

NOTICE  
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2016 IL App (5th) 150476-U

NO. 5-15-0476

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
DAVID P. CARR,	)	St. Clair County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 13-D-469
	)	
HOLLIANDRA M. CARR,	)	Honorable
	)	Julia R. Gomric,
Respondent-Appellant.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Presiding Justice Schwarm and Justice Moore concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court's order is vacated and the cause is remanded for further proceedings when it failed to consider all relevant factors in determining the best interest of the child before substantially limiting parenting time between a preschool child and her mother.
  
- ¶ 2 The petitioner, David Carr, and the respondent, Holliandra (Holli) Carr, were married on October 21, 2007, and divorced on April 17, 2014. The couple had one child, A.C., born on October 21, 2012.

¶ 3 On August 20, 2013, the original trial court judge awarded David with parenting time on alternating Sundays, starting at 1 p.m., and ending on Monday at 5 p.m.<sup>1</sup> At that time, David worked from home as an artist during the week and on weekend nights at a theatre dinner in St. Louis, Missouri, and Holli was a new accounts representative at a local bank making the majority of the income. The court noted that "right now [Holli is] deemed the primary residential custodian, and it only becomes significant once your child reaches \*\*\* school age and that's kind of a general factor." The court noted that final determination regarding A.C.'s primary residential custodian would be at issue at the final hearing.

¶ 4 In December 2013, both parties petitioned the circuit court to award joint parental decision-making of A.C., with each party requesting designation as A.C.'s primary residential custodian.

¶ 5 On April 17, 2014, a judgment of dissolution of marriage was entered in which the trial court found that both David and Holli were fit and proper persons to have joint parental decision-making of A.C. Pursuant to the terms of the joint parenting agreement, the court awarded joint parental decision-making, alternating week-to-week physical

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<sup>1</sup>Effective January 1, 2016, the Illinois Marriage and Dissolution of Marriage Act (Act) revised the current terminology, specifically "custody" and "visitation" to "parental decision-making" and "parenting time." This order incorporates the revised language; although the trial court's orders contained the old language. See Pub. Act 99-90, § 5-15 (eff. Jan. 1, 2016) (adding 750 ILCS 5/602.5, 602.7).

parenting time, with Sunday exchanges at 6 p.m. in Lincoln, Illinois, given that Holli was moving to Watseka, Illinois, four hours north of the parties' current residences in Belleville, Illinois. Neither party was named primary residential custodian at that time, nor did the order reference the parental agreement as temporary. However, the case was set for review for August 7, 2014.

¶ 6 Prior to the written order, the trial court orally pronounced that its determination was contingent upon Holli finding and securing a teaching position after she moved to Watseka, stating:

"THE COURT: If you don't have that lined up then we're going to come back here that first week of August and I may change the whole thing."

¶ 7 The court allowed both parties the ability to pursue their careers, David, an artist, and Holli, a teacher, but clearly made the terms of the order contingent upon Holli's ability to demonstrate that her move to Watseka was professionally beneficial. Additionally, the court provided the parties with flexibility in determining whether parenting time should alternate weekly or every two weeks.

¶ 8 On August 7, 2014, there was not a hearing on the matter as scheduled; however, the trial court entered an order setting for review the parties' physical parenting schedule for December 10, 2014.

¶ 9 On December 10, 2014, the trial court sanctioned Holli, indicating that it perceived her "tendency to [act] before the fact and just expect approval later" as troublesome. David alleged that Holli had changed A.C.'s primary care physician without notice or discussion, and had failed to provide David with access to the new

physician. As a result, the court modified Holli's driving responsibilities for 60 days, with Holli driving the bulk of the distance every Sunday. No further modifications were ordered. The case was once again set for review for July 22, 2015.

¶ 10 On January 16, 2015, the parties appeared before the trial court on David's motion to reopen proofs regarding Holli's continual lack of improvement in communicating with David. David alleged that Holli applied for the Head Start Program without providing David's name as A.C.'s father and without informing David of A.C.'s progress in the program; that Holli took A.C. to an emergency department in Belleville without informing David, even though David lived a short drive away; and that Holli changed A.C.'s primary care physician without consulting him. The court granted the motion to reopen proofs and ordered the parties to attend mediation.

¶ 11 Following an unsuccessful mediation, David filed a motion to modify the physical parenting schedule on March 27, 2015. In particular, David requested designation as A.C.'s primary residential custodian and for modification of the current parenting schedule.

¶ 12 On July 13, 2015, a successor judge conducted a hearing regarding David's motion to modify the current parenting schedule. At that time, the parties had parenting time on a weekly basis with Sunday exchanges. The court heard testimony from both parents regarding their ideal parenting schedules, but no other witnesses testified at that time. David requested that the court modify the current schedule, allowing him to spend more time with A.C. as her designated primary residential custodian. David testified that he felt "like there's an extreme lack of stability" with the current parenting schedule due to

the following: Holli's failure to identify David as A.C.'s father on medical and educational forms; Holli's attempt to alienate A.C. from him during Sunday exchanges; Holli's failure to communicate injuries to David in a timely fashion; and overall, Holli's lack of communication regarding her remarriage and several changes in residence.

¶ 13 Holli testified at length about the conflicts that arose between her and David and provided explanations for the events and behaviors that David described as evidence of Holli's attempts to alienate A.C. from David and her inability to afford appropriate protections for A.C. Holli admitted that she had at times failed in the past to promptly notify and communicate with David regarding A.C.'s medical and educational information. However, she informed the court that she failed to include David's name on several forms in the past because she was the primary contact in Watseka at that time. When asked to explain the circumstances surrounding scratches that A.C. sustained by her eyes and on her face at daycare and at home, Holli testified that she did not seek medical attention for those injuries, as they were minor, resulting from a "toy scuffle" with another child and a minor accident in the home. Moreover, when asked why she returned A.C. to the daycare after an incident where she allegedly received a scratch on her arm from a daycare worker, Holli testified that she did not believe the worker had attempted to hurt A.C. or that A.C. was at risk for future harm.

¶ 14 In sum, the transcript provided a continuation of the same arguments heard in prior hearings, including a lack of communication among the parties regarding medical and educational issues; Holli's lack of cohesiveness with David at times; as well as concern regarding Holli's personal, financial, and professional stability.

¶ 15 On August 11, 2015, the trial court ordered the continuation of joint parental decision-making, consistent with the joint parenting agreement entered on April 17, 2014. However, the court determined that the current schedule was "not in the best interest of the child"; therefore, it named David as A.C.'s primary residential custodian and modified Holli's visitation from alternating weeks to alternating weekends. The court provided a detailed physical parenting schedule for specific holidays and birthdays in both even-numbered and odd-numbered years. The court awarded each parent an uninterrupted two-week period during the summer, effective once A.C. began kindergarten. At the time of the order, A.C. was less than three years old.

¶ 16 On September 10, 2015, Holli filed a timely motion for reconsideration. On October 7, 2015, the circuit court subsequently denied the motion. On November 6, 2015, Holli filed a timely notice of appeal.

¶ 17 Our first determination on appeal is whether the April 17, 2014, order was a final determination regarding the parties' physical parenting time. On appeal, Holli argues that the April 17, 2014, order was final, and thus, the trial court's August 11, 2015, order was a modification, requiring the court to comply with section 610(b) of the Act. 750 ILCS 5/610(b) (West 2014) (repealed by Pub. Act 99-90, § 5-20 (eff. Jan. 1, 2016)). David argues that the August 11, 2015, order was not a modification, but was instead a final adjudication, as the trial court had "never issued a permanent custody schedule \*\*\*, but had entered multiple temporary orders \*\*\*." In support, David argues that the court's oral pronouncements in conjunction with the April 17, 2014, written order specifying an August 7, 2014, review date demonstrates that the court intended to file a temporary

order, and thus the proper standard for the trial court to employ was not a change in circumstances pursuant to section 610(b) of the Act, but the best interest of the child pursuant to section 602(a) of the Act. We agree.

¶ 18 A judgment that does not reserve any issue for later determination is final and appealable. *In re Marriage of Capitani*, 368 Ill. App. 3d 486, 488 (2006). An order is temporary or final according to its substance and not its form. *In re Marriage of Kondos*, 109 Ill. App. 3d 615, 618 (1982). After a careful review of the record, it is clear that the trial court made oral pronouncements regarding a review of Holli's ability to find suitable employment in Watseka, Illinois, in August 2014, just four months after the April hearing. Although the substance of the April 17, 2014, order did not explicitly state that the parenting arrangement was temporary, we find that the court intended for a temporary order. First, the court on several occasions had reserved determination of primary residential custodian for the final hearing; and, second, the cause was set for review on August 7, 2014, to review Holli's employment status, as well as the parties' determination regarding a schedule for weekly or biweekly exchanges. We find that not all issues in dispute had been fully addressed and settled by the trial court in the April 17, 2014, order, thus the August 11, 2015, order was a final determination regarding parenting time and parental decision-making.

¶ 19 Finding that the April 17, 2014, order was a temporary order, we must next determine if the trial court properly determined the best interests of the child in the August 11, 2015, final order. The trial court's August 11, 2015, order found that the current parenting schedule was not in the best interest of the minor child in that: (1) Holli

failed on multiple occasions to provide David with appropriate medical and educational information, failing to list David as A.C.'s father when she began the Head Start Program; (2) Holli inadequately notified David of her move to Watseka and her subsequent move to Pawnee, Holli's third residence in 12 months; (3) Holli shared a bedroom with A.C., whereas David maintained his residence in Belleville with a separate room for A.C.; (4) Holli moved to Watseka for a teaching position, voluntarily cutting her income in half; (5) after Holli's move to Pawnee, she was unemployed, whereas David presented evidence that he had doubled his income; and (6) Holli repeatedly placed A.C. in harmful situations at a daycare in Watseka. The court noted that "Holli's actions demonstrate that she is not willing or able to facilitate and encourage a close and continuing relationship between David and the minor child."

¶ 20 In Illinois, a trial court's determination is given great deference because that court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child. *In re Marriage of Lonvik*, 2013 IL App (2d) 120865, ¶ 33. A trial court's determination as to the best interest of the child will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Smithson*, 407 Ill. App. 3d 597, 600 (2011). Section 602(a) of the Act sets forth mandatory factors that are to be applied by the trial court in determining custody, specifically the best interests of the child, including:

- "(1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community;

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

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

(7) the occurrence of ongoing or repeated abuse \*\*\*, whether directed against the child or directed against another person;

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

(9) whether one of the parents is a sex offender[.]" 750 ILCS 5/602(a) (West 2014).<sup>2</sup>

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<sup>2</sup>Section 602 of the Act (750 ILCS 5/602 (West 2014)) was repealed by Public Act 99-90, which replaced that provision with a new provision, adding section 602.5 (Pub. Act 99-90, § 5-15 (eff. Jan. 1, 2016) (adding 750 ILCS 5/602.5)). That new law took effect on January 1, 2016, after this appeal was filed, but before either party filed a brief. The parties thus had the opportunity to brief the scope of the new law and its application to the issues raised on appeal. However, neither party briefed the new law, and their arguments are framed solely in terms of the law that was in effect at the time of the trial court's ruling. We, like the parties, cite the old version of the law herein.

¶ 21 After a careful review of the record, we find that the trial court's order was against the manifest weight of the evidence. This court believes that the trial court erred in focusing solely on the factor concerning "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)(8) (West 2014)), without setting forth an analysis on the remaining factors under that Act. In fact, it appears that the trial court did not even address the remaining factors at all in issuing the August 11, 2015, order.

¶ 22 For the foregoing reasons, we vacate the judgment of the trial court of St. Clair County and remand for a new hearing for the court to consider all evidence to the date of the new hearing regarding the best interest of the child pursuant to section 602.7 of the Act (Pub. Act 99-90, § 5-15 (eff. Jan. 1, 2016) (adding 750 ILCS 5/602.7)). The April 17, 2014, order is reinstated.

¶ 23 Vacated and remanded.