

NOTICE  
Decision filed 08/11/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 160075-U

NO. 5-16-0075

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

---

<i>In re</i> ESTATE OF P.M.T.W., a Minor	)	Appeal from the
	)	Circuit Court of
(Sara H., Guardian of P.M.T.W., a Minor,	)	Wayne County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 15-P-17
	)	
Dustin E.W.,	)	Honorable
	)	David K. Overstreet,
Respondent-Appellant).	)	Judge, presiding.

---

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.  
Justices Welch and Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court erred in finding that grandmother had standing to petition for guardianship because grandmother failed to rebut presumption that father was willing and able to make and carry out day-to-day child-care decisions for his daughter.

¶ 2 The petitioner, Sara H., filed a petition for guardianship of P.M.T.W., her granddaughter, in the circuit court of Wayne County. The circuit court determined that the respondent, Dustin E.W., was not willing to make and carry out day-to-day child-care decisions for P.M.T.W. and that awarding Sara guardianship was in P.M.T.W.'s best interest. On appeal, Dustin argues that the circuit court erred in finding that Sara had

rebutted the presumption that he was willing and able to care for P.M.T.W. For the following reasons, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 P.M.T.W. was born December 8, 2014, to Dustin and Danielle T., who lived together but were not married. Four months later, on April 14, 2015, Sara, Danielle's mother, filed an emergency petition for temporary guardianship, alleging that she had physical custody of P.M.T.W. but that Danielle had in the past taken or threatened to take P.M.T.W. from Sara's custody to an unidentified location. Sara alleged that Dustin had had very little contact with P.M.T.W. since March 7, 2015, and faced domestic battery charges resulting from an incident involving Danielle. Without hearing evidence, the circuit court granted Sara temporary guardianship of P.M.T.W. on the same date.

¶ 5 On the same date, Sara also filed a second petition for guardianship of P.M.T.W., in which she alleged that P.M.T.W. resided with her and that Danielle had executed an entry of appearance and consent to Sara acting as guardian. Sara alleged that Dustin was not able or willing to carry out the day-to-day duties for P.M.T.W. and had displayed little or no interest in her day-to-day care.

¶ 6 On May 13, 2015, Dustin filed a motion to dismiss Sara's petition, which the circuit court denied on May 20, 2015. On May 20, 2015, Dustin also filed a petition to establish paternity, child custody, and visitation. In his petition, Dustin requested that the circuit court establish that he was P.M.T.W.'s father and grant him sole custody of P.M.T.W.

¶ 7 At a hearing on November 5, 2015, the circuit court addressed whether Sara had standing to assert guardianship of P.M.T.W., who was 11 months old. At the hearing, Dustin testified that he was 20 years old and lived in his own home. Dustin testified that he had been employed by Warrior Logging and Perforating, Inc., for two years, earning \$12 an hour plus commission for an average of 50 hours per week. Dustin identified 8 a.m. to 4 p.m. as his primary work schedule.

¶ 8 Dustin testified that Danielle lived with him when P.M.T.W. was born, and they cared for P.M.T.W. together. Dustin testified that when P.M.T.W. lived with him, he bathed and fed her. Dustin testified that P.M.T.W. had a room, a bed, clothes, and food in his home. Dustin testified that his parents, Russell and Cindy W., lived less than 500 feet away from his home, and they also helped care for P.M.T.W. Dustin acknowledged that Sara also began providing care for P.M.T.W. at her birth, even keeping her on weekends, even though he did not work weekends. Dustin testified that he had paid Sara approximately \$200 to help provide for P.M.T.W.

¶ 9 Dustin testified that although Danielle lived in his home when P.M.T.W. was born and at the time of the hearing, she had periodically returned to live with Sara. Specifically, Dustin testified that on February 20, 2015, he was charged with domestic battery for an incident involving Danielle and that following this incident, Danielle and P.M.T.W. moved from his home to Sara's home for a couple of months. Dustin testified that he visited P.M.T.W. approximately 10 times between February 20, 2015, and April 2015, when Sara acquired temporary guardianship.

¶ 10 Dustin also testified, however, that he saw P.M.T.W. every day prior to the guardianship order. Dustin testified that Danielle allowed him visitation with P.M.T.W. and supervised his visits. Dustin testified that after the temporary guardianship was established, he requested from Sara visitation with P.M.T.W. approximately seven times, and Cindy or Sara supervised his visits. Dustin testified that Danielle had told him he was not allowed to go to Sara's house.

¶ 11 Dustin acknowledged that in June 2015, Sara and Cindy arranged for his parents to keep P.M.T.W. at their home from Thursday morning until Friday evening each week. Dustin testified that he thereafter visited P.M.T.W. on Thursdays and Fridays while she stayed in his parents' home. Dustin testified that Cindy would also periodically bring P.M.T.W. to his work, and he would see her for a couple of hours there.

¶ 12 Dustin testified that he cared for P.M.T.W., fed her, and bathed her and that his family supported him and helped him care for P.M.T.W. Dustin testified that he provided diapers and supplies to Cindy and to Sara. Dustin testified that there had been no time wherein he had not had contact with P.M.T.W. for over two weeks. Dustin testified that he at no point intended to relinquish custody or rights to P.M.T.W. Dustin testified that he was willing and able to care for P.M.T.W.

¶ 13 Cindy testified that she had observed Dustin with P.M.T.W. since June 2015. Cindy testified that Dustin fed P.M.T.W., changed her clothes, and changed her diapers. Cindy testified that since June, Dustin generally came to visit P.M.T.W. on Thursday, Friday, or both days, every week.

¶ 14 Cindy testified that Dustin was able to care for P.M.T.W. and had helped her care for his younger siblings, who were eight and four years old at the time of the hearing. Cindy testified that Dustin had helped bathe, feed, and babysit them. Cindy testified that Danielle had told them that Dustin was not welcome at Sara's house and would be arrested if he "step[ped] foot on her property."

¶ 15 Cindy testified that she did not understand why Sara and Danielle did not allow Dustin to be left alone with P.M.T.W. Cindy testified that she abided by the rule, however, so that she may continue the visitation schedule with P.M.T.W.

¶ 16 Russell corroborated Dustin's and Cindy's testimony that Dustin fed, clothed, and cared for P.M.T.W. Russell further corroborated their testimony that Cindy periodically brought P.M.T.W. to the office where he and Dustin worked and that Dustin visited with her there also.

¶ 17 Sara testified that she was 37 years old and lived in Cisne with her 16-year-old son and her boyfriend, Larry Billington. Sara testified that Danielle stayed with her on occasion. Sara testified that Danielle currently lived with Dustin.

¶ 18 Sara testified that when P.M.T.W. was about two weeks old, she began caring for P.M.T.W. in her home for two or three days each week. Sara testified that Dustin and Danielle entered a cycle of taking P.M.T.W. to Dustin's home to visit with P.M.T.W. for a couple of days, then returning her to Sara. Sara testified that P.M.T.W. had lived primarily with her for 9 months of her 11-month life.

¶ 19 Sara testified that in January 2015, she and Larry took P.M.T.W. to the emergency room and that although Danielle and Dustin met them there, once the exam was

completed, Danielle and Dustin left. Sara testified that she returned home with P.M.T.W. and cared for her for seven days as she recovered. Sara testified that Dustin and Danielle then took P.M.T.W. home with them, but within an hour, Danielle returned P.M.T.W. because Danielle and Dustin had argued. Danielle then left P.M.T.W. with Sara. Sara testified that when she thereafter returned to the emergency room because P.M.T.W. had not recovered, she called Dustin and Danielle to meet her, but they did not meet her.

¶ 20 Sara testified that after the February 20, 2015, incident, Danielle moved in with her, and both Danielle and P.M.T.W. stayed in her home for about a month. Sara testified that P.M.T.W. had lived in her home ever since that date. Sara testified that between February 20 and April 14, when Sara acquired temporary guardianship, Dustin had visited P.M.T.W. twice, with each visit lasting a couple of hours. Sara corroborated Dustin's testimony that Dustin had made approximately seven requests to visit P.M.T.W. since Sara had acquired guardianship. Sara allowed the visitation, and each time, Dustin's parents were present. Sara testified that she had requested that Dustin be supervised during any visitation with P.M.T.W. and prohibited Dustin and Danielle from taking P.M.T.W. on their own. Sara explained that Dustin and Danielle "fight all the time."

¶ 21 Sara testified that Dustin had not requested to visit P.M.T.W. since June 21, 2015. Sara testified, however, that she and Cindy had met and agreed that Dustin's parents would keep P.M.T.W. on Thursdays and Fridays beginning June 25, 2015. Sara acknowledged that Dustin had been present three times when she went to pick up P.M.T.W. from Cindy's home.

¶ 22 Sara testified that she attended P.M.T.W.'s well-baby check-ups at the doctor and that Dustin had accompanied her to one of six appointments. Sara testified that Dustin did not provide funds, diapers, formula, or any other supplies for P.M.T.W.

¶ 23 Sara testified that a month prior to the hearing, she took food to Dustin's home. Sara asserted that there was no food in the house and Danielle had been hospitalized because she was not eating. Sara described the home as "a mess," stating that plates on the table contained molded food, Styrofoam cups were located throughout the living room, and clothes were scattered throughout the floor. Sara testified that Danielle showed her P.M.T.W.'s room, and a ferret cage, with a ferret in it, was located inside the bedroom door. Sara testified that bedding and ferret feces were located "all over the floor." Sara testified that Dustin was not ready or able to care for P.M.T.W.

¶ 24 At the hearing, the court took judicial notice of Dustin's petition seeking to establish paternity, child custody, and visitation. The circuit court found, among other things, that Dustin had not parented P.M.T.W. and had not showed his willingness to do so. Accordingly, on November 5, 2015, the circuit court entered its docket order, concluding that Sara had established standing to proceed by rebutting, by a preponderance of the evidence, the presumption that Dustin was willing and able to make and carry out day-to-day child-care decisions concerning P.M.T.W.

¶ 25 On January 21, 2016, the circuit court heard evidence regarding P.M.T.W.'s best interest. The evidence revealed that P.M.T.W. continued to live with Sara, with Thursday, Friday, and holiday visitation at Dustin's parents' home. Despite Danielle's intermittent presence in Sara's home, Sara remained primarily responsible for P.M.T.W.'s

meals and care. Dustin had not contacted Sara. Dustin testified, however, that he fed and cared for P.M.T.W. on the Thursday-Friday visitation at his parents' home, although his parents also continued to help feed, bathe, and care for P.M.T.W. Dustin continued to work and remained living in his own home. Dustin's parents testified that Dustin provided diapers, wipes, clothes, and toys for P.M.T.W.

¶ 26 On January 21, 2016, after hearing the evidence, the circuit court granted Sara guardianship of P.M.T.W.'s person and estate. In its order, the circuit court found that Sara had had physical custody of P.M.T.W. since March 7, 2015, and had provided for her daily needs. The circuit court noted that on April 14, 2015, Danielle had filed an entry of appearance and consent to Sara acting as P.M.T.W.'s guardian. The circuit court found it was in P.M.T.W.'s best interest that Sara be named guardian of her estate and person. On February 19, 2016, Dustin filed notice of appeal. On March 17, 2016, Dustin filed an amended notice of appeal.

¶ 27

#### ANALYSIS

¶ 28 Initially, Sara argues that we lack jurisdiction to hear Dustin's appeal because he failed to file a timely notice of appeal from the circuit court's November 5, 2015, order finding that Sara had standing to assert guardianship. Sara argues that Dustin should have appealed the November 5, 2015, order pursuant to Illinois Supreme Court Rule 304(b)(1) (eff. Feb. 26, 2010).

¶ 29 "[G]enerally an appeal can only be taken from a judgment as to fewer than all claims 'if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both' (Ill. S. Ct. R. 304(a) (eff. Feb. 26,



2010))." *In re Estate of York*, 2015 IL App (1st) 132830, ¶ 20. However, pursuant to Rule 304(b)(1), no such finding is required if the judgment or order is "entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party." Ill. S. Ct. R. 304(b)(1) (eff. Feb. 26, 2010); *In re Estate of York*, 2015 IL App (1st) 132830, ¶ 20. The court has explained that "[o]nly final orders fit within Rule 304(b)(1)." *Stephen v. Huckaba*, 361 Ill. App. 3d 1047, 1051-52 (2005); see also *In re Estate of Mueller*, 275 Ill. App. 3d 128, 139 (1995) ("[f]or purposes of appellate jurisdiction, only those orders which 'finally' determine the right or status of a party are subject to Rule 304(b)(1)").

¶ 30 "The Committee Comments to Rule 304(b)(1) indicate that '[s]ubparagraph (1) applies to orders that are final in character although entered in comprehensive proceedings that include other matters.' " *In re Estate of York*, 2015 IL App (1st) 132830, ¶¶ 20-22. " 'Examples are an order admitting or refusing to admit a will to probate, appointing or removing an executor, or allowing or disallowing a claim.' \*\*\* Ill. S. Ct. R. 304, Committee Comments (rev. Sept. 1988)." *In re Estate of York*, 2015 IL App (1st) 132830, ¶¶ 20-22. Rule 304(b)(1) promotes efficiency and provides certainty by allowing an appeal as to some issues as those issues are resolved during, for example, the lengthy procedure of estate administration. *In re Estate of York*, 2015 IL App (1st) 132830, ¶¶ 20-22.

¶ 31 Accordingly, not every order entered in a guardianship proceeding may be immediately appealed. See generally *In re Estate of Vogt*, 249 Ill. App. 3d 282, 285 (1993) (not every order entered in an estate proceeding may be immediately appealed

pursuant to 304(b)(1)). For appellate jurisdiction, the order must "finally" determine the right or status of a party. *Id.* A final judgment is one that fixes absolutely and finally the rights of the parties in the lawsuit and disposes of the entire controversy or a definite and separate portion thereof; it is final if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. *In re Estate of York*, 2015 IL App (1st) 132830, ¶¶ 20-22; *Stephen*, 361 Ill. App. 3d at 1051-52.

¶ 32 Here, Sara sought guardianship pursuant to section 11-5(b) of the Probate Act of 1975 (Probate Act) (755 ILCS 5/11-5(b) (West 2014)). Pursuant to section 11-5(b) of the Probate Act, the circuit court could not properly grant a petition for guardianship without first conducting bifurcated examinations of two separate factual issues and making separate findings regarding: (1) whether Dustin was willing and able to make and carry out the day-to-day child-care decisions and (2) whether guardianship was in the best interest of the minor. *Id.*; *In re Estate of H.B.*, 2012 IL App (3d) 120475, ¶ 36.

¶ 33 The November 5, 2015, order did not finally determine Sara's right as P.M.T.W.'s guardian. The order was the initial finding regarding standing in a bifurcated procedure, which would include a subsequent evidentiary hearing on P.M.T.W.'s best interest, in order to finally determine whether to grant Sara guardianship of P.M.T.W. Requiring appeal after the first stage of the bifurcated procedure to determine guardianship would thwart the very efficiency Rule 304(b)(1) seeks to establish. After the circuit court entered its findings regarding P.M.T.W.'s best interest, the circuit court awarded Sara guardianship on January 21, 2016. At that time, the circuit court's order became final and

appealable. See generally *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 8 (appeal from final judgment order entails review of final judgment and any interlocutory orders that were a step in the procedural progression leading to the judgment). Dustin's notice of appeal, filed within 30 days of the circuit court's final order, was timely. Ill. S. Ct. R. 303(a) (eff. Jan. 1, 2015). Accordingly, we reject Sara's argument that Dustin was required to file notice of appeal within 30 days of the circuit court's November 5, 2015, order.

¶ 34 Sara argued to the circuit court that although Dustin was able to provide the day-to-day care for P.M.T.W., he was not willing to do so, and therefore, she had standing to petition for guardianship. The circuit court agreed and ultimately appointed Sara as P.M.T.W.'s guardian.

¶ 35 "Generally, the question of standing is reviewed *de novo*." *In re Guardianship of K.R.J.*, 405 Ill. App. 3d 527, 535 (2010). However, the circuit court here also heard evidence and made certain factual findings. "Where a trial court makes factual findings, this court reviews those factual findings under the manifest-weight-of-the-evidence standard." *Id.* Consequently, this court will review the circuit court's factual findings under the manifest-weight-of-the-evidence standard and apply those facts *de novo* to the question of whether Sara had standing; that is, whether she rebutted the presumption that Dustin was willing and able to make and carry out day-to-day child-care decisions regarding P.M.T.W. See *id.* at 535-36.

¶ 36 The appointment of a guardian of a minor is governed by sections 11-1 through 11-18 of the Probate Act (755 ILCS 5/11-1 through 11-18 (West 2014)). The Illinois

Supreme Court has described section 11-5(b) of the Probate Act (755 ILCS 5/11-5(b) (West 2014)) as providing the standing requirement a petitioner must meet before the trial court has jurisdiction to proceed on the petition. *In re R.L.S.*, 218 Ill. 2d 428, 436 (2006) (providing that "standing" in this context means the "threshold statutory requirement that had to be met before the court could proceed to a decision on the merits"); see also *In re Guardianship of K.R.J.*, 405 Ill. App. 3d at 534.

¶ 37 Accordingly, a nonparent has standing to proceed on a petition for guardianship under the Probate Act even when the minor has a parent whose whereabouts are known and whose parental rights have not been terminated, when that nonparent rebuts the statutory presumption that the parent is willing and able to make and carry out day-to-day child-care decisions concerning the minor. 755 ILCS 5/11-5(b) (West 2014); *In re R.L.S.*, 218 Ill. 2d at 436; *In re Guardianship of K.R.J.*, 405 Ill. App. 3d at 534-35. This statutory "presumption may be rebutted by a preponderance of the evidence." 755 ILCS 5/11-5(b) (West 2014); see also *In re R.L.S.*, 218 Ill. 2d at 448; *In re Guardianship of K.R.J.*, 405 Ill. App. 3d at 534-35.

¶ 38 Accordingly, section 11-5(b) of the Probate Act establishes the threshold statutory requirement that a petitioner must meet before the court can proceed to a determination of the best interests of a child. *In re R.L.S.*, 218 Ill. 2d at 436; *In re Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 21. "[T]he standing requirement contained in paragraph (b) protects the superior rights of parents and ensures that guardianship proceedings pass constitutional muster." *In re Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 21 (quoting *In re Guardianship of A.G.G.*, 406 Ill. App. 3d

389, 394 (2011)). "By allowing a guardianship petition to proceed to a hearing on the merits over the wishes of a parent only when the parent has been established to be unwilling or unable to carry out day-to-day child-care decisions, the Probate Act respects the superior rights of parents while also insuring to protect the health, safety, and welfare of children." *In re R.L.S.*, 218 Ill. 2d at 441. If the petitioner fails to rebut the presumption, the petitioner lacks standing, and the trial court lacks jurisdiction to proceed on the petition. See 755 ILCS 5/11-5(b) (West 2014); *In re R.L.S.*, 218 Ill. 2d at 448 (petitioners lack standing to proceed with petition unless court determines they have rebutted presumption that respondent is willing and able to make day-to-day child-care decisions).

¶ 39 Based on the record before us, we do not find that Sara overcame the presumption that Dustin was willing and able to make and carry out day-to-day care decisions concerning P.M.T.W. Instead, we find that Dustin was not afforded this presumption. When P.M.T.W. was four months old, the circuit court entered a temporary guardianship order, without hearing evidence on standing (see *In re A.W.*, 2013 IL App (5th) 130104, ¶ 15), transferring custody and control to Sara as P.M.T.W.'s guardian. See also *In re Estate of H.B.*, 2012 IL App (3d) 120475, ¶ 29 (no provision in Probate Act for emergency guardianship of a child; instead emergency request to remove child from parent care may be addressed using Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq.* (West 2014))). Although Sara testified that she at no time denied Dustin visitation with P.M.T.W., she limited his visitation when she required him to be supervised. A parent's desire for and right to the companionship, care, and custody of his child is an important

interest that undeniably warrants deference and protection. See *Wickham v. Byrne*, 199 Ill. 2d 309, 318 (2002). The evidence that P.M.T.W. had not lived alone in Dustin's home and that Dustin's visitation with P.M.T.W. was sparse must be considered in light of a temporary guardianship order that presented challenges to Dustin's visitation and ability to show he was willing and able to make and carry out day-to-day care decisions concerning P.M.T.W.

¶ 40 Further, the evidence revealed that at the time of the hearing, Dustin was working and could provide a home and bedroom to P.M.T.W., that Dustin cared for P.M.T.W. during his supervised visits, and that Dustin had the support of his family to care for P.M.T.W. The evidence revealed that while visiting P.M.T.W. in his parents' home, he was willing to feed her, bathe her, and care for her. Dustin testified that he was willing and able to care for P.M.T.W., and no evidence was presented to suggest that the care Dustin provided to P.M.T.W. was inadequate.

¶ 41 We recognize the evidence showing that Sara has provided a loving, nurturing, and stable environment for P.M.T.W. However, "[w]hether a nonparent petitioner may have the ability to provide a better environment for the child is not a factor to be considered where standing is in issue so long as the presumption that the natural parent is willing and able to care for the child remains un rebutted." *In re Estate of Johnson*, 284 Ill. App. 3d 1080, 1091 (1996). "To compare the potential of the nonparent against the parent when making a standing determination would jeopardize the custodial rights of natural parents such that any nonparent with better qualifications, albeit a stranger, could be found to have standing to petition for custody notwithstanding the established

threshold adequacy of the natural parent." *Id.* (showing that father previously lacked financial ability to pay child support and maintain health insurance and visited minor on limited basis did not rebut presumption that father was willing and able to make and carry out day-to-day child-care decisions regarding the minor). Accordingly, we conclude that the circuit court erred in finding that Sara had rebutted, by a preponderance of the evidence, the presumption that Dustin was willing and able to make and carry out day-to-day child-care decisions concerning P.M.T.W.

¶ 42

#### CONCLUSION

¶ 43 For the reasons stated, we reverse the judgment of the circuit court, and we remand the cause to the circuit court with directions to dismiss Sara's petition for lack of standing.

¶ 44 Reversed and remanded with directions.