FOURTH DIVISION
November 3, 2016

1-15-3589

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
JOAN MINICK,	)	Cook County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 06 D 11753
	)	
JAMES LATZKE,	)	Honorable
	)	Mark Joseph Lopez,
Respondent-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County denying the petition to modify custody is reversed; the trial court erred in refusing to allow a psychiatrist to testify about statements the minor made to him during his examinations of the minor for purposes of the custody hearing where neglect is alleged. The minor's statements are admissible under Illinois law and are relevant to the issues raised in the petition.

¶ 2 This is the second appeal from proceedings on a petition to modify custody. Petitioner, Joan Minick, filed a petition for dissolution of marriage against respondent, James Latzke. In

2010, the circuit court of Cook County entered judgment granting the petition for dissolution. The judgment granted James sole custody of the parties' minor child, M. L., born July 31, 2005, and granted Joan visitation. In January 2013, Joan filed a *pro se* petition to modify custody, and in May 2013 Joan filed a *pro se* amended petition. Joan sought sole custody of M. L. with visitation for James. Joan supported the petition with a report by Dr. Peter Nierman, a psychiatrist who interviewed M. L. James filed a response to the petition.

¶ 3 The trial court proceeded to conduct a hearing on Joan's *pro se* amended petition to modify custody. Joan did not subpoena Dr. Nierman for the hearing. The subject of the prior appeal in this case was the trial court's denial of Joan's oral motion for a continuance because Dr. Nierman was unavailable to testify at that hearing. The hearing proceeded without the testimony of Dr Neiman. Following the hearing, the trial court denied Joan's petition to modify. On appeal, this court reversed the trial court's judgment, holding the court abused its discretion when it refused to continue the proceedings to permit Dr. Nierman to testify. We reversed the judgment denying Joan's oral motion to continue the hearing on her amended petition to modify custody to permit Dr. Peter Nierman to testify and remanded for further proceedings on the amended petition.

¶ 4 On remand, the trial court conducted a hearing in which Dr. Nierman testified. During Dr. Nierman's testimony, the trial court excluded as hearsay any evidence of M.L.'s statements to Dr. Nierman during interviews he conducted of M.L. At the conclusion of the hearing, the trial court denied Joan's amended petition to modify custody. The court also ordered Joan to pay 75% of the child representative's fee and ordered James to pay 25% of the fee. For the following reasons, we reverse the trial court's judgment and remand for further proceedings consistent with this order.

¶ 5 BACKGROUND

¶ 6 We focus here on the proceedings on remand but will provide some contextual information from the prior appeal to help illuminate the proceedings.

¶ 7 In the dissolution proceedings Joan raised her belief that James sexually abused M. L. in fall 2008. The Illinois Department of Children and Family Services (DCFS) made two separate and independent investigations in November 2008 and March 2009 and found no evidence of abuse. DCFS reported the allegations unfounded. Two pediatricians examined M. L. and found there was no physical or sexual abuse. Dr. Grossman, who was appointed as an evaluator, found there was no evidence of either sexual or physical abuse and that it appeared very unlikely that M. L. was the victim of any kind of abuse. The trial court found that "[a]pparently, [Joan] now believes [James] did not sexually abuse [M. L.] ***. The court held it was "convinced that [M. L.] was never sexually abused by anyone, especially [James.]" The trial court ruled that it was in the best interests of M. L. to award James sole custody. Joan appealed that decision to this court. This court found that the manifest weight of the evidence supported the trial court's findings regarding what was in M. L.'s best interests. James and Joan share approximately equal parenting time. (Joan has M. L. 55% of the time.)

¶ 8 In May 2013 Joan filed her amended *pro se* petition for modification of custody. Joan's amended petition to modify custody alleged that since the trial court entered its custody judgment, M. L. has expressed to Joan and to James that she (M. L.) wants Joan to make her decisions, to spend more time with Joan, and to attend school where Joan lives. The amended petition also alleged M. L. has said that she does not feel that James knows how to take care of her, does not care about her feelings, and ignores her questions. The petition alleged that James does not attend to M. L.'s hygiene and cited examples including not washing M. L.'s hair or

brushing her teeth. Joan made allegations about the condition and location of James' home and the fact he does not involve M. L. in activities.

¶ 9 The amended petition also alleged multiple reports to DCFS since the May 2010 judgment that James showered with M. L. and slept in the same bed with her and that M. L. had complained about these behaviors. One such report followed an interview of M. L. by forensic child psychiatrist Dr. Peter Nierman. Dr. Nierman prepared a report of his private interview of M. L. Dr. Nierman's report, dated June 14, 2012, stated, in part, as follows:

1. M. L. told Dr. Nierman that she sometimes showered with her father.

2. M. L. stated that sometimes her father lets her shower by herself and other times he is in the shower and she goes in to join him.

3. M. L. described seeing her father's penis both erect and not erect.

4. M. L. reported that her father sometimes sleeps with her in her bed.

¶ 10 Dr. Nierman's first report includes a cover letter which states, in part, that "I am not in a position to offer an opinion conclusively but I feel the courts should be willing to allow a further review of the matter of [M. L.'s] custody recommendations and joint parenting agreement. I have rarely encountered a child of this age who could so clearly articulate her concerns with the parenting arrangement to which she has been made subject." Dr. Nierman concluded he believes "a full legal assessment of this matter is critical to this child's long term ability to adapt and adjust to life's circumstances." Joan also attached Dr. Nierman's report of a follow up interview he conducted with M. L. In the report of the follow up interview, dated June 19, 2012, Dr. Nierman wrote, in part, as follows:

1. M. L.'s statements suggested she had recently showered with her father.

2. M. L. stated what she really feels is that she spends too much time with her father and she would like to spend more time with her mother.

3. M. L. stated she feels like it is just too much time and that she does not have fun when she is with her father.

4. M. L. feels that her father does not know quite so well or how to take care of her.

5. M. L. felt that she was big enough to be able to wash herself and wash her own hair.

6. M. L. said she did not want him in her bed because she was a big girl and did not feel like he needed to be there in order for her to go to sleep.

7. M. L. felt that she would like to sleep in her own bed at her father's house and that she would like to take her own showers and clean herself the way she does when she is at her mother's house.

¶ 11 Dr. Nierman wrote that it was not clear whether any sexual or sexualized behavior had taken place between M. L. and her father. Dr. Nierman wrote that M. L. never stated that she touched her father and never stated that her father seemed to be in any way gratified or titillated as a result of these episodes where she had showered with him or slept in the same bed with him. Dr. Nierman's second report also states that: "She also stated that she would like her mother to stop hitting her, and she stated that she would like to spend more time with her mother and less time with her father because she feels like her father is not capable of taking care of her as well as her mother." In both interviews M. L. described incidents of spanking by Joan. In his second report Dr. Nierman found that M. L. described spankings and not a reportable offense and did not describe anything abusive with respect to her mother's actions.

¶ 12 Dr. Nierman's second report found that M. L. was "facing a perplexing world in which the disparities in her caretaking seem to be significant to the point that it evokes anxiety. The child directs discussion to matters of clothing, declothing, and nudity far too nonchalantly. *** [M. L.] also clearly expressed that her father could not take care of her as well as her mother. This sentiment, along with the other compiled data in this evaluation, begs that this case be reviewed at the level of the joint-parenting agreement currently enforced that give [M. L.'s] father 45% of the week." Dr. Nierman wrote in the second report as follows:

> "Because the risk of potential sexual abuse is high and the ability to discern whether abuse or grossly inappropriate behavior did not occur in this case is not at a sufficient level of certainty-I telephoned and reported the father to [DCFS] for further investigation. I believe this child has been subjected to behavior that is variant and inappropriate. I believe this child must be protected *** minimally, limits should be put in place and services should be offered to help this child receive the parenting that would serve her best interests."

¶ 13 When the trial court issued its initial ruling on the amended petition it took judicial notice of the May 2010 judgment of dissolution and stated its knowledge of Joan's appeal of that judgment. The trial court read passages from the May 2010 judgment which explained the thinking at the time the May 2010 judgment was entered; after doing so, the court stated that it would "further make more of a record *** based on the parties' judgment." The trial court proceeded to read portions of the May 2010 judgment pertaining to custody. When noting Joan's

prior allegations that James sexually abused M. L. and that DCFS and Dr. Grossman found no basis for those allegations, the court stated as follows:

> "These are very serious allegations, ma'am. And so when you come here now and you start verbalizing all these things that he's doing wrong, I have to take it with a grain of salt, because even the trial court found James to be more credible in his testimony than you were.
>
> And the bottom line is that because you have 50 percent of the time, all those, what you consider deficiencies, ***I have not heard one word that you've been prohibited in any way from *** doing those things.
>
> * * *
>
> So you are--you are as involved as a parent can be, but the court has already found that you can't co-parent. And so that is not going to change from--at this point in time. The fact that you have litigated non-stop in post-decree reinforces that fact, that you two can't co-parent even *** three years after the judgment was entered."

The trial court informed Joan that the reasons stated in the May 2010 judgment were "the foundation for why [the court] made *** findings that the child's best interest was with your ex."

¶ 14 Joan filed a motion to reconsider the order denying her petition to modify custody. Joan, now represented by counsel, argued the trial court should reconsider its prior ruling and allow Joan to bring in her expert and requested a hearing on the allegations raised in the petition.

Counsel also requested the court appoint a guardian for M. L. and conduct and *in camera* hearing with the child. The trial court denied the motion to reconsider stating, in part, "[t]he fact that I denied a motion for another witness to come in, if I believed that there was something credible to substantiate that, I would certainly do so. I didn't believe it." Joan's attorney asked if the court's credibility determination as to Joan was based on the allegations and findings in the 2010 judgment. The trial court commented that all of the parties' post-judgment litigation had been before the same trial judge and he continued: "I have gone through this a number of times. And I find that there's no basis [for] any risk of harm to the child." The trial court discussed the current allegations and stated "And mom obviously, she's aware she needs more than that so that's where I get these allegations of endangerment. And I don't believe them."

¶ 15 On remand from this court, the trial court appointed a child representative. The matter proceeded on Joan's amended petition to modify custody filed in May 2013. Joan's attorney examined Dr. Nierman and the child representative conducted cross-examination. Dr. Nierman testified that he is board certified in both child and adult psychiatry. He is employed as the chief medical officer of Chicago Lakeshore Hospital where he is responsible for the care of children, adolescents and adults. Dr. Nierman testified he is also employed as a professor at the University of Chicago Hospital where he oversees residents, fellows, and medical students in clinical rotations. Although Joan's attorney questioned Dr. Nierman as to his qualifications, experience, and specifically whether he had served as an expert witness in the past, counsel failed to tender Dr. Nierman as an expert witness in these proceedings. The trial court did admit Dr. Nierman's *curriculum vitae* into evidence.

¶ 16 Dr. Nierman attempted to testify regarding a record of an interview of M.L. he conducted on June 13, 2012. The child representative objected on the grounds the document was hearsay.

The trial court admonished Dr. Nierman to testify from his memory or refresh his recollection with the document. Dr. Nierman testified that he recalled meeting M.L., who was about seven-years old, because her mother was concerned about inappropriate behavior and wanted M.L. to see a child psychiatrist to see if he had any concerns as well. Joan's attorney attempted to ask what, if anything, M.L. told him on that date and the child representative objected on hearsay grounds. The trial court sustained the objection. Dr. Nierman testified that he observed that M.L. was demonstrating behavior and telling him things. When Dr. Nierman attempted to testify what M.L. told him, the trial court sustained the child representative's objection.

¶ 17 Dr. Nierman was able to testify that Joan was concerned that M.L. was being disaffected by showering and sleeping with her father. He was not allowed to testify what information he elicited from M.L. Dr. Nierman testified to the questions he asked M.L. The questions pertained to experiences at her father's home including showering with her father. After their first interview, he wanted to see her again in about a week to test the consistency of her reporting because he was "concerned that there was possibly behaviors that were—that were affecting her that—in a way that I would consider to be unhealthy as a child and adolescence [*sic*] psychiatrist." He did not believe M.L. was being coached in any way because M.L. complained about both parents in some way; therefore, Dr. Nierman opined, "if she had been coached, I wouldn't think that she would have taken the tact [*sic*] she had." Dr. Nierman also testified that he is experienced in interviewing children and determining whether they are using their own language or language that has been inserted or giving a trained response. Dr. Nierman testified none of the indicators of coaching were present in his first interview with M.L.

¶ 18 Joan's attorney showed Dr. Nierman a record of his second interview of M.L. dated June 18, 2012. Dr. Nierman testified that during his second interview of M.L., he asked M.L. when

was the last time she showered with her father. He asked if her father was still sleeping in the same bed with her and whether she had ever asked him not to sleep with her. Dr. Nierman asked M.L. "whether or not she had ever told her father that she was a big girl and could shower by herself and take care of her hygiene." He also asked specific questions about how her father takes care of her. Dr. Nierman testified that after the interview he "remained concerned that the child was perplexed and confused and in—perhaps being over-stimulated in a way that I thought was developmentally inappropriate and could potentially be disaffecting her." He believed she was "overly stimulated *** by sexual issues" based on "the reports she had made *** about showering with her father." Following that second interview, Dr. Nierman made a report to DCFS.

¶ 19 Joan's attorney showed Dr. Nierman a record of his interview of Joan and M.L. that he conducted on October 8, 2013. During his third interview of M.L. on October 8, 2013, Dr. Nierman asked M.L. whether she was still showering and sleeping in the same bed with her father and whether there had been any changes in that regard. He testified he was also "curious because of her physical appearance to ask whether she was getting dental care." Dr. Nierman stated that M.L.'s physical appearance reflected what appeared to be "significant dental needs." After that interview Dr. Nierman had different concerns than his first interview because he had learned that DCFS had investigated and there was not a finding. Dr. Nierman became more concerned "with day-to-day care and with whether or not [M.L.] was getting the full and complete care one would hope for in a child who's in a court supervised divorce."

¶ 20 Dr. Nierman interviewed M.L. again on January 19, 2015. He asked M.L. questions about how things were going with regard to her home life. He also asked her about thoughts of suicide and depression and "went through clinical questions running down suicidal ideation." He

asked her about her "expressed desires and frustrations with regard to the structure and architecture of her life with respect to the time she spends with her parents." There was no change in the appearance of M.L.'s teeth at the January 19, 2015 interview. After this interview, Dr. Nierman's concern was that M.L. "seemed under significant stress as a result of the findings of this interview." His clinical findings of his evaluation on January 19, 2015 were "the emergence of suicidal ideation and the emergence of *** obsessive thoughts that were intruding in the school setting of preoccupations with nudity and penises and things like that that I found inappropriate." His clinical findings from his interviews in 2012, 2013, and 2015 were that M.L. "had evidenced inappropriate behavior that was observed, such as thrusting her hips and describing behaviors that she attributed to these experiences of showering or sleeping with her father and that the *** impact of those inappropriate expressions and experiences had persisted now for two and a half years."

¶ 21 Dr. Nierman testified that he wrote the reports of his interviews of M.L. and that they were the reports of his observations and conclusions. Joan's attorney asked to admit the reports into evidence and the child representative objected. The trial court sustained the objection based on the foundation for the reports being hearsay—specifically discussions with Joan and M.L.

¶ 22 On cross-examination, Dr. Nierman testified he did not secure a release from the custodial parent to see M.L., and Joan did not inform him that James had sole custody. When Dr. Nierman interviewed M.L. after he made his report to DCFS, which was found unfounded, when he had concerns of suicidal ideations, he did not make a second report to DCFS, did not hospitalize M.L., and did not give her any medication. He did not hospitalize her because he did not feel that her suicidal ideation was acute at that time or that it required that level of intervention. Dr. Nierman did not meet with James at any time.

¶ 23 At the conclusion of Dr. Nierman's testimony the trial court took the matter under advisement for the issuance of a written order. The court issued its written order on December 2, 2015. The court began by noting that Dr. Nierman's testimony was included with the testimony and evidence presented at the original hearing on Joan's amended petition to modify custody. The court also noted that Joan's attorney did not request that Dr. Nierman be found to be an expert in child psychiatry or any other field, and the court had not made any such finding. The court recounted Dr. Nierman's testimony then noted that in predissolution proceedings Joan alleged sexual misconduct against M.L. by James, and the dissolution court found those allegations not credible or not having any basis in fact. DCFS closed an investigation into that allegation without any findings against James. The court then found that "post decree Joan has again alleged the same or similar allegations against James which the Court finds to be not credible." The court recounted that it found James to be more credible in the proceedings in August 2013. The court pointed out that the dissolution court awarded James sole custody and that determination was affirmed on appeal. The court wrote that "[n]evertheless in the instant cause Joan's Amended Petition for Modification of Custody includes 317 paragraphs, the vast majority of which Joan provided no evidence to support at trial. She also alleged at paragraph seven that 'Based on opinion and belief Judge Kelly got the case wrong' notwithstanding the due process she was afforded in the pre-decree proceedings."

¶ 24 The trial court found that "Joan has significant parenting time with the minor child and is free to supplement what she believes to be James' deficiencies in caring for the minor child by her own efforts. If she believes that M.L.'s hair is not being washed, she is free to do so during her own parenting time, if she believes the child is in need of braces, and the parties are not in agreement that that should be done, she should petition this court and ask that the Court make a

determination on that issue." The court stated that it considered Dr. Nierman's testimony "and gives it the weight it believes appropriate." The court stated that the child representative had not raised any concern with the custody arrangement ordered in the dissolution. The court concluded by finding that a substantial change in circumstances had occurred as M.L. was then over five years older than at the time of the entry of the dissolution judgment, but the court found no credible evidence in the record to warrant a modification of the sole custody awarded to James in the dissolution.

¶ 25 This appeal followed.

¶ 26 ANALYSIS

¶ 27 In this appeal, Joan argues the trial court erred in refusing to grant the requested modification in custody, refusing to allow Dr. Nierman to testify as to M.L.'s statements to him during multiple interviews, and by ordering her to pay the majority of the child representative's fees. First, we address Joan's argument the trial court erred in refusing to admit M.L.'s statements to Dr. Nierman and his records and reports of his interviews of M.L. because our resolution of that issue may require remand to the trial court obviating the need to address Joan's other issues at this time. On this point Joan argues that Dr. Nierman's testimony and reports were admissible as an exception to the rule against hearsay. Joan argues that under section 606(e) of the Dissolution Act, "a child's out of court statements are admissible on the matters of whether a child has been abused or neglected and the wishes of the child with respect to custody." Finally, Joan argues "an exception to introduction of a minor's statements for purposes of state of mind exists *** including the child's preferences as to who they would prefer to live with."

¶ 28 "A trial court's determination on the admissibility of evidence will not be reversed absent an abuse of discretion." *Babcock v. Martinez*, 368 Ill. App. 3d 130, 145 (2006). See also *In re Marriage of Padiak*, 101 Ill. App. 3d 306, 315 (1981). Further, "[w]hether a witness is sufficiently qualified to testify as an expert is a matter committed to the sound discretion of the trial court[,] whose determination on the issue may be reversed only if it constitutes a clear abuse of that discretion. [Citation.]" *In re Brandon A.*, 395 Ill. App. 3d 224, 236 (2009). Joan did not ask the court to qualify Dr. Nierman as an expert in child psychiatry, and the child representative did not *voir dire* him regarding his qualifications. See *O'Brien v. Meyer*, 196 Ill. App. 3d 457, 461-62 (1989). Nonetheless, Dr. Nierman testified as to his conclusions after speaking with M.L. and it is apparent those conclusions were his opinions as a psychiatrist. Dr. Nierman testified as to his qualifications, and we find it would have been an abuse of discretion to preclude him from testifying as an expert in child psychiatry. See *In re Brandon A.*, 395 Ill. App. 3d at 236 ("Given these qualifications, the trial court rightfully allowed Viernum to testify as an expert competent to offer insight into Brandon's behaviors and needs, and under the circumstances, the court would have abused its discretion had it precluded her from doing so." (citing *In re Beatriz S.*, 267 Ill. App. 3d 496, 499-500 (1994) (holding trial court abused its discretion in failing to qualify witnesses as experts and that "[t]o compound matters, although the trial court refused to qualify either *** as experts, they were permitted, even in the face of objection, to render opinion testimony"))).

¶ 29 Joan argues that M.L.'s statements to Dr. Nierman during his examination were admissible pursuant to section 606(e) of the Dissolution Act. We agree. Section 606(e) of the Dissolution Act read, in pertinent part, as follows:

> "Previous statements made by the child relating to any allegations that the child is an abused or neglected child within the meaning of the Abused and Neglected Child Reporting Act, or an abused or neglected minor within the meaning of the Juvenile Court Act of 1987, shall be admissible in evidence in a hearing concerning custody of or visitation with the child. No such statement, however, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect." 750 ILCS 5/606(e) (West 2014).

A neglected child includes a child who is not receiving the proper or necessary medical or other remedial care recognized under State law as necessary for a minor's well-being, or whose environment is injurious to her welfare. 325 ILCS 5/3 (West 2014); 705 ILCS 405/2-3 (West 2014). Joan's amended petition claimed instances of alleged neglect of M.L. and that her "present environment seriously endangers [M.L.'s] physical, mental, moral, and emotional health." Joan supported those allegations with specific allegations of fact. M.L.'s statements relating to allegations of neglect or abuse were admissible in the hearing on Joan's petition concerning custody of M.L. without conducting a reliability hearing. *In re Marriage of Gilbert*, 355 Ill. App. 3d 104, 112-13 (2004). In *Gilbert*, the respondent filed an *ex parte* petition for an order of protection against the petitioner under their original dissolution case number. *Id.* at 106. At a hearing, multiple witnesses testified to statements made by one of the parties' minor children alleging sexual abuse by the petitioner. *Id.* at 106-09. The petitioner argued that the trial court erred in admitting the hearsay evidence of the child's statement as to the sexual abuse. *Id.* at 111. The court found that because the essence of the trial court's ruling implicates questions of custody and visitation and the petition was brought under the name and title of the original dissolution petition, section 606(e) of the Dissolution Act applied. *Id.* at 112. The

Gilbert court held that a reliability hearing is not required before the statements are admissible under the language of section 606(e), and no such hearing would be required in a bench trial. *Id.* at 112-13. "[I]n a bench trial the trial judge is presumed to have considered the time, content and circumstances under which the statement was made in determining the reliability of the statements." *Id.*

¶ 30 Joan also relies on the court's decision in *In re the Marriage of Sieck*, 78 Ill. App. 3d 204 (1979) in support of her argument that "it has long been accepted that a psychologist's or psychiatrist's testimony may properly be considered with respect to whatever illumination it may provide to the court in identifying the best interests of a child." In *Sieck*, the petitioner appealed the trial court's custody order. *In re Marriage of Sieck*, 78 Ill. App. 3d at 206. The respondent's then sexual partner testified on behalf of the respondent over the petitioner's objection. *Id.* at 212. She testified that both of the parties' children told her that they did not like their mother (the petitioner) and they hated her. *Id.* The witness testified the children told her that the petitioner "slapped them in the face, pulled their hair, kicked them and rarely let them go out of doors." *Id.* The witness also testified that the children said they did not like the petitioner's sexual partner (later husband), and that he "hit and spanked them and threatened to lock them and their mother in a cage." *Id.* On appeal the petitioner argued that the trial court erred in allowing the witness to testify as to what the children allegedly told her about their relationship to their mother "because those statements were hearsay and influenced the trial court's decision." *Id.* at 218. The *Sieck* court found that with respect to the statements by the children testified to by the witness, "the record shows that they were not offered to prove the truth of those statements, but rather as evidence of the children's state of mind and emotional state." *Id.* The court held that the court did not err in receiving the testimony. *Id.*

¶ 31 Under *Sieck*, the trial court in this case should have heard Dr. Nierman's testimony regarding M.L.'s statements for the limited purpose of showing M.L.'s state of mind and emotional state. Further support is found in *In re Marriage of Siegel*, 123 Ill. App. 3d 710 (1984), where the respondent appealing a custody award argued that the trial court erred in not admitting evidence of certain statements made by the children to third parties. *In re Marriage of Siegel*, 123 Ill. App. 3d 710, 716 (1984). The respondent argued that "these statements should have been admitted under the 'state of mind' exception to the hearsay rule and that the trial court's failure to hear such evidence prevented the court from ascertaining the children's 'state of mind' when they expressed their preference as to custody." *Id.* at 716. The respondent in *Siegel* relied on the decision in *Sieck* and on *In re Marriage of Rizzo*, 95 Ill. App. 3d 636, 642 (1981). *Id.* In *Rizzo*, the respondent argued that during a custody hearing, the trial court "improperly refused to allow into evidence certain hearsay statements made by the children to a third party." *In re Marriage of Rizzo*, 95 Ill. App. 3d at 642. The statements were to the effect that the children wished to live with the respondent. *Id.* The respondent in *Rizzo* argued that the "statements should have been admitted under the 'state of mind' exception to the hearsay rule." *Id.* The *Rizzo* court wrote that "[o]ne of the factors a court is to consider in determining custody is the wishes of the children concerning with whom they desire to live. ([Citation.]) Thus, one of the ultimate questions the court must determine is the wishes, or state of mind, of the children concerning custody. This being the case, the statements by the children *** shortly before trial expressing their then existing state of mind, though hearsay, were admissible if made under conditions assuring trustworthiness." *Id.* In both *Rizzo* and *Siegel* the trial court conducted *in camera* examinations of the children, thus the error in excluding the evidence was harmless. *Id.* at 643; *In re Marriage of Siegel*, 123 Ill. App. 3d at 717.

¶ 32 In this case the trial court twice sustained objections by the child representative to Dr. Nierman's testimony about what M.L. told him when Dr. Nierman was testifying about his first interview on June 13, 2012. The court finally admonished Joan's attorney that "you're not going to get conversations with the child ***." When Dr. Nierman was testifying about his second interview of June 18, 2012, he testified he did not specifically ask M.L. any questions concerning who she wanted to spend more time with. However, we note that in Dr. Nierman's report of that interview, he wrote that M.L. stated she would like to spend more time with her mother (*supra* ¶ 10) and her father could not take care of her as well as her mother (*supra* ¶ 12). The trial court's order misstates the evidence in this regard and finds that "she [(M.L.)] did not ask about spending more time with mother." Because Dr. Nierman testified he did not specifically ask that question, the record on balance begs the question of whether M.L. spontaneously reported that fact to Dr. Nierman. A child's preference as to custody should be given weight when it is based on sound reasoning. *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 414 (1994). Where a child indicates a stronger attachment to one parent, "that attachment should be respected, even though the child has not given a good reason for it." *Id.* at 414-15. In the absence of evidence of coercion or that the child's stated preference is based on improper reasons, the trial court should give the preference some weight. *Id.* at 415. One "way to get a child's preference before the court is through the admission of hearsay statements made by the child." *Id.* at 416. Unlike *Rizzo* and *Siegel*, the trial court in this case did not conduct an *in camera* interview of M.L. Although Joan claims on appeal to have requested an *in camera* interview, that request came in a second amended petition which she subsequently withdrew to proceed on the first amended petition. Nonetheless, in the absence of an *in camera* interview, in light of the allegations in this

case, it was vitally important that Dr. Nierman's reports of his interviews be admitted into evidence to demonstrate M.L.'s state of mind with regard to her preferred custodian.

¶ 33 Moreover, the trial court should have allowed Dr. Nierman to testify as to M.L.'s statements to him during their interviews for the purpose of explaining the bases for his opinions. "The rule prohibiting the admission of hearsay evidence is not implicated where the testimony in question is offered as evidence of a child's 'state of mind and emotional state' ([citation]), and '[t]he rule is not implicated *** where statements otherwise inadmissible as hearsay are used by experts for the purpose of explaining the bases for their opinions' [citation]." *In re Brandon A.*, 395 Ill. App. 3d at 237. In *Brandon A.*, the court affirmed the trial court's order terminating the respondent's parental rights. *Id.* at 226. In the best interests hearing, the child's counselor testified that the child told her that he did not like visiting the respondent in prison and that he (the child) did not really care if he visited the respondent or not. *Id.* at 230. Another counselor testified that the child stated that he hated his father and did not want to visit anymore and that he (the child) never wanted to see the respondent again. *Id.* at 230. The respondent objected to the counselors' testimony on hearsay grounds. *Id.* at 235. The court rejected that argument because the trial court had indicated it was admitting the testimony as evidence of the child's state of mind and as foundational evidence for the basis of the counselor's opinions. *Id.* at 237. The court held the trial court did not err in overruling the respondent's hearsay objections. *Id.*

¶ 34 Petitioner reminds this court that when remanding this case for the trial court to consider Dr. Nierman's testimony, we wrote that "M.L.'s preferred caretaker, if proven, is entitled to some consideration," and "[o]ne way courts learn the child's preferences is though admission of the child's hearsay statements through the testimony of professional personnel." *In re Marriage of Minick*, 2014 IL App (1st) 133691-U ¶ 41 (citing *In re Marriage of Hefer*, 282 Ill. App. 3d

73, 76 (1996)). In *Hefer*, the court wrote that a "better way than an *in camera* hearing to get the child's preferences before the court may be through admission of the child's hearsay statements, through the testimony of a guardian *ad litem*, or through professional personnel." *In re Marriage of Hefer*, 282 Ill. App. 3d at 76 (citing *In re Marriage of Wycoff*, 266 Ill. App. 3d at 415-16). In this court's prior order, we acknowledged the hearsay nature of Dr. Nierman's reports. *In re Marriage of Minick*, 2014 IL App (1st) 133691-U ¶ 39. We stated that at that time, the trial court should have accepted Dr. Nierman's reports as an offer of proof as to what his testimony would be. *Id.* We found that the reports "indicate he would testify to his professional evaluation of M.L. and her statements to him as a result of that evaluation." *Id.* ¶ 40. We also found that "the child's mental condition is necessarily a material issue. *Id.* ¶ 41. We then held that when the trial court denied the motion for a continuance to permit Dr. Nierman to testify, the trial court deprived itself of "all of the available evidence of the best interest of the child," specifically noting M.L.'s preference as to her caretaker and her mental condition. *Id.* We find that Dr. Nierman's testimony as to M.L.'s statements was contemplated by this court's prior order and anticipated to be allowed.

¶ 35 We are cognizant of the fact Joan failed to file a posttrial motion arguing the trial court erred in excluding Dr. Nierman's testimony about statements M.L. made to him during their interviews and in excluding his reports of those interviews. "Generally, an issue that was not objected to during trial and raised in a posttrial motion is forfeited on appeal." *In re N.T.*, 2015 IL App (1st) 142391 ¶ 41. However, "the waiver rule is a limitation on parties and not on reviewing courts. See *Welch v. Johnson*, 147 Ill. 2d 40, 48 (1992) ('[a reviewing] court *** may, in furtherance of its responsibility to reach a just result, override considerations of waiver')." *In re James S.*, 388 Ill. App. 3d 1102, 1106 (2009). This is a child custody case in

which, at minimum, neglect is alleged and the well-being of a minor child is at issue. Moreover, the appellee failed to file any brief in this court and thus failed to raise the issue of forfeiture. Therefore, we elect to reach the issue of the exclusion of M.L.'s statements to Dr. Nierman and hold that the exclusion was an abuse of the trial court's discretion. *In re Marriage of Almquist*, 299 Ill. App. 3d 732, 735 (1998) ("Generally, a reviewing court will not disturb a trial court's ruling on the admissibility of evidence absent an abuse of discretion."). The trial court's judgment denying Joan's amended petition is reversed. The trial court is directed that evidence of M.L.'s statements are admissible to show her emotional state, state of mind as to her preferred custodian, and for the purpose of explaining the bases of Dr. Nierman's opinions. *In re Brandon A.*, 395 Ill. App. 3d at 237.

¶ 36 The trial court granted the child representative's petition for fees and apportioned responsibility for the fees between Joan and James. "The standard of review in determining the propriety of the trial court's attorney fee award is abuse of discretion." *McClelland v. McClelland*, 231 Ill. App. 3d 214, 228 (1992). "When determining the proper allocation, the court is to consider the total circumstances of the mother as well as the father ([citation]), which includes consideration of the parents' financial resources and relative ability to pay." *Id.* In this case the court specifically found that "James has a greater ability to pay fees than Joan. However, the court finds that the work performed by [the child representative] was attributed to the allegations made by Joan and rejected by this court." Because the assignment of responsibility for the child representative's fees was influenced by the trial court's decision on the merits of the petition at issue in this case, we feel it appropriate to vacate that order in light of our disposition. The trial court's determination of the merits of Joan's allegations may change after the trial court has heard all of the relevant and admissible evidence, which may alter its

finding about the allocation of responsibility for the child representative's fees. *Cf. Id.* at 229 ("Judith brought charges of sexual abuse and satanic cult practices against Donald *without presenting evidence to substantiate the charges*." (Emphasis added.)). The cause is remanded for further proceedings consistent with this order.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, the circuit court of Cook County's judgment is reversed and the cause remanded for further proceedings consistent with this order.

¶ 39 Reversed and remanded.