2011 IL App (3d) 110412-U

Order filed November 9, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

In re KIMBERLY C., n/k/a, KIMBERLY H.,	) Appeal from the Circuit Court) of the 14th Judicial Circuit,) Rock Island County, Illinois,
Petitioner-Appellant,	)
and concerning	) Appeal No. 3-11-0412) Circuit No. 99-F-52
ANTHONY D.,	) Honorable) Mark A. VandeWiele,
Respondent-Appellee.	) Judge, Presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices Wright and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court properly permitted the testimony of a mental health provider and considered testimony and rulings from prior hearings at the custody determination. (2) The trial judge was not biased against petitioner, and therefore petitioner's right to due process was not violated. (3) The trial court properly found a change in circumstances and correctly awarded permanent custody to respondent because it was in the minor's best interest.

¶ 2 After years of dispute between petitioner, Kimberly H., and respondent, Anthony D., regarding custody and visitation of the parties' minor daughter, Brooke D., the trial court awarded physical custody of Brooke to Anthony. Kimberly was awarded visitation in addition

to a holiday schedule. On appeal, Kimberly argues that the trial court: (1) erred in permitting the testimony of Dr. Douglas McCollum and in denying her posttrial motion to strike and exclude his testimony because such testimony violated the Mental Health and Developmental Disabilities Confidentiality Act (Mental Health Act) (740 ILCS 110/1 *et seq*. (West 2010)); (2) erred in considering testimony and rulings from hearings that took place prior to the custody trial as evidence when it made the permanent custody ruling; (3) was biased against Kimberly, and such bias violated her rights to due process; (4) erred in finding a change in circumstances to warrant a change in custody; and (5) erred in holding that Brooke's best interest required a change in permanent custody to Anthony. We affirm.

¶ 3 FACTS

¶ 4 Kimberly and Anthony were never married, but had one child together named Brooke. She was born on November 13, 1998, with achondroplasia, also known as dwarfism. On February 19, 1999, Kimberly filed a petition to establish parent-child relationship, custody, visitation, and child support. On October 28, 1999, the parties filed a joint parenting agreement awarding physical custody of Brooke to Kimberly, and reasonable visitation to Anthony. Anthony lived in Appleton, Wisconsin, and Kimberly lived in Illinois in the Quad Cities area, and later Moline, Illinois. Until Brooke was 10 years old, Anthony exercised his visitation with Brooke in the Quad Cities area. Initially, Anthony purchased a house in the Quad Cities area, with an agreement that Kimberly would pay rent. Kimberly and Brooke lived there for approximately 18 months, but shortly after moving in Kimberly stopped paying rent.

¶ 5 In early 2008, Brooke was diagnosed with type 1 diabetes. On March 2, 2008, Kimberly filed a petition to modify child support, and on March 20, 2008, Anthony filed a counterclaim to

modify custody and visitation, claiming that Brooke's health condition was no longer a reason for Kimberly to limit his visitation with Brooke. Following these petitions, numerous disputes occurred over Anthony's visitation with Brooke, and whether Brooke was healthy enough to travel to Wisconsin for visits.

¶ 6 On December 8, 2008, attorney Derek Hancks was appointed as guardian *ad litem* (GAL) for Brooke. On December 16, 2008, the GAL report described the conflict between Kimberly and Anthony. Anthony alleged that Kimberly interfered with his telephone calls between him and Brooke, and Kimberly alleged that Anthony did not call Brooke unless urged to. The GAL reported that Brooke did not like visits with Anthony in Wisconsin, but noted that Brooke's opinions seemed coached by Kimberly. Brooke stated that the four to five hour drive to Anthony's home was physically hard on her.

¶ 7 On December 17, 2008, a partial agreed order was entered awarding Anthony two weekends a month with Brooke, one in Wisconsin and one in Illinois. Some issues were reserved for trial in May 2009. On January 15, 2009, Kimberly took Brooke to meet with Dr. McCollum, a psychologist, to discuss Brooke's upcoming visit with Anthony in Wisconsin. Kimberly wanted Brooke's visit reduced from four to two days. Dr. McCollum initially agreed, until he talked to the GAL and determined there would be no problem with a four day visit in Wisconsin.

¶ 8 The GAL report filed on June 9, 2009, stated that Brooke talked with Kimberly about what suicide was. The GAL discussed this with Dr. McCollum, who determined it was a product of the stress in Brooke's life and was not concerned. Despite numerous concerns by Kimberly about Brooke's health and safety when in Anthony's care, the GAL determined these concerns

were unfounded. The GAL also noted that Kimberly seemed to be quizzing Brooke about the conversations she had with the GAL after the session. When Brooke talked about Wisconsin, she admitted she had fun with her friends and grandmother.

¶ 9 On December 17, 2009, the parties agreed to modify visitation to allow Anthony one weekend a month anywhere, and one weekend a month within a two-hour radius of Kimberly's house. There was also an issue that Kimberly often claimed that Brooke was too sick to visit Anthony. To rectify this, the order required that Kimberly get a note from Dr. Christopher Moen, Brooke's primary care physician, stating Brooke was too sick to travel to Wisconsin.

¶ 10 On February 19, 2010, while still represented by counsel, Kimberly filed a *pro se* motion to dismiss Anthony's motion to modify custody and filed a petition for substitution of judge for cause. 735 ILCS 5/2-1001(a)(3) (West 2010). Kimberly's petition alleged that the trial judge was biased against Kimberly, and he failed to do what was in the best interest of Brooke. Kimberly's petition was heard before a different trial judge, and it was denied.

¶ 11 On March 1, 2010, Anthony filed a petition for rule to show cause claiming Kimberly willfully disregarded the agreed order from December 17, 2009, because, in part, she interfered with Anthony's visitation. It was reported, and admitted by Kimberly, that Kimberly called the police on February 14 and December 28, 2009, claiming Anthony was violating the visitation order by failing to provide daily contact with Brooke. Kimberly insisted that the police perform a welfare check. Brooke was fine both times.

¶ 12 On March 31, 2010, the GAL withdrew from the case because he was having too many conflicts with Kimberly. After another GAL declined, Kimberly Fuller was appointed. On April 5, 2010, Anthony filed a motion to modify custody. That motion was later dismissed

because Anthony's original motion, filed on March 20, 2008, was never ruled on. Anthony's motion to modify custody alleged, in part, that Kimberly violated numerous parts of the visitation order, including denying him visits with Brooke. Anthony was denied 6 visits in 2009, and 12 visits in 2010. Brooke had been in Kimberly's exclusive care since December 27, 2009.

¶ 13 On May 20, 2010, the court conducted a hearing on Anthony's petition for rule to show cause, but declined to hear his motion to modify custody because Kimberly appeared *pro se*. At the hearing, Dr. McCollum testified over Kimberly's objection based on privilege under the Mental Health Act. Although none of Dr. McCollum's records were admitted into evidence, he did refer to his notes throughout his testimony. He met with Brooke from January 15 until September 21, 2009, when Kimberly stopped bringing her because Dr. McCollum saw nothing wrong with Brooke having regular visits with Anthony in Wisconsin. Dr. McCollum believed that Kimberly was alienating Brooke from Anthony, and that such conduct was harmful to Brooke. He further stated that because of the extremely close relationship between Brooke and Kimberly, Brooke would easily accept Kimberly's opinions as true. Dr. McCollum also believed that Kimberly's choice to home school Brooke was not in her best interest, and could increase the alienation between Brooke and Anthony.

¶ 14 Following the hearing on May 28, 2010, the court's written opinion found Kimberly in indirect civil contempt for violating the visitation order. Furthermore, Dr. Kirk Witherspoon was appointed to prepare a child custody evaluation. On June 1, 2010, Kimberly filed a motion to vacate the judgment and to suppress Dr. McCollum's testimony.

¶ 15 On June 18, 2010, the court found Kimberly in direct criminal contempt for lying to the court, and also in indirect civil contempt for not producing Brooke at the last hearing. Kimberly

lied to the court on May 20, 2010, about amending her 2008 tax return, completing a parenting class, and having a life insurance policy with Brooke as the beneficiary. Kimberly was sentenced to 30 days in jail, and the court issued the mittimus with purge provisions for her indirect civil contempt, set a $10,000 cash bond, and ordered her to produce documents and attend a parenting class. Temporary custody of Brooke was awarded to Anthony. On June 24, 2010, Kimberly admitted that she lied to the court on May 20, 2010. The court modified her sentence to a six-month probationary sentence and ordered that she undergo a mental health examination.

¶ 16 On July 26, 2010, Anthony filed an amended motion to modify custody and visitation, alleging Kimberly did not provide a stable environment, Kimberly alienated Brooke from Anthony, Brooke was sick more often when with Kimberly, and Kimberly's decision to home school Brooke was negatively impacting her academic progress. On August 10, 2010, Kimberly filed a petition to modify temporary custody based on Dr. Witherspoon's recommendations to return Brooke to Kimberly. Kimberly's petition was denied. Upon Anthony's request, the court ordered that Anthony and Cindy, his wife, supervise telephone conversations between Kimberly and Brooke. Kimberly was also ordered to pay $9,440 in attorney fees.

¶ 17 On September 7, 2010, the court found Kimberly in contempt for a third time. The court suspended Kimberly's Illinois visitation, ordered that visits take place in Wisconsin, and ordered that she pay $1,500 in attorney fees. On October 21, October 27, and December 7, 2010, Kimberly filed a petition to modify temporary custody. On December 15, 2010, the court required Kimberly to post a $5,000 cash bond to pay for any possible damages or attorney fees that might occur from her visitations with Brooke over the Christmas holiday.

¶ 18 On January 3, 2011, Kimberly's motion to strike Dr. McCollum's testimony was denied. The court's order stated that the testimony was admitted because Kimberly claimed she relied on Dr. McCollum's advice when she withheld visits from Anthony, in violation of the visitation order. Kimberly also claimed Brooke was suicidal over the prospect of visiting Anthony.

¶ 19 On January 10, 2011, the court began the permanent custody trial. Dr. Witherspoon testified that his custody evaluation recommended that Kimberly be awarded physical custody of Brooke. Dr. Witherspoon stated that Kimberly was not intentionally interfering with visitation, but instead Brooke did not want to visit with Anthony. However, the court questioned Dr. Witherspoon regarding Kimberly's credibility, because he relied on her claims multiple times when he made his evaluation. Dr. Witherspoon admitted that he did not investigate some of Kimberly's claims before he relied on them in his evaluation. One example was that Kimberly reported to Dr. Witherspoon that Brooke was too sick to return to public school, when in fact, the school merely told Kimberly that Brooke could not return if she had a virus. Based on Dr. Witherspoon's recommendations, Kimberly requested a modification of custody, which was denied by the court. The trial continued on February 22, 23, 24, and May 6, 2011.

¶ 20 Kimberly testified at the hearings that she began dating her boyfriend, John H., in 2008, and Brooke and Kimberly began living with John in January 2009, despite the joint parenting agreement which stated that neither party would allow a person of the opposite sex to spend the night while they were with Brooke. Kimberly and John married in July 2010. Kimberly admitted that she refused to speak to Cindy about Brooke's health or needs.

¶ 21 Kimberly admitted that she would not allow Anthony to take Brooke to Wisconsin early on because she claimed Brooke did not want to go and also cited health reasons. Kimberly

testified that Brooke did well in school, except for math. Kimberly began using a tutor for Brooke, but that did not last. Brooke went to school only five or six days in January 2010 due to Brooke's health; however, Dr. Moen wrote notes that Brooke could return to school. Eventually, in March 2010, Kimberly unilaterally made the choice to home school Brooke.

¶ 22 John testified that he helped Brooke with her homework, eating healthy, and taking insulin. He planned to take a diabetes training course, but had not done so yet. He noticed that when Brooke had to visit with Anthony, she would get upset and would not want to go.

¶ 23 At the hearings, Brooke, then 12 years old, brought a list of reasons why she did not want to live with Anthony. This list was made at the request of Kimberly. Brooke claimed Anthony was mean, lied, and was too controlling. Brooke believed that Kimberly knew what was best for her. Nonetheless, Brooke admitted that she had a good relationship with Cindy and Cindy's extended family in Wisconsin.

¶ 24 Anthony testified that he had always been involved with Brooke. Kimberly often restricted his visits to her home and when he arrived for a scheduled visit, they would not be home. Since Brooke had been living with him, he had enrolled her in a Sylvan learning program, and she had since improved her math skills.

¶ 25 Cindy testified that in 2007, she married Anthony and they lived together in Wisconsin. When she first started dating Anthony and visiting with Brooke, Kimberly started making visits more difficult. Due to Cindy's work schedule, she was often an active part of Brooke's care when in Wisconsin. Cindy testified that when Brooke lived with Kimberly, she was not eating fruits or vegetables. Brooke's typical meal at Kimberly's house was a butter sandwich on white bread, popcorn, and diet soda. When Brooke lived with Anthony, she had a healthy diet and ate

fruits and vegetables more regularly. Both Anthony and Cindy have taken a diabetes training course. On numerous occasions when Cindy tried to communicate with Kimberly about Brooke's health or needs, Kimberly refused. Cindy believed that if Kimberly was given custody of Brooke, Anthony would have very limited visitation. In addition, Kimberly set up a Facebook page for Brooke and blocked both Anthony and Cindy from the page.

¶ 26 The GAL filed a report on May 6, 2011, which stated that the reason Brooke might think Anthony does not care for her was because Brooke read Dr. Witherspoon's custody evaluation. In that evaluation, Kimberly conveyed that when Anthony found out she was pregnant, he decided not to be a part of Brooke's life. Kimberly claimed Brooke accessed the evaluation without her permission. It was the GAL's recommendation that Anthony retain physical custody of Brooke because Anthony had been very proactive in supporting her education and independence with managing her diabetes.

¶ 27 Following the hearings, the court issued an order on May 16, 2011, awarding physical custody to Anthony and awarded Kimberly visitation two weekends a month, with one in Wisconsin and one in Illinois. Kimberly also received holiday visitation pursuant to a schedule. In summary, the trial court found Anthony and Cindy credible, and Kimberly incredible. The court also noted Kimberly often made blanket statements about Brooke's health and why she was unable to travel to Wisconsin, but was unable to prove many of these claims with medical evidence. The court stated that Brooke's interest in living with Kimberly was not in her best interest in light of her chronic illnesses, missing numerous days of school, and having limited visits with Anthony while in her care. Kimberly appeals from this judgment.

¶ 28 ANALYSIS

¶ 29 I. Violation of the Mental Health Act

¶ 30 Kimberly's first argument on appeal is that the trial court erred when it permitted Dr. McCollum to testify on May 20, 2010, and in denying her posttrial motion to strike and exclude his testimony, because it violated the Mental Health Act. 740 ILCS 110/1 *et seq*. (West 2010). Specifically, Kimberly argues that neither parent provided written consent authorizing Dr. McCollum's testimony. See 740 ILCS 110/4, 5(a) (West 2010). Kimberly also asserts that requirements under the Mental Health Act, including authorization from the court before issuing a subpoena and holding an *in camera* review of any testimony before it can be admitted, were not followed. See 740 ILCS 110/10(a)(1), (d) (West 2010).

¶ 31 Kimberly's claim under the Mental Health Act (740 ILCS 110/1 *et seq.* (West 2010)) implicates construction of a statute and is a question of law subject to *de novo* review. *Norskog v. Pfiel*, 197 Ill. 2d 60 (2001). The Mental Health Act provides that "[a]ll records and communications shall be confidential and shall not be disclosed except as provided in this Act." 740 ILCS 110/3(a) (West 2010). Records and communications include any record kept by a therapist in the course of providing mental health service to a recipient and any communication made by a recipient or other person to a therapist in connection with providing mental health services to a recipient. 740 ILCS 110/2 (West 2010).

¶ 32 The persons entitled to inspect, copy, and give consent to the disclosure of records include, in part, the parent of a recipient who is under 12 years of age or the recipient if she is 12 years of age or older. 740 ILCS 110/4(a)(1), (a)(2) (West 2010); *In re Marriage of Troy S. and Rachel S.,* 319 Ill. App. 3d 61 (2001) (holding that under the Mental Health Act, the written consent of only one parent is required in a custody proceeding). Disclosing records or

communications to someone other than those persons listed in the Mental Health Act requires written consent by the person entitled to give consent. 740 ILCS 110/5(a) (West 2010).

¶ 33 However, records and communications may be disclosed in a civil proceeding without written consent when the recipient introduces his mental condition or any aspect of his services received as an element of his claim or defense. 740 ILCS 110/10(a)(1) (West 2010). In that circumstance, a prerequisite to disclosure requires that the trial court hold an *in camera* review of the testimony or evidence to determine whether: (1) it is relevant, probative, and not unduly prejudicial; (2) that other evidence is demonstrably unsatisfactory; and (3) that disclosure is more important to the interests of substantial justice than protecting the therapist-recipient relationship. *Id.*

¶ 34 In this case, Kimberly claims multiple violations of the Mental Health Act, both on Brooke's and her own behalf. Kimberly asserts that because Brooke was 11 years old at the time of the testimony, one of her parents was required to give written consent. In addition, Kimberly claims that because she was also involved in some communications with Dr. McCollum, she had an independent privilege of confidentiality. Without addressing whether Kimberly had an independent privilege, we acknowledge that no written consent was validly given by Kimberly or Anthony. Additionally, assuming, *arguendo*, that Kimberly made mental health services an issue in the case, the trial court failed to hold an *in camera* review of Dr. McCollum's testimony before admitting it at the hearing. However, notwithstanding these omissions, in the trial court's written order it determined that the testimony was relevant, probative, and not unduly prejudicial, that other evidence is demonstrably unsatisfactory, and that disclosure is more important to the interests of substantial justice than protecting the therapist-recipient

relationship. See 740 ILCS 110/10(a)(1) (West 2010).

¶ 35 Despite any errors at the trial level, the doctrine of "fundamental fairness commands that the privilege yield." *D.C. v. S.A.*, 178 Ill. 2d 551, 568 (1997). We acknowledge that the importance of protecting the confidential relationship between patient and therapist is evidenced by the strict requirements on disclosure of mental health information found in the Mental Health Act. See *Norskog*, 197 Ill. 2d 60. However, recipients of mental health services cannot use the privilege as a sword to manipulate the legal system. See *D.C.*, 178 Ill. 2d 551.

¶ 36 Under the doctrine of fundamental fairness, we hold that the trial court did not err in admitting the evidence at issue. The testimony admitted in the present case had little to do with either Brooke's or Kimberly's mental health treatment, and more to do with determining what was best for Brooke by ensuring that the visitation schedule was being complied with. See *D.C.*, 178 Ill. 2d 551. Furthermore, the purpose of the Mental Health Act is to protect the patient-therapist privilege. See *Norskog*, 197 Ill. 2d 60. Here, Kimberly voluntarily took Brooke to see Dr. McCollum. Dr. McCollum met with Brooke, Kimberly, and Anthony over the course of Brooke's counseling. The testimony at the hearing was limited in scope, and largely revealed emails sent between Kimberly and Anthony, of which both parties contributed to.

¶ 37 Additionally, Kimberly asserted in 2009 that she relied on Dr. McCollum when she refused to allow Brooke to travel to Wisconsin. In 2010, Kimberly also asserted that she prevented a visit between Brooke and Anthony, claiming that Brooke was suicidal. Dr. McCollum's testimony was relevant to both of these assertions and relevant to the outcome of the case. Kimberly argues that the court did not need to admit Dr. McCollum's testimony because Anthony and Cindy could have testified to the same. However, this assertion is flawed because

throughout this proceeding, both Kimberly and Anthony often argued about similar facts. Dr. McCollum's testimony, as a nonparty to the case, lent credibility to Anthony's assertion that Kimberly had been alienating Anthony. Therefore, the interests of substantial justice and fundamental fairness outweighed Kimberly and Brooke's right to assert their privilege.

¶ 38 Moreover, even if the doctrine of fundamental fairness is not applied to this case, the admission of Dr. McCollum's testimony was harmless error. When erroneously admitted evidence does not prejudice the objecting party, error in its admission is harmless. *Gunn v. Sobucki*, 216 Ill. 2d 602 (2005). The burden is on the party seeking reversal to establish prejudice. *Central Illinois Electrical Services, L.L.C. v. Slepian*, 358 Ill. App. 3d 545 (2005). Here, the outcome of the proceedings would not have been different had Dr. McCollum's testimony been excluded. Dr. McCollum's testimony bolstered the testimony of Anthony and Cindy about Kimberly's attempts to limit Brooke's visitations with Anthony. However, absent such testimony, the trial court could have still reasonably found it was in Brooke's best interest to award permanent custody to Anthony based on Kimberly's inability to facilitate a relationship between Brooke and Anthony. Therefore, any error committed in admitting this testimony is harmless, and the trial court's ruling is affirmed.

¶ 39 II. Use of Prior Testimony and Rulings in Permanent Custody Trial

¶ 40 Kimberly argues that the trial court erred when it considered testimony and rulings from hearings that took place prior to the custody trial as evidence when it made the custody ruling. Kimberly bases her argument on the one-family, one-judge rule of Illinois Supreme Court Rule 903 (eff. July 1, 2006) to argue that these previous hearings did not relate to the permanent custody issue and should not have been used as evidence.

¶ 41 Contrary to Kimberly's assertions, Rule 903 does not lend support to her argument, because the rule only states that child custody proceedings shall be conducted by a single judge whenever possible and appropriate. Ill. S. Ct. R. 903 (eff. July 1, 2006). The rule is devoid of any reference to a trial court's reliance on previous hearings and rulings when making a custody determination. In addition, there was no objection by the parties when the trial court determined it would rely on testimony from previous hearings when making its custody determination. Furthermore, the trial court had heard all of the original testimony from the witnesses; therefore, it relieves the concern that the court would be unable to discern the credibility of each witness in making a custody determination. See *In re Marriage of Fotsch*, 139 Ill. App. 3d 83 (1985) (emphasizing the ability of a trial judge to access the credibility of witnesses when it held that both parties must consent to the use of transcripts from prior hearings to be used by a successor judge in making a custody determination). It should also be noted that in custody proceedings, the paramount issue is the welfare of the children. *Frees v. Frees*, 99 Ill. App. 2d 213 (1968). Therefore, trial courts should exercise broad discretion in admitting evidence which bears on the issue or may assist in arriving at a custody decision. *Id.* Accordingly, we find that the trial court did not err in considering prior hearings and rulings when making its custody determination.

¶ 42 III. Due Process

¶ 43 Kimberly next argues that she was denied the right to due process because the trial judge was constitutionally biased against her. Kimberly's argument is based on the judge's rulings and comments he made about her credibility. During the course of this proceeding, Kimberly filed a petition for substitution for cause (735 ILCS 5/2-1001(a)(3) (West 2010)), which was reviewed by an independent judge and denied. Kimberly does not challenge the denial of her petition, but

instead cites *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) for the proposition that the failure of the trial judge to recuse himself violates her right to due process.

¶ 44 Due process of law requires a fair and impartial hearing before a fair and impartial tribunal. *In re Murchison*, 349 U.S. 133 (1955). The conduct or remarks of a trial judge during the course of trial that are critical or disapproving ordinarily do not support a claim for bias. *In re Marriage of O'Brien*, 2011 Ill. 109039. Unlike a substitution for cause which requires actual prejudice, a claim for recusal based on constitutional bias is an objective test to determine whether the average judge in his position is likely to be neutral or whether there is an unconstitutional potential for bias. *Caperton*, 556 U.S. 868. However, it was noted by the Supreme Court that recusal of a judge under the Constitution was limited to an extraordinary situation where the probability of actual bias rises to an unconstitutional level. *O'Brien*, 2011 Ill. 109039; *Caperton*, 556 U.S. 868. Contentions of due process violations are a question of law, and we will review this matter *de novo*. *In re Todd K.*, 371 Ill. App. 3d 539 (2007).

¶ 45 In this case, Kimberly alleges judicial bias due to alleged erroneous rulings relating to findings of contempt and requirements that she post cash bonds and pay attorney fees, in addition to comments made by the trial judge about her lack of credibility. Despite Kimberly's allegations, none of these comments or rulings affected Kimberly's right to a fair trial in a fair tribunal. See *Caperton*, 556 U.S. 868. It is the trial court's duty to weigh the evidence and determine the credibility of witnesses. Furthermore, nothing the trial court said or did was based on extrajudicial sources to support remanding this case for a new trial, and to a different judge. See *In re Marriage of Smoller*, 218 Ill. App. 3d 340 (1991). Therefore, upon review of the record, we find that the trial judge's rulings and comments do not rise to the level of a due

process violation to justify recusal.

¶ 46 IV. Change in Circumstances and Brooke's Best Interest

¶ 47 Kimberly's final two arguments on appeal allege that the trial court erred in finding a change in circumstances to warrant a change in custody, and in holding that Brooke's best interest required a change in permanent custody to Anthony.

¶ 48 In modifying a child custody agreement, the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) provides that custody may be modified only if the court 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 the entry of the prior judgment, that a change in circumstances has occurred and that a modification of custody is necessary to serve the best interest of the child. 750 ILCS 5/610(b) (West 2010). The court is to determine the best interest of the child by reviewing the nine factors in section 602 of the Marriage Act, which are: (1) the parents' wishes; (2) the minor's wishes; (3) the minor's interactions with parents, siblings, and others who may affect the minor's best interest; (4) the minor's adjustment to his home, school, and community; (5) the mental and physical health of all individuals involved; (6) physical violence, or threat thereof, by the minor's potential custodian, whether directed at the minor or another person; (7) the occurrence of ongoing or repeated abuse, whether directed at the minor or another person; (8) the willingness of each parent to facilitate a relationship between the minor and the other parent; and (9) whether one of the parents is a sex offender. 750 ILCS 5/602(a) (West 2010).

¶ 49 Given that the trial court is in a better position to weigh the evidence and credibility of witnesses, we afford the court's decision great deference and will not disturb the decision unless

it is against the manifest weight of the evidence or constitutes an abuse of discretion. *In re Marriage of Knoche and Meyer*, 322 Ill. App. 3d 297 (2001). A trial court's finding is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *City of McHenry v. Suvada*, 396 Ill. App. 3d 971 (2009). An abuse of discretion occurs when no reasonable person would have taken the view adopted by the trial court. *In re Marriage of Schneider*, 214 Ill. 2d 152 (2005).

¶ 50 A. Change in Circumstances

¶ 51 In the instant case, the trial court found that there was clear and convincing evidence of a substantial change of circumstances since it issued the original child custody order on December 28, 1999. The court listed those changes as Kimberly's intentional alienation of Brooke from Anthony to the detriment of Brooke, Brooke's removal from public school to be home schooled by Kimberly despite Dr. McCollum's opinion that it was not in her best interest, and the danger of Brooke being held back one year in school due to poor attendance when living with her mother. In addition to the trial court's written order, the testimony on May 20, 2010, established that Brooke was diagnosed with type 1 diabetes in 2008, and there was evidence that Kimberly may not be controlling Brooke's diabetes through proper diet and exercise. Cindy testified that when Brooke lived with Kimberly, she was not eating fruits or vegetables. Brooke had also been chronically ill while in Kimberly's exclusive care, which was often the reason Kimberly denied Anthony visitation. Furthermore, the court found that the serious endangerment requirements were satisfied to modify custody within two years of the previous order based on the changes listed.[1] 750 ILCS 5/610(a) (West 2010).

[1] Anthony filed his original motion to modify custody on March 20, 2008. The court

¶ 52 Kimberly also argues that the trial court did not review a broad enough time period when determining a change in circumstances. Despite this allegation, the only limitation upon the trial court is to refrain from considering evidence that was before the court at the prior custody determination, which the trial court did not consider in this case. See 750 ILCS 5/610(b) (West 2010). Accordingly, we hold that the trial court's finding of a change in circumstances was not against the manifest weight of the evidence or an abuse of discretion. See *Knoche and Meyer*, 322 Ill. App. 3d 297.

¶ 53 B. Best Interest

¶ 54 Next, the court systematically and thoroughly considered the applicable factors among the nine best interest factors listed in section 602 of the Marriage Act. See *In re Marriage of Diehl*, 221 Ill. App. 3d 410 (1991) (holding that the best interest factors are not an exclusive list, and the trial court is not required to make specific findings as to each factor as long as the record reflects that evidence of the factors was considered by the trial court). Among these factors, the court noted Brooke had friends and support in both Illinois and Wisconsin, Brooke had numerous absences from school while living with Kimberly, Kimberly suffered from anxiety and depression, and Brooke suffered from depression, type 1 diabetes, and achondroplasia.

¶ 55 The court also noted Brooke's preference to live with her mother, but did not heavily rely on it because Kimberly had tremendous control over Brooke where it may jeopardize Brooke's

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determined that the original motion had never been ruled on, so Anthony's subsequent motion on April 5, 2010, to modify was dismissed. However, even if the court had ruled on the original motion, modification of the custody order was appropriate within the two years given that the trial court found an endangerment to the child.

independence. In addition, Brooke's preference to live with Kimberly may have derived from the stricter environment, including school work and dietary requirements, at Anthony's house. See *In re Marriage of Wycoff*, 266 Ill. App. 3d 408 (1994) (noting that the trial court should not give much weight to a child's preference that is not in his best interest or for a parent who allows the child to watch television or skip homework).

¶ 56 The factor that weighed heavily in the trial court's decision was the willingness of each parent to facilitate a relationship between the child and the other parent. Despite Kimberly's allegations that the custody determination was used as a form of punishment because she did not comply with court orders or visitation, the trial court found that Kimberly's inability to facilitate a relationship with Brooke and Anthony was not in Brooke's best interest. The record supports the trial court's finding that Anthony was the more willing and able parent to facilitate and encourage a close and continuing relationship between Brooke and Kimberly. Furthermore, Kimberly refused to coordinate Brooke's needs, regarding school work and medical needs, with Cindy who was often the primary caregiver. The court also noted that due to Brooke's disabilities, Anthony is best suited to prepare Brooke for maximum independence by teaching her new skills to manage her diabetes. By contrast, Kimberly tried to control Brooke as much as possible, keeping Brooke dependent on Kimberly. Accordingly, the trial court clearly considered all of the factors of section 602(a) of the Marriage Act (750 ILCS 5/602(a) (West 2010)). Under these circumstances, we cannot say that the trial court's decision was either against the manifest weight of the evidence or was an abuse of discretion. See *Knoche and Meyer*, 322 Ill. App. 3d 297.

¶ 57 CONCLUSION

¶ 58 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 59 Affirmed.