disagree.

¶ 101 The evidence showed that the children were homeschooled both during the marriage and after the dissolution. During the marriage, respondent undertook the primary responsibility to direct the parties' homeschooling efforts. After the dissolution, petitioner took over the homeschooling responsibilities. The evidence also showed that, in 2012, R.B. was tested and found to be significantly behind grade level in her reading ability. Closer to the hearing, when R.B. was in fifth grade, testing revealed that she was reading at a low first-grade level. Additionally, testing revealed that J.B. was significantly behind in math. Close in time to the hearing, petitioner admitted that, despite J.B.'s math deficiencies, he was not regularly providing her with math lessons. Finally, evidence was presented showing that petitioner was unwilling to consider options apart from primarily homeschooling the children with a modicum of outside tutoring. Based on these facts, the trial court concluded that the children were falling behind

academically, the children were not making up any of the ground that they were losing, and petitioner's insistence on homeschooling with himself as the primary instructor indicated that prospects were low that the children would begin to make up the academic ground they were continually losing. The trial court held that the falling academic performance of the children relative to their ostensible grade levels constituted a substantial change in circumstances arising from facts that had developed since the dissolution. We cannot say that this conclusion was against the manifest weight of the evidence.

¶ 102 Petitioner argues that he had engaged tutors to help R.B. with her reading deficiencies, and that R.B. had demonstrated some significant improvement in her reading ability. We agree that the evidence showed that R.B. was receiving tutoring that had improved her reading ability. The fact remains unchanged, however, that R.B.'s reading ability, while improving, remained cripplingly below grade level: R.B. was a fifth grade student, but read only at a low first grade level. During the three years from her original testing, R.B. went from illiteracy to a first-grade reading level, which suggests that she was not progressing even at a grade level for each year, but was falling further behind despite petitioner's efforts and the efforts of the tutors. Accordingly, the fact that R.B. was progressing does not outweigh the fact that she continued to fall further behind despite petitioner's presumably best efforts. Thus, we cannot say the fact that R.B. was slowly progressing somehow compensates for the fact that she was continuing to fall further behind academically.

¶ 103 Additionally, petitioner's argument is troubling. According to petitioner, the children started behind and at the hearing, the children remained behind, so there is no change in their circumstance. We cannot, as a matter of sound public policy, accept such an argument. It is in the children's best interests to realize their academic potential. To accept petitioner's argument

is to simply shrug our shoulders and ignore the children's academic potential and condemn them to some sort of stasis, effectively saying the children do not deserve the best efforts of educators to help them reach and fulfill their potential. We do not believe that either petitioner or respondent wish anything but the best for their children. Petitioner's argument, however, suggests that we and they should accept the current and subpar status quo. We reject this contention.

¶ 104 Petitioner's argument, that R.B. always experienced learning disabilities and so the diagnoses of dyslexia and attention deficit hyperactivity disorder after the dissolution cannot constitute a change in circumstance, fares no better. The evidence showed that, at the time of the dissolution, R.B. was not reading. In 2011, respondent began lobbying petitioner to have R.B. undergo testing for learning disabilities. In 2012, petitioner finally agreed to have R.B. undergo testing, and, in 2014, the parties received definitive diagnoses for R.B.'s learning disabilities. We fail to see how the ripening of a suspicion (which could and should have been acted upon more quickly) into certainty does not constitute a change in circumstances. Further, when R.B. was diagnosed, petitioner's efforts did not provide reasonable alleviation or assistance to overcome the learning disabilities identified. We cannot say that the trial court's determination that the definitive 2014 diagnoses constituted a change in circumstance sufficient to justify a modification of custody was against the manifest weight of the evidence.

¶ 105 Petitioner's argument on appeal, that R.B.'s learning disability existed before and at the time of dissolution so it cannot constitute a change in circumstance, is rebutted by the fact that the learning disabilities were, according to petitioner and respondent, only suspected in 2011 and actually diagnosed in 2014. Additionally, the logic of the contention is flawed because children are expected to grow physically, mentally, and academically as they age. To accept this

argument would mean that a child reading at a first-grade level at the time of the divorce has not changed if she is still reading at a first-grade level when she enters high school. Obviously, the child has changed: she has fallen further behind over that time period. Accordingly, petitioner's contention is ill-made and ill taken.

¶ 106 For these reasons, then, we hold that the trial court's determination that the diagnosis of R.B.'s learning disabilities and the children's flagging academic performance constituted a change in circumstance was not against the manifest weight of the evidence. We now turn to the consideration of the children's best interests.

¶ 107 Section 602 of the Act enumerates the following factors to be considered when determining the children's best interests:

> "(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 [(750 ILCS 60/103 (West 2014))], 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).

We note that the factors enumerated in section 602(a) are not exhaustive; the court is to consider any and all relevant factors, even if they are not enumerated. 750 ILCS 5/602(a) (West 2014); *In re Marriage of Martins*, 269 Ill. App. 3d 380, 389 (1995).

¶ 108 Petitioner argues that the court's calculus regarding the enumerated factors should have resulted in finding they all weighed in favor of petitioner or were neutral. Petitioner then contends that the trial court actually ignored the enumerated factors in favor of its determination that, according to petitioner, the children were not being well served by homeschooling. Petitioner argues that the trial court's reliance on the homeschooling factor actually shifted the burden from respondent to prove, by clear and convincing evidence, that a change in custody was in the children's best interests, to petitioner to defend his choice to homeschool the children. The trial court determined that two of the enumerated factors were inapplicable, five of the factors were neutral, two favored petitioner and one favored respondent. The trial court then determined that the enumerated factors did not adequately cover the paramount issue here of the children's academic performance, which it determined to overwhelmingly favor respondent. Petitioner's argument boils down to a rebalancing of the enumerated factors resulting in a stronger balance toward petitioner coupled with a complete discounting of the trial court's academic performance factor because the trial court improperly shifted the burden to petitioner to defend his choice to homeschool the children. We disagree.

¶ 109 If, for the sake of argument, we accept that the trial court's balancing of the enumerated factors should have been four in favor of petitioner and the remaining six being neutral, we do not believe that this would have overcome the trial court's reliance on its academic performance factor. Accordingly, we consider the trial court's treatment of this case's paramount factor.

¶ 110 Contrary to petitioner's view, the trial court focused on the academic progress exhibited by the children, not simply on the homeschool versus public or private school issue. The court noted that the guardian *ad litem*, as well as the neutral observers, all seemed to believe that R.B. was intelligent but needed help to overcome her learning disabilities, and that help was not being sufficiently provided in R.B.'s current educational environment. The court noted that petitioner had made changes, such as engaging tutors and obtaining testing and medication, but petitioner still remained her primary instructor. The court noted that R.B.'s progress was slow and petitioner's belief that he was providing as good an education for her as she could receive with professionals trained to help with R.B.'s specific disabilities was palpably divorced from reality. The trial court also noted that J.B. was not receiving sufficient academic support as evidenced by her significant deficiency in math, compared to her grade-level peers. Finally, the court also noted that there was substantial evidence that petitioner might discontinue outside tutoring either due to his voluntary choice once the custody issue was resolved or due to financial exigencies, so the assistance allowing R.B. to make some minimal progress may ultimately disappear. Additionally, petitioner repeatedly indicated his unwillingness to place the children in a public or private school, and the court concluded that, based on this evidence, there was a significant probability that the academic deficiencies identified by the court would continue unabated. The trial court noted that, by contrast, respondent was open to placing the children in a public school,

especially R.B. As a result of these considerations, the court concluded that it was in the best interests of the children to modify the custody order and award sole custody to respondent.

¶ 111 For his part, petitioner characterizes the trial court's consideration of this point as a shifting of the burden from respondent to prove the best interests of the children to petitioner to defend his choice to homeschool condition. In support, petitioner cites to *In re Marriage of Riess*, 260 Ill. App. 3d 210 (1994). In that case, the court held that the trial court had improperly shifted the burden from the father seeking the custody change to the mother. The court held that little evidence had been presented on the topic of whether homeschooling was having a detrimental effect on the child even thought the trial court relied on the homeschooling issue to modify custody. *Id.* at 219. Here, by contrast, the central issue in the hearing was the academic performance of the children, and substantial evidence was introduced showing that, under petitioner's homeschooling regimen, both children were experiencing significant academic deficiencies. *Riess*, then, is distinguishable.

¶ 112 Moreover, based on the evidence regarding the children's academic performance while homeschooled, we cannot say that the trial court's decision to make it the paramount factor in this case was against the manifest weight of the evidence. Likewise, even if the trial court had balanced the enumerated factors as petitioner suggested, we cannot say it would have changed the outcome, as the trial court expressly stated that the children's academic performance was an overriding factor in its consideration. This conclusion is borne out by the evidence elicited, and we cannot say that the trial court's ultimate determination, that it was in the children's best interests to modify the custody order, was against the manifest weight of the evidence.

¶ 113 III. CONCLUSION

¶ 114 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 115 Affirmed.