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2014 IL App (3d) 130499-U

Order filed January 17, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
CARA SAUL,	)	Rock Island County, Illinois
	)	
Petitioner-Appellant,	)	Appeal No. 3-13-0499
	)	Circuit No. 11-D-462
v.	)	
	)	
GREGORY SAUL,	)	Honorable
	)	Frank R. Fuhr,
Respondent-Appellee.	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justice Schmidt concurred in the judgment.  
Justice O'Brien concurred in part and dissented in part.

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**ORDER**

- ¶ 1 *Held:* In a dissolution of marriage case, the circuit court awarded primary residential custody of the parties' two children to the father and divided the parties' assets and liabilities, and the mother appealed. The appellate court affirmed the circuit court's custody decision but vacated the court's division of assets and liabilities. The appellate court remanded the case with directions for the circuit court to conduct a new hearing on the division of assets and liabilities, on child support, on maintenance, and on contribution to attorney fees.
- ¶ 2 The petitioner, Cara Saul, filed a petition for the dissolution of her marriage to the

respondent, Gregory Saul. After a trial, the circuit court awarded primary residential custody of the parties' two children to Gregory. The court also divided the parties' assets and liabilities, ordered Cara to pay child support to Gregory, denied Cara's request for maintenance, and ordered each party to pay his or her own attorney fees. On appeal, Cara argues that the circuit court erred when it: (1) awarded residential custody of the children to Gregory; (2) allowed Gregory to remove the children to Iowa; and (3) divided the parties' assets and liabilities, including when it ordered that Cara would be responsible for her own attorney fees. We affirm in part, vacate in part, and remand the case with directions.

¶ 3 FACTS

¶ 4 On August 26, 2011, Cara filed for a dissolution of her marriage to Gregory. The parties were married on September 18, 1999, and had two children together; Connor (born April 26, 2000) and Natalie (born April 4, 2002). The parties separated in July 2011 when Gregory moved out. The petition raised issues with regard to child custody, maintenance, and the distribution of assets.

¶ 5 On November 8, 2011, the circuit court entered an agreed order in which the parties agreed, *inter alia*, that: (1) Cara would have sole temporary possession of the marital residence in Moline; (2) Cara would be responsible for the full monthly mortgage payment of \$622.81; (3) the parties would have joint custody of the children, with Cara having primary physical custody; (4) Gregory would have visitation on Wednesday nights and on every other weekend; (5) Gregory would pay temporary child support of \$990.00 per month; (6) Gregory would pay temporary maintenance of \$350.00 per month; (7) Cara would be responsible for paying the monthly utility bills, her credit card bills, and her car loan; and (8) Gregory would be responsible for paying his

credit card bill.

¶ 6 The circuit court entered a bifurcated judgment of dissolution on June 26, 2012. The remaining issues went to a bench trial that was held in January and March 2013.

¶ 7 At the bench trial, the parties presented numerous witnesses regarding parenting issues, financial issues, and personal issues. Other than the testimony presented by each side that they were good parents, the substantial testimony presented in this case can be summarized as follows.

¶ 8 Cara testified that she had been living in the marital residence in Moline for approximately eight years. She was in good health, even though she took a pill to control a high blood pressure problem that she developed during one of her pregnancies, which did not subside after giving birth. She worked in fundraising at the Children's Therapy Center (CTC) and made approximately \$17,000 per year. She also had a 403(b) (26 U.S.C.A. § 403(b) (West 2008)) retirement plan through CTC, which in March 2013 had a balance of approximately \$6,355.73. She had taken out a \$2,000 loan against that plan, which was in repayment. Her boss, W.K. Junker, testified that Cara worked approximately 30 hours per week, from 8:00 a.m. to 2:30 p.m. Monday through Friday, and some weekends for fundraising events. He also testified that Cara had a possibility for advancement once he retired in 1½ years. Cara stated that her job was considered full-time and provided benefits. She claimed that she could make more money in another job, but her ability to find another job would be limited by her parenting responsibilities. She also admitted that she had not looked for another job.

¶ 9 As a part of her job responsibilities, Cara had to purchase items at times for use at CTC fundraising events. While she recently got a Staples business credit card, she had used her

personal debit card and cash to purchase items for CTC in the past. She would get reimbursed by work for these purchases, as well as for the mileage she put on her car. She claimed that she did not hold back any of the reimbursement checks. She had also used her personal credit cards to purchase items for Parent-Teacher Association (PTA) purposes while she was a member of the PTA board; she would get reimbursed for those purchases.

¶ 10 With regard to credit cards, Cara testified that as of January 2013, she had four cards in her name with the following balances: a Target Visa card (\$2,540.10), a Chase card (\$5,913.08), a Citibank card (\$13,625.39), and a Discover card (\$5,228.39). She obtained two of the cards after her separation from Gregory, at which time there was a total balance of approximately \$12,000 on her cards. By January 2013, that total was \$31,307.55. Cara stated that she had to add to the credit card balances because after she and Gregory separated and he moved out, she could not pay for all of the bills. She also testified that part of the balance on the cards came from attorney fees. Gregory testified that he did not know of the \$12,000 credit card balance until the time of separation. He considered \$3,000 of that balance to be marital and was willing to pay half of that amount. Cara claimed that Gregory should have known about the credit card balance because there would still be food in the house at times when Gregory did not give her money to buy groceries. Cara admitted that she had her credit card statements mailed to her work address, rather than the marital residence.

¶ 11 Cara testified that at the time Gregory moved out, she was making approximately \$1,100 per month. Gregory gave her money over the next few months for bills, but those contributions dwindled over time. He started refusing to pay bills in September 2012. Cara claimed that she lacked the funds to be able to pay all of the bills, including the mortgage payments. Cara

testified that she did not make the monthly mortgage payment of \$622.81 between April and September 2012, which resulted in the marital residence going into foreclosure. Cara stated that she did not make those payments "[b]ecause I had child -- summer daycare, and I could not take on more bills without more income." She testified that the cost of the babysitter was \$1,500 for the entire summer, but that her other expenses increased, too, including the grocery bill and car costs associated with additional driving.

¶ 12 Cara stated that her parents loaned her money in October 2012 to bring the mortgage current. Cara's father, Pat Higham, testified that he and Cara's mother loaned her over \$13,000.00 in the last 18 months for the foreclosure and her attorney fees and that they were expecting Cara to repay that amount.<sup>1</sup> Cara testified in January 2013 that she had made the mortgage payments since she brought it current, although she did admit that the bank told her they were modifying the loan to include mortgage insurance and taxes, the result of which was that the bank told her that she was approximately \$375 per month short on her mortgage payments. She claimed that she had been in contact with the bank because she was contesting the bank's modification, but no resolution had been reached yet. The loan balance as of January 2013 was approximately \$40,453.35. She also stated that she intended to refinance to lower the monthly payments, but had not done so yet due to this pending divorce action. She admitted, however, that in October 2012 she had inquired into refinancing with a credit union but was denied.

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<sup>1</sup> Documents presented by the parties to the circuit court listed this liability at approximately \$7,000. Pat testified that approximately \$6,600 of the total loan amount went toward curing the foreclosure.

¶ 13 Cara stated that the house had been appraised at \$128,000 and that if she lost the house, she would find an apartment. Her mother, Pamela Higham, testified that Cara and the children could move in with her and her husband if they needed a place to stay. Cara admitted that the children's ability to stay in the same school district would be jeopardized if she lost the house. Cara testified that she had no bank accounts other than her checking account, although Gregory presented the testimony of his sister-in-law, who claimed that in November 2010, Cara told her that she had money in a secret account in case anything happened to their husbands.

¶ 14 Gregory testified that he was currently living with his brother in Davenport, Iowa, who was charging him \$200 per month to stay there. He was in good health. Gregory had been working with the same company in Davenport, Iowa, since April 1989 and grossed approximately \$60,000 per year. The 401(k) plan (26 U.S.C.A. § 401(k) (West 2008)) Gregory had through work was all marital and totaled \$140,825.67. He also proposed giving Cara a lump sum to cover her interest in his pension, which Gregory said would be worth \$258.75 per month, \$40 of which was marital. He also testified that he had only one credit card, which had a balance of approximately \$2,300. He had also liquidated a mutual fund worth approximately \$20,000 and borrowed \$5,500 from his sister to help pay for his attorney fees. He also alleged that at the time he and Cara decided to divorce, she told him that she would take him down financially. Rochelle Collier, a longtime friend of Gregory's and the person who introduced Gregory to Cara, testified that Cara also told her that Cara would take down Gregory financially.

¶ 15 Gregory was seeking joint custody with him being the primary residential parent. While Cara was a stay-at-home mom for approximately seven years and had been the primary caregiver, Gregory testified that they shared caretaking duties and that he wanted residential custody

because he believed Cara made poor decisions. Gregory took issue with Cara letting the marital residence go into foreclosure, as well as the following with regard to Cara's parenting ability: (1) her overpunishment of the children; (2) her denial of his access to his kids; and (3) a relationship she had with John Cook.<sup>2</sup>

¶ 16 First, with regard to Cara's alleged overpunishment of the children, Gregory stated that Cara was "extreme" in her parenting at times. He claimed that Cara was too hard on Connor. His friend, Rochelle Collier, also testified that Cara yelled at the children and that Gregory was more calm. Gregory stated that Cara had spanked Connor multiple times on one occasion in which he had to stop her. As Cara had testified, she had hit Connor in the mouth before. Gregory also testified that Cara had threatened to beat Connor with a spoon before, and had in fact hit him with a spoon before. Gregory admitted that he spanked the children, too. He also admitted that he had agreed that Cara should have custody of the children until he first decided to seek custody of the children in October 2012.

¶ 17 Second, with regard to Cara allegedly denying Gregory access to the children, Gregory claimed the Cara would not allow the children to talk to him or call him when they were in Cara's care, including an incident in December 2012 in which he claimed that Cara interfered with a phone call he made to Connor. He also alleged that Cara did not confer with him when the children would get into trouble, including an incident in which Cara decided to pull Connor from wrestling for getting a bad grade. He also alleged that he was not listed as an emergency contact

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<sup>2</sup> Gregory also claimed that Cara drank alcohol excessively before the separation. He presented testimony in this regard, but none of it appeared to impact the children and therefore will be omitted from this court's recitation of the facts.

with the children's school anymore, although Cara presented the testimony of a Moline school district employee who showed that Gregory's name had not been removed from the children's records. Gregory admitted that he had blocked Cara's texts, but claimed that he did so because they were interfering with his job and that she could still call him. He also admitted that Cara was the primary caregiver over the past 18 months and that he had not asked Cara what health care providers to which she was taking the children over that time period. He also relied on her for the children's immunizations.

¶ 18 Third, with regard to the relationship Cara had with Cook, Gregory testified that he felt the relationship was inappropriate in that he felt she was bringing a new paramour into the situation too quickly. He never saw physical contact between the two except for one time when he saw Cara leaning against Cook at a 2011 children's Christmas program. He admitted that the majority of his information regarding Cook came from Connor and Natalie, who unsolicitedly relayed the information to Gregory. In that respect, Gregory had stated that Connor told him Cara and Cook were trying to get Connor to choose between Gregory and Cook.

¶ 19 Cook testified that he had three children, who were ages 27, 16, and 12. His youngest child was friends with Connor. He claimed that he and Cara never dated; rather, they were just friends who kissed on occasion.

¶ 20 Gregory's opinion of Cara's alleged relationship with Cook was the driving force behind a confrontation that occurred at one of Connor's baseball games in April 2012. That day, Connor had a doubleheader. Cara testified that she was sitting in a lawn chair next to Cook when Gregory showed up with Natalie. Upon arrival, Gregory looked over in Cara's direction and said sarcastically, "[o]h, look who's here." Natalie set up her chair by Cara and Gregory went to stand



next to the bleachers. After a while, Cara looked in Gregory's direction and noticed that he was taking pictures of her sitting next to Cook. Cara stated that Gregory also came up and put his head between Cara and Cook and said to Cook, while pointing at Cara, "I don't care what you do with this piece of shit \*\*\* but don't fuck with my kids." There were parents around at the time. Cara told Gregory, "[n]ot here."

¶ 21 Gregory testified that he was upset that Cook, with Cara in the car, had been dropping off Connor and Natalie for Gregory's visitation.<sup>3</sup> He wanted to get his point across that Cook was dating a woman with two kids, a fact that he felt ought to be acknowledged and respected.

¶ 22 Next, while in between games, Cara got up to go to the restroom. Cook got up to go to the concession stand. Cara stated that when she exited the restroom and approached the concession stand, she heard Gregory using profane language toward Cook. She heard him say "don't fuck with my kids." Cook turned around and said, "[c]alm down." Gregory stated, "[y]ou sure are a smart-ass for dropping off my kids," and tried going chest-to-chest with Cook. Cara tried stepping in between them, saying, "[n]ot here, not now. Go away." Gregory, who was not yelling, said, "[d]on't you fucking tell me what to do." Cook turned back toward the concession stand and Gregory "start[ed] running his mouth some more." Cara told Gregory to go away and told Cook to walk away. Cara testified that there were a lot of kids around while this was occurring.

¶ 23 Cara's father, Pat Higham, testified that he approached the concession stand when he saw Gregory and Cara arguing. He observed Gregory yelling at Cara and Cara telling Gregory to go away. Gregory was using profane language and was being loud. There were kids and adults

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<sup>3</sup> Cook testified that he went with Cara twice to drop off Connor and Natalie.

around. Pat walked up behind Gregory and told him this was not the time or place. Gregory told Pat that he did not approve of Cara being there with a friend. Pat also testified that Gregory called Cara a bitch and a whore. Gregory testified that he did not recall calling Cara a bitch, but he admitted calling her a "piece of shit."

¶ 24 Cara testified that Gregory yelled at Pat, "[d]o you approve of this?" She also stated that Connor approached them, as it was in between games, and started crying. Connor began walking away, and Pat went after him. Gregory stated, "[t]hat's my son. I'll get him." Connor told Gregory to go away. Cara approached Connor and Connor told her that he wanted to go home. An assistant coach also came over to make sure Connor was okay, as the second game was going to start soon and Connor was usually the starting catcher. Cara testified further that Gregory started to leave the area in the direction of his truck at the same time Natalie came back from the playground area. Natalie began crying and followed Gregory.

¶ 25 Cara testified that Connor did not play in the field during the second game, which upset her, given that he was usually the starting catcher. After the second game started, Natalie came back before Gregory did. When Gregory returned, he and Cara had a short exchange in which Gregory called Cara a "fucking slut." Natalie was right next to Cara at the time.

¶ 26 After the second game ended, Cara approached the dugout, which was where her father had been standing. Cara was going to tell Connor goodbye, as this was Gregory's weekend with the children. Natalie and Cara's mother, Pamela Higham, were also with her. Gregory had approached and told Cara "[y]ou just need to sign the fucking papers." Pamela also testified that she heard Gregory make this comment to Cara. Cara responded, "[n]ot here, not now."

According to Cara, Gregory continued to make comments, although she could not recall what

they were. Pat testified that when Gregory approached, Gregory again asked him if he approved of the dating situation. Gregory testified that he did not approach anyone; rather, that was the area in which they always picked up Connor after his games. Gregory did admit that he was the aggressor during this incident at Connor's baseball game. He also testified that he regretted some of the incident, but not the part in which he tried getting his point across to Cook about dating a woman with kids.

¶ 27 With regard to custody, Cara indicated that she was seeking sole custody, while Gregory indicated that he was seeking joint custody. Gregory testified that if he was awarded residential custody, he would move in with his mother, Mary Saul-Speak, in her house in Davenport, Iowa, which was why he was asking the circuit court to allow him to remove the children to Scott County, Iowa. Gregory had set up rooms for the children at that house. Gregory also testified that he had spoken to his mother about purchasing her house on contract. Saul-Speak also testified that this purchase was discussed, but that they had not discussed a price. She testified that if Gregory did purchase the house from her, which she said was too big for her to continue to keep up, she would stay for a while but then find an apartment. Saul-Speak also testified that she was 79 years old and despite having exercise-induced asthma and having to take a pill for her cholesterol, she was in good health. She cooked meals for Gregory and his children and was available to pick the children up from school should Gregory receive residential custody.

¶ 28 Further, Gregory testified that his family would be able to help with caring for the children if he received residential custody. Saul-Speak stated that she had two sons that lived close by, and that Gregory worked approximately 15 minutes away from her house. Gregory stated that Connor would still be able to do some of the same activities despite the move,

including him continuing to play for his traveling baseball team, which was based in Davenport, Iowa, anyway. Gregory also testified that Connor had a friend that lived about three blocks away, but he had testified earlier that neither Connor nor Natalie had friends in Saul-Speak's neighborhood.

¶ 29 Both Cara and Gregory also presented testimony that Natalie had cerebral palsy and a learning disability. Cara testified that Natalie had issues with her right arm, hand, and leg, and that she was approximately 1½ years behind in reading level. She also worked slower in math. Natalie also had an individualized education program (IEP) set up for her at her current school. With regard to Natalie's physical issues, two physical therapists from CTC testified that Natalie had been receiving treatment for strength, range of motion, and mobility issues. One of the physical therapists had been working with Natalie since 2003. That witness also testified that Natalie does not have to wear her leg brace every day, but she should wear it at night. With regard to that leg brace, Gregory testified that Cara only sent it with Natalie for visitation on one occasion. Natalie told the court that Cara did not tell her to leave the brace at home; rather, Natalie would forget to bring it. The other physical therapist testified that Cara was the parent who brought Natalie to her therapy sessions and that she talked to Cara after each session. She also recalled seeing Gregory at only one of the sessions, which was in December 2010.

¶ 30 In addition, the parties both presented testimony on an incident that occurred prior to one of Natalie's horse-riding events in June 2012. Cara testified that Gregory had the children that day and that she had Natalie's horse-riding helmet and boots. Cara was taking those items to Natalie at the stable, and she was running late. Connor had called her to tell her that she was late and he got disrespectful, so she ended the call. When she arrived, she approached Gregory's

truck and Gregory opened the front and rear doors, which opened in opposite directions. Gregory took one of the boots and began putting it on Natalie, who was seated in the back seat. Cara had said to Gregory that she did not appreciate Connor calling her and verbally accosting her.

Gregory said that Connor grabbed the phone from him. As Gregory was trying to put a boot on one of Natalie's feet, Natalie expressed discomfort. When Cara asked Gregory if he wanted her to do it, among Gregory's responses was "[g]o to hell." Cara proceeded to try to put Natalie's right boot on. At that point, Cara stated that Gregory grabbed her arm and pushed her up against the rear door of the truck. When she looked at her arm shortly thereafter, she saw what looked to her to be a nail mark in her arm, and she described having a "pinched sting" feeling of pain in her arm. She also said it had started to bruise. She took two pictures of her bruised arm, which were introduced into evidence.

¶ 31 Cara's father, Pat, also testified regarding the incident. Pat stated that he was standing about 25 to 30 feet away from Gregory's truck when Cara arrived. He said he could see Gregory and Cara arguing after she approached the truck, although he could not hear what they were saying. At one point, Natalie motioned to Pat to come help. As he was walking over, he saw Gregory grab Cara by both arms and shove her up against the truck. Pat told Gregory to keep his hands off Cara and to refrain from pushing her. Gregory told him that he need to get Cara out of there. Pat also said he saw a bruise on Cara's arm.

¶ 32 Gregory testified that when Cara approached the truck, she said, "[d]on't have your son call me up bitching at me." As he started to put Natalie's boots on her, Cara was also commenting to him about him recently not taking Connor to the doctor for what turned out to be impetigo. Next, Gregory stated, "[s]o we were putting the boot on, and she said -- she came over

and kind of pushed me out of the side to try to put Natalie's boot on. So I kind of pushed her back to get her off me, to finish putting boot [*sic*] on Natalie." Gregory stated that Pat then came over and he told Pat to "[g]et your daughter away from me." He did not recall grabbing Cara by the arm. He said he may have bumped her into the door, but he would not throw her up against a car.

¶ 33 Saul-Speak testified that she saw a big black bruise on Cara's arm one week before the horse-riding incident. The bruise was approximately five to six inches long and was at least two fingers wide.

¶ 34 The circuit court also interviewed Connor and Natalie. Both children stated that they had no preference as to which parent with whom they wanted to reside. Connor stated that he had no problems with his parents' parenting styles, and that he felt safe at both residences. Natalie stated that she wanted to see both parents for equal amounts of time. Connor also stated that he wanted to see his father more than he was currently seeing him. Connor stated that his father is calmer than his mother, and he said he does not feel comfortable talking to his father on the phone while at his mother's residence because his mother would cut their calls short, which was something that his father did not do. Connor also stated that he felt pressured to get back to his mother's residence when his visitation with his father was over, as his mother had punished Natalie and him when they were late. With regard to Cook, Connor stated that his mother and Cook told him that they were boyfriend and girlfriend, and Natalie stated that she had heard kissing sounds coming from her mother and Cook.

¶ 35 Lastly, the parties' attorneys testified regarding the fees they charged in this case. In sum, both Cara and Gregory were billed almost \$40,000 each in attorney fees. Gregory had paid over

\$37,000 and was current. Cara had paid over \$17,000; she still owed nearly \$20,000.

¶ 36 On June 3, 2013, the circuit court issued its written decision. With regard to the child custody issue, the court found:

"Mrs. Saul \*\*\* allowed the marital residence to go into foreclosure during the pendency of these proceedings because she decided to pay a babysitter for the children rather than make the mortgage payments on time. The evidence indicates that that foreclosure has been cured through a loan from her parents, but the marital residence is still in danger of falling back into foreclosure, if it has not already.

Mr. Saul has enunciated a plan to buy his mother's residence from her on contract. This residence would provide a stable and more than adequate home for the children. Through the pendency of these proceedings, Mr. Saul has shown the ability to provide a stable environment to raise the children."

Thus, the court awarded joint custody but gave primary physical custody to Gregory. The court also stated, "[t]he father is granted permission to reside with the children in Scott County Iowa."

¶ 37 Also with regard to the children, the court ordered that Cara's child support obligation would be \$330 per month, but, in lieu of maintenance, she would not be required to begin paying that amount until January 2014. The court also ordered that Gregory would be required to maintain health insurance coverage for the children.

¶ 38 With regard to the distribution of some of the parties' assets, the court awarded the marital residence to Cara. The court ordered the parties to calculate the equity in the house and to use that amount as an offset against Cara's interest in Gregory's 401(k), and, further:

"Fifty percent (50%) of any balance in the husband's 401(k) shall be awarded to the wife pursuant to a QDRO, after offsetting the husband's interest in the wife's [403(b)] through her employment. Wife shall also be awarded an additional One Thousand Dollars (\$1,000) pursuant to the QDRO to offset her interest in the husband's defined benefit plan which he is awarded."

The court also ordered that Cara would be responsible for the Citibank, Chase, Target, and Discover credit card debts, as well as the 2012 property tax, which was approximately \$3,800. Additionally, the court ordered that each party would be responsible for his or her own attorney fees.

¶ 39 The court's June 3, 2013, order was incorporated into its "Judgment for Dissolution—Second Half Matters," which it entered on July 2, 2013. Cara appealed.

¶ 40 ANALYSIS

¶ 41 On appeal, Cara argues that the circuit court erred when it: (1) awarded residential custody of the children to Gregory; (2) allowed Gregory to remove the children to Iowa; (3) divided the parties' assets and liabilities, including when it ordered that Cara would be responsible for her own attorney fees.

¶ 42 I. CUSTODY

¶ 43 First, Cara argues that the circuit court erred when it awarded residential custody of the children to Gregory. Specifically, Cara argues that the circuit court did not consider or apply any of the statutory factors in reaching its decision. Cara contends that the manifest weight of the evidence supported a ruling that she was the proper parent to receive residential custody.

¶ 44 When faced with a dispute over the custody of children, the best interest and welfare of



the children are of paramount importance. *Hall v. Hall*, 226 Ill. App. 3d 686, 689 (1991). In arriving at its decision, the circuit court should consider all relevant factors, including those enumerated in Section 602 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602 (West 2010)). *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 413 (2005). Section 602(a) of the Act provides:

"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, 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." 750 ILCS 5/602(a) (West 2010).

"Because the trial court is in a better position to evaluate the demeanor and conduct of the parties and witnesses, the court's decision is given great deference and will not be disturbed on appeal unless such decision is contrary to the manifest weight of the evidence." *Hall*, 226 Ill. App. 3d at 689. A decision is against the manifest weight of the evidence when the opposite conclusion is clearly apparent or when the factual findings are unreasonable, arbitrary, or not supported by the evidence. *In re Marriage of Karonis*, 296 Ill. App. 3d 86, 88 (1998).

¶ 45 Initially, Cara contends that the circuit court failed to apply any of the factors enumerated in section 602(a) and based its decision on a nonstatutory factor that did not favor Gregory. Cara's argument is misplaced. First, it was not necessary for the court to recite the statutory factors in its decision. *Hall*, 226 Ill. App. 3d at 689. Second, as we previously stated, the court is to consider all relevant factors in arriving at a custody decision that is in the children's best interest, not just the section 602(a) factors. See *Wolff*, 355 Ill. App. 3d at 413; see also *Hall*, 226 Ill. App. 3d at 689 ("where non-statutory factors are considered determinative of the custody decision, such factors should not be obscure, and the weight of the evidence of record must support the custody decision").

¶ 46 In announcing its custody decision, the circuit court emphasized in its written decision that: (1) Cara allowed the marital residence to go into foreclosure, which had been cured, but she may have already allowed it to go back into foreclosure; (2) Gregory had a plan to buy his

mother's residence for himself and the children; and (3) "[t]hroughout the pendency of these proceedings, [Gregory] has shown the ability to provide a stable environment to raise the children." Our review of the entirety of the evidence presented in this case, in light of the standard of review, reveals no error in the court's decision.

¶ 47 The evidence presented in this case belies Cara's claim that her living situation was the stable one and was the proper one for the children. Contrary to Cara's argument, the evidence did not show that her living situation was stable and that the children would be able to remain in the house. In fact, the evidence showed that while the foreclosure had been cured via the loan from the Highams, the situation going forward was anything but stable. While Cara had made two monthly payments of \$622.81, the bank told her they were modifying the loan to include mortgage insurance and taxes, which they said resulted in an additional \$375.00 per month. Cara had not paid those amounts and was disputing the modification, a situation that had not been resolved as of at least January 2013. There was no testimony to indicate that if Cara lost the marital residence, the children's schooling and community situations would be free from change. In fact, she admitted that if she lost the house, her ability to keep the children in the same school district would be jeopardized.

¶ 48 Moreover, it cannot be understated that the evidence showed that Cara allowed the marital residence to go into foreclosure, which indicated some willingness to allow negative impacts on the family. While Cara testified that she neglected to pay the mortgage between April and September 2012 because she had additional expenses related to the children, including babysitting fees, the evidence did not show that she lacked the funds to make those monthly payments of \$622.81. Additionally, there was testimony from two witnesses that Cara had

verbalized her intention to harm Gregory financially through the divorce.

¶ 49 This is not to say that Gregory was clear of questionable judgment or had a solidified residential plan. The two incidents that occurred at the April 2012 baseball game and the June 2012 horse-riding event in fact showed that Gregory lacked sound judgment and acted without the children's best interest at times, and the negative impacts of those situations cannot be understated. With regard to his living situation, even though Gregory's plan to buy his mother's house lacked specifics, the evidence did show that Gregory could live at that house with the children and that he had previously prepared rooms for them at that house. Given the relative positions of the parties, Gregory's living situation did in fact appear to be more stable than Cara's living situation, as the circuit court noted.

¶ 50 Cara also argues that the factors in section 602(a)(3)-(7) favor her as the residential parent. With regard to factor three, "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" (750 ILCS 5/602(a)(3) (West 2010)), the evidence presented in this case showed that the children had good relationships with Cara and Gregory, as well as the other people involved with the children's lives. There was no evidence to suggest that factor three was anything but neutral.

¶ 51 With regard to factor four, "the child's adjustment to his home, school and community," it is true that the children would have to change schools, in which they were doing well, and in which Natalie had an IEP established to help with her issues. It is also true that the children would have to change not only communities, but also cities. The testimony was also undisputed that Cara was the primary caregiver for the children over most of their lives, including the 18-month period preceding the trial in this case. The testimony also indicated that the children did

not have any friends in Davenport, Iowa, in the neighborhood in which Gregory's mother lived. However, there was testimony to indicate that at least Connor would be able to continue with some of his activities, including his baseball team, which was based in Davenport, Iowa. There was no evidence to suggest that Natalie would have to discontinue her sessions at CTC. Gregory had prepared bedrooms in his mother's house for this children, and the children were comfortable with Gregory as a caregiver. Given all of this testimony, we disagree with Cara that factor four favored her. Rather, factor four did not appear to favor either parent.

¶ 52 With regard to factor six—"the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person" (750 ILCS 5/602(a)(6), (7) (West 2010))—Cara refers to the June 2012 incident at the horse-riding event in support of her argument that this factor favored her. While it appears that Cara and Gregory were jockeying for position on that day between the car doors as they attempted to put Natalie's boots on, the accounts of Gregory pushing Cara differed. Cara said Gregory grabbed her arm and pushed her up against the open rear door of the truck. Cara's father testified that Gregory grabbed both of Cara's arms and shoved her up against the truck. Gregory could not recall if he grabbed Cara's arm, but admitted he may have bumped her up against the door. He also stated that he would not have thrown her up against the truck. Cara stated that she had a thumbnail mark and a pinching pain in her arm after the incident. While she stated that a bruise developed, Gregory's mother testified that she saw a big black bruise on Cara's arm one week before the incident at the horse-riding event. The evidence on this incident was conflicting and did not conclusively establish what exactly transpired that day or that factor six weighed in favor of Cara.

¶ 53 Factor seven—"the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person" (750 ILCS 5/602(a)(7) (West 2010))—is even less applicable. For the purposes of factor seven, " 'abuse' means physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation but does not include reasonable direction of a minor by a parent or person in loco parentis." 750 ILCS 60/103(1) (West 2010). There was no evidence presented to indicate that any "ongoing or repeated abuse" (750 ILCS 5/602(a)(7) (West 2010)) occurred in this case.

¶ 54 Furthermore, our review of the record reveals that factor eight—"the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child" (750 ILCS 5/602(a)(8) (West 2010))—weighed in favor of Gregory. The testimony indicated that Cara interfered with Gregory's contact with the children when they were in Cara's care, as evidenced by Connor's statements that Cara cut his calls with Gregory short, which Gregory did not do. According to Connor, Cara would also punish the children if they were late coming back from visitation with Gregory. There was no evidence to indicate that Gregory was taking any steps to interfere with the relationship Cara had with the children.

¶ 55 It is clear from the evidence presented in this case that both Cara and Gregory are capable parents and this case presented a difficult custody question. However, a review of the totality of the evidence presented in this case reveals nothing to indicate that the opposite conclusion was clearly apparent or that the circuit court's factual findings were unreasonable, arbitrary, or not supported by the evidence. See *Karonis*, 296 Ill. App. 3d at 88. Accordingly, we hold that the circuit court's custody decision was not against the manifest weight of the evidence.

¶ 56

## II. REMOVAL

¶ 57 Second, Cara argues that the circuit court erred when it allowed Gregory to remove the children to Iowa.

¶ 58 Section 609(a) of the Act provides:

"The court may grant leave, before or after judgment, to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children. The burden of proving that such removal is in the best interests of such child or children is on the party seeking the removal. When such removal is permitted, the court may require the party removing such child or children from Illinois to give reasonable security guaranteeing the return of such children." 750 ILCS 5/609(a) (West 2010).

"In deciding whether removal is in the child's best interest, a trial court should hear any and all relevant evidence." *In re Marriage of Eckert*, 119 Ill. 2d 316, 326 (1988). Such a determination is contextual, but factors that must be considered include: (1) whether the proposed move would enhance the quality of life for the custodial parent and the children; (2) the motives for both parties in seeking and resisting removal; and (3) the impact the move would have on visitation, including whether a reasonable visitation schedule can be reached. *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 42 (citing *Eckert*, 119 Ill. 2d at 326-27). "A trial court's determination of what is in the best interests of the child should not be reversed unless it is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred." *Eckert*, 119 Ill. 2d at 328.

¶ 59 Initially, Cara takes issue with the fact that the circuit court did not mention section 609 or any of the factors that it should take into consideration when deciding whether removal is in the children's best interest. While the court's single sentence on removal was in fact as scant as it could have been, we disagree with Cara, as we did with regard to custody, that the court's failure to mention the factors is the same as not considering them.

¶ 60 In fact, our review of the record reveals that there was ample evidence presented that was relevant to the factors a court should consider when arriving at a removal decision. The circuit court found that Gregory's living situation with the children in his mother's house in Davenport, Iowa, was the more stable situation for the children. Gregory did not have to change jobs and although the children had to change schools, communities, and cities, as we discussed above, there was evidence presented that somewhat mitigated these changes for the children. Again, Cara's situation in the marital residence—and therefore the children's school and community situation—was not as stable as she claims. Moreover, the distance between Moline and Davenport, Iowa, was minimal, and the visitation exchanges had already been involving those two cities. While allowing removal is certainly not a mere formality when the circuit court has decided which parent should receive custody, there is nothing to suggest that the circuit court in this case ignored any of the evidence relevant to the issue of removal. Accordingly, under these circumstances, we hold that the circuit court's removal decision was not against the manifest weight of the evidence.

¶ 61 III. DIVISION OF ASSETS AND LIABILITIES

¶ 62 Third, Cara argues that the circuit court erred when it divided the parties' assets and liabilities. In support of her claim that the division was inequitable, Cara highlights that the court



assigned most of the credit card debt to her, ordered her to pay the full mortgage, and ruled that she had to pay her own attorney fees.

¶ 63 When a circuit court is tasked with the distribution of marital property, section 503(d) of the Act provides that the court shall divide the marital property in just proportions after considering all relevant factors, which include:

"(1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (i) any such decrease attributable to a payment deemed to have been an advance from the parties' marital estate under subsection (c-1)(2) of Section 501 and (ii) the contribution of a spouse as a homemaker or to the family unit;

(2) the dissipation by each party of the marital or non-marital property, provided that a party's claim of dissipation is subject to the following conditions:

(i) a notice of intent to claim dissipation shall be given no later than 60 days before trial or 30 days after discovery closes, whichever is later;

(ii) the notice of intent to claim dissipation shall contain, at a minimum, a date or period of time during which the marriage began undergoing an irretrievable breakdown, an identification of the property dissipated, and a date or period of time during which the dissipation occurred;

(iii) the notice of intent to claim dissipation shall be filed with the clerk of the court and be served pursuant to applicable rules;

(iv) no dissipation shall be deemed to have occurred prior to 5 years before the filing of the petition for dissolution of marriage, or 3 years after the party claiming dissipation knew or should have known of the dissipation;

(3) the value of the property assigned to each spouse;

(4) the duration of the marriage;

(5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(6) any obligations and rights arising from a prior marriage of either party;

(7) any antenuptial agreement of the parties;

(8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(9) the custodial provisions for any children;

(10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(12) the tax consequences of the property division upon the respective economic circumstances of the parties." 750 ILCS 5/503(d) (West 2010).

The valuation and distribution of marital property are matters within the circuit court's discretion.

*In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1113 (2004). We will not disturb the court's

valuation or distribution decisions unless the court abused its discretion, which occurs when no reasonable person would adopt the view taken by the court. *Sawicki*, 346 Ill. App. 3d at 1113.

¶ 64 In this case, the parties had the following major assets at the time of trial: (1) the marital residence, valued at the time at approximately \$128,000 and subject to a mortgage with a balance of \$40,453.35; (2) Gregory's 401(k), valued at the time at \$140,825.67, all of which was marital; (3) Cara's 403(b), valued at the time at \$6,355.73; and (4) Gregory's pension, which would be worth approximately \$260 per month, with \$40 per month being marital. The court divided these assets as follows: Cara received the marital residence, the equity in which was \$87,546.65. That amount was used as an offset against Gregory's 401(k), as was Cara's 403(b). The remaining balance of Gregory's 401(k), \$46,923.29, was divided equally between the parties, which included an additional \$1,000 to Cara to offset her interest in Gregory's pension plan. In sum, the circuit court divided the parties' major assets approximately 50/50.

¶ 65 The parties had the following major liabilities at the time of trial: (1) the Citibank credit card, which had a balance of \$13,625.39; (2) the Chase credit card, which had a balance of \$5,913.08; (3) the Target credit card, which had a balance of \$2,540.10; (4) one Discover credit card, which had a balance of \$5,228.39; (5) a second Discover card, in Gregory's name, which had a balance of approximately \$2,300; (6) Cara's personal loan from her parents to cover attorney fees, which was approximately \$7,000; (7) Gregory's personal loan from his sister, which was \$5,500; and (8) the 2012 real estate taxes from the marital residence, which totaled approximately \$3,800. These liabilities totaled \$45,906.96. The circuit court assigned all of these liabilities to Cara except for two—Gregory's personal loan of \$5,500 and his Discover credit card balance of approximately \$2,300. Thus, Cara was assigned \$38,106.96 in liabilities, while

Gregory was assigned just \$7,800—an approximate 83% to 17% split.

¶ 66 Our review of the record reveals that the circuit court's distribution order cannot stand. The court divided the parties' assets approximately 50/50 and assigned 83% of the liabilities to Cara. This was done despite the fact that Cara made just \$17,000 per year, while Gregory was making approximately \$60,000 per year, and despite the fact that the marriage lasted nearly 13 years, a significant portion of which Cara was a stay-at-home mother (see *In re Marriage of Scoville*, 233 Ill. App. 3d 746, 758 (1992) (noting that a spouse's contributions as a homemaker should be considered in a distribution decision)).

¶ 67 In addition, the court ordered Cara to pay \$330 per month in child support. The court also denied Cara's petition for maintenance, and "in lieu of maintenance," ordered that Cara did not have to begin paying child support for approximately six months. In light of the relevant statutory provisions in sections 504 (maintenance) and 505 (child support) of the Act (750 ILCS 5/504, 505 (West 2010)), we find the court's child support and maintenance decisions problematic for several reasons. First, it is undisputed that Cara was in a weak financial position, as she earned approximately one-third of Gregory's salary, and essentially the only evidence related to her future earning capacity was her testimony that she could make more money in another job. Second, Cara was assigned the vast majority of the liabilities, which included the monthly mortgage payment, yet she received only approximately 50% of the assets, the vast majority of which was the equity in the marital residence, which was illiquid. Third, the \$330 child support order does not appear to reflect what was Cara's present ability to pay (see *People ex rel. Massey v. Jones*, 233 Ill. App. 3d 411, 414 (1992) ("support orders generally may not anticipate future events and must be based on present ability to pay")). Given that Cara was

grossing approximately \$17,000 per year—or around \$1,100 net per month—and she was assigned the full mortgage payment (which was anywhere from \$622.81 to over \$1,000 per month), as well as the vast majority of the liabilities, plus the \$330 per month in child support, the court's order left Cara in an unsustainable financial position. Fourth, the court's denial of maintenance to Cara does not appear to be warranted by the circumstances in light of the statutory factors listed in section 504(a) of the Act (750 ILCS 5/504(a) (West 2010)), given the division of the parties' assets and liabilities. Much like the court's child support award, the court's denial of maintenance to Cara contributed to the court's order leaving her in an unsustainable financial position in light of the evidence of the parties' assets, liabilities, and income.

¶ 68 Furthermore, the Act also provides for the possibility of contribution by one party to the other party's attorney fees. 750 ILCS 5/503(j), 508(a) (West 2010). When a circuit court is faced with deciding whether to order one party to a divorce proceeding to pay the other party's attorney fees, the court should consider, *inter alia*, the distribution of assets and debts, whether maintenance was awarded, and the parties' relative earning capacities. *In re Marriage of Keip*, 332 Ill. App. 3d 876, 884 (2002); see also 750 ILCS 5/503(j), 508(a) (West 2010). We review the court's decision on attorney fees for an abuse of discretion. *Keip*, 332 Ill. App. 3d at 884.

¶ 69 The circuit court in this case ordered both parties to pay their own attorney fees. The testimony of the attorneys revealed that both parties were billed nearly \$40,000 each in attorney fees. Gregory had paid all of his attorney fees, but Cara had paid less than half of her attorney fees. She still owed over \$19,000 in attorney fees at the time. Given the disparate financial positions of Gregory and Cara, we hold that under these circumstances the circuit court abused its discretion by not ordering Gregory to contribute to a portion of Cara's attorney fees.

¶ 70 In sum, we hold that the circuit court's division of assets and liabilities in this case constituted an abuse of discretion. On remand, the circuit court must reconsider property distribution, as well as child support from Cara to Gregory, maintenance from Gregory to Cara, and contribution by Gregory to Cara's attorney fees, in accord with this court's decision and with the appropriate statutory provisions of the Act.

¶ 71 CONCLUSION

¶ 72 For the foregoing reasons, we affirm the judgment of the circuit court of Rock Island County that awarded residential custody of the children to Gregory. We also vacate the portion of the court's order that contained the division of the parties' assets and liabilities, the child support award, the denial of maintenance to Cara, and the denial of contribution by Gregory to Cara's attorney fees. We remand the cause with directions for the circuit court to conduct a new hearing on the division of the parties' assets and liabilities, including the issues with maintenance to Cara and contribution to Cara's attorney fees, in accord with this court's decision and with the appropriate statutory provisions of the Act.

¶ 73 Affirmed in part and vacated in part; cause remanded with directions.

¶ 74 JUSTICE O'BRIEN, concurring in part and dissenting in part.

¶ 75 I dissent from that portion of the order which affirms the award of residential custody to Gregory as well as the removal of the minor children to Iowa.

¶ 76 As stated by the majority, Cara was in a weak financial position. At the time of the proceedings she earned approximately one-third of what Gregory earned. There is no doubt that Cara's financial situation caused the housing uncertainty the trial court relied on to determine that Gregory could offer the children more stability. Upon remand when the trial court conducts a

new hearing on the division of assets, liabilities, maintenance, child support and attorney's fees as directed by this court the resulting proper division of the assets and liabilities may allow Cara to demonstrate that, with the proper resources, she too can provide the children with a stable living environment. Since the issues of debt and asset allocation are so entwined with the parties financial stability, I would reverse and remand entire matter for a new hearing consistent with the directives of the majority.