

NOTICE

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2014 IL App (5th) 130545-U

NO. 5-13-0545

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

LINDSAY A. HAAKE,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	Marion County.
)	
v.)	No. 09-D-124
)	
JEFFREY W. WEHKING,)	Honorable
)	Michael D. McHaney,
Respondent-Appellee.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justice Spomer concurred in the judgment.
Justice Goldenhersh specially concurred.

ORDER

- ¶ 1 *Held*: The circuit court erroneously awarded primary physical custody of the parties' daughter to Father.
- ¶ 2 Petitioner, Lindsay A. Haake (Mother), appeals the decision of the circuit court of Marion County, awarding primary physical custody of her daughter L.W. to respondent, Jeffrey W. Wehking (Father). We reverse and remand for further proceedings.
- ¶ 3 On August 17, 2009, the five-year marriage of Father and Mother was dissolved. Incorporated into the court's order of dissolution were both a marital settlement agreement and a joint parenting agreement. The joint parenting agreement provided for

joint legal custody and a 50/50 split of physical custody of the parties' daughter, L.W. Under this arrangement, physical custody of L.W. alternated every two days.

¶ 4 In January of 2013, Mother filed a petition for modification seeking sole custody. Mother had remarried and moved to Forsyth, Illinois, approximately two hours away from the parties' marital home. Mother wished to enroll L.W. into kindergarten five days a week at a school near her. Father responded with a counterpetition for modification seeking primary physical custody of L.W. in order to enroll her in a school near his home.

¶ 5 Mother is a senior stylist at a high-end hair salon in Forsyth. She works Tuesday through Friday from 9 to 5 and every other Saturday when she does not have custody. Mother's work schedule will allow her to drop off L.W. at school every morning. Mother's husband is a fireman and EMT. On the days when he is not working, he will be able to pick up L.W. from school. On those days when he, too, is working, L.W. will attend the after-school program until Mother leaves work. Both Mother and her husband are able to leave their jobs "at a moment's notice" should the need arise to attend to L.W. Their house is on a half-acre lot in a quiet and safe neighborhood, only a block away from the firehouse where Mother's husband works. There are two city parks nearby, and the area's school system ranks very high in achievement tests. Mother testified that L.W. has a dog at their house who is L.W.'s "best friend."

¶ 6 Mother also noted that she has been doing things to encourage a good relationship between L.W. and Father, and would continue to do so whether or not she is granted primary physical custody. She further stated that she has never denied Father visitation

and has, in fact, often given him extra time. In addition, she has undertaken all transportation for the visitation exchanges. Mother noted that from the fall of 2009 to the fall of 2011, her mother watched L.W. during the day while she and Father were working. Before Mother filed her petition, she and her mother also watched L.W. on the Mondays and Tuesdays that were Father's days. After she filed the petition, however, Father cut short the additional time with L.W. by preventing her and her mother from watching L.W. on those days.

¶ 7 Father lives in Centralia and is employed at a center which is scheduled to close. While he has been active in the efforts to prevent the closure of the center, he has also applied for many different positions throughout the state as well as in Florida and Missouri. At his present employment, Father works from 8 to 4:30. At times, he is also "on call," which means he could get called into work any time of the day or night. Father testified that he is able, under his present work schedule, to take L.W. to an early school program in the morning and that she could stay at the after-school program until he could pick her up after work. He also stated that he has many friends and family in the area that could help out if needed. Additionally, Mother's parents, who frequently took care of L.W., live nearby as well. They, however, are considering moving to Forsyth upon their retirement in the next year or two. Father testified that he has and will continue to do his best to facilitate a relationship between L.W. and Mother, as well as between L.W. and Mother's extended family.

¶ 8 Father has not remarried. He had been dating someone for about two and a half years, but this relationship ended a few weeks before the hearing on the petitions to modify custody.

¶ 9 Further evidence revealed that during the marriage, Father physically abused Mother on at least one occasion. Mother testified that Father has a quick temper and has pulled her hair and/or head-butted her many times. Mother further claimed that Father tried to choke her once during an argument. Father denied any of the incidents of violence, claiming to be emotionally stable and not physically violent. One of Mother's clients, however, testified to observing red marks around Mother's neck after overhearing a heated argument between Father and Mother while waiting for a hair appointment. Father did admit to putting a dent in a kitchen door during one of their arguments at a time when their daughter was in the room. Father also stated that he does not have a drinking problem, contrary to Mother's claims, but that he does have a bar in his basement and "like[s] to hang out with [his] friends and have a beer." According to Mother, this same basement bar also has a hole burned in the carpet from where a "hookah" fell over while lit. Mother testified that Father "drinks in excess," and that he used to drink every week "until he was stumbling or passed out." Mother also reported that L.W. "talks about her dad drinking beer around her" and that Father's then girlfriend was "drunk and hung over and throwing up in front of her" at Father's house. Father admitted to receiving a DUI in 2008.

¶ 10 Following the hearing, the court noted that, "[b]y failing to designate a primary custodian, and agreeing to split custody of [L.W.], the parties simply delayed this custody

battle for four years." Given that Mother had moved to Forsyth and enrolled L.W. to begin kindergarten there, a substantial change in circumstances, warranting modification of the existing joint parenting agreement, had occurred. The court also determined that Mother and Father were capable of cooperating effectively and consistently, and therefore ordered joint legal custody pursuant to section 602.1(c) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602.1(c) (West 2010)). Concerning the determination of physical custody, however, after listing the factors set forth in section 602(a) of the Act (750 ILCS 5/602(a) (West 2010)) and finding them to be "agonizingly" close, the court ultimately ruled in favor of Father based on stability and the incredible family and community support group in and around Centralia. Given the evidence presented, we conclude the court erred in granting primary physical custody of L.W. to Father.

¶ 11 As the trial court correctly stated, the appropriate standard to be applied under the circumstances presented is the best interest of the child. See 750 ILCS 5/602(a) (West 2010). Section 602(a) of the Act requires that, in making the best interest determination, the court consider all relevant factors. Given that the trial court generally has a superior opportunity to observe the witnesses and evaluate the evidence (see *In re Marriage of Karonis*, 296 Ill. App. 3d 86, 88, 693 N.E.2d 1282, 1284 (1998)), we, sitting as a court of review, will not reverse the trial court's decision unless that decision is contrary to the manifest weight of the evidence or represents a clear abuse of the court's discretion (see *In re Marriage of Archibald*, 363 Ill. App. 3d 725, 738-39, 843 N.E.2d 446, 458 (2006)). Here we find both.

¶ 12 The trial court awarded Father primary physical custody of L.W. after concluding that the perceived stability of the child overwhelmingly favored Father. As Mother correctly states, the stability of a child's home environment is indeed an important consideration for the well-being of the child. See *In re Marriage of Stone*, 164 Ill. App. 3d 1046, 1051, 518 N.E.2d 402, 406 (1987). The evidence, however, does not reveal that L.W.'s environment with Father was or will be that stable. Contrary to the court's conclusion that L.W. had spent her first five years in Father's house, L.W. had actually, at least since the dissolution of the parties' marriage, split her time between Father's house in Centralia and Mother's house in Forsyth. For the last six months prior to the hearing, L.W. was attending dance class and preschool in Forsyth and had become "acclimated to" the area. Moreover, Father's uncertainty with regard to his future employment and location of that employment, compared with the commitment of Mother and her husband to living in Forsyth, belies the court's finding of greater stability with Father. We further note that Father had just ended another relationship with someone he had been dating for two and a half years. It would appear that the only things that have not yet changed in Father's life are the house in which he lives and the family members who live nearby, some of whom he rarely sees or visits. Additionally, L.W.'s maternal grandparents, while currently living in Centralia, visit Forsyth every week and are considering moving to the area upon retirement. The evidence simply fails to support the court's finding of stability in Father's life and an "incredible family and community support group in and around Centralia."

¶ 13 Contrary to the trial court's position, placing L.W. with Mother will, in fact, provide the most consistency for the child. L.W. is already familiar with Forsyth, having lived there some six months prior to the hearing, and having attended the same preschool since February of 2013. Mother's employment allows her the flexibility to leave whenever needed, to attend to her child, as well as to engage in various school activities. With mother being awarded primary physical custody, L.W. will have a normal schedule, without being shuffled between relatives on an almost daily basis. Additionally, placing L.W. with Mother will not adversely affect L.W.'s relationship with Father. Father has already demonstrated his ability to interact and visit with L.W. while she has lived part-time in Forsyth such that the two of them enjoy a loving relationship. We therefore conclude that the factors pertaining to the child's adjustment to her home and community, as well as the interrelationship of the child with other relatives and persons who may significantly affect the child's best interest, overwhelmingly favor Mother.

¶ 14 We also find disturbing the court's trivialization of those factors pertaining to Father's violence, abuse, and poor judgment. The trial court found that factors six and seven of the Act (750 ILCS 5/602(a)(6), (7) (West 2010)) pertaining to physical violence or threat of physical violence and occurrence of ongoing repeated abuse favored Mother. This means that the trial court determined that Father either committed an act of physical violence and/or posed a threat of ongoing or repeated abuse. The court qualified its decision, however, by stating that Mother's attempt to portray Father as "an alcohol crazed, violent monster" fell short. While this may be true, Father clearly does have

some issues which cannot be ignored. Whether or not Father actually choked Mother during an argument, as attested to by an independent witness, Father did punch an indentation or hole in a door during an argument while his daughter was in the room. Father cannot and did not deny this fact. Nor can he deny he received a DUI, whether or not L.W. was in the car. Getting behind the wheel of a car when impaired by alcohol demonstrates poor judgment, and clearly creates a danger to others. We recognize that no one is perfect, and that everyone makes mistakes, but when considering the best interests of the child, courts must carefully consider these kinds of actions. The court abused its discretion in belittling Mother for raising issues of violence at the hearing. The findings by the court that factors six and seven of the Act favored Mother convince us that the court should have reached an opposite conclusion. Under the circumstances presented here, the scales tip in favor of Mother, and the court erred in awarding Father primary physical custody. Accordingly, we reverse the court's decision and award primary physical custody to Mother.

¶ 15 For the foregoing reasons, we reverse the decision of the circuit court of Marion County and remand this cause for further proceedings in accordance with this disposition.

¶ 16 Reversed and remanded.

¶ 17 JUSTICE GOLDENHERSH, specially concurring:

¶ 18 I specially concur based on the trial court's findings of violence or threat of violence and abuse, qualified as those findings may be.

¶ 19 The trial court noted that it had agonized over this case, that the case was "agonizingly close." As the majority acknowledges, the trial court is in a superior position to determine credibility and resolve contested issues of fact. While the court clearly concluded Mother had less credibility generally and was exaggerating Father's faults, attempting to portray him as alcohol-prone and abusive, the court nevertheless found in Mother's favor on factors six and seven, violence or threats of violence and repeated abuse. The court made these findings despite Mother's diminished credibility and her attempts to portray Father as "an alcohol crazed, violent monster." These are serious findings, not based on isolated incidents. In my view, they justify reversal of the court's order despite the trial court's superior position as trier of fact.

¶ 20 For these reasons, I specially concur.