NO. 5-10-0577

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
DEENA HARRIS,	)	St. Clair County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 07-D-784
	)	
RAY HARRIS,	)	Honorable
	)	Randall W. Kelley,
Respondent-Appellee.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Chapman and Justice Welch concurred in the judgment.

R U L E 2 3 O R D E R

Held: The trial court's decision to award the sole custody of the parties' minor son to respondent is not against the manifest weight of the evidence, and the trial court's denial of petitioner's motion to reconsider and reopen the evidence was not an abuse of discretion.

Petitioner, Deena Harris, appeals from an order of the circuit court of St. Clair County awarding the sole custody of the parties' 11-year-old son, A.H., to respondent, Ray Harris. The issues raised in this appeal are as follows: (1) whether the trial court's decision to award sole custody to respondent was against the manifest weight of the evidence, and (2) whether the trial court's denial of petitioner's motion to reconsider and reopen the evidence was in error. We affirm.

FACTS

The parties married on September 6, 1997. A.H., the parties' only child, was born on April 11, 1999. Petitioner is employed as a supervisor by AT&T in East St. Louis, and

respondent is employed by American Steel Foundry in Granite City. Petitioner earns substantially more than respondent and has throughout the parties' marriage.

On October 7, 2007, petitioner filed for a dissolution of the marriage. There was an attempt at reconciliation, but that fell apart in June 2009 when petitioner sought an order of protection against respondent. The record shows that an emergency order of protection was entered on June 15, 2009, which was effective until July 2, 2009. Petitioner alleged that she and respondent were at a party where she was dancing and that respondent became jealous and verbally abusive in front of friends. Petitioner was embarrassed and left respondent at the party. When respondent arrived home, approximately 30 minutes later, an altercation ensued. Petitioner alleged that respondent was abusive throughout the parties' marriage. There were no allegations that any abuse extended to A.H.

A plenary order of protection was entered on July 2, 2009, which was effective until September 10, 2009. On July 2, 2009, another order was entered pertaining to the custody of A.H. The trial court ordered respondent to have physical custody of A.H. from after work until 9 p.m. on Monday through Thursday. Petitioner was then to pick up A.H. at 9 p.m. and keep him until she left for work in the morning, at which time A.H. would stay with his maternal grandmother, where respondent would pick him up after work. Petitioner's work hours were from 11:30 a.m. until 8:30 p.m. By working the night shift, petitioner earned an additional 10% wage differential. A.H. was to alternate weekends between the parties. There was to be "no physical contact between the parties" during the exchange of the parties' son.

On July 10, 2009, respondent filed a motion to reconsider, alleging that while an altercation did occur between the parties, petitioner was the instigator and respondent acted in self-defense. The record does not reflect that the motion was heard; however, the record is clear that the plenary order of protection expired on September 10, 2009, and the order of

protection was not extended beyond that date.

On September 10, 2009, a new order concerning custody was entered to reflect the realities of the school year. Once again, respondent was given physical custody of A.H. Monday through Thursday from after he got off work until 8 p.m., when petitioner was to pick him up at respondent's apartment. Respondent was to pick A.H. up from an after-school latchkey program that was set up by respondent and paid for by him. Alternate weekend custody of A.H. was continued.

On July 19, 2010, a hearing was held on the petition for the dissolution of the marriage. Petitioner testified that she has a loving relationship with A.H., she participates in his school activities, she has signed him up for extracurricular activities such as baseball, and she has taken him on vacations. She testified that she is financially responsible for all of A.H.'s expenses and that respondent has not paid anything toward the maintenance of A.H. during the parties' separation. She testified that respondent is not one of A.H.'s baseball coaches. She testified that A.H. is having trouble in school and that she pays for a tutor. Petitioner stated that if awarded custody, she could change her work hours to 9 a.m. to 5:30 p.m. in order to be able to take A.H. to school and pick him up from the latchkey program.

She also testified that A.H. is doing so poorly in school that he would be held back to repeat fifth grade. She stated that she learned in April 2010 that he was doing badly, at which time she got her mother involved to help in tutoring. Petitioner's mother is a teacher. She testified that respondent did not help A.H. with his homework. Petitioner unilaterally changed the terms of the visitation schedule and had her mother pick up A.H. and tutor him after school because respondent was not helping him.

Petitioner further testified that A.H. has his own room at her house, a backyard with a trampoline and a swimming pool, and is allowed to have his friends over to play and spend the night. She said that respondent lives in an apartment on the opposite end of town but that

she was willing to give him a house in Cahokia that she owns. Petitioner testified that after the parties separated, she was left with several bills and was forced to pay for them herself. Petitioner is concerned about respondent's proclivity toward violence and does not think that is a good environment for A.H.

Petitioner testified that there was a restraining order which was still in force. Petitioner was adamant that she was given a two-year order of protection; however, the record does not support petitioner's allegations in this regard. The trial court took judicial notice that the order of protection had expired.

Petitioner testified that she has not done anything intended to frustrate respondent's visitation, and she discussed that she took care of respondent while he was ill and lost his leg. She testified that she has been solely responsible for the finances pertaining to the marital residence and has paid for all of A.H.'s expenses since the parties separated.

On cross-examination, petitioner admitted that she works 11:30 a.m. to 8 p.m. She said she has still somehow managed to attend A.H.'s baseball games. Petitioner then testified that she has never seen respondent coach her son's team, but then she admitted that respondent is a base coach. She admitted that respondent has helped the coach with the team. She also admitted that respondent participated in field trips with his son up until July 2009 when an order of protection was entered. She admitted that she never had a conversation with respondent concerning A.H. being held back in school. She said she never talked to him because she thought there was an order of protection in place, "so [she] was not communicating with [respondent]." She further admitted that report cards were sent to her house and not the apartment where respondent resides. She never gave respondent a copy of the report cards. Respondent's counsel showed petitioner a copy of a letter from A.H.'s school district which said that respondent took A.H. to tutoring classes during the 2008-09 school year.

Petitioner was questioned about her unilateral decision to change the visitation so that

her mother and someone else could tutor A.H. Beginning in April 2010, petitioner had her mother pick up A.H. from latchkey so he could be tutored. Despite this tutoring, A.H. still failed the majority of his classes. In fact, none of his grades got any better as a result of the tutoring and A.H. was required to repeat fifth grade. Respondent's counsel also pointed out that petitioner told the court on several occasions that she could change her work hours to better accommodate her son's school schedule but that despite promises to make the change, she has yet to do so. Petitioner testified that she did not make the change to her work hours because she needed extra money–she was in arrears on many bills. Respondent's attorney pointed out that the guardian *ad litem*'s initial report, issued a year previously, stated that he was recommending that custody go to respondent in large part because of petitioner's work hours. Petitioner admitted that she saw the report but still did not change her hours.

On cross-examination, petitioner further admitted that her offer to give respondent a house in Cahokia was virtually useless, because a payment had not been made on the house in more than a year and, in all likelihood, it could not be saved from foreclosure. Petitioner further admitted that the two domestic battery charges, one in 2004 and one in 2009, filed against respondent during the parties' marriage had been dismissed.

Petitioner testified that A.H. was very embarrassed about being held back, and she admitted that if A.H. goes to school in the district in which respondent lives, his friends will not know he was held back. On cross-examination, respondent's attorney pointed out that A.H.'s first quarter grades were not good. A.H. got an F in English, reading, and science, along with a D in social studies. Despite these poor grades, petitioner did not change her work hours.

Respondent testified that he has health problems which caused him to lose his leg below the knee. He received health care coverage through petitioner, and he has recovered. According to respondent there were times during the marriage when petitioner did not come

home in the evening but stayed out all night. Respondent said petitioner refused to communicate with him after he moved out of the marital residence. He testified that he did not pick up A.H. on the Fourth of July as planned because he had a Masonic convention. He said he asked A.H. to relay this information to petitioner because petitioner would not communicate with him.

Respondent testified he is a good father and has taken care of his son. He said he has nothing against petitioner but believes he would make a better custodial parent because he is there for his son. He testified that he was unaware that A.H. was struggling in school. He said prior to fifth grade, A.H. was "doing okay" and that during his fifth grade year petitioner did not communicate to respondent that A.H. was having difficulties. He said he never received copies of A.H.'s progress reports. He said he asked A.H. about report cards, but A.H. reported that those were sent to the marital residence. He said he was not aware there was a problem until April when petitioner called him and said her mother was going to start picking A.H. up from school.

He testified that when A.H. was sick, he called petitioner and she told him to go to Walgreens and pick up some medicine, which he did. He said that A.H. went to the hospital for a fever right after he left the marital home. A.H. had a fever of 103 degrees. Petitioner called him to let him know that A.H. was in the hospital, and he immediately went to the hospital and stayed there with his son all night.

Respondent testified that he has been living in an apartment on the east side of Belleville for more than a year. He works approximately 32 hours per week and has earned a little more than $15,000 during the first half of the year. He testified that it was fine with him if petitioner kept the marital residence. He was not seeking maintenance. He asked for some pieces of personal property.

Respondent was shown a copy of his son's report card. He had not seen it before. He

was shocked by the grades. He said he had taken A.H. to tutoring in the past, but A.H. had always been able to receive passing grades until fifth grade.

Respondent testified that around the time the petition for dissolution was filed, petitioner became more frequently absent from the home. There were many times when petitioner did not come home at night, and respondent took care of A.H. and had to get up in the morning and go to work at 5 a.m.

Respondent agreed that he had conversations with petitioner's mother regarding A.H.'s struggles in school but said that she had not talked to him about it in the previous year, nor had petitioner. Respondent testified that after the visitation order went into effect on July 2, 2009, whereby he was to pick up A.H. at petitioner's mother's home, A.H. was not available to him the very next day. When he went to the house to pick up A.H., no one was home. During July and August 2009, this occurred six other times. On one occasion, A.H. was present, but respondent was not allowed to take him. The situation improved when school started and respondent picked up A.H. from the latchkey program. Everything was fine until April when petitioner called him and told him that her mother was going to pick A.H. up from school regardless of what the court order said. Respondent did not approve of the plan and talked to his lawyer about it. Because there was to be a hearing in the near future, respondent and his attorney decided to address the matter at that time.

Respondent testified that he never has done anything to interfere with petitioner's visitation with A.H. and that he has done everything the court ordered. He agreed that he missed the Fourth of July visitation because of a Masonic convention. He tried to call A.H. on Saturday to pick him up for three days, but he could not contact A.H. by phone. He testified that he has had repeated problems attempting to reach A.H. by phone because A.H.'s phone is never turned on. Respondent testified that he received a text from his son's cell phone about money for fireworks. He immediately called A.H., who was so happy to hear

from him that respondent knew A.H. had not sent the text. He said petitioner grabbed the phone from A.H. and said, "[T]ell your dad we don't need his F-ing fireworks or his money, we're barbecuing anyway." Respondent testified that he then heard A.H. asking to talk to him but that petitioner hung up the phone.

Respondent testified that even though petitioner agreed to change her work schedule to accommodate A.H., that has not happened, and he does not believe that it ever will happen. Respondent agreed that the visitation schedule in place at the time of the hearing was not in A.H.'s best interest. Respondent believes that A.H. should live with him, and he stated: "[H]e can see her everyday if he like[s]. You know, I mean, I'm not going to keep him away from his mother." Respondent said he has always been the base coach for A.H.'s team. He said that they play miniature golf and catch, watch movies, and order pizza and that he helps A.H. with his homework. Respondent testified that his current work hours are 7 a.m. to 3:30 p.m.

Donna Scott, petitioner's mother, testified that she is a special education teacher and has been for 31 years. In April, she started helping A.H. with his homework after school and hired a tutor to help him on Saturdays. She said that A.H. had been having ongoing problems in school and that she talked to respondent about it to try to get him to help A.H. with his homework. She said petitioner called respondent and told him she was going to start helping A.H. after school. She was asked why she did not go to respondent's house to help A.H. instead of changing the court order unilaterally, and she replied: "You know, I didn't think about it. I could have done that." She said she wished she had thought of that because she would not have minded going to respondent's apartment to tutor her grandson there.

A letter from A.H.'s school indicating that A.H. was required to repeat fifth grade was entered into evidence.

The guardian *ad litem* testified that he provided a preliminary report on September 3,

2009, and has followed up periodically with the file. He testified that respondent contacted him in April when petitioner stopped allowing visitation, at which time he contacted the school and requested full records, including daily updates with regards to tests and homework. He reviewed those documents and spoke with both parties prior to the hearing. The guardian *ad litem*'s initial recommendation on September 3, 2009, was to give respondent primary custody, and he has not changed his recommendation from that time. He believes that while both parties love A.H., petitioner's work hours and failure to change those work hours indicate that it would be better for respondent to have custody. He specifically stated that petitioner's failure to change her work hours "goes a long way with regards to what–who's making the best decisions for the minor child."

The guardian *ad litem* testified that joint parenting is not feasible given the parties' history. He said he never directly asked A.H. about whom he wished to have custody, because he felt A.H. was too young to make that determination. With regard to violence, he testified that there is no definitive evidence of violence and that he does not believe "that anything rose to the level of endangering the child." With regard to A.H.'s relationship with friends and family, the guardian *ad litem* pointed out that A.H. does have a lot of friends at school but that given the fact that A.H. has failed fifth grade, he will potentially face ridicule. The guardian *ad litem* testified that if he goes to school on the east end of town where respondent lives, that potential problem would be solved. Also, the guardian *ad litem* believes that A.H. is young enough that he will make new friends and his family relationships will not change, and he believes that those relationships will be maintained no matter what the custody or visitation schedule.

The guardian *ad litem* has "some concerns that mom has interfered" with respondent's relationship with A.H. He believes that by making respondent the custodial parent, there is a better chance that he will help A.H. facilitate a relationship with petitioner. He does not

believe that making petitioner the custodial parent would help A.H. facilitate a relationship with respondent.

The guardian *ad litem* admitted that he did not visit the home of either party. He did not recall A.H. ever telling him directly which party he would prefer to live with. He recalled the following from the beginning of his investigation: "I had quite a bit of problems in getting some cooperation from [petitioner]. And in fact I had to throw together–rearrange my schedule quite substantially to get to visit with several of her witnesses." However, he testified that both parties cooperated enough for him to finish his report, and he was not unduly influenced by the cooperation problems with petitioner.

The guardian *ad litem* testified that even if respondent was formally charged with domestic battery with regard to the past incident, it would not have any bearing on his findings, because the alleged altercation does not affect the ability of either party to be the custodial parent and he does not believe there is any risk of child abuse.

Petitioner took the stand again and reiterated her willingness to change her work schedule. She said she was in financial straits and needed the night differential, but she stated "Now that I know that my son needs me more than ever, I am willing to give up that extra money and be there for my son."

After hearing all the evidence, the trial court awarded sole custody to respondent with alternating weekend visitation to petitioner. Petitioner was ordered to pay $800 per month in child support. The trial court also awarded petitioner visitation every Wednesday after work until Thursday morning, along with two two-week periods of summer visitation, plus holidays. On September 2, 2010, petitioner filed a motion to reconsider and reopen evidence, which the trial court denied. Petitioner filed a timely notice of appeal.

ANALYSIS

The main issue in this appeal is whether the trial court's decision to grant the sole custody of A.H. to respondent is against the manifest weight of the evidence. Petitioner argues that the evidence is undisputed that she has been the primary caretaker and "go to" parent for A.H. and that respondent is unable to provide stability, financial support, and day-to-day medical support and is unable to address A.H.'s problems in school. Petitioner also contends that the trial court failed to take into consideration respondent's propensity toward violence. Petitioner asserts that the trial court's decision is an abuse of discretion and not in A.H.'s best interest. After a careful consideration of the record, we disagree.

Section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) directs that the best interest of the child be considered in any child custody determination, stating as follows:

"§602. Best Interest of Child.

(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to 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; and

(9) whether one of the parents is a sex offender." 750 ILCS 5/602(a) (West 2008).

In cases concerning custody issues, there is a strong presumption in favor of the result reached by the trial court, and its discretion will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. *In re Marriage of Jerome*, 255 Ill. App. 3d 374, 396, 625 N.E.2d 1195, 1212 (1994).

We are not to substitute our discretion for that of the trial court and will find an abuse of discretion only in cases in which the trial court "acted arbitrarily without conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial injustice resulted." *In re Marriage of Suriano*, 324 Ill. App. 3d 839, 846, 756 N.E.2d 382, 388 (2001). For a finding to be against the manifest weight of the evidence, the opposite result must be clearly evident. *In re J.P.*, 261 Ill. App. 3d 165, 174, 633 N.E.2d 27, 34 (1994). The strong and compelling presumption favoring the result reached by the trial court exists because the trial court is in a better position than the reviewing court to judge the credibility of the witnesses and the needs of the children. *In re Marriage of Stopher*, 328 Ill. App. 3d 1037, 1041, 767 N.E.2d 925, 928 (2002); *In re Marriage of Williams*, 205 Ill. App. 3d 613, 618-19, 563 N.E.2d 1195, 1199 (1990). Here, we cannot say that the result reached by the trial court was against the manifest weight of the evidence.

A review of the best-interest factors under section 602(a) of the Act does not weigh heavily in petitioner's favor. While it is clear that petitioner provided almost all the financial

support for A.H., which we applaud, we point out that respondent is employed and was on track to make approximately $30,000 in 2010. Respondent's salary, along with the $800 in child support awarded by the trial court, gives respondent the ability to financially support his son. Moreover, petitioner knew for almost a year that the guardian *ad litem*'s initial recommendation was to give sole custody to respondent, mainly because of petitioner's work hours. Petitioner told anyone who would listen that she was willing to change her work hours, but she failed to do so despite the extended period of time between the initial recommendation and the actual hearing.

The record also reveals that respondent wants to be and is an involved parent who loves his son but that petitioner is unwilling to facilitate and encourage a close and continuing relationship between respondent and A.H. See 750 ILCS 5/605(8) (West 2008). The record reveals that petitioner frustrated visitation between respondent and A.H. and unilaterally changed the visitation schedule. While petitioner argued that she only did this in order to have her mother tutor A.H., even her mother recognized that the tutoring could have taken place at respondent's home. The guardian *ad litem* succinctly stated that if the trial court was to make respondent the custodial parent, there was a better chance that he would help facilitate a relationship between petitioner and A.H. but that it would not be that way if petitioner was named the custodial parent.

As to petitioner's claim that respondent failed to monitor or assist A.H. with his homework, which caused A.H. to have problems in school, we point out that even after petitioner unilaterally decided to have her mother tutor A.H., this intervention did not help. A.H. is being forced to repeat fifth grade. Thus, the record reflects that A.H.'s problems cannot be solely attributable to respondent being unwilling or unable to assist A.H. Moreover, we point out that a letter from the school was introduced into evidence showing that respondent took his son for tutoring. Unfortunately, the tutoring was discontinued by

the district, but this letter shows a definite willingness on the part of respondent to be of assistance to A.H. There are many factors involved in A.H.'s academic struggles, including the fact that there has been a complete breakdown in communication between the parties. The record shows that petitioner has left respondent out of the loop with regard to his son's problems in school. By repeating fifth grade in a different school where respondent resides, A.H. may be able to avoid ridicule by his classmates, which the trial court also took into consideration in making its custody determination.

With regard to the allegations of violence, the record reveals that no violence was ever directed against A.H. All the charges against respondent had been dismissed, and despite petitioner's assertions to the contrary, there was not an order of protection in force at the time of the hearing. The guardian *ad litem* opined that even if the State should charge respondent with domestic battery for a past incident, it would not change his opinion concerning guardianship.

Finally, our own review of the record indicates that petitioner lacked credibility on several matters. First, for example, petitioner was adamant that an order of protection was still in force, but the record revealed that the order expired. Second, petitioner asserted that respondent was not a coach of A.H.'s baseball team but was later forced to admit he was a base coach and had assisted the coach of the team in prior years. Third, petitioner asserted on numerous occasions that she was willing to change her work hours to better accommodate A.H.'s schedule, but she failed to change her hours despite the extended period of time this case was pending. Based upon the record before us, we cannot say that the trial court's decision to grant sole custody to respondent was against the manifest weight of the evidence, because the opposite finding is not clearly evident.

The other issue raised in this appeal is whether the trial court's denial of petitioner's motion to reconsider and reopen evidence was in error. Petitioner contends that the trial

court failed to properly consider the evidence as it pertained to sections 602(a)(3), (a)(6), and (a)(7) and that upon a reconsideration of the evidence the trial court would have reversed its custody ruling and awarded sole custody to petitioner rather than respondent. We disagree.

The granting of a motion to reconsider and reopen evidence lies within the sound discretion of the trial court. *In re Marriage of Herrin*, 262 Ill. App. 3d 573, 579, 634 N.E.2d 1168, 1172 (1994). Here, the trial court did not abuse its discretion in denying the motion.

In the motion, petitioner argued that the section 602(a) factors show that awarding sole custody to respondent was against the manifest weight of the evidence. In our analysis on the first issue, we thoroughly discussed the reasons why the trial court's custody determination was not against the manifest weight of the evidence, and there is no need to repeat that analysis here. Suffice it to say, there is sufficient evidence in the record to support the trial court's finding that giving respondent sole custody was in A.H.'s best interest.

The only new evidence offered in the motion was an allegation that the State had reissued charges with regard to allegations of domestic abuse by respondent against petitioner stemming from the June 2009 incident. A copy of the alleged charges was not attached. Even assuming, *arguendo*, that charges were reissued, we disagree that this would be a cause for a reversal. At the time the trial court made its custody determination, it was well aware of the allegations of abuse; however, as the guardian *ad litem* pointed out, there were no allegations that respondent has ever directed any violence toward A.H. Furthermore, in denying the motion to reconsider and reopen the evidence, the trial court specifically stated that it had considered all the relevant section 602(a) factors and the best interest of the child. Under these circumstances, we cannot say the trial court abused its discretion in denying petitioner's motion.

For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

Affirmed.