

**NOTICE**

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**FILED**

October 23, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

2014 IL App (4th) 140462-U

NO. 4-14-0462

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PAUL TOTH,	)	Appeal from
Petitioner-Appellee,	)	Circuit Court of
v.	)	Champaign County
KRISTI HOWREY,	)	No. 10F502
Respondent-Appellant.	)	
	)	Honorable
	)	Arnold F. Blockman,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Justices Pope and Turner concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The appellate court affirmed the trial court's visitation order as it did not apply an erroneous burden of proof and was not against the manifest weight of the evidence.
- ¶ 2 In October 2010, petitioner, Paul Toth, filed a petition pursuant to section 7 of the Illinois Parentage Act of 1984 (Parentage Act) (750 ILCS 45/7 (West 2010)) to establish a father and child relationship between him and A.H. (born June 27, 2010). Respondent, Kristi Howrey, is A.H.'s mother. Over the next several years, the trial court entered a series of temporary visitation orders. In November 2013, the trial court held an evidentiary hearing on Paul's petition. In May 2014, the trial court entered a permanent visitation order.
- ¶ 3 On appeal, Kristi argues (1) the trial court improperly shifted the burden of proof to her, and (2) the visitation order was against the manifest weight of the evidence. We affirm.

¶ 4

## I. BACKGROUND

¶ 5 In October 2010, Paul filed a petition pursuant to section 7 of the Parentage Act (750 ILCS 45/7 (West 2010)) to establish a father and child relationship between him and A.H. Paul requested the trial court establish temporary and permanent visitation schedules. In December 2010, Paul filed a "Petition to Set Visitation" requesting the court to establish a specific visitation schedule.

¶ 6

### A. The Temporary Visitation Orders

¶ 7 In February 2011, the trial court entered the first in a series of temporary visitation orders. In April 2011 and December 2011, the court entered additional temporary visitation orders. In March 2012, the trial court entered a temporary visitation order defining Paul's visitation periods as follows: every Wednesday from 3:30 p.m. to 5:30 p.m. and alternating weekends starting at 5 p.m. on Friday to 5 p.m. on Sunday. The same month, the trial court entered an agreed paternity judgment.

¶ 8

In October 2012, the trial court held a hearing in which the court recognized the parties had a high level of hostility toward one another. The court appointed Dr. Judy Osgood, a licensed clinical psychologist, as a parent coordinator to help reduce the conflict and make recommendations regarding a visitation schedule. The court also entered other orders which are not at issue and directed a written order be entered at a later time. On November 13, 2012, the trial court entered a written order memorializing what it ordered at the October 2012 hearing.

The written order stated, in relevant part:

"G. The currently existing temporary visitation schedule consists of alternating weekends from 5:00 p.m. on Friday to 5:00

p.m. on Sunday and Wednesdays from 3:30 p.m. to 5:30 p.m. The parties exchange the child at the Urbana Police Department."

¶ 9 B. The November 27, 2013, Hearing

¶ 10 In November 2013, the trial court held an evidentiary hearing.

¶ 11 Dr. Osgood testified she met with both Kristi and Paul and observed Paul and A.H. together in developing her visitation recommendation. Dr. Osgood met with Kristi three times. She did not observe Kristi and A.H. together because Kristi did not "follow through" with Dr. Osgood's requests for such parent-child observations. During Dr. Osgood's visits with Kristi, Kristi expressed she did not want Paul to have the visitation he currently had or any additional visitation, she was afraid of Paul, A.H. had emotional and behavioral problems when she returned from visits with Paul, and A.H. exhibited separation anxiety at day care. Dr. Osgood testified Kristi's descriptions of A.H. were as if they were of a "totally different child" than what she observed in her visits with Paul and A.H. Dr. Osgood was concerned about Kristi's ability to promote a relationship between Paul and A.H.

¶ 12 Dr. Osgood testified she had 11 parent-child observations with Paul and A.H. Over these visits, Dr. Osgood observed A.H. bond with Paul. She testified A.H. was "very secure" with Paul and a "very happy child." She did not observe A.H. display any emotional or behavioral problems. Dr. Osgood also interviewed additional witnesses who observed Paul interact with A.H. and expressed A.H. did well with Paul.

¶ 13 Dr. Osgood recommended Paul have time with A.H. every Wednesday, beginning at 10 a.m., and every other weekend, beginning at 10 a.m. on Friday. She recommended specific dates be determined in advance for holiday and summer visitation.

¶ 14 Paul testified he is a registered nurse and works at Carle Foundation Hospital in Urbana. He self-schedules his work schedule. He testified he would not schedule himself to work on the days he had visitation with A.H. He admitted he had worked until 7:30 p.m. on some of the Fridays he had visitation with A.H. and explained he did this because he needed the additional income. His parents, who pick A.H. up from the police station, where the visitation exchange occurs, have cared for A.H. while Paul was at work. Paul testified he and A.H. "do really well together" and in their time together they engage in activities such as playing with toys, watching movies, and reading. His mother is present during the visitation as a form of protection from possible allegations. When asked if there was a "specific reason" he wanted to have more visitation with A.H., he replied, "She's my daughter" and "I just don't see why I can't see my daughter more."

¶ 15 Kristi testified she objected to the additional visitation time because she believed A.H. is "mostly" visiting with Paul's mother. She added her objection was also based on "the things [A.H.] comes back and says, the condition that she comes back in, [and] the stress that it puts on everyone." Kristi testified when A.H. returns from her time with Paul "she has some misbehaviors" and does not want to go to day care. Kristi elaborated A.H. is "not willing to listen" and makes statements "she shouldn't be making." Kristi works on a farm and had placed A.H. in day care for five days a week until November. At the time of the hearing, A.H. went to day care on Monday and Tuesday and was at home with Kristi on the other days.

¶ 16 After Kristi testified, her counsel informed the court he wanted to call Dr. Debbie Sperry, a licensed clinical psychologist, who was not present. The trial court continued the evidentiary hearing.

¶ 17

C. The March 6, 2014, Hearing

¶ 18 In March 2014, the trial court reconvened for further evidence. Kristi informed the court she decided not to have Dr. Sperry testify. Kristi testified about an incident on January 29, 2014, where A.H. was upset at the visitation exchange and Paul's mother become angry with Kristi. Afterward, Paul sent Kristi "a couple of nasty texts." During her testimony, the court asked Kristi questions about her employment and the day care arrangements.

¶ 19 After the close of evidence, the trial court and counsel engaged in a discussion of the parties' positions. The following occurred:

THE COURT: \*\*\* I guess the question is, counsel, I don't understand what's the harm to the child by giving the father these additional hours when he's not working? I mean, Dr. Osgood recommended it, and I mean, [Kristi] said she talked to somebody[.] \*\*\* [Y]ou could have presented somebody that said this wasn't a good idea. \*\*\*

\* \* \*

[KRISTI'S COUNSEL]: My concern is that he's not using his visitation—

THE COURT: Looking at it from my standpoint, all I have is \*\*\* [Kristi] saying that the child didn't want to go, yet Dr. Osgood testified that the child has a real good relationship with [Paul]. \*\*\* I've got to base it on what's best for the child. I don't have any other testimony from anybody.

\* \* \*

THE COURT: [Announced its order and the visitation schedule.] And once again, as we go along, it's certainly a modifiable [order], in the best interest of the child[.] [A]nd if you folks want to present some professional testimony that this is not best for the child, or that the child[ i]s suffering because of this, we'll deal with it at the time. I'm [d]oing this based on the fact that, number one, it seems like a no-brainer to me that if the child is—if the father has time that he's not working, he's the non-custodial parent, he ought to be able to use that time. \*\*\* And secondly, based on the evidence, it's recommended by Dr. Osgood \*\*\*. So for those two reasons, I find it's in the best interest of the child."

¶ 20 On May 8, 2014, the trial court entered a written order establishing a visitation schedule. Paul would visit with A.H. every Wednesday from 10 a.m. to 5:30 p.m. and every other weekend from Friday at 10 a.m. to Sunday at 6 p.m.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, Kristi argues (1) the trial court improperly shifted the burden of proof to her, and (2) the visitation order was against the manifest weight of the evidence. We address Kristi's arguments in turn.

¶ 24 A. The Best-Interests-of-the-Child Standard and the Standard of Review

¶ 25 The Parentage Act establishes a comprehensive statutory scheme for determining paternity and establishing visitation in connection with a judgment of paternity. *In re Parentage of J.W.*, 2013 IL 114817, ¶ 38, 990 N.E.2d 698. Under section 14 of the Parentage Act, once paternity is established, the trial court may order visitation and decisions regarding visitation must be determined in accordance with the best-interests-of-the-child standard and the factors set forth in section 602 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/602 (West 2012)). 750 ILCS 45/14 (West 2012). The best-interests factors include:

"(1) the wishes of the child's parent(s); (2) the wishes of the child; (3) the interaction and interrelationship of the child with the parent(s), siblings, and any other person who may significantly affect the child's best interests; (4) the child's adjustment to his or her home, school, and community; (5) the mental and physical health of the involved individuals; (6) the potential for violence or threat of violence; (7) the occurrence of ongoing or repeated abuse; (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) military obligations." *J.W.*, 2013 IL 114817, ¶ 51, 990 N.E.2d 698.

¶ 26 "A trial court's determination as to the best interests of the child will not be reversed on appeal unless it is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred. [Citation.] A judgment is against the manifest weight of

the evidence only when the opposite conclusion is clearly apparent." *Id.* ¶ 55, 990 N.E.2d 698.

¶ 27 B. Kristi's Argument the Trial Court Shifted the Burden of Proof

¶ 28 Kristi argues the trial court improperly shifted the burden of proof onto her. Specifically, she contends the trial court erroneously started from a presumption additional visitation would be beneficial to A.H. and the court improperly considered Dr. Osgood's recommendation because Paul did not file a petition to modify the visitation schedule provided for in the November 13, 2012, order. Kristi's argument is unpersuasive.

¶ 29 Kristi cites *In re Marriage of Knoche & Meyer*, 322 Ill. App. 3d 297, 750 N.E.2d 297 (2001), in support of her assertion Paul was required to show the "modification" was in A.H.'s best interests. Kristi's reliance on *Knoche* is misplaced. In *Knoche*, the appellate court considered the burden of proof applicable to a custody modification. *Id.* at 306, 750 N.E.2d at 304. A custody-modification determination pursuant to section 610 of the Marriage Act involves a two-part finding there has been a change in circumstances and the modification is necessary to serve the best interests of the child. 750 ILCS 5/610 (West 2012). In contrast to a custody order, pursuant to section 14 of the Parentage Act, a visitation order may be modified "whenever modification would serve the best interest of the child." 750 ILCS 5/607(c) (West 2012); 750 ILCS 45/16 (West 2012).

¶ 30 In *J.W.*, the supreme court recently addressed the appropriate standard to be applied when a biological father seeks visitation under section 14 of the Parentage Act. *J.W.*, 2013 IL 114817, ¶ 36, 990 N.E.2d 698. The supreme court emphasized "the best interests of the child is the 'guiding star' by which all matters affecting children must be decided." *Id.* ¶ 41, 990 N.E.2d 698 (quoting *Nye v. Nye*, 411 Ill. 408, 415, 105 N.E.2d 300, 304 (1952)). Section 602(a)

of the Marriage Act sets forth a nonexclusive list of best-interests factors a court must consider in making a visitation determination. *Id.* ¶ 51, 990 N.E.2d 698. Relevant to the best-interests determination is section 602(c)'s presumption " 'the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child.' " *Id.* ¶ 52, 990 N.E.2d 698 (quoting 750 ILCS 5/602(c) (West 2010)). This presumption "may be overcome if, after considering the relevant factors, the court finds it is not in the child's best interests to grant visitation privileges." *Id.* The supreme court concluded, "in a proceeding to determine visitation privileges under section 14(a)(1) of the Parentage Act, the initial burden is on the petitioner to show that visitation will be in the best interests of the child pursuant to the provisions set forth in section 602 of the Marriage Act." *Id.* ¶ 53, 990 N.E.2d 698. In sum, the petitioner has the initial burden to show visitation will be in the best interests of the child, section 602(c)'s maximum-parental-involvement presumption applies, and evidence visitation is not in the child's best interest may overcome this presumption.

¶ 31           While Kristi is correct that Paul bears the initial burden of proof, her argument ignores the effect of section 602(c) of the Marriage Act. The trial court heard evidence about A.H.'s interaction with Paul. Dr. Osgood's testimony and Paul's testimony were more than sufficient to meet Paul's initial burden of proof. Then, it was not error for the trial court to presume additional visitation time would be beneficial as, under section 602(c), the court starts with the presumption maximum parental involvement is in the best interests of the child. 750 ILCS 5/602(c) (West 2012)). As the supreme court held in *J.W.*, this presumption may be overcome, but there must be evidence the parental involvement—such as visitation—is not in the child's best interests. *J.W.*, 2013 IL 114817, ¶ 52, 990 N.E.2d 698. The court's comment Kristi

could have presented evidence the visitation was not in A.H.'s best interests is consistent with *J.W.* and section 602(c)'s presumption. As the court pointed out, Kristi had the opportunity to present such evidence but did not.

¶ 32 Kristi provides no support for her assertion the trial court could not consider Dr. Osgood's testimony and visitation recommendation because Paul did not file a petition to modify the November 13, 2012, order. She posits this order was a "final" order; however, the plain language of the order states the visitation schedule is "temporary." Further, the record shows all the visitation orders were temporary orders except for the May 8, 2014, order. Paul was not required to file a petition to modify the temporary visitation schedule outlined in the November 13, 2012, order and the court could consider Dr. Osgood's testimony and visitation recommendation.

¶ 33 C. Kristi's Manifest-Weight-of-the-Evidence Argument

¶ 34 Kristi argues the trial court's finding visitation was in A.H.'s best interest was against the manifest weight of the evidence. Specifically, Kristi asserts the trial court erred because (1) it failed to find an increase in visitation would be an "improvement" over the "status quo," and (2) Paul did not demonstrate a change in visitation would serve A.H.'s best interests. Kristi's argument is unpersuasive.

¶ 35 Kristi asserts the trial court was required to find the visitation would be an "improvement" over the "status quo" and "[t]he record is bereft of reasons why increased visitation would benefit [A.H.]" As discussed above, this argument is based on Kristi's mistaken application of the two-pronged standard used for modification of custody orders under section 610 of the Marriage Act. Modification of a visitation order—let alone a *temporary* visitation

order—does not require the same findings required for a custody modification.

¶ 36 Kristi asserts the trial court erred because Paul did not demonstrate a change in visitation would be in A.H.'s best interests. Her argument is little more than a request for this court to reweigh the evidence. We will not do so. See *In re D.F.*, 201 Ill. 2d 476, 498-99, 777 N.E.2d 930, 943 (2002) ("Under a manifest weight of the evidence standard, we give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and the witnesses and has a degree of familiarity with the evidence that a reviewing court cannot possibly obtain. A reviewing court, therefore, must not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn.").

¶ 37 The trial court's visitation order was not against the manifest weight of the evidence. It was undisputed the number of visitation exchanges, the location of the exchanges, and the parties involved in the exchanges would all stay the same. Only the amount of time A.H. was in Paul's care would change—an additional 19 hours per two-week cycle. Dr. Osgood testified A.H. bonded with Paul and they had a good relationship. She recommended Paul's visitation time start earlier on Wednesdays and Fridays. Paul testified he was able to self-schedule and would not work on Wednesdays and the Fridays he had with A.H., allowing him more time with A.H. Kristi testified A.H. occasionally misbehaved after her time with Paul, but she did not present any evidence about what caused this alleged misbehavior. Kristi provided no evidence additional time with Paul would not be in A.H.'s best interests in order to overcome the presumption favoring maximum parental involvement. See 750 ILCS 5/602(c) (West 2012). As the trial court pointed out, Kristi had retained Dr. Sperry as an expert but chose not to present

any expert testimony contradicting Dr. Osgood's testimony.

¶ 38 D. A Closing Note

¶ 39 During the October 1, 2012, hearing, the trial court told the parties the following:

"I hope both of you folks listen to me when I tell you that I have cases here where litigants, parents, keep fighting all the way up until the child reaches majority so, you know, if you want to spend the next 16 years in court, we'll be here. \*\*\* And I don't think that's a good use of your money. I don't think that is a good use of your time. And I think it hurts the child. And somehow you've got to put aside the hurt and the other issues and think about what's best for this child. There's no question that this child needs two involved parents."

During the November 27, 2013, hearing, the court told the parties the following: "[W]hen there's conflict, the kids pick up on it. All you're doing, folks, by continuing this battle is hurting the child. And you may not see it immediately, but that's what's happening."

¶ 40 This advice bears repeating. A prolonged and acrimonious battle over visitation does not benefit A.H.'s well-being. A.H. needs both parents and needs them to work together.

¶ 41 III. CONCLUSION

¶ 42 We affirm the trial court's judgment.

¶ 43 Affirmed.