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2015 IL App (3d) 150454-U

Order filed November 17, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

<i>In re</i> PARENTAGE OF J.P.N.,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
a Minor	)	Knox County, Illinois,
	)	
(Zachary N.,	)	
	)	
Petitioner-Appellee,	)	Appeal No. 3-15-0454
	)	Circuit No. 14-F-6
v.	)	
	)	
Samantha A.,	)	Honorable
	)	James R. Standard,
Respondent-Appellant).	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Wright and Carter concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial court's award of custody of eighteen-month-old child to father was not against the manifest weight of the evidence where mother removed the child to Florida without father's consent and demonstrated an unwillingness to facilitate a continuing relationship between father and child.

¶ 2 Petitioner, Zachary N., and respondent, Samantha A., are the parents of J.P.N., born on August 9, 2013. Both parties petitioned for custody of J.P.N., and the trial court awarded

custody to Zachary. Samantha appeals, arguing that the court's order is against the manifest weight of the evidence. We affirm.

¶ 3

### BACKGROUND

¶ 4

Zachary and Samantha began an intimate relationship in 2012 and moved in together shortly after they started dating. They had a son together, J.P.N., in August of 2013. Zachary and Samantha continued to live together until December of 2013. In January of 2014, Samantha told Zachary she was taking J.P.N. to Florida for a short vacation. When she arrived in Florida, Samantha informed Zachary that she was not coming back to Illinois and planned to remain in Florida with J.P.N. because her mother was moving to Florida.

¶ 5

Zachary filed a petition to determine the existence of a father and child relationship and set child support, seeking sole physical custody of J.P.N. He also filed a motion for temporary relief, asking the court to award him temporary custody or, in the alternative, visitation with the child. Samantha answered Zachary's petition and admitted that he was J.P.N.'s father. Two days later, she filed a petition for custody and leave to remove J.P.N. to Florida.

¶ 6

The court ordered mediation, and the parties entered an agreed temporary order granting Zachary visitation for two one-week periods prior to the custody trial. The order stated that Zachary would pick up J.P.N. to begin the visit and Samantha would pick him up to end the visit, unless otherwise agreed to by the parties. Prior to trial, Zachary flew to Florida twice to see J.P.N. and brought J.P.N. home once in August for his birthday.

¶ 7

The trial court conducted a custody trial on August 21, 2014. The first witness to testify was Tyler Scott, a friend of Zachary's. He testified that Zachary is a "caring father" who just wants the best for J.P.N." He has observed them interact on several occasions and stated that Zachary makes J.P.N. happy.

¶ 8 Zachary's brother, Jeremy Klapp, testified that Zachary owns a "very clean, well kept" house in Galesburg and that J.P.N. has his own room and his own toys. He stated that Zachary has a "very good" relationship with J.P.N. Klapp has watched Zachary and J.P.N. play together and described their relationship as a typical father-son relationship. Klapp testified that Zachary shows "a lot of love and care" for J.P.N.

¶ 9 Mary Hilton, Zachary's mother, testified that Zachary helped Samantha's mother move several times while he and Samantha were living together. Samantha's mother would move in with her boyfriend and then she would move out. At one point, Samantha's mother and her younger sister moved in with Zachary and Samantha and lived with them for three months. Hilton stated that Samantha was four or five months pregnant and that it created a lot of pressure on the couple.

¶ 10 Hilton further testified that Zachary bought a small house in Galesburg when he was 19 and made several improvements to it. The house is nice and clean. J.P.N.'s room has a crib, a changing table, a rocker and several toys. She stated that when Zachary brings J.P.N. home for visits she watches him while Zachary is at work. J.P.N. cries when Zachary leaves for work. She testified that Zachary and J.P.N. have a bond and that Zachary is a "really good father."

¶ 11 Hilton stated that all of Zachary's extended family lives in the Galesburg area. When J.P.N. comes home for a visit, the whole family wants to see him. Hilton testified that "when he's here, we make the best of it." She further testified that Zachary's relationship with J.P.N. is "amazing to watch." She stated that J.P.N. has changed Zachary's life.

¶ 12 Jamie Harter, Zachary's sister, testified that she is 37 years old. She is married with three boys between the ages of twelve and three-and-a-half. She testified that Zachary is "wonderful"

with J.P.N and that he "cherishes every moment with him." She stated that it was wonderful to see how much Zachary cared for and loved J.P.N.

¶ 13 On cross-examination, Harter stated that she was aware that all of Samantha's family lived in Florida, except her step-father. She also acknowledged that when Zachary and Samantha were living together, Samantha was the primary caregiver because Zachary was working.

¶ 14 Zachary testified that he is employed by DuPont Pioneer and has been working for the same company for almost four years. He also helps his grandfather on the farm. He owns a two-bedroom home in Galesburg. It has a full basement and a "good-sized" yard. He testified that shortly after he bought the house, he installed a new roof and a new deck and had the windows replaced. He also remodeled the kitchen and the bathroom. He completed most of the renovations on his own, with help from a friend.

¶ 15 Zachary testified that when he and Samantha lived together, he would get up in middle of the night and change J.P.N.'s diaper and help feed him. Samantha stopped working shortly after she moved in with him. She did a good job taking care of J.P.N. Samantha's mother and sister lived with them for a little while because Samantha's mother had a dispute with her boyfriend.

¶ 16 Zachary stated that Samantha's move to Florida was unexpected. Just days before she left, she and Zachary spent New Year's Eve together in Chicago. When they returned, Samantha attended Zachary's grandmother's funeral with him. When she left, she told him she was going to Florida on vacation. She called him a few days later and informed him that she was not coming back. She told him that he could use his two weeks of vacation during the year to travel to Florida if he wanted to see J.P.N.

¶ 17 Zachary testified that he went to Florida in April and May to visit J.P.N. He picked him up and brought him back to Illinois in August. In April, he flew to Florida to see J.P.N. When he arrived, he called Samantha. She gave him her address and told him to call a cab. When he called the cab company, the dispatcher said it would cost \$250 to get to that address. Zachary decided not to take a cab. He later discovered that Samantha had given him an incorrect address. In May, Samantha came to Zachary's hotel room to drop J.P.N. off. However, in August, when Zachary flew to Florida to pick J.P.N. up to bring him back to Illinois, Samantha refused to deliver J.P.N. to the airport. She told Zachary to rent a car to come and get him, so he did.

¶ 18 Zachary testified that he does Skype with J.P.N. at times, but if Samantha is unhappy with the way things are going, she says that she does not have time or that she is busy. Zachary described his relationship with J.P.N. as "perfect;" he only wished he could see him more. When asked if Samantha has ever filed an order of protection against him or had the police come to the home, Zachary replied, "No."

¶ 19 On cross-examination, Zachary admitted that he and Samantha argued frequently. He also acknowledged that Samantha's mother paid him \$500 a month when she lived with them. He further admitted that he was charged with driving under the influence (DUI) in January of 2015 but stated that the charge was reduced to reckless driving. He was also convicted of DUI in 2012 and charged with reckless discharge of a firearm in 2009 for shooting a firearm in the parking lot of a bar.

¶ 20 On redirect, Zachary testified that he still has a valid driver's license and that he attends Alcoholics Anonymous classes on a regular basis.

¶ 21 Jessica Harshbarger is a friend of Samantha's. She went to Zachary's house a couple of times to visit Samantha and the baby when Zachary was not there. She and Samantha have been

friends since junior high. Harshbarger testified that in the fall of 2012, she and her boyfriend went to a bar with Zachary and Samantha, and they spent the night at Zachary's house. In the middle of the night, she heard Zachary and Samantha arguing and then she heard a loud thump. When she asked Samantha what happened, Samantha said that Zachary kicked her. Samantha had a red mark on her stomach.

¶ 22 Samantha's mother, Jacquelin Claeys, testified that she lives with her mother and her youngest daughter in Sarasota, Florida. Samantha and J.P.N. live with them. Claeys is a registered nurse and is employed at a local hospital and has lived in Florida since February of 2014.

¶ 23 She testified that after J.P.N. was born, Samantha was the primary caregiver. Claeys visited Zachary's house often in the weeks and months after J.P.N.'s birth. She usually visited when Zachary was working. When Zachary was there, she witnessed him caring for J.P.N. He would hold him, play with him and feed him.

¶ 24 Claeys further testified that none of Samantha's relatives live in Illinois. All of her family lives in or near Sarasota. She stated that Zachary and J.P.N. Skype a few times a week and that J.P.N. is a "very happy baby."

¶ 25 On cross-examination, Claeys testified that she is married but that her husband still lives in Galesburg. She testified that her apartment in Florida has four bedrooms and is part of a larger, seven-building complex. Claeys stated that her youngest daughter is in high school and has attended three different high schools during the past three years.

¶ 26 Samantha testified that she is attending school in Florida to become a skin care consultant and will graduate in October. She testified that she believes employment opportunities are better

in Florida. She works two or three days a week after school. Her mother and her grandmother watch J.P.N. when she is attending classes or working.

¶ 27 Samantha testified that Zachary hit her on one occasion in November of 2012. He had been drinking, and they had an argument. Zachary got into bed. Samantha walked toward him, and Zachary pushed her with his foot. She fell backward and hit the closet door. Her friend, Jessica, was there when it happened. She further testified that Zachary threw a lamp at her in October of 2013. He had been drinking again. Samantha wanted to go the Homecoming football game and Zachary did not, so they had an argument. Samantha turned on all the lights and started packing. Zachary then turned off all the lights and pulled a lamp out from behind the couch and broke it. Samantha testified that after he broke the lamp, Zachary grabbed the baby out of the crib and climbed in bed and "wouldn't give him back."

¶ 28 According to Samantha, the couple argued on a weekly basis. She finally moved out in December. She testified that Zachary would change J.P.N.'s diaper, on occasion, but would only feed him if they argued about it.

¶ 29 On cross-examination, Samantha stated that she works as a waitress. She admitted that she and Zachary had arguments before she became pregnant but that she still wanted to have a baby with him. Samantha also testified that under the current visitation arrangement, Zachary pays for the airplane ticket to pick up J.P.N. in Florida and she pays for the ticket to go get him in Illinois. The only other form of communication Zachary has with J.P.N. is Skype. She plans to continue to Skype with Zachary whenever they both have time.

¶ 30 Zachary was called as a rebuttal witness. He testified that both he and Samantha had been drinking when the November 2012 incident occurred. They came home and started arguing. He went to bed because he did not want to argue with her. She turned the lights on in

the bedroom and pulled the covers off the bed, and he kicked her away. Samantha got mad and left. She came back the next morning and continued living with Zachary. A few days later, they talked about it and laughed because "it wasn't that big of a deal." Samantha did not contact the police and there was no order of protection.

¶ 31 He also testified regarding the October 2013 incident. He denied that he threw a lamp or broke a lamp. He testified that they had gone out to dinner and that he may have had one or two drinks, but he was not drinking heavily. Zachary also stated that it has been difficult to work out a regular schedule with Samantha to Skype with J.P.N.

¶ 32 On January 21, 2015, the trial court issued an opinion letter to both parties. In the letter, the court found that many of the factors in section 602 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/602(a) (West 2012)) favored neither party or were not applicable. According to the trial court, the factor of primary importance was the willingness and ability of each parent to facilitate and encourage a close relationship between the other parent and the child. The court found that, based on the evidence, Zachary and J.P.N. had a close relationship and that Zachary demonstrated a willingness to cooperate with Samantha whereas Samantha failed to demonstrate a willingness and ability to encourage a close and continued relationship between Zachary and J.P.N. The court concluded that Samantha and her mother lacked credibility. The court also found that, although Zachary had been charged with driving under the influence, the evidence demonstrated that he had no problems with subsequent alcohol abuse and there had been no adverse affect on his relationship with J.P.N. The court then determined that it was in the best interest of J.P.N that custody be placed with Zachary, subject to reasonable visitation by Samantha. The court entered a final written order on March 3, 2015, awarding custody to Zachary and incorporating the findings in the opinion letter.



¶ 33

## ANALYSIS

¶ 34

Samantha challenges the trial court's finding that it is in J.P.N.'s best interest to award custody to Zachary. Samantha asserts that the trial court erred in awarding custody to him because the findings that Zachary had a close relationship with J.P.N, that Zachary's alcohol-related issues were not a factor, that she did not facilitate Zachary's visitation, and that she and her mother lacked credibility were against the manifest weight of the evidence.

¶ 35

The Illinois Parentage Act of 1984 (Parentage Act) provides that custody shall be determined in accordance with the relevant provisions of the Marriage Act. 750 ILCS 45/14(a) (West 2012). Section 602(a) of the Marriage Act requires courts to determine custody in accordance with the best interest of the minor, considering all relevant factors. 750 ILCS 5/602(a) (West 2012). Those factors 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; [and]

(9) whether one of the parents is a sex offender[.]” 750 ILCS 5/602(a) (West 2012).

In addition to the enumerated factors, a court may also consider which parent has been the primary caregiver of the child since the parties’ separation. See *Shinall v. Carter*, 2012 IL App (3d) 110302, ¶ 41.

¶ 36 Where the other section 602 factors do not strongly favor either party, a trial court’s award of custody to the parent who the trial court believes is more likely to encourage a close relationship with the child and the other parent is not against the manifest weight of the evidence. See *Shinall*, 2012 IL App (3d) 110302, ¶¶ 41-42; see also *In re Marriage of Debra N. and Michael S.*, 2013 IL App (1st) 122145, ¶ 56 (affirming modification of custody to father where mother attempted to thwart father’s efforts to visit and maintain a close relationship with child); *In re Marriage of Spent*, 342 Ill. App. 3d 643, 652-53 (2003) (affirming trial court’s decision to award custody to father where mother “willfully failed to foster a close and continuing relationship between the child and her father” by denying father visitation and telephone contact with child).

¶ 37 In custody proceedings, the trial court is vested with wide discretion and great deference because it is in a superior position to evaluate the testimony of the witnesses and assign weight to the evidence. *In re Marriage of Iqbal*, 2014 IL App (2d) 131306, ¶ 55. Accordingly, we will not reverse the trial court's determination on appeal unless it is contrary to the manifest weight of the evidence and it appears that a manifest injustice has occurred. *Id.* A judgment is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *In re*

*Parentage of J.W.*, 2013 IL 114817, ¶ 55. In determining if a judgment is contrary to the manifest weight of the evidence, we must review the evidence in the light most favorable to the appellee. *Debra N.*, 2013 IL App (1st) 122145, ¶ 45.

¶ 38 Here, the trial court issued an opinion letter on January 21, 2015, and entered its final order on March 3, 2015, which incorporated its specific findings detailed in the opinion letter. In its final order, the court noted that it had considered the evidence and testimony presented by the parties in light of the relevant statutory provisions at issue, including section 602 of the Marriage Act (750 ILCS 5/602(a) (West 2012)). After considering the best-interest factors individually, the court ultimately concluded that it was in J.P.N.'s best interest that custody be awarded to Zachary. Our review of the relevant best-interest factors in light of the evidence presented at trial supports the court's finding that custody with Zachary is in J.P.N.'s best interest.

¶ 39 As the trial court recognized, most of the section 602 factors either favored neither party or are inapplicable. The pivotal factor in this case is the willingness and ability of each parent to facilitate a close and continuing relationship between the other parent and J.P.N. The evidence demonstrated that Samantha removed J.P.N. to another state under false pretenses and then refused to return the child to Illinois, suggesting instead that Zachary use his vacation time to travel to Florida to see his child. In response, Zachary took the appropriate legal steps to establish temporary visitation, began paying child support and then boarded a plane to visit his son.

¶ 40 Samantha suggests that the trial court failed to give appropriate weight to Zachary's acts of physical abuse. However, the trial court found that Samantha's testimony regarding the November 2012 and the October 2013 incidents lacked credibility, and we are not in a superior position to assess the truthfulness of her testimony. Samantha testified that Zachary kicked her

and that she fell against the closet in November 2012 and that Zachary threw a lamp at her in October 2013. But Zachary testified that he pushed her away after a fight in 2012 and he denied that he threw a lamp or broke it in 2013. The trial court is in the best position to make credibility determinations. Its determination that Samantha lacked credibility is not against the manifest weight of the evidence.

¶ 41 Zachary also admitted that he had been charged with more than one alcohol-related offense. The trial court considered Zachary's DUI conviction and the other charges and determined that they did not weigh against him. Although it would be error for the trial court to exclude evidence of Zachary's alleged alcohol abuse if it had an impact on J.P.N. (*Rizzo v. Rizzo*, 95 Ill. App. 3d 636, 641 (1981)), there is no evidence in this case that an alcohol-related issue in Zachary's past adversely affected his relationship with J.P.N.

¶ 42 In light of the evidence presented in this case, the trial court's decision to grant custody to Zachary was not against the manifest weight of the evidence. See *Shinall*, 2012 IL App (3d) 110302, ¶¶ 41-42. We affirm the trial court's decision to award Zachary custody of J.P.N.

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Knox County is affirmed.

¶ 45 Affirmed.