

THIRD DIVISION
OCTOBER 15, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

IN RE CUSTODY OF:)	
B.M.M.,)	
)	
A Minor Child,)	
_____)	Appeal from the Circuit Court
)	of Cook County.
WILLIAM MALAUSKY,)	
)	09 D 80287
Petitioner-Appellant,)	
)	The Honorable
v.)	Grace Dickler,
)	Judge Presiding.
MARIE ADAM SARR,)	
)	
Respondent-Appellee.)	

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justice Fitzgerald Smith concurred in the judgment.
Justice Mason dissented.

ORDER

¶ 1 *Held:* On remand for a second trial after excluding the minor child's therapists testimony at the first trial, the trial court did not consider the mental health of the minor child, nor the wishes of the minor child, which are both required factors to consider under section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2012)) in determining the best interests of the child in making a custody decision. The appellate court reversed the trial court's decision awarding custody to the mother and remanded for a new hearing, ordering that the circuit court appoint an independent expert to psychologically examine

the minor child and the parties and that the court consider the mental health of the child and the child's wishes and give due consideration to the mental health of the parties and their interaction with the minor child, as well as the remaining required factors under section 602(a), after considering the appointed expert's report and custody recommendation and holding a new hearing.

¶ 2

BACKGROUND

¶ 3

This case is before us on a second appeal from a judgment after a retrial awarding permanent custody of the minor child to the mother. The Petitioner- Appellant, Malausky maintains that the main issue in this case is that the court did not allow the therapist who evaluated the minor, B.M.M., to testify. In the first trial, the circuit court did not allow the therapist to testify solely because the witness disclosure was 4 days late and awarded custody to the mother. On appeal, we held that barring the therapist solely due to this technicality was an abuse of discretion when considering the best interest of the minor and remanded for a new trial with the therapist's testimony. See *In re Custody of B.M.M.*, 2011 IL App (1st) 111666-U, ¶¶ 34, 35 (B.M.M. I). On remand, a different circuit court barred the therapist's testimony on different grounds that now the testimony was too remote four years later and that the therapist repudiated any expert opinion regarding custody recommendations. The court did not allow the therapist to testify as even a lay occurrence witness concerning the mental health of the minor and discounted the minor's preference as to custody. We do not find that the court abused its discretion in denying the testimony of the therapist for her custody recommendation. However, we find that the therapist could have been allowed to testify as a lay occurrence witness to provide context to the case, and we further find that the court should have called its own expert witness to conduct a current evaluation. We summarize only the facts pertinent to this appeal.

¶ 4

The parties, petitioner William Malausky and respondent Marie Adam Sarr, are unmarried. They had a relationship while Malausky was separated from his wife, June Anderson.

Malausky eventually reconciled with his wife and remains with her to this day. The minor child, B.M.M., was born on March 24, 2002. Malausky signed a voluntary acknowledgment of paternity on March 28, 2002. B.M.M. lived with Sarr in Atlanta but Malausky visited B.M.M. and paid for B.M.M.'s day care, school tuition, half of her ballet lessons, and some travel. B.M.M. spent Christmas 2004 with Malausky and summer and winter vacation of 2006 with Malausky.

¶ 5 B.M.M. lived with Sarr in Atlanta until November 2007, when Malausky received a call from Sarr's neighbor stating that B.M.M. was with her because Sarr was in a mental institution. Sarr had been diagnosed with depression and was hospitalized in a mental institution for about 10 days. Sarr allowed Malausky to take B.M.M. and care for her. When Malausky brought B.M.M. to Atlanta after Christmas 2007, the parties discussed allowing B.M.M. to reside with Malausky for six months, but B.M.M. remained in Atlanta.

¶ 6 In January 2008, Malausky received a call from B.M.M. that Sarr had whipped her with a belt, which gave him concern over Sarr's discipline of B.M.M. Sarr agreed to let Malausky take B.M.M. to live with him in Chicago to see if B.M.M. would do well in Chicago. B.M.M. moved to Chicago on January 15, 2008. Sarr visited B.M.M. in Chicago several times.

¶ 7 In August 2009 Malausky drove B.M.M. to Atlanta and there was an altercation with Sarr when Malausky wanted to leave the day after arriving, and Sarr did not want him to take B.M.M. back to Chicago. On August 4, 2009, Malausky filed a petition for a determination of father-child relationship seeking temporary and permanent custody of B.M.M. and temporary and permanent child support from Sarr.

¶ 8 Malausky brought B.M.M. to a therapist, Jessica Fox, who saw B.M.M. for approximately 24 therapy sessions between January 2010 and December 2010. Fox wrote a

report recommending that B.M.M. live with Malausky based on, among other things, B.M.M.'s statements that she wanted to live with her father and that he was "caring" while her mother was "harsh" to her.

¶ 9 At the first trial, the court had ruled that Fox could not testify because she was not properly disclosed within the 15 days ordered by the court in its order of October 22, 2010. The court awarded permanent custody to Sarr, with a visitation schedule for Malausky. Malausky appealed and we reversed and remanded for a retrial because the trial court did not allow Fox to testify and did not consider all statutory factors in awarding custody to Sarr, including the wishes of B.M.M., the mental health of all the parties, and allegations of abuse of the child. See *In re Custody of B.M.M.*, 2011 IL App (1st) 111666-U, ¶¶ 34, 35 (B.M.M. I).

¶ 10 After retrial on remand, a different trial court again did not allow the minor's therapist to testify, this time finding that Fox saw the minor 4 years ago, which was now too remote in time, and therefore would not present any relevant evidence, and also finding that Fox stated at her deposition that she would have "no opinion" as to custody. Fox retracted her previous opinion that Malausky should obtain custody and stated she should not have given that opinion because she does not consider herself qualified. The second trial court again awarded permanent custody to the mother.

¶ 11 The trial court this time examined B.M.M. *in camera*. B.M.M. indicated she wished to live with Malausky. B.M.M. stated to the court that Sarr was "harsh" to her, that Sarr gets "easily upset" and that B.M.M. feels that Sarr sees B.M.M. as a "disappointment," while describing Malausky as "loving" and "caring." B.M.M. also indicated that she preferred her life in Chicago because she saw more extended family in Chicago, had more extracurricular activities, attended church more frequently, and preferred the more challenging curriculum of her school in Chicago.

¶ 12 On remand after our order disposing of the prior appeal, Fox was deposed on November 12, 2012, at which time she repudiated her previous opinion as to custody, testifying that she did not consider herself qualified to make any recommendations as to custody or visitation, that she had no opinion as to who should have custody of B.M.M., and that she had not seen the child in over two years. Fox testified that she included custody recommendations at the request of the father, but that if she were to write a report now she would not include any custody recommendations and does not believe she is qualified to make such recommendations. Fox testified that she has no opinion on custody of where B.M.M. should live. Fox also testified that Malausky had submitted to the court versions of her report (attached to an emergency motion) with some sentences boldfaced and underlined, unlike her original report, that were not on Fox's letterhead and were without her signature.

¶ 13 The trial court found that B.M.M. had connected to her community while in Atlanta, and also in Chicago. The court found that both parents were capable parents who had much to offer B.M.M. The ultimate deciding factor for the court in favor of granting custody to Sarr was that the court felt Malausky would not foster an open and loving relationship between B.M.M. and Sarr if he were the custodial parent. The trial court also discounted the minor's *in camera* testimony upon examination by the court that she desired to be with her father and found that B.M.M. was "coached" by the father and found the father not credible.

¶ 14 Malausky appeals, arguing that the trial court erred in: (1) again excluding the testimony of the therapist; (2) not considering the wishes of B.M.M. as related during her *in camera* testimony to live with her father; (3) excluding evidence relating to Sarr's mental health history; (4) ignoring the fact that the child representative ignored B.M.M.'s reports of abuse by Sarr; (5)

awarding permanent custody to Sarr, as this is not in the best interest of B.M.M.; and (6) denying Malausky's post-trial motion to reconsider.

¶ 15 ANALYSIS

¶ 16 Malausky brought his petition for custody pursuant to the Illinois Parentage Act of 1984 (750 ILCS 45/1 *et seq.* (West 2008)) and the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/101 *et seq.* (West 2008)). Courts have granted unmarried fathers several procedural routes to challenge custody and visitation, including challenging custody and visitation through the provisions of the Marriage and Dissolution of Marriage Act (once the father has legally established a father-child relationship. *In re S.L.*, 327 Ill. App. 3d 1035, 1037 (2002).

¶ 17 The Illinois Parentage Act of 1984 provides that custody shall be determined "in accordance with the relevant factors set forth in the Illinois Marriage and Dissolution of Marriage Act." 750 ILCS 45/14(a)(1) (West 2008). See also *In re B.B.*, 2011 IL App (4th) 110521, ¶ 31 ("In determining custody under the Parentage Act, courts are to apply the relevant provisions contained in the Dissolution Act."). Section 602(a) of the Illinois Marriage and Dissolution of Marriage Act requires courts to determine custody in accordance with the children's best interests by considering the following 10 factors:

"§ 602. Best Interest of Child. (a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school and community;

(5) the mental and physical health of all individuals involved;

(6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;

(7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986 [750 ILCS 60/103], whether directed against the child or directed against another person;

(8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;

(9) whether one of the parents is a sex offender; and

(10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed." 750 ILCS 5/602(a) (West 2012).

¶ 18 "[A] reviewing court will not reverse a trial court's custody determination unless it (1) is against the manifest weight of the evidence, (2) is manifestly unjust, or (3) results from a clear abuse of discretion." *In re B.B.*, 2011 IL App (4th) 110521 at ¶ 32 (citing *Marsh*, 343 Ill. App. 3d at 1240). " 'A decision is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based on any of the evidence.' " *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 43 (quoting *In re Marriage of Matchen*, 372 Ill. App. 3d 937, 946 (2007)). "[T]his court will not substitute its judgment for the trial court's and will find an abuse of discretion only when the trial court ' "acted arbitrarily without conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial

injustice resulted." ' ' *In re B.B.*, 2011 IL App (4th) 110521 at ¶ 32 (quoting *Marsh*, 343 Ill. App. 3d at 1240, quoting *In re Marriage of Suriano*, 324 Ill. App. 3d 839, 846 (2001)).

¶ 19 I. Excluding Testimony of Therapist Jessica Fox

¶ 20 Malausky first argues that the trial court erred in again excluding Fox's testimony. We agree. "It is within the trial court's discretion to decide whether evidence is relevant and admissible, and a court's determination on that issue will not be reversed absent a clear abuse of discretion." *In re Marriage of Bates*, 212 Ill. 2d 489, 522 (2004) (citing *People v. Morgan*, 197 Ill. 2d 404, 455 (2001)). While we agree that the evaluation, already 4 years old, was stale as to the matter of child custody, and in fact Fox disclaimed her original testimony on child custody, we find that the court abused its discretion in denying Fox the opportunity to testify as a lay occurrence witness for the purpose of providing context on the child's mental health and development, particularly when we are also finding that the court was under an obligation to *sua sponte* obtain its own independent and current evaluation of the child in this contentious situation.

¶ 21 The court stated the following in its judgment order explaining why it granted Sarr's motion *in limine* and excluded Fox's testimony:

"Based on Ms. Fox's statements in her deposition that she was not qualified to make any recommendations as to custody or visitation, that she had no opinion as to who should have custody of BMM, that she repudiated any custody report she had made in the past, that she had not seen or spoken to the child in over two years, that she had not seen or spoken to the child since the child moved back to Atlanta, and that she had only spoken to Ms. Sarr once, this Court barred Ms. Fox's testimony at trial."

¶ 22 But the fact that Fox withdrew her expert opinion as to the sole issue of a custody recommendation does not disqualify her either as an expert witness regarding B.M.M.'s mental health or as a lay occurrence witness who psychologically treated and observed B.M.M. and thus could indeed offer relevant testimony as to B.M.M.'s mental health at the time of Fox's evaluation without giving an expert opinion as to which parent should have custody. A new hearing is properly required where a circuit court improperly restricts an expert's testimony even where the expert is allowed to testify, but the testimony is limited to that of a lay occurrence witness. See *In re Marriage of Troy S. and Rachel S.*, 319 Ill. App. 3d 61, 65 (2001) (new child custody hearing was required in divorce action where the licensed psychotherapist's testimony concerning father's alleged sexual abuse of parties' child was improperly limited to that of occurrence witness, rather than expert witness).

¶ 23 Evidence is relevant if it tends to prove a matter in controversy. *In re Marriage of Strauss*, 183 Ill. App. 3d 424, 428 (1989) (citing *Bullard v. Barnes*, 102 Ill. 2d 505, 519 (1984)). The testimony of a psychologist has long been generally acceptable in child custody cases. See *In re Marriage of Auer*, 86 Ill. App. 3d 84, 88 (1980). Further, the length of time between the interview and the relevant date applies only to the weight of the testimony, not its admission. *People v. Rogers*, 246 Ill. App. 3d 105, 114 (1993) (citing *People v. Curry*, 225 Ill. App. 3d 450, 454 (1992)). Here the purported remoteness of Fox's testimony was caused solely by the appeal and remand. Nevertheless, due to the passage of time since the last hearing on the first remand, we cannot say that excluding Fox's testimony as to B.M.M.'s current mental health due to relevancy or for a custody evaluation was an abuse of discretion.

¶ 24 Rather, the dispositive issue in this case is that the trial court abused its discretion in not considering B.M.M.'s mental health at all, a required factor under section 602(a)(5), as set forth

above, because there was no evidence before it concerning B.M.M.'s mental health. By excluding Fox's testimony, and failing to *sua sponte* obtaining its own expert and current evaluation the court had no qualified testimony or evidence before it concerning B.M.M.'s mental health. The court was left without any evidence of B.M.M.'s mental health. Section 602(a)(5) requires the consideration of the mental health of all individuals involved, including the minor child, in determining the best interest of the child. Section 602(a)(5) requires the court to consider the mental health of the children involved. *In re Marriage of Kerman*, 253 Ill. App. 3d 492, 496 (1993). For this reason alone this case must be remanded for a new hearing, as not considering one of the statutory requirements is a clear abuse of discretion.

¶ 25 Because there has been no evidence concerning B.M.M.'s mental health during two hearings and a remand now, we order that the circuit court appoint an independent expert to evaluate B.M.M., render an expert opinion as to B.M.M.'s mental health, and make a custody recommendation. Section 604(b) of the Act permits the trial court to appoint its own expert to provide it with an evaluation to assist in determining the best interest of the child as it relates to custody or visitation regarding custody and visitation. 750 ILCS 5/604(b) (West 2010). The purpose of this provision is to make the information available to assist the circuit court, and the expert witness is appointed to protect the interests of minor children regarding issues of custody and visitation. *Johnston v. Weil*, 396 Ill. App. 3d 781, 786 (2009), *affirmed* 241 Ill.2d 169. "The best interests and welfare of children necessitate that full advantage should be taken of psychiatric evaluations and opinions in custody cases, particularly where emotional problems are apparent." *In re Marriage of Cohen*, 189 Ill. App. 3d 418, 424 (1989).

¶ 26 Although it is within the court's discretion to seek independent expert advice in child custody matter, and a court is not bound to abide by the opinions or implement the

recommendations of its court appointed expert (*In re Marriage of Debra N. and Michael S.*, 2013 IL App (1st) 122145, ¶ 52), in this case such an independent evaluation is necessary, because there was no evidence concerning B.M.M.'s mental health. Because the mental health of B.M.M. was not considered as a factor, and the case has already been through two hearings, with both trial courts finding reasons to exclude the testimony of the only therapist who has seen B.M.M., ordering an independent evaluation of B.M.M. is the prudent course to ensure the court hears testimony concerning a required statutory factor in determining her best interests.

¶ 27 Additionally, by appointing an independent expert, there will be no bias or tampering, as has been alleged in this case, because the expert is the court's witness. Fox was hired by Malausky to examine B.M.M., and Malausky allegedly asked Fox to include those recommendations as to custody which she later repudiated, in part, because Malausky had bolded and underlined portions of her emailed report. By appointing an independent expert to evaluate B.M.M. the court will have an appropriate independent evaluation of B.M.M. without interference by either parent. See *Johnston*, 396 Ill. App. 3d at 786 (under section 604(b), the expert's client is the court and "the expert is the court's witness and it is the duty of the court-appointed evaluator to conduct an independent investigation and provide the court and each party with her findings.").

¶ 28 We note the dissent's lengthy reweighing of the evidence in this case and our dissenting colleague's own opinions of the evidence. As the appellate court we are prohibited from reweighing the entirety of the evidence of this case and coming up with our own findings. We only have appellate jurisdiction and therefore properly apply our appellate standard of review.

¶ 29 The dissent further places the onus on Malausky to press the court to consider B.M.M.'s mental health, stating: "Thus, Malausky presented no evidence regarding any mental health

issues affected B[.]M[.]M[.] and, importantly, his trial counsel agreed that this factor was not relevant to the custody determination." The parties' conduct does not absolve the circuit courts from considering a statutorily-required factor. Our legislature has, in no uncertain terms, included the mental health of all parties, including the minor child, as a required factor to consider. See 750 ILCS 5/602(a) (West 2012). The legislature has thus directed, by statute, that the mental health of minor children in custody determinations is not only relevant but a required factor to consider. The dissent also argues that "B[.]M[.]M[.]'s interests have been advocated by a child representative appointed by the court pursuant to section 506 of the Act." The child representative's advocacy does not fulfill the requirement that the trial court consider the required statutory factors, and the child representative did not provide evidence of the minor's mental health. Regardless of the advocacy by the representative, there was no evidence before the trial court concerning, and thus no consideration of, B.M.M.'s mental health.

¶ 30 Our colleague states that "[i]t is improper for a reviewing court to reverse on grounds not briefed or argued by the parties." The doctrine of waiver is a limitation on the parties and not on this court. *C.Capp's LLC v. Jaffe*, 2014 IL App (1st) 132696, ¶ 23 (citing *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 202 (2007)). Since the enactment of the factors required in section 602(a), reviewing courts have reversed custody determinations where it is apparent that the court did not consider the statutorily required factors, as in cases such as this one where there was no admitted evidence on one or several of the required section 602(a) factors. See, e.g., *In re Marriage of Carlson*, 101 Ill. App. 3d 924, 932 (1981) (held awarding temporary custody to spouses jointly and physical custody to wife was improper, reversed that portion of the court's order and remanded the cause for further proceedings because "[t]he testimony did not include facts and information concerning each of the factors listed in section

602."). Further, where a circuit court did not consider all the required 602(a) factors, and most of the remaining section 602(a) factors are somewhat closely balanced, it is appropriate to remand with directions to the circuit court to consider an expert's recommendation of joint custody, even though doing so unfortunately prolongs a custody determination. See *Hall v. Hall*, 226 Ill. App. 3d 686, 691-92 (1991) (reversed a custody order and remanded the cause, holding "[a]lthough we are loathe to prolong this custody determination, we find it necessary to remand this cause. *** Because the relevant factors other than factor 602(a)(4) are so evenly balanced in this case, rather than reversing the custody determination outright we believe that the court on remand should first give serious consideration to Dr. Ward's recommendation of joint custody."). By Illinois Supreme Court Rule, as the reviewing court we have the power to "enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require." Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994).

¶ 31 While we respect the trial court's conscientious consideration of the other evidence before it in this case on remand regarding the remaining factors under section 602(a), the simple fact is that there again was no evidence regarding the minor's mental health, and thus no consideration of the minor's mental health, which is a statutory requirement under the Act and for this reason we must reverse for a proper custody hearing where evidence concerning this factor is heard. Additionally, there was no evidence concerning the parties' current mental health. We are not holding that barring Fox's testimony on remand was error; rather, we are holding that because of this exclusion and the further failure of the court to obtain its own independent and current

evaluation the court then had no evidence before it concerning B.M.M.'s mental health and, therefore, this required factor was not considered.

¶ 32

II. B.M.M.'s Wishes

¶ 33

We also find troubling the fact that B.M.M.'s wishes were discounted. The preference of the child is one of the statutorily mandated factors in awarding custody. See 750 ILCS 5/602(a)(2) (West 2010). The trial court here completely discounted B.M.M.'s preference that Malausky obtain permanent custody based solely on the court's belief that B.M.M. was "coached" by Malausky. There is no evidence in this case that this occurred. B.M.M. was residing with Sarr in Atlanta continuously for the past few years. B.M.M. is 12 years old now, and was 11 years old at the time of this second trial.

¶ 34

B.M.M. also gave specific reasons for her preference for Malausky, not related to any leniency or anything else that would make her preference seem immature or suspect. B.M.M. indicated that she spent more time with Malausky and his wife, whereas with Sarr she spent most of her time in daycare. B.M.M. also indicated that Malausky's wife was loving and supportive to her, and that she saw extended family in Chicago, while she never saw any extended family when with Sarr in Atlanta. Moreover, B.M.M. clearly stated other factors indicating that her overall life was better with Malausky – that she had more extracurricular activities in Chicago, went to church more often in Chicago, and liked the more challenging school curriculum in Chicago. "The preferences of a child, especially one who is mature, are to be given serious weight in custody decisions, especially where the child's desire is based upon reasons related to his best interests such as a desire to remain with friends; to continue attending the same school; and to remain in the same environment." *In re Marriage of Siegel*, 123 Ill. App. 3d 710, 718 (1984).

¶ 35 At the time of the second hearing B.M.M. continued to desire to live with Malausky even after having been with Sarr in Atlanta the last three years. The second hearing occurred after three years of B.M.M. residing exclusively with Sarr. There is no indication anywhere in the record that Malausky coached B.M.M., other than the trial court's belief. This finding by the trial court that B.M.M. was "coached" by Malausky was against the manifest weight of the evidence. This is an issue, however, which can be addressed by a court-appointed expert in evaluating B.M.M.'s mental health and interaction with the parties.

¶ 36 III. The Parties' Mental Health

¶ 37 Malausky next argues that the circuit court erred in excluding evidence of Sarr's mental health in 2007. As we noted in section I, a trial court's determination of whether evidence is relevant and admissible will not be reversed absent "a clear abuse of discretion." *In re Marriage of Bates*, 212 Ill. 2d at 522 (citing *Morgan*, 197 Ill. 2d at 455). The court ruled *in limine* to exclude evidence concerning Sarr's mental health issues from 2007 based on the following reasoning:

"In her November 30, 2012 deposition, Ms. Sarr stated that she had been diagnosed with depression following her father's death. It was around this time that BMM was sent to live with Mr. Malausky. Ms. Sarr stated in her deposition that she had not sought treatment for any mental health issues since 2007 nor had she ever prior to that point. In the prior trial in 2010, the trial court found that this period of depression was too remote in time from the date of trial to be relevant. This Court agrees with that assessment since now the year is 2013 and this period of depression was at least 5-6 years ago and was clearly related to Ms. Sarr's father's death. No evidence was presented to this Court to show that Ms. Sarr has any mental health issues today, that S. Sarr has been diagnosed

with any mental health issues since 2007 or that Ms. Sarr is taking any medication for mental health issues. As such, Ms. Sarr's admitted mental health issues in 2007 are too remote in time to be relevant to these proceedings."

¶ 38 We agree that Sarr's mental health in 2007 is too remote and was explained by her father's passing, and the trial court's refusal to admit this history into evidence was not an abuse of discretion.

¶ 39 We give great weight to the trial court's observations of the parties and its consideration of the evidence before it. We also note the trial court's patience with the parties in this contentious custody battle. However, we find that there was no evidence before the court to consider the current mental health of the parties at the time of the hearing, which is also a required factor. See 750 ILCS 5/602(a)(5) (West 2012). The court found neither party "currently suffers from any mental illness," but there was no evidence concerning the mental health of the parties. "Statutory authority requires that the court consider all relevant factors including the following: the parents' wishes; the child's wishes; *the interaction and interrelationships of the child and the parents*; the child's adjustment to home, school, and community; *the mental and physical health of all individuals involved*; the physical violence or threat of physical violence by the child's potential custodian; and the willingness of each parent to cooperate and encourage a close relationship with the other parent." (Emphasis added.) *In re Koca*, 264 Ill. App. 3d 291, 294 (1993).

¶ 40 We therefore instruct that the court-appointed expert independently also evaluate both Malausky and Sarr and, attendant to this evaluation, the interaction of each with B.M.M. (750 ILCS 5/602(a)(3) (West 2012)) in making a custody recommendation to the court.

¶ 41 IV. Child Representative

¶ 42 We reject Malausky's argument that the court ignored the fact that the child representative ignored B.M.M.'s reports of abuse by Sarr. The court did, in fact, consider the allegations of abuse and found that the instances of abuse reported were when B.M.M. was 5 years old, and in any event the court did not believe them, because other witnesses contradicted B.M.M. The trial court carefully considered this issue and reviewed all the evidence in making its determination. We find that the court's determination that there was no abuse of B.M.M. was not against the manifest weight of the evidence.

¶ 43 V. Award of Permanent Custody to Sarr

¶ 44 As explained above in section I of this order, section 602(a)(5) requires the court to consider the mental health of the child, as well as the parties, in determining an award of custody. This was not possible because there was no evidence of B.M.M.'s mental health or other evidence of the parties' mental health for the court to consider. The circuit court must consider all the required factors under the statute. In order to do so, it must have some evidence of these factors before it, and so, as explained above, we must reverse the grant of custody to Sarr and remand for a rehearing and a new determination regarding custody.

¶ 45 VI. Denial of Post-Trial Motion to Reconsider

¶ 46 Generally, a trial court's ruling on a motion to reconsider is reviewed under the abuse of discretion standard; however, where the motion to reconsider only asks the trial court to reevaluate its application of the law to the case as it existed at the time of judgment, the standard of review is de novo. *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, ¶ 20 (citing *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 97 (2004)). Because Malausky did not raise any new facts and simply repeated his same legal arguments, our review is de novo. Because we hold

the court erred in not considering B.M.M.'s mental health, we also hold the court erred in denying Malausky's motion to reconsider.

¶ 47

CONCLUSION

¶ 48

While we note the trial court gave detailed and conscientious consideration to this case, because the trial court did not have evidence before it concerning the mental health of the minor child, B.M.M., this statutorily-required factor was not considered. The minor child's mental health is one of the required factors to consider in determining the best interests of the child in making a custody decision. Although the court did observe the statutorily-required factor of the parties' mental health and specifically entered a finding that neither party currently suffers from mental illness, the court did not have evidence before it concerning the current mental health of the parties. Thus, we must reverse and remand for a new hearing and order that the court appoint an independent expert to psychologically examine B.M.M. as well as the parties and their interaction with B.M.M. and provide a custody recommendation, and we also instruct that, after receiving this evaluation and conducting a new hearing, the trial court consider the mental health of the minor child and the parties and the minor child's wishes in the context of the minor's current mental health, in addition to the remaining factors under section 602(a) of the Act, in making a custody determination.

¶ 49

Reversed and remanded, with instructions.

¶ 50

JUSTICE MASON, dissenting:

¶ 51

After two extensive custody hearings at which he did not prevail and protracted proceedings in the trial court during which he was represented by more than half a dozen attorneys, Malausky appeals raising several errors he claims warrant yet a third custody hearing. Notwithstanding our supreme court's admonition that we are not to decide unbriefed and

unargued issues on appeal (*People v. Givens*, 237 Ill. 2d 311, 323-25 (2010)), the majority decides this case not on any ground raised by Malausky, but on a ground raised *sua sponte*. The majority concludes that the trial court in its 39-page custody judgment failed to assess required statutory factors and so remands this case for another custody hearing with directions that the trial court *must* appoint an independent custody evaluator, an issue the majority fails to give Sarr the opportunity to address. Because I believe the trial court expressly considered and correctly resolved all relevant factors relating to the custody of the parties' minor child, I respectfully dissent.

¶ 52 After six days of testimony, the trial court carefully considered every relevant factor in determining that Sarr was entitled to sole custody of the parties' daughter, B.M.M. Critical to the court's determination was its finding that Sarr was the parent most likely to foster and encourage B.M.M.'s continuing relationship with her father, a finding that is amply supported by evidence in the record. Two different judges, after extended evidentiary hearings, have now reached the same conclusion. I can find no basis upon which to conclude that the trial court's latest determination as to B.M.M.'s best interests was contrary to the manifest weight of the evidence or constituted an abuse of discretion. Further, I believe both that the majority's opinion usurps the substantial discretion vested in trial courts in custody matters by directing the appointment of a custody expert and that a third custody hearing is decidedly not in the minor's best interests.

¶ 53 "The determination as to which party *** shall receive custody of their child is one of the most difficult tasks of a trial court. Such a decision necessarily rests on the temperaments, personalities and capabilities of the parties, and the demeanor of the witnesses who testify at trial." *In re Marriage of Felton*, 171 Ill. App. 3d 923,926 (1988).

"In custody cases, seldom is either parent shown to be perfect. There is no guarantee that parents will continue their devotion to caring for children after they leave the courtroom. Trial courts have the unenviable task of determining the best interests of the child after considering the section 602(a) factors. [Citation] Great deference must be accorded that decision since the trial court is in superior position to judge the credibility of witnesses and determine the needs of the child." *In re Marriage of Apperson*, 215 Ill. App. 2d 378, 383 (1991).

¶ 54 Although a child's expressed preference in custody matters is an important factor a trial court must take into account, the child's preference is neither controlling nor binding on the court. *Id.* at 384. Courts have recognized that placing undue weight on a child's preference for one parent over the other "places a tremendous amount of pressure on the child." *In re Marriage of Hefer*, 282 Ill. App. 3d 73, 76 (1996). Apart from the trauma that requiring a child to choose a custodial parent can entail, "[s]uch reliance [on the wishes of the child] provides an incentive for parental manipulation and intimidation of the child, and an opportunity for the child's manipulation of the parents, none of which can be said to be in the best interest of the child." *Id.* at 77. This case sadly illustrates the foregoing pitfalls.

¶ 55 At times, the testimony of both parents at the custody hearing was confusing and hampered by selective memory. Their respective versions of events involving their daughter were conflicting and in some respects diametrically opposed. The trial judge in this case displayed extraordinary patience in allowing the attorneys to thoroughly examine their clients and other witnesses, often covering the same ground more than once, and had the "unenviable task" of sorting through the mountain of evidence in order to render a judgment. The court's

opinion describes, in exhaustive detail, the reasons for her conclusion that sole custody should be awarded to Sarr and, in my view, that determination should be affirmed.

¶ 56 The majority gives short shrift to the substantial record on appeal, devoting scarcely half a dozen paragraphs to summarizing what it deems the "pertinent" facts. But a detailed review of the record is necessary to place the trial court's ruling in context.

¶ 57 As in virtually every contested custody matter, the hearing in this case showed that neither of B.M.M.'s parents is perfect. Evidence presented at the hearing revealed that both have serious financial problems. Both owe substantial back taxes to the Internal Revenue Service. Sarr lost her condominium to foreclosure and is subject to a wage garnishment. Malausky has placed all of his assets in his wife's name, perhaps due to his tax problems and the fact that one of his former counsel has obtained a judgment against him for unpaid fees. At the time of the hearing, Malausky had failed to pay outstanding fees for services rendered by B.M.M.'s child representative, despite court orders to do so. The hearing revealed that these financial issues—particularly those experienced by Malausky—figure importantly in the determination of B.M.M.'s best interest.

¶ 58 B.M.M. was born in 2002. Until January 2008, she lived in Atlanta with Sarr. When B.M.M. was less than two years old, Malausky moved back to Chicago to reconcile with his wife. Malausky's contact with B.M.M. thereafter was sporadic, although during a visit to Atlanta in 2004, he, under the guise of taking B.M.M. out to buy her a toy, instead took her for a DNA test. It was only after the DNA test confirmed (for him, at least) his paternity, that Malausky told his wife about B.M.M.

¶ 59 During this time Malausky, who had voluntarily acknowledged paternity shortly after B.M.M.'s birth, did not pay child support, although he sent Sarr money to defray some of the

child-rearing expenses such as day care and school tuition. He also frequently inquired as to Sarr's plans to return to Africa with B.M.M., but expressed no concern over that prospect and did not seek to discourage Sarr from leaving the country with his daughter. Sarr testified she had no plans to return to Africa and was puzzled by Malausky's repeated inquiries.

¶ 60 In 2004, after the DNA test, Malausky would see B.M.M. on unannounced, spur-of-the-moment visits when he was in Atlanta and when B.M.M. came to Chicago for visits: once in 2004 and twice in 2006. There is no evidence in the record that Malausky ever sought or that Sarr denied him more time with his daughter. In fact, Malausky admitted that Sarr never interfered with these visits, which allowed Malausky substantial one-on-one time with B.M.M. both in Atlanta and in Chicago. Sarr testified that she encouraged the father/daughter relationship, believing it to be in her daughter's best interest.

¶ 61 In November 2007, Sarr was hospitalized and diagnosed with depression after the death of her father. She arranged for the care of her daughter with a neighbor and asked that Malausky be notified of her hospitalization. In January 2008, she agreed to allow Malausky to take B.M.M. to Chicago, initially for six months, but there is no evidence that Sarr thereby intended to relinquish custody of her daughter. Malausky claimed his desire to take B.M.M. to Chicago was based on his concern that Sarr was using corporal punishment to discipline B.M.M. On this issue, the trial court specifically found that "much of what the child testified to was contradicted by witnesses who had no stake in these proceedings" and therefore concluded that no conduct constituting "physical violence" had been perpetrated by Sarr.

¶ 62 Sarr visited B.M.M. in Chicago twice in 2008, once in April and again in September. Malausky claimed that for the next year he offered Sarr multiple opportunities to visit with her daughter, both in Chicago and Atlanta, but Sarr was too busy and declined. After September

2008, Sarr did not see her daughter again for nearly a year. Although the parties agreed that B.M.M. would return to Atlanta in the summer of 2009 and Malausky, in fact, brought B.M.M. to Atlanta on August 1, once there, Malausky reneged and within 24 hours, forcibly removed B.M.M. from Sarr's home.

¶ 63 Malausky's behavior on that visit (testified to by Sarr and corroborated by a close friend who was present) was erratic and troubling. Malausky arrived at Sarr's apartment in the middle of the night on August 1 and after dropping his daughter off, drove about 2-3 miles away and parked in front of a gas station, where he remained in his van for the better part of that day even though he claimed his plan was to immediately leave Atlanta to go see his son in South Carolina. When Sarr, B.M.M., Sarr's friend and her sons left that afternoon for an outing, Malausky began calling his daughter's cell phone repeatedly and when she stopped picking up, repeatedly called Sarr's cell phone and later her friend's phone demanding to know where they were. When the group returned to Sarr's apartment that evening, Malausky arrived shortly thereafter, went into B.M.M.'s bedroom with her, told her to pack her things and then yelled at her to "run, run" to his car, while telling Sarr that he intended to call the FBI. He then left with B.M.M. without informing Sarr where he was going. Although Sarr frantically searched the Atlanta area that evening and later drove to South Carolina where she believed Malausky's son lived, she was unable to locate her daughter and Malausky refused to respond to her phone calls.

¶ 64 Malausky's version was that he took his daughter (who had not seen her mother in nearly a year) back to Chicago because B.M.M. was upset with Sarr and had bedbug bites. Upon returning to Chicago, Malausky immediately filed his petition seeking custody of B.M.M. After the first trial, the court found that Malausky had presented "no credible testimony" to explain his

bizarre behavior on that occasion and the story has not improved with time.¹ On this record, a fact-finder could properly conclude that Malausky's version of the altercation with Sarr was contrived and pre-planned.

¶ 65 From the time Malausky took B.M.M. to Chicago in January 2008, until she was returned to Sarr in July 2011 pursuant to the trial court's original custody determination, Malausky required Sarr, an hourly employee at Wal-Mart entitled to two weeks of vacation each year, to travel to Chicago in order to visit her daughter. In those 3 ½ years, Sarr never spent a Thanksgiving or a Christmas with B.M.M. During this period, Malausky insisted on arranging and being present for virtually every visit between Sarr and B.M.M. When Sarr wanted to come to Chicago in March 2008 to celebrate her daughter's sixth birthday, Malausky told her she would have to wait until April and threw a birthday party for B.M.M. in her mother's absence. Sarr was not invited to her daughter's first communion or informed by Malausky when it would occur, even though Sarr is Catholic, has always raised her daughter in the Catholic faith, and invited Malausky to B.M.M.'s baptism in Atlanta when she was five.

¶ 66 After his petition was filed, Malausky opposed *any* visitation with Sarr, arguing that even supervised visitation would endanger B.M.M.'s physical, mental and emotional well-being. After supervised visitation was granted over Malausky's objection, Malausky failed to comply with a court order for visitation between Sarr and her daughter in Atlanta in late 2009 and early 2010, claiming that one of his many attorneys (he was represented by at least eight different lawyers over the course of the proceedings in the trial court) did not inform him of the order.

¹ This is not the only instance of troubling behavior by Malausky contained in the record on appeal. Malausky admitted that he keeps a loaded handgun, which is "locked," in a night stand in his bedroom. Malausky originally testified that the key to unlock the gun was "stored separately." When asked by the trial court how useful a locked weapon with a key stored elsewhere would be if an intruder broke in, Malausky admitted that the key is "under some things" close by. Malausky also admitted that on at least one road trip to Atlanta with B.M.M., he had a weapon and ammunition in his van.

When Sarr was later granted supervised visitation in Chicago in 2010, Malausky again insisted on being present and informed Sarr's friend, who was supervising the visits—in his daughter's presence—that if his daughter was not "comfortable" with her mother, she could leave early, which she did. During one visit, Malausky allowed B.M.M. to leave after Sarr excused herself to go to the bathroom. When she returned, they were both gone.

¶ 67 Malausky insisted that B.M.M. be called "Mary" instead of the African name given to her by her mother and allowed "Mary" to call his wife "mommy," actions which further seriously undermined Sarr's relationship with B.M.M. In short, the record is replete with substantial and compelling evidence that Malausky systematically sought to destroy Sarr's relationship with B.M.M.

¶ 68 B.M.M., now 12, has resided with her mother in Atlanta for more than three years. Sarr testified that the first months following B.M.M.'s return to Atlanta were difficult, as would be expected with a nine year-old uprooted once again from her family, school and friends, but that she and B.M.M. now have a loving relationship. Sarr's testimony was corroborated by testimony from family friends who have spent substantial time with Sarr and B.M.M. after B.M.M.'s return to Atlanta. The principal of B.M.M.'s school in Atlanta testified at the hearing that B.M.M. has acclimated well and is performing well in all her subjects.

¶ 69 But Malausky has continued to do his best to interfere with B.M.M.'s adjustment to life in Atlanta. Although the principal in Atlanta, aware of the different names by which B.M.M. has been known, was assured several times by B.M.M. after her return to Atlanta that B.M.M. preferred her African name, Malausky called the principal insisting that she be called Mary. Malausky, given B.M.M.'s teachers' cell phone numbers to be used in case of emergencies, repeatedly called them asking to speak to B.M.M. when she was in the school's after care

program. He stopped only when contacted by the school principal. Malausky insisted to B.M.M.'s principal that her school was "not up to the standards" of the school B.M.M. attended in Chicago, a view parroted by B.M.M. in her *in camera* interview. And although the principal informed Malausky that an integral part of B.M.M.'s participation in a multi-day school trip to Alabama involved riding the bus to the destination with her classmates, Malausky insisted that he and B.M.M. make the 4-hour drive in his car alone.

¶ 70 Malausky has also engaged in other conduct designed to interfere with B.M.M.'s relationship with her mother since her return to Atlanta in 2011. Following the original order awarding sole custody to Sarr and pursuant to the trial court's orders, Malausky was afforded substantial visitation rights, which the record shows he has exercised (and often abused). During 2012, Malausky spent the following time with B.M.M.: nine long weekends, either in Atlanta or Chicago; a one-week spring break; six weeks during the summer; Thanksgiving; and half of her Christmas break. Sarr testified that Malausky is chronically late in returning B.M.M. home after visitation, arriving sometimes as late as 4:00 a.m. when B.M.M. has to be at school the next day. Further, after taking B.M.M. to Chicago for a visit in October 2012, Malausky refused to return B.M.M. to Atlanta, causing her to miss three days of school while he pursued "emergency" motions in the trial court seeking to require Sarr to re-litigate her entitlement to custody. It took two court orders on successive days to get Malausky to return B.M.M. to her mother. Even after the entry of the second order on a Thursday, directing that Malausky return his daughter "immediately" to Atlanta, Malausky, who is retired (a point he emphasizes in seeking custody of B.M.M.), waited until "Thursday or Friday" to leave, elected to drive instead of fly with his daughter to Atlanta, and did not arrive in Atlanta until Saturday evening. Based on this behavior, the wisdom of the trial court's conclusion that Malausky was not likely to foster a relationship

between B.M.M. and Sarr is graphically illustrated by his behavior following the first custody hearing.

¶ 71 The main issue raised by Malausky in his first appeal related to the trial court's decision, due to a four-day delay in complying with the order to disclose expert opinions, to exclude the testimony of Jessica Fox, a therapist who saw B.M.M. during 2010. We found that the sanction imposed was disproportionate to the untimely disclosure and remanded with directions to allow Fox to testify. I was not a member of the original panel and while I agree that the sanction of barring Fox's testimony was too harsh, the further direction to allow Fox to testify as an expert exceeded the relief we should have ordered on remand. This is because the substance of Fox's opinion and the basis for that opinion were not before us and, without that information, the order that she be allowed to testify was premature.

¶ 72 As it turns out, on remand, the deposition of Fox disclosed multiple reasons for excluding her testimony. Fox, at the time she wrote the report, was 27 years old and had roughly two years of experience as a psychotherapist under the supervision of others. She had no experience in performing custody evaluations or making visitation recommendations and does not possess such credentials to this day. Fox disavowed her prior opinion regarding custody and visitation and expressly disclaimed any expertise that would have allowed her to render such an opinion. Fox felt she had been "used" by Malausky who on one occasion called to see if Fox, who had not seen B.M.M. for several months, could do anything, such as preparing an updated "recommendation," to prevent an upcoming visitation with Sarr. Further, the copy of Fox's report submitted by Malausky to the trial court had been altered by bolding and highlighting material without disclosing that such emphasis was not that of the report's author. Finally, having last seen B.M.M. more than two years earlier, Fox believed she was unqualified to

provide any relevant observations regarding B.M.M.'s present relationship with her parents or whether B.M.M. was currently in need of any further counseling. When she last saw B.M.M. in December 2010, Fox decided to discontinue treatment because "[s]he seemed fine to me. ...She didn't seem nervous or depressed, so we stopped treatment." Based on her deposition, the trial correctly concluded that Fox's testimony would not be relevant to the issues and should be excluded.

¶ 73 The majority finds fault in the trial court's ruling noting that Fox could have testified as a "lay occurrence witness," but the majority does not articulate what relevant information Fox could have offered. Fox stopped treating B.M.M. in December 2010 because B.M.M. was "fine." The trial court correctly accepted Fox's own assessment of her inability to offer any relevant testimony regarding B.M.M.

¶ 74 Once Fox testified in her deposition that she could render no relevant opinions regarding custody, B.M.M.'s relationship with her parents or B.M.M.'s current mental health, it should have been obvious to Malausky, who was represented by counsel, that it would be necessary to retain another expert to conduct a custody evaluation and/or to evaluate B.M.M.'s current mental and emotional well-being if he believed it was a relevant consideration. Malausky made no effort to do so. Thus, Malausky presented no evidence regarding any mental health issues affecting B.M.M. and, importantly, his trial counsel agreed that this factor was not relevant to the custody determination.

¶ 75 The majority nonetheless concludes that the custody determination should be reversed and the matter remanded for a third custody hearing and further directs the trial court on remand to order an independent custody evaluation pursuant to section 604(b) of the Act. 740 ILCS 5/604(b) (West 2012). Not only does the majority direct the trial court to commission a report in

derogation of the trial court's explicit statutory discretion, it also dictates what subjects the report must address, *i.e.*, it must include a custody recommendation *and* an assessment of both Sarr's and Malausky's mental health. Such an extraordinary incursion into the manner of conducting proceedings in the trial court is, under most circumstances, unwarranted, but particularly so here where no party has suggested that either parent manifests any current mental health concerns. The majority's determination merely substitutes its judgment for that of the trial court, which was based primarily on credibility assessments, and its mandate interferes with and infringes on the substantial discretion vested in the trial court under the Act.

¶ 76 The notion that an expert custody evaluation is required to enable the trial court to decide this case flatly contradicts the record. Throughout these protracted proceedings, B.M.M.'s interests have been advocated by a child representative appointed by the court pursuant to section 506 of the Act. 750 ILCS 5/506(a)(3) (West 2008). The majority alludes to this fact in passing, but fails to discuss its important implications. Under the Act, the duty of a child representative is to "advocate what the child representative finds to be in the best interest of the child after reviewing the facts and circumstances of the case." *Id.* In particular, the Act specifically provides that the child representative "shall consider, but not be bound by, the expressed wishes of the child." *Id.* Far from ignoring B.M.M.'s expressed wishes, the trial court clearly took them into account together with the child representative's reasoned evaluation of B.M.M.'s best interests.

¶ 77 The record reveals that B.M.M.'s child representative, in advance of the custody hearing, met with both parents, their respective friends, the principals at B.M.M.'s schools in Chicago and Atlanta and, of course, B.M.M. She visited both Malausky's and Sarr's homes, thus enabling her to gain first-hand knowledge regarding the living conditions in both places. She observed

B.M.M.'s interaction with both parents. B.M.M. gave her a tour of her school in Atlanta and pointed out her church, parks and other places she enjoyed going with her mother and friends. She visited in Chicago with B.M.M. over the 2012 Thanksgiving holiday. In many respects, the child representative's investigation in this case is similar, if not identical to that which would be conducted by a custody evaluator.

¶ 78 The child representative also mediated disputes regarding Malausky's visitation rights such as his request to pick B.M.M. up on Christmas eve instead of Christmas day as the court had ordered. She was also involved when Sarr wrongly insisted that B.M.M. ride the bus back from a school event when Malausky, entitled to start visitation that day, was there and able to take B.M.M. himself. Thus, the child representative had first-hand experience in dealing with each parent in difficult situations.

¶ 79 The child representative specifically informed the court that she had reviewed B.M.M.'s records of counseling sessions in Atlanta and that B.M.M. was not currently experiencing any mental health issues. Thus, the linchpin of the majority's opinion—that the trial court did not consider B.M.M.'s mental health—is belied by the record in this case. Moreover, since the court was advised by the child representative that B.M.M. was not currently experiencing any mental health issues, it is difficult to conceive what testimony the court should have received on that point.

¶ 80 Given the extensive services rendered by B.M.M.'s child representative, the record supports the conclusion that she was thoroughly familiar with the evidence and fulfilled her duty to represent B.M.M.'s interests. Particularly since, as the majority acknowledges, the trial court is not bound by the custody recommendations of experts (*In re Marriage of Debra N. and Michael S.*, 2013 IL App (1st) 122145, ¶ 52), the exercise dictated by the majority on remand,

while time-consuming, intrusive and expensive, is largely duplicative and unlikely to change the outcome. What it is certain to do, however, is to re-ignite this acrimonious dispute and further expose B.M.M. to the manipulative efforts of Malausky.

¶ 81 The majority mentions the "lifestyle" contrasts between B.M.M.'s life in Chicago and in Atlanta, noting that Malausky enrolled B.M.M. in many activities when she was in Chicago (horseback riding and musical instrument lessons, two children's choirs and multiple sports teams) compared to Sarr, a working mother, who is required to leave her daughter in a school after care program while she works. The implication in the majority's assessment is that parents who, for whatever reason, are unable to afford extracurricular activities that are both costly and require parental involvement, are at a disadvantage when it comes to custody determinations. This view, if adopted, encourages the parental manipulation that trial judges in custody matters assiduously seek to avoid and fundamentally devalues the emotional attachment between a parent and child, regardless of their financial circumstances.

¶ 82 The majority's focus on "lifestyle" issues also disregards the evidence in this case. I mentioned earlier Malausky's financial woes. At trial, he acknowledged that he is retired (he is now 72) and that his sole source of income is social security benefits, which for him total approximately \$1700 per month and for B.M.M., roughly \$1000 per month. He has no savings, retirement or investment accounts or other assets. The cost of B.M.M.'s elementary school in Chicago consumed three quarters of her social security benefits. Middle school and high school tuition, assuming B.M.M. remains enrolled in the "elite" schools Malausky has selected for her, runs much higher. Horseback riding lessons for B.M.M. cost \$500 per month. There are fees associated with virtually every other activity she engaged in, not to mention basics such as food, clothing and the other necessities of life. Malausky testified that he has financed B.M.M.'s

Chicago "lifestyle" by "borrowing" nearly \$100,000 from his wife, which he claims he is obligated to repay with interest.

¶ 83 When asked about his ability to continue to afford to provide his daughter with the amenities she has become accustomed to while living in Chicago if he was awarded custody, Malausky informed the court that he believed he could obtain employment—working from home—that would generate \$1,000-\$3,000 *per day*. But when asked in an interrogatory whether he was in any manner "incapacitated or limited in his ability to earn income," Malausky's one-word response was: "Age." Malausky "conservatively" estimated he would earn \$80,000 per year and still remain available to drive B.M.M. to and from school, accompany her to her various activities and spend relaxing time with her in the park, walking her dog or going swimming. The trial court properly discounted such wildly speculative projections.

¶ 84 More troubling is the fact that although Malausky, his lawyers and now this court have contrasted the quality of B.M.M.'s life in Chicago with her life in Atlanta based, in large part, on the perceived quality of the education, extracurricular activities and comforts of home B.M.M. experiences in Chicago, there has been no acknowledgement of Malausky's failure to ensure the quality of his daughter's life in Atlanta. A parent truly committed to a child's quality of life does not provide such amenities only as long as the child is housed under his roof. But this is exactly what Malausky has done. B.M.M.'s child representative observed that Malausky's conduct in providing B.M.M. with opportunities for a multitude of activities in Chicago (including salon birthday parties complete with a pink limousine) while refusing to ensure that B.M.M. had access to those same activities in Atlanta had "completely compartmentalized" B.M.M.'s life, a result the child representative described as "heartbreaking." By making sure that all of the "fun" was concentrated in Chicago, Malausky ensured that his nine-year-old daughter would inevitably

express her desire to live in Chicago with her "caring" father. The majority encourages such behavior by remanding for a third custody hearing.

¶ 85 And while Malausky's indulgence of his daughter during her stays in Chicago certainly had its intended indirect effect, there was also evidence that Malausky attempted to influence B.M.M. more directly and in violation of repeated admonishments that he not discuss the case with her. Specifically, in assessing B.M.M.'s stated preference to live with her father in Chicago made during the *in camera* hearing, the trial court was convinced that she had been coached either by Malausky or someone acting on his behalf.

¶ 86 The trial court's conclusion finds substantial support in the record. The *in camera* hearing was conducted at Malausky's insistence even though B.M.M.'s child representative believed such hearings are normally a "polarizing event" for a child. Not coincidentally, Malausky also insisted that he have visitation with B.M.M. in Chicago prior to the hearing. The *in camera* hearing was held toward the end of the trial. At one point, the parties and court were discussing how the hearing would be conducted and, in particular, whether counsel for the parents would be present. Recognizing that counsel had a right to be present, the trial judge allowed for the possibility that, depending on the level of anxiety displayed by B.M.M., she might ask counsel to leave so that she could talk to B.M.M. alone.

¶ 87 When the hearing convened a day or so later, the court explained the procedure to B.M.M. and assured her that her parents both loved her, that the responsibility for making the decision about where she would live rested with the trial judge and that B.M.M. was not being asked to choose. The court then asked B.M.M. whether she had any questions and B.M.M. asked whether counsel for the parties would be present for "the whole entire thing." When the court asked B.M.M. what gave her the idea that counsel might not be present the entire time, she

said she was "just wondering" and denied that anyone had suggested that. There is no credible explanation for a child's spontaneous inquiry into such a matter other than an adult discussing it with her.

¶ 88 Later in the hearing, when B.M.M. told the trial judge that her mother insisted that she iron all her own clothes (in addition to myriad other chores), B.M.M. informed the judge that she told Sarr, "I'm not from Africa," a comment the child representative thought sounded rehearsed. Further, the trial court observed that B.M.M.'s assessments of her father were invariably positive while her views of her mother were relentlessly negative and that B.M.M.'s reasons for disliking her mother were at odds with much of the third party testimony regarding B.M.M.'s life in Atlanta since 2011.

¶ 89 Obviously, a trial court's belief that a child's testimony has been coached—in the absence of direct proof—is a highly subjective judgment dependent primarily upon the court's ability to observe the child. We are certainly in no position to second-guess the trial court's conclusion on this static record. And a parent who insists that his child be subjected to an *in camera* interview and then attempts to coach her on what to say is obviously not acting in his child's best interests.

¶ 90 Beyond B.M.M.'s statements during the *in camera* interview, from which a fair inference of coaching can be drawn, the record contains other evidence of an attempt by Malausky to directly influence his daughter's behavior, which strongly corroborates the trial court's finding. A supervised visit was scheduled in Chicago in September 2010, with Patricia Anderson of Professional Supervising Associates acting as the supervisor. Malausky first attempted to cancel the visit, calling Anderson that day to inform her that B.M.M. did not want to see her mother. When Anderson reminded him the visit was court-ordered, Malausky relented and eventually showed up with B.M.M. a half-hour late. Malausky insisted on speaking with Anderson in his

car with B.M.M. present before the visit, ostensibly because B.M.M. was apprehensive. After Anderson introduced herself, she offered to answer any questions B.M.M. had. Malausky then informed Anderson that B.M.M. did have some questions for her before the visit began. Despite her father's prompting, B.M.M. hesitated, looked at her father and asked Malausky if he could remember what the questions were. Given this testimony, which Malausky did not dispute, the trial court was justified in concluding that B.M.M.'s *in camera* testimony was coached. The majority glosses over the trial court's conclusion on this point, finding "no evidence" to support it, but it is amply supported and it clearly weighs heavily against awarding custody to Malausky.

¶ 91 By the time this matter goes to hearing again, easily another year, if not more, will pass. By that time, B.M.M. will have been living with her mother in Atlanta for well over four years. Courts have recognized that stability is important and that the length of time a child resides with a custodial parent is relevant even if the delay is attributable to protracted litigation. *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 414 (1994) ("Even where temporary orders and delays in the process of litigation account for the time during which the child remains with a particular parent, the effect on the child [of changing custodians] is the same regardless of the source of the delay.") As a result of the majority's decision, B.M.M.'s future will again be uncertain and scarce judicial resources will necessarily be devoted to yet another evidentiary hearing given that the evidence from the 2013 hearing will be stale. Given the harmonious relationship re-established between Sarr and her daughter and the length of time B.M.M. has resided in Atlanta, another contested custody hearing will no doubt seriously damage that relationship as B.M.M. enters her teen years and, more importantly, harm B.M.M.

¶ 92 Both judges who have conducted extensive hearings in this contested custody matter have concluded that the critical factor in determining B.M.M.'s best interests is the question of which

parent possesses "the willingness and ability *** to facilitate and encourage a close and continuing relationship between the other parent and the child." 750 ILCS 5/602(a)(8) (West 2008). Both judges have independently determined based on the evidence presented that Sarr will likely foster an ongoing relationship between B.M.M. and Malausky and that Malausky is not likely to do the same. No expert custody evaluation is going to change that outcome.

¶ 93 I strongly believe the trial court's custody judgment should be affirmed and I therefore respectfully dissent.