

NOTICE
Decision filed 11/24/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 140326-U

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 5-14-0326

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

<i>In re</i> S.A.D., a Minor Child)	Appeal from the
)	Circuit Court of
(Melissa A.S.,)	Williamson County.
)	
Petitioner and Counterrespondent-)	
Appellee,)	
v.)	No. 13-F-127
)	
Andrew W.D.,)	
)	Honorable
Respondent and Counterpetitioner-)	James R. Moore,
Appellant).)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Welch and Justice Goldenhersh concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court did not err in awarding Mother primary residential custody of the parties' minor child, but did err in reducing Father's visitation once the child began school.
- ¶ 2 Andrew W.D., respondent and counterpetitioner-appellant (Father), appeals from the amended joint parenting order entered by the circuit court of Williamson County awarding the parties joint custody of their four-year-old daughter, but naming Melissa A.S., petitioner and counterrespondent-appellee (Mother), the residential custodian. Father argues on appeal that the court erred in naming Mother residential custodian and

further erred in denying him midweek overnight visitation with his daughter once she begins school. We affirm in part and reverse and remand in part with instructions.

¶ 3 Mother and Father were never married to each other, but did reside together for four or five years in Father's home. When the parties were together, Mother worked evenings doing sleep studies, and Father worked days as an occupational therapy assistant. Accordingly, Mother provided care for their daughter during the daytime, after sleeping until noon, and Father provided care during the evenings after returning home from work. Father testified he generally cooked dinners and breakfasts for the child, and bathed her at night and dressed her in the morning. Mother agreed that Father performed just as many caretaking responsibilities as she did, although she generally took their daughter to doctor appointments. She also noted, however, that Father did not execute an acknowledgment of paternity and have his name added to the child's birth certificate until she was 3½ years old. Nonetheless, both parents have a very good relationship with their daughter, and according to everyone, she is a very happy little girl.

¶ 4 As noted before, Father is a certified occupational therapist. He owns a three-bedroom, two-bath house in Marion where he has lived for many years. Father's sister, nieces and mother also live in Marion. His mother often babysits the parties' daughter and is available to assist Father with her care after school. Father also has a 21-year-old son who is in college and works full-time, but visits when he is able and has a good relationship with the daughter. Father also testified that his daughter enjoys riding her bike, playing outside in the yard, planting flowers, and feeding the chickens and rabbits. Father claims he also is the one who fixes her hair, plays dolls with her, does her nails

and indulges her in "the girly things" she wants to do. Father believes Mother is not as attentive to their daughter and often sends her out with her hair not fixed and in clothes that do not always fit. Father describes Mother as a "not very affectionate person" in general. Father's mother also testified that Mother seemed to be not very observant of her children, was frequently inattentive, and often appeared to "be off in her own world."

¶ 5 Mother and Father's relationship ended because Mother started having affairs. For several months after learning of the affairs, Father asked Mother to move out of his house. According to Father, in August of 2013, Mother finally moved out of the house in the middle of the night, without Father's knowledge. Mother claimed Father was walking around in his room and knew she was leaving. Mother took the parties' daughter with her and left her in Elgin with her parents for several days. According to Father, Mother had told Father that she would never stay overnight at her parents' house because the house was nasty, in disrepair, and not clean, and her father was mean. Mother subsequently denied Father all contact with his daughter for over a month while a temporary order regarding visitation was reached. Father then began seeing his daughter every other weekend (Friday through Sunday), and every Tuesday evening through Thursday morning. Mother believed this split schedule was working well. Father naturally wanted more time with his daughter.

¶ 6 After Mother moved out of Father's house, she rented a trailer in Herrin and brought her daughter back from Elgin once she moved in. Mother hopes to find a better place to live when her lease expires. She testified this was the first place she found to rent that she could afford at that time. While Mother has a history of mental health issues

and was recently diagnosed as bipolar 2, she is now taking medication for the condition and believes she is turning her life back around. She has a new job in Marion with a respiratory staffing agency with flexible enough hours that she is able to accommodate doctor visits and day care for her daughter.

¶ 7 Mother also has another daughter who is 10 years old. This child has ADD, is destructive and picks on the parties' daughter when they are together. The older daughter lives with her father, however, and Mother has limited visitation. Mother also has no family or support system in the area other than church. In the past, when she had to work overnight, she left the parties' daughter with the owner of her daycare. Father claimed Mother never offered him the opportunity to help take care of her first. He further claims that Mother has failed to keep him informed as to all medical issues and even daycare pertaining to their daughter. On the other hand, Mother also has not asked Father to assist in anything financially with their daughter since they separated. Father has only paid Mother a one-time \$50 support award, but claims he has purchased most of the daughter's clothing over the years and has provided for all of her food, toiletries and needs while in his care.

¶ 8 The circuit court entered a joint parenting order for custody, child support and visitation and awarded the parties joint custody, with Mother being designated the residential parent. Under the court-ordered visitation schedule, Father was granted visitation every other weekend and every Wednesday evening to Thursday morning. Father filed a motion for rehearing and reconsideration of judgment. The court granted Father's motion in part by increasing the midweek visitation to Tuesday evening through

Thursday morning but otherwise denied all other requests. When the written order was entered, the visitation scheduled remained the same, but Father's midweek time was to be reduced once the daughter began school full-time. At that point, he was only allowed to have visitation during the weekdays on Tuesdays from 3:30 to 7:30 p.m. Father appeals both the reduction of his midweek visitation time, as well as the granting of residential custody to Mother.

¶ 9 In child-custody cases, there is a strong and compelling presumption in favor of the result reached by the trial court, because in determining the child's best interests, the trial court is in a superior position to observe and evaluate the witnesses' demeanors. Therefore, we, as a reviewing court, will not reverse the trial court's determination unless it is against the manifest weight of the evidence or a clear abuse of discretion. *Connor v. Velinda C.*, 356 Ill. App. 3d 315, 323, 826 N.E.2d 1265, 1271-72 (2005). A custody judgment is against the manifest weight of the evidence when the opposite conclusion is clearly apparent or when the findings appear to be unreasonable, arbitrary or not based upon the evidence. *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶ 33, 995 N.E.2d 1007. Here there was substantial conflicting evidence as to Mother's fitness to maintain primary residential custody. But, the evidence also revealed that Mother has been the primary caregiver for some time and that the child is doing well. All admit that the parties' daughter is a very happy little girl and is bonded with both parents. We further note that Father did little to contribute to the financial needs of his daughter. He claimed that no one told him he had to pay support and, instead, relied on Mother to provide for his daughter's everyday needs and on the State to provide for her medical and

day care needs. Mother has been doing the best she can given her financial situation. Mother admitted she has had mental health problems in the past, but she has also sought medical treatment and appears to be doing better. She also has a new job that allows her the flexibility to be available for any necessity that may arise with her daughter as well. She further testified that she plans to move to a better home when her lease expires, is willing to move to a better public school district in the area if they cannot get their daughter into the private school they have chosen, and is trying, in general, to improve her environment for her daughter. After weighing all of the evidence, all the statutory factors and the credibility of the witnesses, the court found it was in the child's best interests for Mother to continue to have primary residential custody. Though a different court might have drawn different inferences from the evidence and perhaps reached a result favoring Father, we cannot say that the trial court's decision here, under the circumstances presented, is against the manifest weight of the evidence. Again, we will not substitute our judgment for that of the trial court, particularly in light of the fact that the trial court was in a better position to observe the temperaments and personalities of the parties and assess the credibility of the witnesses. See *In re B.B.*, 2011 IL App (4th) 110521, ¶ 32, 960 N.E.2d 646.

¶ 10 We do believe, however, that the court's determination that the reduction of Father's visitation during the weekdays once their daughter starts attending school full time is error. The parties never requested such a modification, and both parties were in favor of the schedule staying as is, assuming Father was denied residential custody. If the present arrangement begins to interfere with the daughter's schooling, then that is the

time to request a change in the visitation schedule. While the court may have been thinking ahead, there is no evidence in the record at the present time that such a change will be needed, especially when the parties do not even know what school their daughter will be attending. We therefore remand this portion of the court's order for modification of the visitation schedule to stay as it is currently, with Father having midweek visitation from Tuesday evening to Thursday morning.

¶ 11 For the foregoing reasons, we affirm in part and reverse and remand in part for modification consistent with the dictates of this disposition.

¶ 12 Affirmed in part; reversed and remanded in part with instructions.