

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (3d) 120435-U

Order filed October 22, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

<i>In re</i> PARENTAGE OF L.S.,) Appeal from the Circuit Court
) of the 13th Judicial Circuit,
A Minor,) La Salle County, Illinois
)
(Bonnie Seby,)
) Appeal No. 3-12-0435
Petitioner-Appellant,) Circuit No. 10-F-321
)
v.)
)
Michael Elliott,) Honorable
) Michael C. Jansz,
Respondent-Appellee.)) Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held:* Trial court erred in finding that grandmother lacked standing to intervene in a parentage action filed on the child's behalf by the Department of Children and Family Services for the purpose of establishing the putative father's child support obligation.

¶ 2 Bonnie Seby (Seby), maternal grandmother of L.S., appeals the trial court's ruling that she lacked standing to pursue custody of L.S. in a parentage action under section 601(b)(2) of the

Illinois Marriage and Dissolution of Marriage Act (Dissolution Act). 750 ILCS 5/601(b)(2) (West 2010).

¶ 3

FACTS

¶ 4 L.S. was born on November 6, 2007, to Michael Elliott (Elliott) and Casey Sebby (Casey). Elliott was present at the birth of L.S. but did not sign a voluntary acknowledgment of paternity.

¶ 5 Nearly three years later, on October 26, 2010, the Illinois Department of Healthcare and Family Services filed a "Petition to Determine the Existence of the Father and Child Relationship" on behalf of Casey pursuant to the Illinois Parentage Act of 1984. 750 ILCS 45/1, *et seq.* (West 2010) (the parentage action). Court-ordered genetic testing showed a 99.97% probability that Elliott was the biological father. Consequently, the court entered an order declaring Elliott to be the biological father of L.S. on January 31, 2011, and ordered him to complete a job diary and return to court for purposes of determining the amount of L.S.'s child support. Elliott obtained employment at McDonald's in Ottawa, Illinois, on June 12, 2011.

¶ 6 On August 4, 2011, the court ordered Elliott to pay child support in the amount of \$68.90 biweekly and to pay \$10 every other week on the arrearage of \$137.80. Elliott's first payment was scheduled for August 8, 2011. Although Elliott's payments of \$68.90 were scheduled to take place every other week, Sebby testified Elliott made one child support payment in August and made only one payment after September 23, 2011, the date Casey was killed in a motor vehicle accident.

¶ 7 At the time of Casey's unexpected death, L.S. resided with Sebby, who provided housing and financial support for her granddaughter until October 30, 2011. On October 14, 2011,

without serving L.S. or Sebby, Elliott filed a petition for permanent and temporary custody of L.S. in the parentage action, La Salle County Case No. 10-F-321.

¶ 8 Four days later, on October 18, 2011, the trial court granted Elliott's emergency motion for temporary custody of L.S. The court wrote, "in accordance with the Superior Rights Doctrine, the Respondent Michael Elliott, is awarded temporary physical custody of the minor child, [L.S.]." However, the court did not conduct a hearing to determine the best interests of L.S.

¶ 9 On October 28, 2011, Sebby filed an emergency motion to vacate the court's October 18, 2011, order in the parentage action. She also filed motions for temporary and permanent custody of L.S. and an emergency petition for leave to intervene in the same proceeding. Sebby provided notice of her pleadings to Elliott through his attorney.

¶ 10 Elliott and Sebby appeared in court on October 28, 2011, and entered into an agreed order which granted Elliott temporary physical custody of L.S. subject to liberal visitation privileges for Sebby. On that date, Sebby withdrew her emergency motion to vacate the October 18, 2011, order. This agreed order specifically preserved Elliott's right to contest Sebby's standing to seek custody. As agreed, and pursuant to the terms of the October 28, 2011, order, Sebby delivered L.S. to Elliott on October 30, 2011, in the lobby of the Marseilles Police Department.

¶ 11 On February 27, 2012, the court conducted a hearing to determine Sebby's standing to seek custody of L.S. as requested in her petition dated October 28, 2011. Sebby first called Elliott as an adverse witness.

¶ 12 At the time of the hearing on February 27, 2012, Elliott admitted he had a pending charge for possession of heroin, and he admitted to residing in a halfway house in Waukegan for three

months in 2010 in an attempt to recover from his heroin addiction. While in the halfway house, he was charged with possession of a hypodermic needle, but the charges were dismissed. Elliott stated he was incarcerated in the Department of Corrections from February 2009 until November 2009 for violating his probation for a previous theft conviction.

¶ 13 Elliott admitted providing no financial support for L.S. in 2008 and 2010. He testified that he paid \$200 to Casey in 2009. According to Elliott, he began paying court-ordered support for L.S. in August 2011. Elliott admitted he did not have much to do with L.S. until he took the genetic test establishing paternity.

¶ 14 Sebby testified Elliott was involved with L.S.'s care shortly after her birth on November 6, 2007, until Easter of 2008, when his involvement ceased until March 2011. Sebby testified that L.S. spent two overnight visits with Elliott in August 2011, and she further agreed Elliott visited L.S. once in September, before Casey's death.

¶ 15 David Elliott, Jr., Elliott's father, testified that Casey and L.S. lived with the Spencers, a couple, for about three months in the middle of 2008. During this time period, Elliott would meet Casey and L.S. at a park. Carla Elliott, Elliott's mother, stated that, after Elliott was adjudicated the father in 2011, he would see L.S. on a monthly basis.

¶ 16 Sebby also called several witnesses who testified Casey lived a transitory lifestyle and often moved to different locations with various romantic partners after L.S.'s birth. Casey would occasionally take L.S. with her, but she regularly left L.S. in Sebby's care.

¶ 17 Elliott testified that, in the beginning of 2010, he saw L.S. two to three times per week when he took L.S. and Casey out to eat and for ice cream. He also claimed that he talked to L.S. on the phone while he lived in the halfway house in Waukegan in 2010. Elliott also testified that while he was working at McDonald's, Casey brought L.S. to see him at work four or five days a

week. Elliott also stated that, in addition to the work visits, he saw L.S. two to three times a week.

¶ 18 The court first applied the legal presumption that "when the custodial parent dies, the minor child will then be considered to be in the physical custody of the surviving natural parent even though the child is actually staying with someone else." *In re Custody of O'Rourke*, 160 Ill. App. 3d 584, 587-88 (1987). The trial court noted Sebby had standing to pursue custody of L.S. only if her parents voluntarily relinquished physical custody of her. 750 ILCS 5/601(b)(2) (West 2010).

¶ 19 For purposes of determining if Elliott relinquished physical custody of the child at any point in time, the court concluded that Elliott's conduct could only be evaluated after he was legally determined to be L.S.'s father on January 31, 2011. The court noted Elliott saw L.S. at his place of employment four or five times a week in 2011, and he cooperated in the parentage action. The court further considered that Elliott sometimes provided Casey with money when needed for L.S. The court ultimately concluded, based on this evidence, Elliott did not voluntarily relinquish physical custody of L.S. after January 31, 2011. Consequently, the court denied Sebby's petitions for temporary and permanent custody based on her lack of standing. Sebby appeals.

¶ 20

ANALYSIS

¶ 21 On appeal, Sebby argues the trial court erred because both Casey and Elliott voluntarily and indefinitely relinquished custody of L.S. to Sebby before Casey's untimely death. In contrast, Elliott argues once paternity was established by court order in 2011, he did not relinquish custody of his daughter to anyone other than her mother, Casey, and the trial court

correctly applied the law when it presumed physical custody of L.S. transferred to him upon Casey's death.

¶ 22 As an initial matter, we note the parties disagree over the standard of review. Sebby argues the issue of standing is a question of law and, therefore, is reviewed *de novo*. See *In re Custody of M.C.C.*, 383 Ill. App. 3d 913, 918 (2008). However, Elliott argues that we should review the trial court's decision for an abuse of discretion based on *Shinall v. Carter*, 2012 IL App (3d) 110302, ¶ 30. Whether a nonparent has standing to pursue custody of a child is a question of law subject to *de novo* review. *In re A.W.J.*, 316 Ill. App. 3d 91, 96 (2000). However, whether the child is in the physical custody of a parent at the time the petition was filed is a question of fact which will not be overturned on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Carey*, 188 Ill. App. 3d 1040, 1050 (1989).

¶ 23 The Illinois Parentage Act of 1984 provides that a nonparent's standing is to be determined pursuant to section 601(b)(2) of the Dissolution Act. 750 ILCS 45/14(a)(1) (West 2010). This provision of the Dissolution Act provides that a nonparent may seek custody of a child "only if [the child] *is not* in the physical custody of one of his parents[.]" (Emphasis added.) 750 ILCS 5/601(b)(2) (West 2010). The standing requirement is designed to "'ensure[] that the superior right of natural parents to the care and custody of their children is safeguarded.'" *In re A.W.J.*, 197 Ill. 2d 492, 497 (2001), quoting *In re Petition of Kirchner*, 164 Ill. 2d 468, 491 (1995). This provision, thus, presents a threshold standing requirement that the nonparent "allege and prove that the child is not in the physical custody of one parent *at the time the petition is filed*." (Emphasis added.) *In re Estate of K.E.S.*, 347 Ill. App. 3d 452, 465 (2004). The standing requirement applies to motions to intervene, as well as initial custody petitions. *In re Parentage of Unborn Child Brumfield*, 284 Ill. App. 3d 950, 954 (1996).

¶ 24 Physical custody has been construed as meaning "something more than mere physical possession of the child at the time custody litigation is initiated." *In re Marriage of Nicholas*, 170 Ill. App. 3d 171, 176 (1988). By the same token, the death of one parent does not automatically "vest" physical custody in the surviving parent. *Brumfield*, 284 Ill. App. 3d at 958, quoting *Nicholas*, 170 Ill. App. 3d at 178. Rather than a simple formulaic approach, our courts have determined that, for purposes of establishing a nonparent's standing, physical custody is based upon several factors, including: (1) how the child came to be in the actual physical possession of the third party (*In re Marriage of Santa Cruz*, 172 Ill. App. 3d 775, 783 (1988)); (2) whether the noncustodial parent consented to the third party's physical possession of the child (*Carey*, 188 Ill. App. 3d at 1050); (3) the reason the parent gave up control of the child (*In re Custody of Peterson*, 112 Ill. 2d 48, 53-54 (1986)); (4) the duration of the possession by the nonparent (*Carey*, 188 Ill. App. 3d at 1050); (5) who was responsible for the care of the child before any initial custody order (*Santa Cruz*, 172 Ill. App. 3d at 773); and (6) the relationship and contact between the child and the nonparent (*In re Marriage of Gustafson*, 181 Ill. App. 3d 472, 479 (1989)).

¶ 25 Here, the record clearly established that, when Elliott filed his petition for custody on October 14, 2011, the child was in Sebby's physical possession. On October 28, 2011, when Sebby filed her petition to intervene, the child was still in her physical possession. Physical possession of the child was not transferred to Elliott until an agreed order of temporary custody was entered after Sebby filed her petition. While physical possession of the child does not equate with physical custody, the fact that the child was in the physical possession of Sebby when the custody proceeding was initiated required the trial court to consider the unique circumstances surrounding how the child came to be in Sebby's actual physical possession in

order to determine her standing. I find nothing in the record to indicate that the trial court gave any consideration to circumstances which placed the child in Sebby's physical possession.

Because the court failed to properly consider the facts giving rise to Sebby's physical control of the child, its decision as to whether the child was in Elliott's physical custody at the time the custody petitions were filed was against the manifest weight of the evidence.

¶ 26 Considering the appropriate factors listed above, L.S. came into the actual physical possession of Sebby following the death of the child's mother on September 23, 2011. However, the record also established that L.S. resided with Sebby since April of 2008, often while the mother lived with a series of boyfriends. Periodically, the mother would return and reunite with the child, but always at Sebby's home. Due to the mother's extended absences and Elliott's apparent unwillingness to take custody of L.S., Sebby became the *de facto* caregiver for the child. The record established that, from the time of the child's birth on November 7, 2007, until nearly three years later when Elliott was made the subject of a petition by the State to establish his paternity of the child for public aid reimbursement purposes, Elliott had only sporadic contacts with the child. During L.S.'s entire life up until Elliott assumed court-ordered temporary custody, Sebby provided for all the financial needs of the child and her mother. Elliott provided one court-ordered child support payment of \$68.90 in August 2011 and another such payment which arrived a few days after the mother was killed. He testified that he gave L.S.'s mother money periodically and that he bought meals for the child on several occasions.

¶ 27 The record also established that Elliott knew that the child's mother left L.S. with Sebby while she moved in with her various boyfriends, yet he did nothing to challenge Sebby's physical possession of the child during those two years. The record also established that, from November 2008 until November 2009, Elliott was incarcerated in the Illinois Department of Corrections

-serving a three-year sentence on a felony theft conviction. An incarcerated parent, by virtue of his or her incarceration, does not have physical custody of his or children. *Naylor v. Kindred*, 250 Ill. App. 3d 997, 1009 (1993). While he was not incarcerated on the date the instant custody petition was filed, his incarceration and subsequent period of mandatory supervised release were factors which should be considered when determining whether he had voluntarily relinquished actual physical possession of L.S. to Sebby at the time the petition was filed. At the very least, his incarceration explains why L.S. came to be in the actual physical possession of Sebby when L.S.'s mother abandoned the child to move in with her boyfriends. Elliott's inability to assert his right to custody during his incarceration necessitated Sebby's assuming of actual physical possession of L.S.

¶ 28 When paternity was established by a court order entered January 31, 2011, sole custody of the child was given to the child's mother. The record is void of any indication that Elliott sought custody of the child and, by all appearances, he never sought custody of the child until October 14, 2011, when he filed his petition for custody along with a petition to terminate his child support obligation. Thus, the only reasonable conclusion to be reached based upon this record is that L.S. had been in the physical possession of Sebby for the entire three years since birth and that Elliott voluntarily accepted this fact and did nothing to assert his parental rights to custody of L.S.

¶ 29 Given the totality of the record, it was against the manifest weight of the evidence for the trial court to conclude that Elliott had not voluntarily relinquished physical custody of L.S. I would find that the trial court erred in dismissing Sebby's petition for lack of standing, and I would remand the matter for a hearing to determine what custody arrangement is in the best interest of L.S.

¶ 30 Moreover, we take judicial notice that, during the pendency of this appeal, Elliott was incarcerated once again on June 28, 2012. He is currently serving an 18-month sentence for possession of a controlled substance and has an anticipated release date of March 28, 2013. *People v. Young*, 355 Ill. App. 3d 317, 321 n. 1 (2005) (court may take judicial notice of inmate information that appears on the Illinois Department of Corrections website). We hold, therefore, that Elliott's current incarceration makes it impossible for this court to affirm any temporary custody order which granted him custody of L.S. As the *Naylor* court explained:

"[A]n incarcerated parent, much like a deceased parent, is no longer able to care for, supervise, provide a home, prepare food, obtain medical treatment, or be involved in the daily life of a child. In short, an incarcerated parent cannot fulfill the role of physical custodian of the child." *Naylor*, 250 Ill. App. 3d at 1009.

¶ 31 We further find that, as of June 28, 2012, L.S. was no longer in the physical custody of Elliott for purposes of establishing standing under section 601(b) of the Dissolution Act. Based on Elliott's incarceration, Sebby would have standing to seek custody of L.S. *Milenkovic v. Milenkovic*, 93 Ill. App. 3d 204, 211-12 (1981).

¶ 32 Moreover, without being apprised of the current custodial arrangements for L.S. while Elliott is incarcerated, it would appear that this appeal is moot. A case on appeal is rendered moot where the issues that were presented in the trial court do not exist any longer because intervening events have rendered it impossible for the reviewing court to grant the relief requested. *In re India B.*, 202 Ill. 2d 522, 542 (2002). Mootness can be raised *sua sponte* by a court of review. *Marion Hospital Corp. v. Illinois Health Facilities Planning Board*, 201 Ill. 2d 465, 471 (2002).

¶ 33 Here, since L.S. is no longer in Elliott's custody due to his incarceration, the child must, undoubtedly, be the subject of either a guardianship proceeding under the Probate Act of 1975 (755 ILCS 5/11-5(b) (West 2010)) or a petition for wardship of a neglected or dependent minor under the Juvenile Court Act of 1987 (705 ILCS 401/1-1 *et seq.* (West 2010)). In either case, the current dispute over whether Elliott had physical custody of L.S. when he filed the petition for custody in the instant proceedings is, likely, no longer relevant. On remand, we direct the trial court to make a determination as to whether L.S. is the subject of another custody ruling. If not, at least while Elliott remains incarcerated, Sebby has standing in the instant matter.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of La Salle County, finding that petitioner lacked standing to seek custody of the minor, is reversed. The matter is remanded to the circuit court for a custody determination based upon the child's best interest, and the circuit court is directed to determine whether other proceedings have rendered moot Elliott's petition in the instant matter.

¶ 36 Reversed and remanded with direction.

¶ 37 JUSTICE WRIGHT, dissenting.

¶ 38 I agree with the majority's conclusion that Elliott, like Casey, periodically voluntarily relinquished physical custody of L.S. to Sebby for indefinite periods of time before Casey's death. Clearly, by allowing Sebby to care for L.S. when Casey was unavailable to do so, Elliott avoided the inconvenience of modifying his lifestyle in order to provide the financial, physical, and emotional needs of his biological child, both before and after the commencement of the paternity action.

¶ 39 When Casey died on September 23, 2011, L.S. was no longer in the physical custody of either parent because Casey was deceased and Elliott was a detached parent who had never requested physical custody of L.S. Therefore, on September 23, 2011, I agree Sebby had standing to intervene in the paternity action.

¶ 40 However, the status quo changed on October 18, 2011, when the court named Elliott as the temporary physical custodian for L.S. Ten days later, Sebby filed a petition to intervene and a motion to vacate the October 18, 2011 order.

¶ 41 Unless vacated, this October 18, 2011 court order extinguished Sebby's standing to intervene in the paternity action, because Elliott, a parent, had a valid court order stating he was entitled to temporary physical custody of L.S. on that date. Therefore, Sebby's continued physical custody of the minor after October 18, 2011 was contrary to that court order.

¶ 42 Sebby's decision to withdraw her challenge of the October 18, 2011 order prevents this court from now considering whether the trial court's failure to conduct a best interests inquiry before granting physical custody to Elliott renders the October 18, 2011 order unenforceable. See *In re B.B.*, 2011 IL App (4th) 110521, ¶ 31 ("[i]n determining custody under the Parentage Act, courts are to apply the relevant provisions contained in the Dissolution Act"); 750 ILCS 45/14(a)(1) (West 2010); 750 ILCS 5/602 (West 2010) (custody determinations should consider the best interests of the child).

¶ 43 Later, during the hearing on standing conducted on February 27, 2012, the court learned that Elliott had a pending criminal charge for the unlawful possession of heroin, his drug of choice. Obviously, Elliott's propensity to make unlawful lifestyle choices, inconsistent with the best interests of his child, would have become evident to the trial court if a best interests inquiry took place on or before October 18, 2011. Certainly, the trial court could have discovered

Elliott was a self-admitted former heroin addict with a troubling criminal history if a serious best interests inquiry occurred.

¶ 44 It is also troubling to me that Elliott appears to now be serving a sentence in the Department of Corrections for possession of heroin with an anticipated mandatory supervised release date of March 28, 2013. *People v. Young*, 355 Ill. App. 3d 317, 321 n. 1 (2005) (court may take judicial notice of inmate information that appears on the Department of Corrections website). Thus, as the majority notes, it is unclear who has physical custody of L.S. at the time of this appeal.

¶ 45 Nonetheless, I apply the tunnel vision necessary to examine the status of physical custody on October 28, 2011, the date Sebby sought to intervene in the paternity action. I believe the trial court's ruling regarding Sebby's lack of standing on that date was correct only because Sebby abandoned her well-founded challenge to the validity of the October 18, 2011 order removing L.S. from her established home without first considering her best interests.

¶ 46 Moreover, I point out that Sebby could have invoked the protections of the Juvenile Court Act of 1987 for L.S. at any time, by reporting, Elliott had abandoned and neglected his daughter in the past. 705 ILCS 405/2-3 (West 2010). However, based on the record before us, it appears Sebby did not do so for reasons that are not apparent of record.