

NOTICE
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2017 IL App (5th) 160378-U

NO. 5-16-0378

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).

AMY R. WILSON, n/k/a AMY R. WHITE,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	Clinton County.
)	
v.)	No. 04-D-31
)	
DONALD L. WILSON,)	Honorable
)	Stanley Brandmeyer,
Respondent-Appellee.)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Presiding Justice Moore and Justice Welch concurred in the judgment.

ORDER

¶1 *Held:* The circuit court's order is affirmed where a substantial change in circumstances necessitated a change in custody and the court's decision was in the best interest of the minor child.

¶2 The appellant, Amy W., appeals the judgment entered by the circuit court of Clinton County granting the appellee, Donald W.'s, petition to modify custody of the parties' minor child, L.W.¹ For the reasons which follow, we affirm the decision of the court.

¹This appeal only pertains to the parties' son L.W., not the parties' eldest son, A.W.

¶ 3 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 shall issue its decision within 150 days of the filing of the notice of appeal. Accordingly, the decision in this case was due on January 27, 2017. However, the briefing schedule was not complete until January 3, 2017. This case was immediately placed on the docket for January 24, 2017, and we now issue our disposition.

¶ 4 On January 11, 2005, the circuit court entered a dissolution of marriage order for Amy W. and Donald W., which incorporated a joint parenting agreement whereby the parties were awarded the joint care, custody, education and control over their children, A.W. and L.W., ages six and three, respectively, with Amy W. as primary physical custodian.

¶ 5 On October 16, 2006, Amy W. filed a petition for leave to remove the children from Illinois, alleging in pertinent part that she had remarried and that her spouse, Michael White, was a United States Army Sergeant currently serving at Fort Campbell in Clarksville, Tennessee.

¶ 6 On April 4, 2008, the circuit court entered an order granting Amy W. permission to remove the children, A.W. and L.W., at that time, seven and four, respectively, from Illinois, to reside in Clarksville, Tennessee. Donald W. was awarded visitation rights, which included one weekend per month and extended summer visitation. The court's order included the following provision, "in the event that Petitioner's current marriage to Michael White ends in divorce, Petitioner shall reside in Illinois with the children."

¶ 7 Approximately two to three years ago, Amy W. divorced Michael White. Donald W. was aware of the divorce, but the record does not indicate that he requested compliance with the order following the divorce, which would have required Amy W. to return to Illinois with the minor children. Therefore, Amy W. and the two minor children remained in Clarksville, Tennessee, following the divorce.

¶ 8 However, on June 10, 2016, Donald W. filed a petition for modification, alleging that there existed a substantial change in circumstances, which included the following:

- "A. The minor child has gotten older;
- B. The minor child has expressed a strong desire to reside with Respondent;
- C. Respondent's work schedule makes him generally available to care for the minor child;
- D. The Respondent is concerned for the general safety and emotional well-being of the minor child while in the care of the Petitioner; and
- E. That on numerous occasions since the Petitioner moved to Tennessee, the Petitioner has concealed the address of herself and the minor children from the Respondent."

Donald W. requested that the circuit court modify the order to designate him as L.W.'s primary residential custodian and allow L.W. to relocate to Dix, Illinois, from Clarksville, Tennessee.

¶ 9 On August 15, 2016, the circuit court granted Donald W.'s petition for modification, awarding Donald with primary residential custody of L.W. Amy W. subsequently filed a timely notice of appeal.

¶ 10 Section 610.5(c) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/610.5(c) (West 2016)) governs the modification of parental responsibilities and provides as follows:

"[T]he court shall modify a parenting plan or allocation judgment when necessary to serve the child's best interests if the court finds, by a preponderance of the evidence, that on the basis of facts that have arisen since the entry of the existing parenting plan or allocation judgment or were not anticipated therein, a substantial change has occurred in the circumstances of the child or of either parent and that a modification is necessary to serve the child's best interests."

"This section reflects an underlying policy favoring the finality of child custody judgments and creating a presumption in favor of the present custody so as to promote stability and continuity in the child's custodial and environmental relationships." *In re Marriage of Fuesting*, 228 Ill. App. 3d 339, 344 (1992). A change in circumstances, by itself, is not sufficient to justify a modification of custody. *Id.* Instead, the change in circumstances must affect the welfare of the child. *Id.* The circuit court must look at the totality of the circumstances when determining whether there has been a change in circumstances. *In re Marriage of Davis*, 341 Ill. App. 3d 356, 359 (2003). "The court has broad discretion in making this determination, and this court will afford great deference to the trial court's determination in recognition of that court's far superior position for evaluating the parents, child, and all other evidence." *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 876 (1994). Accordingly, the court's determination will not

be disturbed unless there is a clear abuse of discretion or the decision was contrary to the manifest weight of the evidence. *In re Marriage of Fuesting*, 228 Ill. App. 3d at 344.

¶ 11 On appeal Amy W. asserts that the circuit court's judgment was against the manifest weight of the evidence because there was no change in circumstances to support the court's decision. Donald W. argues that he satisfied this requirement by showing that L.W. had gotten older, and because of this fact, L.W. had expressed a strong desire to reside with his father to engage in more consistent interaction.

¶ 12 In the case at issue, the circuit court found that a substantial change in circumstances necessitated a change of custody. We agree. First, we agree that L.W.'s age is an important factor that must be taken into consideration based on the facts at hand. As L.W. entered high school he articulated a strong desire to spend significant time with his father. L.W. explained to the court that he wished to spend more time outdoors with his father and for the opportunity to attend high school in a smaller social setting, as compared to his current environment in Tennessee.

¶ 13 Second, as the circuit court noted, we find a change in circumstances existed following Amy W.'s divorce to Michael White. In particular, L.W. testified that following the divorce he rarely spoke or had interaction with Michael White. Additionally, as the court stated, L.W. related that his friendship circle in Tennessee was quite limited, and that he had very few meaningful relationships outside his mother and his longtime friend, Chris. However, the court noted that Chris recently moved from Tennessee to West Virginia, and the record indicates that L.W. has had limited contact with Chris as a result. Thus, the court determined that L.W.'s father and his paternal side

of the family, which included many adult male figures, would have "the greatest and most positive impact upon his best interests." We agree. Therefore, we find there was sufficient evidence to support the court's finding that a substantial change in circumstances related to L.W.'s needs and best interest.

¶ 14 In the final analysis, the child custody provisions are designed to serve one end: the best interest of the child. *In re Marriage of Andersen*, 236 Ill. App. 3d 679, 684 (1992). Most specifically, "[c]ustody cannot be modified unless there is a material change in the circumstances of the child related to the child's best interests and unless the evidence establishes either that the parent to whom custody was originally awarded is unfit or that the change in conditions is directly related to the child's needs." (Internal quotation marks omitted.) *Id.* at 682.

¶ 15 We first note that the circuit court's order cited to the incorrect statute governing the allocation of parental decision making.² Although the court used the incorrect statute in its analysis, nevertheless, a careful reading of the order indicates that the order focused on two factors in reaching its conclusion. First, the court focused heavily on the wishes of the child, and second, Donald W.'s ability to have a greater impact on L.W. as L.W. ages and adjusts to his home, school, and community. Moreover, we find it notable that Amy W. does not explain how the court's use of section 602(a) would produce a different

²The circuit court cited to the old version of the statute at 750 ILCS 5/602(a). The new statute, 750 ILCS 5/602.5(c) (West 2016), was modified and took effect on January 1, 2016.

result than the application under section 602.5(c). Several of the factors are identical in both versions, with section 602.5(c) including additional factors for a court to analyze in determining the child's best interest. See 750 ILCS 5/602.5(c) (West 2016). As such, we find that this citation error was harmless, given that these two factors, which were heavily relied on by the court, have stayed consistent between both versions. Although the preference or wish of children by itself does not warrant change of decision making from one parent to another, feelings of children should always be given serious consideration, particularly when desire or preference of children is based upon reasons related to their best welfare since the guiding star in matters of child custody is, and must be at all times, best interest of children. *Anderson v. Anderson*, 32 Ill. App. 3d 869, 870-71 (1975).

¶ 16 In the instant case, the circuit court not only heard L.W. express his preference to live with his father, but also took into consideration, what we find to be, clear and articulable explanations based on sound reasoning. See *In re Marriage of Andersen*, 236 Ill. App. 3d at 679. In particular, the court found that the change in circumstances which directly related to L.W.'s needs and best interest were that he had matured to a point where he desired to see his father more regularly and was at a point in his life where he needed physical interaction with his father on a more consistent basis. Moreover, the court determined that L.W.'s preference to live with his father also included the ability to partake in outdoor activities, feel more comfortable in smaller social settings at school and with the paternal side of the family, as well as rely on his father to assist him in furthering his career goals. The court found that L.W.'s reasoning was sound and related to his needs and welfare. Evidently, the court believed that it would serve L.W. well as

he transitioned from boyhood to manhood to have the daily guidance and contact with his father. As stated above, the circuit court is in a superior position to evaluate the parents, child, and all other evidence necessary for determining what is in the child's best interest. We, thus, conclude that the evidence supports the court's determination that L.W.'s best interest will be served by changing his decision making to Donald W.

¶ 17 We determine that the circuit court's finding that a substantial change in circumstances occurred was not against the manifest weight of the evidence, and that the court's determination that it would be in L.W.'s best interest to designate Donald W. as L.W.'s primary residential custodian was not an abuse of discretion.

¶ 18 For the foregoing reasons, the judgment of the circuit court of Clinton County is hereby affirmed.

¶ 19 Affirmed.