2011 IL. App (1st) 111666-U

FOURTH DIVISION
November 17, 2011

No. 1-11-1666

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE CUSTODY OF: B.M.M., A Minor Child, _____ WILLIAM MALAUSKY, Petitioner-Appellant, v. MARIE ADAM SARR, Respondent-Appellee.	)	Appeal from the Circuit Court of Cook County. 09 D 80287 The Honorable Naomi Schuster, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justice Fitzgerald Smith and Justice Sterba concurred in the judgment.

ORDER

HELD: (1) The trial court abused its discretion in barring the testimony of the minor child's therapist due solely to the fact that the witness disclosure of the therapist was

technically four days late; (2) the trial court's judgment awarding permanent custody of the minor child to her mother was against the manifest weight of the evidence and constituted an abuse of discretion where the court did not consider three of the statutory factors required under section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2008)), namely, the preference of the minor child as to her custodian, the mental and physical health of all the individuals, and allegations of abuse of the minor child; and (3) the trial court also abused its discretion in denying the father's motion to reconsider where it erred in applying the law. The judgment was reversed and the matter remanded for retrial with directions that the minor child's therapist be allowed to testify, and that evidence be heard on all statutory factors required under section 602(a), specifically including: (1) the wishes of the minor child regarding her custody preference; (2) the mental health of all parties; and (3) allegations of abuse of the child.

¶1 BACKGROUND

¶2 The minor child, B.M.M. was born on March 24, 2002, in Atlanta, Georgia. Marie Sarr, respondent-appellee, is B.M.M.'s biological mother and custodian. Sarr was born in Gambia and moved to Atlanta, Georgia in 1996. Sarr met petitioner-appellant, William Malausky, in 1997 and became involved in a relationship. Sarr maintains she did not know at the time that Malausky was married, and that Malausky proposed to her. Malausky was experiencing marital trouble with his wife, June Anderson, and was living in Atlanta apart from his wife. Sarr became pregnant in 2001 and gave birth to B.M.M., on March 24, 2002. Malausky signed a voluntary acknowledgment of paternity on March 28, 2002. Malausky visited Sarr and B.M.M. at Sarr's home after she was released from the hospital, and Sarr spoke of taking B.M.M. with her back to Africa. Malausky moved back to Chicago in late 2002 and reconciled with his wife.

¶3 About six months later, Malausky called Sarr to inquire when Sarr would take B.M.M. to Africa, and continued calling to inquire every two or three months. When B.M.M. was about 18-20 months old, Malausky appeared at Sarr's residence and had a DNA test performed on B.M.M. when he took her out to purchase a toy that confirmed that B.M.M. was his child. At that time,

Malausky did not pay child support, but Sarr acknowledged that he paid for day care and school tuition, half of B.M.M.'s ballet lessons, and some travel. B.M.M. spent Christmas of 2004 with Malausky. In 2006, B.M.M. spent part of her summer vacation and winter break with Malausky.

¶4 In November 2007, Malausky received a call from Sarr's neighbor in Georgia advising that the minor child was with her because Sarr was in a mental institution. A week later, Malausky went to Georgia to pick up the child from the neighbor and stayed for a couple of weeks. Sarr had been diagnosed with depression and was hospitalized in a mental institution for approximately 10 days. Sarr testified that she agreed to let Malausky take B.M.M. with him to Chicago but was still unaware that he was married. Sarr testified that her father passed away in October 2007, and Sarr was in need of assistance and rest. At the time of trial, Sarr was not on any medication or receiving any treatment related to this occurrence.

¶5 When Malausky brought B.M.M. back to Atlanta after Christmas 2007, the parties discussed B.M.M. residing with Malausky for six months. In early January 2008, Malausky received a call from B.M.M. which gave him concern over Sarr's discipline of the child. The parties agreed that B.M.M. would move to Chicago to see if B.M.M. did well in Chicago. B.M.M. moved to Chicago on January 15, 2008. Sarr came to Illinois to visit B.M.M. in April 2008, staying at a hotel, and Malausky brought B.M.M. to see her. Sarr visited B.M.M. again in the summer of 2008, and again in October 2008, again staying at a hotel while Malausky brought B.M.M. to visit with Sarr. Malausky arranged another visitation with Sarr in March 2009.

¶6 In August 2009, Malausky drove B.M.M. to Atlanta. However, there was an altercation between the parties when Malausky wanted to leave with B.M.M. the day after arriving.

Malausky said he was going to call the FBI and told B.M.M. to run. Sarr attempted to stop Malausky from leaving by pulling and tearing his shirt. The incident resulted in the police being called and Malausky filing criminal charges against Sarr, which were later dismissed.

¶7 On August 4, 2009, Malausky filed a petition for determination of father-child relationship seeking temporary and permanent custody of B.M.M. and temporary and permanent child support from Sarr. Sarr filed a counter-petition for sole custody and support and a petition to set an immediate visitation schedule. On September 24, 2009, the court entered an order declaring Malausky the natural father of B.M.M. pursuant to the voluntary acknowledgment of paternity. On October 16, 2009, the court entered an order that provided for visitation with Sarr in Atlanta from November 7, 2009, through November 9, 2009, and from January 9, 2009, through January 10, 2009, at a specified restaurant. Visitation did not occur, and Sarr filed a petition for rule to show cause against Malausky on January 12, 2010.

¶8 On January 27, 2010, the court entered an order specifying that Sarr was to have the right to telephone B.M.M. nightly, ordering that Sarr was to have therapeutic visitation with B.M.M. in the office of a therapist that was mutually agreeable, and that Sarr was to have visitation on January 28, 2010 at a restaurant in Park Ridge, Illinois, supervised by Sarr's friend, Begary Jaiteh. Sarr thereafter had visitation with B.M.M. On April 16, 2010, the court entered an order that if the parties could not reach an agreement regarding the therapist, the court would appoint a child's representative. The order further stated that Sarr had received referrals for low cost or sliding scale resources for therapeutic visitation and that she must contact an agency to set up therapeutic visitation following the guidelines of B.M.M.'s therapist, Jessica Fox. On August 10, 2010, the

court appointed a child representative for B.M.M.

¶9 On October 7, 2010, the court entered an order setting a hearing on support and visitation issues, setting a pleading schedule, and setting October 20, 2010, as the deadline for witness lists and exhibits. A further order was entered on October 22, 2010, providing for mandatory disclosures and also ordering the parties to exchange witness lists within 15 days. Malausky disclosed Fox as a witness four days late. Upon motion in front of a different judge, Malausky obtained a court order allowing the release of Fox's records and allowing Fox to testify. However, Sarr filed a motion to bar Fox's testimony due to the late disclosure, and the trial court barred her testimony. Trial proceeded, with both Malausky and Sarr testifying.

¶10 Since B.M.M. moved to Chicago, Malausky has provided her with horseback riding lessons, soccer lessons, softball and basketball activities, golf and tennis lessons, and activities in a children's choir. B.M.M. was in good health and doing well in school. B.M.M. began seeing her therapist, Jessica Fox, in January 2010 and has seen her every three weeks. Shortly before B.M.M. began seeing the therapist, she was crying in the closet and stated that she was afraid her mother was going to steal her and take her to Africa. B.M.M. stated she did not want to talk to her mother and hated her. After B.M.M. had been seeing the therapist, Jessica Fox, for about four to six weeks, she stopped crying. However, since she began living in Chicago in January 2008, B.M.M. has not had contact with any member of Sarr's family or her classmates and friends in Atlanta.

¶11 June Anderson, Malausky's wife, testified that she has been married to Malausky since 1994. The couple were separated for a time during 2000-2001. Anderson learned of B.M.M. in

late 2003 or early 2004 and met B.M.M. when she was about three years old. Anderson testified that when B.M.M. first came to live with her and Malausky in January 2008, she was "out of control, crying, sassy, bossy" and threw tantrums. Anderson attends school conferences where B.M.M. is enrolled in third grade, and is involved with B.M.M. in Girl Scouts, knitting and sewing classes, the choir, sports, and horseback riding. Anderson testified that after August 2009, B.M.M. asked to talk to a priest. Thereafter, B.M.M. began sessions with Fox in January 2010 and saw Fox every three weeks. Anderson testified that B.M.M. has more confidence and no longer cries since she began therapy. B.M.M. calls Anderson "mommy" or "mother" and refers to Sarr as her "mother in Atlanta."

¶12 Malausky testified that he would be the better custodial parent because he was retired and has more time available to be a parent, is intelligent, and Sarr was not functioning well. At the time of trial, Malausky was 69 years old and had started working again and expected a monthly income of $8,000, in addition to his social security benefits. Although Malausky testified that he was concerned regarding Sarr's alleged use of corporal punishment on B.M.M., he acknowledged that he never observed any such punishment. Malausky testified that he considered B.M.M. to have two mothers – his wife, June Anderson, and Sarr – but acknowledged there is no real communication between the two. Malausky has another adult child, but there was no testimony regarding what, if any, relationship that child had with B.M.M.

¶13 Malausky testified that he was unaware of the October 16, 2009, court order that provided for visitation with Sarr and thought there was an agreement between the attorneys where visitation was not required. The court found that Malausky's failure to comply with the visitation

order was based upon a misunderstanding with his attorney regarding the dates involved, and denied Sarr's motion for a rule to show cause for Malausky's failure to comply with the visitation order.

¶14 Sarr denied the use of corporal punishment on B.M.M. Sarr testified that Malausky asked her on August 2, 2009, whether she ever "whooped" B.M.M. Sarr responded that she had no idea what Malausky was talking about, and that for discipline, she imposed time-outs or took away certain privileges such as watching television. Sarr married Maurice Grimes in March 2003 and divorced in 2005. Sarr was not remarried. Sarr introduced into evidence photos of B.M.M. in Atlanta with her friends and Sarr's relatives and close friends. Sarr acknowledged that while B.M.M. resided with Malausky, she did not ever visit the school B.M.M. attended for the second half of first grade in Spring 2008, or the school B.M.M. attended for second grade and third grade and, at the time of trial, was attending fourth grade. Sarr only met with B.M.M.'s second grade teacher in the fall of 2010.

¶15 Upon examination by B.M.M.'s representative, Sarr testified that in the summer of 2008 she asked Malausky about the return of B.M.M. to Atlanta, but that Malausky never responded. Malausky subsequently called Sarr and asked if B.M.M. could stay for a year in Chicago, and also asked Sarr to release his social security benefits for B.M.M. Sarr agreed to let B.M.M. stay for the remainder of 2008 and expected B.M.M. back in Atlanta in time to begin the new school year in 2009. When Malausky brought B.M.M. to Atlanta in August 2009, he left with her after less than 24 hours.

¶16 Sarr testified that if she was awarded custody, she would seek therapy for B.M.M. and

provided Malausky full access to B.M.M. and visitation during summer. Sarr claimed she was concerned about changes in B.M.M.'s behavior since living with Malausky, and testified that B.M.M. seemed intense, scared, and exhibited no emotional connection to her in Malausky's presence.

¶17 Patricia Anderson, the court-appointed supervisor who prepared a report in this case, testified in Sarr's case-in-chief. Her report, dated September 4, 2010, was admitted into evidence. Anderson reported her conversations with Malausky and her observations of the parties and B.M.M. B.M.M.'s demeanor with Malausky was interactive and they appeared comfortable with each other. She did not observe any signs of fear or concern in B.M.M.'s demeanor when she was with Sarr. Anderson reported Malausky's stated intent that the visit between B.M.M. and Sarr not take place and Malausky's failure to comply with the visitation time schedule in the court order.

¶18 Begay Jaiteh also testified in Sarr's case-in-chief. Jaiteh testified that she has known Sarr since Sarr was 10 years old in Gambia, and they became close friends when they came to the United States. Jaiteh has two boys, six and eight years old, and lives about one mile from Sarr in Atlanta. In 2005, Jaiteh resided about 35 miles from Sarr. Sarr and Jaiteh spent every other weekend together with the children at each other's homes. Jaiteh testified that she observed Sarr to be a loving, affectionate mother and a good caregiver. Jaiteh was with Sarr during her visit with B.M.M. in January 2010, and observed B.M.M. refuse to talk with Sarr at the restaurant locations Malausky had arranged. Jaiteh never observed Sarr use corporal punishment on B.M.M. Jaiteh also witnessed the incident in August 2009 when Malausky told B.M.M. to run

and stated he would call the FBI. Jaiteh observed Sarr grab Malausky's shirt. Jaiteh testified that when she accompanied Sarr in January 2010 to Chicago, she heard Malausky state in front of B.M.M. that if "if [B.M.M.] wants to leave she can" and that "she just came from therapy and she's afraid of her mother."

¶19 Paula Costello, Sarr's next door neighbor in Atlanta, also testified. Costello first met B.M.M. when she was 20 months old. In November 2007, B.M.M. stayed with Costello when Sarr brought her over and told Costello she was "not feeling well." B.M.M. stayed with Costello for about a week until Malausky came to Atlanta. Costello described B.M.M. and Sarr as a loving family unit and never saw Sarr act inappropriately. Sarr requested sole custody of B.M.M., with visitation rights for Malausky.

¶20 In a custody judgment entered March 1, 2011, the court awarded sole custody of B.M.M. to Sarr and granted visitation and parenting time to Malausky. Malausky filed a motion to reconsider, arguing that the trial court erred in applying the law in barring Fox's testimony and in not considering all required statutory factors in determining custody. The trial court's order stated there was no abuse of discretion and that there was no newly discovered evidence, change in the law, or error in the application of existing law. Malausky appealed.

¶21 ANALYSIS

¶22 Waiver

¶23 We begin by addressing the fact that Sarr's entire brief on appeal is devoid of any citations to authority. Malausky correctly raises this issue and argues that Sarr has thus waived all her arguments before this court. We agree. Filing such a response brief is a violation of

Supreme Court Rule 341(e)(7) (Ill. S. Ct. R. 341(e)(7) (eff. July 1, 2008)). As the court in *Eckiss v. McVaigh*, 261 Ill. App. 3d 778 (1994), stated, "[i]t is well established that a court of review is entitled to have briefs submitted that are articulate and organized and that present cohesive legal argument in conformity with Illinois Supreme Court rules." *Eckiss*, 261 Ill. App. 3d at 786 (citing *Schwartz v. Great Central Insurance Co.*, 188 Ill.App.3d 264, 268 (1989)). "Mere contentions without argument or citation of authority do not merit consideration on appeal [citation], nor do statements unsupported by argument or citation of relevant authority [citation]." *Eckiss*, 261 Ill. App. 3d at 786. "Contentions supported by some argument but absolutely no authority do not meet the requirements of Ill. Sup. Ct. R. 341(e)(7)." *Eckiss*, 261 Ill. App. 3d at 786 (citing *In re Marriage of Drummond*, 156 Ill. App. 3d 672, 684 (1987)). " 'Reviewing courts are entitled to have the issues clearly defined and to be cited pertinent authorities and are not a depository in which an appellant is to dump the entire matter of pleadings, court action, argument, and research as it were, upon the court.' " *Eckiss*, 261 Ill. App. 3d at 786-87 (quoting *In re Estate of Kunz*, 7 Ill. App. 3d 760, 763 (1972)). "The failure to cite authority to support legal arguments violates Ill. Sup. Ct. R. 341(e)(7) [citation], and results in waiver of the argument." *Chicago Title & Trust Co. v. Weiss*, 238 Ill. App. 3d 921, 927 (1992) (citing *Fitzpatrick v. A C F Properties Group, Inc.*, 231 Ill. App. 3d 690, 708 (1992)). The Supreme Court rules of appellate procedure are not merely suggestions. *Weiss*, 238 Ill. App. 3d at 928 (citing *Ryan v. Katz*, 234 Ill. App. 3d 536, 537 (1992))

¶24 Sarr has no citations to any authority anywhere in her brief and does not present any cohesive legal argument. As such, Sarr has waived all her unsupported arguments on appeal.

We therefore conduct our review of the issues based on the record before us and Malausky's brief only.

¶25 Malausky argues that the trial court erred in: (1) barring the testimony of B.M.M.'s therapist, Jessica Fox; (2) awarding permanent custody of B.M.M. to Sarr without considering all relevant statutory factors; and (3) denying his post-trial motion to reconsider. We hold that: (1) the court abused its discretion in barring the testimony of B.M.M.'s therapist due solely to the fact that the witness disclosure was technically four days late; (2) the trial court's judgment awarding permanent custody of B.M.M. to Sarr was against the manifest weight of the evidence and constituted an abuse of discretion where the court did not consider three of the statutory factors required under section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/602(a) (West 2008)); and (3) the trial court also abused its discretion in denying Malausky's motion to reconsider where it erred in applying the law.

¶26 I. Barring Testimony of B.M.M.'s Therapist, Jessica Fox

¶27 Malausky argues it was error for the court to bar the testimony of B.M.M.'s therapist due solely to the technical fact that the witness disclosure by Malausky was four days late. On October 7, 2010, the court entered an order setting a hearing on support and visitation issues, setting a pleading schedule, and setting October 20, 2010, as the deadline for witness lists and exhibits. However, the court subsequently entered an order on October 22, 2010, providing for mandatory disclosures and also ordering the parties to exchange witness lists within 15 days. Sarr did not include Fox in her initial or amended witness lists. On November 10, 2010, Sarr filed a motion to strike and dismiss Malausky's petition to modify the temporary child support

order, child care expenses, and retroactive child care and medical expenses alleging, among other things, that Malausky did not comply with the court's order of October 22, 2010. On November 12, 2010, Malausky petitioned for the release of the mental health records of B.M.M. regarding her treatment by Jessica Fox. Malausky's petition also requested that Fox be allowed to testify at trial. An order entered by Judge David Delgado dated November 15, 2010, allowed the issuance of a subpoena for B.M.M.'s mental health records and ordered that "Jessica Fox may testify in that custody/visitation trial, scope to be determined by the trial judge." Sarr's counsel was not present on November 15, 2010. Previous orders in the case had been entered by Judge Michael Panter. The order by Judge Delgado set the matter for November 16, 2010, for transfer to the presiding judge for trial assignment and trial.

¶28 On November 16, 2010, the matter was transferred for trial, and was set for November 17, 18, and 19, 2010, before Judge Naomi Schuster. On November 17, 2010, Sarr filed a motion to reconsider and vacate the order of November 15, 2010, allowing the release of B.M.M.'s records and allowing Fox to testify. Sarr alleged that she did not receive notice of Malausky's petition and hearing date of November 15, 2010, and that Malausky's disclosure of Fox as a witness was deficient because it was after the deadline for identifying witnesses. The court ruled that Fox could not testify because she was not properly disclosed within the 15 days ordered by the court in its order of October 22, 2010. The trial was thereafter continued to December 20, 21, and 28, 2010. On December 3, 2010, Malausky again sought an order allowing Fox to testify at trial. However, the court again ruled that Fox could not testify. We do not have before us the transcript of proceedings for the court's rulings barring Fox's testimony, nor do we have copies of

any orders regarding these rulings.

¶29 Malausky argues that Fox's testimony should not have been barred due solely to the technical late witness disclosure of Fox by Malausky's trial counsel. Malausky argues that the trial witness disclosure was only four days late, and that the trial court's sanction of barring Fox from testifying punishes only B.M.M., as her interests were not fully represented. Malausky further argues that Fox's testimony and her mental health records of B.M.M. would have impacted the decision as to proper custody and best interests of B.M.M. Included in Fox's records were her findings that visitation with Sarr be limited to supervised visits where Malausky is present based on B.M.M.'s extreme anxiety and her fear of her mother and Fox's conclusion that Sarr's behavior toward B.M.M. was emotionally abusive. Further, Fox indicated in her records that she also suspected that Sarr physical abused B.M.M. Also included in Fox's records was a statement that, when asked by Fox who B.M.M. preferred to have custody of her, B.M.M. immediately answered, "my father."

¶30 Malausky also argues that the disclosure of Fox as a trial witness caused Sarr no prejudice or surprise, as Sarr was long aware of B.M.M.'s treatment by Fox. Further, although it is unclear from the record whether Judge Panter had reviewed Fox's records or whether the court relied on representations by counsel regarding such records, Judge Panter specifically ordered on April 16, 2010, that therapeutic visitation follow Fox's guidelines.

¶31 Child custody proceedings should focus on the best interest of the child. *In re Marriage of A'Hearn*, 408 Ill. App. 3d 1091, 1100 (2011) (citing Ill. Sup. Ct. R. 900(a) (eff. July 1, 2006). "In determining whether the exclusion of testimony is an appropriate sanction for nondisclosure,

a trial court must consider the following factors: (1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness." *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 852 (2010) (citing *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 110 (2004)). With respect to a discovery sanction, an appellate court reviews for an abuse of discretion. *In re Marriage of A'Hearn*, 408 Ill. App. 3d at 1099. An abuse of discretion occurs where no reasonable person would adopt the trial court's view. *In re Marriage of A'Hearn*, 408 Ill. App. 3d at 1099 (citing *McClaughry v. Village of Antioch*, 296 Ill. App. 3d 636 (1998)).

¶32 Malausky relies on *In re Marriage of A'Hearn*, where the court held that barring all of the father's witnesses was too harsh of a sanction, even where he had been given several months to conduct discovery but did not disclose his witnesses until a couple of days before trial. The court held that "while the trial court certainly had an interest in seeking compliance with its discovery order, our supreme court has stated that child custody proceedings should focus on the best interest of the child." *In re Marriage of A'Hearn*, 408 Ill. App. 3d at 1100 (citing Ill. S. Ct. R. 900(a) (eff. July 1, 2006)). The court held that it was an abuse of discretion for the court to have barred the father's witnesses where "other sanctions existed, such as holding [the father's] attorney in contempt or awarding [the mother] reasonable attorney fees." *In re Marriage of A'Hearn*, 408 Ill. App. 3d at 1100 (citing Ill. S. Ct. R. 219(c) (eff. July 1, 2002).

¶33 While *In re Marriage of A'Hearn* involved a discovery sanction that barred all of the father's witnesses and dismissed his petition for custody, whereas here the discovery sanction

merely barred the testimony of the therapist, we find the reasoning of *In re Marriage of A'Hearn* persuasive. Here, the court could have also applied other sanctions, such as holding Malausky's attorney in contempt for the late formal disclosure or awarding Sarr reasonable attorney fees.

¶34 In considering all the factors for excluding testimony, we determine the exclusion of Fox's testimony was not a proper sanction for merely the late technical disclosure of her as a witness. First, the nature of Fox's testimony is critical to the proper determination of the custody and best interests of B.M.M. In custody modification proceedings, the examining psychologist's testimony is entitled to great weight. *In re Dunn*, 208 Ill. App. 3d 1033, 1040 (1991) (citing *In re Marriage of Dilley*, 127 Ill. App. 3d 992, 996-98 (1984). In this case, there are statements in Fox's records concerning the B.M.M.'s mental state and fear of Sarr and preference to reside with Malausky. Fox's records were attached to Malausky's amended and supplemental motion to reconsider, and thus are part of the record before us. Malausky had obtained Fox's records pursuant to court order[1] and thereafter sought Fox's testimony vigorously. On the other hand, Sarr not only did not include her daughter's therapist as one of her own witnesses in her initial and amended witness lists, she also actively sought to bar such testimony. We find it particularly troubling that Sarr would seek to barr her own child's therapist from testifying concerning her child's mental state and best interests. While we find no excuse for Malausky's trial counsel's failure to timely abide by the court's discovery order, the record shows Malausky acted in good

[1] Malausky was entitled to the production of B.B.M.'s mental health records of her therapist, Jessica Fox, because the consent of only one parent is required under section 4(a) of the Mental Health and Developmental Disabilities Confidentiality Act. See 740 ILCS 110/4(a) (West 2008).

faith in seeking to call Fox as a witness. There is no evidence that Malausky was acting in bad faith.

¶35 We also find there are no strong countervailing factors which would support barring Fox's testimony. There would have been no prejudice or surprise to Sarr if Fox were allowed to testify, as Sarr was well aware long before trial that Fox was B.M.M.'s therapist, and the court had indeed referred to Fox's guidelines in entering an order concerning visitation. Cf. *In re Milovich*, 105 Ill. App. 3d 596, 610 (1982) (holding there was no error in the exclusion of a psychologist where the mother sought to add the psychologist as a witness long after discovery was closed, trial was underway, ten witnesses had already testified, the attorneys for petitioner and the children objected to the witness partly on the basis of surprise, and respondent did not offer reasons why the witness had not been available earlier). Here, barring testimony from the child's therapist in this custody proceeding due to a technically late witness disclosure was an abuse of discretion. We thus reverse and remand for rehearing with directions that Fox be allowed to testify.

¶36 II. Judgment Awarding Sole Permanent Custody to Sarr

¶37 Malausky next argues that the circuit court's judgment awarding sole permanent custody of B.M.M. to Sarr was against the manifest weight of the evidence and constituted an abuse of discretion because the court did not consider all required statutory factors, specifically the wishes of B.M.M. as to her custodian, the mental health of all individuals, and any physical abuse. We agree. The court's judgment clearly reveals it did not consider these statutory factors which are required in adjudicating petitions to modify custody.

¶38 A petition to modify custody is brought pursuant to section 610(b) of the Act, which governs modifications of custody over two years after a custody judgment. See 750 ILCS 5/610(b) (West 2008). Regarding modifications of custody, section 610(b) provides the following, in pertinent part:

> "(b) The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child. *** The 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." 750 ILCS 5/610(b) (West 2008).

¶39 Section 602 of the Act provides the following mandatory factors to consider in determining the custody of a child:

> "Sec. 602. Best Interest of Child. (a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
>
> (1) the wishes of the child's parent or parents as to his custody;
>
> (2) *the wishes of the child as to his custodian*;
>
> (3) the interaction and interrelationship of the child with his parent or

parents, his siblings and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community;

(5) *the mental and physical health of all individuals involved*;

(6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;

(7) *the occurrence of ongoing or repeated abuse* as defined in Section 103 of the Illinois Domestic Violence Act of 1986 [750 ILCS 60/103], *whether directed against the child* or directed against another person;

(8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;

(9) whether one of the parents is a sex offender; and

(10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed.

* * *

(c) Unless the court finds the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986 [750 ILCS 60/103], the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of

> the child. There shall be no presumption in favor of or against joint custody. [Emphasis added.]" 750 ILCS 5/602 (West 2008).

¶40 The trial court in this case did not consider all the required statutory factors under section 602 concerning B.M.M.'s best interest. The circuit court set forth the statutory factors and rendered a lengthy judgment analyzing every other factor but, incredibly, acknowledged that it did not consider B.M.M.'s wishes as to her custodian but went on to determine custody. Regarding the wishes of B.M.M., the court merely stated the following in its judgment:

> "The issue of [B.M.M.]'s custodial preference was not addressed during the trial. However, the court finds that [B.M.M.] enjoys a close and loving relationship with William and had enjoyed a close and loving relationship with Marie prior to [B.B.M]'s move to Chicago in January, 2008."

¶41 The statute specifically enumerates the wishes of the minor child as one of the required factors to consider. See 750 ILCS 5/602(a)(2) (West 2008). Our circuit courts cannot substitute their own determinations concerning the wishes of minor children regarding preference for their custody. The statute is clear and provides no exceptions for specifically considering the wishes of the minor child. Where the language of a statute is clear and unambiguous, a court must give effect to the plain and ordinary meaning of the language without resort to other tools of statutory construction. *In re Marriage of De Bates*, 212 Ill. 2d 489, 511-12 (2004) (citing *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 255 (2004)).

¶42 Specifically, Fox's records contained evidence specifically concerning B.M.M.'s clear preference to remain with her father. Thus, barring Fox's testimony was an abuse of discretion

for the additional reason that B.M.M.'s statements to her regarding custodial preference were also barred and not considered, although this type of evidence would be beneficial. See *In re Hefer*, 282 Ill. App. 3d 73, 76 (1996) ("A better way than an *in camera* hearing to get the child's preferences before the court may be through admission of the child's hearsay statements, through the testimony of a guardian *ad litem*, or through professional personnel.") (citing *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 415-16 (1994)). The decision as to B.M.M.'s custody might have been different if the court had heard evidence concerning her preference. See, e.g., *Stuckert v. Brownlee*, 138 Ill. App. 3d 788, 791 (1985) (holding that the trial court considering modification of child custody granted in divorce properly considered each statutory factor in awarding custody to the father, where the child preferred to remain with the father and adjusted well while staying with father). We hold the circuit court in this case abused its discretion in not considering any evidence regarding the wishes of B.M.M. as to her custodian despite the clear requirement of the statute. See 750 ILCS 5/602(a)(2) (West 2008).

¶43 The mental health of all parties was also not considered by the court. The trial court found in its judgment that "there was no issue on the mental health of the parents or [the child]." However, as we discussed above, the court improperly barred the testimony of B.M.M.'s therapist, and thus there was an issue regarding B.M.M.'s mental health, but it was not considered. Additionally, as Malausky points out, the court apparently ignored the evidence concerning Sarr's depression diagnosis and stay in a mental institution in November 2007. During that time, Sarr was unable to care for B.M.M. and left her with a neighbor. Thus, Sarr's mental health also was not considered. We therefore hold the trial court abused its discretion in

not considering the statutory factor of the mental and physical health of all individuals in this case. See 750 ILCS 5/602(a)(5) (West 2008).

¶44 Further, the allegations of mental and/or physical abuse of B.M.M. by Sarr were not considered. Malausky alleges physical abuse of B.M.M. by Sarr. Fox's records indicate that Fox concluded that B.M.M. suffered emotional abuse and that Fox also suspected physical abuse. Thus, there is some evidence in this case of possible physical abuse of B.M.M. that was not considered by the court. Malausky presented this information to the court in his motion to reconsider, but the court denied the motion. We hold the court abused its discretion in not considering the statutory factor of abuse under section 602(a)(7) of the statute. See 750 ILCS 5/602(a)(7) (West 2008).

¶45 Due to the trial court's failure to consider three of the required statutory factors, we hold that its judgment granting full custody to Sarr was not proven by clear and convincing evidence and its judgment that awarding sole custody to Sarr was in B.M.M.'s best interest was against the manifest weight of the evidence and constituted an abuse of discretion. Therefore, we reverse the circuit court's judgment and remand for a rehearing, with directions that evidence be heard on *all* statutory factors under section 602, specifically including: (1) the wishes of B.M.M. regarding her custody preference; (2) the mental health of all parties, including B.M.M.; and (3) allegations of abuse of B.M.M. We also direct that the court state in its decision specific findings of fact in support of its determination regarding custody.

¶46 III. Denial of Motion to Reconsider

¶47 Malausky further argues that the trial court abused its discretion in denying his motion to

reconsider. The trial court apparently denied the motion to reconsider in part because there was no newly discovered evidence. However, Malausky argued that the trial court erred in applying the law, not that there was newly discovered evidence. "When reviewing a motion to reconsider that was based only on the trial court's application (or purported misapplication) of existing law, as opposed to [one] based on new facts or legal theories not presented in the prior proceedings, our standard of review is *de novo*." *Bank of America, N.A. v. Ebro Foods, Inc.*, 409 Ill. App. 3d 704, 709 (2011) (citing *People v. $ 280,020 United States Currency*, 372 Ill. App. 3d 785, 791 (2007)). As we discussed above, the trial court abused its discretion in barring Fox's testimony and did not consider all required statutory factors under section 602(a). Thus, the court erred in applying the law and erred in denying Malausky's motion for a new trial. We reverse and remand for a retrial in this matter, with directions as stated.

¶48 CONCLUSION

¶49 We hold the trial court abused its discretion in barring the testimony of B.M.M.'s therapist, Jessica Fox, and in not considering all the required statutory factors under section 602(a) of the Act (750 ILCS 5/602(a) (West 2008)) in awarding sole custody of B.M.M. to Sarr. Therefore, we reverse the judgment of the trial court, and remand for retrial with directions that B.M.M.'s therapist, Jessica Fox, be allowed to testify, and that evidence be heard on all statutory factors required under section 602(a), specifically including: (1) the wishes of B.M.M. regarding her custody preference; (2) the mental health of all parties, including B.M.M.; and (3) allegations of abuse of B.M.M.

¶50 Reversed and remanded with directions.