

NOTICE  
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2014 IL App (5th) 140104-U

NO. 5-14-0104

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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

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<i>In re</i> MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
KELLYE R. ZEIGER,	)	Randolph County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 13-D-33
	)	
KEVIN P. ZEIGER,	)	Honorable
	)	Eugene E. Gross,
Respondent-Appellee.	)	Judge, presiding.

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JUSTICE CHAPMAN delivered the judgment of the court.  
Presiding Justice Welch and Justice Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the trial court's order on the issue of custody is not contrary to the manifest weight of the evidence, we affirm the court's judgment. Where the trial court's decision not to award retroactive child support is consistent with the amount of time the children spent with each parent, we do not find that the court abused its discretion.

¶ 2 Kellye R. Zeiger appeals from the trial court's award of primary physical custody of the minor children to her ex-husband, Kevin P. Zeiger. In the event that we reverse the custody award, she also argues that the trial court granted Kevin excessive visitation.

Finally, she contends that the trial court erred in refusing to award her retroactive child support.

¶ 3

### FACTS

¶ 4 Kellye and Kevin married in late December 2006. Two daughters were born during the marriage. The oldest girl is currently six years old, while the younger child is two years old. The parties separated in August 2012. Kellye moved out of the marital home and took the children with her. Upon separation, visitation was by agreement. Kellye filed for divorce in March 2013. Kevin and Kellye each sought a temporary order of custody of and support for the children.

¶ 5 Kellye is a registered nurse at Belleville Memorial Hospital. She began working there in January 2011. She works three 12-hour shifts per week on varying days, and has flexibility to move her shifts when necessary. Kevin works at Material Works in Red Bud, Illinois. He has worked there since 1998. He works weekdays from 8:30 a.m. until 4:30 p.m.

¶ 6 When Kellye separated from Kevin, she moved to an apartment in Ruma with the children. She lived there for one year, until her lease expired, and then moved to a larger home in Smithton in August 2013. She chose Smithton because it was geographically closer to the hospital where she worked. Each daughter has her own bedroom in Kellye's Smithton home. Kevin has continued to live in the marital home where he has lived since May 2006. The distance between the two homes is approximately 20 minutes.

¶ 7 The oldest child attended a Lutheran school in Smithton for preschool, which also provided daycare after school. At the beginning of the 2013-14 school year, when the child lived with Kellye, Kellye enrolled her in public school.

¶ 8 In addition to the two girls, Kellye also has another daughter from a prior relationship. This child lives with Kellye and has a good relationship with both of her stepsisters. At the time of the hearing, she was in eighth grade.

¶ 9 On April 4, 2013, the court entered its temporary order granting joint custody with primary physical custody to Kellye. The schedule was very specific with several overnights each week with Kevin in order to accommodate Kellye's work schedule. Rules regarding consumption of alcoholic beverages were included in the order.

¶ 10 Mediation was attempted but the parties terminated the process without reaching an agreement. In June 2013, Kevin filed a motion for a temporary order to determine the school in which the oldest daughter would be enrolled for the coming year. Previously this child had only attended St. John's Lutheran School in Red Bud, but Kellye unilaterally enrolled the child in the Red Bud public school. In the meantime, Kellye moved to Smithton and wanted to enroll the child in the Freeburg public school system. In a temporary order dated August 8, 2013, the court allowed the child's enrollment in the Freeburg school system.

¶ 11 The court held the trial in December 2013. Both parties testified. A large percentage of their testimony was conflicting. Kellye testified that Kevin had a drinking problem, which not only led to the breakdown of the marriage, but also resulted in anger

and violence issues. She claimed that she offered him numerous additional visitation opportunities that Kevin declined. She asked the court to award the statutory allowable child support for two children retroactive to the date that she filed for dissolution of marriage. Kevin denied that he had the alleged alcohol problem. He provided specific instances in which Kellye had various appointments, or wanted to go shopping, and without advance notice, offered him visitation. Sometimes he was able to utilize these extra opportunities, but on other occasions due to preexisting scheduled events, he was unable to do so. In arguing his position to the court, Kevin explained that combining the current visitation schedule with additional days/hours he had the children, he already spent more hours per week with his daughters than Kellye did. He sought custody of the girls.

¶ 12 The court ruled on the custody issue at the conclusion of the trial. It found both parents to be fit. The court considered all of the factors in determining which custodial arrangement would be in the best interests of the children. The court determined that one of the factors was critical to the court's decision—the willingness and ability of the party to facilitate and encourage a close and continuing relationship between the parent and the other child. The court determined that this factor clearly favored Kevin. The court stated that based upon the testimony and its observation of the parties, it reached the decision that Kevin was much more willing to be flexible and to work things out. Due to Kellye's work schedule, and the fact that the court felt that the parties could facilitate an ongoing relationship, it awarded joint custody with Kevin being the residential parent. The court

ordered that the alternating weekend visitation needed to match with the weekends Kellye had her oldest daughter, so that the three girls would be able to spend every other weekend together. The court awarded no child support because it found that the time was evenly split between the two parties. With respect to schooling, the court ordered the parties to return to mediation to resolve the matter of public or private schooling.

¶ 13 Kellye appeals from this ruling.

¶ 14 **LAW AND ANALYSIS**

¶ 15 On appeal, Kellye does not dispute the joint custody ruling, but argues that the trial court committed error in awarding primary physical custody to Kevin. She also argues that the court erred in not awarding her retroactive child support.

¶ 16 **Custody and Custodial Time Awarded**

¶ 17 Custody must be determined with reference to the child's best interests. 750 ILCS 5/602 (West 2012). Factors that the trial court must consider in determining a child's best interests are as follows:

"(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 abuse \*\*\* whether directed against the child or directed against another person; [and]

(8) 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 5/602(a)(1)-(8) (West 2012).

¶ 18 On appeal from a custody decision, the court will not reverse the trial court's judgment unless the judgment expressed is contrary to the manifest weight of the evidence. *In re Marriage of Gambla*, 367 Ill. App. 3d 441, 463, 853 N.E.2d 847, 865 (2006). A judgment contrary to the manifest weight of the evidence is one in which "the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based upon the evidence." *In re Marriage of Gambla*, 367 Ill. App. 3d at 463, 853 N.E.2d at 865-66. We must look at the evidence in the light most favorable to the parent who received the custody award. *In re Marriage of Gambla*, 367 Ill. App. 3d at 463, 853 N.E.2d at 866. Because the trial judge was able to judge the credibility of the witnesses who testified in his court, we afford great deference to the trial court's decision. *In re Marriage of Gambla*, 367 Ill. App. 3d at 463, 853 N.E.2d at 866.

¶ 19 In this case, we have thoroughly reviewed the testimony at the custody hearing and find no basis to conclude that the trial court's custody award or visitation schedule is

contrary to the manifest weight of the evidence. The trial court considered every element necessary in reaching its conclusion that it was in the best interests of the children to award primary physical custody to Kevin.

¶ 20 Both parents sought custody. The children were too young to express their opinions on custody. The children had good relationships with both parents. There was no evidence of physical violence or ongoing abuse from either parent. The court stated that based upon its observations, it found that neither parent suffered from psychopathological problems.

¶ 21 The trial court was able to observe the parents as they testified at the hearing. From the testimonial evidence, the court concluded that Kevin was the more flexible parent. We note that Kevin's work schedule was set, whereas, historically, Kellye's was not. Kellye worked overnight shifts. From the time that the parties began living separately, on most occasions when Kellye had an overnight shift, she turned to Kevin to provide care in her absence. While there was testimony that Kellye did not abide by the temporary custody/visitation order when she had a shift change on at least one occasion and allowed the children to spend the night with her boyfriend, the court did not reference this violation in reaching its custody decision. From the time of separation, the children spent an almost equal amount of time with both parents. Kevin argued that mathematically the children were spending more than 50% of the time with him at his home. The trial court's order essentially keeps this type of schedule in place, with the exception that the primary custodial home is with Kevin in Red Bud, rather than with

Kellye in Smithton. Kellye's concern that the children would not be able to spend as much time with their stepsister is not entirely accurate. Because of her work schedule, the girls always stayed with Kevin while Kellye worked, and thus were apparently not with their stepsister. The order crafted by the trial court still allows the girls to stay with Kellye and their stepsister every week from Tuesday morning through Thursday evening, as well as every other weekend to coincide with the weekend that Kellye has their stepsister.

¶ 22 Because we affirm the trial court's custody order, we do not reach the contingent issue of visitation raised by Kellye.

¶ 23 **Retroactive Child Support**

¶ 24 The trial court has the discretion to award child support retroactively if doing so is reasonable and just. *In re Marriage of Rogliano*, 198 Ill. App. 3d 404, 410, 555 N.E.2d 1114, 1118 (1990).

¶ 25 Kellye argues that the trial court deviated from the statutory guidelines for child support for two children in denying her support during the period that the two were living apart. The trial court heard testimony from Kevin about monies he expended to assist the children during the separation. Additionally, the testimony supported an almost equal division of time.

¶ 26 The April 4, 2013, temporary order directed the parties to continue to pay expenses and costs as they had done so during the separation. Each party had been providing for all expenses while the children were in his or her care.

¶ 27 The court's December 4, 2013, order which did not award child support in an ongoing or retroactive manner was based upon the parties' similar incomes, the ordered division of extracurricular expenses, and the equal division of physical custody time.

¶ 28 While the time spent with each parent was not precisely equal, Kevin and Kellye evenly divided all expenses from the time of separation through the date of the court's order. Kevin provided documentary proof of the money he expended by check and debit entries, and testified that he also spent extra monies in cash. Because of the nearly equal time split between the two households over the months of separation, we conclude that the trial court's order denying retroactive support for that time period was within the court's discretion.

¶ 29 **CONCLUSION**

¶ 30 For the foregoing reasons, the judgment of the circuit court of Randolph County is hereby affirmed.

¶ 31 Affirmed.