

contends that the trial court erred in: (1) placing the parties' minor children in the permanent primary physical custody of the petitioner; (2) awarding a disproportionate share of the marital estate to the petitioner; and (3) ordering him to pay a portion of her attorney fees. The petitioner has not filed a brief in response; however, we will consider the merits of the appeal under the principles set forth in *First Capital Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 3

BACKGROUND

¶ 4 We have thoroughly read the record and because the parties are familiar with the facts, we will recite only those facts which are relevant to the disposition of the issues on appeal. The parties were married in 2001 and had two children during the marriage: Alyssa, age 11 at the time of the hearing, and Michael, age 8. Angela had been employed as an elementary school teacher prior to the marriage, but had left employment to care for the children. At time of the hearing, she had secured employment as an elementary school teacher. David was a journeyman union plumber and volunteer firefighter. At the time the petition for dissolution was filed the respondent was unemployed due to a non-work related knee injury. At the evidentiary hearing, he testified that he had secured employment through his union which would pay \$36.85 per hour for approximately 32 hours per week. The parties had approximately \$12,500 in marital credit card debt, and the only significant marital asset was the marital residence. David testified that he owed his parents \$48,000, of which \$12,000 was allegedly secured by a promissory note. The trial court did not take David's debt to his parents into account when ruling on financial issues.

¶ 5 The court awarded permanent physical custody of the children to Angela and determined that Angela was eligible for an award of maintenance due to the length of the marriage and a relative disparity in income potential. However, the court determined that David would be

unable to pay maintenance, and in lieu of maintenance distributed the marital estate in favor of Angela and ordered David to pay \$2000 toward Angela's attorney fees.

¶ 6

ANALYSIS

¶ 7

1. Child Custody

¶ 8 In determining custody, the paramount issue is the best interest of the children, and the trial court is required to consider all relevant factors, including those listed in section 602 of the Illinois Marriage and Dissolution of Marriage Act (Act). 750 ILCS 5/602 (West 2012). In cases regarding custody, seldom is either parent shown to be perfect. *In re Marriage of Apperson*, 215 Ill. App. 3d 378, 383 (1991). A strong presumption, therefore, favors the result reached by the trial court which is vested with great discretion due to its superior opportunity to observe and evaluate witnesses so as to reach an appropriate finding as to the best interest of the children. *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 876 (1994). Thus, a trial court's findings as to appropriate custodial arrangements will not be disturbed on appeal unless they are against the manifest weight of the evidence. *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103, 108 (2002).

¶ 9 In the instant matter, a three-day hearing was held regarding the issue of custody at which several witnesses testified for both parties. Following the hearing, the trial court provided a detailed written order explaining its decision to grant permanent primary physical custody to Angela. The court's written order articulated its rationale by reference to the best interest factors of section 602 of the Act. 750 ILCS 5/602 (West 2012). The court noted that each parent had presented evidence showing the negative characteristics of the other. Angela produced evidence and testimony, which if credited, showed that David exhibited an explosive temper, was rarely at home, and only started showing an interest in parenting after the parties separated. Angela also presented testimony that David read the divorce petition to the children in contravention of a court order, and otherwise attempted to present Angela in a bad light to the children. David, in

like manner, presented evidence, which if believed, showed that Angela also had an extremely volatile temper and had acted inappropriately in the presence of the children, including sneaking the children into an amusement park without paying for them.

¶ 10 The court determined that the evidence of inappropriate behavior on the part of each were based upon hearsay, or constituted isolated instances, and that both possessed generally favorable characteristics. The court then determined that, overall, the evidence established that both individuals were good parents and it was “a close case” as to which should exercise primary custody over the children. Ultimately, the court found that, all factors being more or less equal, Angela’s work schedule as a grade school teacher was more in line with the children’s school schedule and would provide a more stable environment in that she would be able to take the children to and from school, be with them after school, and care for them over the summer vacation. Additionally, the court noted that David’s proposed reliance upon his parents for some help in caring for the children was problematic due to credited evidence of their negative attitude toward Angela.

¶ 11 On appeal, the respondent takes issue with the trial court’s finding that the evidence established that it was a “close case” as to which parent would serve the best interest of the children by exercising primary custody. Specifically, he maintains that wishes of the children, the recommendations of an independent custody report and the evidence of Angela’s misconduct clearly establish that he should have custody of the children. We find that manifest weight of the evidence supports the trial court’s custody determination.

¶ 12 One of the factors which a court may consider in determining custody in accordance with the best interest of the children is “the wishes of the child as to his custodian.” 750 ILCS 5/602(a)(2) (West 2012). However, courts have well noted that this factor is to be considered with some caution as there exists a potential for manipulation or intimidation by either parent or

child. *Apperson*, 215 Ill. App. 3d at 381. Here, the trial court noted that when the children were interviewed *in camera*, the court could observe no specific preference as to custody, although Michael did express a particular closeness to David. In addition, the court considered the custody evaluation report wherein the evaluator opined that the children would rather live with David. The court noted, however, that this preference was motivated, as least in part, by the children's perception of David as the "fun dad" who "provided enjoyable activities on weekends" while Angela was required to bear the burdens of the "day to day parenting of the children." Viewing the totality of the evidence, we cannot say that the *de minimis* weight given by the trial court to the children's custodial preference was against the manifest weight of the evidence.

¶ 13 David also maintains that the trial court erred in not giving controlling weight to the custodial recommendation prepared for the benefit of the court by Genesis Psychology Associates. The report expressed an opinion that the best interests of the children would be better served by granting primary physical custody of the children to David. This opinion was based primarily upon statements from David regarding Angela's behavior, which the court noted were either not corroborated or contradicted by in court testimony. The court also observed that the opinion articulated in the report may have been inappropriately influenced by a single "scene" caused by Angela in the lobby at the Genesis office.

¶ 14 Although it is in the court's discretion to seek independent expert advice, it is well settled that a court is not bound to abide by the opinions or implement the recommendations of its court appointed experts. *In re Marriage of Saheb*, 377 Ill. App. 3d 615, 628 (2007) ("Advice is simply that – advice. The trial court is the ultimate fact finder in a child custody case, not the expert witness."); *In re Marriage of Bailey*, 130 Ill. App. 3d 158, 160-61 (1985) ("Although the testimony of psychologists and social workers are relevant to the determination of custody, their

opinions are not binding on the court.”). Accordingly, the mere fact that the trial court’s custody determination did not correspond to the recommendation in the Genesis report does not render that determination against the manifest weight of the evidence. *In re Marriage of Debra N. and Michael S.*, 2013 IL App (1st) 122145 ¶ 53. Here, the trial court articulated sound reasons why it discounted the opinions and recommendations contained in the Genesis report, and we cannot say that the court’s rationale was against the manifest weight of the evidence.

¶ 15 David next articulates a general disagreement with the court’s findings regarding the relative qualifications of each of the parents to exercise primary physical custody of the children. Where the trial court found that “both parents have had difficulty controlling their tempers during the pendency of this case,” David’s brief recalls in detail each instance of Angela’s purported misbehavior. Most of those instances supported in the record only by his testimony or testimony of his witnesses. Additionally, David is critical of the trial court’s credibility findings regarding the evidence which it tended to weigh against him. Similarly, David disagrees with the trial court’s finding that “[e]ach parent has the ability to serve as the children’s primary custodian.” He points to the portions of the record wherein Angela is described as “narcissistic,” “argumentative” and “exploitive” while dismissing the fact that Angela obtained an order of protection against him, or that an order remained in effect throughout the pendency of the proceeding that he was to remain in the car while exchanges of the children took place. Clearly there was evidence in the record which the trial court had to weigh in order to determine the relative qualifications of both parties. Our review of the record leads to the conclusion that the trial court weighed the evidence in the light of its credibility findings and its ultimate grant of custody to Angela was not contrary to the manifest weight of the evidence. *In re Marriage of Lonvick*, 2012 IL App (2d) 120865 ¶ 33 (credibility of witnesses is a key factor in custody determinations).

¶ 16 David also maintains that the trial court improperly relied upon evidence outside the record in reaching its custody determination. Specifically, he takes issue with the court's reference to testimony which the court heard during a temporary custody hearing in 2013, and a hearing regarding visitation held approximately three months prior to the final custody hearing. David maintains that it was error for the court to consider testimony taken in those previous hearings. Citing to *In re Marriage of Sorenson*, 127 Ill. App. 3d 967 (1984), David argues that a child custody determination based upon transcripts of prior testimony is improper. In *Sorenson*, the trial judge rendering the custody determination relied upon transcripts of testimony in the prior hearing before another judge. On appeal, the court expressed an overriding concern that the best interest of the child was not served where the court deciding custody had not been afforded the opportunity "to discern truthfulness by observing the demeanor of contradictory witnesses." *Sorenson*, 127 Ill. App. 3d at 970.

¶ 17 Here, David ignores the operative fact that the trial judge who made the ultimate custody determination is the same judge who presided over the prior hearings referenced in the final custody order. Thus the concerns of the *Sorenson* court, that the judge making the ultimate custody determination not rely upon testimony that he or she had not personally observed is not at issue in the instant matter. The trial judge making the ultimate custody determination relied only upon evidence and testimony presented in hearings over which she presided. Accordingly, we find that the trial court did not err in considering evidence taken at prior hearings when making its ultimate custody determination.

¶ 18 2. Marital Estate

¶ 19 David next maintains that the trial court erred in dividing the marital estate. Marital assets consisted primarily of the equity in the marital home, David's 401(k), and a vested pension for each. Marital liabilities included the mortgage on the home (approximately

\$66,000), and credit card debt totaling approximately \$12,500. David maintained that he owed his parents an additional \$48,000 of which \$12,000 was secured by a promissory note, however the record establishes that the court did not consider this to be a *bona fide* debt. After hearing conflicting evidence concerning the value of the house, the court determined the value to be \$120,000. The court awarded the home to Angela and split the \$54,000 in equity equally between the parties. The court ordered Angela to obtain financing in her name alone within 90 days. If she obtained financing, then she was to pay David \$27,000 for his portion of the equity. If she was unable to obtain financing, then David would be given 90 days to obtain financing in his name and pay Angela \$27,000 for her equity. If neither party could obtain financing then the home was to be sold and the net proceeds split evenly. The court then found that Angela was eligible for maintenance. In lieu of maintenance, however, the court ordered David to pay the marital credit card debt of approximately \$12,500.

¶ 20 David maintains that the court erred in awarding a disproportionate share of the marital assets to Angela and a disproportionate share of the marital debt to him. We disagree. On appeal, the trial court's division of the marital estate can be disturbed only upon a showing of an abuse of discretion. *In re Marriage of Partyka*, 158 Ill. App. 3d 545, 550 (1987). An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. *In re Marriage of Wolf*, 180 Ill. App. 3d 998, 1004 (1989). A reviewing court will not substitute its discretion for that of the trial court in apportioning marital assets and liabilities. *In re Marriage of Jones*, 187 Ill. App. 3d 206, 222 (1989). Section 503(d) of the Act (750 ILCS 5/503(d)(West 2012)) directs the court to divide the marital estate in just proportions. Courts have repeatedly and consistently held that "just proportions" requires equitable, but not necessarily equal division of the estate. *In re Marriage of Orlando*, 218 Ill. App. 3d 312, 319 (1991). What constitutes an

equitable distribution of the estate depends on the unique facts of each case. *Jones*, 187 Ill. App. 3d at 222.

¶ 21 Here, the record reveals that the trial court attempted to distribute marital assets and liabilities in equitable proportions. With regard to the marital residence, the record shows that the trial court gave the parties three alternatives, each designed to extinguish the marital debt on the home and distribute the equity evenly. As regards the unsecured credit card debt, the court's determination that David should assume that entire debt in lieu of paying maintenance was not an abuse of discretion. The court determined that Angela was entitled to maintenance; a finding that David does not dispute in his appeal. The court's allocation of the \$12,500 debt in lieu of maintenance to David alone, effectively transferred Angela's portion (\$6,250) of that debt to him. Given David's position as the principle wage earner during the marriage and his potential for greater future income, it cannot be said that splitting the equity in the home equally while assigning David \$6,250 more in marital debt than a 50/50 split would have assigned him was an abuse of discretion.

¶ 22 3. Attorney Fees

¶ 23 David next challenges the trial court's order that he contribute \$2000 toward the payment of Angela's attorney fees. The allowance of attorney fees in a dissolution case and the proportion to be paid by each party are within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion or unless it is against the manifest weight of the evidence. *In re Marriage of Minear*, 181 Ill. 2d 552, 561 (1998). Here, the court found that Angela owed her attorney \$4000 in reasonable attorney fees. The court also found that she had a projected net monthly income of \$2800 while David had projected net monthly income of \$3100. The court further determined that David's income was likely to increase while Angela's was not. The court then apportioned the attorney fees as part of the distribution in lieu of

maintenance. Given the record here, we cannot say that no reasonable person would have done as the trial court did in requiring David to pay \$2000 toward Angela's attorney fees.

¶ 24

CONCLUSION

¶ 25 The judgment of the circuit court of Rock Island County is affirmed.

¶ 26 Affirmed.