No. 2-92-0228

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re THE MARRIAGE OF FREDDY J. OLSON,	)	Appeal from the Circuit Court of Kane County.
Petitioner-Appellee,	)	No. 89-D-958
and	)	
DENNIS R. OLSON,	)	Honorable Roger W. Eichmeier, Judge, Presiding.
Respondent-Appellant.	)	

ORDER

This case involves questions of child custody, support payments and attorney fees which arose out of a judgment for dissolution of marriage entered for Mrs. Freddy J. Olson and against Mr. Dennis R. Olson pursuant to the Illinois Marriage and Dissolution of Marriage Act (Act). (Ill. Rev. Stat. 1991, ch. 40, par. 101 et seq.) Respondent raises the following issues on appeal: (1) whether the trial court erroneously considered respondent's cohabitation with another woman as a factor in awarding custody to Freddy; (2) whether the trial court's custody decision conflicted with the child's best interest; (3) whether respondent's visitation rights were unduly restricted; (4) whether the trial court awarded an excessive amount of child support; (5) whether the award of attorney fees was unsupported by the evidence; and (6) whether the trial court lacked

jurisdiction to hear Freddy's petition for payments of medical expenses and life insurance. We reverse and remand.

On October 16, 1982, Dennis Olson and Freddy Poucher married each other after two and one-half years of cohabitation. Freddy's son from a previous marriage, Jason, lived with the couple during that time. Dennis and Freddy subsequently had a child together named Katie, who was born on October 20, 1983. Because of marital difficulties, Dennis and Freddy separated in 1988. During this separation, Freddy began dating Sonny Cavines and Dennis began dating Alice Chiappellone. Before Dennis' and Freddy's marriage had been dissolved, Dennis and Alice had a child together. After their marriage had been dissolved, Dennis married Alice, and Freddy married Sonny.

Freddy filed for dissolution of her marriage to Dennis on June 22, 1989. At that time, she sought temporary custody of Katie, child support, and maintenance. Pursuant to an agreed order, Judge Peter Wilson granted her request for temporary custody without prejudice to Dennis. Following a hearing on the issue of temporary child support and maintenance, Judge Wilson ordered Dennis to pay $720 per month in unallocated family support to Freddy and Katie. The court further ordered Dennis to maintain the mortgage on the marital home and make a minimum payment each month on the Visa account of the parties.

The case was assigned to Judge Timothy Sheldon, who appointed attorney Phyllis Perko as Katie's attorney. Judge Sheldon ordered attorney Perko to suggest three psychologists to examine the parties and the minor child. Because the parties

were unable to agree upon the appointment of a psychologist to perform the custody evaluation, Judge Sheldon appointed Dr. Edward Orleans. Thereafter, Judge Roger W. Eichmeier replaced Judge Sheldon who had been transferred to another division. Dr. Orleans rendered his written report to Judge Eichmeier on January 18, 1991.

Judge Eichmeier conducted a hearing on a petition to abate Dennis' overnight visitation with Katie. This petition alleged that it was not in Katie's best interest to remain at Dennis' while Dennis lived with his girlfriend, Alice Chiappellone, with whom Dennis had already conceived a child. Judge Eichmeier refused Dennis' request for a continuance which would have allowed him to obtain Dr. Orleans' testimony and opinion as to what type of visitation would be in Katie's best interest. In suspending Dennis' overnight visitation, Judge Eichmeier stated that he would not have appointed a "psychiatrist" where the parties could not agree upon one. The court also found that Freddy had a boyfriend, although not a live-in one, who had stayed in the house with her at least 20 times in a conjugal relationship which took place outside the presence of Katie.

In connection with the divorce proceedings, Dr. Orleans interviewed and tested Dennis, Freddy, Katie, Sonny, Alice, and Jason. In Dr. Orleans' opinion, Katie would receive the most nurturing and affection and stability if custody were granted to Dennis. Dr. Orleans opined that there is a lack of trust between Freddy and Katie which did not exist between Dennis and Katie. Therefore, Dr. Orleans concluded that Katie would fare better

with her father. In his diagnostic summary and conclusions, Dr. Orleans reported that "it may be in Katie's interest for her to be in her father's custody consistent with Katie's strongly expressed wishes."

Counsel for Katie, Phyllis Perko, indicated at trial that Katie wished to be in the custody of her father. Ms. Perko, accordingly, argued that physical custody should be given to Dennis. Ms. Perko believed that Dennis would provide an appropriate home environment for Katie, both materially and socially. She also believed that Katie's development and nurturing was better placed in the hands of Dennis. Finally, Ms. Perko believed that Dennis and Katie were involved in appropriate activities and that Dennis possessed the ability to parent Katie. Ms. Perko believed her position was not inconsistent with the evidence adduced at trial. However, when argument was presented on Dennis post-trial motion, Ms. Perko reversed her position and sought a denial of the motion on the ground that the trial court's custody ruling was amply supported by the totality of the evidence.

Finally, at trial, Katie expressed a desire to be in the custody of her father. Specifically, Dennis Olson's trial counsel asked Katie how much time she would want to live with her mom, and how much time she would want to live with her dad. Katie answered, "I'd like to live with my dad on the weekdays and my mom on the weekends."

The trial court granted sole custody of Katie Olson to Freddy. In reaching this decision, the trial court addressed

Katie's health and social development while under Freddy's care, Dennis Olson's physical health, and Katie's stated desire regarding custody. In addition, the court also noted that Dennis violated the Criminal Code in what the court considered to be an "onerous way" by committing adultery with Alice. (Ill. Rev. Stat. 1989, ch. 38, par. 11-7.) The court expressed a desire to avoid serious criticism which may result if it granted custody to a person who lives in a state of "onerous" adultery. Finally, the court found that some of Dr. Orleans' conclusions were unbelievable.

With respect to visitation, the trial court restricted Dennis' nightly telephone calls to Katie while maintaining Katie's right to call her father at any time. Dennis was declared to have alternate Saturday visitations from 10 a.m. to 6:30 p.m., until further order of the court, and Alice was not to be a part of those visitations.

Dennis first argues that the trial court improperly granted custody to Freddy. Dennis asserts the court erred when it considered adultery as a factor in granting custody to Freddy because Dennis' relationship with Katie had not been affected by the alleged adulterous acts. In support of this proposition, Dennis cites section 602(b) of the Act which provides in relevant part:

> "The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." Ill. Rev. Stat. 1991,c h. 40, par. 602(b).

The determination of child custody rests largely within the broad discretion of the trial court, and its decision will not be disturbed on appeal unless the award is contrary to the manifest weight of the evidence, or unless the court has abused its discretion. (In re Marriage of Siegel (1984), 123 Ill. App. 3d 710, 715.) The trial court is in a better position to evaluate the credibility of the witnesses and the needs of the children and, therefore, a presumption favoring the result reached by the trial court is strong and compelling in custody cases. (Siegel, 123 Ill. App. 3d at 715.) An abuse of discretion will be found where the judgment is palpably erroneous, contrary to the manifest weight of the evidence, or manifestly unjust. In re Marriage of Ramer (1980), 84 Ill. App. 3d 213, 217-18.

The question in this case is similar to one posed by the supplement to the Historical and Practice Notes of section 602. Specifically, the Notes ask whether one parent's unmarried cohabitation with a member of the opposite sex is sufficient, in the absence of tangible evidence of a contemporaneous adverse effect on a child, to sustain an award of custody to the other parent. Ill. Ann Stat. 1992 Supp., ch. 40, par. 602, Supplement to Historical & Practice Notes, at 16 (Smith-Hurd 1991).

In addressing this issue, the Practice Notes cite Jarrett v. Jarrett (1979), 78 Ill. 2d 337. Jarrett involves a father's petition to modify a divorce decree which awarded custody of the children to the mother. Five months after the divorce decree in Jarrett, the mother informed her ex-husband that she planned to have a boyfriend move in with her. The father argued that such

arrangements created a moral environment which was not proper for his three young children. Finding it necessary for the moral and spiritual well-being and development of the children, the trial court modified the custody order in favor of the father. The appellate court reversed, determining that the record did not reveal any negative effects on the children caused by the mother's cohabitation. Our supreme court affirmed the trial court and held that custody had properly been transferred to the father. The supreme court determined that the mother was engaging in conduct which created an environment injurious to the moral well-being and development of the children and that the conduct was expected to continue in the future.

The court distinguished those cases where the person committing the indiscretion indicated a plan to marry the paramour signaling an end to the misconduct. While the court did not wish to condone open and notorious violations of the State's Criminal Code, it also would not mechanically deny custody in every such instance. Instead, the current moral example set for the child was to be examined along with the example "which may be expected by the parent in the future." Jarrett, 87 Ill. 2d at 347.

According to the Notes, subsequent cases clarified Jarrett indicating that extramarital cohabitation is but one of the many factors to be considered in the context of a custody hearing and that such cohabitation should not lead to a conclusive presumption that the child had been harmed. (In re Marriage of Thompson (1983), 96 Ill. 2d 67; Brandt v. Brandt (1981), 99 Ill. App. 3d 1089.) Thus, it is apparent that a court should not presume that

the best interest of a child has been affected by a parent's cohabitation with someone other than their spouse.

In the present case, the trial court considered many factors in reaching its decision regarding custody of Katie. However, we determine the court, in making its determination, abused its discretion by placing undue weight upon Dennis' relationship with Alice. The language in section 602(b) clearly prohibits the court from considering conduct that does not affect a potential custodian's relationship to the child. Here, there is no evidence that Dennis' relationship with Alice, although allegedly in contravention with the Illinois statute regarding adultery, in any way affected his relationship with Katie. It is also apparent that the court placed much weight upon this consideration. Specifically, the court stated, "I have evidence in the record that the girlfriend of Mr. Olson is an integral part of this whole custody question."

Nevertheless, the present case can be distinguished from Jarrett in that Dennis unambiguously expressed a desire to marry Alice and, in fact, did so upon termination of his marriage to Freddy. According to Jarrett, custody should not be denied where future lapses in morality are improbable. (Jarrett, 78 Ill. 2d at 347; see also In re Custody of Boyer (1980), 83 Ill. App. 3d 52; Rippon v. Rippon (1978), 64 Ill. App. 3d 465.) Here, the trial court should have given greater credence to Dennis' stated intention to abate his allegedly illicit relationship with Alice through marriage. Additionally, it is unlikely that Dennis' and Alice's relationship affected in any way Katie's moral

development. At trial, Katie specifically stated her awareness that Dennis and Alice were to be married. Thus, she was not led to believe that unmarried cohabitation was something that should continue indefinitely.

Dennis next asserts that the court failed to consider a number of other factors in determining custody. First, Dennis asserts the court disregarded the testimony and psychological evaluations provided by Dr. Orleans. We agree. The court's reasoning in the ruling indicates that the trial court replaced the theories of psychology espoused by the expert with its own personal beliefs. For example, Judge Eichmeier dismissed as "incredible" Dr. Orleans' findings that certain problems Freddy had as a child adversely affected her ability to parent as an adult. This reasoning necessarily contains internal inconsistencies when considered along with the judge's determination that Katie's exposure to Dennis' alleged transgression would affect her in later life. In addition, the trial court clearly misconstrued the findings in Dr. Orleans' report. These findings do not claim that Freddy would be unable to raise Katie. Instead the report merely points out that difficulties in communication may occur between Katie and Freddy as a result of Freddy's past experiences.

The trial court also found it "incredible that a relationship of open, notorious adultery would not even be mentioned in a psychologist's report where you're dealing with the mental and moral issues of custody of a small child." This statement reveals the focus of the trial court's concerns more than it

reveals any shortcomings in Dr. Orleans' report. In our view, Dr. Orleans properly addressed the beneficial nature of Katie's interactions with Dennis and Alice rather than focusing on the possibility of an alleged legally illicit relationship affecting Katie's moral development.

The opinions expressed by psychologists and social workers are not binding on the court making a custody determination. (In re Marriage of Bailey (1985), 130 Ill. App. 3d 158, 160-61.) In general, an expert's testimony is to be judged by the rules of weight and credibility applied to all witnesses. (Hegener v. Board of Education (1991), 208 Ill. App. 3d 701, 734.) The weight and value of an expert's testimony depends to a great extent upon the facts and reasons upon which the testimony is based. (Hegener, 208 Ill. App. 3d at 734.) In our view, the language of the trial court below reveals a predisposition which would not favor the use of experts in the present case, and the trial court's subsequent treatment of the expert's opinions revealed that such opinions were not given sufficient weight. In Bailey, the trial court only departed from the expert advice tendered by a psychiatrist after giving it "very, very serious consideration" in light of insight obtained during the trial. Bailey, 130 Ill. App. 3d at 160. Whereas, the trial court here appears to dismiss the expert's opinion based on its disbelief of the psychiatric theories underlying that expert's opinion rather than upon the relationship of that opinion to the actual facts in the case. Thus, in our view, the trial court abused its discretion in giving Dr. Orleans' opinion such summary treatment

without weighing his credibility in light of the facts presented in the case.

Dennis next argues that the trial court erred in failing to seriously consider Katie's preference to live with Dennis rather than Freddy. At trial, Katie testified that she would like to live with Dennis because he takes better care of her. She also testified that when she is at Dennis' house she has no desire to return home to her mom's house. She also stated that if allowed to live with Dennis she would like to continue visiting with Freddy every weekend. Although Katie would not object if ordered to live with Freddy, her testimony reveals that she would rather live with Dennis. She specifically stated "I'd like to live with my dad on the weekdays and my mom on the weekends."

The trial court was concerned that Katie's desire to live with Dennis was obtained through promises of a big house and trips to Disneyland and Hawaii. The trial court believed that Katie was subject to substantial questioning when visiting Dennis regarding where she would want to live and regarding complaints she had about her situation at Freddy's house. Thus, the court discounted her stated desire to live with Dennis. In reaching this decision, the court necessarily ignored Dr. Orleans' conclusions that Katie feels a strong desire to live with her father and Alice, that neither Dennis nor Alice bribed Katie and that Katie expressed her opinion of her own will.

Section 602 commands the trial court to consider the wishes of the child in the context of a custody determination. In general, a mature child's preference as to custody is to be given

considerable weight when it is based on sound reasoning. (Shoff v. Shoff (1989), 179 Ill. App. 3d 178, 185.) In Shoff, the court did not accept the child's stated preference regarding custody because she was unable to state the reason for her preference except that her mother had no one else to live with.

In the present case, Dr. Orleans' report indicates that, when interviewed individually, Katie gave very specific reasons underlying her decision to be with her father. For example, she stated her father and Alice were nice to her and that she has lots of friends at her father's house. Moreover, at trial, she indicated that Dennis takes better care of her. While Katie did not have definitively negative things to say about her mother, she reported that she does not receive as much attention as she would like from Sonny or Freddy and that she is generally not allowed to have friends over at her mother's house. In addition, she indicated that Freddy and Sonny often do not believe what she says. In our view, these are very mature insights for a seven-year-old.

A court may find that a child's preference is not in the child's best interest, especially when the child's reasons are not related to her best welfare. (Shoff, 179 Ill. App. 3d at 185.) However, in the present case, there is no indication that Katie's stated preference is not related to her best welfare. She did not testify that she wished to live with her father only because of a desire to live in a large house or as a result of promises to go to Disneyland or Hawaii. Thus, there is little in the record to support the court's determination that Katie

reached her conclusion as a result of coercion. Thus, the trial court apparently did not consider Dr. Orleans' report, and it discounted Katie's stated preferences in reaching its own conclusion that Katie succumbed to pressure exerted upon her by her father and several other parties.

In support of its position that Katie was swayed by financial considerations, the judge cites Dr. Orleans' statement that such economic benefits could influence a child's opinion. In our view, Katie's opinions should not be discounted simply because they rely in part upon financial concerns. Dennis' ability to provide Katie with a more comfortable lifestyle is a valid factor for Katie's consideration.

The trial court did not err in examining the potential factors influencing Katie's opinion. However, the trial court did err in failing to examine the maturity of that opinion and its underlying reasoning. Katie's statements both in and out of court should have been given more serious consideration by the trial court.

Dennis next asserts that the trial court erred in failing to (1) consider the mental and physical health of all individuals pursuant to section 602(a)(5), (2) examine Katie's relationship with involved individuals pursuant to section 602(a)(3), and (3) permit questioning of Freddy regarding her future plans for Katie. (Ill. Rev. Stat. 1991, ch. 40, pars. 602(a)(3),(5).) We find the record does not support these claims, and they do not provide a basis for our reversal.

Dennis next argues that the trial court's award of attorney fees failed to meet the requirements of section 508 and was unsupported by the evidence. (Ill. Rev. Stat. 1991, ch. 40, par. 508.) At the conclusion of the custody trial, the trial court granted Freddy's fee petition in its entirety. After a request for a hearing on attorney fees, this ruling was retracted and the matter was set for hearing. Petitioner first called Theodore Kuzniar as an expert witness on the matter of attorney fees. Kuzniar, an attorney with a concentration in family law, testified that the $27,919.66 fee charged by Freddy's attorney was customary and reasonable. However, on cross-examination, this witness admitted that he did not know how many hours Freddy's attorney actually spent on the five-day trial. Freddy's attorney, Mr. Schwarz, testified about methods he used to document hours in the ordinary course of his business. Schwarz also testified that the fees were necessary. The trial court ruled that the fees stated were reasonable under section 508. The court subsequently ordered Freddy to pay $16,501 of Schwarz' fees and ordered Dennis to pay $10,000 of those fees. Finance charges were deducted from the amount allocated to Freddy.

The allowance of attorney fees in divorce proceedings rests within the sound discretion of the trial court. (In re Marriage of Brophy (1981), 96 Ill. App. 3d 1108, 1117.) We will not reverse such an award on appeal unless the trial court abused its discretion. (Brophy, 96 Ill. App. 3d at 1117.) According to Brophy, the financial position of the parties, the skill and standing of the attorneys employed, the importance, novelty and

difficulty of the questions raised, the degree of responsibility involved from a management perspective, the time and labor required, the usual and customary charge in the community and the benefits resulting to the client, are all factors to be considered in determining an attorney fee award. (Brophy, 96 Ill. App. 3d at 1118.) In addition, the matter of fixing fees is one of the few areas in which the trial judge may rely on the pleadings, affidavits on file and its own experience. (Brophy, 96 Ill. App. 3d at 1118.) In our view, the trial court below abused its discretion because it did not adequately consider these factors in ruling on attorney fees.

At the fee petition hearing, Mr. Martoccio, counsel for Dennis, objected to the fee petition and its attendant computerized fee schedule printout on the ground that it lacked a proper foundation. Martoccio objected to the schedule of hours because no evidence was presented indicating how those hours were transcribed and whether they had been entered accurately into the computer. Schwarz, counsel for Freddy, testified that he reviewed the documents and found them to be accurate and necessary. Mr. Ryan, arguing for Schwarz, asserted that this testimony served as a proper foundation for the records. The time records themselves simply provide a general description of the service performed, the time spent on that service and the fee charged for that service.

The trial court found the fees to be reasonable based upon its own experience, its understanding of section 508 (Ill. Rev.

Stat. 1991, ch. 40, par. 508), and the amount of time and stress the case involved.

Martoccio argued that a mere schedule of hours is insufficient proof upon which to base a fee petition. Martoccio asserted that a fee petition hearing must address the issues regarding the necessity of the fees and the reasonableness of the fees and that neither of those issues were properly addressed by Freddy's attorneys. Martoccio asserted that without more proof, Judge Eichmeier could not have independent knowledge of these issues with respect to the history of the case before he replaced Judge Sheldon.

The amount of fees to be allowed in a divorce proceeding depends:

> "[O]n a consideration of the skill and standing of the attorneys employed, the nature of the controversy, and the novelty and difficulty of the questions at issue; the amount and importance of the subject matter, especially from a family law standpoint; the degree of responsibility involved in the management of the case; the time and labor required; the usual and customary charge in the community; and the benefits resulting to the client. [Citations.] The work for which the compensation is sought must be shown to be reasonably required and necessary for the proper performance of legal services under the circumstances." (Christian v. Christian (1979), 69 Ill. App. 3d 450, 458-59.)

General statements in the record regarding the number of court appearances made is insufficient to establish the basis for an award of attorney fees. (In re Marriage of Edelberg (1982), 105 Ill. App. 3d 407, 410-11.) Although the complexity of the case is a factor in determining an attorney fees, the filing of simple motions is not the type of work which requires the "greater skill" contemplated by the rule allowing court time at a higher rate. In re Marriage of Dulyn (1980), 89 Ill. App. 3d 304, 314.

In the present case, apart from Schwarz' mere assertion that his fees were reasonable and necessary, along with the unconvincing testimony of Kuzniar, we are unable to ascertain the nature of the court appearances specified in Schwarz' computerized fee schedule printout. The hours receiving the higher billing rate for court time are merely described as "Court Appearance" on many occasions. Therefore, the proof offered by petitioner is insufficient to support the pleadings for attorney fees. (See Keno & Sons Construction Co. v. La Salle National Bank (1991), 214 Ill. App. 3d 310, 312.) As a result, we hold that the trial court abused its discretion in granting the fee petition in the absence of sufficient evidence to support that ruling.

Dennis' arguments regarding the trial court's jurisdiction to hear Freddy's petition for payments of medical expenses and life insurance will not be considered because they were not raised in the notice of appeal. Cunningham Courts Townhomes Homeowners Association v. Hynes (1987), 163 Ill. App. 3d 572, 575.

In light of our findings on the custody issues above, we determine it is not necessary to address questions regarding visitation restrictions and child support payments. Furthermore, due to the nature of this case and the nature of the issues leading to our reversal, we order that a new trial judge be assigned to this case on remand.

The judgment of the circuit court of Kane County is reversed, and the cause is remanded in accordance with this opinion.

Reverse and remand.

McLAREN, J., with INGLIS, P.J., and BOWMAN, J., concurring.