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2016 IL App (5th) 150548-U

NO. 5-15-0548

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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GENEVA R. BACA,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Madison County.
	)	
v.	)	No. 14-F-574
	)	
MATTHEW S. JAMES,	)	Honorable
	)	Donald M. Flack,
Respondent-Appellant.	)	Judge, presiding.

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JUSTICE MOORE delivered the judgment of the court.  
Justices Welch and Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held:* Circuit court's order regarding custody affirmed where determination was not an abuse of discretion. Order regarding visitation affirmed in part, vacated in part, and remanded with instructions for the circuit court to amend the order to allow the parties to spend Christmas with the child on alternating years. Order regarding child support affirmed in part, vacated in part, and remanded with instructions for the circuit court to deduct any health insurance premiums for the minor child from the respondent's gross income, to determine his net income for purposes of awarding the statutory 20% to the petitioner as child support.

¶ 2 The respondent, Matthew S. James (Matt), appeals the portions of the June 4, 2015, order of the circuit court of Madison County regarding custody, visitation, and child support. Because this appeal involves a custody determination, Illinois Supreme

Court Rule 311(a)(5) (eff. Feb. 26, 2010) requires that, except for good cause shown, the appellate court issue its decision within 150 days of the filing of the notice of appeal. Accordingly, the decision in this case was due on May 15, 2016. However, due to multiple motions for extensions of time filed by Matt and granted by this court, the briefing schedule was not complete until May 12, 2016. This case was immediately placed on the docket for May 17, 2016, and we now issue our disposition. For the following reasons, we affirm in part, vacate in part, and remand with instructions.

¶ 3

### FACTS

¶ 4 On October 9, 2014, the petitioner, Geneva R. Baca (Geneva), filed, *inter alia*, a petition for temporary and permanent sole custody of the parties' child. A bench trial was conducted on February 24, 2015, March 16, 2015, and March 19, 2015. Geneva testified that she met Matt in February 2012 and the two began living together in September 2012. The following month, Geneva learned that she was pregnant and the parties' son, I.J., was born on June 16, 2013. Geneva indicated that she had been I.J.'s primary caretaker since he was born. She was with him every morning, every evening, and every weekend, and she took him to all of his medical appointments, gave him his medicine, stayed up with him at night when he was sick, bathed him, and fed him. Geneva testified that Matt helped care for I.J., but she was his primary caretaker.

¶ 5 Geneva recalled an incident of domestic violence on July 5, 2014. She testified that Matt came home intoxicated on that date and an argument ensued. When Geneva heard I.J. crying, she attempted to leave the room to console him. Geneva testified that Matt made threats against her life, that he would not let her leave the room, and that he

"chest-bumped" her and put her in a headlock. Geneva indicated that she dropped to the ground, but Matt "followed me down with his \*\*\* hand on the back of my neck in a chokehold." Geneva was screaming and I.J. continued crying. Geneva testified that she bit Matt's arm in an attempt to break free. Matt told her that he would let her go if she would stop screaming. When Geneva stopped screaming, Matt released her. Then Matt went into the bedroom, and picked up I.J.

¶ 6 Geneva testified that she entered the bedroom and attempted to take I.J. from Matt because she wanted to leave with him. She testified that while Matt was holding I.J., he used his legs to "put me in like a scissor lock around my neck." Geneva asked Matt to stop because I.J. was watching, but Matt refused to stop. Geneva testified that she was scratching and pinching Matt in an attempt to break free. When she got free, she could not call the police because Matt had taken her cell phone. Accordingly, Geneva left the home and went across the street to the residence of Matt's parents. Matt's parents returned with Geneva to the parties' home. At that point, Matt's father took I.J. from Matt. Geneva and I.J. returned to Matt's parents' home and stayed the night there. Geneva testified that there were no other instances of domestic violence between the parties after that date, but there were ongoing verbal altercations and they were unable to agree on anything. Accordingly, they separated in September 2014.

¶ 7 Geneva testified that since the separation, the parties experienced conflict over many issues regarding I.J. She stated that an evaluation revealed that I.J. had a mild speech delay. Speech therapy and occupational therapy were recommended, but Matt told Geneva that he did not believe I.J. had any delay, that she was delusional and making

things up, and that he was not going to pay for any such treatment. In addition to the speech issue, Geneva stated that the parties disagreed on I.J.'s religious upbringing because she is a Catholic and Matt is an atheist. The parties also consistently disagreed on parenting time with I.J. as well as his child care providers. Geneva recalled the occasion when Matt called her a "dumb bitch" while she was dropping I.J. off for Matt's parenting time.

¶ 8 In addition to the conflict between the parties, Geneva addressed potential safety concerns when I.J. visits Matt because I.J. is now more mobile and "into absolutely everything." Geneva testified that Matt keeps weapons hidden in every room for easy access in case an intruder breaks in. Geneva explained that early in the separation and before Matt had changed the locks, she went into the home and observed a handgun sitting out on the nightstand in the bedroom. She added that during the relationship Matt kept a handgun in the cushions of the couch, kept knives hidden in various places throughout the home, and stored knives and a hatchet in a utility box close to the floor by the back door. Geneva was not sure of the current safety conditions or whereabouts of the weapons because she had not had access to the home in the last six months.

¶ 9 Geneva testified that when the parties initially separated, she and I.J. resided with her mother in Bridgeton, Missouri, for three or four weeks. They subsequently resided with Linda Bone, who is also I.J.'s babysitter. Geneva indicated that she pays Linda \$300 per month to keep I.J., that she does not currently have the financial means to place I.J. in a more structured facility, and that Matt refused to assist her in paying for I.J.'s child care. After living with Linda for a few months, Geneva and I.J. moved into a townhouse where

they currently reside. Geneva described her relationship with I.J. as very close and loving. They play together, paint, go to the science center, read books, and work on flash cards to improve his speech.

¶ 10 Geneva testified that she is employed as a senior clinical research coordinator at Washington University in St. Louis. Her hours are Monday through Friday, 7 a.m. to 3:30 p.m. Geneva indicated that her schedule is mostly consistent. There were previous, occasional changes to Geneva's work schedule, but the schedule is now consistent, pursuant to an agreement between her and her supervisor. Geneva testified that Matt works 12-hour shifts that rotate between day shift for two weeks and night shift for two weeks.

¶ 11 The current visitation arrangement is that Matt has I.J. on all of his full days off. When he is off on Wednesday and Thursday, he has I.J. from 7 a.m. Wednesday morning until 6 p.m. Thursday evening. When Matt works on Wednesday and Thursday, he has Monday and Tuesday off. Accordingly, he keeps I.J. at the same times from Monday morning until Tuesday evening. He also has I.J. every other weekend when he is not working. Geneva testified that she is satisfied with the current visitation schedule because the arrangement gives I.J. good access to both parents and it is the same access he had to the parties prior to the separation. Geneva felt it appropriate for the parties to alternate holidays, and because Matt is a Veteran, to allow I.J. to be with him every Veterans Day that Matt is not working. Because I.J. is not yet in school, Geneva also felt it appropriate for either party to be able to take I.J. on vacation anytime during the year

before he enters kindergarten. She qualified, however, that at I.J.'s age he should not be separated from either parent for more than three days at a time.

¶ 12 Geneva reported that Matt had not paid her any child support since she moved out in September 2014. Moreover, I.J.'s health insurance premiums are deducted from Geneva's paycheck. Respondent's Exhibit B was admitted into evidence, which is Geneva's final paycheck for 2014 and reflects a gross income of \$53,490.35 for that year. Respondent's Exhibit E was also admitted, which is Matt's W-2 form for the year 2014 and reflects a gross annual income of \$105,428.97.

¶ 13 Linda Bone testified that Geneva and I.J. lived with her and her husband from October 2014 to February 2015 and that Geneva paid her \$350 per month for rent during that time. Linda attested that she babysits I.J. three days a week and charges Geneva \$300 per month to do so. Linda also babysits a three-year-old girl with whom I.J. gets along very well. She said the two love each other, hold hands through the house, sit in the same chair, and get along great. Linda testified that Geneva has a very good relationship with I.J. She stated that Geneva plays with I.J., finger-paints with him, colors with him, reads books with him, and takes him everywhere she goes. Linda observed that Geneva is never without I.J. unless he is with Matt or Geneva is working.

¶ 14 Linda testified that in November 2014, Matt came to her home to pick up I.J. While he was there, Matt told her what a great dad he was, what a great person he was, and that Geneva was a delusional liar. Linda indicated that she had no idea what Matt was even talking about. She recalled another occasion after Christmas 2014, when she saw Matt with a group of his friends at a restaurant. Matt waved at her and he, along

with the group he was with, laughed at her and embarrassed her. Linda admitted that she does not like Matt because of these interactions.

¶ 15 Linda opined that I.J. would be better off if Geneva were awarded custody because Geneva's work schedule allows her to spend more time with I.J. than does Matt's work schedule. Linda explained that Matt works then comes home and goes to sleep, but Geneva works then comes home, spends time with I.J., and then she and I.J. both go to sleep at the same time.

¶ 16 Jaime Doss testified that she is Geneva's mother. She corroborated Geneva's testimony regarding the incident of domestic violence between the parties on July 5, 2014, and that Geneva and I.J. moved in with her in September 2014 and stayed approximately one month while Geneva looked for a place. Jaime testified that she currently cares for I.J. at Geneva's home as needed. Jaime described Geneva's home as nice, with two bedrooms, a large living room, kitchen, and a nice, carpeted playroom in the basement.

¶ 17 Jaime testified that Geneva is an "awesome mom," who corrects I.J., notices the activities that he does, teaches him, and takes him to the doctor. She noted that Matt is a good dad who loves I.J., but she opined that Matt lets I.J. "get by with way too much \*\*\* because he's part-time." She added that Geneva would push more in getting I.J. help and in meeting his needs, such as the recommended speech therapy. Jaime testified that before the parties separated, she visited their home once or twice a week. She admitted that, due to the separation, she had neither observed Matt's parenting style nor seen his interactions with I.J. in the last six months.

¶ 18 Marianne James testified that she is Matt's mother. She confirmed that she lives across the street from Matt's home. After I.J. was born, Marianne kept him if he got sick and could not attend daycare. In February 2014, Marianne began babysitting I.J. permanently because he got sick very frequently at daycare. She stated that she and Geneva never disagreed about her care for I.J. Marianne testified that when Matt worked days, Geneva brought I.J. to her house anywhere between 6 and 8 a.m. and Matt picked him up around 5:30 p.m. after he got off work. When Matt worked nights, he brought I.J. to Marianne around 7 or 7:30 a.m., returned home to sleep for a few hours, then picked him up around 2 or 3 p.m. and played with him until 4:30 p.m. when he had to go to work. Marianne then kept I.J. again until Geneva picked him up between 6 and 8 p.m. Marianne indicated that she fed and bathed I.J. on those evenings and put him in his pajamas. On Matt's days off, Marianne occasionally kept I.J. for short periods of time to allow Matt to run errands. After the parties separated, Marianne learned from Matt that Geneva had taken I.J. to Linda Bone for child care. However, she still spends time with I.J. when Matt has him for parenting time. I.J. also spends time with extended family during Matt's visits and interacts very well with them.

¶ 19 Marianne described Matt as a good dad who wants to be with I.J. all the time. She indicated that Matt loves playing with I.J. and teaching him. She opined that I.J. has no delays in his speech or motor skills, but conceded that speech therapy and occupational therapy would not hurt I.J. if experts in those areas noted any delays and recommended such. Marianne frequently observed Matt express verbal affection and encouragement to I.J. She agreed that Geneva is a very good mother and stated that both parties love I.J.



equally and that I.J. loves being around both of them. Marianne believed that, between the parties, Matt was I.J.'s primary caretaker because he did laundry, cooked, gave I.J. his bottle at night, and cared for I.J. when he was sick. Marianne preferred Matt to have custody because she believed that Matt is with I.J. more during the day. She explained that Matt is home during the day about half of the month. She stated that she is available to care for I.J. while Matt works, day or night and free of charge. She added that I.J. has a bed at her home and is comfortable there.

¶ 20 Marianne confirmed the incidence of domestic violence between the parties on July 5, 2014, but stated that it was an isolated incident and there were no other such instances to her knowledge. She admitted that she sent Geneva a text message on August 14, 2014, indicating that "when [Matt] is off and he goes drinking, do not stay there! I see a difference in him, too." Marianne further attested that she offered Geneva a place to stay if Matt came home drunk again, and told her that if she was afraid, to come to her place and she would change the locks on the doors and the code to the garage. Marianne conceded to sending another text message to Geneva, stating that "if [Matt] wants to play dirty, we can round up some old girlfriends to say how abusive he can be." Despite the foregoing evidence and testimony, Marianne denied having any concerns about Matt having violent tendencies, and she opined that Matt is not a habitual drunk or a problem drinker, nor would his drinking interfere with his ability to parent I.J.

¶ 21 Matt testified that Geneva was pregnant when the parties moved in together. Because Geneva had a "high risk" pregnancy, Matt did most of the household chores. In the six weeks following I.J.'s birth, Matt continued to do all of the chores because Geneva

had a rough pregnancy and he wanted to facilitate her recovery. The parties took turns taking care of I.J. with Matt attending to him at night and Geneva attending to him during the day.

¶ 22 Matt testified that he is employed by ConocoPhillips as an operating engineer and has been so employed for 10 years. He confirmed that he works day shift for two weeks, during which he works on Monday and Tuesday, off Wednesday and Thursday, on Friday, Saturday, and Sunday, off Monday and Tuesday, on Wednesday and Thursday, and off Friday, Saturday, and Sunday. His day shift is from 5 a.m. to 5 p.m. After two weeks on day shift, he works night shift for two weeks, working 5 p.m. to 5 a.m., with the same aforementioned daily schedule. In addition to his regular schedule, there is a rare possibility of mandatory overtime. Matt worked overtime eight or nine times in 2014—some of which were voluntary—but he had not yet worked any overtime in 2015.

¶ 23 Matt corroborated his mother's testimony regarding his work schedule and when he picked up and dropped off I.J. He testified that, on his days off, he was able to spend the majority of his time with I.J. He indicated that he occasionally had rough days at work and needed extra sleep, so he took I.J. to Marianne's home on those occasions.

¶ 24 Matt testified that his retirement account comes from two sources. One is a pension that is age plus years worked and funded by the company, the other is everything he puts in himself. He stated that the account currently totaled \$490,000. Matt's goal is to retire from ConocoPhillips, obtain a Ph.D., and open his own business. Matt testified that, before the separation, the parties had discussed his goal at length and Geneva was thoroughly supportive of that goal. He noted that, although he would like to work a few

more years, his current financial position would allow him to quit his job now and enroll in a Ph.D. program. Matt testified that "shift work sucks" because he is constantly tired and if he were to quit his job and go back to school now, he would be able to spend more time with I.J. He conceded that he had not yet applied to any graduate schools, and was not familiar with the Graduate Record Exam.

¶ 25 Besides the inconvenience of his work schedule, Matt added that his job has resulted in physical injuries. He had an injured rotator cuff that required surgery and has had "a bad neck for a long time." He also pinched a nerve in his arm, and "busted a knee" a couple of times. The physical toll his job has taken on him is another reason he wants to retire and open his own business. Matt testified that if he were awarded custody of I.J., the time frame of him returning to school would depend on how he and Geneva could work together.

¶ 26 Matt testified that before the parties separated, they sought input from each other in decisions regarding I.J. That continued for a short while after the separation. Matt noted, however, that the cooperation between them declined after the lawyers got involved. He explained that they are now reluctant to discuss anything with each other for fear that it would be used against them in the litigation.

¶ 27 Matt testified that before the separation, the parties agreed that his mother should keep I.J. full time, but after the separation, Geneva made a unilateral decision to place I.J. with Linda Bone. Matt objected because he did not know Linda well. Matt recalled the day when there was a misunderstanding regarding when he was to pick up I.J. from Linda's house. He stated that when he arrived, Linda was "very scathing with me."

Accordingly, Matt told her, "I don't know what you've been told about me, but \*\*\* [y]ou're not getting the whole story basically." Matt expressed concern that many times when he picks I.J. up from Linda's house, he smells like smoke. He does not think I.J. is being mistreated, but he opined that his mother's house would be a better placement for him. Matt reiterated that if he were awarded custody, he would work with Geneva to maximize both of their parenting times with I.J. He did not believe that Geneva would extend the same courtesy.

¶ 28 Matt testified that Geneva did not inform him that she was taking I.J. to a speech therapist in December 2014, but he learned of it after the fact. Notwithstanding the speech therapist's report to the contrary, Matt opined that I.J.'s speech was not lacking and therapy was not necessary. Matt further objected to the fact that Geneva scheduled speech therapy appointments on his visitation days with I.J.

¶ 29 Regarding the domestic violence incident, Matt testified that Geneva encouraged him to go out for the evening and when he got home at 3 a.m., she told him he was a horrible father. He stated that threats were made by both parties and he and Geneva were "inappropriate to each other." He specified that Geneva said she wanted out and he stood in the doorway and stopped her. He testified that Geneva was "ranting and raving," he told her to calm down, and she "decked me in the jaw[,] \*\*\* gouged my neck, and then I grabbed her and we went to the ground." According to Matt, Geneva continued screaming and Matt told her to "stop it and I'll let you go." He testified that he was not attacking her, but trying to avoid being attacked. He testified that "she bit me \*\*\* and

\*\*\* clawed me." Matt admitted that he was intoxicated, but denied being physically violent with Geneva, notwithstanding the earlier contrary testimony of other witnesses.

¶ 30 Regarding an altercation with his brother, Matt testified that his brother stole his mother's keys, broke into Matt's house, and took a substantial amount of money. The next day Matt went to where his brother was sleeping, put his hand on his chest, woke him up, and asked him where the money was. Matt stated that when his brother woke up, he "pressed harder with [his] hand on his chest" until his brother told him where the money was. Matt stated that the incident occurred before he met Geneva and that neither he nor Geneva have a problem with physical violence.

¶ 31 Matt testified that before the parties separated, they made a joint decision to store a gun in the cushions of the couch, but they also decided to move the weapons out of I.J.'s reach when he got older. Matt emphasized that I.J. is unable to reach any of his guns and that they are all locked away when not in use. He further indicated that all of his knives are out of I.J.'s reach.

¶ 32 Matt described I.J. as a fun, caring, playful, curious, and happy child who watches everything and laughs all the time. He testified that he wants to provide I.J. with all of the knowledge and understanding he can and that his goal is for I.J. to have opportunities in life and to be happy. Matt wants I.J. to have a good education, to play sports if he wants to, and he wants to provide financially to facilitate everything that he can for him. Matt testified that he currently plays with I.J. indoors and outdoors, reads with him, and takes him to the science center so he can explore and discover new things.

¶ 33 Matt testified that if he were awarded custody, he would incorporate Geneva into I.J.'s life as much as possible and compromise with her on raising him. He admitted that he has not been nice to Geneva and indicated that the breakup had caused a lot of emotion between the two of them. He stated that he would "go the extra mile to make sure that we're understanding each other" and "to go the extra mile to be nice even when I don't want to be because we're not trying to get along for us, we're getting along for [I.J.], and that is more important than us hating each other or fighting." He stated that his goal would be the same if Geneva were awarded custody.

¶ 34 Matt testified that if he were awarded custody, Geneva would have I.J. one day a week and every other weekend, but "we can work on whenever I can't watch him I'll let her have him [*sic*]." No matter what visitation schedule the court established, Matt stated that he would let Geneva see I.J. more if she wanted to. Matt testified that since the separation, Geneva established the days and times for him to see I.J. and they had frequent disagreements in that regard. Matt reported that there were instances when Geneva refused to allow him to take I.J.

¶ 35 Matt opined that he is the better parent to have custody of I.J. because he is more understanding and better capable of working through problems without getting angry. He emphasized that he and I.J. have an "awesome relationship," that I.J. responds to him, and that he connects with I.J. better than Geneva does. He added that he loves to parent, loves being with I.J., and has a happy attitude.

¶ 36 Despite Matt's work schedule being difficult and tiresome, he emphasized that it does not impede his ability to parent. If awarded custody, Matt stated that he and I.J.

would get to spend more nights together. He added that he has more free time than Geneva because his schedule allows him to be with I.J. 15 days out of the month. In contrast, Geneva works five days a week, which would result in more time in daycare for I.J. if Geneva were awarded custody. Matt stated that his mother would provide child care if he were awarded custody, which would also allow more time for him to be with I.J. He indicated that he would discuss any alternate child care providers with Geneva before selecting them, in the instances where his parents were unavailable to keep I.J.

¶ 37 Matt testified that he recently started a business in which he grows, produces, and markets hot spices and sauces. He admitted that he attends to all of the aspects of the business on his days off, which entails growing, weeding, watering, dehydrating, packaging, and marketing peppers. He added that he does it all himself and has no employees to assist him. When asked about the business taking time away from I.J., Matt responded that he and I.J. do everything together. He conceded, however, that he is unable to take I.J. with him when he markets his products to restaurants and taverns. Matt testified that he could attend to the duties of the business on the weekends that Geneva has I.J. He added that the duties of the business are inconsistent. Some days he does nothing and other days he does much.

¶ 38 Matt testified that he currently owns a second home that he is in the process of selling. He has approximately \$25,000 equity in the home. Notwithstanding the equity in the home and all of the money in his retirement account, Matt admitted that he had not paid any child support to Geneva since the parties separated, despite the fact that she had asked him to do so more than once. He opined that he would not like the way Geneva

may spend the child support, indicating that she does not spend money wisely. Matt opined that he is not failing I.J. by not paying child support, but admitted that I.J. would be better off with more household income. He indicated that he buys food, clothing, and diapers for I.J. when he is with him.

¶ 39 Matt testified that Geneva has the ability to teach I.J. how to do the right thing in some, but not all cases. He admitted that I.J. has a close and loving relationship with Geneva and he wants their relationship to continue that way. He testified that Geneva is a good mom who loves I.J. very much, but he does not believe that she would be a good custodian. He denied seeing any signs of Geneva abusing or neglecting I.J., nor was there any indication that Geneva abused alcohol or any other substances. Matt also noted that Geneva's home is safe and stable. However, Matt opined that Geneva is not equipped to have custody of I.J. because she has a violent temper, wild mood swings, is untruthful, and emotionally unstable. He indicated that Geneva attempted to keep I.J. away from him since the parties separated and the police intervened a couple of times when he showed up at Geneva's residence and demanded that she turn I.J. over to him. He admitted that no visitation order had been entered at that point and he believed that an order setting a structured visitation schedule would be beneficial.

¶ 40 On June 4, 2015, the circuit court entered an order that, *inter alia*, awarded sole custody of I.J. to Geneva, established a visitation schedule, and ordered Matt to pay child support in the amount of \$1,270.97 per month. Matt filed a timely notice of appeal. Additional detailed facts will be added in our analysis of the issues.



¶ 41

## ANALYSIS

¶ 42

### I. Custody

¶ 43 "In custody proceedings, the trial court must determine the best interests of the child and its decision will not be disturbed on appeal absent an abuse of discretion." *In re Marriage of Duffy*, 307 Ill. App. 3d 257, 259 (1999). "An abuse of discretion exists only where we can conclude that no reasonable person would take the view adopted by the trial court." *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 651 (2008). Section 602 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602 (West 2014)) enumerates the factors for the circuit court to consider prior to making a custody ruling.<sup>1</sup>

¶ 44 In this case, the circuit court found Geneva to be I.J.'s primary caregiver and observed that I.J. had lived primarily with Geneva since the parties separated. We recognize that there was conflicting testimony regarding which party was I.J.'s primary caretaker. We defer to the trial court's judgment regarding credibility determinations. See *Prignano v. Prignano*, 405 Ill. App. 3d 801, 810 (2010).

¶ 45 In applying the factors of section 602, both parties desire sole custody of I.J. (750 ILCS 5/602(a)(1) (West 2014)). I.J. is too young to express any preference regarding custody (750 ILCS 5/602(a)(2) (West 2014)). Both parents have a positive interaction

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<sup>1</sup>Although the parties were never married, the factors of section 602 of the Illinois Marriage and Dissolution of Marriage Act are properly used to determine custody. See *In re S.L.*, 327 Ill. App. 3d 1035, 1038 (2002).

with I.J. Matt's parents and Linda Bone all have positive relationships with I.J., as does the little girl who also stays with Linda when I.J. is there (750 ILCS 5/602(a)(3) (West 2014)). There is no evidence to indicate that there are any problems with I.J.'s adjustment to his home or community (750 ILCS 5/602(a)(4) (West 2014)). Matt testified that I.J. experienced changes in his life when the parties separated, but there is no evidence that he has suffered any detriment due to those changes. Geneva testified that I.J. has good access to both parents and it is the same access he had to the parties prior to the separation. I.J. has lived with Geneva since the separation and has adjusted well to his new home. Geneva's work schedule is predominantly consistent and predictable, which allows her to spend evenings, nights, and early mornings with I.J. during her work week. In contrast, Matt's work schedule is tiring for him, requires him to sleep during the day when he works the night shift, and provides less daily structure for I.J. because of the day to night rotation. Moreover, I.J. would be required to spend significant amounts of time with Matt's parents, including sleeping at their home when Matt works the night shift. This would result in I.J. sleeping in three different homes rather than two. For these reasons, we find this factor favors Geneva.

¶ 46 Regarding the mental and physical health of all individuals involved (750 ILCS 5/602(a)(5) (West 2014)), Matt testified that his job has resulted in physical injury to him, but there is no evidence that his parenting has been affected by that. We note Matt's testimony that Geneva has a violent temper, wild mood swings, is untruthful, and emotionally unstable. However, no other witnesses corroborated this testimony, nor does the record reflect that Geneva has any history of mental health issues. "This evidence

was subject to the trial court's determinations regarding credibility." *Prignano*, 405 Ill. App. 3d at 810. "In a bench trial, the trial court sits as the trier of fact, hearing the witnesses and reviewing the direct presentation of the evidence, and it therefore is in the best position to make credibility determinations and factual findings." *Id.* "This court will not reweigh the evidence or second-guess the trial court's credibility determinations, especially where, as here, the evidence amply supports the trial court's conclusions." *Id.* Here, the circuit found no medical evidence in the record to indicate any concerns in these areas regarding either party. We agree and find this factor to be neutral.

¶ 47 The factor of physical violence or the threat of physical violence by the child's potential custodian (750 ILCS 5/602(a)(6) (West 2014)) favors Geneva. Testimony revealed that there was physical violence between the parties on July 5, 2014. While all of the evidence indicates that this was an isolated incident between the parties, additional testimony shows a physical altercation by Matt against his brother. Moreover, Matt's mother sent Geneva text messages indicating that "if [Matt] wants to play dirty pool we can round up some 'old' girlfriends to say how abusive he can be"; "when [Matt] is off and he goes drinking do not stay there! I see a difference in him, too"; and "If u [*sic*] get afraid come down anytime. I will change locks and code on my garage door[.]" We find this evidence shows that Matt has a history of and propensity for violence, notwithstanding other testimony to the contrary. We find this factor favors Geneva. There is no evidence of any occurrence of ongoing or repeated abuse (750 ILCS 5/602(a)(7) (West 2014)).

¶ 48 Regarding the willingness and ability to facilitate and encourage a close and continuing relationship between I.J. and the other parent (750 ILCS 5/602(a)(8) (West 2014)), we observe that each party described the other as a good and loving parent to I.J. Although Matt testified that Geneva attempted to keep I.J. away from him while the litigation was pending, he admitted on cross-examination that she never kept I.J. from him on his days off. Moreover, Geneva testified that the current visitation arrangement allows I.J. the same access to both parties that he had prior to the separation. We find no evidence to indicate that Geneva is unwilling to facilitate a close relationship between Matt and I.J.

¶ 49 In contrast, the evidence shows that Matt called Geneva a "delusional liar" and that he called her a derogatory name in I.J.'s presence during an exchange for parenting time. Additionally, Matt testified that Geneva has a violent temper, wild mood swings, is untruthful, and emotionally unstable. The circuit court noted, and we agree, that these facts undermine Matt's claim that he will facilitate and encourage a close and continuing relationship between Geneva and I.J. Accordingly, we find this factor favors Geneva. Pursuant to our analysis and review of the appropriate factors, we cannot say the circuit court abused its discretion in awarding sole custody of I.J. to Geneva.

¶ 50

## II. Visitation

¶ 51 Besides custody, Matt additionally challenges portions of the circuit court's order regarding his visitation with I.J. "Visitation orders will not be disturbed on appeal absent an abuse of discretion." *In re Marriage of Ross*, 355 Ill. App. 3d 1162, 1167 (2005).

Matt argues that the circuit court erred by severely limiting his regular parenting time with I.J. and by awarding the Christmas holiday to Geneva every year.

¶ 52

#### 1. Regular Visitation Time

¶ 53 Matt argues that the visitation order "severely limits" his parenting time with I.J. and gives him less visitation than he had prior to the entry of the order. The court awarded Matt visitation on the first, third, and fifth Fridays of every month, beginning at 7 a.m. on those Fridays, until the following Sundays at 6 p.m. We note that this—rather than the typical every other weekend visitation schedule—results in Matt having I.J. two weekends in a row when a particular month has a fifth Friday. In addition to the weekend visitation arrangement, the circuit court awarded Matt parenting time with I.J. on Wednesday from 6 p.m. until Thursday at 6 p.m., with the understanding and agreement that Geneva would accommodate Matt's swing-shift schedule and provide Matt make-up parenting time on Monday and Tuesday on those weeks when Matt is off on those days and working on Wednesday and Thursday. Given that Matt's schedule switches from day to night every two weeks, this weekly visitation schedule would allow for him to sleep during the day on Wednesday after working the night shift on Tuesday night, then to have visitation with I.J. that evening, and to keep him for a full 24 hours before having to return to work. We cannot say that no reasonable person would have awarded visitation time as did the circuit court. Accordingly, we find no abuse of discretion in this regard.

¶ 54

#### 2. Christmas

¶ 55 Besides regular visitation time, Matt challenges the circuit court's award of the Christmas holiday to Geneva every year. Geneva argues that this point is waived on

appeal, as Matt failed to raise it anywhere at the trial level. Matt conceded at oral argument that he did not challenge the allocation of visitation on Christmas either at the trial or in his motion to reconsider. Accordingly, the issue is waived. See *In re Marriage of Minear*, 181 Ill. 2d 552, 564 (1998) (issues not raised in the trial court are waived and may not be raised for the first time on appeal). However, "[t]he rule of waiver is a limitation on the parties and not on the courts, and a reviewing court may ignore the waiver rule in order to achieve a just result." *In re Marriage of Bennett*, 131 Ill. App. 3d 1050, 1055 (1985). Waiver notwithstanding, we opt to address Matt's argument.

¶ 56 In dividing holidays in the order of visitation, the circuit court awarded Christmas to Geneva every year and denoted that Matt does not celebrate Christmas. The only place in the record that any such allegation exists is in Geneva's position statement that she submitted to the circuit court after the close of evidence. The circuit court acknowledged at the end of the trial that both parties had submitted position statements. Matt's position statement requests that the parties have I.J. every other year for Christmas. Despite the allegation in Geneva's position statement that Matt does not celebrate Christmas—which was adopted by the circuit court in its order—there is no evidence or testimony to support this. Geneva testified that she is a Catholic and Matt is an atheist, but she did not indicate that Matt does not celebrate Christmas, nor is there any evidence that Matt does not desire to spend Christmas with I.J. Indeed, Matt's position statement requesting an every-other-Christmas arrangement between the parties contradicts any such suggestion. For these reasons, we find the circuit court abused its discretion by awarding Christmas to Geneva every year. Accordingly, we vacate the visitation order to this extent and remand

with instructions for the circuit court to alternate the Christmas holiday between the parties every year, and to specify which party will have even years and which will have odd years, in accordance with the remainder of the holiday visitation schedule.

¶ 57

### III. Child Support

¶ 58 "The amount of a child support award is within the discretion of the trial court and will not be disturbed absent an abuse of discretion." *In re Marriage of Scafuri*, 203 Ill. App. 3d 385, 391 (1990).

¶ 59

#### 1. Downward Deviation

¶ 60 Matt contends that the circuit court should have deviated downward from the statutory 20%. He argues that the parties have above-average incomes and the statutory percentage results in a windfall for Geneva because that amount exceeds I.J.'s needs. "Calculating [child support] is a two-step process." *In re Marriage of Mayfield*, 2013 IL 114655, ¶ 16. "The trial court must determine the parties' income, then apportion that income, setting an amount of child support for the noncustodial parent." *Id.* "Section 505(a)(3) of the \*\*\* Act governs the first step. It provides a definition of net income, which is the 'total of all income from all sources,' minus various deductions." *Id.* (quoting 750 ILCS 5/505(a)(3) (West 2010)).<sup>2</sup>

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<sup>2</sup>Section 505 of the Illinois Marriage and Dissolution of Marriage Act is used to determine net income for child support calculation for unmarried parents. See *Einstein v. Nijim*, 358 Ill. App. 3d 263, 267 (2005).

¶ 61 "Section 505(a)(1) and (a)(2) of the \*\*\* Act governs the second step." *Id.* ¶ 17. "[That section] provides guidelines to help the trial court determine the minimum amount of child support." *Id.* "The guidelines state that the minimum amount for one child is 20% of the supporting party's net income." *Id.* "Section 505(a)(2) provides that the court should apply the guidelines, unless it finds that a deviation from them is appropriate after considering the best interests of the child in light of the evidence presented on several relevant factors." *Id.* These factors include (1) the financial resources and needs of the child; (2) the financial resources and needs of the custodial parent; (3) the standard of living the child would have enjoyed had the parties not separated; (4) the physical and emotional condition of the child, and his educational needs; and (5) the financial resources and needs of the noncustodial parent. See 750 ILCS 505(a)(2) (West 2014).

¶ 62 Matt cites *In re Marriage of Bush*, 191 Ill. App. 3d 249, 260 (1989), for the proposition that a downward deviation from the standard is appropriate where both parties have more than enough income to provide for a child, and an award of 20% of the noncustodial parent's income exceeds the bounds of anything the child can reasonably need or desire. The *In re Marriage of Bush* case is distinguished from this case because there, both parents were physicians, the respondent's gross annual income was \$299,739, the petitioner's gross annual income was \$86,400 (*id.* at 253), and the respondent was ordered to pay the petitioner approximately \$30,000 per year in child support. *Id.* at 260.

¶ 63 This case is more comparable to *In re Marriage of Hubbs*, where the appellate court emphasized the importance of "balanc[ing] the concern that the child support award should not be a windfall with a concern for the standard of living that the [child] would



have enjoyed absent the parental separation." *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 708 (2006). "In light of the standard of living that the [child] would have enjoyed, child support is not to be based solely upon the shown needs of the child." *Id.* In *In re Marriage of Hubbs*, the petitioner, who was earning \$70,000 per year, was the primary physical custodian of two of the parties' three children. *Id.* at 705. The respondent was earning \$115,000 per year. *Id.* at 707. The respondent argued that the circuit court erred by not deviating downward from the statutory guideline, stating "that [the petitioner's] income alone provide[d] a significant resource for the children and that because each party ha[d] an above-average income, the large award of child support \*\*\* result[ed] in a windfall." *Id.* The appellate court disagreed, holding that although "[a] circuit court is *justified* in awarding child support below the guideline amount where the incomes of the parents are more than sufficient to provide for the reasonable needs of the parties' [child]" (emphasis added), the respondent "fail[ed] to cite a case where the circuit court is *required* to do so." (Emphasis added.) *Id.* We found no abuse of discretion in *In re Marriage of Hubbs* and affirmed the judgment of the circuit court. *Id.* at 708.

¶ 64 In the case of *In re Keon C.*, the appellate court—in discussing a prior holding where a downward deviation was granted on the basis of avoiding a windfall to the custodial parent—emphasized that such a holding was limited to circumstances where "the individual incomes of *both parents* are more than sufficient to provide the reasonable needs of the parties' [child]." (Emphasis added.) *In re Keon C.*, 344 Ill. App. 3d 1137, 1142 (2003) (quoting *In re Marriage of Bush*, 191 Ill. App. 3d 249, 260 (1989)).

¶ 65 Here, Geneva's gross annual income is \$53,490.35. Matt's is \$105,428.97. Geneva's income is roughly half of and nominal in comparison to Matt's, and the record provides no evidence that her income is sufficient to provide I.J. the type of lifestyle he would have enjoyed had the parties not separated. Even assuming, *arguendo*, that Geneva's income is more than sufficient to provide I.J.'s reasonable needs, Matt, like the respondent in *In re Marriage of Hubbs*, fails to cite a case where the circuit court is *required* to deviate downward from the statutory guidelines on that basis. See 363 Ill. App. 3d at 707. For these reasons, we cannot say the circuit court abused its discretion by not deviating from the statutory guidelines in calculating child support.

¶ 66

## 2. Calculation of Net Income

¶ 67 Matt next contends that the circuit court erred in its calculation of his net income. We agree. The circuit court ordered Matt to pay child support in the amount of 20% of his statutory net income, retroactive to October 10, 2014. However, the circuit court also ordered Matt to reimburse Geneva \$300 per month for premiums she paid for I.J.'s health insurance between the separation and the entry of the order. In doing so, the circuit court failed to deduct the \$300 per month from his gross wages in determining his net income for purposes of calculating the statutory amount. Subsequently, the circuit court entered an order on Matt's motion to reconsider, reducing the amount of retroactive child support, and reducing his net income in conjunction with the amounts he reimbursed Geneva for I.J.'s health insurance premiums.

¶ 68 The circuit court also ordered Matt to begin providing health insurance for I.J. until I.J. is no longer eligible for Matt to provide such insurance. There is no indication



tax exemption every year because he contributes the majority of I.J.'s support. *In re Marriage of Rogliano*, 198 Ill. App. 3d 404, 415 (1990). We find *In re Marriage of Rogliano* distinguishable because there, the combined expenses of the petitioner and the child totaled \$1,640 and the monthly child support award was \$1,100. *Id.* at 408. Also in *In re Marriage of Rogliano*, the petitioner had no housing or household expenses because she was staying with her parents. *Id.* In this case, Geneva has her own home which, as Matt noted, requires her to pay a high amount of monthly rent. Geneva's total monthly expenses are \$3,329. Matt's monthly child support amount is \$1,270.97—which, as previously noted, will be further reduced by any amount of increased deductions for I.J.'s health insurance. The circuit court did not find either party to be paying the majority of I.J.'s expenses. Accordingly, the rule in *In re Marriage of Rogliano* is not applicable. See *In re Marriage of Moore*, 307 Ill. App. 3d 1041, 1043 (1999). We add that "[d]etermining monthly expenses for children is not an exact science." *Id.* at 1044. Here, it is not apparent from the record that Matt is paying the majority of I.J.'s expenses. Accordingly, we cannot say the circuit court abused its discretion by dividing the tax exemptions between the parties.

¶ 73

#### CONCLUSION

¶ 74 For the foregoing reasons, the June 4, 2015, order of the circuit court of Madison County is affirmed regarding its custody determination, vacated regarding the visitation order and remanded with instructions for the circuit court to grant visitation on the Christmas holiday to the parties on alternating years, and vacated regarding the calculation of Matt's net income and remanded with instructions for the circuit court to

deduct any health insurance premiums for I.J. from Matt's gross income. The order regarding visitation and child support is affirmed in all other aspects.

¶ 75 Affirmed in part and vacated in part; cause remanded with directions.