2018 IL App (2d) 170601-U
No. 2-17-0601
Order filed March 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re PARENTAGE OF A. I. G-K., a Minor	)	Appeal from the Circuit Court of Kane County.
	)	No. 12-F-99
	)	Honorable
(Adrian Gonzalez, Petitioner-Appellant, v. Jennifer Kraft, Respondent-Appellee).	)	Joseph M. Grady, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff concurred in the judgment.
Justice Birkett dissented.

ORDER

¶ 1 *Held*: The trial court erred in denying father's request to award him primary residential custody of his daughter. Reversed and remanded.

¶ 2 Petitioner, Adrian Gonzalez, appeals from the trial court's denial of his request for modification of custody of his and respondent's, Jennifer Kraft's, minor daughter, A. I. G-K., to award him primary residential custody. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Adrian and Jennifer began living together in 2005 and never married. A. was born on December 1, 2005. On February 8, 2012, Adrian, age 31, sought to obtain custody of A. The trial court appointed Lidia Serrano as the (first) guardian *ad litem* (GAL) for A.

¶ 5 A. First GAL's Report

¶ 6 For background purposes, we summarize the first GAL's report, dated June 19, 2012. At the time, the parties and A. resided in Sugar Grove. Serrano wrote that A. was in good health, well cared for, and happy. A. was about to start first grade and excelled at sight words at school and received advanced worksheets. She was extremely creative and active. A. was very close to Adrian's family, who lived close by and with whom she spent substantial time. She was also close to Jennifer's family, but they did not have the same level of daily involvement. A. was raised in an interfaith home, with Adrian being Christian and Jennifer being Jewish.

¶ 7 Jennifer, according to Serrano, has a bachelor's degree and worked as a staffing manager at Robert Half International in Rosemont. Her work hours were flexible, and she intended to move to Skokie. Adrian also has a bachelor's degree and worked as a consultant at Accenture. His client was located in Detroit, and Adrian was required to work there during the week. However, Adrian was in the process of transferring to a local client. (This did not occur in 2012.)

¶ 8 The parties had lived together since 2005, but spent only weekends together due to Adrian's work. They initially lived with Adrian's sister and moved out on their own in 2009. The parties admitted that their relationship suffered while they lived with Adrian's sister, but improved after they moved out.

¶ 9 The parties agreed to share joint custody, but disagreed on residential custody. Jennifer believed that A. was thriving under her care and that she was there for her on a daily basis,

whereas, if Adrian had residential custody, his family, who were alienating themselves from Jennifer and trying to alienate A. from Jennifer, would be raising A. Adrian's concerns were that Jennifer's interactions with A. were limited, she was lax with her schedule and bounced from house to house (her residence was in Sugar Grove, but she always went back and forth from there to her family's Skokie home), she did not ensure that A. ate well, she was not physically active (*i.e.*, good at arts and crafts, but does not enjoy outdoor activities), "frequently" smoked marijuana (Adrian was concerned about her ability to keep a job), took Vicodin (which made her "more lazy"), and would probably cut ties with Adrian's family.

¶ 10 The GAL opined that joint custody would be in A.'s best interests. As to residential custody, she recommended that Jennifer be awarded residential custody, because she had acted as A.'s primary caregiver and had the ability to continue to do so. The GAL expressed doubts as to the sincerity of Adrian's concerns about Jennifer; he had not raised them with Jennifer and had admitted that A. was healthy, doing well in school, and was happy. The GAL acknowledged that A. would have to adjust to a new school if Jennifer had residential custody, but opined that A. would be better able to adjust to those changes than to not being with Jennifer on a daily basis. As to Jennifer's depression and drug use, the GAL opined that they did not pertain to Jennifer's ability to provide for A.'s primary care and that Adrian did not appear to be concerned about them because he entrusted Jennifer with their daughter's care. Also, Adrian had acknowledged that Jennifer had not been depressed for a long time and had not been diagnosed with it. Jennifer herself stated that she was down, not depressed, when they lived at Adrian's sister's house, because she felt uncomfortable there. As to her marijuana use, Adrian admitted that he uses it himself and that he was not concerned about Jennifer's use as it related to her ability to care for

A., only as to her ability to keep a job. As to Vicodin, Jennifer admitted to having used it once when she was suffering from bulging discs.

¶ 11 B. 2012 Orders

¶ 12 In a July 10, 2012, order, the trial court noted that the parties accepted and agreed to the GAL's and trial court's custody recommendations. In an agreed order entered on August 22, 2012, the trial court granted Jennifer's motion for temporary child support. It ordered Adrian, who earned $104,000 in annual gross income, to pay Jennifer, who earned about $40,000 in gross annual income, $1,224 per month, plus 20% of any gross income in excess of $8,666 per month.

¶ 13 On October 17, 2012, the parties entered into a parentage judgment and joint custody agreement, whereby Jennifer was awarded residential custody and Adrian was granted parenting time on alternating weekends, certain holidays and a summer schedule, and additional time as agreed. Adrian was not awarded weekday parenting time. The agreement also provided that both parties would have equal rights and responsibilities concerning A.'s rearing and overall well-being and decision-making on issues concerning her growth and development, including choice of schools. "[A]ll major decision regarding the child's life shall be made jointly, by and between the parties."

¶ 14 C. Adrian's Petition to Modify Custody

¶ 15 On July 29, 2015, Adrian petitioned to modify custody, alleging substantial changes in the parties' and A.'s circumstances since entry of the parentage judgment and joint custody agreement. Specifically, Adrian alleged that: (1) Jennifer had changed her residence multiple times, resulting in disruption to Avya's relationships and changes in schools, which emotionally upset the child; (2) Jennifer lived with a male companion, Nicklaus Hubbs, whom she started

dating in 2011, had not married, and had told A. that he is her "step-dad"; (3) Jennifer had a second child, M., out of wedlock that had caused A. to feel unwanted; (4) Jennifer did not support and assist A. with her school work and neglected to provide her with money for lunch tickets at school; (5) Jennifer did not get A. to school on time and allowed her to be absent without any reason; (6) Jennifer failed to arrange for regular medical, optical, and dental checkups; (7) Jennifer did not provide consistent discipline for Avya and used excessive forms of discipline; (8) Jennifer frequently failed to attend A.'s school activities; (9) Jennifer refused to consult with Adrian on matters required by the agreement; and (10) although, at the time of the agreement, Adrian travelled four to five days per week for work and could not spend much time with A., his job requirements changed and, currently, he seldom travels. Adrian sought residential or sole custody of A., arguing that this change was in her best interests. In her response, Jennifer denied the allegations.

¶ 16 On April 29, 2016, the trial court appointed Bradley David as (the second) GAL for A.

¶ 17 D. Second GAL's Report

¶ 18 On August 9, 2016, the second GAL filed his report with the court. He noted that he had interviewed the parties and A. He had also conducted home visits at both residences with A. present. The GAL also reviewed documentation provided by the parties and noted that Adrian's work clients were now located in Burr Ridge and Racine, Wisconsin, and that Adrian was no longer required to spend overnights away from his Sugar Grove residence and has opportunities to work from home on some occasions. Also, since the parenting agreement was entered into, the parties had informally agreed that Adrian have additional parenting time, including Sunday overnights, Wednesday overnights, and alternating weeks during the summer. The GAL

recommended that Jennifer retain primary residential custody and that parenting time be modified to incorporate the new schedule to which the parties had informally agreed.

¶ 19 Addressing Jennifer's multiple relocations and the resulting changes in schools for A., the GAL noted that, since the parties' split in 2012, Jennifer has lived in Arlington Heights, Palos Heights, Plainfield, and Joliet. With the exception of second and third grades, A. has attended a different school every year. In fourth grade she attended Riverview Elementary School in Plainfield. Jennifer explained that she could not keep A. at that school due to financial issues. Currently, A. is enrolled at Cunningham Elementary School in Joliet for fifth grade. According to the GAL, Jennifer admitted that moving schools on a yearly basis was not what is best for her daughter. However, Jennifer told the GAL that A. is resilient and always does a good job of making new friends wherever she attends school. A. confirmed this to the GAL, stating that she always ends up being one of the most popular kids in her class. The GAL found it "of significant importance" that A. earned, with few exceptions, A's and B's in school and had not exhibited any behavioral issues. Also, the GAL wrote, A. was not concerned about the school changes and echoed Jennifer's desire to return to school in Plainfield if she is able to do so. Jennifer had noted to the GAL that she has attempted to remain in proximity to Adrian as her circumstances allow. The GAL stated: "While I would certainly hope that Jennifer is able to maintain a stable residence as [A.] prepares to enter middle school, it does not seem as though Jennifer's moves have had a lasting effect on [A.]'s outlook and attitude and they do not seem to have been an attempt to thwart Adrian's parenting time."

¶ 20 Next, addressing A.'s two-year-old brother, M., the GAL opined that he did not believe the brother's presence has caused A. to feel unwanted. He noted that, when he visited Jennifer's residence, A. and M. played together for nearly the entire visit (*i.e.*, 30 to 45 minutes). During

the GAL's meeting with A. at his office, A. did refer to M. as a " 'brat,' " but she often helped change his diaper, feed him, and put him to sleep. M.'s presence, in the GAL's view, weighed in Jennifer's favor, not Adrian's.

¶ 21 As to A.'s preference, she prefers to live with Adrian because Adrian's girlfriend's (Vicky's) daughter is her best friend and she would spend more time with her if she lived with Adrian. Also, Adrian's family would be nearby and A. enjoys spending time with his parents and sister. A. also knows Adrian's neighbors. However, the GAL noted, outside of this, A. did not articulate any reasons for wanting to live with Adrian that were significant to his investigation. A. stated that she had done school projects with Adrian, but also asked Jennifer for help with certain homework. Although A. does not often ask Jennifer for help, "Jennifer is certainly entitled to credit for managing the majority of [A.]'s day-to-day activity to ensure that she has been successful in school[.]"

¶ 22 The GAL related that Adrian believed that he was A.'s primary caretaker since the parties' 2012 separation, had always had an active role in her schooling, and has been responsible for scheduling her doctor's appointments. Jennifer stated that Adrian offered to schedule the doctor's appointments, and she believed that his involvement in school was appreciated but not always necessary. The GAL further noted that Jennifer's position was that the parties' dynamic in raising A. was highly functional and that it is unfair for Adrian to construe Jennifer's willingness to co-parent and include him to be the equivalent of trying to avoid or ignore her responsibilities. The GAL recommended that the court not disturb the original award of joint decision-making responsibilities to both parties. He noted that the environment the parties provide to A. has allowed her to succeed in school without experiencing

any social or behavioral issues. The manner in which each party has taken on some parenting responsibilities is how "co-parenting is supposed to work."

¶ 23 Addressing the allocation of parenting time, the GAL recommended that Adrian's request for residential custody be rejected because "it is my opinion that *he cannot meet his burden of showing that a modification is necessary* to serve [A.]'s best interests by naming him as the parent with the majority of parenting time." (Emphasis added.) Instead, the GAL recommended that parenting time be modified to incorporate the new schedule to which the parties had informally agreed. Adrian would be awarded alternating weekends during the school year (to begin on Fridays after school and with an option to end on Sunday evenings or Monday mornings); Wednesdays (with an option to end Wednesday evenings or Thursday mornings); and alternating weeks during the summer. The GAL also encouraged the parties to accommodate reasonable requests for modification of parenting time, as unique situations arise.

¶ 24 B. Trial

¶ 25 1. Bradley David - GAL

¶ 26 The trial commenced on August 17, 2016. Bradley David, the second GAL, testified that he interviewed the parties and A. He spoke to A. during both home visits and met with her alone at his office. His investigation was broader than what he included in his GAL report, where he focused on the most significant issues. The GAL acknowledged that, in 2012, Adrian sought residential custody and attempted to have his work schedule changed so that he could be home for A.; however, when he was unable to change his work schedule, he gave that up and entered into the parenting agreement.

¶ 27 The GAL further testified that, at a pre-trial conference he attended prior to submitting his GAL report, he stated that this case involves two good parents and it is a close call. Thus, the

GAL "was still struggling with which way I was going to recommend[.]" After the pre-trial conference to the trial date, the GAL did not conduct any additional investigation. He based his recommendation that there be no change in residential custody on his determination that Adrian would not be able to sustain his burden of proof.

¶ 28 The GAL acknowledged that one of Adrian's primary concerns is Jennifer's multiple changes in residence, which resulted in multiple school changes for A. Also, Jennifer wanted to return to Plainfield, which would result in another school change. Jennifer acknowledged to the GAL that the school changes were less than ideal, and the GAL agreed. He concluded in his report that he hoped the changes do not continue.

¶ 29 The parties, the GAL determined, have effectively co-parented. Adrian has been involved in A.'s schooling. There was an issue with funding the snack program (where kids can get snacks at lunch), and Adrian responded to the issue.

¶ 30 The parenting agreement provides that the parents each have rights and responsibilities regarding school choice; that all major decisions regarding the child's life shall be made jointly between the parties; and that the parties shall agree as to which school the child shall attend (and, if unable to agree, the matter will be submitted to mediation). The GAL testified that, reviewing the emails between the parties, it was clear that Adrian objected to the changes in school. In spite of the objections, Jennifer went ahead and changed residences and schools. The GAL agreed that it would have been better if A. had not changed schools.

¶ 31 The GAL addressed Jennifer's romantic relationship with Hubbs, which the GAL did *not* mention in his report. Jennifer and Hubbs did not marry, but had a child, M., together two years before the hearing. Hubbs, M., Jennifer, and A. lived in the same residence until November 2015. On November 16, 2015, an incident occurred at the residence, resulting in Hubbs being

charged with criminal sexual abuse (a class 4 felony, a conviction of which results in a designation as a sex offender) and domestic battery (a class A misdemeanor) against Jennifer and property damage to Jennifer's cellphone.[1] A. was not present during the incident. The GAL spoke to the parties about the incident; he did not independently investigate it, or review court records. Jennifer told the GAL that Hubbs no longer lived at her residence, but he was occasionally present to visit with M. Also, some of his belongings remained at the residence. A $50,000, 10% cash bond was required as a condition of Hubbs being released, and he or someone on his behalf posted the money. Initially, as a condition of the bond, there was a no-contact order, where Hubbs was prohibited from going to Jennifer's residence or having any contact with the residents at the address. Subsequently, Hubbs's attorney moved to modify the bond, and the no-contact order was removed at Jennifer's request and over the State's objection. The GAL did not believe that this incident was worthy of including in his report to the court.

¶ 32 The GAL further testified that A. is doing well. She does well in school, does not exhibit behavioral issues, and ends up as the popular child. The GAL acknowledged that these factors would not preclude her doing better in a situation where she was not constantly changing schools.

¶ 33 On cross-examination, the GAL testified that, in his opinion, the parenting agreement's reference to choice of school means public versus private school where the residential parent resides. Adrian never requested mediation to resolve the school-change issue.

¶ 34 A. reported to the GAL that she had a good relationship with Hubbs. A. and M. look like brother and sister when they play together. The GAL witnessed them interact at Jennifer's house

[1] A four-count criminal complaint against Hubbs included counts for criminal sexual abuse of Jennifer, two counts of domestic battery, and criminal damage to property.

for about 30 to 45 minutes. Other than A. giving the GAL a tour of the home, A. and M. were inseparable during the visit. A. did tell the GAL that M. could be a brat, but, overall, there is a good sibling bond. It would be important for A. to continue living with Jennifer to bond with Jennifer and with M. Jennifer denied to the GAL that she smokes in her home.

¶ 35 As to the charges against Hubbs, the GAL stated that Jennifer advised him that Hubbs had pleaded guilty to the misdemeanor and was ordered to undergo domestic-violence counseling and was permitted to visit M. A. informed the GAL that Hubbs will leave before she is awake or come by when she is not at the residence. The GAL did not get the impression that Hubbs continued to live in the home. He was told Hubbs did not live there, and the GAL observed that Hubbs's belongings were in the basement.

¶ 36 The GAL further testified that he had concerns about Adrian's ability, if he were awarded residential custody, to be as accommodating and facilitating in co-parenting as Jennifer has been the past four years. However, he agreed that both parents have been co-parenting effectively.

¶ 37 A., according to the GAL, expressed that she wants to live with Adrian. Adrian has discussed this pending litigation with her, which is not appropriate, in the GAL's opinion. In a journal entry, which the GAL reviewed for the first time on the day of the hearing, A. wrote that Adrian and other members of his family told her that she is going to live with Adrian. This, too, is not appropriate. Addressing A.'s reason for wanting to live with Adrian—because her best friend is Adrian's girlfriend's child—the GAL testified that he places very little weight on this preference. "I wouldn't give much weight in general to a 10-and-a-half-year-old unless they can articulate a concern that they have safety-wise. I just don't think that that's a strong basis for suggesting, you know, who the preferred parent would be." Here, the GAL stated, there are no safety concerns. A. loves Jennifer. She talked about things she likes to do with her mother (and

M.), and there were not any bad things to say about Jennifer. The GAL did not get the impression that Jennifer had been saying bad things to A. about Adrian.

¶ 38 During the time that the parties lived together in Sugar Grove, which was about four or five years, Adrian was the breadwinner and Jennifer took A. to doctors' appointments. She was the leader on this until 2012. Addressing Jennifer's moves, the GAL testified that she has moved due to job changes. They have not negatively impacted A. "I'm always concerned with frequent moving based on forming relationships, friends, that type of thing, but [A.] does not appear to suffer from—like I said, she makes friends where she goes. She seems to be resilient. It doesn't seem to be outwardly affecting her." The GAL believes that A., a pre-teen, is comfortable discussing puberty with both parents.

¶ 39 When asked if he wished he could have investigated anything more thoroughly, the GAL stated that he felt he "hit the high points, and I think that there were some other things, some allegations that were brought up that just don't hold a lot of weight with me. I was looking at a 10-and-a-half-year-old that, like I say in my report, I feel like she's thriving and that they've done a very good job getting to where we're at now together."

¶ 40 On redirect examination, the GAL testified that he did not further investigate the information concerning A.'s journal entry, which he received on the day of the hearing, wherein she wrote that Adrian and his family had told her that she was going to live with Adrian. However, A. did not state that Adrian was attempting to influence her decision.

¶ 41 Addressing his statement that he would not generally give a lot of weight to a 10-year-old's preference, the GAL stated that he would give weight to a child's preference at "probably 12 or 13 years of age." However, there is nothing in the statute that limits the application of the child's wishes to children only 12 years or older. A., who was age 10 ½ when she testified, is

bright, self-confident, mature, and articulate. When asked what made him think her preference is based upon any decision other than she has a close friend she wants to be with and she wants to live with her father, the GAL replied that he did not know that there was anything else. He acknowledged that it is possible that one of the factors that caused A. to prefer to live with Adrian is that he is scheduling her doctor's appointments. In terms of homework help, A. said that she generally does not need help; but, when she does, she has certain homework that she brings to Jennifer and certain homework that she brings to Adrian.

¶ 42 2. Adrian Gonzalez

¶ 43 Adrian, age 35, testified that he lives in Sugar Grove in a three-bedroom townhome that he has owned since 2009. Jennifer lived there from 2009 to 2012. When A. stays with Adrian, she has her own bedroom. A. has good friends across the street, and the neighborhood has a very low crime rate, is very quiet, and the residents are friendly. Addressing Vicky, his girlfriend, Adrian testified that A. has a close relationship with her. The school that A. attended for kindergarten is two miles away; A. took the bus to school. During that time, Adrian's family provided before- and after-school care for A. Adrian's sister, her husband, and his 13-year-old niece, with whom A. is very close, live one mile away. Adrian's parents live in Aurora, about a seven-minute drive away. They have an "extremely close relationship" with A. A. sees the extended family every time she visits Adrian.

¶ 44 Adrian is a manager at Accenture. He has worked there since 2005 and has twice been promoted. In 2012, Adrian traveled more for work. He attempted to modify his schedule, but was unsuccessful in 2012. During the initial proceedings, he decided not to pursue custody due to his job's travel requirements. Currently, he is not required to travel frequently for work. Referring to an expense report for his employer, Adrian testified that he travelled 15 days from

January 1, 2013, to the date of the trial (or over 3½ years). Further, Adrian currently has more flexibility with his job, including working from home.

¶ 45 Adrian met Jennifer in 2004 when he was just out of college. They moved to Sugar Grove in 2005, when A. was about to be born. First, for about four years, they lived with Adrian's sister and her family. A. and her cousin grew up like sisters during this time, and Adrian's family provided childcare and other support.

¶ 46 Adrian's relationship with A. is very good, very open, and extremely close. They try to be very active and take up different hobbies and try different things. Adrian has discussed with A. upcoming hormonal changes. A. told Adrian that she is more comfortable having those discussions with him than with Jennifer. As to A.'s school, Adrian has attended every parent-teacher conference; has taken A. to meet-and-greets; he keeps up with the curriculum; maintains open lines of communication with her teacher; and pays attention to her nightly folder. A. has joined a school program for children of divorced parents. Adrian further testified that he helps A. with her homework, including remotely via video conference call. He agreed that A. is "doing pretty well in school."

¶ 47 Addressing the school changes, Adrian testified that A.'s Palos Heights school had a difficult curriculum and he worked with A. during that time to ensure that she did not fall behind. However, when she moved to the Plainfield school, A. complained that she was bored and had previously learned the curriculum. Adrian was concerned that A. was losing pace with any other school that had a more advanced curriculum, like the Palos Heights school.

¶ 48 According to Adrian, he has communication issues with Jennifer. He has been excluded from conversations concerning the schools A. attends. Jennifer made those decisions unilaterally. He has emailed and called Jennifer, trying to discuss the issue. Adrian was

unaware that he had the right to compel Jennifer to go to mediation, pursuant to the agreement. Currently, Jennifer is planning another move. She did not inform Adrian; rather, A. told him.

¶ 49 Adrian testified that Jennifer's current home is not in a kid-friendly area. It is a little rundown, and there are no sidewalks or parks nearby. "[A.] has also echoed that." She prefers the environment where Adrian lives; she has expressed this "for years." She explained to Adrian that her relationship with Jennifer is not ideal. She feels disconnected from her mother and does not feel that Jennifer is engaged in her life. In Adrian's view, A. feels emotionally closer to him and she notices that Adrian pays attention to her schooling; she knows it is easy to go to him for homework help and "anything that she needs to feel ready for school, for life, whatever." Initially, A. was "okay" with being in Arlington Heights with Jennifer, but, immediately, Hubbs moved in. There was a change, and A. realized that the time that she wanted with Jennifer was not going to happen. She expressed this to Adrian.

¶ 50 Adrian learned from A. that Jennifer was pregnant with M. A. reported to the GAL that she assisted in changing M.'s diapers and feeding him. Adrian testified that she does this "extremely often"; "Jennifer will disappear for some time and A. is just kind of left with M. to take care of him." According to Adrian, A. has expressed that she is required to do this, not that she wants to do it. However, she is affectionate with her brother.

¶ 51 As for Hubbs, Adrian is not concerned about him moving back into the home. Rather, he is concerned that there is history. A. has observed Jennifer and Hubbs arguing. Jennifer is not the role model he would like to have for A. Adrian is concerned about her relationship with Hubbs; the lack of interaction in A.'s life; and she smokes around A., which A. does not like and tends to make her ill, including giving her headaches. Further, A. had a lice infestation that Adrian attempted to treat during a visit. She continued to have lice for two to three successive

weekly visits. He informed Jennifer about the lice and asked her to help A. A. informed him that Jennifer did not help her with her hair. Adrian re-applied the treatments over a one-month period.

¶ 52 3. A.

¶ 53 Pursuant to Adrian's motion, the trial court conducted an *in camera* interview of Avya with the GAL present.

¶ 54 A., age 10 ½, testified that she is attending fifth grade at Cunningham school in Joliet. Contrary to the GAL's testimony, who related that only Adrian had raised the issue, A. confirmed that *both* of her parents have discussed this case with her, but neither said anything "bad." A. attended five different schools since preschool and was just starting her newest school (for fifth grade): kindergarten in Sugar Grove; first grade in Arlington Heights (Dryden school); second and third grades in Palos Heights (Palos East school); fourth grade in Plainfield (River View school); and fifth grade in Joliet (Cunningham school). Her favorite schools were River View (in Plainfield) and Kaneland (in Sugar Grove) (because they were "really nice schools, and they teach really well *** and I have really nice friends there"), but she prefers Kaneland overall because it is closest to Adrian's house. She always has friends from school. However, at Adrian's house, she has a lot of friends, including her two best friends: Brady, Delaney, and her neighbors. Her grandparents live in Aurora. Jennifer's family does not live near Joliet, but M.'s grandparents live in Plainfield.

¶ 55 A. addressed her relationship with Jennifer. She explained that they have "a special relationship. Like we get mad at each other a lot, but then we like get over it at some point. So we don't have a great relationship. I would say it's in the middle of good and okay." When asked why, she replied, "she's mean to me," she "yells at me, and she makes me do the dishes a

lot and clean up her and [Hubbs's] messes." "Her and [Hubbs] decide to stay up really, really late on the weekends. Like, for instance, this morning I was texting [Hubbs] asking if I can call my dad, and he said to wake up mama." It was 9:28 a.m., and Jennifer was asleep in the living room. She and Hubbs sleep in the living room, not Jennifer's room. "I just wait for my mom and [Hubbs] to both wake up because they sleep in too late. Basically me and my brother are in our rooms for at least a couple of hours, and he's sitting in there by himself [in his crib] for like a couple hours." A. gets on her iPhone or other electronics, and M. "sits there talking to himself after a while, and then he cries after a while, and then he stops crying."

¶ 56 A. further related that Hubbs is the first to wake up when he is there on Sundays and Thursdays. On school days, Jennifer wakes up early and then yells upstairs to wake up A. A. gets M. out of bed and changes his diaper and clothes. At Jennifer's house, A. "kind of" does her own and Jennifer's laundry. She puts it in the machine and takes it out; she folds her own laundry. When asked if there are rules at Jennifer's house such as going to bed at a certain time and eating at a certain time, A. stated:

> "I don't really eat-eat. I don't really eat breakfast ever there [at Jennifer's house], and then I don't—like she doesn't ask me if I'm hungry for dinner. When I am—or just she doesn't even give me dinner. She won't even ask 'Are you hungry? Do you want dinner now?' That's just the end of the night."

When asked if she eats after school or in the evening, A. replied that she eats after school. She will finish any leftover lunch, eat crackers, "or something that's in the fridge." She does not eat breakfast at Jennifer's house: "I don't know. She's never up early enough to make me breakfast. By the time it's breakfast for her, it's lunchtime." A. feeds herself. Jennifer or Hubbs feeds M., cooking him food. A. "rarely" makes food for M.

¶ 57 When asked if Jennifer helps her with homework, A. replied, "Not really. I just call my dad." He is better at math. A. does not ask Jennifer for homework help because: "She doesn't really help a lot. She's not necessarily in the room most of the time. She's probably in the kitchen not doing—she's smoking in the kitchen or smoking in the laundry room or smoking on the couch with me and [M.]." Most of the time, "I'm in the same room as[M.], and I like—I change his diapers, stuff like that." A. stated that she babysits M. "most of the time," but does not change his diapers all of the time.

¶ 58 A. testified that she and Adrian get along "great" and that she is "way closer" to him than to Jennifer. She has chores at Adrian's house, including folding the laundry and making her bed. A. does not feed herself at Adrian's house; they either go out or Adrian (sometimes with A., who loves to cook) cooks. (Adrian orders three meals every week from Blue Apron, a meal-kit service, and he and A. cook the meals together.) Adrian also helps her with homework. A. further testified that she used to spend Wednesday overnights at Adrian's house, "but now my mom doesn't let him do that" because "court started." Adrian takes A. to the doctor and the dentist. She visited the dentist recently, and Adrian told her this was her first visit in two years because he was waiting for Jennifer to do it.

¶ 59 The trial court asked A. if she felt comfortable at Jennifer's home, and she replied, "Not really," explaining that "I have to take care of [M.] most of the time and the fact she smokes in the house, in the same room, in the same car, in the same house." A. asked Jennifer to stop smoking many times, and Jennifer promised to stop, but broke her promise. Also, Jennifer does not give A. privacy when A. wants to call Adrian, and she has A. stay in the same room so she can listen to the conversation. Adrian, on the other hand, gives A. privacy when she calls Jennifer. Adrian, further, allows A. to take any of her belongings to Jennifer's home, but

Jennifer "doesn't let me take anything to my dad's much." Jennifer also does not let A. bring her guitar from Adrian's home because A. has to share everything with M. and M. will damage it.

¶ 60 As to extra-curricular activities, A. wants to do tap dancing, soccer, and guitar, but her time with Adrian, who wants to help her enroll in activities, is limited and he cannot enroll her in the activities. Jennifer has not enrolled her in activities. She told her that the hours for tap are bad.

¶ 61 A. prefers to live with Adrian.

> "He's nicer to me. He has fun with me. He feeds me even though I'm not hungry. He makes sure I eat. He doesn't go to bed late. He goes to bed when I go to bed; and if he goes to bed later than I do, he's probably working on his computer.
>
> He wakes up early. We both wake up. I'm an early bird. He's an early bird. Our whole family is an early bird, except mom."

She further related that Adrian "has always bought me my school supplies. So he'll definitely make sure I have everything I need. He'll make sure I'm at the school on time." No one smokes at Adrian's house. When Jennifer smokes, A. gets a headache. M. "is always sick."

¶ 62 A. gets A's and B's in school. However, she missed "a lot of" days of school. "When I was at my mom's and I didn't feel good, she thought I was annoying." Once, when they lived in Palos Heights, A. did not feel well one night and asked Jennifer for help. Jennifer replied that she would not give her medicine, that she was tired and needed to sleep, and that A. should go back to bed. In contrast, when she was sick once at Adrian's house, Adrian stayed up with her all night. When asked at which house she feels safer, A. replied, "My dad's."

¶ 63 A. talks to Adrian about "everything," but not Jennifer (who "gets mad at me for telling my dad first"). She does not try to talk to Jennifer because she does not feel comfortable with her. According to A.:

> "[Adrian]'s just like—he's better with me. He knows me better.
>
> I've asked my mom for clothes. Let's just say that. 'I need this. I need shorts,' because my shorts are dirty. She doesn't do the laundry. So she said, 'I'll get you this. I'll get you that when you come back from your dad.'
>
> All this stuff that my dad and my grandma have gotten me, my dad and grandma, all from them. All my clothes, either gifts from my mom's family, but this whole outfit, my shoes, my hat, everything is from my dad.
>
> Like she doesn't keep her promises. She doesn't take care of me. I feel like she loves me as a daughter, but she doesn't like me, period."

¶ 64 A. further stated that Jennifer "acts like [M.] is like the apple of her eye. He's everything to her. I'm just—I'm nothing." This was so even when Jennifer was pregnant.

¶ 65 4. Jennifer

¶ 66 Jennifer, age 32, testified on direct examination by Adrian's attorney that, in 2015, she lived in Plainfield with Hubbs, A., and M. She had a photography business. Addressing the incident with Hubbs, Jennifer testified that she was truthful when she made the police report. About one month after the incident, Hubbs's counsel asked Jennifer's assistance in removing the no-contact restriction that was a condition of Hubbs's bond. Jennifer agreed and represented in the motion to modify the bond that she was not fearful of any adverse consequences of Hubbs returning to the home. Jennifer explained that she cooperated so that Hubbs could pick up and drop off M., not so that he could move back into the residence.

"Because it's just one of those things. When you know somebody, you know somebody. There was a lot on the line at this point for him. So if he were to even—if he were to even look at me the wrong way, right, he can go back to jail and, I mean, it was going to be hell breaking loose again.

So again, in regards to why it was lifted, it was lifted because—it was strictly so he can pick up [M.]. We can cut out the middle man. Everybody's picking up the babies, dropping them off. This was to make things easier. He didn't move back in. He couldn't so much as—[.]"

¶ 67 Hubbs continued to pay for the house because it was in his name. Jennifer started working.

¶ 68 On cross-examination by her attorney, Jennifer testified that, after leaving Adrian's home in Sugar Grove, she moved to Arlington Heights for one year. She worked at Robert Half International in Arlington Heights. A. attended first grade in Arlington Heights. Jennifer next moved to Palos Heights, where she, A., and Hubbs lived for about 1 ½ years. (She started dating Hubbs in 2011.) While living in Palos Heights, A. attended second and third grades. Next, the family moved to Plainfield, where A. attended fourth grade. The move was prompted by the fact that a home she and Hubbs rented under a rent-to-own arrangement fell into foreclosure. She chose Plainfield because M. was born around this time, Hubbs had family in the Plainfield area, and Adrian's girlfriend, Vicky, would be only five minutes away. Next, Jennifer moved her family to Joliet. The move was prompted by the incident with Hubbs. She could not afford to remain in Plainfield on her income alone. Jennifer's mother lives in Round Lake, which is in Lake County (about one hour and 40 minutes away). Hubbs does not live with Jennifer in Joliet, and they are no longer romantically involved.

¶ 69 Jennifer noted A.'s journal entry from a school assignment, where A. mentions that she discussed the litigation with Adrian and other family members and that it made her sad. Next, Jennifer read a letter A. gave her, wherein she states that she loves Jennifer very much and that they have a special connection. In another journal entry, A. wrote that mom fights for me and dad fights for me and that she loves each of them.

¶ 70 Jennifer believes that Adrian should have liberal parenting time with A. She also believes that they have been co-parenting effectively. According to Jennifer, she has consistently helped A. with her homework. Addressing the lice incident, Jennifer testified that she sprayed the house and washed everything. She regularly communicated with Adrian about the situation.

¶ 71 Jennifer further testified that A. and M. are very close. Avya is not responsible for babysitting M. on a regular basis, nor is she responsible for changing his diaper on a regular basis. "She has no duties." It is not her responsibility. Jennifer believes that A. is happy residing with her. She also believes that differences in her and Adrian's disciplinary styles may be the reason ("a huge thing") for A.'s preference to live with Adrian. Her belief is apparently based on her observations, after A. spends extended periods with Adrian or his family, that she returns to Jennifer's home acting rude; it takes her a couple of days to put things in perspective again. Jennifer does not allow A. to post videos of herself online, which happened *once* when she was in Adrian's care.

¶ 72 Jennifer believes that, if Adrian is awarded residential custody, it will have a negative impact on her relationship with A. because they will not be as close as they are now. Further, Adrian's family will have more influence because they are very involved in his life. Jennifer

noted that she gets along well with Adrian's mother. She also explained that it is difficult to reach A. when she is with Adrian, whereas Jennifer has A. call Adrian every night.

¶ 73 5. Trial Court's Ruling

¶ 74 On July 12, 2017, the trial court issued its ruling, finding that there was "no need to modify" the terms of the October 17, 2012, parentage judgment and joint custody agreement. Also, the court noted that it did *not* find by a preponderance of the evidence, since the entry of the judgment and agreement, "that a substantial change has occurred in the circumstances of the child or of either parent that would necessitate such modification to serve the *best interest* of the child." (Emphasis added.) Addressing Jennifer, the court determined that her life circumstances "do not appear to be dissimilar to the circumstances of her life when she and [Adrian] were in their original relationship, except for another child and some residential moves." As to Adrian, the court found that his life circumstances *have* changed "in that he travels less in his employment and his more available to have parenting time with [A.] than when" the agreement was entered into. Finally, the court modified Adrian's parenting time as follows: alternating weekends during the school year; Wednesday evenings; and alternating weeks during summer breaks. The court noted that it agreed with the GAL's suggestion that the parties continue to accommodate reasonable requests for modification of their parenting times, as various situations and circumstances "arise in the parties' schedules so as to continue to arrange or adjust their parenting time as is in the *best interest* of the child." (Emphasis added.) Adrian appeals.

¶ 75 II. ANALYSIS

¶ 76 Prior to addressing the arguments Adrian raises in this appeal, we address the timeliness of our decision. This is an accelerated appeal under Illinois Supreme Court Rule 311(a) (eff. July 1, 2017). Under Rule 311(a)(5), we must issue our decision within 150 days after the filing

of the notice of appeal, except for good cause shown. Ill. S. Ct. R. 311(a)(5) (eff. July 1, 2017). Here, Adrian filed his notice of appeal on August 4, 2017, making the deadline to issue our decision January 2, 2018. This court has made every effort to efficiently handle this matter, and we find good cause for issuing our disposition after the 150-day deadline.

¶ 77 Turning to the merits, Adrian argues that the trial court erred in not allocating primary parenting time to him. He contends that the court erred in assessing whether there was a substantial change in the parties' circumstances and in assessing the best-interests factors. He further asserts that the court: (1) misread the law to require a substantial change in circumstances of both parents and the child; and (2) failed to give any consideration to A.'s wishes, relying instead on the GAL's report, which failed to address all of the issues. For the following reasons, we conclude that the trial court erred in denying Adrian's petition.

¶ 78 A. Substantial Change in Circumstances

¶ 79 Section 610.5(c) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610.5(c) (West 2016)) prescribes the standards a court must use in determining whether to grant a petition for modification. It provides that the trial court has the authority to modify a parenting plan or allocation judgment (formerly known as a custody order) "if the court finds, by a preponderance of the evidence, that on the basis of facts that have arisen since the entry of the existing parenting plan or allocation judgment ***, a substantial change has occurred in the circumstances of the child *or* of *either* parent and that a modification is necessary to serve the child's best interests."[2] (Emphases added.) 750 ILCS 5/610.5(c) (West 2016). "The paramount

[2] Effective January 1, 2016, the terms "allocation of parental responsibilities: decision-making" and "allocation of parental responsibilities: parenting time" have replaced the phrase "custody" throughout the Act. See P.A. 99-90, §§ 5-15 (eff. Jan. 1, 2016) (adding 750 ILCS

issue in all matters concerning custody of a child is his or her welfare. Changed conditions, in itself, is not sufficient to warrant a modification in custody without a finding that such changed conditions affect the welfare of the child." *In re Marriage of Fuesting*, 228 Ill. App. 3d 339, 344 (1992).

¶ 80 A trial court's determination concerning parental responsibilities and custody, including custody modification, is given great deference because the court is in a superior position to judge witness credibility and determine the best interests of the child. *In re Marriage of Lonvik*, 2013 IL App (2d) 120865, ¶ 33. We will not reverse the trial court's judgment unless it is clearly against the manifest weight of the evidence, that is, only when the opposite conclusion is clearly evident. *In re Parentage of J.W.*, 2013 IL 114817, ¶ 55. Where the evidence permits multiple inferences, we will accept those inferences that support the trial court's order. *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004). Further, to the extent that the trial court did not expressly so find, we presume that it made findings consistent with its judgment. *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 386 Ill. App. 3d 585, 586 (2008). However, the court's discretion is not unlimited, and when a custody determination is contrary to the manifest weight of the evidence, it is the duty of the reviewing court to reverse that decision. *In re Marriage of Bush*, 170 Ill. App. 3d 523, 529 (1988).

5/610.5(c)). Also as of that date, the standard of proof was lowered from clear and convincing evidence to a preponderance of the evidence. *Id.*; see also *In re Marriage of Wendy L. D.*, 2017 IL App (1st) 160098, ¶ 73 n.2. Proof by a preponderance of the evidence means that the fact at issue is rendered more likely than not. See, *e.g.*, *Lindsey v. Board of Education of the City of Chicago*, 354 Ill. App. 3d 971, 986 (2004). Here, although Adrian filed his petition in 2015, the parties agreed to be bound by the 2016 statutory provisions.

¶ 81 Adrian first notes that the statute requires proof of a substantial change in circumstances of the child *or* of *either* parent and does *not* require a change in all three. The trial court, he asserts, misconstrued the statute, imposing a higher standard because it required Adrian to show a substantial change for himself, Jennifer, and A. The trial court found that Adrian's circumstances had changed, but that Jennifer's had not and, as Adrian interprets the court's ruling, therefore, no modification was required. Adrian further contends that the court's misreading was evident from the fact that it did not mention or analyze what would be in A.'s best interests; it focused only on the substantial-change analysis. According to Adrian, the fact that his situation had changed due to his altered work schedule was sufficient to satisfy the substantial-change requirement without regard to Jennifer's circumstances. The trial court, he contends, should have engaged in a best-interests analysis, and its failure to do is reversible error. Alternatively, Adrian argues that, even if the trial court were required to find a change in both parties' circumstances, it should have found that Jennifer's frequent moves and relationships and the resulting instability in A.'s life constituted a substantial change in circumstances.

¶ 82 First, we conclude that the trial court did not misconstrue the statute and thereby evade its duty. The court found that there was "no need to modify" the terms of the 2012 parentage judgment and joint custody agreement and that it did *not* find by a preponderance of the evidence, since the entry of the judgment and agreement, "that a substantial change has occurred in the circumstances of the child *or* of *either* parent that would necessitate such modification to serve the *best interest* of the child." (Emphases added.) As this language reflects, the court accurately recited the statutory standard. It then continued to recite its findings as to Adrian (finding a substantial change) and Jennifer (no change). The trial court did not specify whether or not there was a change in A.'s circumstances, and we infer that it found none.

¶ 83 Second, the parties agree, as do we, that the trial court did not err in finding that there was a substantial change in Adrian's circumstances since entry of the parenting agreement. The undisputed evidence clearly supports this finding, as Adrian testified that he no longer travels overnight for work and, therefore, can be more available to parent A.

¶ 84 Third, turning to Jennifer's circumstances, Adrian argues that, to the extent the trial court was required to find a change in both parties' circumstances, the trial court should have found that Jennifer's frequent moves and relationships and the resulting instability in A.'s life constituted a substantial change in circumstances.

¶ 85 As we discussed above, the trial court correctly recited the statutory standard, which does not require a finding that both parties experience a change in circumstances. However, for thoroughness and because it bears on our decision, we address both Jennifer's and A.'s circumstances and, for the following reasons, we conclude that the trial court erred in finding that there was no substantial change in Jennifer's or A.'s circumstances.

¶ 86 First, as to Jennifer's moves, as Adrian notes, Jennifer has moved four times since the 2012 judgment, all of which involved changes in schools for A. Even the GAL, he notes, found this problematic, but summarily dismissed it because A. is, in his view, resilient. Adrian argues that the ill effects of such moves need not necessarily manifest themselves before a court can order a change in custody. See, *e.g.*, *In re Marriage of Dunn*, 208 Ill. App. 3d 1033, 1040-41 (1991) (the mother and daughter had resided in seven locations in the five years since the parties' divorce; court noted that, although the effects of changes in residence need not manifest themselves before a court can change custody, in the case before it, the psychologist opined that mother's "chaotic lifestyle" was primarily responsible daughter's problems in school). We disagree that the trial court erred in finding no substantial change in Jennifer's and A.'s

circumstances on this basis *alone*, but, as detailed below, it is one of several factors that, collectively, clearly warrant a different result than that reached by the trial court, which erroneously relied on the GAL's incomplete and cursory investigation. The parties' residential status was fairly stable prior to the agreement and their separation. Since that time, however, Jennifer has moved multiple times and A. has had to adjust to multiple new residences, schools, changing curricula, and friends. The moves resulted from changes in Jennifer's employment or, as to the final move, the incident with Hubbs, which we discuss below. Although the evidence reflects that A. does well in school, easily makes friends, and, according to the GAL, appears to be thriving and is resilient, it cannot be denied that frequent moves hamper social connections and can be emotionally unnerving, even if the effects do not always outwardly and immediately manifest themselves in negative behavior or academic struggle.

¶ 87 Although, again, this aspect of Jennifer's and A.'s lives, alone, is not sufficient to undermine the trial court's substantial-change determinations, several other facets of Jennifer's and A.'s lives support our conclusion that the trial court's findings were erroneous. As Adrian points out, Jennifer's relationship with Hubbs, which the GAL did not address in his report, has taken focus away from A. Jennifer, Adrian argues, stays/stayed up late with Hubbs, sleeps in, and leaves A. to "clean up her and [Hubbs's] messes," and to feed herself breakfast and go without a nutritious dinner. Also, Hubbs was charged with criminal sexual abuse and domestic battery that took place in Jennifer's home. Although A. was not present at the time, the evidence, Adrian asserts, sheds light on Jennifer's living situation. Jennifer also, he argues, continues to have contact with Hubbs and not merely to facilitate visitation at Jennifer's residence.

¶ 88 While the incident occurred outside of A.'s presence and Jennifer moved to Joliet afterwards, we find the incident of concern. Also very worrying is the GAL's failure to specifically address it in his report (although he testified that he spoke to the parties about it), which causes us to question his evaluation, and the trial court's reliance thereon, as a whole. Further, although A. told the GAL that she has a good relationship with Hubbs, she also stated that Hubbs will leave before she is awake, which reflects that he still spends time overnight in Jennifer's new residence. We acknowledge that Adrian himself testified that he is *not* concerned that Hubbs will move back into Jennifer's residence, but the fact that the incident occurred in Jennifer's home and the fact that Hubbs spends more than brief time in her new home, sheds light on the changes in both Jennifer's and A.'s circumstances since the 2012 agreement, most critically with respect to how the various changes have impacted Jennifer and A.'s relationship.

¶ 89 Further, we agree with Adrian that M.'s birth, although not a *per se* substantial change in circumstances, has had a significant and negative impact on A.'s relationship with Jennifer. Specifically, A. sees Jennifer's attention focused on M. and A.'s role as M.'s caretaker when Jennifer sleeps in. Adrian contends that the GAL did not investigate this aspect of A.'s life, even though she told him about it. We agree that M.'s birth was a factor affecting A.'s relationship with Jennifer and that the GAL failed to fully investigate this issue, as evidenced by his brief visit to Jennifer's home and his lack of awareness of A.'s complaints about her caretaking responsibilities (along with her feelings of neglect and her alienation from Jennifer). While we acknowledge that a new child does demand substantial attention, often at the expense of the older child, here the issue is more complex. A., who was 10 ½ years old at the time of the hearing, has been given responsibilities disproportionate to her age and maturity level, including providing substantial assistance in caring for her brother. The GAL specifically noted in his report that he

did not believe that M.'s presence has caused A. to feel unwanted. However, A.'s testimony clearly reflects otherwise. She stated that she is sad about the attention that M., who is a toddler, receives and the increased responsibilities that Jennifer has assigned to her. The GAL, as noted, conducted only one very brief visit to each of the parties' homes and did not address the increased responsibilities Jennifer has given A. to care for M.

¶ 90 Again, none of the foregoing factors, alone, warrant reversal of the trial court's findings, but, together, it is clear that the changes in Jennifer's and A.'s lives have been substantial in that A. now feels alienated from Jennifer. That was not the case when the parties entered into the 2012 agreement. Indeed, addressing A.'s adjustment to her home, school, and community if Jennifer were awarded residential custody, the first GAL opined in her report that, at that time, A. would have been better able to adjust to residential, school, and community changes than to not being with Jennifer on a daily basis. Clearly, since that time, things have dramatically changed. A. does not feel close to her mother, nor does she believe that her mother cares about her well-being. Tellingly, although Jennifer denied that A. is responsible for regularly babysitting M., she did *not* refute the allegations that she does not provide meals for A. (and that A. eats crackers for dinner), that A. does her own and Jennifer's laundry, that Jennifer smokes in the house, or that she does not enroll A. in any extracurricular activities. As to activities, Jennifer offered no explanation for why A. was denied all opportunities. Just as it did with respect to the GAL's failure to address the incident with Hubbs and his very brief home visits, the trial court unreasonably ignored these voids in Jennifer's testimony.

¶ 91 In summary, the trial court did not err in finding a substantial change in Adrian's circumstances, but did err in finding no substantial change in both Jennifer's and A.'s circumstances.

¶ 92 B. Best Interests

¶ 93 Adrian next argues that the trial court's refusal to transfer primary parenting time to him is against the manifest weight of the evidence because: (1) the court did not conduct a best-interests analysis and, instead, stopped after erroneously requiring Adrian to show a substantial change as to both parents; (2) the court failed to give any consideration to A.'s wishes as expressed in her *in camera* interview; (3) it applied excessive weight to the GAL's analysis, which was incomplete because it failed to relate the reasons for A.'s opinion and omitted other highly-relevant facts; and (4) the statutory best-interest factors overwhelmingly favor Adrian. We conclude that the trial court erred in assessing A.'s best interests. The only reasonable conclusion is that the change in all three parties' circumstances affected A.'s welfare.

¶ 94 A trial court has the authority to modify a parenting plan if it is necessary to serve the child's best interests. 750 ILCS 5/610.5(c) (West 2016). That is, a change in circumstances, by itself, is not sufficient to justify a modification of custody; rather, the change in circumstances must affect the welfare of the child. *In re Marriage of Fuesting*, 228 Ill. App. 3d 339, 344 (1992). In determining the best interests of the child for purposes of allocating parenting time, the trial court should consider all relevant factors, including: (1) the wishes of each parent seeking parenting time; (2) the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to parenting time; (3) the amount of time each parent spent performing caretaking functions with respect to the child in the 24 months preceding the filing of any petition for allocation of parental responsibilities; (4) any prior agreement or course of conduct between the parents relating to caretaking functions with respect to the child; (5) the interaction and interrelationship of the child with parents and siblings and other significant persons; (6) the child's adjustment to home, school, and community; (7) the

mental and physical health of all individuals involved; (8) the child's needs; (9) the distance between the parents' residences, the difficulty of transporting the child, and the ability of the parents to cooperate in the arrangement; (10) whether a restriction on decision-making or parenting time is appropriate; (11) the physical violence or threat of physical violence by the child's parent directed against the child or other members of the household; (12) the willingness and ability of each parent to place the needs of the child ahead of his or her own needs; (13) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; (14) the occurrence of abuse against the child or other members of the household; (15) whether one parent is a convicted sex offender or lives with a convicted sex offender; (16) the terms of a parent's military family-care plan; and (17) any other factor the court expressly finds to be relevant. See 750 ILCS 5/602.7(b) (West 2016).

¶ 95 1. The Trial Court Conducted a Best-Interests Analysis

¶ 96 First, Adrian argues that the trial court did not conduct a best-interests analysis and, instead, stopped after erroneously requiring Adrian to show a substantial change as to both parents. We disagree.

¶ 97 Section 610.5(c) does *not* require that the court, in ruling on a modification motion, make specific factual findings. 750 ILCS 5/610.5(c) (West 2016).[3] Here, there was evidence

[3] In contrast, case law under the former section 610(b) of the Act, which was repealed by Public Act 99-90, held that courts were required to make specific factual findings of fact before modifying a parenting order. See, *e.g.*, *Suriano v. Lafeber*, 386 Ill. App. 3d 490, 493 (2008); see also 750 ILCS 5/610(b) (West 2008) (noting that the trial "court shall state in its decision specific findings of fact in support of its modification or termination of joint custody if either parent opposes the modification or termination.").

presented concerning the best-interest factors and the trial court, in its written order, noted that it considered the evidence the parties presented, the reports by both GALs, the second GAL's testimony, counsels' arguments, applicable statutes, and case law. The court further noted that it did not find by a preponderance of the evidence, since the entry of the judgment and agreement, "that a substantial change has occurred in the circumstances of the child or of either parent that would necessitate such modification *to serve the best interest of the child*." (Emphasis added.) Thus, it determined that there was no substantial change in circumstances that *warranted* a modification to serve A.'s best interests, reflecting that it *did* consider the best-interests factors (although, as we discuss below, it erred in its assessment of the factors).

¶ 98 2. A.'s Wishes

¶ 99 Next, focusing on one of the best-interests factors, Adrian argues that the trial court failed to give any consideration to A.'s wishes as expressed in her *in camera* interview, where she articulated specific reasons for wanting to live with him. He points to A.'s statements that Jennifer does not do many things with her; makes her clean up after her, Hubbs's, and M.'s messes; does not feed A. breakfast or dinner; does not help with homework or allow her to participate in extracurricular activities; and is jealous of her relationship with Adrian (as evidenced by being present for their conversations and taking away the agreed-upon Wednesday overnights after commencement of the modification proceedings). According to Adrian, A. feels that Jennifer does not want to be with her or do things with her. In contrast, A. prefers Adrian because he ensures that she has breakfast and dinner, helps with homework, takes her to the doctor and dentist, and she feels that he cares for her while Jennifer leaves her on her own.

¶ 100 The trial court's finding that a change of custody is in the child's best interest may be based on the child's preference where the child's reasons are related to his or her best interests.

In re Marriage of Edsey, 199 Ill. App. 3d 39, 55 (1990). A mature child's preference should receive considerable weight when it is based on sound reasoning. *In re Marriage of Valter*, 191 Ill. App. 3d 584, 590-91 (1989) (court assigned *some* weight to 14-year-old's preference in assigning custody on basis that child articulated very specific reasons for wishing to live with his mother; reasons included substantial additions to his immediate family and feeling closed in, disagreements with new stepmother concerning his mother and desire to live with her, and his fear of the respondent due to the respondent's alcohol dependency and volatile nature). However, the desires of immature children are not controlling. *Shoff v. Shoff*, 179 Ill. App. 3d 178, 185 (1989) (preference of eight-year-old child, who did not indicate sound reasoning for her preference, was not given considerable weight in custody decision; child, who lived with her father, expressed a preference for living with her mother because her mother had no one else, while her father did; however, she was not unhappy living with her father; court determined that child was not mature and that her preference was not based on sound reasoning).

¶ 101 A. testified that she believes that Jennifer loves her as a daughter but does not like her. She also reported that she has to do the dishes, clean up, change M.'s diaper, "kind of" do her own and Jennifer's laundry, and feed herself. A. stated that she does not feel comfortable talking to Jennifer, whereas Adrian "knows" her better and purchases clothes and school supplies for her. Also, Jennifer acts like M. is the apple of her eye.

¶ 102 However, A. also testified that she has a special relationship with Jennifer; it is not a great relationship, but, rather it is "in the middle of good and okay." She is rightly concerned about her mother's apparently heavy smoking, but did not otherwise note any safety issues in Jennifer's home and she did not witness the incident with Hubbs, who no longer lives in Jennifer's residence but is apparently spending overnight there, as A. reported that he is gone

before she wakes up (*i.e.*, she is aware he is back in the house). Some of A.'s other comments are consistent with her relatively young age. For example, A. testified that Adrian and his family purchase clothes and other items for her, whereas Jennifer does not. This testimony was immediately followed by her statement that Jennifer does not keep her promises and does not like her.

¶ 103 However, A.'s testimony about having to prepare her own meals and do her own and Jennifer's laundry, coupled with her responsibilities concerning M., reflect an even more worrisome situation in Jennifer's home, none of which was addressed by the GAL. Furthermore, Jennifer's testimony, tellingly, did not refute that A. fends for herself for meals. Nor did she refute A.'s testimony concerning her failure to get up in the morning in time to give her breakfast, her failure to help A. get to school, and her overall inattentiveness toward her children. We acknowledge that the meal-preparation arrangement at Adrian's home may reflect, at least in part, his financial circumstances. Jennifer may not have the resources, especially after terminating her cohabitation with Hubbs, to eat out and order meal kits, but she still has the obligation to feed her daughter. A.'s responsibility to prepare her meals and attend to M. on a daily basis due to Jennifer's unwillingness to wake up, displays, like the heavy smoking in the home, insensitivity to A.'s basic needs and health.

¶ 104 We do not mean to imply that no aspects of the parties' co-parenting arrangement are effective. The evidence reflected that, as to homework, A. related to the GAL that she ordinarily does not need homework help, her grades are excellent, and that she can go to both parents for help (though she favors Adrian). A.'s testimony similarly reflected that she gets A's and B's in school. However, she stated that Jennifer does "[n]ot really" help her with homework "a lot" and that Adrian is better at math. We believe that the fact that one parent provides the majority of

assistance with homework can also reflect a healthy co-parenting arrangement, as the GAL related. Similarly, the fact that Adrian takes A. to her doctor's appointments does not necessarily show a lack of interest for A.'s welfare on Jennifer's part. (However, the fact that A. apparently did not go to the dentist for two years is troubling.) Jennifer testified that, when A. was younger and Adrian worked out of town, she took A. to her doctor's appointments (until 2012). Thereafter, Adrian *offered* to take over this responsibility. This arrangement may continue.

¶ 105 Nevertheless, overall, the trial court erroneously placed little to no weight on A.'s strong and well-reasoned preference to live with Adrian.

¶ 106 3. GAL's Report

¶ 107 Next, Adrian argues that the trial court erred in relying on the GAL's report, where it was based on an inadequate investigation. Adrian contends that the GAL provided his legal opinion that Adrian would not meet his burden of proof of showing that a modification is necessary. This was error, he asserts, because the GAL's investigation lacked the depth required to make an informed recommendation or opinion about the strength of the evidence. Adrian complains that the GAL placed little or no weight on A.'s preference to live with Adrian simply because she was 10 years old and wanted to spend more time with her best friend. Adrian argues that the GAL conducted no further inquiry as to A.'s reasons, concluding that A. had not articulated any reasons that were significant to his investigation. In contrast, Adrian notes, A. articulated many reasons to the court during her testimony. He points to her testimony that M. is "everything" to Jennifer and A. is "nothing"; Jennifer does not like her; A. feels closer to Adrian; Jennifer does not enroll her in extracurricular activities; Jennifer smokes; she monitors her phone and Facetime conversations with Adrian; and A. eats poorly at Jennifer's home.

¶ 108 We agree with Adrian. The GAL submitted a report to the court and testified during the trial. Addressing his report, he stated that he believed that he "hit the high points" in it and acknowledged that there were some allegations that were raised that did not hold a lot of weight with him. As noted above, we find it very troubling that the GAL did not mention the domestic incident in his report, nor Jennifer's agreement to lift the no-contact order over the State's objection. This causes us to question his overall evaluation of A.'s life. Further, the GAL discounted A.'s strong preference to live with Adrian without addressing her specific concerns about the living arrangement in Jennifer's home, including her smoking and A.'s claims concerning neglect, at the very least the lack of breakfast and dinner. The evidence reflects that the GAL's visits to the parties' homes were very short; thus, he did not take the time to establish enough of a rapport with A. to allow her further elucidate her reasons for preferring to live with Adrian. At trial, the GAL explained that he does not generally place much weight in a 10-year-old's preference, unless it relates to a safety concern, and, here, in his opinion, there are no such concerns. However, in her testimony, A. addressed Jennifer's smoking and articulated that she primarily wanted to live with Adrian because she feels neglected by and alienated from Jennifer. Indeed, in the context of addressing the care she receives in each home when she is sick, she testified that she feels safer in Adrian's home. Although the neglect about which A. complains may not be a safety concern, *per se*, it goes directly to addressing A.'s emotional well-being, which is a paramount concern in assessing her best interests.

¶ 109 The foregoing reflects that the GAL's investigation was cursory and incomplete and that the resulting testimony was deficient or unreasonably limited. In this respect, the trial court should have discounted it and placed more weight on A.'s testimony.

¶ 110 4. Statutory Best-Interests Factors

¶ 111 Finally, Adrian argues that the statutory best-interests factors favor him. We agree.

¶ 112 First, as to the wishes of each parent seeking parenting time (750 ILCS 5/602.7(b)(1) (West 2016)), he acknowledges that both he and Jennifer seek the majority of the parenting time, but he asserts that he makes better use of it. Adrian points to how he is active in A.'s schooling, helps her with homework, communicates with her, including about upcoming pre-teen changes, and encourages her hobbies. In contrast, he notes, Jennifer is distant, fails to feed A., leaves messes for A. to clean up, does not ensure that A. has money for school snacks, does not encourage activities, and does not ensure that A. has no school absences or leaves early. We conclude that this factor does not necessarily favor either parent. Both parents seek the majority of parenting time.

¶ 113 Next, as to the wishes of the child (750 ILCS 5/602.7(b)(2) (West 2016)), we addressed that factor above and determined that the trial court erred in impliedly discounting A.'s preference, which is to live with Adrian.

¶ 114 As to the factors relating to the amount of time each parent spent performing caretaking functions in the preceding 24 months preceding the filing of the petition and any prior agreement or course of conduct between them relating to caretaking functions (750 ILCS 5/602.7(b)(3), (4) (West 2016)), Adrian argues that, after his work schedule changed, the parties agreed to allow Adrian more parenting time, including weeknights. Thus, Adrian has experience parenting A. that he did not have in 2012 when the parties initially separated and, he contends, he has made good use of his time and has been more able to provide her with what she needs. We agree that he has had more parenting time in recent years, but Jennifer has had the majority of the time. Jennifer has had more hours of the week with A., but we cannot conclude that she, therefore, has

spent more time performing caretaking functions. Having a child under your roof, without more, does not equate to "performing caretaking functions." This factor is, at best, neutral.

¶ 115 Next, as to the interaction and interrelationship of the child with her parents and any other person who may significantly affect her best interests (750 ILCS 5/602.7(b)(5) (West 2016), Adrian argues that he not only interacts with A., but he also has his own extended family, whom A. see when she visits Adrian, and his girlfriend, Vicky, and her own daughter who are quite active in A.'s life. By contrast, he notes, at Jennifer's home, A. has only Hubbs and M. The GAL's belief that M.'s presence is good for A. fails to take into account, he argues, that: (1) A. feels neglected due to Jennifer's focus on M.; and (2) A. would have time with M. during her stays with Jennifer, even if primary parenting time is awarded to Adrian. We conclude that this factor favors Adrian. Although Jennifer lives close to Hubbs's relatives and to Vicky, Hubbs still spends some time, including overnights, in Jennifer's home and A.'s feelings towards Jennifer result from Jennifer's lack of interest in her. She feels neglected.

¶ 116 The next factor, the child's adjustment to her home, school, and community (750 ILCS 5/602.7(b)(6) (West 2016)), Adrian asserts, weighs in his favor because he has lived in the same home since before the parties' separation, while Jennifer has moved four times and was planning a fifth move at the time of trial. This has resulted in school changes for A., and, he contends, even the most resilient child should not have to go through that change and a new neighborhood and friends. He maintains that he can provide a more stable life for A. We believe that this factor strongly favors Adrian, as even Jennifer conceded that school changes are not what is best for A. Although, outwardly, A., who will be starting middle school soon, appears to have adjusted well to the frequent moves and does well in school, it is common sense that the constant disruptions can have long-term negative effects on her life. Even the GAL acknowledged that

the moves are less than ideal and stated that he hoped that Jennifer can keep A. in the same school in the future, but could point to nothing to indicate that Jennifer will be able to do so.

¶ 117 As to the mental and physical health of all individuals involved (750 ILCS 5/602.7(b)(7) (West 2016), Adrian claims that A. often gets sick, Jennifer does little about it, especially when she is trying to sleep, and Adrian is the one who takes her to the doctor when necessary. Also, during her testimony, Jennifer did not refute that she has again taken up smoking and that she often smokes in the house with the children present and in her car. We conclude that this factor favors Adrian, primarily because of Jennifer's smoking. Although the evidence, specifically, A.'s testimony, was not that she often gets sick, but that M. does, Jennifer herself did not refute the evidence concerning her smoking. As to doctor's appointments, as we noted above, the evidence was that Adrian has offered to take on this responsibility; thus, this aspect of this factor does not necessarily weigh in his favor. However, A. related, and it was not refuted, that Adrian recently took her to the dentist for the first time in two years because Jennifer had neglected to do so.

¶ 118 As to A.'s needs (750 ILCS 5/602.7(b)(8) (West 2016)), Adrian contends that she is a growing girl who needs love and support that Adrian has been providing. He concedes that Jennifer loves A., but argues that Jennifer is incapable of providing the support that A. needs at this time, including schooling, preparing food, and providing A. clean clothes. We conclude that this factor weighs in Adrian's favor. A. feels neglected by and alienated from Jennifer, and the unrefuted evidence supports a finding that her basic needs are not being met.

¶ 119 The next three factors, the distance between the parties' residences, whether a restriction on parenting time is appropriate, and physical violence or the threat thereof (750 ILCS

5/602.7(b)(9), (10), (11) (West 2016), Adrian submits, and we agree, that they either favor neither party or are inapplicable.

¶ 120 As to the willingness of each parent to place the child's needs ahead of his or her own needs (750 ILCS 5/602.7(b)(12) (West 2016)), Adrian argues that this factor favors him. We agree. He points to A.'s testimony that Jennifer does not help when she needs it, such as feeding her properly and doing laundry. Instead, Jennifer focuses on Hubbs, M., or sleeping, leaving A. to do the work around the house. Adrian maintains that he puts A.'s needs first whenever he sees her. He is not merely the "fun dad," but makes her do her homework, cooks with her, has her do age-appropriate chores, and exposes her to activities. In our view, this factor favors Adrian.

¶ 121 Next, as to the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child (750 ILCS 5/602.7(b)(13) (West 2016)), Adrian maintains that, at one point, this factor was neutral, but, when the litigation commenced, Jennifer became jealous and resentful of Adrian's time and relationship with A., and she precludes A. from taking any of her belongings to Adrian's home and from bringing her guitar from Adrian's home to Jennifer's residence because she has to share everything with M. and he would damage it. Jennifer restricted phone calls, stopped the Wednesday overnights, occasionally resisted communicating with him, and overrode his objection to changes in school districts. We believe that this factor favors neither party. The GAL testified that both parents have been effective in co-parenting, but that he had concerns about Adrian's ability, if he were awarded residential custody, to be as accommodating and facilitating as Jennifer has been in the past four years. Contrary to the 2012 order, Jennifer also made unilateral changes without consulting Adrian. Further, although A. told the court that both parents had spoke to her about the court proceedings, she stated that Adrian was not attempting to influence her decision, and, in

a journal entry writtein as part of a school assignment that the GAL received on the day of the hearing, A. wrote that Adrian and his family had told her that she was going to live with Adrian. However, we do not know the context of the journal entry, including the nature of the assignment, or the circumstances of the event to which A. refers. Further, since the parenting agreement was entered into, the parties agreed to grant Adrian more parenting time, including Sunday overnights, Wednesday overnights (which Jennifer apparently took away after Adrian filed his petition), and alternating weeks during the summer. Although this factor does not favor either party on its face, we are concerned by Jennifer's restriction, after he filed his petition, of Adrian's Wednesday night parenting time. We also note that to the extent that the they may have effectively co-parented with Jennifer having primary residential custody does not mean the effective co-parenting cannot continue if Adrian has primary residential custody.

¶ 122 As to the occurrence of abuse against the child or other member of the child's household (750 ILCS 5/602.7(b)(14) (West 2016)), Adrian asserts that this favors him because Hubbs was charged with sexual abuse and domestic battery against Jennifer. Jennifer admitted that the charges were true, but, nevertheless, did not object to Hubbs coming to her home and agreed to assist in changing his bond conditions and lifting the no-contact order. We conclude that this factor weighs in Adrian's favor for reasons addressed above.

¶ 123 The next two factors, concerning convicted sex offenders and military family-care plan, do not apply in this case.

¶ 124 The foregoing factors, on the whole, favor Adrian, and the evidence reflects that the court's best-interests findings were unreasonable. The court's determination that the substantial change in the parties' circumstances did not warrant a modification to serve A.'s best interests was against the manifest weight of the evidence, and the trial court erred in denying Adrian's

petition to modify custody to award Adrian primary residential custody. We hereby award Adrian primary residential custody. Jennifer is awarded parenting time on alternating weekends, certain holidays and a summer schedule, as detailed in the 2012 order with respect to Adrian's time, including additional time as the parties agree.

¶ 125 III. CONCLUSION

¶ 126 For the reasons stated, the judgment of the circuit court of Kane County is reversed and the cause is remanded for further proceedings consistent with this decision.

¶ 127 Reversed and remanded.

¶ 128 JUSTICE BIRKETT, dissenting:

¶ 129 I respectfully disagree with my colleagues. The trial court's findings that Adrian had failed to sustain his burden of proof are not against the manifest weight of the evidence. Custody cases present perhaps the most difficult decisions that trial judges face. Reviewing courts are sometimes tempted to review the facts with an eye toward achieving the best outcome for the children. However, the law does not permit us to review custody decisions, especially those involving modifications, with a neutral eye. "In determining whether a judgment is contrary to the manifest weight of the evidence the reviewing court views the evidence in the light most favorable to the appellee." *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004). Reviewing courts are not permitted to try child custody cases *de novo*. *In re Custody of Sussenbach*, 108 Ill. 2d 489, 499 (1985). In order to reverse the trial court's judgment it is not enough to show that the record would support a contrary decision, "[r]ather, if the record contains any evidence to support the trial court's judgment, the judgment should be affirmed." *King Koil Licensing Co. v. Harris*, 2017 IL App (1st) 161019 (citing *Department of Transportation ex rel. People v. 151 Interstate Corp.*, 209 Ill. 2d 471, 488 (2004)). Despite the picture the majority paints of Jennifer,

it is clear from the evidence that A. is a healthy, intelligent, well-adjusted child who loves both of her parents. Section 610(b) of the Act reflects an underlying policy favoring finality of child custody judgments and creating a presumption of the present custody arrangement in order to promote stability and continuity in the child's custodial and environmental relationships. *In re Marriage of Fuesting*, 228 Ill. App. 3d 339, 344 (1992). Changed circumstances are not sufficient to warrant modification in custody "without a finding that such changed conditions affect the welfare of the child." *Id*., citing *Brandt v. Brandt*, 99 Ill. App. 3d 1089, 1099 (1981).

¶ 130 Adrian's relationship with A. has grown closer over the years, no doubt in large measure to Jennifer's continued efforts to accommodate Adrian's request for more parenting time. The majority forgets that the decision to award Jennifer residential custody was by agreement. The underlying policy favoring the present custodian is more persuasive when the initial custody determination was made by agreement of the parties. *Stukert v. Brownlee*, 138 Ill. App. 3d 788, 792 (1985). Jennifer's generosity in allowing Adrian to exercise greater visitation rights and making sure that her residence was always within a reasonable driving distance for Adrian should not be held against her. See *In re Marriage of Wechselberger*, 115 Ill. App 3d 779, 787 (1983) ("[m]other's generosity in allowing the father to exercise greater visitation rights than mandated by the court order does not demonstrate that she consented to the integration of her children into the father's family.")

¶ 131 It is clear from the record in this case that Adrian has always desired to have A. live with him. Adrian told the GAL that at that the time he sought residential custody in 2012, "he was attempting to alter his position with his employer so that he could be at home." The "Parentage Judgment and Joint Custody Agreement" could have contemplated that there be a modification of residential custody in the event that Adrian was successful in reducing his time away from

home, but no such provision was made. Ordinarily, the court will only grant a modification if neither of the parents nor the court knew about the changes at the time of the original order. If a change is anticipated it should be included in the order. The joint custody agreement by its terms was intended to be final. The agreement, consistent with Supreme Court Rule 905 (eff. March 8, 2016) (Mediation), also required that if there was any disagreement concerning provisions of the agreed joint custody order the parties were to first "communicate his or her position in writing." If the parties were unable to resolve the problem they could request the use of a mediator who was named in the order or one the parties agreed upon from the list of court-appointed mediators. The order also provided that "[n]either party shall proceed to a hearing in any court with respect to differences between the parties concerning a disputed parenting issue, unless the mediation process has first been initiated and then terminated without a resolution of the difference or differences between the parties. Both of the parties hereto further agree that they shall make a good faith effort to mediate any impasse *prior* to litigating the disputed issue(s)." (Emphasis added.) Adrian testified he knew the parenting agreement had a mediation clause but he did not "really know the process." Of course, mediation is not a jurisdictional prerequisite and Jennifer has forfeited this issue. However, a party's failure to abide by a court order is a relevant consideration in a modification proceeding. See *Stuckert*, 138 Ill. App. 2d at 792 (failure to pay child support and maintenance was relevant and proper in determining best interest of child). Failure to mediate was not Adrian's only violation of the court order. The order specifically provided that each parent would have A. on his or her birthday. The record reflects, however, that on Jennifer's last birthday, before the modification hearing, Adrian had A. and he lied to Jennifer when he told her that A. was spending the night with him. In fact, A. spent the night with Adrian's girlfriend because Adrian's "schedule" did not allow for him to be with A. that

night. The joint agreement also provides that "[p]arenting time as set forth herein shall not be unreasonably withheld, nor shall the parent having parenting time threaten to delay or prevent the return of the child after a parenting time period."

¶ 132 On cross-examination Adrian also acknowledged that he did not comply with the terms of the trial court's child support order "the way it's explicitly laid out there." The order provided that Adrian was to pay Jennifer "$612 semi-monthly" based upon his income in October 2012 of approximately $112,000 per year. The order also provided that Adrian pay Jennifer "20% of any additional net income within seven (7) days of his receipt of said additional income. At the time of the modification hearing, Adrian was making $150,000 and admitted that "it could be" that he made more money each year since the October 2012 order. Adrian was asked the following questions:

> "Q. Isn't it true, sir, that you've never directly made a payment to the mother and provided documentation to [the] mother evidencing additional income concurrently with the payment? Isn't that true, sir?
>
> MR. COOPER [(ADRIAN'S ATTORNEY)]: Objection. Asked and answered about three times at this point.
>
> THE COURT: I think it's been asked a few times, but I'm not sure that it's been answered.
>
> A. I've not paid in the exact way that it says there, that's correct."

¶ 133 A father's failure to make court ordered child support payments is relevant evidence in a hearing on the father's petition for custody. *In re Custody of Harne*, 77 Ill 2d 414, 423 (1979). It is appalling to me that Adrian relies on Jennifer's "frequent moves" as a basis to modify custody while at the same time violating the court's child support order. Also, the evidence

demonstrates that Jennifer's moves were in large measure due to her finances. In his emails to Jennifer Adrian incorrectly informed her that he was entitled to know when she moved before she did so. However, the joint custody agreement only required that each party keep the other informed as to the exact place where each of them resides; there was no requirement that either parent provide information about a move before it happened.

¶ 134 What is much worse, however, is that Adrian was attempting to use Jennifer's lack of finances to try to bribe her into allowing him to get residential custody of A. In a November 2014 email from Adrian to Jennifer he states, "I would like you to know that at any point if things are tough, I will gladly take [A.] back." Then in a email on February 3, 2015, Adrian says:

> "I understand that times are tough for you financially right now. There are a lot of things that are probably going through your head. Car, rent, space in your current place considering [M.] is getting older and will need a room (I know there is a basement and the kids can share a room). Anyway I was prepared to discuss some middle ground financially with you if you were open to letting [A.] come live with me. So here we go."

Adrian then sets out a proposed change of residential custody to him and offers to pay the attorney fees and waive child support from Jennifer. He then says, "I would be willing to give you a lump sum amount to cover you sooner rather than later on\some expenses you need to take care of NOW and not later." Finally, he says "[a]s of right now I could propose $5K."

¶ 135 Jennifer responded to this email the next day and said that his offer seemed "kind of shady" and said that Adrian must have misunderstood her kindness as a request for help of some kind. Finally, she said that she did not need Adrian's help, and unfortunately he had now put her in a position where she did not trust him anymore. In response, Adrian said "I thought a chunk

of money would be helpful for you considering your situation. I have mentioned to you before that I will continue to try and get [A.] back." At the end of the email he says "[e]ven if you need more money . . . I would consider it."

¶ 136 For Adrian to fail to pay Jennifer the child support that she was entitled to based upon his increased salary over the years and then try use her financial situation against her in order to get custody of A. is inexcusable and a very poor reflection on his character.

¶ 137 The majority concludes that the trial court erred in finding that there was no substantial change in circumstances in Jennifer's or A.'s situations. I disagree. The majority focuses first on Jennifer's moves. Adrian should be estopped from even making this argument. Adrian has not shown that the moves, while regrettable, have adversely affected A. "When a party offers evidence regarding repeated changes in residence, employment or babysitters, the offering party must be prepared to show that the conduct has adversely affected the child." *Nolte v. Nolte*, 241 Ill App. 3d 320, 328 (1993). My colleagues acknowledge that the moves alone would not warrant reversing the trial court's "no substantial change" determination. *Supra* ¶¶ 85-86. However they relate this to other "facets" of Jennifer's and A.'s lives to conclude that the "trial court's findings were erroneous." *Supra* ¶ 86.

¶ 138 The majority throws Hubbs into the mix despite the fact that there was no testimony that Hubbs was a concern. Even Adrian testified that he was not concerned about Hubbs returning to Jennifer's home. The GAL testified that it did not appear that Hubbs was living with Jennifer and that Hubbs' belongings were stored in the basement. Jennifer testified that she agreed to lift the no contact order in Hubbs' criminal case solely so that Hubbs could exercise his parental rights with M. Jennifer testified that she is no longer romantically involved with Hubbs. As the majority notes, we must accept inferences that support the trial court's order. *In re Marriage of*

Bates, 212 Ill. 2d at 615. The majority, despite the lack of any evidence to suggest that Hubbs' visits to the home are of any concern, find "the incident (the November criminal case) of concern." Again, reviewing courts are not permitted to try custody cases *de novo*. *In re Custody of Sussenbach*, 108 Ill 2d at 489 (1985).

¶ 139 The majority criticizes the GAL's failure to address the evidence of the domestic incident with Hubbs in his report and question the trial court's reliance on the report "as a whole." *Supra* ¶ 87. First, the GAL was appointed on Adrian's motion and Adrian paid his fees. Second, the trial court's written decision did not make specific findings of fact, as it is no longer required to do so by law. 750 ILCS 5/610.5 (West 2016) (Modification). The order reflects that the court "considered the evidence presented by the parties, the report of Attorney Lidia E. Serrano, the previous GAL, the report and testimony of GAL David, the arguments of counsel[4] and the applicable statutes and case law." The order also reflects the "*in camera*" hearing with A. There is simply no basis upon which to conclude that the trial court placed too much weight on the GAL report. The majority forgets that Adrian, as the party moving for modification, had the burden first of proving a substantial change in circumstances, and if successful, that A.'s best interest required that Adrian be awarded residential custody. See *Jacobs v. Jacobs*, 25 Ill. App. 3d 175 (1974) and *Hendrickson v. Hendrickson*, 49 Ill. App. 3d 160 (1977). "The evidence must establish that the parent to whom custody was originally awarded, is either unfit to retain custody

[4] The parties submitted written closing arguments. Adrian filed his argument on December 22, 2016. Jennifer filed her closing argument on June 16, 2017. The trial court entered its written order on July 12, 2017, well beyond the 18 month deadline from service of the petition on Jennifer, in violation of Illinois Supreme Court Rule 922 (eff. March 8, 2016) (Time Limitations).

or the change in conditions is directly related to the child's needs." *In re Custody of Dykhuis*, 131 Ill. App. 3d 371, 374 (1985) (citing *Brandt v. Brandt*, 99 Ill. App. 3d 1089 (1981)). When reviewing the evidence in the light most favorable to Jennifer, I submit that Adrian has fallen short of meeting his burden with respect to both the issue of moving and Mr. Hubbs.

¶ 140 The majority concludes that M.'s birth "has had a significant and negative impact on A.'s relationship with Jennifer." *Supra* ¶ 88. I disagree. First, there is evidence in the record to support the opposite conclusion. Photographs of A. and M., together along with A.'s drawings, were introduced into evidence to corroborate the GAL's testimony that A. and M. had an "inseparable" brother and sister relationship. The majority criticizes the GAL for not fully investigating A.'s complaints about "caretaking responsibilities" regarding M. First, if this issue was a source of friction, Adrian had a responsibility to raise it in writing as required by the joint parenting agreement. Second, Jennifer testified that A. had no regular duties regarding M.'s care. The trial court was in a superior position to judge A.'s and Jennifer's credibility in this case. We have a responsibility to accept the inferences that support the trial court's order. *In re Marriage of Bates*, 212 Ill. 2d at 516. By accepting A.'s testimony to the exclusion of other evidence regarding A.'s relationship with M., the majority has not only ignored our standard of review, they have also shifted the burden to Jennifer to disprove A.'s claims.

¶ 141 The majority also states that since the 2012 agreement things have dramatically changed and that "A. does not feel close to her mother, nor does she believe that her mother cares about her well-being." *Supra* ¶ 89. The evidence does not support such a conclusion, especially by a reviewing court. During Jennifer's testimony, the trial court had an opportunity to evaluate her credibility, just as with A. The trial court also had before it A.'s letter to her mother dated August 26, 2015, where A. wrote:

> "Dear Mama,
>
> I love you *so* much. I do think we have a special connection. When you guys said I was special I have been noticing . . . that it was true. I just thought that you were just saying that because you were parents. But I have been noticing special things. You have been by my side all my life. When daddy wasn't there you were. We do have a special connection that other people don't have.
>
> Love, Mouse." (Emphasis in original).

At the bottom of the letter A. drew a picture of two stick figures holding hands with a heart above their heads.

¶ 142 Although she is not required to do so, Jennifer rebutted any notion that she is not a loving and caring parent. She also established that A. has and continues to express her love for her.

¶ 143 The majority also comments on Jennifer smoking in the house. Again, this subject was never raised in writing by Adrian as a source of concern as required by the joint parenting agreement. Additionally, the GAL asked Jennifer about smoking in the house and she said that she did not smoke in the house. If there had been unrebutted evidence that Jennifer's smoking has caused or will cause health problems for A., smoking might be relevant to a best interest determination. See *In re Marriage of Diddens*, 255 Ill. App. 3d 850, 856 (1993). Also, it is reasonable to infer that if Jennifer regularly smoked in the house the GAL would have been able to smell it during a house visit, and that he would have noted that in his report. The majority acknowledges that none of the factors discussed in ¶¶ 78-89 "alone, warrant reversal of the trial court's findings, but together" together they do warrant reversal in part because "the trial court 'unreasonably ignored' voids in Jennifer's testimony." *Supra* ¶ 89. The majority points to A.'s testimony that Jennifer does not enroll A. in any extracurricular activities. It is more than a fair

inference that A. is not enrolled in extracurricular activities because Adrian's liberal visitation schedule would be interrupted. Again, the majority has shifted the burden.

¶ 144 Finding that cumulative factors warranted reversal of the trial court's finding of no substantial change for A. and Jennifer, the majority goes on to conclude that the trial court also erred in not finding that A.'s best interest required that Adrian be awarded primary residential custody. In doing so, the majority places great weight on A.'s *in camera* interview with the court. During Jennifer's testimony it was revealed that both Adrian and his family members discussed the upcoming modification hearing with A. Jennifer found A.'s journal entry where A. wrote about conversations with Adrian where they discussed A. coming to live with him. The journal entry was received in evidence. A. wrote that she was sad; that there was a "big fight" between "mommy and daddy; that "daddy called a lawyer" and discussed with him "[her] life at mommy's and how much he wants me to live with him." A. also wrote that Adrian "has been telling me that I've had to re-make friends 4 times" and that she "just can't stop thinking about who I'm gonna live with." Jennifer's testimony and the journal entry established that Adrian violated the joint parenting agreement by discussing "the conduct of the other parent in the presence of the children except in a laudatory or complimentary way." This was a proper factor for the court to consider in assessing the weight to be given to A.'s testimony. As I have noted, Adrian never raised any of the concerns expressed by the majority as to A.'s best interest in writing, as required by the joint parenting agreement. Also, in 2012 the GAL stated in her report that she "[had] doubts as to Adrian's sincerity with regard to the concerns he has raised. Adrian has not raised those concerns with Jennifer and in fact admits that [A.] is healthy, doing well in school, and is generally a happy little girl." As a result, the trial court may well have determined that Adrian's complaints were simply not credible. Also, Jennifer testified that she believed one

of the main reasons A. preferred to live with Adrian was because she is a more strict disciplinarian than Adrian.

¶ 145 The majority writes that "A. feels neglected by and alienated from Jennifer, and the unrefuted evidence supports a finding that her basic needs are not being met." *Supra* ¶ 117. How is it then that by all appearances A. appears to be thriving? She is bright, does well in school, has no behavioral problems and loves *all* of her family members.

¶ 146 Finally, modification proceedings are not about who would be the better parent. "There is a legislative policy against modification of custody because the importance of stability in a child's life and the belief that finality is more important than determining which parent is truly the better custodian." *In re Marriage of Oros*, 256 Ill. App. 3d 167, 169 (1994). The evidence presented in the instant case, when viewed in a light most favorable to Jennifer, clearly supports the trial court's decision. For these reasons, I respectfully dissent.