

No. 1-16-1906

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LISA R.,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	Cook County.
)	
v.)	No. 12 D 0200
)	
TOHRU O.,)	Honorable
)	Edward A. Arce
Respondent-Appellee.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffmann and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not abuse its discretion or act contrary to the manifest weight of the evidence by denying appellant's emergency motion to suspend visitation.

¶ 2 Petitioner-appellant, Lisa R. (Lisa), appeals from the circuit court of Cook County's denial of her emergency motion to suspend visitation between respondent-appellee, Tohru O. (Tohru) and the parties' two minor children. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

¶ 4 Lisa and Tohru were married on July 11, 2004, and a judgment for dissolution of the marriage was entered on November 12, 2014. On September 9, 2014, an agreed custody¹ judgment was entered between the two parties regarding their two minor children, M.R.O., a male born in April 2008, and M.Y.O., a female born in November 2010. Lisa was awarded custody of the children, subject to Tohru's visitation² as set forth in the custody judgment.

¶ 5 On January 10, 2015, Lisa picked the children up from Tohru's house at 4:30 p.m. after his scheduled visitation. There is no dispute that M.Y.O, who was four years old at the time, was crying as Tohru brought her to Lisa's car. Lisa testified that M.Y.O. continued to cry until they arrived at Lisa's house. A few hours later, when Lisa and the children were watching television and M.Y.O. had calmed down, Lisa said to M.Y.O., "It's good to see you happy again," to which M.Y.O. responded "Yeah, I was crying because my privates hurt." When Lisa asked M.Y.O. why her privates hurt, she responded "Because Daddy sticks his fingers in them." Lisa, who is a physician, then performed a superficial examination on M.Y.O.'s genital area, in which she spread the child's labia, but did not observe any blood, redness, odor, or any other kind of abnormality. Lisa did not take M.Y.O. to the hospital to be examined.

¹ The term "custody" has been updated to "parental responsibility" under the amended Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/801 (eff. Jan. 1, 2016)). The custody judgment was decided by the trial court prior to the update, and so for simplicity we will use the term "custody" in this order.

² The term "visitation" has been updated to "parenting time" under the amended Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/801 (eff. Jan. 1, 2016)). In this case, Lisa filed for suspended visitation in 2015, prior to the update. Even though the trial court did not issue its ruling until July 14, 2016, after the update, and occasionally used the term "parenting time" throughout this case, we will use the term "visitation" in this order for simplicity.

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¶ 6 Lisa contacted Tohru by text message to ask if he had given M.Y.O. a bath. Tohru responded by text message that he gave her "a quickie below the waist cleanup as there was an unpleasant odor." Tohru later testified that around 4:15 p.m. on January 10, 2015, about fifteen minutes before Lisa picked up the children, he was changing M.Y.O. out of her ballet outfit and detected a pungent odor coming from her genital area. He put her in the bathtub and wiped down her buttocks and vaginal area with a wet washcloth for about 30 to 40 seconds. As he dried her off, she began to cry and claimed that she was feeling pain in her genital area.

¶ 7 Later in the evening on January 10th, Lisa called Dr. Katherine Boho (Dr. Boho), a therapist who had worked with M.R.O. in the past related to the divorce proceedings. Lisa told her what M.Y.O. had said about the alleged sexual abuse. Dr. Boho suggested that Lisa praise M.Y.O. for telling the truth and to bring her into the office for an appointment.

¶ 8 On January 12, 2015, the children's nanny took M.Y.O. to see Dr. Boho. Dr. Boho testified that during that meeting, M.Y.O. told her "Daddy took his finger and he sticks it in inside me" and then motioned to her vagina and said "I cry because it hurts." Dr. Boho then called the Illinois Department of Children and Family Services (DCFS) to report the alleged abuse. DCFS initiated an investigation that same day.

¶ 9 On January 15, 2015, Lisa filed an emergency motion to have Tohru's visitation with the children suspended. The court ordered temporary supervised visitation between Tohru and M.Y.O. pending the court's final order on the motion to suspend visitation. A hearing then commenced on Lisa's motion to suspend visitation. On April 23, 2015, pursuant to a motion by the children's representative Gloria Block (GAL Block), the court also ordered temporary supervised visitation between Tohru and M.R.O., pending the court's final order on Lisa's motion to suspend visitation.

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¶ 10 The trial court reappointed Dr. Phyllis Amabile (Dr. Amabile) pursuant to section 604(b)³ of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), who had conducted an evaluation during Lisa and Tohru's custody judgment proceedings. In connection with Lisa's emergency motion to suspend visitation, Dr. Amabile was reappointed to determine whether visitation with Tohru constitutes a serious endangerment to the children based upon Lisa's emergency motion. As part of her evaluation, Dr. Amabile interviewed the parties, the children, and third parties. She did not, however, interview any of the participants from the victim sensitive interview conducted by DCFS, or have access to its audio or video recording. Dr. Amabile interviewed M.Y.O. on two separate occasions. During both interviews, M.Y.O. reported that Tohru had inserted his first, second, and third fingers into her vagina, and that this hurt her and made her cry. During the first interview, however, M.Y.O. reported that this had only happened once and that it happened in the bathtub at Lisa's house. And during her second interview, she reported that this had happened twice and that it happened in the bathtub at Tohru's house. Based upon the information Dr. Amabile gathered during her evaluation, she testified at the hearing that it is much more likely than not that Tohru had engaged in sexual conduct with M.Y.O. Citing alleged past domestic violence that Tohru had committed against Lisa and M.R.O., Dr. Amabile testified that Tohru lacks impulse control and has a tendency to disavow his actions, and that she had considered this past conduct in reaching her conclusion.

¶ 11 Dr. Eric Ostrov (Dr. Ostrov) also testified as an expert witness for Tohru pursuant to Illinois Supreme Court Rule 215(a) (eff. Mar. 28, 2011). Lisa filed a *Frye* motion to bar Dr. Ostrov's testimony on the basis that his testing methods are not sufficiently common in the

³ During the pendency of this case, section 604(b) was repealed and replaced with section 604.10 of the amended IMDMA (750 ILCS 5/604.10 (eff. Jan. 1, 2016)).

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United States. The court denied Lisa's motion, and found that her point went to the weight of Dr. Ostrov's credibility as a witness, and not his admissibility as a witness.

¶ 12 Dr. Ostrov testified that he is a clinical forensic psychologist who evaluated Tohru to determine if he has a history of or inclinations towards pedophilic behavior and to determine if he engaged in the alleged sexual abuse of M.Y.O. The interview included performing several different psychological tests on Tohru. The only other person that Dr. Ostrov interviewed was Tohru's girlfriend at the time to better understand Tohru's sexual interests and habits. While Dr. Ostrov did not interview the children, he did observe them interacting with Tohru. After his evaluation, Dr. Ostrov concluded that Tohru does not have a history of or inclinations towards pedophilic behavior, and that he did not engage in the alleged sexual abuse of M.Y.O.

¶ 13 As part of DCFS's investigation, they conducted a victim-sensitive interview of M.Y.O. on January 23, 2015. Present during the victim-sensitive interview was a DCFS interviewer, a DCFS investigator, and a detective from the Evanston Police Department. At the interview, M.Y.O. reported that Tohru had a towel in his hand as he was washing her and that he put his finger to her vaginal area when he bathed her. M.Y.O. further reported that this had occurred many times in the past. She never stated that Tohru put his fingers inside her at any time during the victim sensitive interview.

¶ 14 Following the victim-sensitive interview on January 23, 2015, M.Y.O. was taken to the Advocate Medical Group for a physical examination as part of the DCFS investigation. The report from the examination concluded: "Patient is a four year old with disclosure of sexual abuse by her biological father a few weeks ago. Exam today is normal. Normal exams are common in cases of child sexual abuse. A normal exam does not contradict or negate the allegations made by the patient."

¶ 15 On April 28, 2015, DCFS issued a letter to Tohru with a determination that the report of alleged sexual abuse was "unfounded." The letter further stated "This letter means that no credible evidence of child abuse or neglect was found during the investigation." DCFS Investigator Roy Bozeman (Investigator Bozeman) testified that DCFS usually needs an "outcry" from the victim and/or some kind of medical evidence to make a finding of sexual abuse, and that this case had neither in DCFS's investigation.

¶ 16 After all of the witness testimonies and after the conclusion of DCFS's investigation, the parties submitted written closing arguments. Although her emergency motion had sought suspending Tohru's visitation, in her closing argument, Lisa requested the court to order that Tohru's visitation be supervised. This is the first time in the record that Lisa requested *supervised* visitation instead of *suspended* visitation.

¶ 17 On July 14, 2016, the trial court ruled on Lisa's motion to suspend visitation. The trial court held that Lisa had failed by a preponderance of the evidence to establish that Tohru had committed an act or acts of sexual abuse on M.Y.O. The court found that M.Y.O.'s statements about the abuse were too inconsistent to be credible. The court relied upon the victim-sensitive interview, in which M.Y.O. did not state that Tohru had digitally penetrated her vagina, and that Dr. Amabile had made her conclusion without having access to that victim-sensitive interview. The court further relied upon the lack of evidence in the record of any physical manifestation to corroborate M.Y.O.'s statements, such as either medical evidence or M.Y.O. displaying fear or discomfort around Tohru.

¶ 18 The court also noted that it considered Lisa's evidence of alleged domestic violence during the course of the marriage by Tohru against her and M.R.O., but did not find this evidence probative as the alleged acts of domestic violence occurred prior to the entry of the

agreed custody judgment. The court thus determined that such evidence was not relevant to the allegations of sexual abuse at issue.

¶ 19 The court concluded by stating that Lisa failed by a preponderance of the evidence to prove any sexual abuse committed by Tohru and thus, there was no basis to suspend his visitation. The court vacated the temporary orders of supervised visitation and denied Lisa's motion to suspend Tohru's visitation. The court did not address Lisa's request for *supervised* visitation in her written closing argument in its final ruling.

¶ 20 Lisa filed a notice of appeal on July 15, 2016, challenging the trial court's finding, and in her notice of appeal requested that Tohru's visitation with the children be supervised. In addition to the parties' briefs, GAL Block also filed a brief challenging the trial court's finding and arguing that Tohru poses a serious danger to the children.

¶ 21 ANALYSIS

¶ 22 We note that we have jurisdiction to review this case as Lisa filed a timely notice of appeal after the circuit court of Cook County's final order. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994).

¶ 23 This case presents a procedural quagmire because of the unusual presentation of the issues. In her notice of appeal and in her brief, Lisa requests this court to review the trial court's denial of her motion to have Tohru's visitation supervised. GAL Block's brief also requests supervised visitation. However, the emergency motion that Lisa filed in the trial court is a motion to *suspend* visitation. Nowhere in that motion does she mention *supervised* visitation. The only time in the record that Lisa formally seeks supervised visitation, instead of suspended visitation, is in her written closing argument after all of the evidence had been heard. Tohru's response also did not indicate that Lisa had changed the requested relief to supervised visitation,

rather than suspended visitation. Additionally, the trial court's ruling explicitly states that it is denying her motion to *suspend* visitation. In its ruling, the trial court did not mention supervised visitation except to vacate the temporary supervised visitation which it had ordered during the pendency of the hearing. However, since Lisa did raise the issue of supervised visitation in her written closing argument, without objection from Tohru, we can presume that the trial court did consider it, but chose to respond to the issue of suspended visitation as originally requested by Lisa's emergency motion. Therefore, we will focus our review on the issue of suspended visitation with the assumption that the trial court considered the closing argument in the context of the evidence presented and ruled accordingly.

¶ 24 Further, regardless of whether the issue is suspended visitation or supervised visitation, our review would apply the abuse of discretion standard, as the trial court is vested with wide discretion in resolving visitation issues. *In re Marriage of Betsy M.*, 2015 IL App (1st) 151358, ¶ 59. Thus, the inconsistency in Lisa's requested relief in the trial court and on appeal does not affect our ability to review the trial court's order at issue.

¶ 25 Pursuant to section 603.10(a) of the IMDMA⁴, a court may restrict a parent's custody or visitation through a variety of orders if the court finds by a preponderance of the evidence that the parent engaged in any conduct that seriously endangered the child's mental, moral, or physical health or that significantly impaired the child's emotional development. The custodial parent bears the burden of proving by a preponderance of the evidence that visitation with the

⁴ During the pendency of this case in the trial court, section 607 of the IMDMA was repealed and replaced with section 603.10 of the amended IMDMA (750 ILCS 3/603.10 (eff. Jan. 1, 2016)). The trial court found, and we agree, that there is no substantive change to either the burden of proof required or the legal standard that must be established in order to restrict a parent's custody or visitation. The trial court relied upon section 603.10 as its applicable law in its ruling on July 14, 2016.

noncustodial parent would seriously endanger the child. *In re Marriage of Slayton*, 292 Ill. App. 3d 379, 387 (1997). We will not interfere with a trial court's visitation determination unless an abuse of discretion has occurred or the finding is against the manifest weight of the evidence. *In re Marriage of Betsy M.*, 2015 IL App (1st) 151358 at ¶ 59. An abuse of discretion occurs only when no reasonable person could find as the trial court did. *Id.* at ¶ 61. And a decision is against the manifest weight of the evidence where the opposite result is clearly evident from the record. *Id.* As set forth below, we find that the court's ruling was neither an abuse of discretion nor against the manifest weight of the evidence.

¶ 26 In its ruling, the trial court noted that M.Y.O.'s statements about the alleged abuse were inconsistent. The court further explained that the inconsistent statements were not corroborated by *any other evidence* of abuse. Sufficient corroboration of alleged abuse requires more than just witnesses stating that a minor claimed to have been abused or neglected. *In re A.P.*, 179 Ill. 2d 184, 198 (1997). "In essence, corroborating evidence is evidence that makes it more probable that a minor was abused." *Id.* at 199. The form of corroboration will vary depending on the unique facts of the case and can include physical or circumstantial evidence. *Id.*

¶ 27 In this case, the court's finding of a lack of corroborating evidence is not against the weight of the evidence. While M.Y.O. did make statements to Lisa, Dr. Boho, and Dr. Amabile that Tohru had digitally penetrated her vagina, she also made statements to DCFS that he only put his fingers *to* her vaginal area when he washed it with a wash cloth. And as the trial court noted, there are many inconsistencies throughout M.Y.O.'s statements of abuse, such as how many times and where Tohru allegedly sexually abused her (she even claimed that it occurred at Lisa's home). We recognize that a four year old will naturally be inconsistent to some extent, but M.Y.O.'s inconsistency is significant, especially in light of the lack of corroborating evidence.

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¶ 28 While the trial court noted that medical evidence is not necessary to find sexual abuse, the lack of medical evidence does make it more difficult to corroborate the inconsistent statements. We note also that Lisa did not seek a medical examination of M.Y.O. until January 23, 2015, thirteen days after M.Y.O.'s initial claim of abuse. Notably, Lisa is a physician, who would likely understand the need for a medical examination of M.Y.O after her initial statement. Although medical evidence of abuse is not necessary to find abuse, its absence is important when, as here, there is *no other corroborating evidence*.

¶ 29 Investigator Bozeman testified that DCFS usually needs an "outcry" from the victim and/or some kind of medical evidence to make a finding of sexual abuse, and that DCFS concluded that the abuse was unfounded in this case because both of those criteria were missing in its investigation. It is reasonable that the trial court would reach the same conclusion based on the same information. While we may have reached a different conclusion if we had been in the trial court's position, we cannot say that the opposite conclusion is clearly evident or that no reasonable person would reach that conclusion.

¶ 30 We further find that the trial court did not abuse its discretion by finding that Lisa's evidence of alleged domestic violence by Tohru against her and M.R.O. during the marriage was not relevant to the issue of alleged sexual abuse in this matter. The court could reasonably conclude the past alleged acts of domestic violence were not factually similar enough to have any probative value and may have been prejudicial in reaching a conclusion about the current issue of sexual abuse.

¶ 31 And even though Dr. Amabile testified that Tohru's alleged past acts of domestic violence show his lack of impulse control and a tendency to disavow his actions, the amount of weight to give each witness' testimony is within the trial court's discretion. An expert's testimony

is to be judged by the rules of weight and credibility applied to all other witnesses. *Iaccino v. Anderson*, 406 Ill. App. 3d 397, 402 (2010). The role of an expert witness is advisory, and the trial court does not have to accept expert witness testimony as *per se* true. The trial court clearly determined to give less weight to Dr. Amabile's opinions, as is within its sound discretion. It is not enough to say that we or another trier of fact may have considered Dr. Amabile's testimony more heavily in a final ruling had we been in the trial court's position. Under the standard of manifest weight of the evidence, a reviewing court will not substitute its judgment for that of the trial court regarding the credibility of witnesses. *Best v. Best*, 223 Ill. 2d 342, 350–51 (2006).

¶ 32 The same principles apply to GAL Block, who did not testify, but did submit a written closing argument expressing to the trial court that Tohru poses a serious endangerment to his children. While the children's representative opinion should be given considerable weight, the court is not required to implement the opinion of a child representative. *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 55. It is apparent that the trial court did consider GAL Block's position, but ultimately concluded there was still not enough evidence to find that Tohru had engaged in sexual misconduct with M.Y.O. We cannot say that this conclusion is against the manifest weight of the evidence.

¶ 33 Finally, Lisa argues that the trial court abused its discretion by permitting the testimony of Dr. Ostrov. When determining the reliability of an expert witness, the trial judge is given broad discretion. *People v. Lerma*, 2014 IL App (1st) 121880, ¶ 35. The trial court did not abuse its discretion in qualifying Dr. Ostrov as an expert witness, and finding that he had the proper experience and credentials. The trial court correctly noted that Lisa's argument regarding Dr. Ostrov's testing methods went to the weight of his evidence, not his admissibility as a witness. Therefore, the trial court did not abuse its discretion in permitting his testimony.

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¶ 34 In summary, there was conflicting testimony in this case, and it is ultimately within the trial court's discretion to determine which testimony will be given more weight. The trial court had a lengthy period of time to consider all of the evidence in this case. The trial court was therefore in the best position to evaluate the credibility of the witnesses in its role as the final decision maker. Thus, we cannot say that it was unreasonable for the trial court to find that Lisa failed by preponderance of the evidence to prove that Tohru sexually abused M.Y.O. or that Tohru is a serious endangerment to the two children. Accordingly, we cannot hold that the trial court abused its discretion or that its denial of Lisa's motion to suspend visitation was against the manifest weight of the evidence.

¶ 35

CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.