2013 IL App (5th) 130188-U

NO. 5-13-0188

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JUSTIN M. BEATTIE,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	St. Clair County.
	)	
v.	)	No. 05-F-1264
	)	
REBECCA BYBEE,	)	Honorable
	)	Zina R. Cruse,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justice Chapman concurred in the judgment.
Presiding Justice Spomer dissented.

ORDER

¶ 1 *Held*: Trial court erred in entering a temporary order granting change of custody under section 610(b) of the Illinois Marriage and Dissolution of Marriage Act.

¶ 2 In this appeal, we are asked to review two orders entered by the circuit court of St. Clair County modifying child custody. For the reasons that follow, we must vacate both orders and remand this cause for further proceedings consistent with the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610(b) (West 2012)).

¶ 3 The parties, Rebecca and Justin, were never married. They have one child together, J.B. On September 7, 2006, the court awarded full custody of J.B. to Rebecca, subject to liberal visitation rights with Justin. On August 26, 2011, Rebecca filed a motion to modify visitation and child support. On November 4, 2011, Justin

filed an answer and counterpetition to modify custody and child support.

¶ 4 On December 17, 2012, after three days of hearing evidence, the trial court issued an eight-page, handwritten order that was characterized as a "temporary modification" indicating that custody was being modified "on a temporary basis." After finding that "there has been a change in circumstances in regard to the child and the Respondent pursuant to 750 ILCS 5/610(b)," the court determined that when school resumed, the child would live with Justin. Justin was also awarded temporary sole custody. The order further indicated that the case was "reset for a review of [the] temporary modification" on March 19, 2013. As a part of its order, the court also invited the parents to get back in touch with the court prior to March 19, 2013, if either party believed the child was not adjusting to the change of custody for the better so that custody could be switched back immediately. Other pending issues, specifically, a motion to modify the tax exemption and a petition for rule to show cause, were held in abeyance until the March 2013 hearing.

¶ 5 On March 19, 2013, the parties appeared before the court as scheduled. No additional testimony was taken. The next day, on March 20, 2013, the trial court entered a permanent order, adopting its findings from the December 17, 2012, temporary order. In the first paragraph of the March 20, 2013, order, the trial court repeated that it had previously entered a temporary order modifying custody of the parties' minor child. In the next paragraph, the court noted that it had set the matter for "review of the temporary custody order" for March 19, 2013.

¶ 6 In the context of this procedural history, the first issue we must address is whether this court has subject matter jurisdiction to decide this appeal. Justin has filed a motion to dismiss this appeal claiming that the December 17, 2012, order was a final order and that Rebecca's appeal is, therefore, untimely because she did not file

her appeal within 30 days of that order. We disagree. In our view, the December 17, 2012, order was not a final order for purposes of appeal. Not all of the ancillary issues involved in this case had been decided at the time the court entered its temporary order. Specifically, there were issues of arrearage and a tax exemption still to be determined. In fact, the trial court indicated in its December 17, 2012, order that "the arrearage and tax exemption issue will be taken up at [the] next setting." Accordingly, the December 17, 2012, order was nothing more than a temporary order, with issues yet to be resolved. It was the March 20, 2013, order that was the final, appealable order. This is the order from which Rebecca timely appealed. Therefore, we have subject matter jurisdiction to resolve the issues in this appeal.

¶ 7 The problem in this appeal, however, is that we are still faced with a temporary order issued by the trial court which specifically referenced section 610(b) of the Act (750 ILCS 5/610(b) (West 2012)). As noted in *In re Marriage of Cesaretti*, 203 Ill. App. 3d 347, 561 N.E.2d 306 (1990), this section of the Act does not contemplate temporary orders in child custody decisions, except in situations involving military deployment. See 750 ILCS 5/610(f) (West 2012).

¶ 8 Section 610(b) provides in relevant part:

"(b) 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, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child. *** The court shall state in its decision specific findings of fact in support of its modification or termination of joint

custody if either parent opposes the modification or termination." 750 ILCS 5/610(b) (West 2012).

This section of the Act provides a statutory mechanism in which a parent may petition the court to modify a child custody provision. If, as in this case, the modification is sought more than two years after the entry of the initial award of custody, the statute requires the petitioner to prove by clear and convincing evidence that (i) a change has occurred in the circumstances of the child or either or both parties having custody and (ii) a modification is necessary to serve the best interest of the child. 750 ILCS 5/610(b) (West 2012). In other words, the statute describes a two-step process. First, the court must determine whether the evidence offered for modification is clear and convincing, and second, whether a change in custody is necessary to serve the best interests of the child. Only if both of these evidentiary burdens are satisfied may the court modify the prior custody judgment. 750 ILCS 5/610(b) (West 2012). The burden of proof is on the party seeking modification of custody. *In re Marriage of Valliere*, 275 Ill. App. 3d 1095, 1099, 657 N.E.2d 1041, 1044 (1995). Case law that has developed in the courts of this state require proof that there has been a substantial change in circumstances, proved by clear and convincing evidence that warrants a modification. Moreover, the standard of clear and convincing evidence requires a high level of certainty. Clear and convincing evidence is considered to be more than a preponderance of evidence while not quite approaching the degree of proof necessary to convict a person of a criminal offense. *In re Marriage of Wechselberger*, 115 Ill. App. 3d 779, 785, 450 N.E.2d 1385, 1389 (1983). "Changed conditions alone do not warrant modification in custody without a finding that such changes affect the welfare of the child. [Citation.] Custody cannot be modified unless there is a material change in the circumstances of the child related to the child's best interests and unless the evidence establishes either that the custodial parent is unfit or that the change in conditions is directly related to the child's

needs." *In re Marriage of Nolte*, 241 Ill. App. 3d 320, 325-26, 609 N.E.2d 381, 385 (1993).

¶ 9 Our supreme court has described section 610(b) as follows:

> "Section 610(b) reflects an underlying policy favoring the finality of child-custody judgments and making their modification more difficult. Its effect is to create a legislative presumption in favor of the present custodian, thereby promoting the stability and continuity of the child's custodial and environmental relationship which is not to be overturned lightly. [Citations.] However, once the trial court has determined that the presumption has been overcome, the court of review will not disturb that determination on appeal unless the trial court's decision was contrary to the manifest weight of the evidence or amounted to an abuse of discretion." (Internal quotation marks omitted.) *In re Custody of Sussenbach*, 108 Ill. 2d 489, 499, 485 N.E.2d 367, 371 (1985).

¶ 10 The circuit court is vested with significant discretion in child custody matters, and we, sitting as a reviewing court, should be reluctant to interfere in the exercise of that discretion. *In re Marriage of Valliere*, 275 Ill. App. 3d at 1100, 657 N.E.2d at 1044. What is not clear here, however, is whether the court actually engaged in the two-step process required by section 610(b) when it entered the temporary order. We must be careful to ensure that the court follows the strict, two-step evidentiary requirements set forth in the Act, as well as the legislative presumption in favor of the present custodian, and the policy favoring the finality of child custody judgments. By entering the temporary order of December 17, 2012, we believe the trial court circumvented this legislative presumption and policy.

¶ 11 We reiterate that, in enacting section 610(a) of the Act, the legislature imposed a two-year prohibition upon the filing of custody petitions so that child custody decisions would have some permanency and promote a stable environment for the

child. See 750 ILCS 5/610(a) (West 2012). "A trial judge must make a permanent decision based on the evidence presented and cannot continue temporary custody from time to time either to avoid making a difficult decision or to avoid the requirements of section 610." *In re Marriage of Valliere*, 275 Ill. App. 3d at 1101-02, 657 N.E.2d at 1045. Thus, "a trial court cannot avoid the possible consequences of an order by making all orders temporary 'experiments' to see which set of circumstances will result in the best living conditions for the [child]." *In re Marriage of Cesaretti*, 203 Ill. App. 3d 347, 353, 561 N.E.2d 306, 309 (1990).

¶ 12 By creating a temporary custody order, the court also imposed a new burden on Rebecca, not recognized under the law. What the trial court did, by entering such a temporary order, was to set up an unauthorized hearing for further review of the prior temporary modification of custody, thereby shifting the burden of proof to Rebecca. See *In re Marriage of Valliere*, 275 Ill. App. 3d 1095, 657 N.E.2d 1041. Again, this is not contemplated by the Act, and it is a burden that Rebecca should not have been forced to carry under section 610(b) of the Act. At no time would the presumption that Rebecca enjoyed as the custodial mother cause her to carry such a burden of proof unless and until Justin rebutted that presumption by clear and convincing evidence. The temporary order entered here, in essence, also allowed the parties to seek a further modification of custody within 90 days, contrary to the two-year prohibition of section 610(a).

¶ 13 The language of the December 17, 2012, order does not reference the first prong of the two-step process set forth in section 610(b). The temporary order simply states "there has been a change in circumstances in regard to the child and the Respondent pursuant to 750 ILCS 5/610(b)." Without any comment on the burden of proof required by step one of section 610(b), the court next analyzes the "best

interest" factors contained in section 610(b) of the Act, and orders that Justin's motion to modify custody is granted on a temporary basis when the next school session began. The court failed to make any finding that Justin had met his burden of proof, by clear and convincing evidence, thus warranting a permanent change in custody. See *In re Marriage of Nolte*, 241 Ill. App. 3d at 326, 609 N.E.2d at 385. Only after such a finding can the court then review the "best interest" factors under section 610(b).

¶ 14 The question thus arises as to whether Justin, during the December 2012 hearing, carried his very heavy burden of proof by clear and convincing evidence that a substantial change in circumstances regarding the minor child warranted a modification of custody, and that said modification was in the best interests of the child. Either the party seeking a change has met his burden of proving by a high level of certainty that a change in circumstances has occurred, or he has not. It appears from the record that the trial court had reservations about changing custody, which were announced while issuing the December 17, 2012, temporary order. First, the court admitted that both individuals were not bad parents, stating: "Listen, if there was something bad about either of you, this would be easy. If you were bad parents. You're just not." Second, the court's concern was evident from the language put in the order itself, which stated: "That the court is concerned about the detriment to the minor child emotionally, and that may actually outweigh the necessity for modification, given the fact that he is in the process of seeking treatment for ADD and other behavioral issues." Additionally, the court invited the parents to get back in touch with the court prior to March 19, 2013, if either party believed the child was not adjusting to the change of custody for the better. Thus the temporary order allowed custody to be switched back immediately at any time prior to March 19, 2013.

Finally, the court announced that it was going to "babysit" the case.

¶ 15 In summary, we are not clear from the record what standard of proof the court used to make its determination regarding the temporary change in custody. The issuance of a temporary order and the scheduling of a review hearing was error. The fact that the court later incorporated its findings into the March 20, 2013, order does not cure the error in entering the December 17, 2012, temporary order. The court could not avoid the entry of a permanent order in December 2012 to circumvent making what was, obviously, a difficult decision or to sidestep the requirements of section 610. The court was obligated, in December 2012, to make a permanent order regarding custody using the two-step process required by section 610(b).

¶ 16 Accordingly, we vacate the orders entered December 17, 2012, and March 20, 2013, and remand this cause to the circuit court to enter a revised order based upon the evidence heard in December 2012, designating which parent is entitled to permanent custody in accordance with the provisions of section 610, as construed herein. Physical custody of J.B. will remain with Justin until the circuit court has entered the permanent order. Justin's motion to dismiss the appeal is denied.

¶ 17 Vacated and remanded for further proceedings; motion to dismiss appeal denied.

¶ 18 PRESIDING JUSTICE SPOMER, dissenting:

¶ 19 I respectfully dissent. As explained below, although I agree it was improper to enter a temporary order on December 17, 2012, I believe the permanent order of March 20, 2013, superceded that improper order, is supported by the evidence presented at the December 17, 2012, hearing, and should be affirmed. In my opinion,

vacating the permanent order without reaching its merits, and remanding the case for the entry of a new order, without taking any new evidence, will do nothing more than give rise to an additional appeal in which the merits must be reached. To me, that seems to be a waste of judicial resources, and of the parties' own finances.

¶ 20 As a preliminary matter, I address Justin's motion to dismiss Rebecca's appeal for a lack of subject matter jurisdiction, which we took with the case. Justin argues that because section 610 of the Act (750 ILCS 5/610 (West 2012)) does not contemplate the entry of a "temporary" order, the December 17, 2012, order was a final order, and Rebecca's appeal is untimely because she did not appeal that order within 30 days as required by Illinois Supreme Court Rule 303 (eff. June 4, 2008). I disagree.

¶ 21 Justin cites *In re Marriage of Cesaretti*, 203 Ill. App. 3d 347, 352 (1990), for the proposition that the December 17, 2012, order was a final order, so as to be appealable. I agree that in *Cesaretti*, the appellate court held that an order such as this, where the circuit court entered an order pursuant to section 610 of the Act (750 ILCS 5/610 (West 2012)), but provided for a review at a later date, is "final" so as to be appealable, but subject to the circuit court's later review. See *id.* However, I find that the March 20, 2013, order, in which the circuit court reviewed that order and made it "permanent," was also a "final" and appealable order for purposes of Illinois Supreme Court Rule 303 (eff. June 4, 2008). The March 20, 2013, order, from which Rebecca appealed within 30 days, incorporated, by reference, the circuit court's findings from the December 17, 2012, order, and for that reason, those findings are subject to review of this court. Therefore, I agree with the majority's decision to deny Justin's motion to dismiss.

¶ 22 For the same reasons, Rebecca's argument that the March 20, 2013, order

should be reversed because the December 17, 2012, order was void on its face also fails. If Rebecca wished to appeal the December 17, 2012, order, she could have done so within 30 days of that order under the reasoning of *Cesaretti*. *Id.* At that time, she may have been able to have the December 17, 2012, order reversed for being temporary, as the *Cesaretti* court also held that a circuit court must make a permanent decision under the evidence presented when considering a section 610 petition. *Id.* at 354. I note, however, that the *Cesaretti* court found such an order to be error, not void on its face as Rebecca suggests. See *id.* In any event, Rebecca chose to wait until the circuit court entered its "permanent" order of March 20, 2013, which superceded the December 17, 2012, order, to file a notice of appeal. Because the March 20, 2013, order incorporated the findings from December 17, 2012, by reference, those are the permanent and reviewable findings of the circuit court. Accordingly, I would review the March 20, 2013, order, granting permanent custody of J.J.[1] to Justin, on its merits.

¶ 23 Rebecca contends that the circuit court erred by granting Justin's motion for a modification of custody. I first note the proper standard of review: "[i]t is not the function of this court to reweigh the evidence or assess the credibility of testimony and set aside the trial court's determination merely because a different conclusion could have been drawn from the evidence." *In re Marriage of Pfeiffer*, 237 Ill. App. 3d 510, 513 (1992). "The standard of review for modification of a child custody order *** is whether the modification is against the manifest weight of the evidence or constitutes an abuse of discretion." *In re Marriage of McGillicuddy*, 315 Ill. App. 3d

[1]Although the minor child's initials are J.B., he was referred to in the trial court as "J.J.," the initials that signify his first and middle name, and that is how I refer to him in this dissent.

939, 942 (2000). "In determining whether a judgment is contrary to the manifest weight of the evidence, the reviewing court views the evidence in the light most favorable to the appellee." *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177 (2002). "We will affirm the trial court's ruling if there is *any* basis to support the trial court's findings." (Emphasis added.) *Id.* "The trial court's custody determination is afforded 'great deference' because the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child." *Id.*

¶ 24 Section 610 of the Act states the following, *inter alia*, regarding the modification of custody:

"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 *** 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." 750 ILCS 5/610(b) (West 2012).

¶ 25 In this case, the record supports a finding by the circuit court, by clear and convincing evidence, that there were several substantial changes of circumstances regarding both Rebecca and J.J. since the original September 7, 2006, custody order. Namely, Rebecca got pregnant with her paramour Dan's child, Dan moved in with her and J.J., Rebecca gave birth, Dan was arrested, indicted, and eventually sentenced to federal prison, and J.J. developed problems in school and began exhibiting oppositional behavior toward Rebecca while in her care, thereby requiring counseling and medication. In addition, J.J. wet the bed, had nightmares, and expressed to Dr. Kennedy concerns about safety and being stressed out at home and school.

¶ 26 Rebecca contends that because Dan is now in prison and out of the picture, and because J.J. is doing better in school and being more cooperative at home, the

respective changes in circumstances no longer exist. I disagree. Custody proceedings commonly produce positive changes in the parties while litigation is pending. However, any lifestyle improvements or changes in family structure during custody litigation do not erase history or the events which transpired up until the day that Justin filed the petition to modify custody. Although the requirement for a change in circumstances is satisfied in this case, the test regarding custody modification is twofold, the second application being that the modification must serve J.J.'s best interests. See 750 ILCS 5/610(b) (West 2012). Section 602 of the Act enumerates the best-interest factors for the trial court to consider prior to ruling on a petition for a modification of custody. 750 ILCS 5/602 (West 2012).

¶ 27 The first two factors are the wishes of the parents as to J.J.'s custody (750 ILCS 5/602(a)(1) (West 2012)) and J.J.'s wishes as to his custodian (750 ILCS 5/602(a)(2) (West 2012)). Obviously both parents desire custody of J.J. Accordingly, even when viewed, as it must be, in the light most favorable to Justin, this factor favors neither party. Regarding J.J.'s wishes, the GAL stated in her interim report that was filed with the circuit court on October 16, 2012, that J.J. did not state a desire with respect to where he wishes to reside permanently. However, she stated in her followup report that was filed with the circuit court on March 19, 2013, that J.J. informed her that he wants to live with Rebecca. Notwithstanding J.J.'s statements, the GAL concluded that J.J. is not of sufficient age or maturity to make that decision. Accordingly, even when viewed, as it must be, in the light most favorable to Justin, this factor favors neither party.

¶ 28 An additional factor I find to favor neither party, even when viewed in the light most favorable to Justin, is the physical violence or threat thereof by the potential custodian, whether directed against the child or another person (750 ILCS 5/602(a)(6)

(West 2012)). There is no evidence of physical violence by either Rebecca or Justin. Although Dan displayed violence toward Justin by spitting on him and he made threats of physical violence toward Justin and an unknown individual on Facebook, the Act specifies that the physical violence or threat thereof be by *the potential custodian* (750 ILCS 5/602(a)(6) (West 2012)), who would be Rebecca or Justin in this case.

¶ 29 The next relevant factor to consider is the interaction and interrelationship of J.J. with his parents, siblings, and any other person who may affect his best interest (750 ILCS 5/602(a)(3) (West 2012)). Evidence shows that J.J. has positive interactions and interrelationships with both parents, his stepmother Hallie, Dan, and both of his siblings. Additionally, J.J. has exposure to extended family members who enrich his life while in the care of both parents. However, when viewed, as it must be, in the light most favorable to Justin, I find evidence in the record to support a finding that this factor favors Justin, because the record is replete with testimony about J.J.'s temper tantrums and defiance toward Rebecca, Dan, and Rebecca's mother, and these were not isolated incidents, but frequent and ongoing. I note that the GAL stated in her interim report that J.J. told her that it is not easy to talk to Justin because he gets mad. I also acknowledge Rebecca's testimony that J.J.'s behavior has improved since the custody proceedings commenced and the GAL reported that J.J. interacted lovingly with both parties. However, there is no evidence that J.J. ever threw any temper tantrums or displayed defiance while in Justin's home. Accordingly, I find evidence in the record which supports a finding, by clear and convincing evidence, that this factor favors Justin over Rebecca.

¶ 30 Also relevant is J.J.'s adjustment to his home, school, and community (750 ILCS 5/602(a)(4) (West 2012)). The GAL reported that when she asked J.J. where

he felt safe, he replied at Rebecca's home. However, J.J. displayed problematic behavior at Rebecca's home and in school while in Rebecca's care. In contrast, there is no evidence that J.J. threw temper tantrums or displayed defiance while in Justin's home. Testimony shows that J.J. did very well attending preschool while in Justin's home. The teachers spoke highly of him, he had lots of friends, and he worked on projects for school every afternoon with no difficulty. There is no indication that J.J. would have any problem adjusting to changing school districts. Various witnesses testified that J.J. has many friends who come to the farm to play. Those friends would attend the same school as J.J. Moreover, J.J. is familiar with the teachers there because he participates in various activities at the school. Likewise, J.J. is already acclimated to the community, as he attends church there, participates in community activities and fundraisers, and plays ball there in the summer. For these reasons, I again find evidence in the record that supports a finding, by clear and convincing evidence, that this factor favors Justin.

¶ 31 An additional factor for which there is clear and convincing evidence in the record favoring Justin is the mental and physical health of all individuals involved (750 ILCS 5/602(a)(5) (West 2012)). Although there is no indication that either parent has any issues with their physical health, testimony shows that Rebecca has a history of anxiety and ADD, and received a DUI in 2009. Justin had a burglary conviction when he was 17 years old, he received DUIs in 2005 and 2006, and was subsequently arrested for driving on a revoked license. The mental and physical health of Dan and Hallie are also relevant. Dan has a history of seizures, which are now under control. Although J.J. witnessed one of the seizures, Rebecca ensured that J.J. was never left alone with Dan until his risk of seizures subsided. Dan's mental health is questionable at best. Evidence shows that he publicly posted derogatory,

threatening, and drug-related messages on Facebook, he brought a loaded gun into the home, he was convicted and sentenced for conspiracy to manufacture marijuana, and he spat on Justin and threatened him in J.J.'s presence. Although Dan was sentenced to two years in prison, he has been involved in J.J.'s daily life. He also has a child with Rebecca and will likely continue to be a part of their lives, to some degree. There is no evidence that Hallie has issues with either physical or mental health.

¶ 32 Clear and convincing evidence in the record also supports a finding in Justin's favor as to the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and J.J. (750 ILCS 5/602(a)(8) (West 2012)). There are substantial amounts of evidence and testimony, even from Rebecca's own witness, that Rebecca continually interfered with Justin's visitation. Visitation disputes were so frequent the parties were eventually required to use the VEC for exchanges. Justin testified that Rebecca once withheld visitation for eight months. The circuit court also entered an order finding her guilty of visitation abuse. Moreover, Rebecca testified that she had disparaged Hallie and M.B. and called them derogatory names in the past. Such behavior is not conducive to fostering a positive relationship between J.J. and Justin, and it certainly has the potential to have a negative emotional impact on J.J. Nothing in the record suggests that Justin has done anything to discourage a close relationship between J.J. and Rebecca, nor is there any evidence that Justin ever disparaged Rebecca in J.J.'s presence.

¶ 33 Although I have exhausted the list of section 602(a) factors (750 ILCS 5/602(a) (West 2012)) applicable here, I emphasize that "[t]he factors enumerated in section 602(a) are not an exclusive list of factors." *In re Marriage of Diehl*, 221 Ill. App. 3d 410, 424 (1991). As such, an additional factor I find worthy of discussion is the

recommendation of the GAL, who opined that Rebecca's home is a more stable environment for J.J. than Justin's home. Notably, the GAL testified that she based her opinion on J.J.'s statement that he felt safe at Rebecca's home, although she also testified that J.J. was not old enough to make a reliable determination about where he wishes to live.

¶ 34 The trial judge emphasized that she rarely goes against the recommendation of a GAL, but in this case she disagreed that Rebecca's home is more stable than Justin's. This finding by the trial judge is also supported by clear and convincing evidence, particularly when viewed, as it must be, in the light most favorable to Justin. J.J.'s perception of safety does not necessarily correlate to the stability of a home. Other evidence in the record refutes J.J.'s statements to the GAL. In particular, Dr. Kennedy testified that J.J. voiced issues concerning safety, asking if her office was bulletproof. J.J. also specified that he was feeling stressed out at home and had been through a lot. The record reflects that Rebecca knowingly moved Dan into her home, despite his run-ins with the law. The depth of her knowledge regarding the details of Dan's issues is questionable, but testimony reveals that Rebecca was not as forthcoming as she could have been. Dan brought a loaded weapon into the home, and he was eventually arrested, indicted, and sentenced to prison, all the while living under the roof with J.J. This is not symbolic of a stable home. Accordingly, evidence supports the trial judge's decision not to follow the GAL's recommendation.

¶ 35 After viewing the evidence in a light most favorable to Justin, I find ample evidence in the record to support the circuit court's order granting Justin's counterpetition to modify custody. Because I believe vacating the previous permanent order and remanding for a new order based upon this same evidence is wasteful and ill-advised, I respectfully dissent from the majority's disposition of this

case.