NOTICE
Decision filed 06/24/16. The text of this decision may be changed or corrected prior to the filing of a Peti ion for Rehearing or the disposition of the same.

2016 IL App (5th) 160047-U

NO. 5-16-0047

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).

---

| | | |
|---|---|---|
| *In re* K.M.L., a Minor | ) | Appeal from the |
| | ) | Circuit Court of |
| (Douglas L., | ) | Shelby County. |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | No. 14-F-10 |
| v. | ) | |
| | ) | |
| Megan L.B., | ) | Honorable Allan F. Lolie, Jr., and |
| | ) | Honorable Kevin S. Parker, |
| Defendant-Appellee). | ) | Judges, presiding. |

---

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

## ORDER

¶ 1 *Held*: The trial judge in custody proceedings did not abuse his discretion in failing to recuse himself where he prosecuted the father in a criminal case a decade earlier. The court did not abuse its discretion in denying the father's request to bar all of the mother's witnesses from testifying as a discovery sanction where the evidence presented was not complex, the mother did not act in bad faith, and the court continued the matter to allow him to prepare for those witnesses. The court's decision was not against the manifest weight of the evidence.

¶ 2 The parties, Douglas L. (Doug) and Megan L.B., were involved in a dating relationship when Megan became pregnant with their daughter, K.M.L. (K.); however, they never married, and their relationship ended before K. was born. Doug filed a

petition to determine the existence of a parent-child relationship and to determine custody and visitation. He appeals an order giving primary residential custody to Megan, arguing that (1) the trial judge erred in failing to recuse himself because he served as the prosecutor in a criminal case against Doug 10 years earlier; (2) the court erred in allowing Megan, who appeared *pro se*, to disclose her witnesses at the end of the first hearing; and (3) the court's ruling was against the manifest weight of the evidence. We affirm.

¶ 3 K. was born on January 20, 2014. On April 11, 2014, Doug filed a petition to determine the existence of a parent-child relationship and determine custody and visitation issues. On August 20, the court entered a temporary custody and visitation order, pursuant to which Megan had sole custody of K., and Doug had visitation with K. every other weekend.

¶ 4 Both parties had older children from previous relationships. Megan's daughter S. was four years old when this matter came for a hearing. However, she suffered from developmental delays and functioned at the level of a two-year-old. S.'s father was not involved in her life. Doug had three sons. The oldest, A., was four years old. Doug shared custody with A.'s mother equally, having residential custody on alternating weeks. He had visitation with his two younger sons on alternating weekends from Friday to Sunday. All four children were with him on the same weekends.

¶ 5 The hearing in this matter began in April 2015 with Judge Allan F. Lolie, Jr., presiding. Doug appeared with counsel, while Megan appeared *pro se*. At the outset, Doug's attorney noted that Megan had not disclosed any witnesses pursuant to discovery.

Counsel argued that, as a result, Megan should not be permitted to present the testimony of any witnesses. Megan stated, "Actually, Your Honor, the problem is they asked if I had a witness and I didn't understand the question. So I left it blank because I didn't understand what they were." The court asked Megan, "I assume you're going to testify; correct?" Megan indicated that she intended to testify. She then stated, "And my mother and my–." The court interrupted her at this point. The court ruled that it would allow Doug to present his case and continue the matter for one month to allow Megan to disclose witnesses and give Doug's attorney the opportunity to interview or depose any of those witnesses. The court explained, "I want to make an informed decision in this case so I want to hear all the evidence that would be appropriate." The court also noted that it anticipated that a second hearing date would be necessary anyway due to time constraints.

¶ 6 Doug testified that at the time of the hearing, he lived with his mother, Angela Banning (Angie), and her husband, Neil, both of whom helped him with child care. He testified that he had lived with them for the past eight years.

¶ 7 Doug then testified at length about the reasons he believed he was better able to care for K. He testified that Megan moved several times during the first 15 months of K.'s life. She moved in with Doug for two weeks after the birth of their daughter, after which time she moved back in with her mother. She next moved in with her then-boyfriend, Patrick Coleman, and his mother. Patrick and Megan later moved into a trailer together. Megan eventually moved back in with her mother. Doug further testified that he did not believe either of the homes Megan shared with Patrick provided K. with a

healthy environment. He testified that when they lived with Patrick's mother, K. was "always dirty" and covered in cat hair. He also testified that Patrick Coleman was not good with children "because of the type of person he is." Doug opined that Patrick was selfish and had a temper. He also noted that Patrick was on parole.

¶ 8 Doug next testified regarding Megan's parenting skills. He testified that he saw Megan use a pillow to prop up K.'s bottle while feeding her rather than holding her. He further testified that K. had frequent diaper rashes. In addition, Doug testified that Megan did not do enough to discipline her older daughter, S. Finally, he testified that he was seeking custody because he believed he could provide K. with a more stable environment.

¶ 9 The court took a brief recess before cross-examination. A docket entry indicates that during that recess, Megan disclosed to Doug and his counsel the witnesses she intended to call. Among those witnesses were her mother, Cindy Bly, and her sister-in-law, Wendi Musson. When court resumed, counsel noted that both of those witnesses were present. She therefore made an oral motion to exclude witnesses, which the court granted.

¶ 10 On cross-examination, Megan asked Doug why he believed his home environment was any different from hers while both were living with their respective mothers and stepfathers. Doug replied, "It's about the same." He acknowledged that four-year-old S. did not behave like his developmentally normal four-year-old son. He further acknowledged that he had a felony conviction. The following exchange then took place:

"THE COURT: And the Court's aware of his burglary conviction in 05-CF-41.

MS. KOEBELE [COUNSEL FOR DOUG]: Thank you, judge.

THE COURT: And I was the prosecutor.

MS. KOEBELE: Oh, okay.

THE WITNESS [DOUG]: Were you? Oh, okay. I remember now.

THE COURT: Ask your next question."

Doug then acknowledged that for the first six months of K.'s life, she slept in a bedroom with Doug's mother and all three of her brothers during weekend visitation with Doug. He explained, however, that once an addition was built, she had her own room.

¶ 11 Doug's mother, Angie, testified on his behalf. She explained that before the addition was built, their home had only three bedrooms. At that time, she slept in the same room as K. while Doug worked nights, so that she could hear K. if she woke up. She testified that sometimes they slept in the living room, and other times they slept in the bedroom with the three boys. Angie testified that with the additional bedroom, K. had her own bedroom.

¶ 12 Angie further testified that she believed Doug was a good father and K. was a happy baby. She testified that she and her husband, Neil, helped Doug with child care, and that Doug was not afraid to ask for help if he needed it.

¶ 13 Angie testified that she did not believe Megan's discipline of S. was appropriate. She testified that Megan often did nothing to discipline S. if she acted up. She testified further, however, that on one occasion, Megan was too rough with S. Angie explained that Megan was getting ready to leave and asked S. to come with her, but S. refused. According to Angie, Megan "grabbed her by the forearm and pulled her up" in a rough

manner. On cross-examination, Megan asked Angie to acknowledge that S. is "different than [Doug's four-year-old son] A." Angie replied that S. was not different and just needed "a little discipline." She stated, "She knows what you're saying."

¶ 14 Constance Nodeen testified for Doug. She was the stepsister of Patrick Coleman, a friend of Doug, and a former friend of Megan. Constance acknowledged that Megan was nurturing to K. and "seemed very good" as a mother. However, she did not believe Megan was a good parent to her older daughter S. She noted that S. had behavioral issues–she would often kick or bite people or play with feces from her own diaper. Constance explained that Megan often did not discipline her for these behaviors, but when she did, she would yell at S., grab her by her arm, or lock her in her room using a baby gate. Constance acknowledged that Megan loves her children, but testified that "S. is more than a handful," which makes it difficult for Megan to give K. the attention she needs.

¶ 15 Constance testified about a series of text messages she received from Megan in April 2014. In those messages, Megan told Constance that she was depressed and that her mother was not supportive of her. She told her she was thinking of giving custody of K. to Doug, and she asked Constance if she could sign her rights to S. to Constance, explaining, "I love her, but I don't know if I can afford to take care of her." On cross-examination, Megan asked Constance why she did not retrieve all of the text messages from this exchange. Constance replied that her phone broke, but she retrieved some of the messages by email.

¶ 16 The hearing resumed on May 11, 2015. Megan first testified as an adverse witness. She testified at length about the text messages she sent to Constance. She testified that Constance left out parts of their conversation. She explained that she moved out of Doug's mother's house because she was upset by Angie's suggestion that S. needed to be on medication. At that time, she did not have a good relationship with her mother, and she was afraid she might become homeless. Megan explained that she wanted to give Doug temporary custody of K. because of these concerns. She testified that she wanted to give temporary custody of S. to Constance rather than to her mother. She explained that she did not trust her mother due to concerns her father had raised about her mother related to their battles over child support. Megan testified that her relationship with her mother improved when her father was in the hospital shortly before he died. This occurred in August 2014. Megan explained that they resolved many of their conflicts and misunderstandings during this time.

¶ 17 Megan testified that at the time of the hearing, she was working 32 hours per week as a cook in a nursing home and taking classes to get a CNA license. She acknowledged that S. required extra attention. However, she testified that she made time for both S. and K. She further testified that she had help in caring for her two children from her mother, stepfather, sister-in-law, and brother. Megan acknowledged that Doug was a good father to all of his children.

¶ 18 Megan's stepfather, Michael Bly, testified on Megan's behalf. He testified that both he and Megan's mother, Cindy, helped to care for Megan's children. He stated that

each night either he or Megan cooked dinner for the girls, and that either Megan or Cindy bathed them every night. He believed that Megan was a good mother.

¶ 19 Michael testified at length about the impact of S.'s developmental delays. He testified that the development of S.'s speech was delayed. He noted that she was able to communicate her basic needs either by using a single word or, for example, by bringing her cup to an adult when she was thirsty. He testified that S. has "meltdowns" when she is frustrated. He further explained that due to speech delays, it was difficult to discipline S. He explained that Megan handled discipline of S. by trying to sit S. down in a chair for a time out or telling her not to do something. However, he explained, S. did not always understand what she'd done wrong. Michael further testified that when S. got angry, she would go to her room on her own and come out when she was no longer angry.

¶ 20 Next, Megan's sister-in-law, Wendi Musson, testified. Wendi babysat S. and K. two times a week. She described K. as a happy baby and testified that K. was always clean when she saw her. Wendi acknowledged that S. was sometimes "hyper" and it was difficult to get her to calm down. Contrary to the testimony of Doug's witnesses, she testified that she never saw Megan lock S. in her room. She explained that Megan disciplined both girls by distracting and redirecting them, telling them "no," and trying to explain that they did something they should not do. She confirmed Michael's testimony that S. often went to her room of her own accord when she was upset. Wendi testified that she believed Megan was a good mother to both girls.

¶ 21 Megan's mother, Cindy Bly, testified about the past difficulties in her relationship with Megan and the reasons she was not always supportive of Megan's decision to include Doug in K.'s life. She explained that she was upset when she first learned that Megan was pregnant by Doug because she believed he was not providing financial support for the three children he already had. She admitted, however, that the basis for this belief was the fact that her husband, Michael, had helped Doug find a job because he was unable to support his children while he was unemployed. She also testified that Doug did not support K. (We note that both Megan and Doug testified that Megan did not request child support. Megan, however, testified that she did ask for help purchasing diapers. Child support is not an issue in this appeal.) Cindy admitted that because of this concern, she advised Megan not to put Doug's name on K.'s birth certificate, advice that Megan did not take. Cindy testified that she no longer believed that Doug should not be a part of K.'s life. She explained that Doug loved K. and there were usually no problems when they meet to exchange after visitation periods.

¶ 22 Cindy acknowledged that she and Megan had a difficult relationship until August 2014. She explained that Megan was a "daddy's girl" who took her parents' divorce very hard. Cindy believed that Megan blamed the divorce on her. She testified that her relationship with Megan's father became more amicable at the end of his life. Cindy believed that this allowed her to resolve her differences with Megan. She testified that she intended to allow Megan and the children to live with her for as long as necessary. She acknowledged that at one point, she did not allow Megan to move in with her, but

she explained that this was because one of Megan's brothers was living there at the time, and her lease does not permit more than five people to live in her home at one time.

¶ 23 Cindy also addressed the issue of K.'s diaper rash. She acknowledged that K. had frequent diaper rashes. She testified that when Megan switched to a different brand of diapers, this alleviated the problem. She further testified that nothing else seemed to help.

¶ 24 The hearing was continued again to allow Dr. Amanda Bierman, K.'s pediatrician, to testify. Megan informed the court that she previously sent Dr. Bierman a subpoena requesting her presence at the May 11 hearing. She also requested that Dr. Bierman provide her with records from all of K.'s doctor's visits. Dr. Bierman instead sent two disks containing the records directly to the court along with a letter asking that she be allowed to testify by telephone. The court informed the parties of this. The court then directed Megan to allow Doug's attorney to make a copy of the records, which she did.

¶ 25 On June 12, 2015, the hearing continued and Dr. Bierman testified by telephone. She did not believe that K. was neglected. She testified that K. was a healthy baby who was meeting all of the developmental milestones for a child her age. K. was up-to-date on all her vaccines, and Megan brought K. for all her well-baby checks. Dr. Bierman testified that diaper rashes are common in babies and do not indicate neglect. She acknowledged, however, that infrequent diaper changes can be a cause of diaper rash. Dr. Bierman testified that she provided Megan with a referral to a developmental pediatrician to determine the cause of S.'s developmental delays. She further testified that the specialist diagnosed S. with global developmental delay.

¶ 26 At the close of the hearing, the court directed the parties to submit written arguments. On August 3, 2015, the court entered a written order containing findings of fact. The court found that both Megan and Doug would likely be unable to care for K. without the support they received from their families. The court then noted that much of Doug's case "revolved around issues of medical neglect and past statements made by" Megan. The court found no merit to Doug's allegations. The court pointed to Dr. Bierman's testimony that diaper rash is common and not a sign of neglect, and her testimony that K. was a healthy baby who was meeting all developmental milestones. The court noted that this testimony was not refuted. The court also noted that Megan admitted making statements about wanting to give up custody of K. to Doug at a time when she feared she might become homeless. The court found, however, that Megan subsequently reconciled with her mother and no longer faced this risk. The court granted the parties joint custody of K. with Megan to continue to serve as the primary residential custodian. The court also set forth a visitation schedule which provided that Doug was to have visitation on alternating weekends from Thursday to Sunday. The schedule also gave Doug two weeks of uninterrupted visitation during the summer, and divided holidays and birthdays between the parties.

¶ 27 On August 24, 2015, Doug filed a motion to reconsider, arguing that (1) the court erred in allowing Megan to present witnesses that were not disclosed prior to trial, and (2) Judge Lolie abused his discretion by failing to recuse himself. On September 21, Judge Kevin S. Parker held a hearing on the recusal issue. On November 3, Judge Parker entered an order denying this portion of Doug's motion to reconsider. Judge Parker noted

that Judge Lolie disclosed his participation in Doug's 2005 burglary conviction during the testimony of the first witness, and that the issue was not raised for the remainder of that hearing or either of the subsequent hearings. He emphasized that the issue was only raised after an adverse ruling. Judge Parker found that there was no indication that Judge Lolie's ruling was influenced by his knowledge of Doug's prior felony conviction.

¶ 28 On November 30, Doug filed a petition for leave to file an amended motion to reconsider. The amended motion added an argument that Megan withheld documentary evidence. This allegation was based on the fact that the disks containing K.'s medical records included records from five office visits with Dr. Bierman when in fact K. had visited Dr. Bierman's office 10 times.

¶ 29 The court held a hearing on the motions to reconsider on December 3, and denied them in a written order entered on December 31. The court found that Megan did not fully comply with the rules of discovery; however, the court also found that there was no unfair surprise to Doug as a result. In relevant part, the court noted that because the five missing office visit records corresponded to the first six months of K.'s life, it should have been obvious that records were missing, and Doug had ample opportunity to request production of those records. The court further noted that the hearing was conducted over a three-month period and the witness list was to be tendered to Doug by the time of the second hearing (we note that the list was in fact tendered to him during the first hearing setting). This appeal followed.

¶ 30 Doug first argues that Judge Lolie erred in failing to recuse himself and that Judge Parker erred in denying his motion to reconsider on this basis. We disagree.

¶ 31 Illinois Supreme Court Rule 63 requires a judge to recuse himself from any case "in which the judge's impartiality might reasonably be questioned." Ill. S. Ct. R. 63(C)(1) (eff. July 1, 2013). This includes cases in which the judge has a personal bias against any of the parties or attorneys or has personal knowledge of factual matters that are in dispute. Ill. S. Ct. R. 63(C)(1)(a) (eff. July 1, 2013). Whether a trial judge's impartiality may reasonably be questioned is subject to an objective test–that is, recusal is required if "a reasonable person might question the judge's ability to rule impartially." *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 176 (2008). We review a trial court's decision regarding recusal under an abuse-of-discretion standard. *Id.* at 175.

¶ 32 We find our supreme court's decision in *People v. Storms*, 155 Ill. 2d 498 (1993), instructive. That case involved a criminal trial before a judge who had previously acted as a prosecutor in a case involving similar charges against the defendant. *Id.* at 499. Specifically, the case involved a charge of residential burglary. Eight years earlier, the trial judge had been the assistant State's Attorney representing the State at probation revocation hearings after a previous burglary conviction. *Id.* at 500.

¶ 33 In addressing the recusal issue on appeal, the supreme court found that under the facts before it, there was "nothing in the record" to support a finding that the judge would be biased against the defendant or that the judge would be likely to consider facts outside the record in sentencing the defendant. *Id.* at 505. The court emphasized that the previous criminal proceedings took place nearly a decade before the trial at issue. *Id.* In addition, the court found it "significant that neither the defendant nor the trial judge recalled their previous encounters." *Id.* at 506. The court also noted that the trial judge

only served as prosecutor at some court appearances in the previous proceedings, not throughout the trial. *Id*. at 505.

¶ 34 Here, as in *Storms*, Doug's previous encounter with Judge Lolie took place many years prior to the proceedings at hand. However, here, it appears that Judge Lolie was the lead (or sole) prosecutor in the earlier proceedings. In addition, Judge Lolie remembered Doug. However, contrary to Doug's assertion, there is nothing in the record to indicate that he remembered the decade-old proceeding in detail. Moreover, the fact that Doug had a previous conviction was not disputed, and the details do not appear to be relevant. The proceedings here were civil, not criminal. Because the proceedings involved different questions, the risk of prejudice is far lower than it was in *Storms*, which involved two criminal prosecutions for similar crimes. Under these circumstances, we do not believe that recusal was required merely because Judge Lolie once prosecuted Doug. The only additional facts Doug points to in support of his claim that Judge Lolie was biased against him are adverse rulings. Adverse rulings are insufficient to support a claim of judicial bias. See *In re Estate of Wilson*, 238 Ill. 2d 519, 554 (2010).

¶ 35 Finally, we note that we do not agree with Doug's claim that he had no opportunity to challenge Judge Lolie's impartiality. Judge Lolie informed the parties that he was the prosecutor in the earlier case during cross-examination of the first witness. Doug could have objected immediately. He also could have filed a motion for substitution of judge for cause. He did neither. Instead, he waited until after the court issued a ruling giving Megan custody of K. Under these circumstances, we believe he has forfeited his claim

that Judge Lolie was required to recuse himself. See *Federal Deposit Insurance Corp. v. O'Malley*, 163 Ill. 2d 130, 140 (1994).

¶ 36 Doug next argues that the court erred in allowing any of Megan's witnesses to testify. He argues that she willfully refused to comply with his discovery request to disclose witnesses before trial and, further, that she did not disclose the substance of their testimony. He asserts that Megan's failure to disclose her witnesses in a timely manner prejudiced him in two ways. First, he claims he was prejudiced because two of Megan's witnesses remained in the courtroom while he was testifying. Second, he contends that he was prejudiced because he could not adequately prepare to refute the testimony of these witnesses at trial. We find these arguments unavailing.

¶ 37 We will first briefly address Doug's contention that he was prejudiced by the presence of two of Megan's witnesses in the courtroom during his testimony. The two witnesses were her mother, Cindy Bly, and her sister-in-law, Wendi Musson. As previously discussed, Doug moved at the outset of the hearing to bar the testimony of any witnesses Megan might call. The court denied the motion, and Doug presented his direct testimony. He did not move to exclude witnesses from the courtroom until Megan was about to begin cross-examination. Megan revealed at the beginning of the hearing that she intended to call her mother as a witness. We acknowledge that she did not disclose Wendi Musson as a witness until the court took a recess after Doug's direct testimony. However, had Doug moved to exclude witnesses prior to testifying, the court could have granted the motion and inquired as to whether any other intended witnesses were present.

We find that by failing to do so, Doug forfeited this claim on appeal. We turn our attention to the remainder of Doug's arguments concerning Megan's witnesses.

¶ 38 Supreme Court Rule 213 mandates that, upon written interrogatory, a party must provide her opponent with the identities and addresses of any witnesses she intends to call. She must also provide information about the substance of their expected testimony that is sufficient to give the opposing party "reasonable notice" of the expected testimony. Ill. S. Ct. R. 213(f)(1), (f)(2) (eff. Jan. 1, 2007). Discovery is to be completed no later than 60 days before the anticipated beginning of trial. Ill. S. Ct. R. 218(c) (eff. July 1, 2014). If a party fails to respond to discovery requests, the party requesting discovery may move the court for an order to compel discovery. Ill. S. Ct. R. 219(a) (eff. July 1, 2002).

¶ 39 Compliance with Illinois Supreme Court rules, including those governing discovery, is mandatory. *Warrender v. Millsop*, 304 Ill. App. 3d 260, 265 (1999). Thus, sanctions are available for failure to comply with discovery rules and court orders related to discovery. Such sanctions include barring the testimony of a witness. *Phillips v. Gannotti*, 327 Ill. App. 3d 512, 518 (2002) (citing Ill. S. Ct. R. 219(c)(iv) (eff. Jan. 1, 1996)). However, drastic sanctions–such as barring a witness from testifying–should be imposed only if a less drastic measure–such as granting a continuance–would not be effective. *Id.* at 518-19. In this regard, we emphasize that in this case, Doug wanted to exclude the testimony of *all* of Megan's witnesses. This would result in an unusually drastic sanction. The purpose of discovery sanctions is not to punish a party, but to ensure a fair discovery process and a fair trial on the merits. *Id.* at 518.

¶ 40 In deciding whether to exclude witness testimony as a discovery sanction, courts consider the following six factors: (1) surprise to the opposing party, (2) the prejudicial effect of the testimony, (3) the nature of the testimony, (4) the diligence of the opposing party, (5) whether the opposing party timely objected to the testimony, and (6) whether the party calling the witness has acted in good faith. *Pancoe v. Singh*, 376 Ill. App. 3d 900, 913 (2007). We will not reverse the trial court's decision absent an abuse of its discretion. A trial court abuses its discretion where no reasonable person would take the view of the trial court on the matter. *Id.*

¶ 41 Here, Doug did timely object to the testimony at trial. However, the remaining factors weigh against imposing such a harsh sanction on Megan. The first factor is surprise. Although Doug claims that he was surprised by the testimony, Megan points out that her entire case was devoted to refuting evidence he put forward. As such, all of the testimony related directly to issues Doug raised. Moreover, Megan disclosed her witnesses on April 17, and none testified until May 11. We acknowledge that this is less time than is ordinarily available. However, we do not believe Doug can reasonably claim unfair surprise for two reasons. First, none of the testimony related to complex questions. Second, if Doug required additional time to interview or depose any witnesses, he could have requested it. Under these circumstances, we do not find unfair surprise hampered Doug's ability to prepare for trial.

¶ 42 In analyzing the second factor–the prejudicial effect of the testimony–we consider the strength of the evidence, the likelihood that earlier disclosure could have helped the opposing party refute or discredit the testimony, and the feasibility of allowing a

continuance. *Phillips*, 327 Ill. App. 3d at 519. As discussed, the court allowed a continuance, and noted that a second hearing was necessary in any event in order to give the parties sufficient time to present their evidence. Thus, this less drastic measure was feasible. Further, we do not believe that earlier disclosure could have aided Doug in refuting the testimony. As stated earlier, Megan's entire case focused on refuting Doug's claims; she did not offer any evidence concerning issues not raised by Doug. Thus, the evidence Doug offered in his case refuted Megan's evidence.

¶ 43 Doug argues, however, that Dr. Bierman's testimony was particularly prejudicial because the court relied on it in determining that Megan was not neglectful. We agree that Dr. Bierman's testimony was given great weight by the court. However, as discussed, Doug could have requested more detailed disclosures on the subject of her testimony, attempted to depose her, or filed a motion to compel discovery. He did none of those things. Moreover, Dr. Bierman's testimony did not introduce into the proceedings any new and particularly prejudicial factual matters that Doug and his counsel could not have been expected to anticipate. It was Doug who attempted to show that Megan was neglectful because K. suffered frequent diaper rashes and that Megan was unable to control her older daughter's unruly behavior. We cannot find that the court abused its discretion by failing to bar Dr. Bierman's testimony simply because the court found her testimony credible and gave it significant weight. Moreover, Doug requested that *all* of Megan's witnesses be barred from testifying, not just Dr. Bierman. For the reasons we have discussed, the case for excluding her other witnesses is even weaker than the case for excluding Dr. Bierman's testimony.

¶ 44 The third factor is the nature of the testimony. *Phillips*, 327 Ill. App. 3d at 519. As discussed, the testimony in this case was not complex, and it related to facts placed in evidence by Doug and testified to by his witnesses.

¶ 45 The fourth factor–the opposing party's diligence–requires us to consider whether Doug was diligent in seeking discovery. *Id.* Although Doug sent written interrogatories, he did not file a motion to compel discovery. Instead, he waited until trial began and requested Megan be prohibited from presenting any witness testimony. We find that this does not constitute due diligence. Moreover, we believe this is the type of tactical gamesmanship that the discovery rules are meant to prevent. See *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 537 (1998).

¶ 46 Finally we consider whether Megan acted in good faith. *Phillips*, 327 Ill. App. 3d at 519. Megan informed the court that she did not answer Doug's interrogatory regarding witnesses because she did not understand the question. The court apparently believed her. Although a *pro se* litigant is required to follow the rules of procedure just as if she were represented by counsel, it would defy logic and ignore reality to find that a *pro se* litigant with little more than a high school education willfully refused to answer an interrogatory question in a deliberate attempt to manipulate the rules of procedure.

¶ 47 We also emphasize that the court had an obligation to consider K.'s best interests in this matter. As the court noted when ruling, it would have been quite difficult for the court to fulfill this obligation if it sanctioned Megan by denying her the opportunity to present any evidence. For these reasons, we conclude that the court properly denied Doug's request to bar all of Megan's witnesses from testifying.

¶ 48 Doug's final contention is that the court's decision was against the manifest weight of the evidence. This is so, he contends, because there was "no evidence" to support the court's decision. We disagree.

¶ 49 In all custody decisions, the court's primary consideration must be the best interests of the child involved. *Shinall v. Carter*, 2012 IL App (3d) 110302, ¶ 40. Relevant factors in this case include: the interaction and relationship between the child and her parents, siblings, and any other people who may have a significant impact on her best interests (750 ILCS 5/602(a)(3) (West 2014)); the child's adjustment to her home and community (750 ILCS 5/602(a)(4) (West 2014)); the physical and mental health of the individuals involved, including the child (750 ILCS 5/602(a)(5) (West 2014)); and the willingness and ability of each parent to encourage and facilitate the child's relationship with the other parent (750 ILCS 5/602(a)(8) (West 2014)). We give great deference to the trial court's decision because the trial court is in a better position than is this court to assess the credibility of witnesses and observe the demeanor of the parties. *In re Marriage of Hahin*, 266 Ill. App. 3d 168, 174 (1994). We will reverse the court's decision only if the court abuses its discretion or the factual basis underlying its decision is against the manifest weight of the evidence. *Id.* at 175. Applying that standard to the case before us, we believe the court's decision was supported by the record and constituted a proper exercise of the court's discretion.

¶ 50 Doug focuses much of his argument on evidence related to the stability of K.'s home environment with each parent. See 750 ILCS 5/602(a)(4) (West 2014) (directing courts to consider "the child's adjustment to [her] home, school and community"). As he

correctly contends, stability is an important consideration. *In re Marriage of Apperson*, 215 Ill. App. 3d 378, 384 (1991). Doug points to evidence that Megan moved four times to three different addresses, while he remained in his parents' home. There was no evidence that any of these moves impacted K.'s ability to spend time with her parents, grandparents, siblings, or any of the other family members involved in her life. In addition, several witnesses described K. as a happy baby, and there was no evidence to suggest that this was not the case. In addition, both Megan and Cindy testified that Megan and the children could continue to live in Cindy's home as long as necessary. The court was entitled to find this testimony credible.

¶ 51 Doug also points to the testimony concerning Megan's text messages to Constance telling Constance that she wanted to give Doug custody of K. He argues that while he has "never wavered from his desire to parent K.," there is no way to be certain "that Megan will not decide that being a parent is too difficult and K. will have to go through upheaval in her life and transition to a new primary residence." We note that this argument mischaracterizes the testimony that was presented. Constance did not testify to what, if anything, Megan told her about her reasons for wanting to give Doug custody. Megan testified that at the time, she was unsure if she would be able to provide K. with food, shelter, and other basic necessities. She further testified that she found help and was no longer in that situation. There was no evidence to suggest that Megan simply decided being a parent was too difficult or that she did not want to be a parent to her daughters. Moreover, as previously discussed, the trial judge had the discretion to believe Megan's testimony that her living situation was currently stable. We are not

persuaded that this evidence required the court to find that Megan is unable to provide K. with a stable home.

¶ 52 Doug also argues that the evidence showed that Megan was not able to properly care for K., which adversely impacted K.'s physical health (see 750 ILCS 5/602(a)(5) (West 2014)). He points to testimony that K. was often dirty when arriving for weekend visitation and the evidence that she suffered from diaper rash frequently. He also points to testimony that Megan had difficulty managing her older daughter, gave K. less attention as a result, and often lost her temper with S. and used inappropriate methods of discipline. We are not persuaded. Although the evidence was not disputed that K. suffered frequent diaper rashes or that S. was difficult to handle, the remainder of this testimony was disputed. As we have stated previously, it is the role of the trial court to determine the credibility of witnesses. The court expressly rejected Doug's claim of neglect. It is also worth noting that even Doug's witness, Constance, testified that Megan was loving and nurturing toward K. We do not believe the court's findings were against the manifest weight of the evidence.

¶ 53 Doug further argues that consideration of K.'s relationship with her siblings leads to the opposite result from the one reached by the trial court. See 750 ILCS 5/602(a)(3) (West 2014). He argues that while the evidence showed that K. had a close relationship with his three sons and played well with them, there was no similar evidence concerning her relationship with Megan's older daughter. We do not believe that the custody order will adversely affect K.'s relationships with her brothers. As discussed earlier, Doug has custody of his oldest son, A., all week on alternating weeks, and he has custody of his

two younger sons on alternating weekends that correspond with the weeks A. lives with him. Pursuant to the visitation schedule ordered, K. will continue to spend alternating weekends with all three of her brothers. We also note that although giving Doug full custody of K. would allow her to spend three additional days with A. every other week, it would not alter the amount of time she currently spends with her other brothers.

¶ 54 Finally, Doug contends that Megan is less able to foster and encourage a relationship between him and K. He points to the evidence that in the past, Cindy encouraged Megan to keep Doug out of K.'s life. However, there is no evidence that *Megan* ever tried to prevent Doug from being present in K.'s life or that she ever wanted to do so. In fact, undisputed evidence shows that the opposite is true. There is also no evidence that Cindy interfered with Doug's relationship with K., regardless of her feelings in the matter. We conclude that the court's decision was neither against the manifest weight of the evidence nor an abuse of discretion.

¶ 55 For the foregoing reasons, we affirm the order of the trial court.

¶ 56 Affirmed.