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2015 IL App (3d) 150091-U

Order filed July 9, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
JAYME LYNN S. n/k/a)	Will County, Illinois.
JAYME LYNN B.,)	
)	
Petitioner-Appellant,)	Appeal No. 3-15-0091
)	Circuit No. 07-D-2266
v.)	
)	
BRETT S.,)	Honorable
)	Victoria M. Kennison,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's finding that it was in the children's best interest to terminate joint custody and award sole custody to respondent father was not against the manifest weight of the evidence.

¶ 2 Petitioner, Jayme Lynn S., now known as Jayme Lynn B., appeals from an order in which the trial court terminated a joint parenting agreement and awarded sole custody of the children to

respondent, Brett S., with reasonable visitation rights. Because the trial court findings were not against the manifest weight of the evidence, we affirm.

¶ 3

FACTS

¶ 4

The parties were married in May of 1998 and have three children: T.S., born November 10, 1998; H.S., born March 25, 2003; and D.S., born January 14, 2004. On April 28, 2009, the marriage was dissolved by order of the circuit court. On the same date, a parenting agreement was entered granting the parties joint custody of the children, and designated Brett as the primary residential custodian. On April 13, 2012, Jayme filed a petition for modification of custody, in which she alleged that several substantial changes of circumstance had occurred and that it would be in the children's best interest for her to have sole custody.

¶ 5

The court appointed Jennifer Lynch as guardian *ad litem* (GAL). On July 5, 2012, Lynch filed her report recommending that the joint parenting agreement be terminated. In her report, she noted that there had been a significant change in circumstance since the agreement was entered in that Brett's girlfriend, Heather, and her three children had moved into the custodial home. She also observed that Brett and Jayme were unable to co-parent and that significant conflict surrounded routine decisions.

¶ 6

In discussing several best interest factors, Lynch reported that all three children expressed a strong desire to live with Jayme. The children and Heather described Brett's household as "chaotic." All three children told Lynch that Brett frequently yells and curses. They wished to live with their mother because her house was "quieter." During her home visit with Brett's family, Lynch observed the children approach Heather for their needs and interacted normally with Heather, as well as with her children. She did not note any fear in the children of Heather or their father. Lynch stated that she was concerned that the children had a difficult schedule at

Brett's house. She noted that they left the home at 5 a.m. to go to the babysitter because Brett and Heather had to go to work, and she noted that they only had access to one bathroom, which was in the master bedroom. She also stated that the children reported a lack of food at Brett's house. She reported that T.S. told her that the children go without lunch or dinner on occasion and that they have to sneak food up to their rooms at night.

¶ 7 Lynch indicated that the children are well-adjusted socially. She noted that there have been allegations of physical violence made against Brett, but that there have been no indicated reports of abuse by DCFS despite investigations. She further reported that Jayme has not worked with the children to foster respect for their father and that she is "very vocal" that Brett does not have the right to delegate child responsibilities to anyone else. Lynch stated that Jayme does not appreciate that both of Brett's parents and Heather are working to help raise the children and that her lack of gratitude has helped foster ill feelings between the families. She wrote that Brett's frustration with Jayme "appears reasonably grounded in her failure to pay child support, for which there are significant arrears," and noted that the parties had been in court numerous times regarding child support matters since the dissolution judgment. Lynch stated that based on her discussions with Jayme, she was concerned that Jayme would not appropriately include Brett in decision making involving the children. She concluded that Jayme "was in a position to be an appropriate primary custodian" but recommended that Jayme and Brett enroll in high-conflict parenting classes because the lack of communication was detrimental to the children.

¶ 8 On November 16, 2012, Dr. Robert Shapiro was appointed as an evaluator section 604(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/604(b) (West 2012)). He tendered an evaluation to the court on August 19, 2013, which included his investigative finding in favor of Jayme as the custodial parent. The parties stipulated to the contents of the

report in lieu of his testimony. His report contained similar statements by the children that Brett yelled and cursed and was frequently angry. All three children told Dr. Shapiro that they preferred to live with Jayme.

¶ 9 On March 5, 2014, the GAL filed a petition for judicial intervention in which she stated that she received an email from the oldest child, T.S., indicating that Brett and Heather had discussed the case and her report with all three of the children a few days earlier and had threatened the children. She stated that the discussion upset them and averred that she was "deeply concerned about the welfare of the children." An emergency hearing was held that same day, at the conclusion of which possession was transferred to Jayme pending a full custody hearing.

¶ 10 The custody modification hearing began on May 5, 2014. Dr. Dirk Skogsberg testified that he is the superintendent at the school the children attend in Lockport. He described all three children as good students with great demeanors. He stated that T.S. is a pleaser and is always willing to help in any way that he can, H.S. is a leader and his peers look up to him, and D.S. always has a smile on her face.

¶ 11 Nancy Harms testified that her daughter, Jenna B., and Jayme were married by civil union and have been together since 2011. She stated that Jayme and Jenna have a close relationship and that they seldom have a dispute. Jayme also has a good relationship with her children, and the children are well-behaved. She testified that Jayme and Jenna have rented 2 or 3 different houses since 2012 and that they currently live in a house in Oswego.

¶ 12 Jayme stated that she has visitation with the children on Tuesdays and every other weekend. She also has visitation for three weeks during the summer. At the time of the divorce, she agreed that the children should live with Brett. She testified that she has lived in four

different rental houses since she and Brett separated. She testified that she started a new job a few weeks ago as a nursing administrative assistant in a nursing home. She also works at a local restaurant on the weekends.

¶ 13 Jayme claimed that the children have reported incidents where Brett has been physically abusive to Heather's children. D.S. told her that Brett tried to choke Heather's 14-year-old daughter, Samantha. She further testified that T.S. told her about an incident with a bat that occurred in February of 2014. T.S. and his friend, Kyle, were in T.S.'s room, and Brett came in the room and put a bat in Kyle's face and threatened him. After T.S. told Jayme what happened, she did not ask Brett about the incident.

¶ 14 Jayme admitted that the couple had difficulty communicating and that transferring the children was particularly problematic. She testified that on Easter Sunday in April of 2012, she had the children at her house and sent an email to Brett asking if they could spend the night. She sent him several emails, and he did not respond. When Brett arrived to pick the children up that evening, she called the police because he was threatening to kill her and take the children away from her. The next day, she obtained an emergency order of protection against Brett.

¶ 15 On cross-examination, Jayme stated that she has an estranged relationship with her father and her step-mother, but her relationship with her step-mother is improving. She does not speak to her biological mother. She admitted that her step-mother and her sister are allowed to see the children when they are in Brett's care. Upon questioning, she also acknowledged that she has not paid for any extra-circular activities for the children, has not paid for any of the children's school fees, has failed to pay child support in a timely manner and has not paid for any of the children's uninsured medical expenses. She was arrested for failure to pay child support. She also recognized that although the terms of the dissolution judgment allow Brett to claim all three

children as exemptions on his tax returns, she has claimed the children on her 2012 and 2013 returns.

¶ 16 Jayme agreed that during a deposition taken by Brett's attorney on February 10, 2014, she mentioned that she believed Brett molested their daughter, D.S., in 2008 and that if she were awarded custody she would seek supervised visitation due to the incident. She testified that she took D.S. to the hospital when the incident allegedly happened and that the results of the rape kit were negative. She further acknowledged that Brett was allowed to take D.S. home from the emergency room after he was questioned by police. She testified that she still believed Brett did it. But she admitted that she never mentioned her concerns about the relationship between Brett and D.S. to the GAL or the 604(b) evaluator.

¶ 17 Jayme later testified that she no longer believed that Brett was being physically abusive to Heather or her children and that, contrary to her deposition testimony, it was no longer her intention to seek supervised visitation.

¶ 18 Lynch testified that she filed an original report and two supplemental reports regarding the case. In preparing her original July 2012 report, she spoke with Jayme, Brett and Heather, as well as the children. Heather described the living conditions in Brett's household as "chaotic." The children described a lot of fighting and said that their dad was "generally unhappy." Her second report was filed on May 5, 2014. In that report, she noted that the children were happy and that they were enjoying spending time with their dad. He was not discussing the case with them anymore. All three children were asking to spend more time with him. Lynch testified that the children have never made any allegations that Brett verbally or physically abused them, just that he was angry in general. In her supplemental investigation, Lynch noted that T.S. expressed to her that his dad is better now. He loves his father and wants to spend time with him. He

doesn't want his father to think that he does not love him. H.S. told Lynch that he misses his friends and that he wishes he could spend more time with his dad when he is in school. D.S. also expressed that she wants to spend time with Brett.

¶ 19 On-cross examination, Lynch testified that although the children reported in 2012 that food was lacking in Brett's household, she determined that those statements were not accurate. During her home visit, she found no shortage of food in the kitchen. She noted that the social worker at school had reported a few incidents involving the children to DCFS, but that the investigations resulted in findings that they were unfounded. Based on her interviews, she also believed they were unfounded.

¶ 20 Lynch noted that the children no longer go to a babysitter at 5 a.m. Brett has arranged for in home care for the children when he leaves for work in the morning. Lynch conducted home visits for both parents. She observed that Brett helps the children with homework but that Heather is the primary tutorial source. At Jayme's house, Jayme helps the children when they need assistance with school work.

¶ 21 Brett testified that the parties moved into the marital residence when T.S. was three or four years old; H.S. and D.S. have lived there since they were born. He has a large extended family and most of them live in the area. They enjoy spending time together and have frequent gatherings. He has an open and cordial relationship with Jayme's step-mother. Since the divorce, Brett has allowed visitation between Jayme's step-mom and her sister while the children were in his care because Jayme has a strained relationship with her family. He testified that he has no problem supporting a relationship between Jayme and the children and that he had never tried to restrict her visitation. He admitted that on occasion he did not apprise Jayme of routine

doctor or dentist appointments because he did not think it was necessary. If an emergency or a serious medical problem arose, he always informed Jayme.

¶ 22 Brett testified that his girlfriend, Heather, and her three children live in his house along with T.S., H.S. and D.S. Heather has three daughters: Emma, age 7; Maggie, age 8; and Samantha age 14. The family lives in a 3,200 square foot home with four bedrooms and one-and-a-half bathrooms. The master bedroom is on the first floor and it has a bathroom with a shower. The bathroom can be accessed by a door that is separate from the bedroom. The bathroom upstairs is still under construction but the shower and the toilet have been working since April of 2013. Brett stated that he converted the garage into a recreational room for the children. It has a television and furniture in it; the children hang out there with their friends. He acknowledged that his children and Heather's children frequently argue but that he felt the arguments were normal given the large family. He opined that the children wanted to live with Jayme because she allowed them to do whatever they wanted to do; they could play video games and watch television and eat snacks at their discretion. He stated that Jayme has "coerced the kids by giving them what they want."

¶ 23 Brett identified a letter that he received from the IRS indicating that his 2012 tax return, reporting a \$8,049 refund, had been rejected because Jayme had already filed her tax return claiming all three children as dependents. The letter stated that in addition to the rejected refund, he owed the government \$4,800. He further testified that he did not receive his 2013 refund of \$6,645 for the same reason.

¶ 24 In 2011, Brett worked as a manager at Aldi's and earned an annual salary of approximately \$80,000. He testified that he quit that job in 2011 and began working as a

supervisor at a local service station, making \$60,000 per year, because the hours were more conducive to raising a family. He works from 5 a.m. to 3 p.m., Monday through Friday.

¶ 25 Brett explained that the bat incident occurred in the fall of 2013. The children were all upstairs with several friends in each room and some of the boys had gone into the girls' rooms and messed things up. He grabbed the bat and told them to behave. He claimed that he was joking and that T.S. and his friend understood that his actions were not serious.

¶ 26 Brett also testified that the 2012 Easter incident involved an dispute over returning the children. Jayme wanted to extend her visitation past Sunday evening and Brett said, "No." He drove to Jayme's house and called her on her phone and said, "Send the kids out." He stated that 15 or 20 minutes later, six or seven police cars arrived and officers exited their vehicles with guns drawn. Their guns were drawn because she told them that he was threatening to kill her and the children. He talked to the officers. He was not arrested. He left without the children. Jayme filed a petition for an order of protection the next morning. Four days later, he appeared at the hearing, and the matter was dismissed.

¶ 27 Brett also briefly discussed the allegation of sexual abuse that was made in 2008. He stated that he was questioned at the hospital for five or six hours. He eventually left with D.S., without any recommendation from the emergency room doctor for further medical treatment. He was never contacted by police or DCFS again regarding the incident. He recounted that since the divorce in 2009, he has been reported to DCFS "half a dozen times." Following investigations, DCFS indicated that the reports were unfounded and that they did not find anything that warranted further inquiry.

¶ 28 On cross-examination, Brett acknowledged that he has filed four or five petitions for rule to show cause, seeking a contempt finding against Jayme for failing to pay child support since

she filed her petition for change of custody. He denied that he choked Samantha or that he physically disciplined any of Heather's children.

¶ 29 The trial court considered the provisions relative to modification of custody in section 610 of the Act, the custody evaluation offered by the 604(b) expert and the three reports tendered to the court by the GAL. After enumerating the best interest factors in section 602, the court concluded that it was in the children's best interest to modify custody in favor of Brett. The court's written order terminated the joint parenting agreement entered on April 28, 2009, and awarded Brett sole custody with reasonable and liberal visitation granted to Jayme.

¶ 30

ANALYSIS

¶ 31 Jayme challenges the order entered by the trial court and argues that its decision to award sole custody of T.S., H.S. and D.S. to Brett was against the manifest weight of the evidence.

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

¶ 33 Section 610(b) of the Act governs the modification of a custody judgment:

"The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior

judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child." 750 ILCS 5/610(b) (West 2012).

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

¶ 35 Here, no stipulation was entered in which both parties agreed that the joint custody agreement should be terminated. However, both parties filed petitions to modify the custody agreement, each seeking sole custody. Once both parties moved to terminate the joint parenting agreement, there was no need to show a change in circumstances. *In re Marriage of Ricketts*, 329 Ill. App. 3d 173 (2002); *In re Marriage of Lasky*, 176 Ill. 2d 75, 81 (1997). Section 610(b) provides that, under these circumstances, the trial court shall make any modification that is in the children's best interest. 750 ILCS 5/610(b) (West 2012).

Section 602 of the Act directs the trial court to consider the following factors in determining custody in accordance with the best interest of the child:

"(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school and community;
- (5) the mental and physical health of all individuals involved;
- (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
- (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;
- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
- (9) whether one of the parents is a sex offender; and

(10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed." 750 ILCS 5/602(a) (West 2012).

¶ 37 A custodial decision rests on the temperaments, personalities and capabilities of the parties, and the trial court is in the best position to evaluate these factors. *Prince v. Herrera*, 261 Ill. App. 3d 606, 612 (1994). The court has broad discretion in making a custody determination. *Id.* If the evidence before the trial court did not clearly favor either party, a reviewing court cannot say that the trial court's decision to place permanent custody of the child with one of the parents was against the manifest weight of the evidence. *Id.* at 613.

¶ 38 The trial court carefully considered each of the section 602 factors in making its decision. After close scrutiny of the trial proceedings, we determine that the court's decision to terminate the joint custody arrangement and grant Brett sole custody was consistent with the manifest weight of the evidence presented at trial.

¶ 39 Both parties desired custody of the children. Accordingly, the first factor favors neither parent. The record establishes that the children love both of their parents, but the GAL's report shows that the children had a strong desire to reside with Jayme because her house is quieter, as opposed to Brett's household. Therefore, the second factor favors Jayme.

¶ 40 Regarding the interaction and relationship of the children with their parents, siblings and extended family members, testimony revealed that the children have healthy relationships with both parents and their partners. Although they have arguments with Heather's children, their family experiences are not abnormal. They also have developed close relationships with Brett's extended family and with Jayme's family. Thus, this factor favors neither party.

¶ 41 It is also evident that each of the children are well-adjusted and have numerous friends in school and in Brett's neighborhood, while Jayme's living arrangements have been unstable since the parties' divorce in 2009. As a result, the children have not developed close friendships in Jayme's community. Accordingly, this factor favors Brett.

¶ 42 The record demonstrates that, while Brett has had several allegations of physical and sexual abuse made against him by Jayme, those allegations have been investigated by DCFS and the reports have all been returned as unfounded. The GAL stated that neither party has endangered the physical health of the children. Thus, neither party is favored.

¶ 43 The willingness and ability of Jayme and Brett to facilitate and encourage a close and continuing relationship between the other parent and the children is a factor that is disputed. Evidence at the hearing depicted that Jayme still harbored intense negative emotions toward Brett. On the other hand, while Brett was frustrated with Jayme's failure to pay child support, he continued to cultivate relationships between the children and Jayme's family. Further, Jayme testified that she would not seek supervised visitation, but she claimed only months earlier that she wanted restricted visits between D.S. and Brett because she still believed Brett had inappropriate sexual contact with their daughter. Nothing in the record supports her continued conviction. By contrast, Brett testified that he tried to encourage a close relationship between Jayme and the children. Even though Jayme failed to financially support the children, Brett never attempted to restrict Jayme's visitation. Based on the evidence, this factor favors Brett.

¶ 44 The remaining section 602 factors are inapplicable to this case.

¶ 45 Having had a superior opportunity to observe the witnesses, evaluate the evidence and consider the needs of the children, the trial court was in a better position to determine the children's best interest. Moreover, the evidence supports the trial court's finding that the

applicable best interest factors narrowly favor Brett. Therefore, the court's finding that custody modification in Brett's favor was in the children's best interest was consistent with the manifest weight of the evidence.

¶ 46 In the alternative, Jayme claims that the decision in Brett's favor was against the manifest weight of the evidence because the trial court failed to adopt the recommendations of the court-appointed section 604(b) evaluator and the GAL.

¶ 47 While it is within the court's discretion to seek independent expert advice, a court is not bound to abide by the opinions or implement the recommendations of its court-appointed expert or the GAL. *In re Marriage of Debra N.*, 2013 IL App (1st) 122145, ¶ 52. Section 604 does not require the trial court to follow the advice of the 604(b) evaluator. 750 ILCS 5/604(b) (West 2012) ("court may seek the advice of professional personnel"). A custody evaluator's advice may be considered and ultimately disregarded by the trial court if the evidence, weighed against section 602 factors, suggests otherwise. See *In re Marriage of Saheb*, 377 Ill. App. 3d 615, 628 (2007). Moreover, a GAL's recommendation to the court is not a binding decree. See 750 ILCS 5/506(a)(2) (West 2012).

¶ 48 Although Shapiro and Lynch recommended that Jayme be awarded custody of the children, they did not suggest that Brett was an unfit parent or otherwise unable to properly care for the children. Neither Shapiro nor Lynch noted any evidence of physical or sexual abuse. Lynch specifically testified that the children wanted to spend more time with their father and that Brett's household circumstances had improved since her initial report in 2012. In addition, both Shapiro and Lynch acknowledged that some of Jayme's behavior was problematic. The court's decision to award Brett custody was not against the manifest weight of the evidence. *Saheb*, 377 Ill. App. 3d at 628.

¶ 49

CONCLUSION

¶ 50

The judgment of the circuit court of Will County is affirmed.

¶ 51

Affirmed.