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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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In re MARRIAGE OF SUZANNE WALLACE,	)	Appeal from the Circuit Court of Lake County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 11-D-1200
	)	
WILLIAM WALLACE III,	)	Honorable
	)	Charles D. Johnson,
Respondent-Appellant.	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices Jorgensen and Birkett concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* We affirmed the trial court's denial of respondent-father's amended petition to modify custody where he failed to produce clear and convincing evidence that a change in custody was necessary to serve the best interests of the children.
- ¶ 2 The parties, Suzanne Wallace (n/k/a Suzanne Nelson) and William Wallace III (Buddy), had two children during their marriage. Upon the dissolution of their marriage, they were awarded joint legal custody, and Suzanne was the primary residential parent. After Suzanne relocated with the children about 1 ½ hours from Buddy's residence, Buddy filed a petition to modify custody, which he later amended. Following a 13-day trial, the court denied Buddy's

petition. Buddy appeals. Because the trial court's determination—that there was not clear and convincing evidence that a change in custody was necessary to serve the best interests of the children—was not against the manifest weight of the evidence, we hold that the trial court did not abuse its discretion in denying Buddy's petition to modify custody.

¶ 3

### I. BACKGROUND

¶ 4 The parties were married in September 2004 and had two children together. William was born in September 2006, and Madelyn was born in September 2008. After William's birth, Suzanne worked as a nanny to earn income while keeping William with her. After Madelyn was born, Suzanne became a stay-at-home mother.

¶ 5 The parties' marriage was dissolved in September 2010.<sup>1</sup> Incorporated in the judgment of dissolution was a marital settlement agreement. The marital settlement agreement included a joint parenting agreement (JPA), which provided for joint legal custody requiring joint decisions on all major issues concerning the children, including religion, education, and health care. Under the JPA, the children lived with Suzanne and saw Buddy on alternate weekends, Tuesday and Thursday evenings, and specified holidays. The JPA further provided that, absent agreement, neither party could enroll the children in any organized activity that interfered with the other parent's parenting time.

¶ 6 At the time of the dissolution, Suzanne moved with the children from the parties' marital home in Lake in the Hills, Illinois, to Libertyville, Illinois, where she had found a job. Buddy moved to Libertyville three days later to be near the children and to minimize the effects of the

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<sup>1</sup> The judgment of dissolution was entered by the circuit court of McHenry County in case No. 09-DV-541. By agreed order, the case was transferred to Lake County on June 7, 2011, and docketed as case No. 11-D-1200 during postdissolution proceedings.

divorce on them. In Libertyville, the parties resided within a few minutes of each other. Although their interactions were somewhat contentious, the parties functioned relatively well under the JPA. The parties did disagree, however, about additional parenting time for Buddy in the event that Suzanne was unavailable to care for the children.

¶ 7 By agreed order in January 2012, the parties modified the JPA as to Buddy's parenting time based on his work schedule as an assistant high school principal. Buddy was to have additional parenting time during summers that he was not working. Additionally, the agreed order allowed Buddy to exercise additional parenting time during the school year. Upon notice to Suzanne, he could pick up the children earlier on Tuesdays and Thursdays, and he could have parenting time on Mondays, Wednesdays, and Fridays, if he was available and Suzanne was unavailable for more than two hours during the work day. The parties still struggled with their communication and often disagreed as to when Buddy should have additional parenting time.

¶ 8 In the summer of 2012, Buddy moved to a five-bedroom house in Vernon Hills, Illinois, with his girlfriend and her three children. He was still within a few minutes of Suzanne's Libertyville home, and the move enabled him to reside within the children's school district.

¶ 9 In August 2012, Suzanne and the children moved to Capron, Illinois, to live with Suzanne's boyfriend, Steve Nelson. Steve owned a home in Capron; his two children from a previous marriage resided there during his parenting time. The Capron house was about 1 ½ hours from Buddy's residence in Vernon Hills, Illinois. Suzanne had a flexible schedule that enabled her to work from home three days a week. She employed a nanny for the entire work week. In the fall of 2012, William started kindergarten and Madelyn was enrolled in preschool, both in Capron.

¶ 10 In September 2012, Buddy filed a petition to modify custody, in which he sought to be named the primary residential parent. Buddy amended his petition a year later, during the trial, requesting not only to be designated as the primary residential parent, but also to be awarded sole custody.

¶ 11 The case went to trial in August 2013 and spanned 13 days over the next few months. At the time of trial, William was entering first grade and Madelyn was starting kindergarten. The children were healthy and generally doing well socially and emotionally and had adjusted to their blended families; however, they were aware of their parents' conflicts. William had been going to counseling since early 2012 for help in dealing with the divorce, but he was doing well.

¶ 12 The parties testified about the changes caused by Suzanne's move. Each blamed the other for their conflicts. Each party testified about particular examples of the other's inability to cooperate and to facilitate the children's relationship with the other parent.

¶ 13 Buddy continued to exercise his parenting time after the move, including the Tuesday and Thursday evening visitations. The children spent about three hours traveling for each visit. The midweek visitations were facilitated by Suzanne allowing Buddy's girlfriend or father to pick up the children right after school instead of having to wait until 4 p.m. pursuant to the JPA.

¶ 14 The parties testified at length about their disagreement as to what the children's involvement in organized sporting activities should be. According to Buddy, the children loved participating in sports such as hockey, baseball, gymnastics, and tae kwon do; according to Suzanne, the children were overcommitted and stressed.

¶ 15 Buddy testified that it was in the children's best interests to award him residential custody because he would promote Suzanne's relationship with the children. He explained that, unlike Suzanne, he would be flexible about her parenting time, allow her to Skype with the children,

and keep her informed of the children's activities. Buddy testified that he was able to communicate with Suzanne, but she was not able to communicate with him.

¶ 16 Suzanne testified that it was in the children's best interests that they remain in her physical custody because she had been their primary caretaker since birth. She had been a stay-at-home mother (or worked as a nanny with William) until the divorce compelled her to work. Her ability to work at home a few days a week permitted a high level of availability to the children. Suzanne believed that placing the children with Buddy was unwarranted and would be very disruptive for the children.

¶ 17 Dr. Frances Pacheco, the section 604(b) custody evaluator appointed by the trial court (see 750 ILCS 5/604(b) (West 2012)), testified that she thought it was in the children's best interests to award Buddy sole custody and to make him the primary residential parent. She opined that joint custody should be terminated because of the parties' antagonism and lack of cooperation with each other. Dr. Pacheco testified that the children were comfortable and bonded with both parents. She thought they were perhaps more energetic and spontaneous with Buddy and a little more affectionate and "kind of lower key" with Suzanne. Dr. Pacheco believed that the children's personalities were a "better fit" with Buddy. She testified at length regarding the parties' conflicts, especially about Buddy's parenting time and the children's involvement in organized sports. Overall, Dr. Pacheco placed the blame for the conflicts on Suzanne and her move to Capron. Dr. Pacheco acknowledged, however, that she accepted some of Buddy's complaints without giving Suzanne an opportunity to respond. Dr. Pacheco agreed that the children were basically well adjusted.

¶ 18 Paul Novak, the guardian *ad litem* (GAL) (see 750 ILCS 5/506(a)(2) (West 2012)), also testified that the JPA should be terminated and sole custody should be awarded to Buddy. He

testified that the parties could not cooperate in joint decision making; he attributed most of the blame to Suzanne. Novak believed that the children were more comfortable at Buddy's house. Novak testified that if the children resided with Buddy, the conflict would decrease because, unlike Suzanne, Buddy would not act out in anger to negatively impact Suzanne's parenting time. Novak thought that Buddy's relationship with the children was suffering because of Suzanne's actions; however, he agreed that Buddy and the children got along well and that Buddy was able to exercise his scheduled parenting time. Novak acknowledged that Buddy's conduct in enrolling the children in activities that overlapped with Suzanne's parenting time had affected her relationship with the children and put them in the middle of the conflict.

¶ 19 On December 3, 2013, the court entered a written order denying Buddy's amended petition for modification of custody. The court found that there was clear and convincing evidence of a change in circumstances based on Suzanne's move to Capron. However, the court found that Buddy "presented no evidence to show that the children's situation would be better if custody was placed with him." The court noted the testimony and reports of Dr. Pacheco and Paul Novak, who both thought that Buddy should have sole custody, but the court expressed its belief that Dr. Pacheco and Novak ignored the policy favoring the present custodian, which promoted stability for children. The court went on to consider the statutory factors regarding the best interests of the children and found that none of the factors supported modifying custody. The court also found that "while neither parent's testimony was fully credible, Buddy's testimony was less believable and less persuasive than Suzanne's." The court decided that, although the parties fell short of the goal of joint parenting, it was still possible to maintain the JPA. Concluding that it had not been "presented with any evidence, much less clear and convincing evidence, that awarding custody to Buddy would in any way alleviate the

complained-of problems between the parties, or otherwise be in the children's best interests," the court denied Buddy's petition for modification of custody. Buddy timely appeals.

¶ 20

## II. ANALYSIS

¶ 21 Buddy contends that the trial court's ruling denying his petition to modify custody was against the manifest weight of the evidence. Under the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq.* (West 2012)), custody proceedings are " 'guided by the overriding lodestar of the best interests of the child or children involved.' " *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45 (quoting *In re A.W.J.*, 197 Ill. 2d 492, 497-98 (2001)). Section 610(b) of the Act permits modification of a custody order only if the trial court finds by clear and convincing evidence that both (1) a change in circumstances has occurred and (2) "the modification is necessary to serve the best interest of the child." 750 ILCS 610(b) (West 2012); *Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 47. Clear and convincing evidence is a higher burden of proof than preponderance of the evidence but not quite as high as the beyond-a-reasonable-doubt burden in criminal cases. *In re Marriage of Wechselberger*, 115 Ill. App. 3d 779, 786 (1983). The high burden of proof in section 610(b) reflects a legislative presumption in favor of a child's current custodian to promote the stability and continuity of a child's custodial and environmental relationship. *In re Marriage of Sussenbach*, 108 Ill. 2d 489, 499 (1985) (citing *Wechselberger*, 115 Ill. App. 3d at 786).

¶ 22 Here, the trial court found by clear and convincing evidence that a change in circumstances occurred, namely, Suzanne's move to Capron. At issue in this appeal is the court's determination that Buddy failed to produce clear and convincing evidence that a modification was necessary to serve the children's best interests.

¶ 23 Section 602(a) of the Act (750 ILCS 602(a) (West 2012)) sets forth a nonexhaustive list of factors for the trial court to consider in determining the best interests of the child. *In re Marriage of Martins*, 269 Ill. App. 3d 380, 388 (1995). Relevant here, the factors include: the parents' wishes; the children's wishes; the interaction and interrelationship of the children with parents, siblings, or other significant persons; the children's adjustment to home, school, and community; the mental and physical health of all involved persons; and "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." 750 ILCS 602(a) (West 2012). "Stability and continuity are in the best interest of the child under section 602, and the presumption of section 610 is but a specific recognition of that fact." *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 412-13 (1994).

¶ 24 A trial court's custody determination is afforded great deference because the trial court is in the best position to judge the witnesses' credibility and assess the best interests of the child. *Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45 (citing *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004)). We will not reverse a trial court's modification of custody unless the decision is against the manifest weight of the evidence and an abuse of discretion. *Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45 (citing *Bates*, 212 Ill. 2d at 515). In examining the evidence, we view it in the light most favorable to the appellee, and, if multiple inferences reasonably can be drawn, we accept those inferences that support the trial court's decision. *Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45 (citing *Bates*, 212 Ill. 2d at 516). The trial court's decision is against the manifest weight of the evidence only where an opposite conclusion is clearly apparent. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 100.

¶ 25 The court's findings as to the section 602(a) factors were as follows. The parents' wishes did not weigh in favor of either side because the parents were diametrically opposed. Likewise,

the court found neutral the factor of the children's wishes because the children were very young. The court also found that the children's interactions with the parties and their households did not weigh in favor of either side. Regarding the children's adjustment to home, school, and community, the court found that they were well adjusted but did not give this factor much weight because the children were young and "would be well adjusted no matter where they were." With respect to the willingness and ability of the parties to facilitate and encourage a close and continuing relationship between the children and the other parent, the court found that each parent had "significant deficiencies." The court explained, "Put bluntly, both parents seem to believe that their way of parenting is the only way, and neither gives the other much credit for their ability to raise the children."

¶ 26 Our review of the record reveals that the trial court's findings were not against the manifest weight of the evidence and that the opposite conclusion was not clearly apparent. The trial court heard 13 days of testimony. The evidence established that both Buddy and Suzanne love their children and want what is best for them. Dr. Pacheco testified that both parties were "seeking the \*\*\* same outcome, they may just do it in different ways." She described the difference in parenting styles as a "nuance" or slight variation. Novak likewise testified that it was a "close case." Buddy notes that both Dr. Pacheco and Novak believed that the children were more relaxed and under less stress at Buddy's house. He takes issue with the trial court's statement that he "presented no evidence to show that the children's situation would be better if custody was placed with him." Taken in the context of its entire opinion, the court's "no evidence" statement reasonably meant that there was insufficient clear and convincing evidence that a custody change was necessary to the children's best interests. Though both Dr. Pacheco and Novak recommended that Buddy be awarded sole custody, neither opinion was based on

clear and convincing evidence that a custody change was necessary to the children's best interests. Rather, they noted only minor differences in the parties' parenting styles.

¶ 27 Moreover, at their core, the parties' conflicts predated the change in circumstances prompting Buddy's petition—Suzanne's move to Capron. The trial court observed that the record was "replete with examples of conflicts between the parties." The court found it "beyond dispute" that Suzanne's move to Capron "affected the parenting time of the parties by, among other things, requiring the children to travel for significant time periods for each visitation." The court further found, however, that it could not be said that the parties' conflict was "solely" the result of Suzanne's move, "or even solely a result of her actions." Buddy failed to present clear and convincing evidence that modifying custody would alleviate or even reduce the parties' conflicts. His testimony that he would do a better job than Suzanne of encouraging the children's relationship with the other parent was speculative, and, as the court found, not borne out by the evidence as a whole. Accordingly, the trial court's denial of Buddy's petition to modify custody was not an abuse of discretion.

¶ 28 Buddy essentially disagrees with the trial court's findings. Buddy highlights how his work schedule coincided with the children's school schedule, thus making him more available to the children than Suzanne. However, he ignores Suzanne's flexible work schedule, which enables her to work from home three days per week. Buddy also argues that, if he had primary physical custody, Suzanne could more easily exercise her midweek visitations because she works near Buddy's home two days a week. This conclusion is speculative, and Suzanne also testified that she sometimes works late at the office on those days. Additionally, to the extent that there was evidence that Vernon Hills' schools were better than Capron's, the differences were certainly not dramatic, and Buddy's testimony about the schools was severely impeached on

cross-examination with respect to the source of and basis for the statistics he offered. Furthermore, abstract statistics aside, there was evidence that the children were doing well in school in Capron. Buddy also points out that Dr. Pacheco and Novak believed that he could better promote the children's relationship with the other parent. Yet, the trial court found the record "replete with examples of conflicts between the parties," and cited two examples demonstrating that "the evidence is not as one-sided as Buddy would argue." In particular, the court observed that Buddy violated the JPA by enrolling William in hockey over Suzanne's objection and during her parenting time. Even accepting the weight Buddy attributes to the evidence, it was not clear and convincing that a custody modification was necessary to the children's best interests. See *Wechselberger*, 115 Ill. App. 3d at 786 ("The law is well settled that clear and convincing evidence requires a high level of certainty.").

¶ 29 Moreover, the trial court made credibility findings to which we must afford great deference. *Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45. Although finding that neither party was "fully credible," the court found that Suzanne was more believable and persuasive than Buddy. The court was in the best position to "observe the temperaments and personalities of the parties and assess the credibility of the witnesses." (Internal quotation marks omitted.) *In re Marriage of Spent*, 342 Ill. App. 3d 643, 652 (2003); see also *In re Marriage of Felson*, 171 Ill. App. 3d 923, 926 (1988) (stating a custody decision "necessarily rests on the temperaments, personalities and capabilities of the parties, and the demeanor of the witnesses who testify at trial"—all of which the trial judge is in the best position to evaluate). While Buddy has many positive qualities to offer the children, the trial court's finding that he failed to present clear and convincing evidence that a custody change was necessary to the children's best interests was not against the manifest weight of the evidence. See *Wycoff*, 266 Ill. App. 3d at

410 (“It is a mistake to change custody from a good custodian in hopes that another may be better.”).

¶ 30 Buddy also argues that the trial court improperly discounted the opinions of Dr. Pacheco and Novak, taking issue with the court’s comment that both Dr. Pacheco and Novak “applied the standards of § 602, as though the Court were making an initial custody determination, rather than § 610, regarding modifications.” Buddy further claims, without citation to authority, that the presumption favoring the present custodian “has weakened to the point that it is no longer a separate and additional consideration.”

¶ 31 Buddy misapprehends the legislative presumption in favor of the current custodial arrangement. The child’s stability is a “major consideration” in both the initial award of custody under section 602 and in a modification of custody under section 610. *Wycoff*, 266 Ill. App. 3d at 409-10. The case law is clear that the heightened burden of proof required by section 610(b) embodies a legislative presumption in favor of the current custodian. See *In re Marriage of Davis*, 341 Ill. App. 3d 356, 359 (2003). Thus, any “additional hurdle” imposed by the trial court was the statutorily required heightened burden of proof. Furthermore, examining the trial court’s comment in the context of its entire ruling, the court reasonably meant that neither Dr. Pacheco’s nor Novak’s opinion was based on facts that a custody change was necessary for the children’s best interests. Although they both cited examples of what they believed were Suzanne’s shortcomings, none of the concerns rose to the level requiring a change in custody.

¶ 32 Buddy’s argument also reflects his misapprehension of the role of the GAL and the section 604(b) custody evaluator. The GAL “shall investigate the facts of the case and interview the child and the parties.” 750 ILCS 5/506(a)(2) (West 2012). The GAL acts as a witness who is empowered to advocate for the children’s best interest through written reports and

recommendations. *Vlastelica v. Brend*, 2011 IL App (1st) 102587, ¶ 22. The GAL's recommendations are not binding on the court. *Taylor v. Starkey*, 20 Ill. App. 3d 630, 634 (1974). Section 604(b) of the Act "provides a mechanism for court appointment of an independent evaluator on custody and visitation issues. The purpose of the statute is to make the information available to assist the circuit court \*\*\*." (Internal quotation marks omitted.) *Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 51. However, "it is well settled that a court is not bound to abide by the opinions or implement the recommendations of its court appointed expert." *Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 52. Regardless of whether it receives recommendations from a GAL, or a section 604(b) custody evaluator—or both, or neither—the trial court is the ultimate fact finder (*In re Marriage of Saheb & Khazal*, 377 Ill. App. 3d 615, 628 (2007)).

¶ 33 The record reveals that the trial court, acting as the fact finder, neither ignored Dr. Pacheco's and Novak's opinions nor improperly discounted them. The court expressly acknowledged their opinions but disagreed with them. Buddy speculates that, because the trial court did not include a detailed analysis of their testimony, the court must have ignored them. We decline to attribute such fault to the trial court. Nothing indicates that the court ignored any evidence.

¶ 34 Moreover, Dr. Pacheco's and Novak's explanations for their opinions provide further support for the trial court's conclusion that a change in custody was not necessary for the children's best interests. Dr. Pacheco testified that her opinion was based on "the children's relationship with their father, the activities that the children [we]re involved in and want[ed] to be involved in, [and the fact that] the rules [and] expectations of the father for his children were appropriate." She further testified that the children were bonded with both parents but were

“maybe more strongly bonded” with Buddy—that the “personalities of the children are better fit with their father.” Novak testified that he considered a number of things in reaching his opinion, “[b]ut ultimately [he] believe[d] that father’s relationship with his children [was] suffering because of mom’s actions.” However, when asked how the relationship was suffering, he said that it was “not one specific thing,” and cited an example of when Suzanne declined to allow Buddy to pick up the children at 2:30 instead of 4 p.m., even though she routinely had been allowing this additional parenting time, because she wanted them to trick-or-treat in their neighborhood. Dr. Pacheco’s and Novak’s explanations for their opinions support the trial court’s conclusion that a custody change was not necessary for the children’s best interests. See *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2000) (“An expert’s opinion is only as valid as the bases and reasons for the opinion.”).

¶ 35 Finally, the cases that Buddy cites do not compel us to reverse the trial court. Not only are custody cases *sui generis* (see *In re Parentage of Scarlett Z.-D.*, 2014 IL App (2d) 120266-B, ¶ 65), but also the cases upon which he relies are inapposite. See *In re A.S.*, 394 Ill. App. 3d 204 (2009) (reversing an initial custody award to the father where the child had resided with the father for the year prior to the determination, but the father misled the trial court about the temporary nature of the custody arrangement he had with the mother); *Martins*, 269 Ill. App. 3d 380 (reversing the trial court’s denial of the father’s petition to modify custody where most of the statutory factors weighed heavily in favor a custody change); *In re Marriage of Bush*, 170 Ill. App. 3d 523 (1988) (rejecting the “tender years doctrine” that the mother is always better suited to care for very young children).

¶ 36 For the reasons stated, we affirm the decision of the circuit court of Lake County.

¶ 37 Affirmed.