

No. 1-15-2476

**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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IN THE  
 APPELLATE COURT OF ILLINOIS  
 FIRST JUDICIAL DISTRICT

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<i>In re</i> MARRIAGE OF:	)	Appeal from the
	)	Circuit Court of
DEMETRIOS J. L.,	)	Cook County.
	)	
Petitioner-Appellant,	)	
	)	No. 12 D 002853
and	)	
	)	
AMY E. P.,	)	Honorable
	)	Patricia Logue,
Respondent-Appellee.	)	Judge Presiding.

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PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.  
 Justices Connors and Gordon concurred in the judgment.

**ORDER**

¶ 1     *Held:* Trial court's award of joint custody was an abuse of discretion.

¶ 2     Petitioner Demetrios L. and respondent Amy P. began dating in 2006, were married in June 2009, and had a son, D.L., in August 2009. In 2012, Demetrios initiated dissolution of marriage proceedings. Both parties filed petitions seeking custody of D.L. After approximately three years of contentious litigation, the trial court awarded joint custody to the parties. On appeal, Demetrios contends that the trial court abused its discretion in awarding the parties joint custody and that instead, he should have been awarded sole custody of D.L. For the following

reasons, we reverse the judgment of the trial court.

¶ 3

### BACKGROUND

¶ 4 On appeal, Demetrios challenges only the custody of D.L., accordingly, we will address the facts of the case only to the extent necessary for resolution of the appeal.

¶ 5 On March 22, 2012, Demetrios filed a petition for the dissolution of his marriage to Amy. According to the petition, Demetrios and Amy were married on June 18, 2009, and had one son, D.L, born August 5, 2009. Demetrios alleged that he was an anesthesiologist practicing "in Arlington Heights, Illinois" and that Amy was unemployed at the time the petition was filed, although as recently as 2009 she was employed on a full time basis as a pharmaceutical representative with Baxter, Inc. In addition, Demetrios alleged that irreconcilable differences had "caused an irretrievable breakdown of the marriage" and that "future attempts at reconciliation would be impracticable and not in the best interests of the family." Demetrios further alleged that he was a "fit and proper person to have the care, custody, control and education" of D.L., and that he should be awarded primary custody, care, and control of D.L. in the event of a joint custody arrangement. In the alternative, that he should be awarded sole custody of D.L.

¶ 6 Amy responded to Demetrios' petition on June 1, 2012, admitting the majority of his substantive allegations. She denied, however, that Demetrios was a "fit and proper person to have the care, custody, control and education" of D.L. Instead, Amy alleged that she was and remained D.L.'s primary caretaker and that "the parties [lacked] the ability to affectively [*sic*] communicate and cooperate to make joint decisions" in D.L.'s best interest. In a counter-petition for dissolution of marriage filed on June 25, 2012, Amy alleged that, during their marriage, Demetrios was "guilty of extreme and repeated mental cruelty toward [Amy], without cause or provocation on the part of [Amy]." She requested temporary and permanent sole care, custody, and control of D.L.

¶ 7 On August 1, 2012, pursuant to an agreed order, the trial court appointed Howard P. Rosenberg as a representative for D.L. (hereinafter, "child representative").

¶ 8 In the two-and-a-half years leading up to trial, the parties filed multiple pleadings and engaged in extensive and acrimonious motion practice concerning the custody of D.L.

¶ 9 According to an emergency motion filed by Amy in the late summer or fall of 2012,<sup>1</sup> she had been D.L.'s primary caretaker as a stay-at-home mother since he was born. However, Demetrios took over the care of D.L. in July 2012 so that Amy "could enter a partial in-patient" rehabilitation program at Highland Park Hospital (HPH) "to address a multitude of personal issues, including substance and alcohol abuse." At the time of her petition, Amy alleged that she had entered the HPH program on July 19, 2012, and would complete it on August 10, 2012, at which time she would voluntarily transition to a program at the Chapman Center in Evanston, Illinois, for further outpatient services related to her substance abuse. Amy further alleged that since Demetrios had taken control of D.L.'s care, he had refused to cooperate with her, "bitterly opposed" her requests for "significant and quality parenting time," including overnight visits, and allowed her "mere hours" of parenting time with D.L., thwarting her efforts to have D.L. "see his mother and father interact in a positive manner." Amy also alleged:

"[Demetrios] has sent multiple texts to [Amy] stating such things as '[A]my's brain is deteriorated from all those years of cocaine, alcohol and smoking'; [Amy] is a 'trainwreck', a 'fake' and a 'compulsive liar', and that [Amy] needs to 'Just leave [my son] and I alone. [D.L.] needs to grow up in a healthy environment with his father. Too bad his mother is a train wreck and introduced drugs to

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<sup>1</sup>Although the petition was file-stamped October 10, 2012, the issues it raised appear to have been ruled on by the trial court in late August 2012, discussed *infra*.

her son at such a young and vulnerable age.' [Demetrios] also unilaterally enrolled [D.L.] in Greek School in Lake Forest and contacted the landlord to terminate the lease term for the parties' former marital residence and insisted that [Amy] move to Lake Forest so that she can exercise visitation with [D.L]."

¶ 10 Amy later alleged that she had been "clean and sober for 3 weeks" and that she was therefore a fit and proper person to have the sole care, custody, and control of D.L. She further alleged that Demetrios was not a fit and proper person to care for D.L. "as he [had] exhibited volatile, aggressive and alienating behavior towards [Amy] in the very limited time that he [had] had possession of [D.L.]," and that his communications with Amy proved that he was "incapable of fostering a loving relationship" between Amy and D.L. Amy concluded that, "[b]ased on the above allegations, [Amy] and [Demetrios were] unable to cooperate and communicate effectively and consistently in matters that directly [affected] the joint parenting of [D.L.]; as a result, joint custody [was] not in the best interests of [D.L]."

¶ 11 The trial court continued the hearing on Amy's petition and entered an agreed order granting her parenting time on certain specified afternoons and evenings, provided that she "not consume alcohol or any other intoxicating substance[,] \*\*\* continue her current course of treatment with Highland Park Hospital, \*\*\* [and] allow[] the [child representative] access to her drug screen results." On August 31, 2012, the court again continued the hearing, and granted Amy parenting time two evenings per week and every other weekend, provided that she submit to urine and breathalyzer testing every Monday, Wednesday, and Friday, and the results were made available to the child representative.

¶ 12 The same day, the court appointed Dr. Phyllis Amabile as a 604(b)<sup>2</sup> custody evaluator to "investigate and report as to the best custodial arrangement and parenting schedule" for D.L. Dr. Amabile's findings and recommendations are discussed *infra*.

¶ 13 On October 16, 2012, Demetrios filed a petition for the temporary and permanent custody of D.L., alleging that he was and always had been D.L.'s primary caregiver, taking care of D.L. "almost every evening and every weekend" since D.L. "was an infant" and that, regardless of his work schedule, he was the one who generally attended to D.L.'s day-to-day and long term care. Demetrios alleged that Amy, on the other hand, "consistently placed her personal and social needs before those" of D.L. by, for example, enrolling him in a Montessori school when he was two years old even though she was not working and "routinely" dropping him off with Demetrios' parents so that she could pursue social engagements on weekends.

¶ 14 Demetrios also alleged that Amy's behavior "seriously endangered the emotional and physical well-being" of both him and D.L. According to Demetrios, Amy had "a history of drug and alcohol abuse" predating the couple's marriage that he had only become aware of in the last few months. In his petition, he described one incident in particular that occurred the first weekend after he moved out of their marital residence when, by prearrangement, D.L. was staying with Demetrios at Demetrios' father's home:

"[A]fter dropping off [D.L.] at school on the following Monday morning, Demetrios called Amy to let her know he was coming to the marital residence to drop off the child's bag of clothes. He called Amy multiple times, up to 5-6 times, and each time, he received no answer with the call going into voicemail. At the marital residence, Demetrios found Amy's car in the garage, no

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<sup>2</sup>See 750 ILCS 5/604(b) (West 2014).

answer at the front door, and the back door wide open. In the kitchen he found several dirty glasses, empty beer bottles and cocaine paraphernalia and remnants in [a] small plastic bag. Demetrios found Amy wearing a bikini, semi-conscious in the parties' bedroom."

Demetrios alleged that it was this incident that resulted in Amy beginning the program at HPH. He also accused Amy of smoking cigarettes in D.L.'s presence despite D.L. being recently diagnosed with a heart murmur and said that "[a]ny continued smoking around the child will only further harm his health." Ultimately, Demetrios argued that he was the "more mentally and physically stable parent," that D.L. was already familiar with the home Demetrios lived in with his father, and that Demetrios was willing and able to encourage and facilitate a close and continuing relationship between Amy and D.L.

¶ 15 On November 2, 2012, Demetrios responded to Amy's emergency petition, denying her assertion that he prevented Amy from spending parenting time with D.L. Attached to his response was a calendar showing the parenting time which Amy had enjoyed with D.L. Demetrios admitted that he had refused to allow Amy overnight parenting time during the last two weeks of July and throughout August 2012 due to her "substance abuse issues," but acknowledged that he had reconsidered that position after Amy completed five weeks of rehabilitation. Demetrios denied Amy's allegations that he and she were "unable to cooperate and communicate effectively and consistently in matters that directly affect the joint parenting of [D.L.]" Demetrios instead alleged:

"[H]istorically he and Amy had been able to cooperate and communicate effectively in matters regarding the joint parenting of [D.L.]. However, since March 2012, the discovery of Amy's drug

and alcohol addiction [had] made it more difficult for the parties to effectively communicate and for Demetrios to trust Amy in her [j]udgment. However, if Amy successfully complete[d] her rehabilitation and maintain[ed] her commitment to a clean lifestyle, Demetrios believe[d] joint legal custody, with himself as the primary residential custodian [was] possible."

¶ 16 The court established a temporary custody schedule for the holidays, effective through January 1, 2013. In mid-December, Demetrios filed a motion seeking to require Amy to submit to drug testing on December 26, including an ethyl glucuronide (EtG) test that he claimed would show whether Amy had consumed any alcohol within 72 hours of taking the test, when he alleged she would be traveling with D.L. to Minnesota. He also asked that the test be performed "by Quest Diagnostics and/or Nancy Menard [sic][.]"

¶ 17 Although that date passed before the trial court ruled on the motion, Demetrios subsequently argued that the EtG test should be used in the future, as it was "the only true test to determine if in fact [Amy was] in recovery." On January 29, 2013, the court ordered Amy to submit to "ONE random EtG/EtS test and hair follicle [test] (on same date) \*\*\* within 30 days at [Demetrios'] sole expense." The court also said that the issue of Amy's parenting time would be "reviewable" on March 5, 2013, pending the issuance of the expert's report.

¶ 18 On March 5, 2013, the court continued Amy's emergency petition to May 8, 2013.

¶ 19 On March 8, 2013, Demetrios filed a motion to appoint Dr. Mary Gardner as an expert pursuant to section 604.5 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/604.5 (West 2012)), which the trial court granted. Dr. Gardner's findings and recommendations are discussed *infra*.

¶ 20 On April 12, 2013, Amy filed a petition for modification of her parenting time with D.L.

Based on recommendations in Dr. Amabile's 604(b) report, summarized *infra*, she asked the court to gradually expand her parenting time over the next several months, with an ultimate goal of both parents having equal parenting time. Amy also asked the court to enter an order specifically outlining summer vacation parenting time "to avoid future filings and litigation as a precursor to agreements." In his response, Demetrios denied that the expansion of Amy's parenting time was in D.L.'s best interest, arguing that Amy had "failed to evidence that she is in recovery from substance abuse."

¶ 21 On June 5, 2013, Demetrios filed an emergency motion to "modify supervision and/or restrict visitation," attaching test results indicating that several of Amy's random urine tests from the spring of 2013 involved diluted samples. He alleged that the May 23 sample "revealed the presence of alcohol at a level of three times the cut-off" and that eight of 15 random urine tests during March 2013 "were found to be positive based upon the adulteration." Finally, Demetrios alleged that during a weekend trip to Montana with D.L., Amy "did consume alcohol and operate a motor vehicle with [D.L.] in the vehicle." In response to the motion, the trial court temporarily suspended Amy's visitation, allowing it to resume provided that her visits with D.L. were supervised by Amy's brother Michael. The court also enjoined Amy from operating a vehicle with D.L. as a passenger until further notice; required her to undergo additional urine testing; and ordered her to attend 30 Alcoholics Anonymous (AA) meetings within the next 35 days.

¶ 22 On June 25, 2013, Demetrios filed another emergency motion alleging that Amy was continuing to drink and posed a danger to D.L. In support of his motion, he attached an affidavit and the result from a court-ordered drug test conducted on June 19, 2013, which indicated that the test was again positive and diluted. Demetrios requested that the court terminate Amy's visitation until further order of the court and that any future visitation be supervised. That same day, the court entered an order suspending Amy's visitation with D.L. until further order of the



court "or by agreement of the parties as to an acceptable supervisor to supervise visitation." The matter was continued until June 27, 2013, when the court allowed Amy limited visitation in her home, to be supervised by Pat Anderson of Professional Supervising Associates. That supervised visitation was later expanded to two evenings per week and alternating weekends.

¶ 23 On May 1, 2014, Amy filed a motion to "terminate temporary supervised parenting time and for entry of unsupervised temporary parenting schedule and/or to appoint alternate supervisor," alleging that since the June 27, 2013 order requiring her parenting time with D.L. to be supervised, she had "been supervised for approximately an entire year." Amy further alleged that there was "no reason or cause why [she] should not [ ] resume regular and unrestricted contact with her son," as she had complied with the court's orders and a finding was never made that she posed a serious danger to D.L. Amy also detailed the financial hardship being caused by the cost of her professional visitation supervisor, claiming to have paid 20% of her annual salary, for the visits, "which she [could not] afford but [paid] \*\*\* as she love[d] her son and desperately want[ed] to spend time with him." According to Amy, she had made numerous efforts to agree on an unpaid supervisor vetted and approved by the child representative but that all of her suggestions had been rejected by Demetrios, which she felt was meant to be punitive. Amy ultimately asked the court to either allow her unsupervised parenting time with D.L. or to appoint an unpaid supervisor.

¶ 24 In an order dated May 30, 2014, the court directed the child representative to "prepare a custody judgment consistent with Dr. Amabile['s] recommendations" and Amy to "suggest several unpaid supervisors who [the child representative] and [Demetrios] shall speak to" and the court would decide whether they were acceptable.

¶ 25 On June 25, 2014, the court appointed Elizabeth Nash as the approved unpaid supervisor for Amy's parenting time. The order indicated that the parties agreed that Ms. Nash would

temporarily supervise Amy's visitations with D.L., subject to certain conditions and terms. Less than a month later, Demetrios sought to terminate Ms. Nash as supervisor, alleging that she had failed to return his telephone calls and that she falsely stated that D.L. did not leave Amy's residence during a visit when, in fact, Amy had taken D.L. on a train ride. Demetrios told the court that Ms. Nash was manipulated by Amy to violate the court's order, falsify her affidavit, and not return his calls. On August 20, 2014, the trial court terminated Ms. Nash as a supervisor for Amy's parenting time.

¶ 26 In October 2014, Demetrios moved to appoint a guardian *ad litem* to represent D.L., "act in his best interests and present evidence to the Court." The court denied the motion and, several weeks later, ordered the parties to "cooperate and work together to select a free supervised visitation provider" from a list provided by the court, with visitation times otherwise to remain the same.

¶ 27 Trial was postponed several times and finally scheduled for February 2015.

¶ 28 The trial court received pretrial recommendations, summarized in pertinent part below, from: (1) Dr. Phyllis Amabile, the section 604(b) custody evaluator appointed to "investigate and report as to the best custodial arrangement and parenting schedule" for D.L.; (2) Dr. Mary Gardner, a section 604.5 expert appointed at Demetrios' request; and (3) Howard P. Rosenberg, the court-appointed child representative for D.L.

¶ 29 Dr. Amabile was appointed by the trial court to evaluate the following: (1) the ability of the parties to "cooperate effectively and consistently" to jointly parent D.L.; (2) the emotional, psychological, mental, and physical status of the parties, "including substance abuse issues (drug and alcohol), if any"; (3) the parenting skills and abilities of the parties; (4) the ability of both parties to attend to the physical, medical, and emotional needs of D.L.; (5) D.L.'s "interaction and interrelationship" with each party; (6) D.L.'s adjustment to his home and community; (7) each

party's availability and supervision of D.L. during parenting time; (8) each party's willingness and ability to "facilitate and encourage a close and continuing relationship between the other parent and [D.L.]" and; (9) each party's ability to facilitate D.L.'s "social, emotional and academic development."

¶ 30 In preparing her report, Dr. Amabile reviewed court pleadings and orders, documents provided by or on behalf of the parties, and Amy's treatment records. Dr. Amabile also interviewed the parties extensively and observed them individually with D.L. at her office.

¶ 31 According to the report, when the couple initially separated in July 2012, they worked out a joint parenting schedule on their own. Amy told Dr. Amabile that they "were to have joint custody, and that [D.L.] was to be with her a little bit more than 50% of the time. They were going to all have dinner together every Thursday evening." The report indicates, however, that as time went on, the two found it increasingly difficult to cooperate:

"[Amy] says that her husband made a unilateral decision following the separation to put their son in two new schools. [Demetrios] responds that they had previously agreed that [D.L.] would attend the Greek school when he turned 3. Also enrolling him in the Highland Park Montessori school made sense because the child was living in Lake Forest. [Demetrios] maintains that his wife knew about it prior to the enrollment, although she did want their son to stay at the Skokie Montessori school that he had attended the year before.

\* \* \*

[Amy] says that her husband took their son to the doctor concerning a heart murmur, and did so without her knowledge or

involvement. [Demetrios] maintains that he told his wife about the appointment one week prior and invited her to attend. She could not because she was busy.

[Amy] says her husband will not discuss child issues with her. [Demetrios] maintains that he does this all the time. They recently attended a [parent/teacher] conference together."

¶ 32 Dr. Hilarie Terebessy from Rush University Medical Center, who Dr. Amabile interviewed by telephone, said that she interacted with Demetrios and Amy on three occasions in May and June 2009. According to Dr. Amabile, she summarized the substance of Dr. Terebessy's interaction with the couple as brief and focused on helping Demetrios manage his anger. Dr. Terebessy's contact with the couple was too brief to have made a diagnosis of either party. Dr. Amabile indicated that she believed Amy's claim that Demetrios was verbally abusive to her.

¶ 33 Dr. Amabile also reviewed a treatment summary completed by Dr. Robert Noone, who interacted with the couple for marriage counseling between March and May 2012. According to Dr. Noone, the couple was "highly reactive to each other, and although neither seemed to want to end the marriage, their level of distrust remained high." That said, "[w]ith regards to the parenting of their son, they saw the other as caring and thoughtful parents. Neither expressed concerns about the quality of care their son was receiving.' "

¶ 34 Dr. Amabile's report summarized the parties' respective parenting strengths and weaknesses:

"[Amy] demonstrated maturity and excellent insight when I questioned her about [the] allegation that their child sometimes comes home from visits angry at the paternal grandfather \*\*\*. [Amy] comprehends that parenting time transitions and living in

two households can be stressful for [D.L.], and that his acting out is probably related to that. She volunteered that [D.L.] sometimes hits her as well; she handles this with verbal corrections and does not assume [Demetrios] is to blame.

[Amy recognized] that her son and husband have a good relationship and love one another very much. She provides structure, routine, chores, and discipline for [D.L.], she spoke knowledgeably about her son's cardiac murmur and the cause.

[Amy] was able to describe her husband's parenting strengths. She spoke of ways that she could encourage and foster a good relationship between him and their son in the future, and she also spoke of ways her own parenting could improve."

However, Dr. Amabile recognized that Amy had "a significant \*\*\* history of alcohol dependence and cocaine abuse," which Amy herself acknowledged as "excessive and problematic." Amy had made good progress and remained sober "(with one small relapse) for more than six months" at the time of the report. Dr. Amabile noted that, "[a]lthough she remain[ed] at risk for relapse, especially during the next six months, her prognosis [was] favorable if she remain[ed] in aftercare, AA, and ha[d] random monitoring." (Emphasis in original.)

¶ 35 Dr. Amabile concluded that Demetrios, who had served as D.L.'s primary parental caregiver since the marital separation, likewise "love[d] his young son deeply, \*\*\* ha[d] an identification with the parenting role, \*\*\* [D.L. was] a high priority in his life, and \*\*\* present[ed] himself as strongly motivated for primary residential custody." As Dr. Amabile observed:

"He has changed and decreased his work hours to be available to [D.L.] as much as possible when the child is not in school. He plans to continue this as much as possible in the future. \*\*\*

[Demetrios] recognizes that his son loves and trusts [Amy], that the quality of their relationship is 'good,' and that the child has close emotional ties to both parents. [Demetrios] provides [D.L.] with structure, routine, and simple chore responsibilities. His methods of discipline are appropriate.

[Demetrios] spoke in a well informed way about his son's heart murmur and the possible causes, as well as plans for future monitoring. It is possible that the child may need surgery when he reaches adulthood.

[Demetrios] says that he understands how it feels to be a child of divorce, and that he wants to be sensitive to those issues with his son. He was able to describe his wife's parenting strengths, ways that he could foster a good relationship between her and [D.L.] in the future, and ways that his own parenting could improve."

Dr. Amabile expressed concern about what she termed Demetrios' anger management and the possibility that Demetrios' anger may be directed at D.L. in the future, although there was no evidence that such had ever occurred.

¶ 36 Dr. Amabile opined that although the parties "[had] not cooperated effectively and consistently to joint parent the minor child since the July 2012 separation, they did not dispute major issues concerning [D.L.] prior to that point in time" and "had a three year history of co-

parenting reasonably well" in the past. She suggested that—so long as Amy continued participating in aftercare, AA meetings, and periodic monitoring, and Demetrios completed a course of anger management—after the parties' specific custody disputes were ruled on, "the parties' ability to cooperate and co-parent should resume." Dr. Amabile opined that both parties were capable parents and lived in pleasant, stable communities, and "[b]oth ha[d] much of value to offer this young child." Dr. Amabile concluded her report by recommending joint custody.

¶ 37 Dr. Amabile made the following specific recommendations: (1) both parties be mandated to communicate civilly in speech, writing, and texting and that they should, at least once per week, confer by email, telephone, or text about D.L.'s "progress, problems, and any decisions to be made," and that they should try to make decisions jointly; (2) the parties remain living in close proximity to one another, approximately within a 20-minute drive from home to home; (3) Amy should attend aftercare sessions at the Chapman Center at least two times each month for six months, then once each month for the following six months, and that she should attend AA meetings at least twice each week for six months, and then once per week indefinitely; (4) Amy should submit to random urine toxicology testing one or two times each month for the next eight months; (5) if Amy complies with the recommendations that she attend meetings at Chapman and AA, and submits to random urine testing, her parenting time should expand; (6) Demetrios should take a course in anger management; (7) Amy should receive financial counseling; and (8) both parties should refrain from "the use of alcohol and recreational drugs during their respective parenting times and for 12 hours prior."

¶ 38 Dr. Gardner also completed an evaluation for the court. In her report, Dr. Gardner indicated that the trial court referred the matter to her for an evaluation because Demetrios raised questions about the accuracy, completion and currency of the prior report prepared by Dr. Amabile in February of 2013. She noted that Amy believed Dr. Amabile's report was fair and

accurate. Dr. Gardner observed each party with D.L. and individually over four separate dates, including in their respective home settings. In addition, Dr. Gardner considered other sources of information, including emails and text messages between the parties, court filings, the results of Amy's drug and alcohol testing, various financial documents, and "[c]orrections to Dr. Amabile's report" made by both parties. Dr. Gardner also considered information from several collateral sources provided by both parties.

¶ 39 In her discussion of the factors set out in section 602,<sup>3</sup> Dr. Gardner noted that Demetrios wanted sole custody of D.L. and wanted Amy to have supervised visits until she could demonstrate that she had stopped drinking and abusing drugs, while Amy wanted joint custody and to have "meaningful involvement in her son's life." Amy also indicated that Demetrios "[did] not communicate with her and refuse[d] to answer her emails or text messages" and that he "[made] important decisions about their son on a unilateral basis." As to D.L.'s relationship with his parents, Dr. Gardner said:

"D.L. has a close and loving relationship with both his parents. He related to them in a warm and affectionate way, and they responded in kind. Both parents are devoted to his well-being and want him to be happy. They want him to be successful and have loving family around him. Both parents value extended family, and want [D.L.] to know his relatives. They have a close emotional bond with him. It is clear that [D.L.] is attached to both his parents."

¶ 40 Dr. Gardner noted that a number of collateral sources provided conflicting accounts and characterizations of the couple's marriage and interactions since their separation. Several sources,

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<sup>3</sup>See 750 ILCS 5/602 (West 2014).



for example, described Demetrios as "angry and verbally abusive," but Demetrios "felt his wife had selected individuals during the previous evaluation [who] did not know them well, so they were less able to speak to certain issues, particularly about his demeanor over time." Demetrios provided information from "people who had known him or both of them for many years" and who, generally, "did not describe [Demetrios] as angry, volatile, or abusive, even a former girlfriend." Dr. Gardner also spoke with Chuck Anderson, who had been supervising Amy's visits with D.L. for the months preceding Dr. Gardner's evaluation. Among other observations, he told Dr. Gardner that he had not observed any "anger or inappropriateness" on the part of Demetrios, and further that he had not observed "anything improper from either parent," and that Demetrios was often "willing to trade [visitation] time" with Amy if needed.

¶ 41 As to D.L.'s adjustment to school, Dr. Gardner noted that D.L.'s teacher said that he was "doing very well." She observed that both of D.L.'s parents loved him. Dr. Gardner noted that Demetrios acknowledged that Amy loved D.L. but felt that, by Amy continuing to drink and smoke, showed that she did not make D.L. a priority. Amy insisted that her substance abuse problems were a result of the stress of the divorce and Demetrios' alleged verbal abuse. Dr. Gardner felt that Amy's insistence that the diluted urine specimens which she provided and claimed were not the same as positive test results suggested a "pattern of dishonesty" by Amy that was a large obstacle to her sobriety. Dr. Gardner noted that, "[a]s often happens in these cases, it appear[ed] that there [was] some truth to the arguments from both litigants."

¶ 42 Ultimately, Dr. Gardner recommended that D.L. reside with Demetrios, who would have "sole legal decision-making power," and for Amy to have parenting time "three days a week for three to four hours at a time." Dr. Gardner further recommended that Amy's visits remain supervised until Amy could "have four months in a row of negative/nonadulterated alcohol testing" and that her tests be observed by a female officer to ensure that she was not diluting the

samples. In addition, Dr. Gardner suggested that the court appoint a Medicinal Review Officer who would be able to "offer professional opinions about the test results and their significance (for instance if they are diluted or low gravity, etc.)." Psychotherapy was also recommended for both parties, so that Amy could "address her emotional issues and unresolved grief from the tragic loss of her mother" and so Demetrios could "deal with issues outlined in the report, and to provide a source of support for him." Finally, Dr. Gardner recommended that the couple share holidays and that "[e]ach parent should have up to two weeks of uninterrupted parenting time during the year" which would take "precedence over the regular visitation schedule."

¶ 43 The child representative recommended that both parties comply with the recommendations of both Drs. Amabile and Gardner: for Amy, that included attending AA meetings and obtaining a sponsor, as well as attending aftercare meetings at Chapman and engaging in therapy; for Demetrios that meant going through a course in anger management and psychotherapy. As to Amy's submission to testing, the child representative stated:

"The random testing by Nancy Mynard has been nothing short of an unmitigated disaster. There have been serious allegations made that Ms. Mynard has skewed her procedure and testing [ ] as a result of a personal relationship. Nancy Mynard is usually a dependable provider of testing services but in the [present] case, it has been a cat and mouse 'got you' mentality. There have been far too many diluted specimens and too much money being spent for way too little information. I recommend the use of the SCRAM bracelet or, employing the use of Soberlink. Both alternatives will, in my opinion, lead to a more objective analysis and dependable conclusion over the use or non-use of

alcohol by Amy. If the Court is to use alternate testing and utilize random urine tests, Arc Point Labs and Lesly Datlow offer an unbiased and dependable alternative to the current tester being employed."

He further recommended that a non-paid visitation supervisor be provided for Amy rather than requiring the use of a paid supervisor. He additionally recommended that the issue of Amy's visitation be revisited in 120 days, that Amy be provided with a "dependable method" of phone contact with D.L., that Demetrios "discontinue his angry emails and reported conduct which is counterproductive to Amy's recovery and the parties' son's wellbeing," and that both parties start using "Our Family Wizard" which would "assist in the exchange of information, school and preschool events and, [would] help coordinate visits and the like."

¶ 44 On February 6, 2015, the court conducted a trial at which Dr. Gardner was the only expert witness. The court qualified her as a section 604 expert (see 750 ILCS 5/604 (West 2014)).

¶ 45 Dr. Gardner testified that, in coming to her conclusion on custody, she reviewed Amy's treatment records and met with Amy six times. Amy indicated that she only drank "[o]ccasionally and socially" prior to her marriage but that she subsequently "self-medicate[d]" with alcohol "due to the stress from her husband and the divorce," but "she did not [believe] that she had an alcohol problem." According to Dr. Gardner, Amy had two positive EtG tests, which detect the metabolite for ethanol up to five days after the consumption of alcohol. Amy claimed that at least one of the positive tests was because she was "self medicating" as a result of verbal abuse from her husband. Amy told Dr. Gardner she had been attending AA meetings but that she did not have a sponsor. Her records from the North Shore University Health System program indicated that she had "fair insight as opposed to good insight, about understanding her addiction

\*\*\* and her use of substances." As to Dr. Gardner's impression of Amy's credibility during their six meetings, Dr. Gardner testified that she believed "there were a number of very clear inconsistencies, misrepresentations, and denials of some of the information that was available to her."

¶ 46 Dr. Gardner testified that she "did not see any evidence of alienation tactics [by Demetrios] or him expressing his feelings [about Amy] in front of his son." Although he was aware of his anger, she opined that he did not understand its effect on Amy. She also opined that she found no support for the proposition that Amy's problems were solely caused by Demetrios.

¶ 47 Dr. Gardner recommended that Demetrios participate in "weekly psychotherapy with a trained specialist in high-conflict divorce situations," to address his anger issues, for approximately "six months at a minimum." She agreed that Amy's visitation should continue to be supervised because she thought Amy posed a serious danger to D.L.

¶ 48 On August 4, 2015, the court entered its custody judgment, noting that it had "heard all the testimony in this matter; evaluated the demeanor and credibility of the witnesses; considered their testimony along with all other evidence; considered the arguments of counsel before the bench and in written motions and pleadings; and reviewed relevant authorities, including Sections 602 (Best interest of the child), 602.1 (Joint Custody), and 607 (Visitation) of the Illinois Marriage and Dissolution of Marriage Act." The court first stated that the parties had failed to agree on either a joint custody or sole custody arrangement. However, it further noted that "[D.L.] ha[d] a strong bond with each parent that the court [found would] be best protected and advanced in this case through a joint parenting arrangement rather than sole custody for either parent." The court noted that this was also the recommendation of the child representative.

As the court explained:

"Each parent has strengths but also weaknesses that can

take center stage, to the detriment of themselves, the other parent and/or [D.L.], especially if one parent proceeds as sole custodian. The court believes that a joint custody arrangement in this contentious matter actually will calm tensions, help the parties parent effectively, and secure [D.L.'s] best interests, including his desire to spend substantial time with each parent. The court therefore enters the following Joint Parenting Order, with appreciation for the suggestions proposed by the [child representative] and party counsel that the court has adopted herein."

¶ 49 The court's detailed joint parenting order begins with a statement of intent which indicates that "[b]oth parents shall maintain an active role in, and have continuing influence in, the life of their child" and dictates that each parent should: (1) refrain from commenting to D.L. about the other parent; (2) refrain from making derogatory remarks about the other parent in D.L.'s presence; and (3) "behave with restraint and courtesy whenever they are together in the presence of their son."

¶ 50 According to the order, Demetrios is the primary residential parent, but each parent has sole authority and responsibility for D.L.'s care and supervision when D.L. is in that parent's care. Demetrios and Amy are to jointly make major decisions for D.L., including decisions relating to his "education, religion, health, and extracurricular activities."

¶ 51 The order provides a detailed framework for the parties' joint involvement in D.L.'s life, anticipating and setting ground rules for areas of conflict that might arise in the future. It dictates that D.L. will attend public school in the district in which Demetrios resides, unless otherwise agreed upon by the parties, and that both parents are entitled to attend parent/teacher

conferences, school functions, and extracurricular activities. Demetrios and Amy are to "exchange newly assigned homework, and any homework in progress, by leaving it in [D.L.'s] backpack each night along with any new work [D.L.] has done on his homework." In the event of an emergency at school that would impact D.L., each parent is to receive separate notice from the school, but the order further provides: "[d]uring any emergency that may involve [D.L.], be it at school or otherwise, the parents shall communicate with each other directly by phone, email or text as soon as possible to make sure each is aware of the situation and updated as to their son's whereabouts and condition when known." (Emphasis in original.)

¶ 52 In regard to religion, the order states that D.L. "shall continue to be reared in the Christian faith" and provides that Demetrios and Amy "may attempt to agree on suitable, age-appropriate religion training such as after-school classes or Bible study programs for children at a favored church," and that both parents are permitted to celebrate with D.L. and attend services for each seminal event with respect to D.L.'s religious education and upbringing.

¶ 53 The order further states that Demetrios and Amy shall discuss "what number and types of activities, lessons, team sports or other extracurricular activities are appropriate to arrange for [D.L.] that season," allocate time for any agreed upon activities, and then if D.L.'s schedule permits, each parent may alternate choosing an additional activity for D.L., starting with Amy. "Neither parent has a veto over the activity choices of the other parent. However, the parents shall discuss any legitimate safety concerns that may arise, shall try to work through any safety or scheduling conflicts that may arise, and shall pay mind to their discussion of how many activities are appropriate" for D.L.

¶ 54 As to D.L.'s medical and health-related matters, the order dictates that Demetrios and Amy "shall jointly share responsibility for major decisions relating to [D.L.'s] medical, mental health, orthodontic, and other health-related issues and proposed treatments," and that "[e]ach

parent shall notify the other well in advance of any non-emergency doctor, dentist or other healthcare provider appointments he or she plans to arrange and its purpose." In addition, the order specifically provides that because Demetrios "is a medical doctor, he shall be primarily responsible to identify/approve doctors or specialists for any non-routine health issues that may arise with [D.L.]" For any major medical procedures for D.L., after "seriously [considering] his fellow physicians' recommendations, the information provided by the second opinion received, if any, and [Amy's] opinion and position relative to the proposed care and treatment, as well as known risk factors and possible complications specific to the procedure," Demetrios "shall make the final decision as to whether going forward with the proposed medical procedure would be in [D.L.'s] best interest."

¶ 55 Under the section of the court's order titled "Communication Methods & Obligations to Notify," the order states that email is the preferred method of communication for exchanges between Demetrios and Amy and that D.L. shall not have access to any such email exchanges. Further, "[n]either parent shall repetitively email the other or make any derogatory comments in these emails." Moreover, according to the order, if Demetrios or Amy emails "or leaves a sufficient message at the other's designated telephone number," that parent's obligation to notify or contact the other "shall be deemed satisfied."

¶ 56 The order forbids Demetrios and Amy from using alcohol or recreational drugs "at any time while they are with [D.L.] and for 12 hours prior thereto" and states that Demetrios "shall enroll in a course of anger management treatment and seek psychotherapy in order to explore the factors that are contributing to his excessive anger[.]"

¶ 57 The order also includes a section titled "Prerequisites To Broader and/or Unsupervised Parenting Time For [Amy]" which states that the court "determined, based upon all of the information before it, that [Amy] has a dependency on substances including alcohol and cocaine

that require appropriate, successful treatment" prior to her receiving a modified or expanded parenting schedule with D.L. "The Court requires the requisite confidence that unsupervised parenting time for [Amy] with [D.L.] will be safe and consistent with [D.L.'s] best interests. The court does not have that confidence at this time." The order dictates that, prior to receiving expanded or modified parenting time, Amy must: (1) be reevaluated at the Chapman Center for drug dependency and comply with all recommendations of the Chapman Center; (2) attend after-care meetings at the Chapman Center "no less than twice per month for the next six months" and, if she follows the schedule, her attendance may decrease to once per month for the next six months; (3) seek out an AA sponsor and attend AA meetings at least four times each week for six months, which will be decreased to three meetings per week if successful, and so forth; (4) consider with Chapman Center staff whether she should also attend Cocaine Anonymous; (5) submit to "random urine toxicology testing for both alcohol and drug presence" initially through the Chapman Center and if the samples "are adulterated or diluted, as has happened before with [Amy's] samples, they shall be reported to the [child representative] as such and considered positive tests. \*\*\* Any positive test may set back [Amy's] effort to expand her parenting time and have it be unsupervised"; and (6) attend psychotherapy sessions "with an emphasis on the factors contributing to her alcohol and substance abuse." The order provides that all recommendations from the Chapman Center, and attendance records and documentation from the Chapman Center and AA meetings shall be provided to the child representative, and that "providing satisfactory documentation to confirm her full compliance" with each requirement is Amy's responsibility.

¶ 58 As to parenting time, the court's joint parenting order follows a similar schedule to that which had been previously followed by the parties, and also provides for possible increases in Amy's parenting time pending her compliance with the outlined treatment plan. Ultimately,



assuming Amy's compliance with the treatment plan, the order envisions that Demetrios and Amy will have "a 50/50 parenting schedule on a five day-five day-two day-two day schedule."

¶ 59 Finally, the court's joint parenting order includes a provision for mediation and review, which provides that if any dispute arises between the parents as to the provisions of the order "or any other issue relating \*\*\* to [D.L.'s] welfare and best interests," that the parties are to first notify the other parent of the complaint in writing and allow the other parent seven days to respond to the complaint in writing. "If the parents are unable to resolve their dispute within seven (7) days, the parents shall participate in the non-binding mediation of their dispute."

¶ 60 The court's judgment for dissolution of marriage was entered on August 12, 2015, and the order incorporated the joint custody judgment.

¶ 61 On September 1, 2015, Demetrios timely filed his notice of appeal. Accordingly, this court has jurisdiction.

¶ 62 ANALYSIS

¶ 63 On appeal, Demetrios contends that the trial court erred in awarding the parties joint custody of D.L. Demetrios points to the language of the trial court's joint parenting order which states: "a joint custody arrangement in this contentious matter will actually calm tensions, help the parties effectively parent, and secure [D.L.'s] best interests[.]" He argues that the trial court's order as highlighted by the aforementioned language, is not supported by the record.

¶ 64 Initially, however, we must address Demetrios' claim that Amy, in her verified response to his petition for dissolution of marriage, made a judicial admission that the parties cannot effectively communicate. Specifically, in his opening brief, Demetrios states that Amy "affirmatively pled and made a judicial admission that 'the parties lack the ability to effectively communicate and cooperate to make joint decisions in the best interests of [D.L.]' " Demetrios cites general case law on judicial admissions and concludes that "Amy's statement \*\*\* [was]

unequivocal, positive and definite [in] nature [citation] and, therefore, constituted a judicial admission dispensing with proof of that fact."

¶ 65 A judicial admission is defined as a "formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it." Black's Law Dictionary 49 (7th ed. 1999). "In order to constitute a judicial admission, a statement must not be a matter of opinion, estimate, appearance, inference, or uncertain summary." *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 468 (2009). A judicial admission cannot be contradicted by evidence at trial and is binding on the party that made it, if it is made in a verified pleading. *Shelton v. OSF Saint Francis Medical Center*, 2013 IL App (3d) 120628, ¶ 24. "It must be an intentional statement that relates to concrete facts and not an unclear summary." *Id.*; see, e.g., *Shelton*, 2013 IL App (3d) 120628, ¶¶ 25-27 (finding the plaintiff's allegations in her amended complaint and her deposition testimony that the defendant terminated her employment constituted binding judicial admissions that the defendant terminated her employment); *Caponi v. Larry's 66*, 236 Ill. App. 3d 660, 671 (1992) (finding testimony that a brake pedal "was all the way at the top and would not move down at all and that [the witness] had his foot on the brake pedal the entire time trying to depress it" was a judicial admission because it was an unequivocal statement and "the condition of the brake pedal before the collision was not an opinion, estimate, or inference, but rather was an observed fact solely within [the witness's] knowledge"); see also *Waugh v. Cender*, 29 Ill. App. 2d 408, 415 (1961) (noting that the reason for the judicial admission rule "is that when a person speaks against his own interest it is to be supposed that he has made an adequate investigation").

¶ 66 In the case before us, it is unclear whether Amy's subjective characterization of the parties' relationship in her response to Demetrios' petition for dissolution of marriage could be considered "an observed fact solely within [her] knowledge" (*Caponi*, 236 Ill. App. 3d at 671),

rather than a mere opinion or, even if it could, what its relevance might be to the parties' present ability to cooperate. We need not resolve these issues, however, where we find that the argument that Amy's statements should be characterized as judicial admissions, has been forfeited. "The function of a reviewing court is limited to review of issues decided by the trial court and cannot be extended to issues not passed upon at trial." *In re Estate of Devey*, 239 Ill. App. 3d 630, 632-33 (1993). It is also well-established that "a party who does not raise an issue in the trial court forfeits the issue and may not raise it for the first time on appeal." *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 695 (2010); see also *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶¶ 15-16; *Stuckey v. Renaissance at Midway*, 2015 IL App (1st) 143111, ¶ 30. Demetrios' characterization of Amy's statements in her responsive pleadings as judicial admissions is made for the first time on appeal. Accordingly, we decline to consider this issue.

¶ 67 Demetrios also asks us to strike or disregard the statement of facts in Amy's appellate brief, on the grounds that it is "improper and *argumentative*" (emphasis in original), and in violation of Illinois Supreme Court Rule 341(h)(6) (eff. Jan. 1, 2016). Rule 341(h)(6) provides that an appellate brief's statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment[.]" *Id.* However, "we will not strike a party's statement of facts unless it includes such flagrant improprieties that it hinders our review of the issues." *John Crane Inc. v. Admiral Insurance Co.*, 391 Ill. App. 3d 693, 698 (2009). Amy's statement of facts, while not strongly compliant with Rule 341(h)(6), is not such a violation as to hinder our review. Accordingly, we will not strike it. We now turn to the merits of the parties' contentions.

¶ 68 The Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101, *et seq.* (West 2014)), "shall be liberally construed and applied to promote its underlying purposes." 750

ILCS 5/102 (West 2014). Those purposes include securing "the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children before and after the litigation[.]" 750 ILCS 5/102(7) (West2014). Child custody determinations are governed by section 602 of the Act, which states that the trial court "shall determine custody in accordance with the best interest of the child" and "shall consider all relevant factors" including, in pertinent part:

"(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; [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) (West 2014).

In addition, section 602(c) of the Act provides that, unless the trial court finds "the occurrence of ongoing abuse," then it "shall presume that 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. There shall be no presumption in favor of or against joint custody." 750

ILCS 5/602(c) (West 2014).

¶ 69 An award of joint custody may be proposed by either party or the court may consider such an award upon its own motion. 750 ILCS 5/602.1(b) (West 2014). Moreover:

"The court may enter an order of joint custody if it determines that joint custody would be in the best interests of the child, taking into account the following:

(1) the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child. 'Ability of the parents to cooperate' means the parents' capacity to substantially comply with a Joint Parenting Order. The court shall not consider the inability of the parents to cooperate effectively and consistently in matters that do not directly affect the joint parenting of the child;

(2) the residential circumstances of each parent; and

(3) all other factors which may be relevant to the best interest of the child." 750 ILCS 5/602.1(c) (West 2014).

¶ 70 "[W]e will not disturb a trial court's custody award unless the court abused its discretion or its factual determinations are against the manifest weight of the evidence." *In re Marriage of Perez*, 2015 IL App (3d) 140876, ¶ 24. "An abuse of discretion occurs only when no reasonable person could find as the trial court did." *In re Marriage of Ward*, 267 Ill. App. 3d 35, 41 (1994). "A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent[.]" *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002).

¶ 71 "Generally, a joint custody order consists of an arrangement whereby both parents retain custody of the child and jointly participate in reaching major decisions affecting the child's

welfare." *In re Marriage of Marcello*, 247 Ill. App. 3d 304, 309 (1992). "Joint custody requires an unusual level of cooperation and communication from both parents." *In re Marriage of Swanson*, 275 Ill. App. 3d 519, 524 (1995); see also *Perez*, 2015 IL App (3d) 140876, ¶ 28 ("the parties demonstrated the extraordinary level of cooperation required for a joint parenting arrangement"); *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 877 (1994) ("We add that we view joint custody as most extraordinary"); *In re Marriage of Drummond*, 156 Ill. App. 3d 672, 679 (1987) ("Since joint custody requires extensive contact and intensive communication, it cannot work between belligerent parents").

¶ 72 The Fourth District has explained:

"We have expressed our disfavor of joint custody arrangements, which in all but rare instances engender dissension between the parties and instability in the child's environment. [Citations.] For joint custody to work, for it to benefit the child, a level of cooperation unusual in divorced parents is required." *In re Marriage of Oros*, 256 Ill. App. 3d 167, 169-70 (1994).

¶ 73 In this case, the record shows that Demetrios and Amy are unable to cooperate at any level, let alone that they are able to exercise an "extraordinary" or "unusual level of cooperation" as our court has recognized to be necessary for joint custody. The custody litigation in this case, was drawn out for approximately three years, during which time multiple motions were filed by both parties and each party expressed disagreement with the other. For example, from the start of the litigation, Amy denied that Demetrios was a "fit and proper person" to have custody of or care for D.L. She also alleged that Demetrios had refused to cooperate with her, that he opposed her requests for parenting time, and that they were "unable to cooperate and communicate

effectively and consistently"<sup>4</sup> to allow joint parenting of D.L. In response, Demetrios claimed that he and Amy had been able to cooperate and communicate in the past, but that "since March 2012, the discovery of Amy's drug and alcohol addiction [had] made it more difficult for the parties to effectively communicate." Throughout the remainder of the litigation, Demetrios repeatedly alleged that Amy continued to drink in contravention of the court's orders, leading to temporary suspensions of Amy's parenting time with D.L. and requiring supervision of her visits with D.L. These contentious allegations do not build confidence that these parties can cooperate effectively to jointly parent this child.

¶ 74 Although Dr. Amabile recommended joint custody, her reason for doing so is not evident from the record nor her report. In fact, her report is replete with factors which militate against joint custody being awarded to these contentious parents. She expresses the observation that the parties "had not cooperated effectively and consistently since [their] separation in July 2012." She then goes on to lay out a lengthy list of procedures with which Amy must comply in order to "co-parent." The list included: continued participation in substance abuse aftercare; attendance at AA meetings; and periodic toxicology monitoring for substance and alcohol abuse over an indefinite period of time.

¶ 75 Dr. Amabile concluded that Amy's allegation of Demetrios' anger management issues were true. Therefore, Dr. Amabile suggested that Demetrios should be required to participate in anger management classes as a condition of his joint parenting. Even a cursory review of the points outlined by Dr. Amabile, belies her recommendation that joint custody was appropriate for these parties. In fact, her report highlights the difficulties the parties had cooperating and gives numerous, specific examples of poor cooperation and lack of communication between the

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<sup>4</sup>Although we have declined to find that whether Amy's statement that she and Demetrios were "unable to cooperate and communicate effectively and consistently" was a judicial admission, it is nonetheless a relevant part of the record.

parties. For example, Amy said Demetrios unilaterally enrolled D.L. in two new schools while Demetrios said Amy knew about the enrollments and that she had previously agreed to D.L.'s enrollment in the school; Amy said Demetrios took D.L. to the doctor without her knowledge and Demetrios said he told Amy about the appointment; Amy said Demetrios refused to discuss "child issues" with her and Demetrios said that they discussed such issues all the time.

¶ 76 Neither Dr. Gardner nor the child representative indicated a belief that the parties could effectively cooperate, and Dr. Gardner specifically recommended that Demetrios be awarded sole custody.

¶ 77 Moreover, the trial court's order belies its finding that joint custody was appropriate. First, the trial court specifically acknowledged that the litigation had been "contentious" but in awarding joint custody, stated that it believed a joint custody arrangement would "calm tensions, [and] help the parties parent effectively." As we have noted, however, a joint custody arrangement should only be awarded where an *extraordinary or unusual level of cooperation* exists. *Swanson*, 275 Ill. App. 3d at 524. In addition, the trial court's unusually lengthy and detailed procedures that the court found necessary to effectuate its joint custody order supports the conclusion that even the trial court was not convinced the parties were going to be able to effectively cooperate to jointly parent D.L. without an extensive list of court ordered and monitored procedures.

¶ 78 We are guided by the Third District's decision in *Kocal v. Holt*, 229 Ill. App. 3d 1023 (1992). The father in *Kocal* filed a petition for an order regarding the custody and visitation of his minor child. *Id.* at 1024. At the hearing on the father's petition, the mother "testified that she was opposed to joint custody. She stated that her relationship with [the father] was marked by animosity and a total lack of agreement concerning [their child]. She also testified that she and [the father did] not communicate at all." *Id.* "The trial judge ordered that [the father] and [the



mother] have joint custody of their daughter, 'in spite of the vitriolic interrelationship between the parties and the distance involved.' " *Id.*

¶ 79 The appellate court reversed the imposition of joint custody. *Id.* at 1026. Noting that "one factor in the joint custody determination is 'the ability of the parents to cooperate effectively and consistently with each other towards the best interests of the child,' " (citing Ill. Rev. Stat. 1989, ch. 40, ¶ 602.1(c)(1)), the court found that the parties had not "displayed a capacity to cooperate effectively regarding their daughter's upbringing." *Kocal*, 229 Ill. App. 3d at 1026. The reviewing court determined that the parties had "such a history of disagreement that imposing a joint custody arrangement, even though limited, [was] against the best interests of the child." *Id.*

¶ 80 Similarly here, the trial court awarded joint custody to the parties despite a complete absence of evidence that the parties were able to cooperate effectively. Without any indication of such an ability to cooperate—even where the court indicates a *belief*, albeit unsupported by the record, that the parties will be able to cooperate in the future once a joint custody order is in place—and particularly in light of the trial court's acknowledgement that the litigation had been "contentious," a joint custody order under those facts is an abuse of the trial court's discretion. As the court found in *Oros*, we find in this case that "[t]hat level of cooperation [necessary for joint custody] certainly does not appear to be present [here]." *Id.* at 170. The trial court's order instead sets the stage for continuing litigation each time the parties disagree, as the record has demonstrated they are wont to do. Accordingly, the trial court should not have awarded joint custody where nothing in the record suggests that the parties are able to cooperate to the degree necessary for the success of such an order.

¶ 81 Notably, Amy agrees with the trial court's award of joint custody. She relies on two cases to support her conclusion that the trial court did not abuse its discretion in awarding joint custody under the facts of this case. See *In re Marriage of Young*, 2015 IL App (3d) 150553; *In*

*re Marriage of Seitzinger*, 333 Ill. App. 3d 103 (2002). Our review of these cases does not alter our conclusion as the facts of both cases and the issues on appeal are inapposite to the instant case.

¶ 82 In *Young*, the trial court awarded the parties joint custody of their son, with residential custody to the father. *Young*, 2015 IL App (3d) 150553, ¶ 9. However, the parties did not challenge the award of joint custody on appeal. Rather, the issue on appeal was "whether the trial court erred when it awarded residential custody to [the father]"—not whether the parties were able to cooperate and effectively parent their son together. *Id.* ¶ 11. Accordingly, we find no guidance from *Young*.

¶ 83 The appellate court in *Seitzinger* did consider whether the trial court abused its discretion in awarding the parties joint custody of their daughter. *Seitzinger*, 333 Ill. App. 3d at 105. On appeal, the mother argued that the trial court should have awarded her sole custody of their daughter because the parties could not effectively cooperate "with respect to raising [their daughter] jointly." *Id.* at 107. The appellate court disagreed and affirmed the award of joint custody, observing that "[a]mple evidence showed the parties' ability to cooperate" and listing several specific examples of the parties' cooperation in parenting their daughter. *Id.* at 108-10.

¶ 84 Notably, the custody litigation in *Seitzinger* lasted just under five months. *Id.* at 105. Here, in contrast, the custody proceedings were drawn out over three years and were described by the court as "contentious." Moreover, where the *Seitzinger* court found ample evidence to support the parties' ability to cooperate with one another, the present record is devoid of examples of Demetrios and Amy cooperating in parenting D.L. during the pendency of the custody litigation.

¶ 85 Accordingly, under the facts and circumstances of this case, the court's award of joint custody was an abuse of discretion. See 750 ILCS 5/602(a)(5) (West 2014). We note that a

majority of the litigation during the pendency of the case was specifically related to Amy's alcohol and substance abuse issues. Dr. Amabile, Dr. Gardner, and the child representative all expressed concern about Amy's alcohol dependency and substance abuse issues. Each made extensive recommendations regarding the assistance that she required. Further, the trial court specifically found in its custody judgment that Amy had "a dependency on substances \*\*\* that require[d] appropriate, successful treatment" before she could receive modified or expanded parenting time with D.L. The court's order also included detailed and extensive procedures for Amy to complete before she could receive expanded or unsupervised parenting time with D.L. In light of our finding that joint custody is not supported by the record and Amy's substance issues, which the trial court identified as a barrier to unsupervised parenting, it is clear that Demetrios should have been awarded sole custody. The trial court could then set a parenting and visitation schedule that would allow Amy to remain involved in D.L.'s life.

¶ 86 Although the record does not support an award of joint custody, the record does show that D.L. will benefit from having both parents present in his life and this should be considered as the trial court fashions a new custody judgment.

¶ 87 **CONCLUSION**

¶ 88 For the foregoing reasons, we reverse the judgment of the trial court and remand the case with directions to the trial court to award sole custody to Demetrios and to enter a new judgment consistent with this order.

¶ 89 Reversed and remanded, with directions.