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2015 IL App (3d) 150152-U

Order filed July 10, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

STACEY DALTON,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Petitioner-Appellee,)	Grundy County, Illinois.
)	
v.)	Appeal No. 3-15-0152
)	Circuit No. 10-F-102
KEITH CORWIN,)	
)	Honorable Sheldon R. Sobol,
Respondent-Appellant.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The trial court's denial of respondent's motion to modify custody was against the manifest weight of the evidence. It is in the best interests of the minor that the court award respondent residential custody.

¶ 2 Respondent, Keith Corwin, is the biological father of the minor child A.C. Petitioner, Stacey Dalton is A.C.'s mother. In 2011, the court entered an agreed order incorporating a joint parenting agreement, awarding Stacey primary residential custody. Keith and Stacey shared equal parenting time. Keith had visitation every week starting on Saturday at 2 p.m. through Tuesday at 5 p.m. In 2014, Keith filed a petition to modify custody and a motion to appoint a

guardian *ad litem* (GAL). Ultimately, the court denied Keith's motion to modify custody. The court found that Keith failed to establish by clear and convincing evidence that there had been a substantial change in circumstances that necessitated modification of the joint parenting agreement.

¶ 3 Keith appeals, arguing that: (1) the court misapplied section 610(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610(b) (West 2014)); (2) the court's denial of his petition to modify custody was against the manifest weight of the evidence; and (3) the court erred in failing to consider the best interests of the minor pursuant to section 602 of the Act (750 ILCS 5/602 (West 2014)). For the following reasons, we reverse and remand for further proceedings.

¶ 4 **BACKGROUND**

¶ 5 Keith and Stacey began dating and living together during high school. They lived together for approximately six years. A.C. was born on May 19, 2009. Keith and Stacey lived together until A.C. was almost two years old. On February 25, 2011, the court entered an agreed order finding Keith to be A.C.'s biological father and incorporated a joint parenting agreement. Keith and Stacey shared joint legal custody of A.C. The court named Stacey as A.C.'s principle residential custodian. Keith had parenting time with A.C. every week from Saturday at 2 p.m. through Tuesday at 5 p.m. The parties agreed to divide holidays and A.C.'s birthday equally. Keith and Stacey also agreed that once A.C. started kindergarten, they would follow the Grundy County guidelines for visitation or agree to their own schedule.

¶ 6 When the court entered the agreed order and joint parenting agreement, Stacey and A.C. resided with Stacey's parents. Stacey was 29 years old and single. A.C. appeared well dressed,

adequately taken care of, and attended to. Keith was a pipefitter and traveled all over the world for work. He was not yet engaged to his now fiancé, Alex Boldyga.

¶ 7 On April 17, 2014, Keith filed a motion to modify custody, requesting that the court: grant him residential and sole custody; award visitation to Stacey in a manner that protects A.C.; award him child support consistent with statutory guidelines; and require Stacey to contribute toward daycare, medical, and school expenses. He also filed a motion to appoint a GAL, which the court granted; the court appointed attorney Joan Harrop. In December of 2014, the court conducted a hearing pursuant to Keith's motion to modify custody. The parties presented the following evidence.

¶ 8 At the time of trial, Keith and Boldyga were engaged and lived together. A.C. attended kindergarten. Boldyga or Boldyga's sister dropped A.C. off at school each morning; Keith or Boldyga picked A.C. up from school every day. Keith works for CSX, a railroad company, in Ottawa, Illinois, located 20 minutes from Keith's current residence. This job does not require him to travel or work overtime. He works Wednesday through Friday 7 a.m. until 3 p.m. and Saturday and Sunday from 5 p.m. until 1 a.m.

¶ 9 In April 2013, Stacey and A.C. moved out of Stacey's parents' house and into an apartment in Morris, Illinois, with Stacey's then-boyfriend, Geno Wagner. Stacey started dating Wagner in February of 2013. Stacey testified that A.C. met Wagner four or five times prior to them moving in. Keith testified that Stacey told him A.C. met Wagner twice before moving in together. Neither Keith nor Boldyga knew that Stacey and A.C. planned on moving in with Wagner until one week before they actually moved. Keith noticed changes in A.C.'s care after Stacey moved in with Wagner. A.C.'s clothes did not fit properly, Stacey dropped A.C. off with

Keith unfed and asked that Keith feed A.C. and Stacey was always rushed. Keith addressed his concerns with Stacey, but nothing changed.

¶ 10 Two months later, Wagner committed suicide by shooting himself. A.C. was at Keith's house when this happened and stayed there for a week or two afterward. Stacey told A.C. that Wagner passed away due to an accident. Keith testified that after Wagner's death, A.C. was sad and explained that she performed "happy dances" for her mother. While at Stacey's house, A.C. would not brush her teeth or comb her hair, she dressed in pajamas and reeked of cigarettes.

¶ 11 Prior to Wagner's suicide, Stacey drank on the weekends when A.C. was with Keith. After Wagner died, Stacey drank everyday or every other day. While intoxicated, Stacey drove into a tree. As a result of this accident, Stacey suffered a broken foot. She also received a DUI and her license was suspended for six months. Stacey admitted that she was intoxicated at the time of the accident. A.C. was with Keith at the time of the accident and stayed with him for approximately two weeks.

¶ 12 After Wagner's death, Stacey also self-mutilated herself by cutting her arms. She stated that she could not control herself and did not know why she did that. A.C. was not present when Stacey did this, but saw the scars on her arms. Stacey did not receive counseling after cutting herself. Boldyga testified that after Wagner's death, Stacey was quieter and more emotional than before. The GAL testified that she believed factors in Stacey's personal life directly affected A.C.; Stacey had not recovered from Wagner's death as of trial.

¶ 13 Stacey's friend, Abby, and Abby's child, Harmony, moved in with Stacey and A.C. Shortly thereafter, Doug Cherrone also moved in. Stacey did not inform Keith or Boldyga that Cherrone moved in. A.C. met Cherrone a few times before he moved in. A.C. and Harmony shared a room. Abby had her own room; Stacey shared a room with Cherrone. Prior to

Cherrone moving in, Stacey knew that Cherrone's ex-girlfriend was murdered and Cherrone was convicted of burglary and served 22 months in prison. At the time of trial, Cherrone faced a pending criminal complaint for possession of marijuana. Stacey testified that A.C. stayed home alone with Cherrone on two occasions.

¶ 14 Boldyga, a registered nurse, testified that she saw A.C. nearly every day for the past four years. She noticed a physical and emotional change in A.C. after Cherrone moved in. A.C. was more emotional and sensitive. A.C. cried uncontrollably when she had to return to Stacey's house. Keith testified that at the start of his parenting time A.C. was quiet, but she would eventually return to her happy self. Shortly before A.C. would return to Stacey's care, she would burst out in tears. A.C. was scared to return to her mother.

¶ 15 In September of 2013, A.C. suffered from severe irritation in her vaginal area. Boldyga put cream on the irritated areas. About half way through A.C.'s time with Keith, the rash would get better. However, after A.C. returned to Stacey's house, the irritation flared up again. In November 2013, Boldyga and Keith took A.C. to the doctor for treatment of the irritation. A.C. said "maybe [the irritation] is from when [Cherrone] touched me." The doctor called the Department of Children and Family Services (DCFS). DCFS advised Keith to obtain an order of protection.

¶ 16 Subsequently, the court granted Keith's request for a temporary emergency order of protection for A.C. A.C. resided with Keith for a couple of weeks. During that time, the irritation completely healed. The court dismissed the emergency order of protection, holding that Keith failed to prove physical evidence of sexual abuse. A.C. returned to Stacey's custody and the irritation came back. A.C. complained to Stacey about pain and irritation in her vaginal

area. Stacey observed that A.C. was going to the bathroom frequently; she put Vaseline on A.C. This was the first time that A.C. complained of pain to her.

¶ 17 In December 2013, Cherrone punched Stacey in the eye. Stacey attempted to call 911, but Cherrone threw the phone in the toilet and choked Stacey with a sweatshirt. The sweatshirt eventually ripped and Stacey escaped to call 911. A.C. was at Keith's house when Cherrone attacked Stacey. Police arrested Cherrone for domestic violence. The court dismissed the case when Stacey failed to appear for the hearing; Cherrone's lawyer told her not to attend. Stacey allowed Cherrone to move back in a week later. Stacey testified that she did not think Cherrone was a danger to A.C. Had she known that Wagner was going to commit suicide or that Cherrone was going to punch her, she would not have allowed either one to move in with her and A.C.

¶ 18 Boldyga's mother, Sandy Boldyga, testified that she has a close relationship with A.C. In March 2014, A.C. spent the night at Sandy's house. A.C. said Cherrone was always naked and made A.C. touch his privates. A.C. could not relax while at Sandy's. When asked why, A.C. responded, "I only have two sleeps until I have to go back to my mom's." In June of 2014, A.C. told Sandy that Cherrone put his fingers in A.C.'s private parts.

¶ 19 On June 11, 2014, Keith filed a verified petition for order of protection of A.C., alleging that: (1) Cherrone had inappropriate contact with A.C. in a sexual nature; (2) A.C. was scared of the fights between Stacey and Cherrone; and (3) A.C. suffered from irritations since Cherrone moved in with Stacey and A.C. On July 2, 2014, Keith filed an emergency motion for temporary custody, alleging serious endangerment to A.C. by Cherrone. On July 10, the GAL filed her preliminary report with the court. A.C. told the GAL that Cherrone touched her private parts and pointed to the area between her legs. Based on this report, the court granted Keith's emergency motion for temporary custody, holding that: (1) Stacey shall not allow Cherrone to have any

contact, direct or indirect, with A.C.; and (2) Cherrone shall not be present or visible when the child is present. The court entered the order without prejudice; it was effective until further order of the court. Stacey testified that she obeyed the order. Cherrone stayed at Stacey's house when A.C. was with Keith. During this time, A.C.'s vaginal irritation cleared up. A.C. did not complain about pain or irritation.

¶ 20 The GAL testified that she first met A.C. on June 16, 2014, at Keith's house. A.C. was happy at both Stacey's and Keith's house, but was happier at Keith's house. A.C. pointed to a smiley face to express how she felt at her dad's house; she pointed to a sad face to signify how she felt at her mom's house. A.C. was not happy at her mom's house when Cherrone was present. A.C. told the GAL that Cherrone touched A.C.'s private parts. The GAL did not believe that A.C. was being coached or influenced. The GAL next met with A.C. at Stacey's house on June 20, 2014. A.C. was happier because Cherrone was gone. A.C., again, said Cherrone touched her private parts and pointed between her legs. A.C. was mad at Stacey for allowing Cherrone to live with them. Stacey told the GAL that A.C. appeared to be terrified of Cherrone. Three days later, the GAL met A.C. at Keith's house. A.C. said that Stacey told her a white packet of salt was referred to as "Coke." A.C., again, told the GAL that Cherrone touched her private parts.

¶ 21 The GAL contacted DCFS regarding A.C.'s allegations against Cherrone. She attempted to follow up with DCFS on the case, but such attempts were futile. The GAL left voicemail messages for the DCFS agent in the case and the agent's immediate supervisor. She never received a return phone call or documents regarding A.C.'s file. DCFS had not contacted the parties since early June. The GAL did not think that DCFS carried out its investigation far enough into the allegations against Cherrone.

¶ 22 On September 18, 2014, the GAL met Stacey, who told the GAL that she was still in a relationship with Cherrone and that A.C. lied about Cherrone. A.C. also said that she lied about Cherrone; she was jealous that her mom spent time with Cherrone and not with her. On September 20, 2014, Keith and Boldyga brought A.C. to the GAL's office. A.C., again, said that she lied about Cherrone and learned about touching someone's private parts from the Disney Channel.

¶ 23 The GAL testified that it was in A.C.'s best interests that the court award Keith residential custody. In regard to the best interests factors set forth in section 602 of the Act (750 ILCS 5/602 (West 2014)), the GAL testified as follows. A.C. liked living with Stacey when she was there and liked living with Keith when she was with him. A.C. did not want to live with Stacey if Cherrone would be there. A.C. interacted well with Keith, Stacey, and Boldyga, but did not interact well with Cherrone. Keith and Stacey lived in the same school district.

¶ 24 Keith is mentally and physically healthy. Stacey is physically healthy. However, the GAL was concerned about Stacey's mental health, as evident by the following statement: "issues with [Wagner] dying a year ago and then her relationship shortly thereafter with [Cherrone], followed up by these allegations that [A.C.] has made, I think she's got a lot of things going on in her life, and I guess my concern is the choice she made when she — — when [A.C.] presented with these allegations, whether they're true or not true, [Stacey] continued to maintain a relationship with Doug Cherrone. Granted she didn't have him present in the house when [A.C.] was there; but throughout this whole period of time, she did maintain that relationship, and that concerned me." Stacey loved A.C., but issues in her personal life prevented her from making decisions that were in the best interests of A.C. Also, such issues directly affect A.C.

¶ 25 Cherrone poses a threat of physical violence; Stacey admitted to the domestic violence that occurred in December of 2013. Despite the fact that the domestic violence occurred over a year ago, it raised concerns. Cherrone did not participate in a diversion program; the GAL did not know whether he received any other treatment. A.C. made allegations against Cherrone that he sexually abused her. Although, she recanted those allegations, the fact that she made the allegations was cause for concern. It was not in A.C.'s best interests to be in the same house with Cherrone whether or not he sexually abused her.

¶ 26 The parties worked together and both fostered a close and continuing relationship with the other parent. Keith and Stacey worked out vacation and holiday visitation schedules without going to court.

¶ 27 The court entered its ruling, finding that Keith failed to meet his burden of proving by clear and convincing evidence that there had been a substantial change in circumstances necessitating modification of the joint parenting agreement. The court stated that the changes in A.C.'s environment appeared to have minimal impact on her.

¶ 28 Keith appeals. We reverse and remand for further proceedings.

¶ 29 ANALYSIS

¶ 30 Keith argues that the trial court's denial of his petition to modify custody was against the manifest weight of the evidence. Specifically, Keith argues that he presented clear and convincing evidence that a change in circumstances occurred.

¶ 31 We will not disturb a trial court's decision to deny a petition to modify child custody, unless such a determination is contrary to the manifest weight of the evidence. *In re Marriage of Rogers*, 2015 IL App (4th) 140765, ¶ 62. Findings are against the manifest weight of the

evidence only when the opposite conclusion is apparent or the finding is unreasonable, arbitrary, or not based on the evidence. *In re Marriage of Hefer*, 282 Ill. App. 3d 73, 80 (1996).

¶ 32 Section 610(b) requires the party seeking modification of custody prove by clear and convincing evidence that a change in circumstance has occurred and a modification is necessary to serve the best interests of the minor child. Clear and convincing evidence requires a high level of certainty; it is more than a preponderance of the evidence but does not approach the degree of proof necessary to convict a criminal defendant. *In re Marriage of Jones*, 160 Ill. App. 3d 593, 596-597 (1987). Section 610(b), in relevant part states:

"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 2014).

The court cannot modify custody without finding that such changes affect the welfare of the child. *Rogers*, 2015 IL App (4th) 140765, ¶ 57; *In re Marriage of Nolte*, 241 Ill. App. 3d 320, 325-26 (1993); *Finn v. Finn*, 11 Ill. App. 3d 385, 388 (1973); *Brady v. Brady*, 26 Ill. App. 3d 131 (1975). However, we do not have to find that the changes have *already* harmed the child. *Rogers*, 2015 IL App (4th) 140765, ¶ 58. Changes that affect the minor include changes that have the potential to adversely affect the minor. *Id.* ¶ 60.

¶ 33 Based on the evidence, we find that the trial court's determination that Keith failed to prove changed circumstances was against the manifest weight of the evidence.

¶ 34 When the court entered the joint parenting agreement, Stacey and A.C. resided with Stacey's parents. Keith and Stacey provided adequate care for A.C. At that time, Keith was a pipefitter and traveled all over the world for work.

¶ 35 However, circumstances surrounding Stacey's living situation and judgment changed. Stacey allowed two different boyfriends to reside with her and A.C. Wagner committed suicide shortly after Stacey and A.C. moved in. Subsequently, Stacey suffered a broken foot after crashing into a tree while driving intoxicated. She also engaged in self-mutilation by cutting herself. The GAL opined that Stacey never fully recovered from Wagner's death.

¶ 36 Shortly after Wagner's death, Cherrone, a convicted felon, moved in with Stacey and A.C. Cherrone domestically abused Stacey; he punched her in the eye and attempted to strangle her. The police arrested Cherrone for domestic violence. The court did not convict Cherrone; Stacey failed to appear at the court date. A week later, Stacey allowed Cherrone to move back in with her and A.C. A.C. told the GAL that she did not want to live at Stacey's house if Cherrone was going to be around. In addition, Stacey admitted to the GAL that A.C. appeared to be terrified of Cherrone. Despite knowing about A.C.'s fear of Cherrone, Stacey continued to allow Cherrone to reside with them.

¶ 37 Moreover, A.C. alleged that Cherrone touched her private parts and made her touch his private parts. A.C. did not recant the reported allegations until almost a year after first reporting that Cherrone touched her. In addition, A.C. suffered from severe irritation in her vaginal area. The irritation would begin to heal while she resided with Keith, but recame back after she returned to Stacey's house. Further, after the court ordered that Cherrone was not to have any

contact with A.C., the irritation cleared up completely. The court below erred in finding no credible evidence of sexual abuse.

¶ 38 As of trial, Keith no longer traveled for work. He worked for CSX, a railroad company, located approximately 20 minutes from his residence. He lived with one woman, Boldyga, during the past four years. A.C. and Boldyga had a close relationship. Boldyga or her sister dropped A.C. off at school every morning. Keith or Boldyga picked A.C. up from school every afternoon.

¶ 39 The court below failed to consider the GAL's testimony, except as to A.C.'s retraction of the allegations against Cherrone. Further, the court addressed each event in isolation. However, when considering the culmination of the evidence, it is clear that circumstances changed since the time the court entered the joint parenting agreement.

¶ 40 Based on our finding that Keith satisfied the changed circumstance requirement, we address the best interests. 750 ILCS 5/610(b) (West 2014).

¶ 41 Section 602 indicates the factors that a court must consider in determining the best interests of a child. 750 ILCS 5/602 (West 2014). Section 602, in relevant part, states:

- "(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 *** 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 (West 2014).

¶ 42

The evidence clearly establishes that it is in A.C.'s best interests to modify custody. While both parents wish to have custody, the GAL testified that it was in the best interests of A.C. that Keith be awarded residential custody. Stacey's circumstances changed after Wagner committed suicide and the GAL did not think that Stacey recovered. A.C. did not want to live at Stacey's house if Cherrone would be there. Further, the GAL did not believe that it was in A.C.'s best interests to be in a house with Cherrone whether he sexually abused her or not. In addition, A.C. told the GAL that she was happy at both houses, but was happier at Keith's house. Moreover, A.C. drew a smiley face and said that was her at Keith's house; she drew a frowning face and said that was her at Stacey's house. Sandy also testified that A.C. was unable to relax due to the fact that A.C. only had two nights before returning to Stacey's care.

¶ 43 Stacey resided in three different residences with numerous different people from April 2013 through June 2014. After Stacey moved in with Wagner, Keith noticed changes in Stacey's care for A.C.; A.C.'s clothes did not properly fit, Stacey was always rushed, and Stacey did not feed A.C. prior to dropping A.C. off at Keith's house. Keith addressed his concerns with Stacey, but Stacey did not change. Further, after Wagner died, A.C. would not brush her teeth or comb her hair when she was at Stacey's house. A.C. dressed in pajamas and reeked of cigarettes. Keith resided in two places since A.C.'s birth; Boldyga resided with Keith during the past four years. A.C. would attend the same school regardless of whether she resided with Keith or Stacey.

¶ 44 There are concerns regarding Stacey's mental health. She self-mutilated herself after Wagner passed away and never sought medical treatment. Further, she drank excessively after Wagner's death. Stacey drove while intoxicated and hit a tree, which resulted in a broken foot and a DUI. The GAL opined that the changes in Stacey's behavior after Wagner died affected A.C. There are no such allegations concerning Keith's mental health.

¶ 45 Further, Cherrone poses a threat of physical violence. He punched Stacey in the eye and attempted to strangle her. Police arrested Cherrone for domestic violence. However, Stacey opted not to testify in court against Cherrone, resulting in dismissal of the case. She then let the abuser back in her home with her and A.C. The GAL stated concerns about Cherrone having contact with A.C. due to his violence issues. The court below noted that A.C. was not present when Cherrone punched and strangled Stacey. However, a court need not find that the minor was *actually* harmed to modify custody; the changed circumstance need only have the *potential* to adversely affect the minor. Further, section 602 does not require a finding that the abuse was directed at the minor. Stacey's decision not to testify in court against Cherrone and to allow

Cherrone to move back in speaks volume to her poor judgment and lack of consideration for what is in the best interests of A.C.

¶ 46 A.C. alleged that Cherrone sexually abused her. A.C. told her doctor in November of 2013 and the GAL three times during June of 2014 that Cherrone touched her private parts. A.C. also told Sandy that Cherrone was always naked and made her touch his private parts. In September 2014, the GAL visited A.C. at Stacey's house. Stacey told the GAL that she was still in a relationship with Cherrone and that A.C. lied about Cherrone. It was only after this that A.C. denied her previous allegations against Cherrone. The court ruled that Cherrone was not to have contact with A.C. That order was in effect until the court ruled otherwise. A.C. was happier when Cherrone was not around. A.C. was mad at Stacey for allowing Cherrone to reside with Stacey and A.C. Stacey knew that A.C. was terrified of Cherrone, but allowed Cherrone to live with them. Even if the allegations are not true, Stacey failed to remove Cherrone from A.C.'s presence when A.C. made such allegations. The evidence is clear that Cherrone's presence adversely affected A.C.

¶ 47 Moreover, in September 2013, A.C. started suffering from vaginal irritation. When she was with Keith the irritation started to heal, but flared up after returning to Stacey's house. In addition, after the court ordered that Cherrone was not to have contact with A.C., A.C.'s irritation completely healed. Again, there are no suggestions of abuse when A.C. is with Keith or Boldyga. To the contrary, A.C. and Boldyga have a close relationship. Boldyga sees A.C. almost every day; she takes A.C. to school in the mornings. Either Keith or Boldyga pick A.C. up from school in the afternoons.

¶ 48 The evidence clearly proves that it is in the best interests of the minor that the court grant Keith residential custody. We reverse and remand this cause with instructions to enter an order

awarding Keith residential custody and to hold other proceedings necessary to address the consequences of awarding residential custody to Keith, such as visitation and child support.

¶ 49

CONCLUSION

¶ 50

For the foregoing reasons, the judgment of the circuit court of Grundy County is reversed and this cause is remanded with directions.

¶ 51

Reversed; cause remanded.