

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DARRELL LAMB,)	Appeal from the Circuit Court
)	of Winnebago County.
Plaintiff-Appellee,)	
)	
v.)	No. 11-F-894
)	
ROBIN LINTZ (n/k/a Robin Pickett),)	Honorable
)	Gwyn Gulley,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in awarding joint custody of the minor to the mother and father and physical custody to the father; the trial court properly considered the required factors in determining custody, and the factors did not weigh in mother's favor such that she should have been granted sole custody, as she argued on appeal. Further, the trial court's conclusion that the parents could cooperate effectively and consistently in matters that directly affect the joint parenting of the child was not against the manifest weight of the evidence.

¶ 2 In these consolidated child custody cases, the trial court awarded joint legal custody of Matthew Lamb to his parents, plaintiff, Darrell Lamb and defendant, Robin Lintz (now known as Robin Pickett). The court awarded physical custody of Matthew to Darrell. Robin now appeals

from that order, seeking reversal of the award of joint custody judgment and requesting that she be granted both physical custody and sole legal custody. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Matthew was born in January 2010. Although they never married, Darrell and Robin lived together from Matthew's birth until August 2011, when Robin left, her whereabouts initially unknown. Matthew remained with Darrell.

¶ 5 Darrell then petitioned to establish custody, child support, and a visitation schedule, seeking temporary and permanent sole custody of Matthew. Darrell also sought to restrict Robin's visitation because of the "[p]eople that [s]he [l]ives with." He also requested that Robin pay child support. Court-ordered mediation was terminated after one session.

¶ 6 In January 2012, Robin obtained an emergency order of protection against Darrell. Robin alleged that, when she returned Matthew to Darrell on December 31, 2011, Darrell beat on her car with a wooden axe handle and yelled at her husband, Rick Pickett, who was seated in the car. All of this occurred in front of Matthew. Darrell was arrested for criminal damage to property. Matthew remained in Robin's care. Darrell filed a petition for temporary relief, seeking custody of Matthew. Pursuant to an agreed temporary order, Matthew remained with Robin, and a visitation schedule was set up for Darrell. The trial court vacated the order of protection and appointed a guardian *ad litem* for Matthew.

¶ 7 At trial on Darrell's petition, Darrell argued that the court should order joint legal custody with physical custody awarded to him; even if the court awarded physical custody to Robin, he argued that joint legal custody was appropriate. Robin argued that she should be awarded sole custody of Matthew. She could not agree to joint custody because she did not "feel comfortable in talking to [Darrell] and being able to deal with him on a rational basis." After noting that it

was “clear in this case that both parents love the child and want custody” and that it “was not a very easy decision for the Court to make,” the trial court awarded joint legal custody of Matthew to Darrell and Robin and physical residence and custody to Darrell. This appeal followed.¹

¶ 8

II. ANALYSIS

¶ 9 Robin now contends that the trial court erred in awarding joint custody of Matthew with physical custody to Darrell. According to Robin, the court's judgment was an abuse of discretion, against the manifest weight of the evidence, and manifestly unjust.

¶ 10 Determinations of child custody are governed by section 602 of the Illinois Marriage and Dissolution of Marriage Act (Act), which provides that custody must be determined “in accordance with the best interest of the child” and by considering all relevant factors, including the 10 factors listed in that section. 750 ILCS 5/602(a) (West 2014). These factors are:

- “(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;

¹ Robin filed her notice of appeal in case 2-15-0477 on May 5, 2015. However, Darrell and Robin did not file their required joint parenting agreement until July 9, 2015, after which Robin filed another notice of appeal that resulted in case 2-15-0732. Thereafter, the cases were consolidated. Because of this delay in filing the parenting agreement after the initial notice of appeal, along with an extension of time to file appellant's brief and the necessity of an overdue warning letter, these cases are filed outside of the 150-day requirement of Supreme Court Rule 311(a)(5) (eff. Feb. 26, 2010).

- (4) the child's adjustment to his home, school and community;
- (5) the mental and physical health of all individuals involved;
- (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
- (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;
- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
- (9) whether one of the parents is a sex offender; and
- (10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed." 750 ILCS 5/602 (a) (West 2014).

The court is not to consider the conduct of a present or proposed custodian that does not affect his relationship to the child. 750 ILCS 5/602 (b) (West 2014). In addition:

“Unless the court finds the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child. There shall be no presumption in favor of or against joint custody.” 750 ILCS 5/602(c) (West 2014).

¶ 11 We give a trial court's determination regarding custody great deference because the trial court is in a superior position to judge the credibility of the witnesses and determine the best

interests of the child. *In re Marriage of Iqbal and Khan*, 2014 IL App (2d) 131306, ¶ 55. We will not reverse such a determination on appeal unless “ ‘it is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred. [Citation.]’ ” *Id.* A judgment is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent. *Id.*

¶ 12 In giving its oral ruling, the trial court specifically noted that, in addition to the evidence and the credibility of the witnesses, it considered “the best interest factors pursuant to 750 ILCS 5/602.” On appeal, Robin addresses each of the factors above *seriatum* and states that “[m]ost all of the factors***that are relevant to this case favor Robin having sole custody of Matthew.” In fact, Robin argues that *all* of the relevant factors favor her having sole custody of Matthew. According to Robin, section 602(a)(1) (the wishes of the child's parent or parents as to his custody) favors her even though both she and Darrell sought custody. The wishes of the child as to his custodian (section 602(a)(2)) would appear to be not applicable in this case, as even Robin acknowledges that Matthew, at age five, was “too young to be called upon to give his preference;” however, Robin argues that this factor favors Robin's sole custody because the guardian *ad litem* recommended that Robin be awarded sole custody. Robin finds no relevant factor that is neutral as to both sides, let alone in favor of Darrell having any kind of custody of Matthew. Such one-sided argument is not effective advocacy.

¶ 13 We also note that much of Robin's brief is taken up with comparing this case with other published decisions. Such argument is not helpful, as cases involving parental rights, including child custody, are *sui generis*. See *In re Scarlett Z.-D.*, 2014 IL App (2d) 120-266-B, ¶ 65.

¶ 14 Robin argues that section 602(a)(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”) favors her sole custody of Matthew because of “the wonderful relationship [that Matthew] has with his mother, step-father and sister Destiny, and courts are usually loathe to separating [*sic*] siblings.” The evidence showed that both Robin and Darrell were involved in activities with Matthew. The trial court noted the good relationships that Matthew had with Robin, her husband Rick (whom Matthew called Daddy), and her daughter Destiny, who was seven years older than Matthew and had been adopted by Robin (after Robin’s parental rights to her had earlier been terminated) less than a year before the court's judgment. The court also noted the good relationships that Matthew had with Darrell, Darrell's grown sons, and Darrell's grandchildren. The evidence shows, and the trial court found, that Matthew had loving families in both homes, and the evidence does not overwhelmingly favor either parent.

¶ 15 Robin next argues that section 602(a)(4) (the child's adjustment to his home, school and community) favors her having sole custody because Matthew had “been in Robin's sole custody for over four (4) of his five (5) years of life.” We first note that Robin never had sole custody of Matthew; while she was Matthew’s primary caretaker before the trial court’s order, there was no prior custody determination. Court orders specifically awarded Darrell regularly scheduled parenting time. Other than analysis of other published cases, Robin's argument consists of nothing more than “Matthew is completely adjusted to living with Robin, Rick and Destiny in their stable home [citations to record]. His room has his toys and books and he goes to school close to Robin's house [citation to record].” However, Darrell and Robin live in the same community, and Matthew was similarly well adjusted in his time spent with Darrell. Both Darrell and Robin testified to helping Matthew with his education and testified regarding the activities they did or hoped to engage in with Matthew. We find that this factor does not overwhelmingly favor either parent.

¶ 16 In regard to the next three factors (602(a)(5) (mental and physical health of all individuals involved); 602(a)(6) (violence or threat of physical violence by the child's potential custodian); 602(a)(7) (the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986)), Robin argues that she should be granted sole custody because of Darrell's "anger problem." For support, Robin points to: (1) the December 31, 2011 incident during which Darrell swung the axe handle near her and Matthew and damaged the garage and Robin's car; (2) Darrell's alleged use of alcohol and drugs; (3) Darrell's alleged difficulties in dealing with the GAL; (4) an incident in which Darrell got upset and yelled in the courtroom; and (5) an alleged July 2011 incident in which Darrell chased Rick with a gun. According to Robin, "Darrell has many undesirable characteristics for a father to have, such as anger, inflexibility,***not communicating well, and he is impatient."

¶ 17 We first note that there was no evidence presented that any of Darrell's "undesirable characteristics" was, in fact, a mental or physical health defect. Therefore, section 602 (a)(5) is not applicable here. Further, in her arguments regarding section 602(a)(7), Robin points only to the December 2011 axe handle incident for evidence of "ongoing or repeated abuse." Clearly, one incident more than three years before the court's judgment was entered is not evidence of ongoing or repeated abuse. Again, section 602(a)(7) is not applicable in this case.

¶ 18 Physical violence under section 602(a)(6) is a legitimate issue. Regarding the July 2011 incident, Rick Pickett testified that he was with Robin in the house in which Darrell and Robin lived together when Darrell came home; Darrell then chased him down the street with a handgun. Robin testified that Darrell came home from work early that day and found her and Rick in the house (Matthew was upstairs sleeping in his bedroom). Darrell had his grandfather's gun. Robin went into the basement and tried to block the door; Darrell kicked the door and screamed

at her. Matthew never came down, and Robin never called the police. She also denied that she tried to kill herself. Darrell testified that he came home from work early and found Rick and Robin in the living room. After Rick left, Darrell went upstairs to get Matthew and told Robin to leave. Robin went downstairs, tied a rope around her neck, and tried to throw it over a beam. She said that if she was going to lose Darrell, she was going to take herself out. He testified that his “grandfather’s” gun was actually his father’s gun; the gun was a rifle, not a handgun, and his brother in Missouri was in possession of it in July 2011.

¶ 19 Regarding the December 2011 incident, Robin testified that she was carrying Matthew to return him to Darrell after a visitation when Darrell came running out of the house, screaming and hollering and swinging an axe handle. Darrell struck the garage with the axe handle and broke a hole in the siding. Darrell also struck Robin’s car, in which Rick was sitting, with the axe handle, creasing the roof. Darrell testified that, when Robin brought Matthew to the house, Rick said to him “that if you want your son come through me to get him, he’s mine now.” Darrell said that he got angry and admitted damaging the siding but denied damaging Robin’s car, saying that he only tapped it. He was arrested, and he eventually pleaded guilty to disorderly conduct. He also admitted that he was wrong for going after Rick.

¶ 20 Darrell admitted that he got angry in court once and had to be told by the judge to be quiet. The GAL, Kelly Vecchio, testified that, in 2013, during the course of the proceedings, Darrell contacted her office and threatened to turn her in to “authorities.” Darrell was “upset and emotional” about her recommendations, so she was no longer comfortable meeting with him in person in her office. While Vecchio found that both Robin and Darrell were good parents, she ultimately recommended that Robin have “primary” custody of Matthew as well as physical custody.

¶ 21 The trial court found the testimony of Rick and Robin regarding the December incident to be “a little questionable,” finding that there would have been more damage to the car if their testimony was to be believed. The court also questioned their credibility regarding whether Darrell chased Rick with a gun. The court was “concerned about the GAL situation, as the court did not “know what happened,” but noted that “there was some sort of strain in the relationship” between Darrell and the GAL. Ultimately, the court expressed its belief that Darrell “may have some anger issues” and ordered him to undergo anger management counseling.

¶ 22 Robin argues not only that the court’s decision was an abuse of discretion and against the manifest weight of the evidence, but that the court has “put Matthew in harm’s way***with only an anger management class to fix the problem” and that leaving Matthew with Darrell “is just short of abuse on the trial court’s part.” Such hyperbole is ridiculous and unhelpful. The court considered the alleged acts of violence (which occurred more than three years prior to judgment) and found Robin’s descriptions of the events to be less than credible. Still, the court ordered Darrell to attend counseling because there were “some anger issues.” Giving deference to the court’s assessment of credibility and weighing of the evidence, we determine that the trial court did not err in its consideration of this factor.

¶ 23 Robin next contends that section 602 (a)(8) (the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child) weighs heavily in favor of her sole custody of Matthew because she tends to be more flexible and understanding, and she is cordial with “the father” (although, apparently, not cordial enough to call him Darrell). Robin points to instances from years before the judgment (for example, refusing to allow her to take Matthew when she left Darrell, and calling more than once a day to talk to Matthew during the period of the emergency order of protection, which was

vacated in January 2012) as proof of Darrell's intransigence. She even points to Darrell's anger when she wanted to send Matthew to St. Bridget's school, which is closer to her house, and Darrell wanted to send him to St. Edward's. Robin fails to mention in her argument that, after Darrell visited St. Bridget's, he agreed to send Matthew there. Darrell paid more of Matthew's tuition than Robin did and testified that, if Robin could not continue to afford her part of the tuition, he would "have to do something because I would like him to stay there." There was no evidence that either parent made disparaging remarks about the other to Matthew, and Darrell testified that there was no animosity, discord, or disrespect between them. The GAL noted that both Robin and Darrell think that the other is a good parent, although she did not think that they worked well together. Further, Darrell testified that he had had joint custody with visitation of his other sons in the past; as the court found, Darrell had "a successful track record" raising those sons, who went on to college and to have families. This factor does not overwhelmingly favor either parent.

¶ 24 Robin admits that neither section (a)(9), involving sex offender status, nor section (a)(10), involving military deployment, is at issue in this case.

¶ 25 Robin next asserts that, pursuant to section 602(b), the court is not to consider conduct of a present or proposed custodian that does not affect her relationship to the child. She then argues that the trial court "appears to be holding Robin's past drug use against her by awarding Darrell physical custody of Matthew." Robin testified that she had used drugs in the past but had successfully completed drug treatment through Rosecrance and had been clean and sober for six years. She had not been required to attend any further support group. In its oral ruling, the trial court noted that Robin "has testified that she's been clean for six years, although, she has tested—did testify that she's not part of AA or Narcotics Anonymous for ongoing support."

¶ 26 Robin testified concerning her prior drug use, and the court commented in one sentence regarding the lack of ongoing support after her completion of treatment. We fail to see how this was improper or was error.

¶ 27 Robin next contends that the trial court erred in ordering joint custody because Darrell does not cooperate effectively and consistently with her for Matthew's best interest. Section 602.1(b) of the Act provides that, upon the application of one or both of the parties, or on its own motion, the trial court "shall consider an award of joint custody." 750 ILCS 5/602.1(b) (West 2014). The court may award joint custody if doing so is in the best interests of the child, after considering the following:

"1) the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child. 'Ability of the parents to cooperate' means the parents' capacity to substantially comply with a Joint Parenting Order. The court shall not consider the inability of the parents to cooperate effectively and consistently in matters that do not directly affect the joint parenting of the child;

(2) [t]he residential circumstances of each parent; and

(3) all other factors which may be relevant to the best interest of the child." 750 ILCS 5/602.1(c) (West 2014).

¶ 28 Robin points to some specific examples of animosity and non-cooperation, including incidents involving Matthew's medical care (with no citations to the record) and testimony that Darrell will call her on the telephone multiple times until he gets to talk with Matthew. Many examples are from years before the judgment, and some actually show cooperation instead of non-cooperation, such as Darrell's change of mind in allowing Matthew to attend St. Bridget's school, where Robin wanted him to go.

¶ 29 Robin notes that the GAL did not recommend joint custody, saying that, while both are good parents, “the two of them as parents unfortunately don’t work well.” However, the trial court did not “feel that there was enough investigation done to rely on her recommendation” and noted that the GAL did not file a report with the court.

¶ 30 Robin never mentions Darrell’s testimony that he and Robin had had good communications “for at least a year and a half,” communicating about Matthew at work (they are employed at the same company). Darrell also testified that there was no animosity, discord, or disrespect between them.

¶ 31 The trial court noted such testimony, citing Darrell’s statement that he did not want Robin out of Matthew’s life and that, while Darrell is a single parent, Robin is Matthew’s other parent. The court, which is in the best place to make such an assessment, “found this testimony to be credible.” The court also noted Darrell’s testimony that he and Rick now got along and that Rick picked Matthew up from Darrell’s home. The court also noted that Robin and Darrell had reached several agreements outside of court.

¶ 32 The trial court was under no illusions; while awarding joint custody, the court also ordered Robin and Darrell to attend a co-parenting class. However, the court did conclude that both Robin and Darrell had the willingness and ability to facilitate and encourage a close and continual relationship with Matthew. The record is replete with evidence that Darrell was willing and able to facilitate and encourage a close relationship between Matthew and Robin. Robin’s claims, in the trial court and here, make her appear to be less so. We find no error in the trial court’s award of joint custody to Darrell and Robin.

¶ 33 Finally, Robin contends that the trial court abused its discretion in awarding physical custody to Darrell based on his “resourcefulness” and “credibility.” The trial court stated its

belief that Darrell “is more resourceful in providing valuable experiences for the minor,” noting the “clear and convincing” evidence of his involvement with Matthew and listing both many of the things Darrell did with Matthew and his plans for the future. Robin argues that she had “provided more resourceful experiences than Darrell with exhibits to prove it.”

¶ 34 These are issues that the trial court, not this court, is in the best position to assess. The court stated that it was “swayed by [Darrell’s] testimony and sincerity.” While we can read testimony, we cannot assess sincerity from the printed page. Again, the trial court noted that it was “very difficult for the Court to decide where to place the physical custody.” We agree that the evidence was not clear cut as to where Matthew should reside. Thus, we cannot say that the conclusion opposite to that of the court is clearly apparent such that the court’s judgment was against the manifest weight of the evidence, nor can we conclude that a manifest injustice has occurred. We find no error here.

¶ 35

III. CONCLUSION

¶ 36 For these reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 37 Affirmed.