

2013 IL App (2d) 121194-U  
No. 2-12-1194  
Order filed May 8, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> ANYA J.K., a Minor	)	Appeal from the Circuit Court
	)	of Du Page County.
	)	
	)	No. 06-F-659
	)	
	)	
(Benjamin T., Petitioner-Appellee v.	)	Honorable
Julie K., Respondent-Appellant.)	)	Thomas Dudgeon
	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices Hutchinson and Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in granting father's motion *in limine* barring nine of mother's exhibits from admission into evidence on the ground that they were too remote in time and irrelevant to the instant proceedings. The trial court's rulings granting father's petition to modify custody and denying mother's petition to modify custody were not against the manifest weight of the evidence where there was clear and convincing evidence presented that a modification in custody was in the best interest of the child.

¶ 2 The respondent, Julie K. (Julie), appeals from an order of the trial court granting the petition filed by petitioner, Benjamin T. (Ben), to modify custody of the parties' seven-year-old daughter, Anya J.K. (Anya) and denying Julie's petition to modify custody. On appeal, Julie argues: (1) the

trial court abused its discretion in granting Ben's motion *in limine* to bar exhibits 12, 13, 14, 15, 17, 18, 20, 21 and 23 from being admitted into evidence; and (2) the trial court's rulings awarding sole custody to Ben and denying her petition to modify custody are against the manifest weight of the evidence. For the following reasons, we affirm.

¶ 3

### I. BACKGROUND

¶ 4 The record reflects that Anya was born on March 11, 2006. The parties were never married, but Ben acknowledged that he was the biological father of Anya. Two months after Anya's birth, the parties' relationship terminated and both Julie and Ben filed petitions in the trial court to establish paternity, custody and visitation. The litigation was protracted, and on September 23, 2008, the parties entered into an Agreed Judgment Establishing Parent/Child Relationship (Agreed Judgment). Joint custody of Anya was awarded to both parties, with Julie designated as the primary residential parent subject to Ben's parenting rights and time.

¶ 5 At the time they entered into the Agreed Judgment Julie lived in Bensenville, Illinois, and Ben lived in Highland Park, Illinois. The travel time from Highland Park to Bensenville was approximately one hour. Five months after the entry of the Agreed Judgment, Julie resigned from her job and moved to Savanna, Illinois, to live with her mother, Josephine K. (Josie). Savanna is approximately three hours from Ben's home in Highland Park. Due to Julie's move, the court entered an order on February 9, 2009, modifying the visitation schedule to allow Ben visitation with Anya on alternating weekends from Friday at 9:00 a.m. to Sunday at 6:00 p.m. Further, on alternating weeks Ben was given visitation from Friday at 9:00 a.m. to Saturday at 9:00 a.m. Ben was ordered to pick up Anya at Julie's home in Savanna, and Julie was ordered to pick up Anya at the end of Ben's visitation period at his home in Highland Park.

¶ 6 On July 10, 2009, Julie petitioned for and received an emergency order of protection against Ben after he had picked up Anya in Savannah for visitation and was driving himself and Anya back to Highland Park. The emergency order required Ben to bring Anya back to Julie when he arrived

in Highland Park. On July 16, 2009, Ben filed a motion to vacate the *ex parte* emergency order of protection. In the motion, Ben alleged that Julie's *ex parte* order of protection was initiated solely to obstruct and interfere with his vacation visitation with Anya that he was entitled to pursuant to the Agreed Judgment. He explained that on July 10, 2009, he went to Julie's residence to pick up Anya for his regular visitation and vacation time. He put Anya in his car and reminded Julie about his vacation visitation as a courtesy and then left with Anya without any incident. He later received a telephone call from Julie where she said, "I am going to call the police on your ass." Julie then went to the Carroll County Circuit Court, where she resides, and obtained an *ex parte* order of protection against Ben. Following a hearing, Julie's order of protection was vacated and Ben was granted make-up visitation for his missed vacation time.

¶ 7 On October 5, 2009, the visitation schedule was again modified and provided that: (1) Ben's alternating weekday changed from Friday to Wednesday; and (2) Anya shall be exchanged at the Savanna Police Department at the start of all visitation and at the Highland Park Police Department at the end of all visitation.

¶ 8 On August 31, 2010, Julie obtained another emergency order of protection against Ben. This time, Julie alleged that Ben had punched Anya in the stomach and pushed her to the ground. In response, Ben filed a petition for an expedited hearing, and Betsy Shaulis, a guardian *ad litem* (GAL), was appointed to investigate the allegations. Shaulis interviewed both parties and Anya.<sup>1</sup> Her overall impression was that it was clear that Anya had been coached to say that her father had

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<sup>1</sup>The parties do not cite to Shaulis' report in the record, but Ben cites to a summary of her report which is contained within the report of the GAL assigned to the instant matter.

punched her. Further, Shaulis opined that Josie was controlling the situation. The order of protection was dismissed on September 27, 2010. Again, Ben was awarded make-up visitation.

¶ 9 On June 21, 2011, Julie filed an emergency motion for rule to show cause. In the motion, Julie alleged that Ben had visitation with Anya on June 19, 2011, which was Father's Day. Julie said that when she went to pick up Anya at the police department at 8:00 p.m. as scheduled, Ben was not present. She then alleged that the modified parenting order required that the parties must notify each other of their intent to take a vacation by April 1 of each year, and although Ben's attorney had notified her that Ben would like to take Anya on vacation from June 20 through June 28, 2011, the notification was not timely made pursuant to the modified order. Finally, Julie alleged that the cause was an emergency because she did not know Anya's location, and that, based upon "prior pattern," Anya may be in danger and it was reasonable for Julie to have "grave concern for the safety and welfare" of Anya. That same day, the court found that no emergency existed and continued the motion to June 23, 2011.

¶ 10 On June 23, 2011, the court ordered Ben to return Anya to Julie. Ben filed his petition to change custody that same day. In the petition, Ben alleged that he was requesting sole custody of Anya due to his concern that Julie would destroy his father-daughter relationship with Anya by not facilitating Ben's parenting time, making false allegations against him, and involving Anya in the dispute. In response, on October 3, 2011, Julie filed a petition to modify custody and requested sole custody of Anya. In her petition Julie alleged several reasons why it was no longer in Anya's best interests for Ben to have joint custody and why she should be awarded sole custody: (1) Ben had not demonstrated an ability to set aside any and all negative feelings toward her; (2) Ben had "commenced a course of conduct of a pattern of abuse" toward her in an attempt to intimidate and

harass her and interfere with her relationship with Anya; (3) Ben's history of verbal, physical and mental abuse toward Julie and others affected his ability to care for and nurture Anya; (4) Ben had given her improper notice and incorrect itineraries regarding his visitation times in the past; (5) Ben had at times not exercised his visitation time; (6) Ben had a history of not supporting Anya financially and emotionally; and (7) Ben refused to communicate with Julie and she believed he may reside in a different location than he had previously told her.

¶ 11 On December 14, 2011, attorney Kathleen Kenny was appointed by the court to serve as Guardian *Ad Litem* (GAL) in this matter. The GAL was ordered to investigate the matter of the custody of Anya, make a written report, and render an opinion concerning Anya's best interest.

¶ 12 From August 27, 2012, through August 31, 2012, the trial court conducted an evidentiary hearing. Prior to hearing any testimony, Ben's counsel presented a motion *in limine* to bar some of Julie's proposed exhibits. Julie's counsel made offers of proof as to these exhibits. Ultimately, the trial court barred 10 exhibits, holding that they contained information that was either too remote in time or not relevant to the instant proceedings. Specifically, it barred the following exhibits: (1) exhibit 12 (a petition for an order of protection filed by Ben's ex-wife, Maritza T. (Maritza) in 1992 and an order of protection in response to that petition); (2) exhibit 13 (another petition for an order of protection filed by Maritza in 2000); (3) exhibit 14 (an order of protection from 2000 entered in response to Exhibit 13); (4) exhibit 15 (an information filed in 2000 charging Ben with two counts of domestic battery in an incident involving Maritza, an order dismissing one count of domestic battery against Ben, and another unreadable document); (5) exhibit 16 (Ben's guilty plea and sentencing order to a battery charge in 2005, where Julie was the victim); (6) exhibit 17 (a 1998 petition for an order of protection filed by a woman named Agnieszka Fronczak, an *ex parte* order

of protection in response to that petition, and an order vacating and dismissing the order of protection); (7) exhibit 18 (a 1998 judgment of dissolution of marriage between Ben and Agnieszka Fronczak); (8) exhibit 20 (a petition for dissolution of marriage between Ben and Lucyna Jablonska from 2001 which contains allegations that Ben was “guilty of extreme and repeated mental and physical cruelty towards [*sic*] her”); (9) exhibit 21 (a “complaint to determine the existence of the father and child relationship” filed by a Mirsada Kalajdzic against Ben in 2010, and an order adjudicating Ben to be the natural father of Kalajdzic’s child); and (10) exhibit 23 (a Report of Child Custody Evaluation regarding Anya from 2007, before Ben and Julie entered into the 2008 Agreed Judgment).

¶ 13 The GAL’s report was admitted into evidence. In her report, the GAL indicated that in the course of her investigation she interviewed the parties, Anya, Josie and several other individuals. During her interview with Julie, Julie told the GAL about several occasions where she alleged that Ben was physically abusive to her, either prior to Anya’s birth or during the first few months of Anya’s life. For example, in 2005, there was an incident where Ben and Julie had been driving together when an argument ensued and Julie got out of the vehicle in a store parking lot. According to Julie, Ben also got out of the vehicle and attempted to force her back in. The police were called, and Ben was charged with domestic battery. Julie told the GAL that Ben eventually pled guilty to a misdemeanor battery charge based upon that event.

¶ 14 During the GAL’s interview with Ben he talked about his continuing difficulties with Julie and her mother at visitation exchanges. Ben said that Julie and Josie frequently yelled at him and called him names in front of Anya. He said that a friend of Josie’s named Ray would approach Ben in Anya’s presence and call him an Asian freak and then make fake karate moves. Anya told Ben

that sometimes when she and Julie and Josie would drive to the police station for visitation exchanges Josie would look toward Ben and say “die, die, die.”

¶ 15 Ben told the GAL that when he would pick up Anya at the police station for visitations she would walk toward him slowly with her head down. Then, after Julie and Josie had left, Anya would hug and kiss Ben. Ben said that Julie, Josie and Ray would often follow he and Anya out of town. Anya told Ben that at the end of her visitation with him she did not want to hug or kiss him in front of Julie. Ben said that Anya is afraid to show him affection in front of Julie, so they have a routine that when he brings her to the police station at the end of his visitation they stop a block or two away and say their goodbyes there.

¶ 16 Ben also reported to the GAL that when he picks up Anya from kindergarten for his weekend visitation he has seen Julie and Josie sitting in their car at the other end of the school parking lot. When Anya learned that Julie and Josie were watching them she stopped running to him and giving him a hug and a kiss after school.

¶ 17 On February 6, 2012, the GAL interviewed Anya when Ben brought Anya to see her at the end of his weekend visitation. Anya showed the GAL a picture of a bird that she made for Ben at school. Anya told her that she hid the picture in her cubby at school and kept it there until she could see Ben again because if Julie saw it she would get angry. Anya said that she has a different backpack for when Ben picks her up from school, so she put the hidden picture in her backpack to bring to Ben’s house. Anya said that Julie calls Ben “man” and that Julie does not like Ben. When asked whether Ben liked Julie, Anya replied, “I don’t know.”

¶ 18 The next time the GAL met with Anya, Julie brought her to the meeting. Julie openly spoke negatively about Ben in front of Anya during the interview and indicated that Ben hurt her very

badly. Julie told the GAL that she tells these things to Anya because she does not “sugar coat” life for her. While Julie was talking, Anya moved from her chair to the floor, then under the chair, and finally under the table. The GAL noted that Julie answered every single question that the GAL posed to Anya. The GAL finally asked Julie to leave the room so that she could speak with Anya alone. As soon as Julie left the room, Anya got up off the floor and sat in a chair.

¶ 19 The GAL’s report also included an interview with Josie, who referred to Ben as “that man.” Without hesitation, Josie admitted that she talks to Anya about Ben all the time. Josie said that she loves her daughter and granddaughter very much and that she will do everything in her power to protect them from the dangers she believes Ben presents. The GAL said that Julie and Josie told her that when Anya is questioned about her visitation time with Ben she hides under the table and does not talk.

¶ 20 The GAL also interviewed Kim Caldwell, Anya’s preschool teacher. Caldwell told the GAL that Julie always spoke very negatively of Ben. She said that there never was any “give” with Julie. Julie would raise her voice at Caldwell whenever she tried to talk about Ben’s involvement. Julie had given her the impression that she had full custody of Anya and that she was letting Ben have time with her even though she did not have to. Caldwell said she was surprised when Ben told her that he had joint custody of Anya. Caldwell recalled a parent-teacher conference with Julie where they were discussing Anya’s upcoming preschool graduation. Caldwell asked Julie if she would consider allowing Ben to pick up Anya earlier that day so that Anya could arrive on time for the graduation. She said that Julie “flipped out,” yelling and screaming about how Ben had tried to kill her and how abusive he was.



¶ 21 Kenny also interviewed several other people, including Josie's sister, Carol Abrams, Julie's sister, Debbie Bango, and Ben's fiancé, Miriam Ortiz. Abrams told the GAL that Anya is a different child after visiting with Ben and that she often hides under the table when her visits are discussed. Abrams said that Anya is afraid of Ben and that on more than one occasion Anya told her that Ben had punched her in the stomach or in the legs. She has never seen marks on Anya when she returns from visits with Ben, but said that Ben knows how to do things so that nothing shows up. Debbie Bango, Julie's sister, told the GAL that she knew Ben had been hitting Anya and that Anya has told her many times that Ben hit her in the stomach and the knees.

¶ 22 Ortiz told the GAL that she was Ben's fiancé and they were expecting a baby in July 2012. Ortiz has never been married before and she has no other children. She and Ben were currently looking to purchase a home and move in before the baby was born. Ortiz told the GAL that she was currently in school to be a medical technician. She had been working for an investment firm for eight years and she left the job very financially secure and is now living on her savings. She is currently renting a two-bedroom condominium in Chicago. Ortiz told the GAL that most of the time when Ben is exercising his weekend parenting time with Anya they stay at her place in Chicago. Anya has her own bedroom. Although she is present during their visitation, Ben and Anya go out and do many activities on their own. She and Anya get along just fine, but Anya prefers to be with her father. She enjoys being the center of Ben's universe.

¶ 23 Ortiz reported that she has never seen Ben lose his temper or become violent. He does raise his voice when he becomes aggravated, but not any more than anyone else when they get angry or frustrated. Ortiz said that she and Ben talked very early in their relationship about Anya and the role she plays in Ben's life. Ortiz is very supportive of Ben's efforts to seek custody of Anya and she is

planning both for Anya and the new baby in the house that they are purchasing. Ortiz said that she will love Anya as a member of her family, but she respects Julie as Anya's mother. She will be there for Anya as a backup and emotional support.

¶ 24 At the conclusion of her report the GAL thoroughly reviewed the statutory factors used in making a custody decision and ultimately recommended that Ben should have the sole custody, care, control and education of Anya. In so doing, the GAL noted that Anya shares a close bond with each of her parents. However, she found that Ben was more capable of recognizing and caring for Anya's emotional security and development than Julie, and that Ben understood Anya's need to have a close and positive relationship with both of her parents as well as her need to be free to express her feelings of love and affection for each of them. The GAL found that Julie's insistence on speaking negatively about Ben directly to Anya and to others in Anya's presence demonstrates her lack of insight into the emotional damage she may be causing Anya.

¶ 25 With regard to the physical violence between Julie and Ben, the GAL opined that Julie's allegations of abuse by Ben seemed exaggerated at times, and Julie frequently referred to herself as a victim of domestic abuse. On the other hand, Ben minimized Julie's allegations, and insisted that there was never any physical abuse between them whatsoever. However, the GAL said that irrespective of the extent of physical interaction between Julie and Ben, it had little bearing on the instant case because all of the alleged occurrences took place before the entry of the initial custody judgment therein.

¶ 26 With regard to Julie's allegations that Ben punched and kicked Anya, the GAL noted that in both interviews with Anya she denied that Ben had ever punched her, hit her or pushed her, even when the GAL asked her in several different ways and in several different contexts. The GAL noted

that GAL Shaulis had also concluded that Ben had not kicked or hit Anya, and that it was clear Anya had been coached to say that Ben had punched her.

¶ 27 With regard to the willingness of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, the GAL found that Julie was unable and unwilling to facilitate and encourage a close and continuing relationship between Anya and Ben. The GAL noted that although Julie says that she facilitates the relationship between Anya and Ben allowing the visitation to happen, Julie interfered with Ben's vacation time with Anya two summers in a row by obtaining *ex parte* emergency orders of protection which were later vacated. Ben, however, did appear capable and willing to support a close and continuing relationship between Anya and Julie. He has indicated that he will encourage as much parenting time as is possible given the distance, and even more parenting time in the event Julie relocates to Du Page County.

¶ 28 At the hearing, Kenny testified that she has been a duly licensed attorney since 1991 and that she practiced family law exclusively. She has been appointed a GAL five times in the past, and she has taken all the required guardian *ad litem* training. According to her, Anya was above average in intelligence and a well adjusted child. When asked by Julie's attorney whether she knew for sure if Julie was causing Anya any damage Kenny said, "I don't know if Anya has yet suffered damage." Kenny was then asked whether she had any training or the expertise necessary to render her opinion as stated in her report that Julie's actions in speaking negatively about Ben both to and in front of Anya may damage Anya. Kenny responded by saying that she had a certain level of expertise to form such an opinion based upon the fact that she was an attorney who has been practicing family law for almost 20 years. She said that as an attorney, she knows that the kind of negative talk by one

parent about the other parent to and in the presence of a minor child is damaging for the child, which is why that language (forbidding such conduct) is in every joint parenting agreement.

¶ 29 The GAL was asked about the fact that during some of Ben's visitations he took Anya to Chicago and stayed with her at Ortiz' home. When asked whether she thought Ben was forthright in telling Julie that he was spending time with Anya in Chicago when Ben advised Julie that he was living elsewhere, the GAL responded, "[w]ell, probably not." Julie's counsel then asked whether she thought Ben was living a secret life with Ortiz when he took Anya to Chicago without advising Julie. The GAL responded by saying, "I don't know whether it was a secret life. I don't know that he was necessarily keeping that information from Julie. These parties did not communicate at all."

¶ 30 When asked about her opinion as stated in her report that Ben would be able to facilitate and encourage a close and continuing relationship between Anya and Julie, the GAL said, "I can tell you that I did not get the impression that either one of these parties was excessive in their willingness to foster a positive relationship between Anya and the other parent." She also said that part of her determination with respect to whether either Ben or Julie would promote a close relationship between Anya and the other parent "was not necessarily who would be more inclined to promote that positive relationship but who is less inclined to promote that positive relationship, and I did conclude that Julie is far less inclined to promote a positive relationship" between Ben and Anya than Ben would be between Julie and Anya.

¶ 31 At the hearing, Ben testified that he was 48 years old and currently resided in a three-bedroom townhouse in Glendale Heights with his fiancé, Miriam Ortiz, and his five-week-old daughter, Malia. With regard to his relationship with Julie, Ben said that before Julie moved to Savanna they would talk to each other when they exchanged Anya for his visits. He would talk to

Julie both on her cell phone and in person. After she moved to Savanna, however, all communication stopped. He has tried to call Julie's phone, but she never answers, and he said she leaves her voice mail full so he cannot leave a message. Julie never gave Ben an alternative number to call, but about two years ago Josie called him from a different number so he has used Josie's number to communicate with Julie.

¶ 32 Ben recalled an incident in the spring of 2009 when he had pulled into Julie's driveway to pick up Anya and saw Julie and Josie walking down the driveway with Julie holding a video camera. She was videotaping Anya's exchange, and the child was very upset and crying. Ben took Anya in his arms and put her in her car seat. While Anya was crying, Julie put the camera inside the window of Ben's vehicle and continued to narrate. This incident led the trial court to enter an order on November 17, 2009, prohibiting both parties and any third party from recording the visitation exchanges.

¶ 33 Ben also testified about an event that occurred while he and Julie were in court in 2010. He said that he was in the hallway of the courthouse with Julie, Josie, Anya and Julie's aunt when they began calling him a child molester. During this time, Anya was next to Julie and she kept her head down. Ben testified that he never speaks negatively of Julie to Anya and that he tries to encourage a relationship between Anya and Julie by going to a flower shop and buying Julie flowers for Julie's birthday or Mother's Day. He recently taught Anya how to use the telephone or the iPad to call Julie during his visitation, but Anya did not want to call Julie.

¶ 34 Ben said that in May 2010 he was scheduled to have Anya for his regular weekend visitation from Friday to Sunday of Memorial Day weekend, and then again on Monday at 9:00 a.m. for his Memorial Day holiday parenting time. Ben asked Julie if he could keep Anya from Friday through

Monday in order to save Anya from the long drive. Ben said that Julie refused, and indicated that she would call the police on him. Therefore, Anya was required to travel a total of six hours back and forth in an eight-hour period. Based upon this incident, in December 2010 a court order was entered providing that if Ben's holiday or other special visitation day immediately preceded or followed his weekend visitation then his weekend would be expanded to include the holiday or special visitation day.

¶ 35 Ben also testified that in June 2012 he was running about 10 minutes late to drop off Anya and he called Josie's number and asked to speak to Julie. As she always did, Josie told Ben that Julie was unavailable. Ben then told Josie that he was running about 10 minutes late and asked her to relay this information to Julie. In response, Josie told him to call the police department and she hung up on him.

¶ 36 Julie testified that on July 10, 2009, Ben picked up Anya for his visitation and as he left he reversed and sped off. Julie thought he was driving recklessly so she called the police to tell them to give him a ticket for driving fast with a child in the car. An officer then came to her house and after she explained the situation he told her to get an order of protection. That is why she filed that petition for an order of protection. In August 2010, Anya returned from a visitation with Ben and she told Julie that "she had gotten punched and that she had been pushed and she had scars on her leg." Julie said she believed her child and for her safety she filed a petition for an order of protection and she would do it again. When asked why she thought it was in Anya's best interest that she be granted sole custody Julie said that she had been the primary caretaker of Anya and that Anya has thrived with her. She did not see why there was a concern.

¶ 37 Julie testified that with regard to Ben's summer visitation in 2011, the Agreed Judgment required them both to give notice of any summer vacation by April 1 of that year. She said that she adhered to that requirement but Ben did not. Therefore, they had to go back into court and eventually she accommodated Ben. Julie said that she did communicate with Ben by telephone and that if she misses his phone calls she calls him back. She also denied Ben's statement that she keeps her voice mail full so that he cannot reach her. She said Ben knows that he can use two different lines and she knew that one of the lines did not have voice mail on it. She also denied ever calling Ben a child molester and said that to the best of her knowledge her aunt and mother had also never called him a child molester. When asked about speaking to Anya about Ben, Julie said she told Anya that Ben was mean to her and she tells Anya things like this because she does not "sugar coat" life for her.

¶ 38 During closing argument Julie's counsel requested that the trial court reconsider its grant of Ben's motion *in limine* barring several exhibits from being admitted into evidence.

¶ 39 On September 14, 2012, the trial court entered a written memorandum of opinion and order granting Ben's petition for change of custody and denying Julie's petition for sole custody of Anya. In the first part of the memorandum the trial court ruled on Julie's motion to reconsider its ruling on Ben's motion *in limine*. The court ruled that it would allow Exhibit 16 into evidence (Ben's 2005 guilty plea to battery) because it related to Julie. However, it denied Julie's motion with regard to the remaining exhibits based upon its finding that they were too remote in time and were irrelevant to these proceedings.

¶ 40 In the trial court’s memorandum of opinion and order it engaged in a detailed analysis of the statutory factors used to determine the best interest of Anya in this custody matter. See 750 ILCS 5/602 (West 2012). With regard to denying Julie’s petition for sole custody the trial court stated:

“Julie has not demonstrated, as she has alleged, that she is able to ‘set aside any negative feelings’ for [Ben]. Instead, her behavior while interviewed by the guardian *ad litem*, while speaking with Anya’s teachers, interacting with Anya, conversing with Anya’s grandmother and her refusal to communicate directly with [Ben] demonstrate that her animosity toward him is uncontrollable.

She is utterly incapable of facilitating and encouraging a close and continuing relationship between Anya and [Ben]. In fact, her efforts have been designed to destroy that relationship. Julie denigrates Anya’s father in her presence. Her words drive Anya to hide under the table and avoid any expression of affection for her father in Julie or Josie’s presence. Anya cannot give her father a gift without hiding it from her mother. Worse, Julie is oblivious to the impact her words and those of Josie have on Anya.

These factors made the risk of alienating Anya from either of her parents and her extended family very real. As long as Anya resides in Josie’s home, she will be continually exposed to the attacks on her father. Anya is already exhibiting signs of emotional stress because of them. Therefore, granting Julie sole custody is not in Anya’s best interest on multiple levels.”

¶ 41 With regard to awarding Ben sole custody of Anya the court stated:

“Granting sole custody of Anya to [Ben] carries with it numerous uncertainties and risks. Julie, not [Ben], has been Anya’s primary caregiver throughout her life. In addition, the



record does not reveal much about Anya's relationship with Miriam Ortiz. Anya has never really lived with her and she has never lived in Mrs. Ortiz' new home. Anya also has no connections with the community where [Ben] will ultimately live. All of this will be new for her.

What *is* certain is that Anya is presently suffering emotionally while in Julie's care and that Julie is oblivious to the impact her words and those of her mother are having on Anya. Moving Anya to [Ben's] household carries risks and uncertainties and Anya may require a certain period of adjustment in the short run. But, over time, [Ben's] household holds the promise of better emotional stability for Anya. [Ben] has not retaliated in the face of Julie and Josie's comments. He has not allowed them to interfere with his time with his daughter and he has consistently maintained regular contact with her despite a six-hour round-trip to see her. In the process, he and Anya have developed a reciprocal, loving relationship. Anya's best interests require that sole custody be granted to her father."

¶ 42

## II. ANALYSIS

¶ 43

### A. Ben's Motion *In Limine* to Bar Exhibits

¶ 44 On appeal, Julie argues that the trial court abused its discretion in granting Ben's motion *in limine* barring Exhibits 12, 13, 14, 15, 17, 18, 20, 21 and 23 from being admitted into evidence. Specifically, she argues that the 2008 Agreed Judgment contained no mention as to Ben's past violent behavior not only toward Julie but others as well. Therefore, she claims, the trial court could have considered facts existing at the time of the earlier decree but not known to the court at the time the 2008 Agreed Judgment was entered when reviewing the parties' petitions to modify custody.

As support for that proposition Julie cites to *Valencia v. Valencia*, 71 Ill. 2d 220 (1978) and *In re Marriage of Kleiboeker*, 262 Ill. App. 3d 644 (1994).

¶ 45 In response, Ben argues that the trial court properly barred these exhibits because they: (1) predate the entry of the 2008 Agreed Judgment; and (2) are not relevant to the alleged change in circumstances contained in Julie's petition to modify custody.

¶ 46 Section 610 of the Act provides that a court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian. 750 ILCS 5/610 (West 2012); *In re Marriage of Kleiboeker*, 262 Ill. App. 3d 644, 648 (1994). However, evidence of facts that existed prior to the earlier judgment will not be admitted unless the proponent lays a foundation which shows it is relevant to the change of circumstances being urged to justify a change in the custody of the child. *Johnson v. Johnson*, 34 Ill. App. 3d 356, 367 (1975). A trial court's ruling on the admissibility of evidence is reviewed under an abuse of discretion standard. *Auirre v. City of Chicago*, 382 Ill. App. 3d 89, 98 (2008).

¶ 47 Here, we agree with Julie that both *Valencia* and *In re Marriage of Kleilboeker* stand for the proposition that the trial court could have considered facts existing at the time of the earlier decree but not known to the court at that time in ruling on a petition to modify custody. See *Valencia*, 71 Ill. 2d at 226; *In re Marriage of Kleilboeker*, 262 Ill. App. 3d at 645. Further, since the 2008 Agreed Judgment does not reference any of the documents contained in the barred exhibits we will assume for the sake of argument that the trial court was not aware of this information when the Agreed Judgment was entered. Nevertheless, *Valencia* and *In re Marriage of Kleilboeker* do not hold that

a party in a custody modification proceeding has unbridled control over what documents are admitted into evidence. Obviously, such documents must be considered relevant to be first admitted. Ill. R. Evid. 402 (eff. Jan. 1, 2011) (evidence which is not relevant is not admissible). Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ill. R. Evid. 401 (eff. Jan. 1, 2011).

¶ 48 Here, although Julie alleged in her petition to modify custody that Ben’s history of verbal, physical and mental abuse toward her and others affected his ability to care for and nurture Anya, she could not show how the barred exhibits were relevant – *i.e.*, how orders of protection filed by other women over ten years ago, for example, made it more probable that Ben is currently a violent person who should not have custody of Anya. We are not holding that evidence of prior domestic violence is not relevant as to whether a person may be violent in the future. However, the fact that these instances happened several years ago, with no instances of domestic or any other type of violence on Ben’s part within the last seven years, indicates to us that the trial court’s decision to bar them as irrelevant because they were too remote in time was not an abuse of discretion. For example, Exhibits 12, 13 and 14 are petitions for and orders of protection entered on behalf of Ben’s ex-wife Maritza and are 20, 12, and 12 years old, respectively. From what can be read of Exhibit 15, it is an information filed 12 years ago charging Ben with two counts of domestic battery of Maritza, an order dismissing one count of domestic battery, and an unreadable document.<sup>2</sup> Exhibit

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<sup>2</sup>We will review the propriety of the trial court’s ruling barring this exhibit based upon those documents which can be reviewed. As to the unreadable document, Julie has forfeited any review of it. See *Foutch v. O’Bryant*, 99 Ill. 2d 389, 392 (1984) (to the extent that we are left with

17 is a petition for an order of protection filed in 1998 by a woman named Agnieszka Fronczak, an *ex parte* emergency order of protection entered in response to that petition, and an order vacating and dismissing that order. That exhibit is not relevant because it is 14 years old *and* it is not evidence of Ben's allegedly violent nature since the exhibit contains the order vacating and dismissing the original order of protection. Exhibit 18, a 1998 judgment of dissolution between Ben and Fronczak, contains no findings whatsoever about Ben's alleged violent nature and is wholly irrelevant. Exhibit 20 is a petition for dissolution of judgment from 2001 filed by Lucyna Jablonska which contains boilerplate *allegations* that Ben was "guilty of extreme and repeated mental and physical cruelty toward her" and is therefore not relevant. Exhibit 21 is a "complaint to determine the existence of the father and child relationship" filed by a Mirsada Kalajdzic and an order adjudicating him to be the natural father of Kalajdzic's child. Neither of these documents refer to any violent tendencies on Ben's part and are therefore likewise irrelevant. Finally, Exhibit 23 is the report of the court ordered evaluator that was issued in 2007. Since the trial court that presided over the parties' 2008 action to establish custody and visitation was clearly aware of this report because it ordered it pursuant to section 604(b) of the Act (750 ILCS 5/604(b) (West 2012)), Exhibit 23 did not constitute "facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment" and was therefore properly barred as irrelevant. See 750 ILCS 5/610 (West 2012).

¶ 49 Accordingly, the trial court did not abuse its discretion when it granted Ben's motion *in limine* barring Exhibits 12, 13, 14, 15, 17, 18, 20 21 and 23 from admission into evidence.

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an incomplete record, any doubts that arise from the incompleteness of the record will be resolved against the appellant).

¶ 50

B. Custody Determination

¶ 51 We now turn to Julie's contention that the trial court's orders granting Ben's petition for sole custody and denying her petition for sole custody was against the manifest weight of the evidence. Within this argument, she claims: (1) the trial court erred in finding that Anya was suffering emotionally while in Julie's care because there was no medical or therapeutic evidence to support that finding; and (2) it is not in Anya's best interest that her sole care, control and custody be awarded to Ben based upon the factors enumerated in section 602 of the Illinois Marriage and Dissolution of Marriage Act (Act). 750 ILCS 5/602 (West 2012).

¶ 52 Again, the court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or either or both parents having custody, and that the modification is necessary to serve the best interest of the child. 750 ILCS 5/610(b) (West 2012).

¶ 53 In determining the best interests of the child, the court shall consider all relevant factors, including: (1) the wishes of the child's parent or parents as to her custody; (2) the wishes of the child as to her custodian; (3) the interaction and interrelationship of the child with her parent or parents, siblings and any other person who may significantly affect the child's best interest; (4) the child's adjustment to her 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 abuse; (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and 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 2012). After weighing these factors, the trial court's custody determination is afforded great deference because the trial court is in a better position to judge the credibility of the witnesses and determine the best interests of the child. *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177 (2002). A trial court's decision regarding child custody modification will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Ricketts*, 329 Ill. App. 3d at 177. A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding is unreasonable, arbitrary or not based on the evidence presented. *Best v. Best*, 223 Ill. 2d 342, 350 (2006).

¶ 54 1. Finding that Anya was suffering emotionally in Julie's care

¶ 55 Julie first argues that the trial court erred when it found "[w]hat *is* certain is that Anya is presently suffering emotionally while in Julie's care and that Julie is oblivious to the impact of her words and those of her mother are having on Anya." Specifically, Julie contends that the finding that Anya was suffering emotionally while in her care was not based on or supported by any evidence with any "therapeutic or medical certainty." Julie claims that even the GAL testified that she didn't know if Anya had suffered damage. Finally, Julie notes that Anya was not presented as a witness in this cause, either in open court or by *in camera* interview, therefore the trial court did not have the opportunity to observe Anya's demeanor or to speak to her if it so chose.

¶ 56 We are not persuaded. First, Julie cites no authority for the proposition that the trial court could not make a finding that Anya was being emotionally damaged by Julie without having "medical or therapeutic" evidence to support such a finding. Second, there was a plethora of

evidence in the record to support the trial court's finding that Anya was suffering emotionally while in Julie's care. In her report, the GAL said that Julie and Josie told her that when Anya is questioned about her visitation time with Ben she hides under the table and does not talk. Further, the GAL observed Anya hide under her chair and then move under the table when she was trying to interview her in Julie's presence as Julie continued to talk about Ben. As soon as Julie left the room Anya got off the floor and moved into a chair. The GAL also testified that from her interviews, she believed that Julie freely and openly spoke negatively about Ben both directly to Anya and in front of her. Even Julie herself testified that she has told Anya that Ben was mean to her and she does not "sugar coat" life for Anya. Given this evidence, it was reasonable for the trial court to make an inference that Anya was presently suffering emotionally while in Julie's care and that Julie was oblivious to the impact that her words and those of her mother were having on Anya. See *In re Marriage of Divelbiss*, 308 Ill. App. 3d 198, 206-07 (1999) (where the evidence supports multiple, reasonable inferences leading to a decision, the reviewing court will accept those inferences that support the trial court's order).

¶ 57 We also disagree with Julie that the GAL testified that she did not know if Anya had suffered damage. A review of the record indicates that when asked if she knew for sure that Julie was causing Anya any damage, the GAL testified that she did not know if Anya had *yet* suffered damage. More important, when the GAL was asked whether she was qualified to render her opinion that Julie's conduct in speaking negatively about Ben both to and in front of Anya may in fact be damaging to the child, the GAL testified that her experience as an attorney who has practiced family law for almost 20 years qualified her to opine that negative talk by one parent about the other parent to and in the presence of a child is damaging to that child.

¶ 58 Next, Julie’s comment that Anya was not presented as a witness in this case either in open court or through an *in camera* interview with the trial court is irrelevant since Julie does not allege that she ever requested that Anya testify in open court or through an *in camera* interview. Further, the trial court was not required to conduct an *in camera* interview of Anya or have her testify at trial to observe her demeanor since the court appointed a GAL for Anya. It is the duty of the guardian *ad litem* to call the rights of the minor to the attention of the trial court, to present the minor’s interests and claim for the minor such protection as he or she is entitled to under the law. *In re Griesmeyer*, 302 Ill. App. 3d 905, 914 (1998). Here, the GAL did an excellent job of interviewing many people and preparing a very thorough report to the trial court regarding Anya’s best interests and her recommendation regarding custody.

¶ 59 Finally, in her reply brief Julie argues for the first time that “the GAL in this case fell short in the interview process of Anya” because she did not ask Anya if she knew the difference between a truth and a lie. Having raised this issue for the first time in reply we find that Julie has waived review of this argument. *Palm v. 2800 Lake Shore Drive Condominium Ass’n*, 2013 IL 110505, ¶ 65 (points not argued are waived and shall not be raised in the reply brief). For all these reasons, the trial court’s finding that Anya was suffering emotionally while in Julie’s care was not against the manifest weight of the evidence.

¶ 60

## 2. Anya’s Best Interest

¶ 61 Next, Julie contends that the trial court’s ruling granting Ben’s petition to modify custody was against the manifest weight of the evidence. Specifically, Julie argues that Ben’s petition should



not have been granted because certain relevant factors that the trial court was required to consider pursuant to the Act disfavored its determination that it was in Anya's best interest for Ben to have sole custody of her: (1) the evidence presented at trial was that Anya was a well-adjusted child who was above average in intelligence and that she exhibited these traits while in her primary residential custody (750 ILCS 5/602(a)(3),(4) (West 2012)); (2) Ben's fiancé Miriam Ortiz was not called as a witness so the trial court had no opportunity to observe her (750 ILCS 5/602(a)(3),(4) (West 2012)); (3) the GAL did not investigate where Anya will live with Ben and Ortiz or personally observe Anya interact with Ortiz or Ben and Ortiz' newborn child (750 ILCS 5/602(a)(3),(4) (West 2012)); (4) Ben's history of domestic violence, as indicated in Exhibit 16 and in the barred exhibits, established a pattern of conduct by Ben of violence toward Julie and others (750 ILCS 5/602(a)(6) (West 2012)); and (5) Ben's actions do not establish that he will be able to facilitate and encourage a close relationship between Julie and Anya (750 ILCS 5/602(a)(8) (West 2012)).

¶ 62 We have reviewed the trial court's detailed findings in its memorandum with regard to the relevant factors listed in the Act and do not find the trial court's ruling to be against the manifest weight of the evidence.

¶ 63 Although it is true that the evidence presented at trial was that Anya was a well adjusted child who was above average in intelligence and that she exhibited these traits while primarily in Julie's custody, there was overwhelming evidence that Julie's conduct, as well as the conduct of her mother, caused Anya much emotional turmoil. For example, Julie told Anya that Ben had been mean to her, Josie said "die, die, die" in Ben's direction when Anya was present, and Julie and Josie had called Ben a child molester in front of Anya. Even though Julie denied that anyone ever called Ben a child molester, it was up to the trial court to determine the credibility of the witnesses and to

resolve any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Anya's reaction to this extreme negativity was clearly expressed in her body language when she would hang her head or actually crawl under a chair or table when Julie and Josie were discussing Ben.

¶ 64 With regard to Miriam Ortiz, Julie cannot complain that the trial court did not have an opportunity to observe her when Julie did not call her as a witness. Further, the GAL interviewed Ortiz and prepared a thorough report of that interview, stating that Ortiz will love Anya as a member of their family and is making room for both Anya and her and Ben's new baby if Ben is granted full custody of Anya. An overwhelming majority of the evidence presented at the hearing indicated that Ben's environment was preferable to the one in which Anya resided with Julie.

¶ 65 Next, Julie argues that Ben's history of domestic violence, as indicated in exhibit 16 and in the barred exhibits, established a pattern of conduct by Ben of violence toward Julie and others. Since we have held that the trial court did not abuse its discretion in barring the exhibits at issue here we will not address the substance of those exhibits or rely upon them in determining whether this factor has been met.

¶ 66 Section 602(a)(6) refers to 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) (West 2012). In finding that this factor did not weigh against Ben the trial court stated:

“The issues of physical violence and domestic abuse, despite Julie's fears, are, \*\*\* not significant factors in this case. All alleged incidents of violence involving [Ben] occurred decades ago or prior to the entry of the joint custody order and are more than seven years old. There is no credible evidence [Ben] has been violent toward Anya.”

¶ 67 Here, although the fact that Ben pled guilty to battery in a case involving Julie is certainly a significant event, we agree with the trial court that the issues of physical violence and domestic abuse were not significant factors in this case. Ben's guilty plea took place before Anya was born and seven years before the instant proceedings. Since that time Ben has had no history of any physical violence, either toward Julie or others. In fact, the record reflects that Ben has avoided any confrontation with Julie and Josie even when provoked on several occasions.

¶ 68 In her reply brief Julie argues for the first time that the trial court's action in allowing Exhibit 16 into evidence upon reconsideration without giving her an opportunity to examine Ben regarding the incident interfered with her due process rights and to properly put forth her case. Again, having raised this issue for the first time in reply we find that Julie has waived review of this argument. *Palm*, 2013 IL 110505, ¶ 65 (points not argued are waived and shall not be raised in the reply brief).

¶ 69 Finally, Julie argues that Ben's actions do not establish that he will be able to facilitate and encourage a close relationship between Julie and Anya because: (1) the GAL testified that Ben was not forthright about taking Anya to Chicago to stay with Ortiz during his visitations; and (2) the GAL's testimony that neither party was excessive in their willingness to foster a relationship between Anya and the other parent was "unsupported and faulty analysis on her part."

¶ 70 First, Julie claims that the GAL testified that Ben was not honest with Julie when he had parenting time with Anya because Anya spent substantial time with Ortiz at her Chicago residence and not where Ben resided. We have reviewed Julie's citation to the record and do not find that it accurately supports her claim. When asked whether she thought Ben was forthright in telling Julie that he was spending substantial time with Anya in Chicago when Ben always advised Julie that he

was living elsewhere the GAL responded, “[w]ell, probably not.” Julie’s counsel then asked whether she thought Ben was living a secret life with Ortiz when he took Anya to Chicago without advising Julie. The GAL responded by saying, “I don’t know whether it was a secret life. I don’t know that he was necessarily keeping that information from Julie. These parties did not communicate at all.” Given the ample evidence in the record regarding the utter lack of communication between Julie and Ben we agree with the GAL that the fact Julie may not have known that Anya was in Chicago at Ortiz’ home during some of Ben’s visitations was not evidence that Ben was unwilling to foster a relationship between Julie and Anya.

¶ 71 Second, Julie argues that the GAL’s testimony that neither party was excessive in their willingness to foster a relationship between Anya and the other parent was “unsupported and faulty analysis on her part.” We are not persuaded. A review of the entire record here supports the GAL’s testimony that both Ben and Julie did not show a strong willingness to encourage a relationship between Anya and the other parent. Between the two of them, however, it is clear that Ben had at least shown some willingness to make an effort in this area. He told the GAL that if he was awarded sole custody of Anya he would like Julie to have significant parenting time with Anya. He also testified that he purchased flowers for Julie on her birthday and Mother’s Day (presumably from Anya) and taught Anya how to call Julie during his visitations. On the other hand, Julie’s efforts were designed to destroy any relationship between Anya and Ben. Accordingly, the trial court did not err in finding that Julie was “utterly incapable of facilitating and encouraging a close and continuing relationship” between Anya and Ben. For all these reasons, the trial court’s order granting Ben’s petition to modify custody and denying Julie’s petition to modify custody was not against the manifest weight of the evidence.

¶ 72

III. CONCLUSION

¶ 73 In sum, the trial court did not abuse its discretion in granting Ben's motion *in limine* barring exhibits 12, 13, 14, 15, 17, 18, 20, 21, and 23 from being admitted into evidence. In addition, the trial court's order granting Ben's petition to modify custody and award him sole custody of Anya was not against the manifest weight of the evidence.

¶ 74 The judgment of the circuit court of Du Page County is affirmed.

¶ 75 Affirmed.