

NOTICE

Decision filed 03/31/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140550-U

NO. 5-14-0550

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

| | | |
|-------------------------------|---|-------------------|
| MALINDA DARLENE MILLER, n/k/a |) | Appeal from the |
| Malinda Darlene Waier, |) | Circuit Court of |
| |) | Hamilton County. |
| Petitioner-Appellant, |) | |
| |) | |
| v. |) | No. 01-D-41 |
| |) | |
| CHRIS DWAIN MILLER, |) | Honorable |
| |) | Eric J. Dirnbeck, |
| Respondent-Appellee. |) | Judge, presiding. |

JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's denial of the petitioner's petition to modify visitation is vacated and remanded for further proceedings, where the court held the petitioner to the clear and convincing evidence burden of proof instead of the proper preponderance of the evidence burden of proof.

¶ 2 Petitioner Malinda Waier appeals the circuit court's denial of her petition to modify visitation and motion to reconsider seeking to deny or restrict respondent Chris Miller's visitation rights regarding their daughters, Alexandra and Anna. The circuit court denied the petition to modify visitation because it found that Malinda had failed to prove by clear and convincing evidence that Alexandra and Anna faced serious

endangerment. For the reasons that follow, we vacate the decision of the circuit court and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Malinda and Chris married on November 7, 1997. They had two children during their marriage: Alexandra (born August 23, 1998) and Anna (born November 17, 2000). Malinda and Chris's marriage was dissolved on April 5, 2004. Earlier, on December 22, 2003, the circuit court had entered an order of custody and visitation. According to this order, Malinda would have sole custody of Alexandra and Anna, while Chris would exercise visitation with the children every other weekend and every Tuesday.

¶ 5 On September 20, 2012, Malinda filed a petition to modify visitation, claiming a substantial change in circumstances. She alleged that Chris was verbally abusive to Alexandra and Anna, causing emotional distress in the children. She asked that the court modify the visitation to one that could be agreed to by both Chris and the children. On February 15, 2013, Malinda filed a motion for appointment of a guardian *ad litem*, and on April 10, 2013, the circuit court appointed Sharron Gholson as guardian *ad litem*. On June 27, 2014, the circuit court conducted a hearing on the petition to modify, at which Chris, Alexandra, Anna, Sharron Gholson, and Malinda all testified.

¶ 6 On July 21, 2014, the circuit court made a docket entry in this case, denying the petition to modify visitation because "the Petitioner has failed to prove by clear and convincing evidence that the minor children are facing serious endangerment by visiting with their father." On August 21, 2014, Malinda filed a motion to reconsider the petition to modify visitation. On September 12, 2014, the court held a status hearing on the case.

At the hearing, the court explained that it found visitation to be in the best interests of children. To that end, it recommended the girls attend short visits with Chris at a McDonald's with Gholson and Chris's sister supervising, starting with a visit on September 15, 2014.

¶ 7 On October 3, 2014, the circuit court held a hearing on Malinda's motion to reconsider. In denying the motion to reconsider, the circuit court opined on its reasoning for denying the petition to modify. The court stated that termination of visitation rights is an extraordinary form of relief. In considering the evidence presented, the court was chiefly concerned with whether Malinda had met the "very high burden of proof" needed to grant such an extraordinary remedy. Further, the court noted that, based on its interpretation of her testimony, Gholson "didn't think [the girls] were in physical danger" but "that they were suffering mentally." However, the circuit court expressly noted that "these two girls are going to get what they want and that *** could mean they don't ever see their father again." The circuit court went on to state that, unless ordered to do so by a higher court, it would not enter an order forcing the girls to be physically removed from Malinda's home in order to attend visitation. On November 3, 2014, Malinda timely filed notice of appeal.

¶ 8 ANALYSIS

¶ 9 Malinda argues that the findings of the circuit court were against the manifest weight of the evidence based on the testimony of Alexandra and Anna and the recommendation of Gholson. Chris is not participating in this appeal. We need not

address Malinda's argument, however, because the circuit court applied the incorrect burden of proof to the evidence.

¶ 10 "A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health." 750 ILCS 5/607(a) (West 2012). " 'A parent is entitled to reasonable visitation rights unless the custodial parent proves, by a preponderance of the evidence, that without a restriction of visitation, the child's physical, mental, moral[,] or emotional health will be seriously endangered.' " *In re K.E.B.*, 2014 IL App (2d) 131332, ¶ 31 (quoting *In re Marriage of Campbell*, 261 Ill. App. 3d 483, 492 (1993)); see also *In re Marriage of Manhoff*, 377 Ill. App. 3d 671, 676 (2007); *In re Marriage of Slayton*, 292 Ill. App. 3d 379, 386-87 (1997); and *In re Marriage of Marshall*, 278 Ill. App. 3d 1071, 1078 (1996) (applying a preponderance of evidence standard where a custodial parent seeks to restrict or deny visitation to a noncustodial parent). This burden of proof is the same for the custodial parent regardless of whether he or she seeks a restriction of visitation in the initial visitation schedule or by a modification of visitation. Compare *Manhoff*, 377 Ill. App. 3d 671, and *Slayton*, 292 Ill. App. 3d 379 (custodial parent seeking to modify visitation schedule), with *In re Marriage of Lombaer*, 200 Ill. App. 3d 712 (1990) (parent seeking temporary custody, restricted visitation, and other prohibitions on the mother during the course of divorce proceedings). Visitation restrictions include termination of visitation, a prohibition on overnight visitation, and a requirement of supervised visitation. *K.E.B.*, 2014 IL App (2d) 131332, ¶ 33. When a custodial parent seeks a visitation restriction, the restriction

"must meet the serious-endangerment standard, which is more onerous than the best-interests standard (which governs the *modification* of visitation (citing *In re Marriage of Anderson*, 130 Ill. App. 3d 684, 687 (1985)))." (Emphasis in original.) *K.G.B.*, 2014 IL App (2d) 131332, ¶ 33.

¶ 11 According to its July 21, 2014, docket entry, the circuit court denied Malinda's petition to modify visitation because she "failed to prove by clear and convincing evidence" that Alexandra and Anna would face serious endangerment by continuing to visit Chris. At the October 3, 2014, hearing on the motion to reconsider, the court further stressed that its decision "wasn't about whether or not [the court] believed what the girls were saying" but "about whether or not the burden—the very high burden of proof was met to result in the extraordinary remedy of terminating visitation." "Clear and convincing evidence is considered to be more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense." *In re Marriage of Nolte*, 241 Ill. App. 3d 320, 326 (1993) (citing *In re Marriage of Wechselberger*, 115 Ill. App. 3d 779, 786 (1983)). As noted in the July 21, 2014, docket entry, the court properly applied the serious-endangerment standard when considering the visitation restriction itself. However, it is clear from the July 21, 2014, docket entry and the October 3, 2014, hearing that the circuit court held Malinda's burden of proof to be the higher clear and convincing evidence standard than the proper preponderance of the evidence standard. Because the circuit court applied the incorrect burden of proof, we must vacate its denial of Malinda's petition for modification of visitation and remand for further proceedings.

¶ 12

CONCLUSION

¶ 13 For the reasons stated, we vacate the judgment of the circuit court of Hamilton County and remand for further proceedings.

¶ 14 Vacated and remanded.