

2015 IL App (2d) 150724-U  
No. 2-15-0724  
Order filed December 10, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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ROBERT E. NOLAN, III,	)	Appeal from the Circuit Court
	)	of Kane County.
Petitioner-Appellee,	)	
	)	
v.	)	No. 06-F-193
	)	
BRIENNA PETERS,	)	Honorable
	)	David P. Kliment,
Respondent-Appellant.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held:* The record supported the trial court's findings that a change in the minor child's circumstances occurred and a change in custody was in the minor's best interest. Accordingly, the trial court's order granting custody to petitioner was not against the manifest weight of the evidence, and we affirmed.

¶ 2 Petitioner, Robert E. Nolan, III, filed a petition to modify custody of his son, Aiden, in December 2013. At the time, Aiden was residing with his mother, Brienna Peters. In January 2015, Robert filed an emergency motion for temporary custody, supported by a section 604.5 evaluation (750 ILCS 5/604.5(a) (West 2014)). The court granted Robert temporary custody, and the petition proceeded to a four-day trial beginning in May 2015. After trial, the court found

that a change in circumstances occurred and that it was in Aiden's best interest to modify custody from Brienna to Robert. For the reasons set forth herein, we affirm.

¶ 3

### I. BACKGROUND

¶ 4 Brienna gave birth to Aiden on March 5, 2006. Both Brienna and Robert acknowledged that Robert was Aiden's biological father, and they signed a voluntarily acknowledgement of paternity to that effect. Brienna and Robert were never married.

¶ 5 Shortly after Aiden's birth, on April 11, 2006, Robert filed a complaint to establish visitation rights. Brienna also petitioned for child support. After a hearing, the court entered an order on July 27, 2006, ordering that custody would remain status quo with Brienna and granting Robert visitation with Aiden. The court entered no further custody order, and custody remained with Brienna.

¶ 6 Robert filed a petition to modify child custody on March 27, 2009. He alleged various changes in circumstances since the 2006 visitation orders, including: Aiden's illnesses, such as fever and bronchitis, for which Brienna neglected to seek appropriate medical assistance; Brienna's lack of supervision, which lead to a gash to Aiden's face from falling out of bed and an unexplained black eye; an inspection by the Department of Children and Family Services (DCFS) that concluded there were "environmental issues" with Brienna's residence; and Aiden experiencing developmental delays with language and motor skills. The court appointed Dan O'Connell as guardian *ad litem* (GAL) in September 2009. The matter proceeded to trial on October 25, 2010.

¶ 7 The trial court entered judgment on Robert's petition to modify custody on November 23, 2010. It ordered that Robert have sole custody of Aiden and that Brienna have unsupervised visitation with Aiden, provided she kept her residence clean and in order.

¶ 8 Brienna appealed, and we reversed. *Nolan v. Peters (Nolan I)*, No. 2-10-1323 (2011) (unpublished order under Supreme Court Rule 23). In *Nolan I*, we held that the trial court's order to change custody was against the manifest weight of the evidence. We reasoned that while the trial court's finding that Aiden's developmental delays and illnesses were a change in circumstances was not against the manifest weight of the evidence—to wit, the parties agreed that Aiden showed developmental delays and had experienced various infections—more than a change in circumstance was necessary for a change in custody. *Nolan I*, No. 2-10-1323, at 20-21. The trial court also needed to find, by clear and convincing evidence, that a change in custody was in Aiden's best interests, considering the factors set forth in section 602 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (705 ILCS 5/602 (West 2008)). The trial court had found two factors in favor of Robert: that he had a cleaner home than Brienna and that Brienna failed to advise him of Aiden's illnesses, in particular his repeated Methicillin-resistant *Staphylococcus aureus* (MRSA) infections. *Nolan I*, No. 2-10-1323, at 21. It found that these factors outweighed other factors, including that Brienna had been his primary caregiver since birth, that both parents desired to be the primary caregiver, and that Aiden was involved in a good school program. *Id.*

¶ 9 We disagreed that the record supported the trial court's findings related to the best interest factors in favor of Robert. *Id.* First, we reasoned that the record did not contain evidence that Brienna's home caused Aiden harm by contributing to his MRSA infections because Robert presented no evidence concerning the cause or source of his infections. Moreover, we noted that the photos of her home did not depict uninhabitable or dangerous living conditions, and the initial inspection of her home found it was safe for Aiden. Brienna also provided Robert with Aiden's medications for his MRSA infection, and there was no evidence

that his infections adversely affected his health or anyone's in Robert's home. The record showed that Brienna complied with the GAL's recommendation to improve her home by cleaning it, repairing a handrail, and making better food options available to Aiden. Finally, Aiden's injury from a fall was minor and the circumstances in the record did not suggest abuse or neglect. Accordingly, we found that the record did not show that the condition of Brienna's house or that she and Robert had poor communication (in particular that she failed to inform him of Aiden's infections) adversely affected Aiden's welfare. *Id.* a 22. Rather, it showed that Brienna had been Aiden's primary caregiver since birth, he had been thriving in an educational program in Brienna's community, and remaining in her care would not pose present or future harm to Aiden. *Id.*

¶ 10 Robert's petition for leave to appeal to the supreme court was denied August 1, 2011.

¶ 11 On remand, the trial court entered an agreed order on October 17, 2011, in which custody of Aiden reverted back to Brienna, consistent with our mandate. The matter was continued to March 1, 2012, whereupon the court entered an agreed order that vacated its November 23, 2010, order that granted custody of Aiden to Robert. The agreed order further stated that custody would remain with Brienna, consistent with its October 17, 2011, order; set a visitation schedule; and set Robert's child support at \$105 per week.

¶ 12 On December 13, 2013, Robert again petitioned to modify custody, stating that since the denial of his petition for leave to appeal to the supreme court, "several facts have arisen which establish a change in circumstances in both the child and Brienna." The reasons he provided included: Brienna had neglected Aiden's physical and mental health, Aiden's social and emotional growth was stunted by Brienna's neglect, and Aiden's infections threatened the health of his family and those at his education program.

¶ 13 On September 10, 2014, Robert moved to appoint Dr. Robert P. Hatcher as a “custody expert” pursuant to section 604.5 of the Marriage Act (750 ILCS 5/604.5 (West 2014)). The motion stated that Brienna had already admitted that Aiden had autism, rumination syndrome, Pervasive Development Delay, and several dental problems that required dental surgery. In Brienna’s response to Robert’s motion to appoint Hatcher as a custody expert, she confirmed these admissions. The court granted Robert’s motion to appoint Hatcher as a section 604.5 evaluator on September 25, 2014.

¶ 14 Robert filed an emergency petition for temporary custody of Aiden on January 30, 2015. In his emergency petition, Robert stated that he had retained Hatcher to evaluate Aiden’s best interest pursuant to section 604.5 of the Marriage Act (750 ILCS 5/604.5 (West 2014)), and Hatcher evaluated Aiden’s best interests and filed a report by January 27, 2015. He continued that Hatcher’s report recommended an immediate change of custody, finding that Aiden was a “multiple-handicapped child.” That same day, the court granted Robert’s emergency petition for temporary custody.

¶ 15 A bench trial on Robert’s December 2013 petition to modify custody began on May 26, 2015. Robert first called Brienna. She testified as follows. She lived in an apartment in St. Charles, Illinois, with her brother, Richard, aged 34, and her father, Todd, aged 55. She was 33 years old, and her boyfriend, Kelly, was 49. Kelly drove her to the trial because she could not drive herself; she never had a driver’s license. She was not currently employed and had no income, relying on food stamps and aid. Her father paid the rent. Her last job was in 2009, and she was currently looking for employment. She planned to move with Kelly into a different apartment in the same complex over the summer. Kelly had one child of his own, a 25-year old woman.

¶ 16 She did not speak with Robert unless she had to. They did not make joint decisions—at the time of trial, Robert made the decisions.

¶ 17 She was a smoker, but she was trying to quit. When asked whether she smoked a pack of cigarettes a day, she said no. However, she admitted that she told Hatcher that she used to smoke a pack a day. Her father did not smoke, but Kelly smoked as much or more than she did.

¶ 18 Robert testified next as follows. He was married to Jessie Nolan since August 2011, and he lived with her and her son, Isaic. At the time of trial, Isaic was eight years old and Aiden was nine. He was currently employed as a full-time project engineer, working for a general contractor that built single-family homes. Jessie was also employed part-time as a hair stylist. He was not a smoker and was concerned that Aiden was exposed to smokers at Brienna’s home.

¶ 19 Aiden and Isaic would play and eat together when Aiden visited. They liked to go to the park together and ride bikes. Aiden “really trie[d] to mirror Isaic a lot.” He had a “little buddy” with Isaic around. Isaic attended Edgebrook Elementary School in McHenry, Illinois, about a mile from their home. Aiden had attended Edgebrook when Robert had custody of him previously. Aiden also got along well with Jessie; he would tell her that he loved her and would give her hugs.

¶ 20 Both Robert’s father and Jessie would help with Aiden’s care. During Robert’s temporary custody of Aiden, his father would usually pick Aiden up from school, and Jessie would feed him breakfast and get him ready for school because Robert would leave early for work. Robert would see Aiden when he got home in the afternoon, ask him about his day and maybe go outside. He would help Aiden get his homework done before dinner.

¶ 21 In his opinion, Aiden needed a routine to get things done. It helped Aiden transition between tasks to lay them out one by one. He needed guidance every step of the way for daily

activities: “Take your plate to the kitchen. Wash your own hands. Wash your face.” He needed assistance going to the bathroom and needed a bathroom schedule, although he had not had an accident in a long time. He had trouble putting on clothes, too, especially tighter clothes.

¶ 22 Robert continued that Aiden was under the care of several physicians and therapists. He had been under the care of Dr. Colleen Buhrfiend, a pediatric neurologist at Rush Hospital in Chicago, since March 2013. He was supposed to visit a neurologist every six months, and he saw Dr. Buhrfiend every six months for a checkup. She recommended that Aiden go to therapy for help with various conditions, including autism. Brienna had failed to take Aiden to see a neurologist from February 2011 to March 2013.

¶ 23 Aiden was seeing three therapists based on Dr. Buhrfiend’s recommendations. Every Monday he saw a speech pathologist, every Wednesday he saw an occupational therapist, and every Saturday he saw a behavioral therapist. Aiden began seeing the speech and occupational therapists in February 2015, and he had been going to behavioral therapy since at least March 2014. Aiden was making good progress with his therapists, especially his occupational therapist, who was able to get him to perform difficult tasks, like using scissors or putting beads on string. On Dr. Buhrfield’s recommendations, Aiden attended hippotherapy and aquatic therapy. Hippotherapy involved autistic children training with horses to work on communication and motor skills by steering and guiding the horses.

¶ 24 Robert continued that Aiden suffered from rumination syndrome. He would observe Aiden eat food “and then he can effortlessly pull his food up out of his stomach into his mouth and then he would play with it.” His breath would smell like vomit. He took Aiden to see a gastroenterologist, Dr. Rajesh Nagpal, in the summer of 2014, who diagnosed Aiden with rumination syndrome. After seeing Dr. Nagpal, though, the problem “kind of fizzled out,”

slowly going away. Robert did not know what caused the rumination syndrome, but it was his opinion that a stressful home life could fuel it.

¶ 25 Regarding Aiden's MRSA infections, Robert understood that it was a flesh-eating staph infection immune to antibiotics, and he and his family had to take precautions in their residence when Aiden visited, such as always having Isaac bathe first and scrubbing the tub after Aiden. He believed the MRSA infections were an ongoing concern because Brienna would not disclose enough information about Aiden's infections to him, and his family would always have to take precautions.

¶ 26 Aiden was not yet fully toilet trained when Robert filed his December 2013 petition. At that time, Aiden was still wearing pull-up diapers. Brienna was not working to correct his lack of toilet training because she did not believe Aiden understood about going to the bathroom yet. Aiden's teacher called a meeting in April 2013 with Brienna and Robert for a "potty training intervention," telling them they needed to stop putting him in diapers. Robert and Jessie worked with him and his school, and Aiden was greatly improved by the time of trial. He was wearing underwear all the time with Robert's family and going to the bathroom on his own. He still needed help going "number 2."

¶ 27 Robert next detailed an indentation that Aiden had on his head from an injury he suffered at Brienna's home. He had at least an inch long abrasion on his forehead, for which he had to go see the doctor. The injury occurred when he fell down the stairs with Brienna at the bottom of the stairs. Robert reported the incident to DCFS because Aiden needed to be supervised going down the stairs.

¶ 28 Robert further testified that Aiden has had ongoing dental problems, beginning in August 2011. In the fall of 2013, Aiden went to see the doctor for an infection in his lymph nodes. The



doctor noticed that Aiden also had dental decay and referred Aiden to see a dentist, Dr. Scott Goldmann. Aiden went to see Dr. Goldmann, and he found that he had “a lot of decay. A lot of cavities.” He had to have caps put on his teeth, and he had dental surgery under general anesthesia in August 2014. When Robert was with Aiden, he would help him brush his teeth every night and Jessie would help him in the mornings. He would sing to Aiden and created a brushing routine: brush, spit, repeat twice, and then wipe his mouth. Aiden liked routines.

¶ 29 Robert’s testimony concluded, and the proceeding was continued to May 27, 2015. Robert called Dr. Hatcher, and he testified as follows. Hatcher was a licensed clinical psychologist and had performed 1,500 or more custody evaluations in Illinois since the early 1980s. He was appointed pursuant to section 604.5 of the Marriage Act to perform a custody evaluation on behalf of Robert. He performed his evaluation and completed a written report in this case around the third week of January 2015, in which he concluded that there were “very strong compelling reasons to change this child’s custody in the psychological, medical, physical wellbeing interests.” In his opinion, it was not a close call; a change in custody was needed.

¶ 30 In his report, Hatcher described Aiden as multiply handicapped, by which he meant that he had multiple mental and developmental disorders, including cognitive delay or retardation as well as autistic behaviors. Aiden’s neurologist, Dr. Buhrfiend, told him she diagnosed Aiden with global developmental delay, that is, mental retardation. He had neurological conditions such as hypertonia [*sic*],<sup>1</sup> which is characterized by reduced muscle tone in the lower extremities, affecting his motor development and balance. He was growth retarded; he was about half the

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<sup>1</sup> The record reads hypertonia, but we note that the record should likely read “hypotonia” because Aiden’s condition was marked by reduced, not increased, muscle tone. The record later refers to hypotonia.

size of someone half his age. That is, he was nine years old but looked like he was four or five. His height was less than the 1st percentile for his age group (he was shorter than 99% of children his age). He also had language delays, fine and gross motor coordination problems, sensory regulation problems, and chronic allergies.

¶ 31 Hatcher psychologically tested both Brienna and Robert. Brienna was moderately defensive in responding to his questions but not unduly so. She did not have a major psychiatric disorder such as major depression or anxiety. Rather, she was best described as having a personality that was “socially distant and distrusting of others, of poor socialization, poor ability to form and maintain social relationships, and particular poor ability to maintain close relationships.” She was a remote, isolated individual. She also had a strong family history of psychiatric illness—both parents struggled with depression, anxiety, and substance abuse, and her brother, Richard, had major anxiety disorder. Richard lived with her in St. Charles. He also struggled with socialization, mostly staying in his room at the apartment. There was a “family pattern of withdrawal and avoidance of social interaction.”

¶ 32 Brienna had no history of substance abuse but was a heavy smoker, smoking more than one pack a day. Richard smoked, and Hatcher believed her father smoked too, although he was not sure about the father. Her boyfriend Kelly smoked as well.

¶ 33 Hatcher made an unannounced visit to Brienna’s home shortly before Christmas 2014. He came in the mid-morning, around 10 a.m. The apartment was “crowded,” by which he meant there was a lot of stuff in it—a lot of oversized furniture and a large TV. As to the apartment’s condition, “[i]t was chaos. It was filthy.” He observed old food on the floor and clutter and trash everywhere. It had not been cleaned in a long time. The downstairs bathroom was “filthy.” The sink was dirty, the toilet had not been cleaned, and the shower was dirty.

¶ 34 Brienna said it was a mess because it was laundry day, indicating the pile of laundry at the bottom of the stairs, but he hardly noticed the laundry because there was such a mess around it. There was also a “very strong smell of cigarettes, cigarette smoke.” He could smell the cigarette smell before he entered the apartment. He was concerned about secondary smoke exposure for Aiden, especially because he had chronic respiratory problems.

¶ 35 He also visited Robert’s home unannounced on Christmas Eve around 10 a.m. “It was 180 degrees from Brienna’s.” Robert, Jessie, Aiden, and Isaic were there having Christmas brunch. The house was very clean—the kitchen was clean and the bathroom was spotless. Each child had a separate bookcase for their books and belongings upstairs. Each had a chest of drawers for his clothes, and they had a playroom area outside of the bedroom.

¶ 36 Aiden and Isaic looked “very appropriate” playing together. They interacted, and they looked interested in each other and what they were doing. Aiden clearly enjoyed being with Isaic. It was his opinion that Aiden needed intensive therapy and intensive contact with others and with socialization, and his relationship with Isaic was very important to his socialization.

¶ 37 Robert was mildly defensive but had no major psychiatric illness or impairment. Like Brienna, Dr. Hatcher noted a few “different” personality traits, such as that Robert tended to be a “compulsive type character.” He would think in circles all the time, not pathologically, but somewhat obsessively. In other words, “he’d probably make a pretty good lawyer.” He was very detail-oriented, very orderly, and would stay on task. Dr. Hatcher opined that people found Robert annoying because he could not let something go once he deemed it important. However, he viewed this trait as a strength for a parent of a handicapped child. Robert’s orderly persistence and tenacity would aid him in being an advocate for Aiden throughout his

development. Robert's family had no history of substance abuse, and his parents were very involved in his life.

¶ 38 Hatcher also met with Brienna and Robert together to assess how they communicated and interacted. Communication problems between the two were evident to him. She was impatient with any criticisms by Robert of her—perceived or real—and Robert could not let go of the many things he worried about with Aiden. This combination was a “recipe for banging heads.” Robert would try to ask Brienna what was working for her with Aiden, and she would shut down, taking that as an attack on herself. Brienna had told Hatcher that she wanted as little contact with Robert as possible, whereas he would contact her via email. It was his opinion that the two could not joint parent.

¶ 39 He described Robert as an advocate for Aiden and Brienna as a participant. By that, he meant that Robert would push for more for Aiden, such as asking the neurologist what he could do to help Aiden with language or brushing his teeth, whereas Brienna would go along with what was in front of her. For example, at a summer school meeting, Brienna thought the proposed services for Aiden were “fine,” whereas Robert pushed for more socialization, which he saw as missing from the summer lessons.

¶ 40 Hatcher next explained that rumination syndrome was a habit disorder, most frequently found in mentally retarded and autistic children. It involves the regurgitation of food and is a form of self-stimulation. The regurgitation contributed to Aiden's dental problems, in combination with a lack of proper dental hygiene. He had severe dental disease with multiple cavities, which lead to surgery in 2014 to try to save his teeth. He lost one tooth, and he had to have a dental crown implanted. Hatcher spoke with Brienna about Aiden's dental care, but she said he was stubborn and would not learn from her training. Robert was able to get Aiden to

brush his teeth. It was not uncommon for a child on the autistic spectrum to have problems brushing his teeth. Aiden had sensory regulation problems, affecting how he felt the toothbrush in his mouth. He also had coordination issues with being able to brush, and it was difficult for him to build new habits without regular training.

¶ 41 Hatcher found unwillingness on the part of Brienna to implement Dr. Buhrfiend's recommended speech and occupational therapies. She told him they were not necessary and that the neurologist recommended them only because Robert pushed for them. It was his opinion that a substantial portion of her unwillingness to aid with Aiden's therapies was a resistance to Robert "pulling the strings." She also had problems with transportation because she could not drive, and she told him she was afraid to drive. It is why she never got her license.

¶ 42 Hatcher was concerned that, without a change in custody, Aiden's pattern of sicknesses would continue, that the window of opportunity to intervene with necessary therapies was shrinking, and that Aiden would never become independent or even semi-independent as an adult without interventions. It was critical that Aiden be physically safer, healthier, and receive the services he needed immediately.

¶ 43 The trial was continued to May 28, 2015. Brienna called Mary Parker, and she testified as follows. Mary lived in an apartment next door to Brienna, and she had known Brienna for about seven years. They were "pretty close" friends. Aiden would play with her two children, aged 12 and 8 at the time of trial. She observed Aiden playing with other children outside, and he was not ostracized from the other children. She would have people over, including Brienna and Aiden, to cook for them and watch movies about once a week.

¶ 44 Kelly Reid testified next. He was Brienna's boyfriend of almost four years, but he did not currently reside with her. He had plans to marry her but had not asked her yet. He was 49

years old and self-employed as a handyman. He and Brienna had plans to move into an apartment together in the next month, but in the interim, he visited her daily. He occasionally spent the night at her home but only when Aiden was not there. He described Aiden as his “buddy,” but “[i]t took a long time to get there.” Aiden was affectionate toward him but only after some time—about six months. He described excursions that he, Brienna, and Aiden took, including trips to the Kane County fair, the carnival, swimming, and going out to dinner. He would take Aiden and Brienna to see his family in Elgin for barbecues and picnics.

¶ 45 Kelly was aware of Aiden’s rumination issues. He would try to figure out what Aiden just ate so that he could “narrow it down” to find out what he had trouble digesting. He had not seen Aiden ruminate in months.

¶ 46 Kelly was a smoker. He did not smoke in Brienna’s apartment and never observed anyone smoking around Aiden. He disagreed that the apartment smelled like smoke.

¶ 47 Kelly had a Labrador named Chubs who lived with Brienna. He let Chubs stay with Brienna because he “likes her better.”

¶ 48 Todd Peters testified next as follows. He was Brienna’s father, and he had lived with her and Aiden since Aiden was born. He was employed as a gelato chef in St. Charles. He used to be a smoker, but he quit in 1987; he had not smoked since. Brienna smoked, but he never observed her smoking in front of him. He did not believe the house smelled like smoke. He also did not think the apartment was dirty, and Brienna took care of the cleaning. He observed that Aiden had a “philosophical quality” to him, a sadness he did not have before, since changing custody in January 2015.

¶ 49 Brienna testified again in her case in chief. She testified as follows. Her daily routine with Aiden was that she would wake him up around 7 a.m., dress and feed him, make him go to

the bathroom, and get him on the school bus. After school, she would make him do his homework and then let him do something he wanted to do, like watch a movie or play outside. His favorite activity was kicking a soccer ball. She would make him dinner, bathe him, and put him to bed. She was a smoker but did not smoke in front of Aiden. On cross-examination, she did state that she smoked in the bathroom when Aiden was not home.

¶ 50 Aiden played with other children in the neighborhood. His best friend was Mary Parker's eight-year old daughter. Aiden did not, however, have any friends from school that he played with.

¶ 51 She never missed a meeting with Aiden's school teachers "because I'm his mother." Aiden had had behavioral problems throughout his life, but they usually resolved themselves. "He goes through phases," such as banging his face on the sliding glass door or licking walls, neither of which he did anymore. She was aware of his rumination, taking food from his stomach, bringing it up to his mouth, and then swallowing it again. This behavior had been subsiding in the past several years. She cut milk out of his diet because she observed that his rumination occurred more frequently when he drank milk.

¶ 52 Aiden had trouble with toilet training because he had a hard time figuring out when he needed to go to the bathroom. When Aiden was four or five, she and Robert had a disagreement over putting him in regular underpants. Robert believed he should be in them but Aiden would still go in his pants and was not bothered by it like other children might be. Soiling his pants did not encourage him to go to the bathroom because "[h]e didn't care." Pull-ups were easier to clean up than his underwear and pants.

¶ 53 Aiden also had issues brushing his teeth. "He just doesn't want to have his teeth brushed." He would scream so that she could not brush his teeth. She would use an electric

toothbrush because Aiden liked that better. She would brush his teeth twice a day, every morning and night. She had to help him because he could not hold a toothbrush on his own. The reason Aiden needed to have dental surgery was because of his autism: he would not let a dentist in his mouth.

¶ 54 She left the apartment to socialize “[a]ll the time.” She would go out to dinner and go out with Kelly. She would also go to Mary Parker’s house. She did not have a driver’s license but she did have a permit that she obtained in the last year. She intended to get her driver’s license.

¶ 55 She recently completed an education program, obtaining a certificate in medical billing and coding through an online program over about ten months. She wanted to work but had last worked full-time six years ago.

¶ 56 She supported additional therapy for Aiden “within reason.” By that, she meant she did not want Aiden in therapy every single day. Rather, she wanted him to be a nine-year old and to “experience things.” She delayed taking Aiden to a neurologist because, when she first got Aiden back from Robert after Robert’s first grant of custody of Aiden, she did not like the current neurologist. He was “rude and dismissive” and did not believe Aiden had autism. She wanted to find somebody better. She also did not have insurance. After a year and a half, she found a new neurologist, Dr. Buhrfiend. Dr. Buhrfiend diagnosed Aiden with Autism sometime after October 2011.

¶ 57 In the past, she had taken Aiden to the Field Museum, the Shedd Aquarium, and the zoo. Two years ago, she found a softball league for children with disabilities and asked Robert about it. He said no, she could not enroll Aiden in it.



¶ 58 It had been years since the last time Aiden had an MRSA infection. He did have dental problems, but she was not doing anything differently with his dental care since his dental treatments.

¶ 59 She described herself as Aiden's advocate. She got him into therapy when she noticed something was wrong with him, and she attended all his school meetings. She communicated with teachers and did whatever she could for him. He did not need a step-mother; he needed his mother. He "need[ed] to be an only child as well." She and Robert did not communicate well because "everything that he says to [her] is an accusation."

¶ 60 She next described Hatcher's visit. It was messy that day because she had a lot of laundry to do. It cost money to do laundry at her apartment complex, so she could not do laundry every day. She took issue with Hatcher's report, in particular denying that she was reclusive, that she was not Aiden's advocate, and that Aiden was a sick child. He was "not physically sick" but had "normal childhood illnesses." She denied that Aiden had a chronic runny nose, and she described his height as "a little shorter" relative to other children in the neighborhood.

¶ 61 The trial was continued to June 9, 2015. Robert called Marissa Hanson, Aiden's current GAL. She was appointed by the court as GAL in March 2013. She was tasked with notifying the court whether there was any change in circumstances that would merit a change in custody. As part of her investigation in this case, she interviewed both parents and Aiden. She also spoke with Hatcher and Aiden's treating physicians.

¶ 62 It was her opinion that a change in circumstance had occurred since October 2011 (when Brienna received custody of Aiden back from Robert) in this case that would merit a change in custody from Brienna to Robert. She had visited Brienna's home twice, one visit announced, one unannounced. Her first visit was an announced visit in the spring of 2013, allowing Brienna

at least a week's advance notice. Aiden and Brienna were present. She described the apartment as "somewhat crowded." She did not see too much of concern besides cigarette ash in the upstairs bathroom. Brienna assured her it was a "one-time issue."

¶ 63 The second visit was unannounced on January 30, 2015, after reading Hatcher's report. His report brought up new concerns because it presented information she was previously unaware of. Brienna seemed agitated on this second visit, and the "second that the door opened to this apartment, I could see smoke in the air. You could see it, you could smell it." There was pet hair everywhere. There was a large pile of laundry, and her father had been sleeping on the sofa the night before; his bedding was still there. The carpet was "filthy. It was black." The house had not been cleaned "in a very, very, very long time." Upstairs, clothes were in boxes and bags because, according to Brienna, there had been an outbreak of bed bugs next door. She observed cigarette ash in the bathroom again, more than last time. She spoke with Richard, Brienna's brother, and he said he had been smoking in the house that day. The apartment was a "far cry" from the home she saw initially. Kelly and Brienna asked her if there was anything they could do, and she responded she thought it was too late. She emailed both attorneys after her visit, and she agreed that a temporary change in custody from Brienna to Robert should be made.

¶ 64 She became concerned about Brienna's attitude toward Aiden's therapies after reading Hatcher's report. She had previously believed Brienna was looking for therapies and had not expressed any objections. After reading Hatcher's report, she spoke with Brienna. Brienna told her that she was opposed to these new therapies, or additional therapies, because Aiden needed time to decompress. This greatly concerned her because Aiden was a special needs child, and his therapies at school would not be sufficient for his growth and development.

¶ 65 Smoke inhalation was terrible for children—that was common sense. Her investigation revealed that Aiden had a “very, very long history of going to the emergency room.” In November 22, 2013, Aiden visited Central DuPage Hospital Aiden’s because of a cough and throat problems, and his medical records indicated that he had “positive smoke exposure.” However, considering his condition and special needs, he was actually healthy with respect to his height and weight.

¶ 66 She was aware of Aiden’s rumination syndrome, but it was only labeled as such in the previous couple of months before trial. Many doctors and therapists had been examining this issue with Aiden for some time, debating its cause and treatment. It contributed to his dental problems because the stomach acid adversely interacted with his teeth.

¶ 67 The trial court entered its findings and order on June 11, 2015. It ordered that sole custody of Aiden be awarded to Robert, effective immediately, and Brienna be allowed liberal visitation. The court listed its findings and reasoning as follows. It based its decision on all the testimony presented over four days of trial, and it considered the exhibits in evidence and the applicable statutes. It found that Brienna’s witnesses (herself, Kelly, Todd, and Mary) were not credible. Although its decision was not based on the second hand smoke and cleanliness issues of Brienna’s home, Breinna’s witnesses’ testimony concerning smoke and cleanliness was in direct opposition to the testimony of Hanson and Hatcher.

¶ 68 The court found that, pursuant to section 610(b) of the Marriage Act (750 ILCS 5/610(b) (West 2014)), a change in circumstances occurred in that Hatcher’s interview with Dr. Buhrfiend revealed “the full extent of Aiden’s mental and physical disabilities,” which was information not fully developed until after the resolution of Robert’s prior petition to modify custody. The court

considered Dr. Hatcher's testimony and report to be clear and convincing evidence that a change in custody was necessary.

¶ 69 The court also considered the factors set forth in section 602(a) of the Marriage Act (750 ILCS 5/602(a) (West 2014)). It found factor 1 neutral; factor 2 did not apply; factors 3 and 4 in favor of Robert (based on Aiden's relationship with Isaac and the healthy environment at Robert's home); factor 5 in favor of Robert (his personality traits were "perfect for the task at hand"); factors 6 and 7 did not apply; factor 8 favored Robert (Robert tried to include Brienna whereas she excluded him); and factors 9 and 10 did not apply.

¶ 70 Brienna timely appealed.

¶ 71 **II. ANALYSIS**

¶ 72 Section 610(b) of the Marriage Act (750 ILCS 5/610(b) (West 2014)) permits a modification of custody in certain circumstances. It provides:

"The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian \*\*\* and that the modification is necessary to serve the best interest of the child." *Id.*

Therefore, modification of a custody order is warranted only if there has been: (1) a change in circumstances and (2) modification is necessary to serve the best interest of the child. *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 47.

¶ 73 We afford great deference to a trial court's custody determination because the trial court is in the best position to judge the credibility of the witnesses and assess the best interests of the minor. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004). Accordingly, we review whether a

custody modification judgment was against the manifest weight of the evidence. *Id.* “Where the evidence permits multiple reasonable inferences, the reviewing court will accept those inferences that support the court’s order.” *Id.* A decision is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent or when the court’s findings are unreasonable, arbitrary or not based on the evidence. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44.

¶ 74 Brienna argues that the trial court erred in finding by clear and convincing evidence that a change in circumstances occurred and that modification of custody was necessary to serve the best interests of Aiden. She argues as follows. A change in custody is warranted only where a change in circumstances occurs *since* the entry of the last decree with relates to the child’s welfare. Accordingly, the secondhand smoke and hygienic state of Brienna’s apartment did not demonstrate a change in circumstances since the last petition because they were raised in prior proceedings. Likewise, Robert’s allegations of neglect pertaining to Aiden’s repeated MRSA infections and any disagreements between Robert and Brienna over Aiden’s therapies were not changes in circumstances. Rather, they were issues the court previously addressed or were irrelevant to the court’s findings.

¶ 75 Brienna continues that the trial court based its decision on Aiden’s physical and mental disabilities, which the court reasoned were not fully developed until after Robert’s previous modification petition was heard. It relied on Dr. Hatcher’s testimony and report, but Brienna argues, with respect to Aiden’s therapies for his disabilities, that there was no testimony that Aiden was not receiving and would not continue to receive therapy in her care. While it was true she could not drive, Kelly could provide her and Aiden a ride when needed. Moreover, if Brienna’s lack of a driver’s license worried the court, it could order her to obtain one within a set

time period instead of disrupting custody and changing Aiden's environment again. A stable environment is an important factor in weighing a child's best interests. *DeFranco v. DeFranco*, 67 Ill. App. 3d 760, 771 (1979).

¶ 76 Further, Brienna argues that the court failed to properly consider that Robert and Jessie were expecting a child at the time of trial. A new child would present additional burdens, and with Aiden and Isaic, that would be three children, one with special needs, for Robert and Jessie to care for. Brienna argues that failure to consider Jessie's pregnancy was an abuse of discretion.

¶ 77 Brienna next turns to the best interest factors a court considers under section 602(a) of the Marriage Act, specifically addressing the courts findings under factors 3, 4, 5, and 8 (705 ILCS 5/2-602(a)(3), (4), (5), (8) (West 2012)). First, she argues under factor 3 (interaction of the child with the parent, his siblings, and others at home) that the court failed to give appropriate weight to the fact that Aiden missed Brienna and Todd and failed to consider how Aiden would interact with a new baby. Next, she argues that the court's finding that Aiden exhibited better health since temporary custody was awarded to Robert was not proved by clear and convincing evidence because the court never stated it was proved by clear and convincing evidence and did not identify a causal link between the move and the improved health. Further, she argues that there was no evidence under factor 4 (the child's adjustment to his home, school, and community) that Aiden's new school was better than the one he attended while with Brienna. Rather, the testimony was that the schools offered similar services. Addressing factor 5 (the mental and physical health of all individual involved), she argues that it took a "quantum and unsupported leap in logic" for the court to conclude that Robert—with his on-task, annoying personality—was a better advocate for Aiden, and that this fact necessitated a change in custody. Finally, regarding factor 8 (the willingness of each parent to facilitate a continuing relationship

between the other parent and the child), she argues that there was no evidence that either parent failed to foster a close relationship with Aiden, only evidence that the two could not agree between themselves. Accordingly, Brienna concludes that the order to modify custody was against the manifest weight of the evidence.

¶ 78 Robert responds as follows. He first argues that the relevant time period for this case was the time since the court's July 27, 2006, original custody order. He continues that the court was careful to consider only evidence since the October 2011 order reverting custody back to Brienna, after we reversed the order granting custody to Robert on his first petition to modify custody, but it was free to consider facts that would establish a change in circumstance since the July 2006 order. In support, he cites *IRMO Spent*, 342 Ill. App. 3d 643, 650 (2003), which held that a denial of a petition to modify custody did not amount to a "custody judgment" for purposes of section 610(a) of the Marriage Act's two-year limitation on subsequent motions to modify custody.

¶ 79 Nevertheless, he argues that, even looking back to only those events since the end of the last custody petition and trial, a change in circumstances occurred. In particular, he points to the following: Robert is now married to Jessie, with a son, Isaic; Isaic and Aiden have a good relationship; Dr. Buhrfiend, who Aiden began seeing in 2013, recommended that Aiden receive additional therapies; she diagnosed him with mental retardation, autism, sensory regulation problems, and rumination disorder; Dr. Hatcher found Aiden multiply handicapped, including with autistic behavior and hypotonia; Aiden began seeing three different therapists since Dr. Buhrfiend's recommendation—a speech, behavioral, and occupational therapist; Brienna was reluctant to implement these therapies for Aiden; Aiden began having problems with rumination syndrome in 2013; Aiden had severe dental problems, in part due to his rumination syndrome;

Dr. Buhrfiend recommended that Aiden participate in hippotherapy and aquatic therapy to help with his autism; at the time of trial, Aiden was nine years old but not toilet trained and continued to have problems with MRSA infections; and Aiden has had chronic respiratory problems, exacerbated by exposure to second-hand smoke.

¶ 80 Robert also responds that a change in custody was in Aiden's best interests. He argues that even if the hygienic conditions of Brienna's home were not relevant to a change in circumstances, they were relevant to Aiden's best interests. Both Hatcher and the GAL testified that Brienna's home was filthy and that the second-hand smoke was problematic. Of particular concern for the court was Aiden's continued socialization, and Isaac helped him with that. The evidence, in particular Hatcher's testimony, showed that Robert was more willing and able to help Aiden receive his recommended therapies and that he was a better advocate for Aiden. Accordingly, the court considered evidence that supported its decision, and its finding that Aiden's best interests favored a change in custody was not against the manifest weight of the evidence.

¶ 81 We agree with Robert. When determining whether a change in circumstances has occurred, the trial court must look to the totality of the circumstances. *In re Marriage of Davis*, 341 Ill. App. 3d 356, 359 (2003). The change in circumstances must directly affect the needs of the child, and in some cases, the differences between the needs of a small child and the needs of that child as he ages can be sufficient to constitute a change in circumstances. *Id.* at 360. The court considers not only changes that have adversely affected the child but also those that have the potential to adversely affect the child. *In re Marriage of Rogers*, 2015 IL App (4th) 140765, ¶ 60.



¶ 82 Here, regardless of whether we look back to 2006 or only late 2011, a change in circumstances occurred. Aiden began seeing a new neurologist, Dr. Buhrfiend, in 2013, and she diagnosed Aiden with mental retardation and found that he was on the autistic spectrum. Importantly, she recommended various therapies that Aiden was not receiving. On her recommendation, Aiden began seeing three different therapists, each weekly. He saw a speech, behavioral, and occupational therapist. He also participated in hippotherapy and aquatic therapy, which were for autistic children.

¶ 83 The trial court found that Dr. Buhrfiend revealed the full extent of Aiden's mental and physical disabilities, and that this was information not fully developed at the prior modification hearing. This finding is supported by the record. Brienna testified that Aiden's prior neurologist did not diagnose Aiden with autism and was "rude and dismissive" of Aiden's needs. In fact, this is why she sought a new neurologist, eventually finding Dr. Buhrfiend, although she delayed in finding one for the better part of two years. Only after visiting Dr. Buhrfiend did Aiden begin his many therapies. Both Hanson and Hatcher, whose testimony the trial court found more credible than any of Brienna's witnesses, agreed that the recommended therapies were crucial to Aiden's growth and development. Without them, he may never become an independent, or even semi-independent, adult.

¶ 84 In short, the record shows that Aiden is a special needs child, but only since the last custody petition and order has the extent of his special needs and the interventions necessary to promote his well-being become apparent. Accordingly, the trial court's finding were not against the manifest weight of the evidence.

¶ 85 A change in circumstances alone, however, does not warrant a modification of custody without a finding that such changes affect the welfare of the child. *Nolte v. Nolte*, 241 Ill. App.

3d 320, 325-26 (1993). In other words, the change in circumstances must be material to the child's best interest. *In re Marriage of Rogers*, 2015 IL App (4th) 140765, ¶ 57. This is consistent with the paramount concern in all matters of child custody, the welfare of the child. *In re Marriage of Fuesting*, 228 Ill. App. 3d 339, 344 (1992). Section 602(a) of the Marriage Act (750 ILCS 5/602 (West 2014)) provides that a court shall consider all relevant factors in determining the best interest of the child, including the ten that the section provides. The factors are as follows:

- (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 \*\*\*;
- (7) the occurrence of ongoing or repeated abuse \*\*\*;
- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
- (9) whether one of the parents is a sex offender; and
- (10) the terms of a parent's military family-care plan \*\*\*. 750 ILCS 5/602(a) (West 2014).

¶ 86 Here, the record supported that a change in custody was in Aiden's best interest. The court stated that it considered all of the testimony presented, weighed the credibility of the

witnesses, and considered all admitted exhibits and relevant statutes. In particular, the court examined all the factors under section 602. It found factor 1 to be neutral, and the record supports that both parents love Aiden and wish to have custody of him. It found factor 2 did not apply. There was no testimony from Aiden or report as to which parent Aiden would prefer, and given Aiden's autism and special needs, it was unclear whether he was capable of having such a preference.

¶ 87 The court next found that factor 3 (the interrelationships Aiden had with parents, siblings or others) favored Robert. In particular, the court focused on Aiden's relationship with Isaic, his step-brother of similar age. The record showed that Aiden and Isaic got along well, and Hatcher noted they seemed very appropriate together. The record supported the court's concern that socialization was very important for Aiden's development. The court found this relationship outweighed Aiden's relationship with the other children at Brienna's apartment complex and with Todd. Moreover, we do not find that it was error for the court not to mention that Jessie was pregnant. This third factor examines the relationship Aiden has with his parents, siblings, and others he may live with, and the court's examination of these relationships does not necessarily depend on whether Aiden eventually has another sibling. In fact, the court found that increased socialization was a positive for Aiden, and therefore Aiden having another sibling would not necessarily weigh against Robert under this factor.

¶ 88 The court found factor 4 (Aiden's adjustment to his home, school, and community) analogous to factor 3, and it also weighed in favor of Robert. The court reasoned that Aiden had adjusted well to his new home with Robert during temporary custody and exhibited better health. The record supports this. Aiden has had less and less occurrences of rumination syndrome, Robert has him brushing his teeth every day, he has had no more MRSA infections, and Aiden is

in a routine at Robert's. Robert's home is smoke free. Under Robert's care, Aiden is mostly toilet trained and no longer wearing pull-ups. He has a play area with Isaac, and he gets along well with both Jessie and Isaac. He had attended the same school during Robert's first temporary custody of him, and the record reflects no current issues with the school.

¶ 89 The court found that factor 5 (the mental and physical health of the parents) favored Robert. The court reasoned that Robert's personality traits—in particular, his relentless persistence—would be a boon for Aiden. It found Robert to be an advocate for Aiden, whereas Brienna, although she loved him, was far more passive. Robert would push for what Aiden needed, and Aiden had a lot of needs. This finding was supported by the testimony of Hatcher, who the court found credible.

¶ 90 Factors 6 and 7 did not apply. There were no allegations of violence or abuse in this case.

¶ 91 The court found factor 8 (the willingness of each parent to foster a relationship between Aiden and the other parent) favored Robert. Hatcher testified that Brienna and Robert had real communication issues. Robert would push for Aiden's needs and would not let go of anything he thought was important. Brienna often took this as criticism of herself, even if it was not a criticism of her. Overall, the record supports that Robert was willing to do what was best for Aiden, including contacting and working with Brienna, whereas Brienna would not return his communications regarding Aiden. She testified that she would not communicate with Robert unless she had to. Accordingly, the trial court did not err in finding factor 8 favored Robert.

¶ 92 Finally, factors 9 and 10 did not apply.

¶ 93 Accordingly, the record supports the trial court's considerations of Aiden's best interest under section 602 and its determination that a change in circumstances occurred. Therefore, the

trial court's order granting Robert's petition to change custody was not against the manifest weight of the evidence. *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 47.

¶ 94

### III. CONCLUSION

¶ 95 For the aforementioned reasons, the judgment of the Kane County circuit court is affirmed.

¶ 96 Affirmed.