2014 IL App (5th) 130260-U

NO. 5-13-0260

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
ELIZABETH M. ROY,	)	St. Clair County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 09-D-499
	)	
PATRICK D. ROY,	)	Honorable
	)	Zina R. Cruse,
Respondent-Appellee.	)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Stewart and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: No appellate jurisdiction to review the circuit court's judgment, which is not final and appealable, with the exception of the issue of custody, which is reviewable pursuant to Illinois Supreme Court Rule 304(b)(6) (eff. Feb. 26, 2010), and the issue of substitution of judge, which is reviewable on the basis that an erroneous refusal of a proper request for substitution of judge would void the subsequent custody determination. Denial of motion for substitution of judge for cause affirmed where the same was not against the manifest weight of the evidence. Award of joint custody reversed where the same was against the manifest weight of the evidence. Cause remanded for further proceedings to make sole custody determination.

¶ 2 The petitioner, Elizabeth M. Roy, appeals the June 17, 2011, order of the circuit court of St. Clair County that denied her motion to disqualify the Honorable Zina R.

Cruse for cause, and the April 29, 2013, supplemental judgment of dissolution of marriage that awarded joint custody of the parties' children to her and the respondent, Patrick D. Roy, made certain dispositions of marital property and debts, and found the parties had previously entered into a settlement agreement. We lack appellate jurisdiction to review this appeal because the judgment is not final and appealable, with the exception of the issue of custody, which is appealable under Illinois Supreme Court Rule 304(b)(6) (eff. Feb. 2, 2010), and the issue of substitution of judge, which is reviewable on the basis that an erroneous refusal of a proper request for substitution of judge would render void the subsequent custody determination. For the following reasons, we affirm the denial of the motion for substitution of judge for cause, and we reverse the circuit court's award of joint custody and remand for further proceedings to make a determination of sole custody.

¶ 3 PROCEDURAL HISTORY

¶ 4 This is a malicious divorce case which has been complicated by contention not only between the parties, but also between opposing counsel. When the supplemental judgment of dissolution of marriage was entered, the circuit court noted that there had been at least 21 temporary orders, 20 motions for contempt, numerous motions to amend the temporary orders, motions for sanctions, motions relative to discovery compliance, motions for joinder, motions to intervene, at least five petitions for injunctive and/or declaratory relief, and petitions to disqualify both the trial judge and the respondent's counsel. This case has involved a guardian *ad litem*, a mediator, a best-interest evaluator pursuant to section 604.5 of the Illinois Marriage and Dissolution of Marriage Act (750

ILCS 5/604.5 (West 2012)), and a licensed clinical social worker. As so aptly emphasized by the circuit court, the parties' behavior seemed to shift from focusing on the best interests of the children to competing in a battle of wills and legal strategic stamina against each other. Hostility between opposing counsel has only further exacerbated the bitter and chaotic climate of this case.

¶ 5 The parties filed numerous additional motions in this court on appeal. These include but are not limited to a motion for leave to file suggestions in support of the notice of appeal, a motion to stay the supplemental judgment of dissolution and the response thereto, a motion to take a discovery deposition regarding a separate motion for attorney fees on appeal and the response thereto, a motion to supplement the supplemental record on appeal and the response thereto, motions for extension of time to file briefs, and a motion to continue oral argument. In addition, on June 14, 2013, Elizabeth filed a motion, requesting the permission of this court to take the children on a summer cruise, which was stricken by this court on June 28, 2013, as we are proscribed from exercising original jurisdiction except in aid of existing appellate jurisdiction. Ill. Const. 1970, art. VI, § 6.

¶ 6 On July 19, 2013, this court entered an order holding the appeal in abeyance due to a pending posttrial motion that Elizabeth had filed in the circuit court on May 17, 2013. The circuit court denied the posttrial motion on October 14, 2013, Elizabeth filed an amended notice of appeal on October 22, 2013, and this court entered an order reinstating the appeal on October 24, 2013. Despite our June 28, 2013, order, on February 18, 2014, Elizabeth filed another motion, requesting the permission of this court

to take her children on a vacation to Europe. On February 27, 2014, Patrick filed a motion to strike Elizabeth's motion, along with a motion for sanctions. We entered an order on March 5, 2014, striking Elizabeth's motion as another improper attempt to invoke the original jurisdiction of this court. Patrick's motion for sanctions was taken with the case.

¶ 7 Additional motions taken with the case are as follows. On April 24, 2014, Elizabeth filed "Petitioner's Motion to Strike Improper Matters From Response Brief of Respondent/Appellee Patrick Roy." On April 30, 2014, Patrick filed a response to that motion. On May 8, 2014, Elizabeth filed "Petitioner's Motion to Strike Respondent/Appellee's [4/30/14] Response to Petitioner's [4/24/14] Motion to Strike Improper Matters From Response Brief of Respondent/Appellee Patrick Roy." On May 19, 2014, Patrick filed "Respondent-Appellee's Response to Petitioner's [5/8/14] Motion to Strike Respondent/Appellee's Response to Petitioner's Motion to Strike Improper Matters From Response Brief of Respondent/Appellee Patrick Roy." We find these motions to be a continuation from the circuit court of the scheme of the parties and their counsel to harass each other, which is an abuse of the time and resources of this court. We refuse to provide a forum for such insolence to continue and accordingly deny all pending motions.

¶ 8 Because this appeal was held in abeyance, a new timetable was put into place after the appeal was reinstated. Pursuant to that new timetable, under Supreme Court Rule 311(a)(5) (eff. Feb. 26, 2010), this court was to issue its decision by March 23, 2014 (150 days after the reinstatement of the appeal). However, the disposition is being issued

after the deadline for good cause, due to the motion traffic occurring after the appeal was reinstated.

¶ 9 APPELLATE JURISDICTION

¶ 10 At the outset, we note that neither party raised the issue of jurisdiction in this appeal. However, we have a duty to consider our own jurisdiction, regardless of whether the issue was raised by the parties. See *In re Marriage of Thomas*, 213 Ill. App. 3d 1073, 1074 (1991). "Supreme Court Rule 301 [citation] generally provides that this court has jurisdiction over a timely appeal from a final judgment." *Id*. "An order will be classified as final when it terminates the litigation on the merits of the case so that, if affirmed, the trial court has only to proceed with execution of the judgment." *Id*. "In general, a petition for dissolution is not fully adjudicated until all of the issues, *i.e.*, grounds, child custody, child support, maintenance, and property distribution, are resolved." *Id*.

¶ 11 In the case at bar, the circuit court did not enter a final judgment pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994), because it failed to dispose of all the property. Specifically, in paragraph 23 of the supplemental judgment of dissolution, the circuit court found that "[s]ince the marital residence cannot be sold due to the cloud on the title, the marital residence *should* be awarded to [Elizabeth] with an equity award to [Patrick]." (Emphasis added.) However, the circuit court did not specifically order the house awarded to Elizabeth. Moreover, the circuit court reserved the issue of the valuation and disposition of the equity of the marital home and ordered the parties to submit appraisals of the home so such a determination could be made, thereby rendering its judgment not final and appealable.

¶ 12 We note that "courts have carved out narrow exceptions for finding dissolution of marriage orders final and appealable even though ancillary issues are reserved." *In re Marriage of Susman*, 2012 IL App (1st) 112068, ¶ 14. "The exceptions usually involve unique and compelling circumstances, where reserved issues cannot be easily resolved, or public policy concerns." *Id.* Such exceptions do not apply here. The circuit court reserved ruling on the allocation of equity on the marital home until appraisals could be conducted. This is hardly a compelling circumstance, nor do public policy concerns exist that would justify an exception to our jurisdictional rules in this circumstance. Accordingly, the supplemental judgment of dissolution was not final and appealable for purposes of conferring jurisdiction on this court.

¶ 13 As such, our jurisdiction is dependent on the applicable supreme court rules providing for interlocutory appeals. Illinois Supreme Court Rule 304(b)(6) (eff. Feb. 26, 2010) provides that a custody judgment is immediately appealable without a special finding notwithstanding the fact that it does not dispose of an entire proceeding. Accordingly, we have jurisdiction on this basis to review the issue of custody. No such rule allows for an interlocutory appeal of an order dividing marital property, an order finding the existence of a settlement agreement, or an order denying a motion for substitution of judge. However, the scope of our review of the custody determination is to review any prior order that bears directly upon the question of whether the custody determination is proper. See *Sarah Bush Lincoln Health Center v. Berlin*, 268 Ill. App. 3d 184, 187 (1994). Such is the case with the motion for substitution of judge. "The importance of a proper ruling on a motion for substitution of judge is so great that some

courts have held that the wrongful refusal of a proper request for substitution of judge renders all subsequent orders by that judge entered in the case void." *Id*. Accordingly, we grant review of the issue of substitution of judge on this basis.

¶ 14 FACTS

¶ 15 The facts necessary for our disposition of the issues over which we have appellate jurisdiction are as follows. The parties were married on July 19, 1997. Children were born to the parties on December 13, 1997, and September 4, 2000. On June 18, 2009, Elizabeth filed, *inter alia*, a petition for dissolution of the marriage. Patrick filed a counterpetition for dissolution on July 10, 2009, and the circuit court subsequently appointed a guardian *ad litem* (GAL). On July 31, 2009, the circuit court entered an agreed order, wherein the parties agreed, *inter alia*, that the children would reside with Elizabeth in the marital home, with a final custody determination reserved until the GAL could make a recommendation to that regard.

¶ 16 Also pursuant to the agreed order, the parties were forbidden to communicate with each other, except in the case of an emergency involving the children. Patrick was awarded visitation and was ordered to pay temporary child support to Elizabeth. On October 2, 2009, the GAL filed a motion for evaluation, pursuant to section 604.5 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/604.5 (West 2008)), for the appointment of Dr. Daniel Cuneo to conduct an evaluation of the best interests of the children. In the motion, the GAL reported that the issues of custody and/or visitation were "highly contentious matters in this case" and that mediation was unsuccessful. The circuit court granted the motion for evaluation.

¶ 17 Meanwhile, Patrick and Elizabeth filed motions to modify the agreed order on October 20, 2009, and November 5, 2009, respectively, each alleging that the other was not abiding by the terms. On December 16, 2009, the circuit court entered a temporary order that, *inter alia*, granted temporary sole custody of the children to Elizabeth, pursuant to the interim recommendation of the GAL and subject to the reasonable and liberal visitation rights of Patrick. Over the course of the following year, the circuit court entered several orders regarding scheduling, visitation, mediation, and tax refunds, and the parties filed an outrageous number of motions back and forth, including but not limited to motions to compel, motions for contempt, motions for sanctions, motions to suspend visitation, and motions to modify the temporary order of December 16, 2009.

¶ 18 On November 16, 2010, the circuit court entered a mediation order to resolve issues of custody and visitation, and removed the case from the trial docket. This resulted in an alternative dispute resolution settlement agreement between the parties, which was filed on November 24, 2010. The settlement agreement addressed retirement pensions, maintenance, divisions of certain property, education funds for the children, and health insurance, but did not address custody or visitation. A subsequent order was entered on December 1, 2010, scheduling a case management conference and directing the parties to complete custody mediation as previously ordered. Mediation was attempted on December 29, 2010, but was terminated without an agreement. The mediator reported that further mediation would not be beneficial.

¶ 19 The pleadings filed in 2011 essentially mimic those of 2010, with regard to the huge number of motions and responses filed between the parties and a dozen orders

entered by the circuit court. In particular, on June 16, 2011, Elizabeth's counsel (Melroy Hutnick) filed a motion to disqualify circuit judge Zina R. Cruse, for cause, alleging certain statements she made in a hearing on June 16, 2011, showed bias so substantial that it would be impossible for Elizabeth to receive a fair and impartial trial. After a hearing, the motion to disqualify was denied in a 17-page written order entered by circuit judge Ellen Dauber on June 17, 2011, the specifics of which will be discussed as necessary in our analysis of the corresponding issue on appeal.

¶ 20 The parties continued to exchange countless motions and responses in 2012, and the circuit court entered over a dozen additional orders. A judgment of dissolution of the marriage was declared and entered on April 24, 2012, and a supplemental judgment of dissolution was entered on April 29, 2013. Attached to the supplemental judgment was a joint parenting order, in which the circuit court, *inter alia*, awarded joint custody of the children to the parties and designated Elizabeth as the primary residential custodian. Elizabeth filed a timely, amended notice of appeal.

¶ 21 ANALYSIS

¶ 22 As previously discussed, the issues over which we have jurisdiction are: (1) whether the circuit court erred by denying Elizabeth's motion for substitution of judge for cause; and (2) whether the circuit court erred by awarding the parties joint custody of the children.

¶ 23 I. Substitution of Judge

¶ 24 The first issue on appeal is whether the trial court erred in denying Elizabeth's motion for substitution of judge for cause, pursuant to section 2-1001(a)(3) of the Illinois

Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(3) (West 2010)). A party requesting a substitution of judge for cause bears the burden of establishing actual prejudice, hostility, ill will, or distrust towards him or her to prevail on their motion. *People v. Patterson*, 192 Ill. 2d 93, 131 (2000). " 'Proving prejudice so as to justify a substitution for cause is a heavy burden and the conclusion of prejudice will not be made lightly.' " *In re Marriage of O'Brien*, 393 Ill. App. 3d 364, 373 (2009) (quoting *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 340 (2001)). Impartiality on the part of a trial judge is presumed (*id.*), and the requesting party has the burden of showing that any prejudice stemmed from an extrajudicial source and resulted in an opinion on the merits on some basis other than what the judge learned from participation in the case. *People v. Melka*, 319 Ill. App. 3d 431, 442 (2000). A reviewing court will only disturb the trial court's ruling on a motion to substitute judge if it is against the manifest weight of the evidence. *In re Marriage of O'Brien*, 393 Ill. App. 3d at 373. A finding is against the manifest weight of the evidence when an opposite conclusion is clearly apparent from the record. *People v. Rozela*, 345 Ill. App. 3d 217, 222 (2003).

¶ 25 In this case, Elizabeth's counsel, Melroy Hutnick, alleged in the June 16, 2011, motion for substitution of judge for cause that his interpretation of a certain exchange occurring in chambers on that date indicated that Judge Cruse accused him of being a bigot. Accordingly, Hutnick averred that Elizabeth would not receive a fair trial if Judge Cruse continued to preside.

¶ 26 In her brief regarding this issue on appeal, Elizabeth additionally argues that certain rulings of the circuit court made throughout the case, as well as in the

supplemental judgment of dissolution, are erroneous, have no supporting evidence, and are rooted in bias. Illinois law holds that a trial judge's ruling on an evidentiary issue is not a valid basis for substitution for cause. See *In re Marriage of O'Brien*, 393 Ill. App. 3d at 380. Indeed, even erroneous rulings are not sufficient bases for substitution. See *id*. We find Elizabeth's arguments to be no more than challenges to evidentiary rulings and reiterations of the issues over which we have no jurisdiction. For purposes of our analysis here, we focus solely on the alleged basis of the bias, which is Hutnick's allegation that Judge Cruse accused him of bigotry.

¶ 27 The only evidence offered to support the motion for substitution of judge for cause is Hutnick's affidavit, which is attached to the motion. Judge Ellen Dauber was appointed as required by section 2-1001(a)(3) of the Code (735 ILCS 5/2-1001(a)(3) (West 2010)), and although argument was heard before Judge Dauber, no sworn testimony was presented. As stated at the hearing on the motion, an audio-recorded transcript of the in-chambers exchange was reviewed by Judge Dauber, but that recording is not a part of the record on appeal. It is well established that if the record on appeal is incomplete, we presume the circuit court's order had a sufficient factual basis and was in conformity with the law. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Moreover, any doubts arising from an incomplete record are resolved against the appellant. See *id*.

¶ 28 Hutnick alleged in his affidavit that Judge Cruse stated in chambers that she either was going to change the custody and visitation arrangement on her own motion or was inclined to do so. Hutnick allegedly responded that she could not do so on her own

without an evidentiary hearing. As reflected in the transcript of the June 16, 2011, proceedings (transcript) at which Judge Cruse presided, Hutnick made an oral motion to substitute Judge Cruse for cause at the outset, but she refused to stop the proceedings because she had not made any rulings and she required him to submit the motion in writing. Hutnick further alleged in his affidavit that there was a brief recess and during that time in chambers, Judge Cruse accused him of being unprofessional and that he had never respected her as a judge. Hutnick stated that he had disqualified Judge Cruse as a matter of right in all of his past cases, and he alleged that she was now holding that against him and accusing him of showing her no respect. He stated that it was not until they returned to the courtroom that he came to the conclusion that he was being accused of being a bigot.

¶ 29 The transcript of June 16, 2011, reflects the following exchange between Hutnick and Judge Cruse, subsequent to the recess in chambers:

> "MR. HUTNICK: But I've just been accused by the Court of unprofessional conduct and I've been accused by the Court of never having any respect for you as a judge. I am stunned. I am–
>
> THE COURT: What is it that you're–what are you–go ahead and get to the bottom line so–we've been holding up this proceeding too much this morning. I–you know what, I can tell you that in my life I have been disrespected. I have gone through I can't even tell you things that would probably blow your mind but because of the type of person I am I know exactly how to do my job, how to continue. You're not the first person–if you do disrespect me you certainly aren't

the first and probably won't be the last. So are you asking for some relief that I need to address or can we move forward?

MR. HUTNICK: I'm going to assume, Your Honor–well, again I'm asking for disqualification on cause–

THE COURT: Okay.

MR. HUTNICK: –on that basis alone.

THE COURT: Go ahead and write it up and I guess sometime over–maybe you can get it in over lunch.

MR. HUTNICK: That is physically impossible for me to do that over lunch. And I'm asking for leave for time to file both motions; one on the first matter. Now the Court having accused me of what I have been accused of I think I am entitled to a reasonable amount of time to prepare something and have it on file otherwise we're proceeding with a case in which I believe the Court because of its feelings toward me personally–

THE COURT: You don't know my feelings towards you.

MR. HUTNICK: Well, to be called–for the Court to accuse me of being unprofessional–

THE COURT: I actually have none. I think you're a lawyer. So far you're a good lawyer. That holds in my opinion.

MR. HUTNICK: And for the Court to say that I have no respect for it I think speaks volumes and loudly. I have never–

THE COURT: For the Court to say that you've shown no respect, counsel?

MR. HUTNICK: For you as a judge.

THE COURT: Okay. So what's your motion?

MR. HUTNICK: I'm going to move for a recess to reconvene at 1:00 so I can prepare written motions on all of this so we can have it on file.

THE COURT: The motion is denied. Now call your–finish–Ms. Roy, come on and take the stand.

MR. HUTNICK: Well, of course, Your Honor, so that the record is clear we're objecting to have to continue to proceed under the circumstances.

THE COURT: Okay. Thank you."

¶ 30 Hutnick alleged in his affidavit that he interpreted the foregoing exchange to mean that he was being accused of being a bigot because he had disqualified Judge Cruse not for any legitimate reason but because of race. He further alleged that Judge Cruse was retaliating against him for prior disqualifications. We find nothing to support Hutnick's contentions. As the record reflects, Judge Cruse said "*if* you do disrespect me." (Emphasis added.) Moreover, in response to Hutnick's statement regarding her feelings toward him, Judge Cruse stated: "I actually have none. I think you're a lawyer. So far you're a good lawyer. That holds in my opinion." Judge Dauber's order found, and we agree, that Judge Cruse's comments did not show animosity, ill will, hostility, or distrust toward Hutnick, nor do we interpret the comments to imply bigotry on the part of Hutnick.

¶ 31 The above analysis is based on the principle that actual prejudice is required to merit a substitution of judge for cause. However, when a motion for substitution of judge

is made on the basis of an alleged violation of Illinois Supreme Court Rule 63(C)(1) (eff. April 1, 2003), which requires a judge to disqualify herself for an appearance of impropriety, the movant need not show actual prejudice, but must only show "that an objective, reasonable person would conclude that the judge's impartiality might reasonably be questioned." *In re Marriage of O'Brien*, 393 Ill. App. 3d at 374. We find this standard does not apply here, as Hutnick's motion was not made on the basis of that rule, although he argues this standard in Elizabeth's brief on appeal. Even assuming, *arguendo*, that the motion was properly made on the basis of a violation of Rule 63(C)(1), we find that the argument also fails under this standard because the evidence does not support a conclusion that a reasonable person would question Judge Cruse's impartiality. In reviewing Hutnick's affidavit and the applicable transcript, we find that Judge Dauber's order was not against the manifest weight of the evidence because an opposite conclusion is not apparent from the record. See *In re Marriage of O'Brien*, 393 Ill. App. 3d at 373; *People v. Rozela*, 345 Ill. App. 3d at 222. Accordingly, we affirm the circuit court's June 17, 2011, order denying Elizabeth's motion to substitute Judge Zina R. Cruse for cause.

¶ 32 II. Custody

¶ 33 The next issue on appeal is whether the circuit court erred by awarding joint custody to the parties. A child custody decision will not be overturned by a reviewing court unless it is against the manifest weight of the evidence. *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 1031 (1993). A judgment is considered to be contrary to the manifest weight of the evidence when the opposite conclusion is apparent or when the

findings appear to be unreasonable, arbitrary, or not based on the evidence. *In re Marriage of Karonis*, 296 Ill. App. 3d 86, 88 (1998). "In determining whether a judgment is contrary to the manifest weight of the evidence, the reviewing court views the evidence in the light most favorable to the appellee." *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177 (2002). "We will affirm the trial court's ruling if there is any basis to support the trial court's findings." *Id.* "The trial court's custody determination is afforded 'great deference' because the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child." *Id.*

¶ 34 "The statutory prerequisites for joint custody outlined in section 602.1(b) of the Act indicate the legislature's intent that joint custody be awarded only where the parents are willing to cooperate in the upbringing of their children." *In re Marriage of Swanson*, 275 Ill. App. 3d 519, 522 (1995). "In 1986, the legislature amended the statute to eliminate the requirement that both parents agree to joint custody." *Id.* "Nevertheless, the statute still requires that the parents be able to 'cooperate effectively and consistently with each other towards the best interest of the child.' " *Id.* (quoting 750 ILCS 5/602.1(c)(1) (West 1992)). As previously noted by the appellate court, joint custody orders are "usually unworkable and should rarely be entered." *Id.* (citing *In re Marriage of Manuele*, 107 Ill. App. 3d 1090 (1982)). Moreover, "unless parents have an unusual capacity to cooperate, substantial disagreement will likely arise, ultimately resulting in harm to the children." *Id.* Joint custody orders have also been reversed where the evidence established that there was too much animosity between the parties which prohibited cooperation. *Id.* at 522-23.

¶ 35 Applying these principles to the case at bar, the circuit court stated that "the parties possess the ability to substantially comply with the joint parenting order" and that "the best interests of the minor children will be served through a joint parenting order." We disagree. This statement is blatantly contradicted by the history of this case. At the outset, we note that we are mindful of the provision in section 602.1(c) that " '[a]bility of the parents to cooperate' means the parents' capacity to substantially comply with a Joint Parenting Order," and "[t]he court shall not consider the inability of the parents to cooperate effectively and consistently in matters that do not directly affect the joint parenting of the child." 750 ILCS 5/602.1(c)(1) (West 2012).

¶ 36 The parties have disagreed on several matters and there is no indication that they have cooperated any better in matters regarding the children. To the contrary, the record is replete with evidence of conflict over custody and visitation, as the parties have filed untold numbers of motions for sanctions and for contempt, each alleging that the other was not abiding by previously entered orders relative to those issues. The circuit court stated that the parties had shifted their focus from the best interests of the children to a competition with each other, thereby further evincing the propensity of the parties to disagree and to disregard the best interests of their children. We also observe the many visitation orders entered by the circuit court which reflect a micromanagement of this case, due to the inability of the parties to collaborate. Some of those orders include not only specific exchange times, but also instructions regarding items to be packed when visiting one parent or the other, or directions regarding the needs of the children for their recreational activities. Given that the circuit court felt the need to intervene at such a

minute level, we are not convinced that the parties will suddenly exhibit "meaningful involvement, understanding and cooperation" as indicated by the circuit court to be essential to serve the best interests of the children.

¶ 37 Additional evidence in this case highlighting the failure of the parties to cooperate with regard to custody and visitation includes the July 31, 2009, agreed order, in which the parties were forbidden from communicating with each other except in the event of an emergency involving the children, the need for a best-interest evaluator due to custody and visitation being "highly contentious matters in the case," and unsuccessful mediation regarding the same. Because the evidence in this case does not demonstrate an unusual capacity on the part of the parties to cooperate, substantial disagreement will likely arise, and ultimately result in harm to the children. See *In re Marriage of Swanson*, 275 Ill. App. 3d at 522. For the above-stated reasons, we find it was against the manifest weight of the evidence for the circuit court to award joint custody to the parties. Accordingly, we reverse that portion of the supplemental judgment of dissolution and remand for further proceedings for the circuit court to make a sole custody determination.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we affirm the June 17, 2011, order of the circuit court of St. Clair County that denied Elizabeth's motion for substitution of judge for cause, reverse the portion of the April 29, 2013, supplemental judgment of dissolution of marriage that awarded joint custody to the parties, and remand with instructions for further proceedings for the circuit court to make a determination of sole custody.

¶ 40 Affirmed in part and reversed in part; cause remanded with directions.