

NOTICE

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2015 IL App (4th) 150602-U

NO. 4-15-0602

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 6, 2015

Carla Bender

4th District Appellate

Court, IL

CARY COLE,)	Appeal from
Petitioner-Appellee,)	Circuit Court of
v.)	Sangamon County
TRISHA SHAFFER, n/k/a TRICIA COLE,)	No. 13F86
Respondent-Appellant.)	
)	Honorable
)	Steven H. Nardulli,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's change in visitation between respondent mother and her daughter. We found that, although the trial court applied the incorrect standard, a change in visitation was appropriate. We also found the admission of medical records without a sufficient foundation was harmless error.

¶ 2 In April 2015, petitioner, Cary Cole, filed a motion to modify visitation as it pertained to respondent, Trisha Shaffer, n/k/a Tricia Cole, and their daughter, J.C. In July 2015, the trial court reduced the amount of visitation between Tricia and J.C.

¶ 3 On appeal, Tricia argues the trial court (1) applied the incorrect standard in restricting her visitation, (2) erred in admitting J.C.'s medical records, and (3) erred in reducing her visitation with J.C. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Cary and Tricia are the parents of J.C., born in October 2012. In February 2013,

Cary filed a petition to establish parentage and a petition for an emergency order of protection on behalf of himself and J.C. The trial court granted the emergency order of protection. In March 2013, the court granted Tricia visitation if the Department of Children and Family Services (DCFS) agreed. The parties were ordered to attend mediation.

¶ 6 In April 2013, it was determined that mediation had been unsuccessful. The trial court set supervised visitation on Thursdays and Fridays from 11 a.m. to 1 p.m. In May 2013, Tricia filed a motion to modify, seeking to increase the time and frequency of visitation. In June 2013, the court approved an additional supervised two-hour visit every Saturday.

¶ 7 In September 2013, Tricia filed a motion for custody. Later that month, the trial court granted Cary custody of J.C. The order granted Tricia visitation every Monday, Wednesday, and Friday from 8:30 a.m. to 1 p.m. The court indicated the parties could agree on additional visitation times or agree to change times.

¶ 8 In December 2013, Cary filed an emergency motion to suspend-restrict visitation. Cary alleged J.C. suffered various injuries, *i.e.*, a burn on her finger, a bump on her head, insect bites, and scratches on her face, while in Tricia's care. Cary argued it was in J.C.'s best interests that Tricia's visitation be suspended or restricted.

¶ 9 The trial court entered an order granting Tricia visitation every Monday, Tuesday, Wednesday, and Thursday from 8 a.m. to 3 p.m. Tricia was also allowed to have J.C. every other weekend from Saturday at 3 p.m. to Sunday at 3 p.m.

¶ 10 In April 2014, Tricia filed a motion to modify, seeking to increase her visitation with J.C. Tricia stated her overnight visits with J.C. had been going well and should be extended.

¶ 11 In May 2014, the trial court conducted a hearing on Tricia's motion. Rashanda

Andrews, a parent educator, testified she conducted home visits and found Tricia's home to include books, toys, balls, and "all the things that would help stimulate that growth and development." Andrews stated Tricia acted appropriately with J.C. At group meetings, Andrews stated J.C. was appropriately dressed and clean.

¶ 12 Tricia testified she had visitation with J.C. Monday through Thursday and every other weekend. She stated she was seeing a mental-health counselor and taking medication. Tricia stated DCFS investigated in December 2013 because of a cut on J.C.'s finger but the allegation was unfounded. In April 2014, DCFS conducted another investigation involving abrasions on J.C. Tricia stated she works at the Corner Pub and has a flexible schedule for visitation.

¶ 13 On cross-examination, Tricia stated the abrasions around J.C.'s eye resulted from falling down the stairs while in her care. In March 2014, J.C. suffered a cat scratch across her face but it "didn't break the skin."

¶ 14 Jason Fletcher testified his wife, Brandy, regularly watches J.C. When J.C. is brought over after visits with Tricia, Fletcher stated she is dirty and her clothes have "some kind of smell on them." Terri Woolbright, Brandy's mother, testified J.C. returned from a visit with Tricia with a scrape and another time with "a head injury" after falling down the stairs. Cary testified to the scratches on J.C.'s face, which Tricia claimed were caused by a cat. A scratch near her eye resulted from falling down the stairs.

¶ 15 Following the hearing, the trial court modified the visitation order, allowing Tricia to have J.C. on alternate weekends from 10 a.m. on Saturday until Sunday at 4 p.m. and one overnight visit each week. Tricia still had visitation Monday through Thursday from 8 a.m. to 3 p.m.

¶ 16 Tricia filed a motion to reconsider, requesting the trial court change pick-up times between the parties based on her work schedule. Cary, through his attorney, filed a response, stating he learned Tricia no longer works at the Corner Pub. In August 2014, the court ordered each party to follow the language of the order if they are not otherwise able to agree as to the time and place of visitation exchanges.

¶ 17 In November 2014, Tricia filed a motion for relief, alleging Cary did not make J.C. available for her court-ordered extended visitation period. The trial court ordered Tricia to have her one week of visitation from February 9, 2015, to February 15, 2015.

¶ 18 In January 2015, Cary, acting *pro se*, filed a motion to modify visitation, asking that Tricia receive visitation every other weekend from 6 p.m. Friday to 6 p.m. Sunday. The trial court entered an order, granting Tricia visitation every Thursday from 3 p.m. to Friday at 3 p.m. and alternate weekends from Friday at 3 p.m. until Monday at 9 a.m.

¶ 19 In February 2015, Cary filed a motion for clarification, asking the trial court to clarify the prior order because there was no vacation or holiday schedule included. On the same day, Tricia filed an emergency motion for rule to show cause, alleging Cary refused to make J.C. available for her extended visitation. The following day, the court entered an order granting Tricia extended visitation from March 9, 2015, until March 16, 2015.

¶ 20 In April 2015, Cary filed a motion to modify, requesting supervised visits for six months because J.C. had been hospitalized for injuries. Tricia filed a petition for rule to show cause, alleging Cary refused to make J.C. available for visitation. In May 2015, Tricia filed a second petition for rule to show cause, alleging Cary did not make J.C. available for visitation on several dates. In June 2015, Tricia filed her third and fourth petitions for rule to show cause, alleging Cary refused to make J.C. available for visitation on several dates and refused to provide

information about taking J.C. out of state.

¶ 21 In June 2015, the trial court conducted a hearing "on various post-parentage order petitions relating to visitation." Cary appeared *pro se*. Misty Hatcher, a child-protection specialist at DCFS, testified she investigated an allegation against Tricia in February 2015. Hatcher met with J.C. at Cary's house. At one point, she picked J.C. up by the outsides of her shoulders and put her in her lap to read to her. Fifteen to twenty minutes later, Hatcher noticed J.C.'s arms were "bright red" and "you could see where [her] fingers had touched."

¶ 22 Nancy Brittin, a child-abuse-and-neglect investigator for DCFS, testified she conducted an investigation involving J.C. in 2015. At the home, she asked Cary what he would like to see happen. Cary said "he'd like to see the mom not visit the child anymore."

¶ 23 Brandy Fletcher testified she was present when Brittin came over to the home. Fletcher stated Cary was concerned about J.C.'s injuries and he wanted supervised visitation. Upon her return from visits with Tricia, J.C. has "bumps, bruises, [and] cuts."

¶ 24 Cary testified that on February 13, 2015, he was notified that J.C. was having breathing problems during a visitation with Tricia. Cary took J.C. to the doctor and then she was taken by ambulance to the hospital. J.C. was admitted for "severe breathing problems and dehydration."

¶ 25 Cary testified J.C. suffered a head injury in March 2015 while in Tricia's care. In April 2015, Cary was told J.C. was at the hospital because "she fell into a bush." Upon taking J.C. to the restroom and changing her diaper, Cary noticed severe bruises on her legs, stomach, ribs, and neck. She also had bumps on the front and back of her head. Cary testified to various pictures showing injuries to J.C., including bruises, scrapes, cuts, and bumps to her arms, legs, back, and head.

¶ 26 Tricia testified she and J.C. were at a restaurant in February 2015 when J.C. "tripped and fell into the wall." Tricia took her home, washed her face, and then took her to the doctor's office. Cary arrived and took J.C. to the emergency room. On one morning, Tricia stated J.C. had a fever and was congested. Tricia called Cary and eventually Brandy picked up J.C. Later in the day, Tricia learned J.C. had "some breathing treatments." She was admitted to the hospital and Tricia stayed with her.

¶ 27 Tricia stated a friend named Roxanne took J.C. for a walk with her dog. Sometime later, J.C. returned crying. Later that evening, Tricia took J.C. to the hospital and told the doctors that Roxanne tied the dog's leash to the stroller. The dog saw a rabbit and chased it, pulling the stroller into a "thorny bush" and causing abrasions on J.C.

¶ 28 Tricia stated she has never been diagnosed with bipolar disorder and quit smoking cigarettes in August 2014. She stated she was not using illegal drugs. Tricia stated she has tattoos on her wrists and has made pen drawings on J.C.'s arms and legs because J.C. likes it. Tricia testified J.C. has "fair skin" and scratches show up "pretty easily."

¶ 29 In July 2015, the trial court issued its written order. The court went through the history of the case, the various visitation schedules, and injuries suffered by J.C. while in Tricia's care. The court stated, in part, as follows:

"At some point, the court must recognize that a child's injuries go beyond the bumps of ordinary play. [J.C.] is now beyond that point. The court can only conclude, based upon all of the litigation that has led to this point, coupled with the evidence presented in the present hearing, that Tricia does not provide [J.C.] with adequate supervision during her visitations. If [J.C.] is

'injury-prone' the adults who are responsible for her are required to exercise increased vigilance, not simply blame her bumps and bruises on accidents and 'children being children.'

The standard that the court is to apply in setting a visitation schedule in parentage cases is one of best interests. The court does not believe that returning to the restrictive, supervised visitation schedule previously imposed is in [J.C.'s] best interests. The court believes that the extensive visitation currently in effect is also not in [J.C.'s] best interests. Instead, the court believes that reduced time with [J.C.] will enable Tricia to focus more on [J.C.] and protecting her from injury."

The court allowed Tricia to have alternate-weekend visitation from Saturday at 10 a.m. to Sunday at 4 p.m. and every Wednesday from 4 to 8 p.m. The court vacated its prior order that entitled Tricia to an extended visitation each year. This appeal followed.

¶ 30

II. ANALYSIS

¶ 31

A. The Trial Court's Visitation Order

¶ 32

Tricia argues the trial court's visitation order constituted a restriction, not a modification, of her visitation and was improper because the court utilized the incorrect standard. "Courts favor liberal visitation for the noncustodial parent because the child is entitled to a healthy, close relationship with both parents." *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 877, 629 N.E.2d 812, 815 (1994). According to section 607(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/607(a) (West 2014)), a noncustodial parent is entitled to reasonable visitation rights, unless the trial court finds "that visitation would endanger

seriously the child's physical, mental, moral or emotional health." 750 ILCS 5/607(a) (West 2014). Section 607(c) of the Act concerns modification to a visitation order and provides as follows:

"The court may modify an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral or emotional health."
750 ILCS 6/607(c) (West 2014).

¶ 33 In looking at section 607(c), an issue arises as to whether the change in visitation is a modification or a restriction, given that each involves a different standard. The Second District has stated "the difference between a modification and a restriction in section 607(c) is that a modification looks at the child's best interests directly, while a restriction looks at the suitability of the parent whose visitation would be curtailed." *In re Marriage of Chehaiber*, 394 Ill. App. 3d 690, 697, 917 N.E.2d 5, 12 (2009). "Examples of restrictions include a termination of visitation, a prohibition on overnight visitation, or a requirement of supervised visitation." *In re K.E.B.*, 2014 IL App (2d) 131332, ¶ 33, 14 N.E.3d 1259. "A reduction of weekend and summer visitation is not considered a restriction of visitation." *In re Marriage of Ross*, 355 Ill. App. 3d 1162, 1167, 824 N.E.2d 1108, 1114 (2005). "[I]t is not the result—the actual change in visitation—that distinguishes a restriction from a modification; it is the purpose for the change." *Marriage of Chehaiber*, 394 Ill. App. 3d at 697, 917 N.E.2d at 12.

"A trial court must hold a hearing on the issue of restricted visitation and should grant restricted visitation only after making

the extraordinary finding that visitation would seriously endanger the child's physical, mental, moral, or emotional health. [Citation.] The serious endangerment standard contained in section 607(c) of the Act is 'onerous, stringent, and rigorous' to meet because liberal visitation is the rule and restricted visitation is the exception. [Citation.] The custodial parent carries the burden of proving by a preponderance of the evidence that visitation with the noncustodial parent would seriously endanger the child. [Citation.] Use of a best interests standard, rather than the serious endangerment standard, constitutes reversible error. [Citation.]" *Heldebrandt v. Heldebrandt*, 251 Ill. App. 3d 950, 957, 623 N.E.2d 780, 784-85 (1993).

A court's decision concerning the modification of visitation will not be overturned on appeal unless it is against the manifest weight of the evidence or constitutes an abuse of discretion. *Heldebrandt*, 251 Ill. App. 3d at 954, 623 N.E.2d at 783.

¶ 34 In the case *sub judice*, Cary filed a motion to modify in April 2015, asking that visits between Tricia and J.C. be supervised for six months because J.C. had suffered injuries while in Tricia's care. At the time, Tricia had an overnight visitation with J.C. on Thursdays, alternate weekends from Friday at 3 p.m. to Monday at 9 a.m., and an extended visitation set for March 9, 2015, through March 16, 2015.

¶ 35 At the hearing, the trial court stated it was dealing with a "petition to restrict visitation" and "[t]hat's all we're going to really be doing today." The court reduced Tricia's alternate-weekend visitation with J.C. to Saturday at 10 a.m. until Sunday at 4 p.m., cut the

overnight Thursday visitation, and vacated the extended March visitation. However, in reducing and restricting Tricia's visitation time, the court utilized the best-interests standard. Despite the proposed reason for the change in Cary's motion to modify, the court did not find Tricia's visitation with J.C. would seriously endanger the physical, mental, moral, or emotional health of J.C. While a "formalistic recital that section 607 ha[s] been complied with" is not required (*In re Marriage of Johnson*, 100 Ill. App. 3d 767, 771, 427 N.E.2d 374, 377 (1981)), we find the court used the wrong standard in deciding to reduce Tricia's visitation time.

¶ 36 Notwithstanding the trial court's error, this court may affirm on any basis found in the record. See *Mutual Management Services, Inc. v. Swalve*, 2011 IL App (2d) 100778, ¶ 11, 956 N.E.2d 594 (stating "this court is not bound by the trial court's reasoning and may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper grounds"); *In re Marriage of T.H.*, 255 Ill. App. 3d 247, 259, 626 N.E.2d 403, 411 (1993) (stating "[i]t is the judgment and not what else may have been said by the trial court that is on appeal to a court of review").

¶ 37 Here, the evidence indicated J.C. was returned to Cary on several occasions with marks on her head and body, including bumps, bruises, and scratches. Pictures showed the various injuries. The trial court found J.C. had to be taken to the hospital on two occasions, one because of breathing issues and the other after being knocked into a bush when her stroller was being pulled by a large dog. The court found the injuries could not be written off as just the ordinary incidences of childhood. Instead, the court concluded Tricia did not provide J.C. with adequate supervision during her visitations. Based on the entire record, the trial court could conclude continuing the same visitation schedule could seriously endanger J.C.'s physical, mental, moral, or emotional health. Had the court made that specific finding, we believe it

would have ruled the same and, as a result, reduced the amount of visitation to "enable Tricia to focus more on [J.C.] and protecting her from injury" as it did. Accordingly, we find the trial court's new visitation order was not against the manifest weight of the evidence and did not constitute an abuse of discretion.

¶ 38 B. Medical Records

¶ 39 Tricia argues the trial court erred in admitting and relying on J.C.'s medical records. We agree but find the error harmless.

¶ 40 In Illinois, business records are admissible as an exception to the hearsay rule. Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992). In 1992, our supreme court amended Rule 236 to allow medical records to be treated as any other business record. Ill. S. Ct. R. 236(b), Committee Comments to paragraph (b). Thus, "medical records are admissible 'as long as a sufficient foundation is laid to establish that they are business records.' " *Jackson v. Reid*, 402 Ill. App. 3d 215, 237, 935 N.E.2d 978, 996 (2010) (quoting *Troyan v. Reyes*, 367 Ill. App. 3d 729, 733, 855 N.E.2d 967, 972 (2006)).

¶ 41 Here, Tricia takes issue with Cary offering J.C.'s medical records at the June 2015 hearing as exhibits and evidence of J.C.'s injuries, Tricia's statements, and the statements and diagnoses of J.C.'s treating physicians. At the June 2015 hearing, Cary acted *pro se*. While testifying in the narrative, Cary indicated his desire to enter J.C.'s medical reports into evidence. Tricia's counsel objected on the grounds of hearsay, and the trial court asked to see the records. Further discussion was had, as Cary indicated what he was attempting to prove with the reports. The court overruled some objections and sustained others. When Tricia's counsel asked the court what it was reading and again objected, the court indicated it was reading the medical records but would ignore Cary's handwritten notes. The parties then moved on to the pictures of J.C.'s

injuries. The court ultimately admitted the records into evidence.

¶ 42 To establish a proper foundation, Illinois Supreme Court Rule 236(a) (eff. Aug. 1, 1992) requires only that the document be "made in the regular course of any business, and if it was the regular course of business to make such a *** record at the time of [the event] or within a reasonable time thereafter." Here, Cary failed to present a sufficient foundation for the medical records, as he simply handed them to the trial court and proceeded to testify as to what happened at the hospital. Thus, the admission of the records into evidence was improper. However, even considering this error, the court had before it sufficient evidence to justify the new visitation order. In its written ruling, the court reviewed the long history of the case and stated facts and conclusions that could be taken from the testifying witnesses and the pictures of J.C.'s injuries. Accordingly, we find any error in the admission of the records to be harmless.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the trial court's judgment.

¶ 45 Affirmed.