2015 IL App (4th) 150396-U

NO. 4-15-0396

FILED
October 6, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: MARRIAGE OF	)	Appeal from
MARCY R. STEGEMAN,	)	Circuit Court of
Petitioner-Appellant,	)	Sangamon County
and	)	No. 06D736
RYAN L. STEGEMAN,	)	
Respondent-Appellee.	)	Honorable
	)	April Troemper,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court's custody determination was supported by the record and it committed no error in denying the mother's request for custody.

(2) The mother's due process rights were not violated by the trial court's decision to increase her child support obligation and the court did not abuse its discretion by imputing income to the mother based upon a finding that she was voluntarily unemployed.

(3) The trial court erred by ordering the mother to pay a portion of the father's attorney fees and allocating to her a greater portion of fees owed to the children's representative and guardian *ad litem*.

¶ 2 In April 2011, following the dissolution of the marriage of petitioner, Marcy R. Stegeman (now known as Marcy Jameson), and respondent, Ryan L. Stegeman, the parties entered into an agreed order which gave Ryan custody of the parties' four minor children. In April 2013, Marcy filed a petition to modify custody. Ultimately, the court denied Marcy's motion.

Marcy appeals, arguing the trial court erred following the custody modification proceedings by (1) denying her request for custody of the parties' children, (2) *sua sponte* increasing her child support obligation, (3) ordering her to pay a portion of Ryan's attorney fees, and (4) allocating to her a greater portion of the fees owed to the children's representative and guardian *ad litem*. We affirm in part, reverse in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 The record shows Ryan and Marcy were married on January 7, 2000, and had four children: J.S. (born May 18, 2000), C.S. (born October 10, 2003), W.S. (born May 30, 2005), and L.S. (born August 18, 2006). On September 18, 2006, Marcy filed a petition for dissolution of marriage. This appeal concerns issues related to the parties' lengthy and highly contentious custody battle over their four children.

¶ 5 On November 16, 2006, following the filing of Marcy's petition for dissolution of marriage, an agreed temporary order was entered. That order permitted Marcy to remain in the marital residence with the children and set forth specific visitation times for Ryan. On December 15, 2008, an order was entered in the matter providing that Marcy was to have custody of the children subject to Ryan's reasonable right of visitation.

¶ 6 In August 2009, Marcy was arrested for driving under the influence of alcohol and subsequently entered an inpatient rehabilitation program to address alcohol-related substance abuse issues. On September 11, 2009, the trial court entered a temporary order placing custody of the parties' four children with Ryan. The court ordered that Marcy was entitled to one hour of visitation with the children each week at her treatment facility. On November 23, 2009, Ryan filed a petition for permanent custody.

¶ 7 On December 4, 2009, the trial court entered a judgment for dissolution of marriage, dissolving the parties' marriage, dividing marital property, and allocating debts. The order did not resolve the issue of custody and expressly provided that "[a]ll issues relative to child support and daycare [were] reserved."

¶ 8 On March 5, 2010, the trial court entered a visitation and support order. The court ordered that Marcy would have visitation with the parties' children every other weekend and that visitations would be supervised by Marcy's parents, Joe and Kathy Turek. Visitations were to occur in the Turek's home and no alcohol was to be present in the home during visitations. Marcy was also restricted from driving a vehicle with the minor children. Finally, the court set Marcy's child support obligation at $300 per month.

¶ 9 On April 4, 2011, the parties appeared before the trial court and presented an agreed child custody and visitation order, which the court signed. The order provided that Ryan was to have sole custody of the parties' four children, with Marcy having visitation every other weekend. Pursuant to the agreed order, (1) Marcy was to continue to reside with her parents "so long as deemed necessary" by Marcy's then counselor, Dr. Brian Heatherton; (2) Marcy's overnight custodial periods were required to occur at the Tureks' residence; (3) no alcohol was allowed in the home during visitation; (4) Marcy would not consume alcohol 12 hours prior to a visitation period or during any visitation period; (5) Marcy would continue to engage in counseling with Dr. Heatherton; (6) Marcy would continue to have an Alcoholics Anonymous (AA) sponsor and continue to attend AA meetings in accordance with the recommendations of Dr. Heatherton; and (7) Marcy would ensure the children attended all extracurricular events. The order further set forth a holiday and summer visitation schedule. Additionally, pursuant to the

order, the parties agreed their oldest child, J.S., would "remain in counseling with Dr. Heatherton so long as Dr. Heatherton deem[ed] necessary." Finally, effective April 1, 2011, Marcy agreed to pay Ryan $300 per month in child support.

¶ 10 The record reflects that, following the agreed April 2011 order, the parties continued to have conflicts regarding the children and their custody. In June 2012, they both filed motions to modify the previous custody and visitation order. In her motion, filed June 5, 2012, Marcy asked for custody of the children or, alternatively, increased visitation time. She alleged the children's present environment "may endanger seriously their physical, mental, moral[,] and/or emotional health." Marcy asserted all of the children had expressed a desire to live with her; J.S. disliked Ryan and had threatened to run away; on May 2012, Ryan hit J.S. "several times about his head, face[,] and body"; in July 2011, Ryan's paramour, Megan Rakers, grabbed L.S. by the neck; and Ryan had refused to include Marcy in the children's lives by failing to list her as a parent at the children's schools, failing to provide her with information about the children, and making it difficult for her to attend the children's events.

¶ 11 On June 13, 2012, Ryan filed his petition for modification of the previous custody order. He asked that Marcy be allowed only supervised visitations with the children on a limited basis, that she be restricted from having overnight visitations, and that someone other than Marcy's parents supervise the visits. Ryan alleged that, on June 7, 2012, Marcy appeared to be intoxicated at W.S.'s T-ball game; Marcy continually harassed Ryan and Megan "by false reporting to the Illinois Department of Children and Family Services (DCFS)"; and Marcy attempted to undermine the children's relationship with Ryan and Megan by instructing J.S. to lie to Ryan about a cellular phone, sending inappropriate text messages to the children, instructing the children to

disobey and cause trouble for Ryan, and calling the police to demand welfare checks when the children were with Ryan.

¶ 12 On August 31, 2012, an agreed order was entered in the matter. Pursuant to that order, the parties agreed to withdraw all motions and petitions that were then pending, except a petition to increase Marcy's child support obligation that Ryan filed on June 7, 2012. The order also provided as follows:

> "[U]pon the filing of a future motion to modify custody or visitation by either party, the parties acknowledge that facts known to the parties from April 4, 2011 (the date of the prior Custody and Visitation Order) through the date of any future hearing shall be admissible during said future custody or visitation hearing. Further[,] in the event of a future filing, the parties expressly agree that the date of the Custody and Visitation Order of April 4, 2011[,] shall remain the effective custody judgment date in accordance with [the Illinois Marriage and Dissolution of Marriage Act (Act)]."

The agreed order contained numerous other provisions, including that Marcy was no longer required to reside with her parents or exercise overnight custody periods at her parents' residence, Marcy's visitations were unsupervised, Marcy would not consume alcohol at any time, neither party would contact DCFS without first taking the minor child at issue to a pediatrician or hospital, Ryan would forward to Marcy information he received regarding the children's schools that was otherwise unavailable through the schools' Internet systems, the children would not keep

journals at the parties' residences except as required by their school and current journals would be destroyed, the parties would not sit in close proximity to one another at the children's events, the children would have reasonable telephone access with each parent, Marcy would begin counseling with someone other than Dr. Heatherton, and Marcy would continue with AA as recommended by her new mental health provider.

¶ 13 On April 26, 2013, Marcy filed the motion to modify custody that is the subject of this appeal. She alleged that substantial changes in the circumstances of the parties had occurred since the April 2011 order was entered, which warranted a modification of custody. In particular, Marcy asserted (1) the children were older, more mature, and better able to express their desires regarding custody; (2) the children had a strong desire to live with Marcy; (3) Megan, Ryan's live-in girlfriend, had been violent toward L.S.; (4) the children did not have a good and wholesome relationship with Megan; (5) Ryan would become angry with the children and would yell at the children, and the children were afraid of Ryan; (6) the children were fearful of Megan; (7) the environment Ryan maintained was not in the children's best interests and resulted in J.S.'s need for counseling; (8) Marcy had established a more wholesome, stable environment in which the children desired to reside; (9) Marcy had remarried and the children had an excellent relationship with Marcy's new husband; (10) Marcy and her husband were moving to the children's current school district; (11) Ryan failed to foster Marcy's relationship with the children and criticized her in front of the children on a regular basis; (12) Ryan denied Marcy's requests for additional time with the children without a good reason; (13) Ryan failed to provide J.S. medication necessary for his medical condition; (14) Ryan failed to provide proper care for the children or properly maintain their hygiene; (15) Ryan had a "critical alert" at the children's school, which

prohibited them from being released to Marcy; (16) Ryan failed to allow W.S. to participate in a school counseling program that Marcy requested for him; (17) Ryan refused to provide Marcy with information from the children's coaches and activity leaders; (18) Ryan failed to provide Marcy with information regarding the children's activities and social functions; (19) Ryan was rude and verbally aggressive toward Marcy at the children's activities and events; (20) Ryan failed to list Marcy as a parent so that she could receive medical information regarding J.S. and W.S.; (21) Ryan failed to list Marcy as a parent at the children's schools; (22) Marcy was expecting another child to be born in September 2013; (23) Ryan refused to talk with Marcy except by text and e-mail; (24) Ryan was inflexible with respect to the children's activities; and (25) Ryan refused to allow the children to sit with Marcy at sporting events. Marcy asserted it was in the children's best interests that she be awarded custody.

¶ 14 In connection with Marcy's motion to modify, a voluminous amount of evidence was presented by the parties. The record reflects hearings on the motion were conducted over five days, specifically April 29, April 30, May 1, May 16, and May 28, 2014. Several witnesses were called by the parties to testify and 16 evidence depositions and numerous exhibits were admitted into evidence. Given the amount of evidence submitted and the parties' obvious familiarity with the facts presented by this case, we find it unnecessary to recite that evidence in detail. We recount it only as necessary to put the parties' arguments in context and resolve the issues raised on appeal.

¶ 15 Evidence showed that, following the April 2011 custody order, Marcy initially lived with her parents. She worked at a restaurant as a server and was also engaged in nursing classes. In December 2011, Marcy began working as an infectious disease nurse at SIU School

of Medicine. She testified she was designated a Licensed Practical Nurse (LPN) II. Initially, she worked part-time but became full-time in March 2012. In March 2013, she married her current husband, Dr. Travis Jameson, with whom she had a daughter, Q.J., in September 2013. In June 2013, Marcy and Travis purchased a home, which the record reflects was in close proximity to Ryan's home. While pregnant with Q.J. in April 2013, Marcy went on sick leave from work. Following Q.J.'s birth, she decided not to return to work and became a stay-at-home mother.

¶ 16 Since September 2009, the parties' four children resided on a full-time basis with Ryan and Megan. In March 2011, they moved to their current residence and, in August 2011, the children began attending school in a new school district. In October 2013, Ryan and Megan were married.

¶ 17 Marcy testified she had a positive and close relationship with her children. She described her involvement in the children's education and extracurricular activities, as well as the activities they engaged in together. Marcy testified all of the children had expressed a desire to live with her. She also described in detail difficulties she had over the years obtaining information from Ryan about the children's schools, homework, and extracurricular activities. Marcy further reported difficulties communicating with the children when they were with Ryan and getting Ryan to agree on extra visitation time. She testified Ryan's communication and willingness to cooperate with her only improved following the filing of her motions to modify custody in June 2012 and April 2013.

¶ 18 Ryan also testified at the hearing. Like Marcy, he described his interactions with the children and the manner in which he assisted them with homework and other activities. Ryan stated the children were happy, as well as comfortable and adjusted to his home. He denied

Marcy's specific allegations that he failed to provide or withheld information regarding the parties' children. He testified he often forwarded school information to Marcy to guarantee that she had received it and wanted Marcy to have access to all of the information he had. Ryan denied limiting the children's contact with Marcy and asserted he encouraged them to have contact with her. Ryan described J.S. as generally a happy child but noted his moods would change around court-related periods of time and when conflicts arose between the parties. He believed his relationship with the children would be diminished or destroyed if Marcy was awarded custody.

¶ 19 Both parties presented the testimony of numerous family members, friends, and neighbors, who described their observations of the children and the children's interactions with Marcy, Travis, Ryan, and Megan. Testimony was submitted from individuals associated with the children's schools and evidence was also presented regarding several specific conflicts between the parties, including conflicts involving police contacts and DCFS investigations of Ryan and Megan following allegations of abuse. Additionally, evidence included testimony from Dr. Helen Appleton, Marcy's counselor, and Dr. Heatherton. Dr. Heatherton's discovery deposition, taken on July 31, 2012, was also admitted into evidence.

¶ 20 The record shows Dr. Heatherton was a licensed clinical psychologist who provided counseling services to J.S. to address difficulties in his relationships with Ryan and Megan. For a period of time, Dr. Heatherton also provided services to Marcy. Dr. Heatherton acknowledged that, since April 2011, J.S. clearly expressed a desire to live with Marcy rather than Ryan. He testified that, over time, J.S.'s relationship with Ryan improved and J.S. experienced less anger toward Ryan; however, J.S. consistently reported a dislike for Megan, believing she was bossy and mean. J.S. also believed Megan had abused L.S., although Dr. Heatherton's

understanding was that J.S. had not been present when the incident of abuse was alleged to have occurred. Dr. Heatherton testified J.S. usually did not give examples of Megan being bossy or mean except to say that she would demand, rather than ask, that he get ready for bed or pick up his plate after dinner.

¶ 21 J.S. believed Ryan was responsible for the transfer of custody away from Marcy and made comments that "dad stole us from daycare four years ago." J.S. also felt Ryan was overly strict. Dr. Heatherton testified J.S. felt sorry for Marcy that she no longer had custody of the children and J.S. "felt it was his duty to restore the kids back to [Marcy's] custody." He agreed J.S. viewed Marcy as flawless.

¶ 22 Dr. Heatherton suspected J.S. continued to hold and operate under the belief that Ryan stole him and his siblings from Marcy. J.S. had never discussed with Dr. Heatherton that there had been two agreed orders giving Ryan custody of the parties' children. Dr. Heatherton felt that J.S. would have a hard time believing that Marcy agreed to Ryan having custody of the children unless such information was provided by Marcy. He felt J.S. "puts a great deal of credibility on Marcy's head." Further, Dr. Heatherton agreed it was not appropriate for Marcy to send text messages to J.S. in December 2011 promising to get the children back when she had agreed eight months earlier to Ryan having custody and the parties were striving for permanency. Dr. Heatherton believed such messages "would be upsetting" to J.S.

¶ 23 Dr. Heatherton testified there were times that he questioned the credibility of J.S.'s reports to him, noting they felt "exaggerated." He stated J.S.'s reports that Megan was always mean or bad and that Marcy was always good or great did not "feel like a credible reflection." Dr. Heatherton had frequently asked J.S. not to take action on behalf of his father or

mother with respect to the other parent. More often, he had the concern that J.S. was acting on behalf of Marcy. Dr. Heatherton testified as follows:

> "I feel like, early on, [J.S.] felt that he had to right the wrong of Ryan taking custody from [Marcy], and so, I think he would do that. I know there is one place in here where I note that he felt if he wasn't doing well in school this may reflect poorly on [Ryan], and trying to, kind of hurry the custody transfer over by virtue of failing[.]"

¶ 24 Dr. Heatherton believed J.S. suffered from "mind-made-up syndrome," which he described as an inability to be argued out of a position or even consider other possible alternatives. He testified "mind-made-up-syndrome" was "the outcome of parental alienation syndrome."

¶ 25 Dr. Heatherton further testified he believed J.S. had been "coached" and he made notes to "[r]ule out parental alienation from mother's side." He stated he "suspected" that parental alienation had occurred after April 2011. Dr. Heatherton had not heard anything that would make him suspect parental alienation was occurring at Ryan's house. He stated J.S.'s reports of how custody was transferred between the parties made him wonder "who's the adult in the background informing him of these details." At times J.S. would volunteer information that Dr. Heatherton found concerning. For example, he testified J.S. volunteered that his maternal grandmother did not help him write a list which contained complaints about Ryan. Dr. Heatherton believed it was not the typical way a child would talk and he worried "about it being scripted."

¶ 26 Dr. Heatherton believed J.S. was capable of making a decision as to his preference for custody. He testified as follows:

> "You know, I'd think any of us would look at this ourselves, he's capable of making it with the information he's taking in. Arguably, he's not discriminated the information as well as maybe I would like him to, but I certainly—I don't think any of us do that. I think we all lean towards what we want to believe and make decisions on those beliefs. So arguably, he'll have some bias in his belief and we still think he's capable of making a decision and knowing the consequences of that decision, yes."

Dr. Heatherton believed J.S. had a "fundamental bond" from birth with Marcy.

¶ 27 Dr. Heatherton opined that J.S., and children in general, needed permanency, stating children "settle far better if they know this is where you're permanently going to be." However, he did not have a recommendation for custody of any of the children. Dr. Heatherton testified he would be concerned about changing J.S.'s custody to Marcy if J.S. took the position that he did not want to see Ryan at all. Dr. Heatherton stated he would never be in favor of such a thing as a child needed both parents. He had concerns that the relationship between Ryan and J.S. "may fall away" if custody was switched, which he did not believe would be good for J.S. or Ryan. Further, he believed that if J.S. were to spend more time at Marcy's house, "[i]t would certainly round out the picture" and could alleviate some of the problems J.S. was experiencing.

¶ 28 Dr. Heatherton opined Ryan had done a "good job" in addressing J.S.'s educational needs, noting he questioned J.S. about his homework, followed up with teachers, and obtained

a math tutor. His understanding was that J.S. was well-behaved at school. Dr. Heatherton also believed Ryan was "doing what he should do as a parent" with respect to disciplining J.S. Currently, he would assess J.S. as "good" and agreed that he seemed like a happy kid. Dr. Heatherton further agreed J.S. was "better adjusted" to Ryan's house at the time of the hearing than he had been in April 2011. He had no recent concerns that Ryan spoke negatively about Marcy to J.S.

¶ 29 Dr. Heatherton testified J.S. was stable at Ryan's house. He viewed stability and likeability as separate concepts. Dr. Heatherton believed that if custody was not changed, J.S. could eventually accept living with Ryan, although he would initially be upset. He testified that if Marcy discussed with J.S. that she had previously agreed to Ryan having custody of the children, J.S.'s ability to adjust to Ryan's home could possibly be affected. Dr. Heatherton had no opinion as to how J.S. would like living with Marcy on a full-time basis.

¶ 30 Additionally, Dr. Heatherton testified he had spoken with C.S., who also reported she wanted to live with Marcy. C.S. claimed Marcy "was less rule-bound" and Ryan's "place had rules."

¶ 31 On September 18, 2014, the trial court entered an order addressing Marcy's motion to modify custody. It determined as follows:

> "[W]hile a change in circumstances ha[d] occurred with regard to Marcy's marital and living status, [J.S.'s] attitude toward his father and Megan, and Ryan's marital status, Marcy ha[d] not met her legal burden of proof to warrant a change in custody. Marcy, however, has established that it is in the children's best interest that they

spend more quality time with their mother, especially for [J.S]."

The court ordered that Ryan would retain sole legal custody of all four children. Further, it ordered a visitation schedule for J.S. that represented "almost equal time between the parents" and gave Marcy additional visitation time with C.S., W.S., and L.S.

¶ 32 In its order, the trial court additionally increased Marcy's child support obligation. The court held that because of the parties' shared time with J.S., Marcy would pay child support for only C.S., W.S., and L.S. It ordered her child support obligation to "be based upon 32% of the average net pay for [an LPN], working at Memorial Medical Center or St. John's Hospital, located in Springfield, IL." The court ordered the parties to "forward reliable documentation *** as to what Marcy's child support obligation should be." Further, the court ordered Marcy to contribute to a portion of Ryan's attorney fees and allocated the payment of fees associated with the children's representative and the guardian *ad litem* between the parties.

¶ 33 Finally, the trial court concluded its order by addressing the tortured history of the case and encouraging Marcy and Ryan to resolve their differences. It stated as follows:

> "The Court wants nothing more than the parties to accept the changes made by this Order. The parties must learn to work together from this day forward—with each decision and discussion focused on the best interests of the children. The Court expects the parents will help their children deal with the transition and help them accept this custodial arrangement, indicating that this is a decision that the Court will not continuously reconsider. All parties need closure and stability, which is what this Order offers."

¶ 34 On October 16, 2014, Marcy filed a petition for emergency temporary custody and a permanent restraining order. She alleged that, on October 15, 2014, J.S. reported to her that Ryan "had shoved him down the stairs, causing injuries to his hip and arm." Marcy asserted she observed bruising on J.S.'s hip and arm and J.S.'s arm was sore. She took J.S. to his health-care provider for an examination and J.S.'s nurse practitioner determined she was required to report the incident to DCFS. Marcy alleged J.S. was afraid to return to Ryan's residence. She requested relief, including emergency temporary custody of J.S., that Ryan undergo anger management counseling, a full hearing to address placing full and permanent custody of J.S. with Marcy, and an order temporarily and permanently restraining Ryan from engaging in any corporal punishment toward any of the parties' children.

¶ 35 On October 17, 2014, Ryan filed a petition for an emergency restraining order restraining Marcy's custodial time until a mental health evaluation was completed, a motion to dismiss Marcy's petition for emergency temporary custody and a permanent restraining order, and a motion for an independent medical examination of Marcy. On October 22, 2014, Marcy filed a motion to dismiss Ryan's petition for an emergency restraining order, a verified petition for an order of protection against Ryan and on behalf of J.S., and a motion to dismiss Ryan's motion for an independent medical examination.

¶ 36 On December 12, 2014, the trial court entered an order addressing issues related to child support and attorney fees. It noted its September 18, 2014, order had not been final and appealable because the issue of child support and attorney fees had not been fully resolved. The court held there remained no final order as custody and visitation issues remained pending.

¶ 37 The record reflects the trial court conducted hearings on December 10 and 15,

2014, and January 8, 2015, with respect to filings related to Marcy's claim that Ryan pushed J.S. down the stairs. It heard testimony from witnesses, including the parties and their significant others, a nurse at J.S.'s school, Megan's sister, J.S's nurse practitioner, and J.S.

¶ 38 On February 13, 2015, the trial court entered a final order as to all issues. Regarding the incident of alleged abuse to J.S. in October 2014, the court stated it did "not find credible evidence that Ryan pushed, shoved, or threw [J.S.] down the stairs." The court further stated as follows:

> "Here, in addition to the previous change in circumstances *** the following facts are also changes in circumstances: DCFS conducted an investigation. The findings of that investigation are not admissible. Marcy is expecting her sixth child (2nd child with her current husband) in February 2015, [J.S.'s] desire to live with his mother appears to be stronger than at the last evidentiary hearing, and the parties' inability to cooperate *** for the benefit of their children is greater.
>
> Although these changes have occurred since the conclusion of the last evidentiary hearing, the totality of the circumstances directs this Court to reach the same conclusion: it is not in [J.S.'s] best interest to change legal custody and primary residence from Ryan to Marcy. The Court's September 18, 2014[,] Opinion attempted to solve the problem by giving Marcy 50/50 parenting time with [J.S.] and increased visitation with the younger three,

> which is why this Court will not tolerate or reward a party's or a child's manipulation of the system in order to get one's way. Marcy and [J.S.] made it perfectly clear they will do whatever it takes until [J.S.] (and the other children) reside(s) permanently with Marcy and Travis. If the Court were to have granted Marcy's and [J.S.'s] request, [J.S.] also made it clear that he wants nothing to do with his father."
>
> While the Court's heart aches on a personal level that [J.S.] feels so much turmoil and is not as happy as he believes he could be, Marcy and [J.S.] now have the choice of either accepting the Court's decision as final and trying to make the best of it or continuing to believe the fight is not over and living an unsatisfied life until they reach the results they desire. The Court hopes they will make the right choice."

¶ 39 The trial court's February 2015 order was otherwise substantially similar to its September 2014 order regarding its findings as to custody, visitation, child support, and attorney fees. With respect to custody, however, the February 2015 order summarized Dr. Heatherton's testimony and opinions at length. The court further reiterated its previous closing remarks to the parties.

¶ 40 On March 13, 2015, Marcy filed a motion to reconsider. She asked the court to reconsider its decision as to custody, visitation, child support, and attorney fees. On April 6, 2015, the trial court conducted a hearing in the matter. On April 13, 2015, it made a docket en-

try, setting forth modifications with respect to certain aspects of Marcy's visitation. The court otherwise denied Marcy's motion.

¶ 41 This appeal followed.

¶ 42 II. ANALYSIS

¶ 43 A. Modification of Custody

¶ 44 On appeal, Marcy first argues the trial court erred by refusing to modify its prior custody order and award her custody of the parties' four children. She maintains a change in custody was warranted based on evidence which showed (1) all of the children expressed a desire to live with Marcy, (2) the children reacted negatively when returned to Ryan after visitations, (3) the environment Marcy could provide for the children was better and more stable than the environment Ryan provided, (4) violence had occurred between Ryan and J.S., (5) Ryan attempted to separate the children from Marcy by giving her only minimal information about the children and allowing only minimal contact with them, (6) Ryan was hostile toward Marcy, and (7) Ryan neglected the children's medical and educational needs.

¶ 45 Pursuant to section 610(b) of the Act (750 ILCS 5/610(b) (West 2012)), a court may not modify a prior custody judgment unless it finds, by clear and convincing evidence, that (1) a change in circumstances of the child or his custodian has occurred and (2) modification of custody is necessary to serve the child's best interests. To modify custody, "the change in circumstances must be material to the child's best interest." *In re Marriage of Rogers*, 2015 IL App (4th) 140765, ¶ 57, 25 N.E.3d 1213. "In other words, '[c]hanged conditions alone do not warrant modification in custody without a finding that such changes affect the welfare of the child.' " *Rogers*, 2015 IL App (4th) 140765, ¶ 57, 25 N.E.3d 1213 (quoting *In re Marriage of Nolte*, 241

Ill. App. 3d 320, 325-26, 609 N.E.2d 381, 385 (1993)). Further, the Act provides that relevant factors for determining the best interests of the child include:

> "(1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
>
> (4) the child's adjustment to his home, school and community;
>
> (5) the mental and physical health of all individuals involved;
>
> (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
>
> (7) the occurrence of ongoing or repeated abuse ***, whether directed against the child or directed against another person;
>
> (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
>
> (9) whether one of the parents is a sex offender; and

> (10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed." 750 ILCS 5/602(a) (West 2012).

This court has acknowledged that "stability and continuity are major considerations in custody decisions, so that a presumption exists in favor of the present custodian." *In re Marriage of Spent*, 342 Ill. App. 3d 643, 652, 796 N.E.2d 191, 199 (2003).

¶ 46 "The standard of review of custody modification judgments is the manifest weight of the evidence." *In re Marriage of Bates*, 212 Ill. 2d 489, 515, 819 N.E.2d 714, 728 (2004). "A custody determination inevitably rests on the parties' temperaments, personalities, and capabilities, and the witnesses' demeanor." *Spent*, 342 Ill. App. 3d at 652, 796 N.E.2d at 199. "The trial court is in the best position to review the evidence and to weigh the credibility of the witnesses." *Bates*, 212 Ill. 2d at 515, 819 N.E.2d at 728. Thus, its custody determination "is afforded 'great deference.' " *Bates*, 212 Ill. 2d at 516, 819 N.E.2d at 728 (quoting *In re Marriage of Gustavson*, 247 Ill. App. 3d 797, 801, 617 N.E.2d 1313, 1316 (1993)).

¶ 47 Here, the trial court found a change in circumstances had occurred but "Marcy ha[d] not met her legal burden of proof to warrant a change in custody." After reviewing the evidence presented and the parties' arguments, we find the record supports the court's denial of Marcy's request to modify custody.

¶ 48 The record undoubtedly shows Marcy's circumstances changed significantly following the April 2011 custody judgment. She had remarried, moved to a new home, had another child, and quit working to become a stay-at-home parent. However, the Act requires a court to

find "a change has occurred in the circumstances of the child or his custodian." 750 ILCS 5/610(b) (West 2012). The evidence presented in this case does not similarly reflect such significant changes in the lives of Ryan or the children. Nevertheless, to the extent it does show changes, like the trial court, we find Marcy failed to demonstrate the best interests of the children warranted a modification of custody.

¶ 49 As discussed, since 2009, the children have lived on a full-time basis with Ryan and Megan. Several witnesses testified regarding the positive interactions they observed between Ryan, Megan, and the children. The children were described as clean, appropriately dressed, well-behaved, and happy. Ryan's home was similarly described as clean and appropriate. Evidence was presented that the children had a good relationship with Ryan and Megan. Although evidence was presented that J.S. was in counseling with Dr. Heatherton to address relationship issues with Ryan and Megan, Dr. Heatherton testified J.S.'s relationship with Ryan had improved between 2011 and the initial custody hearings in April and May 2014. Dr. Heatherton also believed Ryan provided a stable environment for J.S., appropriately disciplined J.S., and appeared to have appropriately addressed J.S.'s educational needs.

¶ 50 On appeal, Marcy relies heavily on the children's expressed preference for living with her rather than Ryan. "Although the preferences of a minor child are important factors to be considered in custodial arrangements the court is not bound to follow such wishes." *Swanson v. Swanson*, 1 Ill. App. 3d 753, 755, 274 N.E.2d 465, 466 (1971). Further, "the wishes and preferences of the child standing alone do not warrant changing custodial provisions previously established." *Swanson*, 1 Ill. App. 3d at 755, 274 N.E.2d at 466. "A court may find that the child's preference is not in his best interest" and "[c]ourts must be alert for situations where parents have

attempted to influence the statements made by the child." *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 414, 639 N.E.2d 897, 903 (1994).

¶ 51 Marcy testified all of the children reported that they wished to reside with her. Additionally, Dr. Heatherton's testimony showed the two oldest children, J.S. and C.S., each reported a preference for living with Marcy. In particular, J.S. strongly and consistently expressed his desire to live with Marcy and not Ryan. However, despite this evidence, the record also supports the conclusion that the children's expressed preferences for living with Marcy may not have been in their best interests.

¶ 52 As discussed, evidence was presented that Ryan provided a stable and appropriate environment for the children and had no significant relationship issues with his three youngest children. With respect to J.S., Dr. Heatherton reported concerns about "coaching" or parental alienation by Marcy. He noted some of the information J.S. reported to him sounded "scripted." Dr. Heatherton further testified J.S. held the inaccurate belief that Ryan obtained custody by stealing the children from Marcy. Dr. Heatherton testified that a child needs both parents and he had concerns that the relationship between Ryan and J.S. might "fall away" if custody of J.S. was given to Marcy.

¶ 53 Dr. Heatherton further testified that if J.S. were to spend more time with Marcy, "[i]t would certainly round out the picture" and could alleviate some of the problems J.S. was experiencing. We note that, in reaching its decision, the trial court relied heavily on Dr. Heatherton's opinions and extensively referenced portions of his testimony. Ultimately, although the court denied Marcy's request to change custody of the children to her, it did grant Marcy more parenting time with all of the children, including a visitation schedule that represented "almost

equal time between the parents" for J.S. The court's decision is supported by the record.

¶ 54 On appeal, Marcy makes several additional arguments, including that Ryan had been violent toward J.S., was hostile toward her, failed to facilitate her relationship with the children, failed to provide her with information about the children, and neglected the children's medical and educational needs. Clearly, the parties have a highly contentious relationship which has negatively impacted their ability to communicate with each other. During the relevant time period, numerous conflicts arose and conflicting evidence was presented regarding many of the specific claims asserted by Marcy in her motion to modify and on appeal. The trial court was in the best position to weigh the evidence and determine the credibility of witnesses. The record reflects no error in the manner in which the court performed this essential function or its ultimate determination regarding custody.

¶ 55 Here, the record contains evidence supporting the trial court's denial of Marcy's request to award her custody of the parties' children. The court's custody determination was not against the manifest weight of the evidence.

¶ 56 B. Child Support

¶ 57 On appeal, Marcy challenges the trial court's decision with respect to child support. Initially, she contends the court violated her due process rights by *sua sponte* increasing her child support obligation when no pleading was before the court. Marcy also argues the court erred by imputing income to her based upon a finding that she was voluntarily unemployed.

¶ 58 "Due process of law requires that a party be accorded procedural fairness, *i.e.*, given notice and an opportunity to be heard." *In re Custody of Ayala*, 344 Ill. App. 3d 574, 586, 800 N.E.2d 524, 537 (2003) (holding the trial court exceeded its jurisdiction when making a

shared custody award where no pleadings requested the relief awarded and the objecting party had no notice that custody would be addressed at the hearing). Further, "the circuit court's jurisdiction, while plenary, is not boundless, and where no justiciable issue is presented to the court through proper pleadings, the court cannot adjudicate an issue *sua sponte*." *Ligon v. Williams*, 264 Ill. App. 3d 701, 707, 637 N.E.2d 633, 638 (1994). "Orders entered in the absence of a justiciable question properly presented to the court by the parties are void since they result from court action exceeding its jurisdiction." *Ligon*, 264 Ill. App. 3d at 707, 637 N.E.2d at 638. "[A] trial court cannot modify a spouse's child support obligations without a petition for modification first being filed." *In re Marriage of Sawyer*, 264 Ill. App. 3d 839, 848, 637 N.E.2d 559, 565 (1994).

¶ 59 Here, the record reflects that, on June 7, 2012, Ryan filed a petition for modification of child support. He identified Marcy as having a $300 per month child support obligation and alleged a substantial change in circumstances had occurred, warranting an increase in that obligation. On August 31, 2012, the parties entered into an agreed order that all petitions and motions which were then pending with the court would be withdrawn *except* Ryan's petition for modification of child support. Ryan's petition remained unresolved at the time of the hearings on Marcy's motion to modify custody.

¶ 60 In April 2014, Ryan and Marcy each filed a final pretrial memorandum. In his memorandum, Ryan proposed Marcy "pay child support and contribute to half of health care and extracurricular/school activities." In her memorandum, Marcy identified one of the issues presented to the court as a "determination of child support to be paid by [Ryan] to [Marcy] is [*sic*] custody is changed." At the hearings conducted in April and May 2014, only Marcy's motion to

modify custody was identified as a subject of proceedings.

¶ 61 In its initial order, filed in September 2014, addressing Marcy's motion to modify custody and visitation, the trial court ordered Marcy to pay child support for C.S., W.S., and L.S. "based upon 32% of the average net pay for [an LPN], working at Memorial Medical Center or St. John's Hospital, located in Springfield, IL." It ordered the parties to "forward reliable documentation *** to the Court and opposing counsel, as to what Marcy's child support obligation should be."

¶ 62 On October 2, 2014, Marcy filed a motion objecting to the trial court establishing child support without an evidentiary hearing. She argued Ryan did not have a "current" petition for modification of child support on file and his June 7, 2012, petition "was never noticed up for hearing or litigated." Marcy also maintained the court lacked the legal authority to impute income to her. On October 22, 2014, a hearing was conducted on Marcy's objection. The court made the following docket entry:

> "Based on [Marcy's] request to have an evidentiary hearing in lieu of the Court imputing income, the Court placed [Marcy] under oath and allowed counsel to ask questions. The Court also asked questions and determined, based on the legal authority, that the Court could impute income based on [Marcy's] voluntary unemployment."

A transcript of the October 22 hearing does not appear in the appellate record.

¶ 63 On December 12, 2014, the trial court entered an order, which further addressed the issue of child support and Marcy's due process objections. Its order stated as follows:

> "On December 10, 2014, the Court heard additional arguments regarding [Marcy's] claim that [Marcy's] due process is being violated by the Court's intention to impute child support because [Marcy] claims [Ryan] did not notice up his request for a modification of child support. The Court granted [Marcy's attorney] seven (7) days to provide the Court with legal authority to support his client's due process argument. However, the Court now concludes additional authority is not necessary for the Court to make its determination.
>
> The Court finds that [Marcy] cannot claim surprise or due process violations given [Ryan's] Final Pre-Trial Memorandum *** states 'Proposed Calculations of net income, child support and/or maintenance—Father proposes Mother pay child support and contribute to half of the health care and extracurricular/school expenses.' Further, [Marcy's] Final Pre-Trial Memorandum *** indicates *** that the Court is to determine child support should custody be changed from [Ryan] to [Marcy]. Clearly, the parties knew child support was going to be an issue."

Ultimately, the court ordered Marcy to pay $654 per month in child support.

¶ 64 Here, we find Marcy suffered no due process violation as the record reflects she ultimately received notice and an opportunity to be heard regarding the issue of an increase to her child support obligation. Initially, we agree that the record reflects Ryan failed to move for-

ward with his June 2012 petition to increase child support and an increase to Marcy's child support obligation was not clearly identified as an issue that was pending between the parties at the time of the April and May 2014 custody modification hearings. However, we find any due process violation that occurred was remediated by the hearing the trial court conducted on October 22, 2014, of which Marcy was provided notice and during which she was given the opportunity to testify and was questioned by counsel and the court.

¶ 65 On appeal, the parties disagree as to the nature and substance of the October 2014 hearing. Marcy complains the hearing permitted only "very limited questioning" and argues it was not a "full evidentiary hearing." Ryan, on the other hand, contends the hearing afforded Marcy the opportunity to address the issues outlined in her objection to the trial court's decision to increase her child support. Specifically, he maintains Marcy submitted testimony "regarding her employment opportunities, her infant daughter's medical condition, and her ability to secure employment."

¶ 66 As discussed, the appellate record does not contain a transcript of the October 2014 hearing and, thus, fails to show precisely what information or evidence was obtained at the hearing. However, "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill. 2d at 392, 459 N.E.2d at 959. In this instance, we resolve doubts that arise from the incompleteness of the record against Marcy and find no violation of

her due process rights.

¶ 67 As stated, Marcy also argues on appeal that the trial court erred by imputing income to her based upon its finding that she was voluntarily unemployed. "It is well established that courts have the authority to compel parties to pay child support at a level commensurate with their earning potential." *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077, 916 N.E.2d 614, 618 (2009). "If present income is uncertain, a court may impute income to the payor." *Gosney*, 394 Ill. App. 3d at 1077, 916 N.E.2d at 618. A court may impute income where it finds the payor is voluntarily unemployed, the payor is attempting to evade a support obligation, or the payor has unreasonably failed to take advantage of an employment opportunity. *Gosney*, 394 Ill. App. 3d at 1077, 916 N.E.2d at 618. A court's decision to modify child support "will not be disturbed on appeal unless an abuse of discretion is found." *In re Marriage of Deike*, 381 Ill. App. 3d 620, 630, 887 N.E.2d 628, 637 (2008).

¶ 68 The record shows that, following the October 2014 hearing and Marcy's testimony, the trial court determined Marcy was voluntarily unemployed. In her brief, Marcy contends she "did not have the opportunity to present evidence concerning her ability to work and care for her infant daughter who had medical conditions which prevented her from being able to be placed in daycare." Again, we find the incompleteness in the record regarding the testimony and evidence presented at the October 2014 hearing must be resolved against Marcy. Further, the court based its increase in Marcy's child support on the proposed calculation she submitted to the court, which was "based on earnings of [an LPN] II at SIU School of Medicine, which is where [Marcy] was previously employed." The record supports the court's findings and fails to reflect it committed an abuse of discretion.

¶ 69 C. Attorney Fees

¶ 70 Finally, on appeal, Marcy challenges the trial court's award of attorney fees to Ryan and the allocation between the parties of child representative and guardian *ad litem* fees. She maintains the court abused its discretion.

¶ 71 In this instance, the trial court's order provided as follows:

> "After a careful review of the Attorney's Affidavit regarding fees, the Court finds various fees were associated with Marcy's unnecessary and untimely filing of various pleadings. As such, Ryan is entitled to contribution toward his attorney's fees he had to incur to defend various pleadings and in related evidentiary hearings. Marcy will pay 25% of Ryan's attorney's fees he incurred *since* April 26, 2013. The Court's decision is not based on Marcy's ability to pay and Ryan's inability to pay; but rather the litigious nature of this case—of which most was initiated by Marcy. *** The Court is mindful, however, that a small portion of Ryan's fees are related to his Petition for Rule to Show Cause and his unwillingness to agree to additional custodial/visitation time between Marcy and the children without a full evidentiary hearing.
>
> * * *
>
> Regarding fees Attorney [Dawn] Behnke [(the children's representative)] incurred subsequent to April 26, 2013, Marcy shall pay 60% [($9,434.34)] and Ryan shall pay 40% [($6,289.56)]. ***

> Regarding Attorney [Dan] Kepner's fees [(the guardian *ad litem*)], Marcy shall pay 70% [($2,793)] and Ryan shall pay 30% ($1,197)]." (Emphasis in original).

¶ 72 With respect to Ryan's attorney fees, the court entered judgment against Marcy in the amount of $20,245.38. It noted that figure was based on an affidavit of attorneys' fees and proposed money judgment filed by Ryan's counsel after the court's September 2014 nonfinal judgment. The record reflects, on October 1, 2014, Ryan's counsel filed an affidavit of attorney fees and costs, asserting that from April 26, 2013, through August 31, 2014, Ryan incurred a total of $80,981.51 in fees and costs. Counsel asserted 25% of the fees and costs incurred by Ryan totaled $20,245.38.

¶ 73 Here, the trial court did not specify the statutory basis for its award of attorney fees. Generally, "attorney fees are the primary responsibility of the person for whom the services are rendered." *In re Marriage of Minear*, 287 Ill. App. 3d 1073, 1084, 679 N.E.2d 856, 865 (1997). However, section 508(b) of the Act (750 ILCS 5/508(b) (West 2012)) provides as follows:

> "If at any time a court finds that a hearing under this Act was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation."

"An award under section 508(b) does not depend on a party's inability to pay the fees or the other

party's ability to pay." *In re Marriage of Walters*, 238 Ill. App. 3d 1086, 1098, 604 N.E.2d 432, 442 (1992). Further, "[t]he circuit court's decision to award or deny attorney fees will not be disturbed absent an abuse of discretion." *In re Marriage of Harrison*, 388 Ill. App. 3d 115, 120, 903 N.E.2d 750, 754 (2009).

¶ 74 Additionally, section 506(b) of the Act (750 ILCS 5/506(b) (West 2012)) provides authority for the trial court to enter an order requiring the payment of fees and costs associated with a child representative or guardian *ad litem*. The provisions contained in section 508 of the Act expressly apply to the payment of fees and costs associated with a child representative or guardian *ad litem*. 750 ILCS 5/506(b) (West 2012). The allowance of child representative fees or guardian *ad litem* fees "rests with the sound discretion of the trial court, and the exercise thereof will not be interfered with unless such discretion is clearly abused." *Gibson v. Barton*, 118 Ill. App. 3d 576, 582, 455 N.E.2d 282, 286 (1983).

¶ 75 Here, Marcy challenges the award of attorney fees to Ryan, arguing the record fails to show she was overly litigious or filed any unnecessary or untimely pleadings. Further, she disputes the trial court's allocation of child representative and guardian *ad litem* fees contending the court provided no statutory basis for its award and its allocation of a greater portion of the fees to her was an abuse of discretion. Marcy contends fees associated with the children's representative and guardian *ad litem* should have been equally divided between the parties.

¶ 76 As stated, the trial court failed to provide the statutory basis for its award of fees. Although the court's comments indicate its award of attorney fees to Ryan was based on section 508(b) and the finding that Marcy initiated litigation for an improper purpose, the court failed to identify which specific pleadings filed by Marcy it found objectionable and required an award of

fees. Further, the record reflects both parties played a role in what the court described as "the litigious nature of this case." Under such circumstances, both parties should be responsible for paying their own attorney fees and we reverse the portion of the court's order directing Marcy to pay a portion of Ryan's attorney fees.

¶ 77 With respect to the fees owed to Behnke and Kepner, the child representative and guardian *ad litem*, respectively, the trial court similarly failed to provide either a statutory or factual basis for its decision. We agree with Marcy that these fees should be equally divided between the parties.

¶ 78 III. CONCLUSION

¶ 79 For the reasons stated, we find the trial court committed no error in denying Marcy's request for custody of the parties' four children. Further, Marcy's due process rights were not violated by the court's decision to increase her child support obligation and the record reflects no error by the court in imputing income to Marcy based upon a finding that she was voluntarily unemployed. Finally, we find the court did err in its award of certain fees. We reverse the portion of the court's order requiring Marcy to pay a portion of Ryan's attorney fees and allocating a greater portion of the fees associated with the child representative and guardian *ad litem* to Marcy. We remand with directions that the court order the parties to pay their own attorney fees and that fees associated with the child representative and guardian *ad litem* be allocated equally between the parties.

¶ 80 Affirmed in part and reversed in part; cause remanded with directions.