No. 3–10–0912

Order filed April 26, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

A.D., 2011

WESLEY NORRIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit
Plaintiff-Appellant,	)	Will County, Illinois
	)	
v.	)	No. 07–F–188
	)	
BEVERLY AARON,	)	Honorable
	)	Thomas Carney
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Schmidt concurred in the judgment.
Justice Lytton dissented.

ORDER

Held: The trial court erred by awarding custody to the mother based, in part, on information which was not presented to the court by the parties but rather independently gathered by the court, *sua sponte*, from the internet. The court's order is reversed, and the cause is remanded to the trial court for a new hearing before another judge.

Father filed a petition for declaration of a father-child relationship, custody and other relief on February 28, 2007, seeking a declaration of paternity and custody of the minor child, W.W.N. Following a contested hearing, the trial court awarded custody of the minor child to

mother. On appeal, father claims the trial court erred by considering evidence not presented by the parties when awarding custody to mother. Father also claims that the trial court's decision to grant custody to mother was against the manifest weight of the evidence. We reverse and vacate the court's order and remand the cause to the trial court for a new hearing before a different trial judge.

FACTS

On February 28, 2007, father filed a petition for declaration of father-child relationship, custody and other relief. In the petition, father alleged that although father and mother were never married, he was the father of the minor child, W.W.N., born June 5, 1997, that father and minor maintained a close and loving relationship, and that it was in the minor's best interest that custody be granted to father. Father requested the court to declare him father of the minor child, award him custody of the minor child, and order mother to return the minor child to the State of Illinois. In her response, mother admitted that plaintiff was the father of the minor child, W.W.N., denied that father and the minor had a close and loving relationship, and denied that it was in the minor's best interest that plaintiff be awarded custody.

On October 10, 2008, father filed a motion for judgment on the pleadings. In the motion, father stated that mother admitted he was the father of the minor child, that mother refused to allow contact between the minor child and father, and that father was concerned regarding the well being of his child. Father requested the court enter an order declaring him the father of the minor child, requiring mother to disclose the location of the parties' minor child, and establishing a visitation schedule between father and the minor child pending the outcome of the case.

On December 17, 2008, the trial court conducted a hearing on father's motion for

judgment on the pleadings, motion to set holiday schedule and motion to appoint evaluator. The court ordered that father would have visitation with the minor child from December 26, 2008, until January 5, 2009. Further, the court declared father the legal father of the minor child and reserved the issue of custody, and the court appointed Dr. Hatcher as an evaluator and directed the parties to meet with Dr. Hatcher.

On March 8, 2010, the trial court began a hearing on all pending matters including petitioner's petition to declare father-child relationship, custody and other relief. The parties acknowledged that mother had removed the minor child to the State of Mississippi. Consequently, mother's counsel requested leave to file a petition for removal of the minor child from the State of Illinois.

Following opening statements, father testified on his own behalf. Father stated that he was currently unemployed but was classified as a "work analyst P-M nuclear contractor or utility, electric utility contractor." He described working for a "head hunter outfit" who would contact him regarding jobs at different plants for approximately 39 months. Prior to that, he worked for Sun Technical at D.C. Cook in southwest Michigan for 26 months.

Father testified that he met mother in 1994, and the minor child was born on June 5, 1997. He described taking mother to the hospital when she was in labor and being present at the minor's birth. Thereafter, he told the court that he "was there every day" with the minor. Father testified that he "was with him and his brother Alex almost every day from up to 2000." Father said that he took the two children to school, cooked for them, helped with homework, took them to different places and on vacation.

He enrolled the minor in preschool at the age of four. Father said that mother was not

involved in selecting the school and told him that he was in charge of the minor's education. When the minor entered kindergarten, father transported the minor to school and picked him up from school every day, spending almost every day after school with him. This routine continued while the minor was in first, second and third grade.

Father described the minor's living arrangements by saying that "the original deal was that I would make sure that they had everything that they need." The minor could stay with mother, and he would not "try to take him away" as long as he could "see the boys" including his son. From 2004 until 2005, father worked in southwest Michigan and when he was not working, he returned home to Illinois.

In the fall of 2005, mother brought the minor to the hospital for treatment following an asthma attack. Father testified that he believed the asthma attack was triggered by mother's decision to bring a rabbit into her household. According to father, he and mother argued over the rabbit and the negative impact the pet had on the minor's health.

In January 20006, mother told father that he "couldn't see him anymore." After February 2006, father did not have any contact with the minor until October 2007. Father said that he would call mother's house, but she would not let him speak to the minor, or she would hang up on him. Father testified that he would leave messages, but mother never returned his telephone calls.

In August 2006, he realized that mother moved because the telephone number was disconnected. Father contacted the police department, and an investigating officer discovered mother's previous residence to be empty. Father hired a private investigator to locate his son, but this attempt was unsuccessful. In January 2007, father contacted an attorney and then filed

the petition in this case. Ultimately, his attorney received a telephone number, and he spoke with his son in October 2007, but did not see his son until May 22, 2008.

After finding the whereabouts of the minor, he traveled to the minor's grade school in Mississippi in 2008. Father admitted into evidence records from the minor's schools. Father expressed concerns that the minor had excessive tardiness and excessive school absences in Mississippi. Thereafter, mother disconnected her telephone number during the summer of 2008, and packages, which father sent to the minor, were returned. Father said the telephone number was reconnected in September or October 2008.

In regard to schooling, father explained that when the minor resided in Joliet, Illinois, the minor was primarily a straight A student. Father said that he attended parent/teacher conferences and participated in the minor's school activities. Father explained that the minor attended kindergarten at the public school and then attended the Eisenhower Academy in Joliet. Father described Eisenhower Academy as a "magnet public school" and that a student had to be recommended by a kindergarten teacher and interview in order to be admitted.

Father testified that if he was awarded custody, the minor would live with him at the Elmwood address, a three bedroom home, until he found a bigger place. He said that the minor could attend eighth grade and graduate from Eisenhower Academy. He clarified that Eisenhower Academy utilized Washington Junior High School for grades sixth through eighth. As to high school, he said that until he could find a suitable, academic school, the minor would attend Joliet public school. Father said that he looked into a couple of schools, including a science academy in Aurora.

Father stated that mother was a great mother in terms of caring for the minor. However,

he disagreed with mother's methods of preparing the minor to enter the world. He said that mother tried to raise the minor in a "vacuum without interaction with the world as it really is and the world as it is going to be when he has to go out and do for his self."

Roger Hatcher, the court appointed custody evaluator in this case, testified as an expert witness. Hatcher prepared a report dated August 14, 2009, based upon an evaluation he completed pursuant to guidelines and protocols mandated by the American Psychological Association. He explained that his evaluation consisted of clinical observations, psychological testing as to personality, overall mental stability and adjustment, and "collaterals or core objective sources of information." Hatcher said that his evaluation considered the question of "the best interest of the child" along with a "consideration of the factors under Section 602 of the Illinois Marriage and Dissolution of Marriage Act."

Hatcher explained that he reviewed the minor's school records, the pleadings in the case, telephone records, a journal prepared by father, and reports of behavior and adjustment from the minor's teachers in Mississippi. Based on this information, Hatcher advised the court that the minor was "very well attached" in both father's house and mother's house. Further, the minor had a strong relationship with both his parents as well as with his paternal and maternal grandmothers and shared a strong relationship with other siblings.

Hatcher testified to considerations pertaining to each factor set forth in section 602 (750 ILCS 5/602 (West 2006)). Hatcher concluded that father would foster a relationship between minor and mother. However, Hatcher also concluded that mother had not and would not foster a relationship between father and son in the future. Hatcher also stated that he believed that if mother was granted custody, the minor's relationship with father would suffer, and the minor

would lose considerable benefits.

Hatcher believed that it was very important for the court to recognize that the minor had "academic or intellectual gifts" and that the minor had "been promoted in his academic activities in large part by his father who continues to promote him in almost every way." Hatcher said that he researched the Eisenhower elementary program in Illinois versus the Picayune school system in Mississippi. Hatcher outlined this information in his report which showed that the Eisenhower school exceeded State standards. However, the school in Mississippi compared poorly to State standards according to Hatcher's testimony.

Hatcher concluded that overall, the minor needed to "develop this strong identity with his dad because, in fact, he's very much like his dad and his dad has a lot to give him." Hatcher went on to say that in considering the quality of life, he looked at educational opportunities, cultural opportunities, intellectual opportunities, and family systems and advised the court that the minor's interest would be best served if father was awarded custody.

Mother testified on her own behalf that she had lived in the State of Mississippi for three years. Prior to moving to Mississippi, she lived in Joliet, Illinois for eight years.

Mother acknowledged that father contributed to the minor's parenting and during the first four years of the minor's life, she described father as being very much involved. Mother said that her relationship with father grew "cold" during Thanksgiving 2005, after the minor was hospitalized. She and father argued over the fact that mother had a rabbit in the house, and father blamed her for the minor's hospitalization. As a result, she ended her relationship with father.

Mother said that she currently lived in Mississippi with her mother, the minor and his older brother. She described the relationship between the minor and his brother as close. Mother

said that she participated in school activities and fundraisers. She denied refusing to allow the minor to communicate with father by computer, instructing the minor to not talk to father, and denied discouraging any relationship between the minor and father. Mother said that she did not have any objection to father having visitation with the minor.

Mother testified that the minor missed the first quarter of the school year when she first moved to Mississippi because she did not have his records although she said that all of his "shots and stuff' were done. She said that she did not contact the Picayune school prior to trying to enroll the minor and believed that she had what she needed. She also said the minor missed the first week or two of school in 2009 because father did not return the minor to Mississippi following visitation prior to the start of school. Consequently, she placed the minor with a tutor at the beginning of the fall 2009 semester. Mother did not know the names of all of the minor's current teachers. Further, after being shown exhibits of class work in the prior months, she denied knowing that the minor received poor grades on various assignments.

Following closing arguments, the court stated that it weighed all of the evidence and the credibility of the witnesses. The court then stated that it wanted to make a few remarks. The court said that this was a "tough decision" because the court found "both of the parents are decent admirable good parents."

The court went on to say that he remembered this case from when it first started and that according to the court, "it is a case that is I don't want to say near and dear to my heart but one that I had to give a lot of thought to." The court then stated again that it found father to be very involved with his son and that father loved his son dearly. The court also found father to be "a talented and smart individual and a very good father who loves [W.W.N.] very much." The court

stated that father was a decent and good man.

The court then stated that it found father working out-of-state "may be problematic." He thought it may be problematic if father was awarded custody in regard to where father would work and where father would be contracting.

Then, the court stated that it was concerned about the fact that father returned the child late from visitation, and as a result, the child missed the start of the school year. He believed that father knew when school started and that father did not want to return the child because they were enjoying their time together. The court also noted that it was troubling that the minor missed school when mother moved to Mississippi, but the court thought mother's "excuse was better" since she did not have the proper records.

The court then stated that it felt:

> "the community down in Picayune is probably a safer community than the one that we live in here. In regards to the school, I think a lot was made about the school, Eisenhower versus the Picayune school. It is true he's [the minor] no longer in Eisenhower. He's [the minor] going to be going or he's enrolled in Washington and then he's going to be going to JT Central. And I was on the school board at Troy School District 30C and I am familiar with some of these reports. And Washington Junior High School, according to this progress report: Is the school making yearly progress, no. Is the school making adequate yearly progress in reading, no. Is the school making adequate yearly progress in mathematics, no.

> Specifically when it comes to black students, percentage meeting and exceeding standards, no. That's for mathematics, reading, so it even gets worse for blacks students.
>
> So I think Washington Junior High School is actually not the exemplary wonderful high school that some who testified would like us to believe.
>
> And the same thing goes for Central. Central has the same abysmal report. Yearly progress, is it making yearly progress, no. Math, no. Reading, no. Regarding blacks, no. So I think that that is a red flag and is very – I would be very troubled sending my child into those waters."

The court said that it considered that there were family members on both sides in the respective locations but was very concerned about the relationship between the minor and his older brother. The court thought it would be traumatic to split up the two brothers. The court stated that it considered the minor's preference that he wanted to remain with his brother and mother in Picayune. Finally, the court noted the minor's schooling and the certificates and accomplishments achieved in Mississippi. Accordingly, the court found that it was in the minor's best interest to remain with mother in Mississippi.

Before adjourning for the day, father's counsel inquired about the Washington Junior High report and the yearly report by asking the judge whether the reports considered by the court had been introduced as exhibits. The court replied, "These were actually reports that I had obtained and that I ran off from the Joliet JTHS website." The court further stated that "they

both have been on academic watch status for five and six years respectively." The court inquired whether the parties would like to view the reports the judge obtained from the internet.

Father, himself, asked the court if this information included the Academy. The judge said that it was his understanding that "the Academy is basically kind of dissolved once they go into Washington." Father responded, "No, the Academy ends in 8th grade." Father also responded that he had no intention of the minor ever going to Joliet Central. The court responded "You can have those if you want." Before adjourning, the court said that it would award father six weeks summer visitation at the most.

On August 11, 2010, the court entered a written order which provided that father's request for custody was denied. The court awarded custody of the minor child to mother and granted her request to remove the minor child to the State of Mississippi. On October 29, 2010, the court entered a written order setting forth father's visitation schedule with the minor child and reasonable telephone contact. On November 24, 2010, father filed a notice of appeal.

ANALYSIS

On appeal, father raises two claims of error. First, father argues that the trial court erroneously considered evidence which the court independently obtained and which was not presented to the court by either party. Second, father argues that the trial court's decision to grant custody to mother was against the manifest weight of the evidence. In response, mother asserts that it was not error for the court to take judicial notice of the documents and reports regarding the Joliet school district available to the court from the internet. Further, mother submits that the trial court's custody determination was not against the manifest weight of the evidence.

The admissibility of evidence rests in the sound discretion of the trial court, and that

determination will not be reversed on appeal absent an abuse of discretion. *Leonardi v. Loyola University of Chicago,* 168 Ill. 2d 83, 92 (1995). Yet, it is the duty of a reviewing court to reverse any judgment "wherein there is a clear and palpable error" in some respect. *Drovers National Bank of Chicago v. Great Southwest Fire Insurance Co.*, 55 Ill. App. 3d 953, 956 (1977), (citing *Brown v. Commercial National Bank of Peoria*, 42 Ill. 2d 365 (1969), *cert. denied*, 396 U.S. 961, 90 S. Ct. 436 (1969)).

It is well established that the "trial judge may consider only that knowledge he has acquired by the introduction of evidence or of which he may take judicial notice." *Drovers National Bank*, 55 Ill. App. 3d at 957. This rule is premised on the fact that parties in a trial have the right to confront adverse witnesses and that the " 'concept of fair play requires that all parties to an action be given a fair opportunity to rebut any evidence which might be damaging to their position.' " *Drovers National Bank*, 55 Ill. App. 3d at 957 (quoting *McGurn v. Brotman*, 25 Ill. App. 2d 294, 298 (1960)). Accordingly, it is improper for a trial judge to go outside the record, conduct experiments or conduct private investigations which have the effect of producing evidence which was not introduced at trial or which aid the trial court in making decisions about the sufficiency of the evidence. *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977); *City of Chicago v. Garrett*, 136 Ill. App. 3d 529, 534 (1985).

It is true that a court may take judicial notice of public documents which are commonly known or which are readily verifiable from undisputed sources. Such documents include published court decisions, records of administrative tribunals, recorded deeds, and documents contained in public court files. See *People v. Henderson,* 171 Ill. 2d 124, 134 (1996); *May Department Stores Co. v. Teamsters Union Local No. 743,* 64 Ill. 2d 153, 159 (1976); *Muslim*

Community Center v. Village of Morton Grove, 392 Ill. App. 3d 355, 359 (2009); *Village of Riverwoods v. BG Limited Partnership,* 276 Ill. App. 3d 720, 724 (1995).

Here, the information gathered by the court was not limited to public documents but consisted of a narrative description of the Joliet school system posted on the internet. Moreover, neither party directed the court to the school district's website or requested the trial court to take judicial notice of this information. The court acted *sua sponte* when gathering information and advised the parties of the information after the hearing had ended and the evidence was closed. In order to have taken judicial notice, *sua sponte*, the judge should have first notified the parties of his intention during the course of the trial, and not after the evidence was closed, and advised the parties regarding the facts and sources included in the *sua sponte* notice. See *People v. Barham*, 337 Ill. App. 3d 1121, 1129 (2003); *People v. Rotkvich,* 256 Ill. App. 3d 124, 130 (1993); *People v. Speight,* 222 Ill. App. 3d 766, 772 (1991), *rev'd on other grounds,* 153 Ill. 2d 365 (1992). This procedural requirement allows all parties to an action to be given a fair opportunity to confront and to rebut any evidence which might be damaging to their position. See *Drovers National Bank,* 55 Ill. App. 3d at 957.

We note that the court appointed custody evaluator presented the court with information regarding both school districts in Illinois and Mississippi. However, for some reason unexplained by this record, the trial court conducted its own investigation of the characteristics and standards of the Joliet school system. The information considered by the court is not included in the record, and it appears the court did not conduct similar research regarding the Picayune school system in Mississippi.

Based on this record, it is clear that the court's own independent investigation affected the

court's view of the credibility of witnesses, and worked to the disadvantage of father. When addressing the information gathered by the court, the court stated, "So I think Washington Junior High School is actually not the exemplary wonderful high school that some who testified would like us to believe." Presumably, the trial court was referring to the testimony of both father and Hatcher, the court appointed custody evaluator, which the court ultimately discredited based on the court's own independent research.

For obvious reasons, we will not engage in any internet inquiry in order to review the information contained on the website consulted by the trial judge. Thus, it is unclear from this record precisely what information the trial court considered in rendering its decision. However, it is clear from the court's remarks that the information obtained from the internet impacted the trial court's findings, credibility decisions, and ultimate determination to award mother custody in this case and to allow her to remove the minor from the State of Illinois.

As previously stated, the case law provides that it is the duty of a reviewing court to reverse any judgment "wherein there is a clear and palpable error" in some respect. *Drovers National Bank*, 55 Ill. App. 3d at 956 (citing *Brown v. Commercial National Bank*, 42 Ill. 2d 365, *cert. denied*, 396 U.S. 961, 90 S. Ct. 436.) This appeal involves the type of palpable error warranting reversal since it is readily apparent that the court erroneously relied on information which was not submitted by the parties and was not the proper subject for judicial notice. Consequently, we do not reach the issue of whether the trial court's custody determination was against the manifest weight of the *evidence* introduced by the partes to the exclusion of the additional internet research the court conducted *sua sponte.*

Therefore, we reverse and vacate the trial court's custody determination, along with the

orders of visitation and support and the decision to allow mother to remove the minor from the State of Illinois. We remand the cause to the trial court for a new hearing on the issues of custody, visitation, child support, and removal in front of a different trial court judge.

CONCLUSION

The judgment of the circuit court of Will County is reversed and vacated, and the cause is remanded to the trial court for further proceedings consistent with this order.

Reversed and remanded with directions.

JUSTICE LYTTON, dissenting:

I respectfully dissent from the majority's reversal of the trial court's custody determination. In this case, the majority finds error in the trial judge's *sua sponte* research on the Internet, which he used to support his findings about the Joliet school system. The majority then concludes that the error requires a remand of the custody determination; however, I believe that its exclusive emphasis on this factor has caused an imbalance in its analysis. Although I agree that there is error, the error is harmless in light of the remaining section 602 factors.

On appeal from a case such as this one, where the trial court has had the opportunity to hear firsthand the witnesses' testimony, we can only reverse the trial court if we conclude that the order is manifestly erroneous or results in a manifest injustice. *In re Marriage of Willis*, 234 Ill. App. 3d 156 (1992). A trial court's custody determination must be given great deference because the trial judge has had the superior opportunity to observe the witnesses as they testified and is therefore in a far superior position to determine the best interests of the child. *In re Marriage of Quindry*, 223 Ill. App. 3d 735 (1992).

The primary consideration in a child custody matter is the best interest and welfare of the child. *In re A.S.*, 394 Ill. App. 3d 204 (2009). The statutory factors listed in section 602(a) apply in determining a child's custody. Those factors include: (1) the wishes of the child's parents; (2) the wishes of the child; (3) the relationship between the child and his parents and other family members; (4) the child's adjustment to home, school and community; (5) the mental and physical health of all the parties; (6) the threat of physical violence; and (7) the willingness of each parent to facilitate a continuing relationship. 750 ILCS 5/602(a) (West 2008).

Here, the trial court carefully considered each of the factors enumerated in section 602. In particular, the court considered the minor's successful adjustment to his community, his numerous awards in school and his desire to reside with his mother. The court acknowledged the minor's lifelong relationship with his half-brother, Alex, who lives with the mother. The court also considered both parties' ability to facilitate a relationship with the other parent. In this regard, both parents exhibited uncooperative behavior. The court was aware of the problems and specifically questioned the father's decision to return the minor two weeks late, resulting in the minor missing the first two weeks of school.

The record shows that the trial judge considered all the relevant factors thoughtfully and thoroughly. His consideration of inappropriate material relating to one does not outweigh his evaluation of the others. I would affirm the custody decision.