

NOTICE
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2016 IL App (5th) 160090-U

NO. 5-16-0090

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> MARRIAGE OF)	Appeal from the
)	Circuit Court of
KEVIN PHELPS,)	Madison County.
)	
Petitioner,)	
)	
and)	Nos. 03-D-1165 & 15-F-883 (cons.)
)	
MIGNON WILLIAMS-PHELPS,)	
)	
Respondent-Appellee)	
)	Honorable
(Arty E. Phelps, Jr., and Marjorie L. Phelps,)	Philip B. Alfeld,
Intervenors-Appellants).)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing the grandparents' petition for allocation of parental responsibilities for lack of standing where they failed to assert any conditions set forth in section 601.2(b)(5)(A), (B), or (C) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/601.2(b)(5)(A), (B), (C) (West Supp. 2015)) and the childrens' surviving natural parent did not voluntarily and indefinitely relinquish custody of the children.

¶ 2 On October 6, 2004, the petitioner, Kevin Phelps, and the respondent, Mignon Phelps, divorced. The parties had two minor children, Christina and Madilyn. Kevin was

awarded custody, and Mignon was granted visitation. On December 8, 2015, Kevin died. The children's paternal grandparents, Arty and Marjorie Phelps, took possession of the children and on December 14, 2015, filed a petition for custody pursuant to section 601(a)(2) of the Illinois Marriage and Dissolution of Marriage Act (the Act).¹ 750 ILCS 5/601(a)(2) (West 2014). On January 6, 2016, Mignon filed a motion to dismiss the Phelps' petition asserting that they lacked standing and that their petition failed to allege sufficient facts to state a claim for relief. Following a hearing, the trial court dismissed the Phelps' petition for lack of standing. On March 2, 2016, the trial court ordered that the children be returned to Mignon. The Phelps filed a notice of appeal. We affirm.

¶ 3

BACKGROUND

¶ 4 Kevin and Mignon married on March 22, 2002. The parties had two children: Christina, born November 11, 2001, and Madilyn, born September 18, 2002. A judgment of dissolution of marriage was entered on October 6, 2004. Kevin was awarded custody of the children, and Mignon was awarded visitation two days per week from 1 to 5 p.m.

¹750 ILCS 5/601 was repealed effective January 1, 2016. 750 ILCS 5/601.2, effective January 1, 2016, sets out the standing requirements for commencement of proceedings for allocation of parental responsibilities (formerly referred to as child custody). "This Act applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered." 750 ILCS 5/801(b) (West Supp. 2015).

Mignon was ordered to pay \$100 per month for child support and to pay one-half of any medical or dental related expenses.

¶ 5 In 2004, Kevin and the children moved in with the Phelps where they lived until a little over one month before his death. On April 29, 2008, Kevin filed a petition for contempt alleging that Mignon failed to pay child support and one-half of the children's medical and dental expenses. On July 2, 2008, the court entered a default order against Mignon ordering her to pay \$20 per month on a child support arrearage of \$3,353.92. Mignon was unemployed from July 27, 2008, through May 11, 2010. Between August 25, 2008, and February 10, 2014, there were numerous court proceedings for noncompliance with the child support order.

¶ 6 Kevin died on December 8, 2015. On December 14, 2015, the Phelps filed a petition for custody. They alleged that following Kevin's death, the children had been in their physical care and that Mignon had voluntarily relinquished physical custody of the children to them. On the same day, they filed an emergency petition for temporary custody.

¶ 7 On January 6, 2016, Mignon filed an emergency petition for return of the minor children to legal parent and for other relief. On the same day, she filed a motion to dismiss and/or strike the petition for custody alleging that the Phelps lacked standing. On February 9, 2016, the trial court heard the motion to dismiss the Phelps' petition for custody.

¶ 8 Mignon testified that she is currently married and resides in a three-bedroom home that she and her husband are planning to purchase. She admitted that in the past her

home life had not been stable. She had five children and very limited financial resources. Mignon testified that her life is much different now than it was in the past. She has been married for 7½ years. She has earned a bachelor's degree in marketing and a minor in management from McKendree University. She works in customer service for Republica. Her husband is a shipping coordinator. She testified that her education enabled her to obtain her present employment, stability, and the ability to purchase her home.

¶ 9 Mignon admitted that in the past she had financial issues and had not always paid her child support in a timely manner. She stated that she had paid the arrearage and is current on her payments. Mignon testified that she had given her daughters cash for special days at school and had helped purchase school supplies. She stated that when extracurricular costs had arisen Kevin had approached her about it and she had contributed when she was able. Marjorie testified that Mignon had provided some school supplies for the children. Arty stated that Mignon had contributed to the girls' school lunch fund.

¶ 10 Mignon testified that she and Kevin had cooperated regarding visitation so she had never sought to modify the original custody order. Mignon testified that prior to Kevin's death she had exercised regular visitation. She had contacted Christina and Madilyn at least every week through telephone calls, text messaging, and Facebook. Her daughters had spent weekends with her, and she had clothes for them at her house. Sometimes she had allowed her daughters to spend the night with friends instead of her because she felt friendships were important at their age. She stated that Christina and Madilyn had spent the weekend with her the weekend before Kevin's death. She testified that she had taken

the girls numerous places including Gatlinburg, Tennessee; the Lincoln Museum in Springfield, Illinois; Florida; and Evansville, Indiana.

¶ 11 Arty testified that he usually transported Christina and Madilyn for visitation and that Mignon had exercised her visitation at times and at other times she had not. He claimed that there were times when Mignon had not seen the children for one month. Arty admitted that it was possible that Mignon had not always exercised her visitation with the girls because it was difficult to schedule around their activities. He testified that she had exercised her summer and Christmas visitation and that she had kept the children for the entire visitation period unless one of the girls became ill.

¶ 12 Arty testified that Mignon had not attended parent/teacher conferences, had not helped the girls with their homework, and had not made them do their homework when they were at her house. Mignon denied that she had not worked on homework with Christina and Madilyn. She said that when she was in school they had done homework together. She also testified that she had generally helped with math homework and that her husband had helped with history. She had encouraged them to do their homework and had made them do it on Friday night so that they could enjoy themselves on Saturday and Sunday.

¶ 13 Arty testified that Mignon had not always given Christina and Madilyn Christmas or birthday presents. Mignon testified that she had celebrated her daughters' birthdays and Christmas at her house and had not sent the gifts with them because Marjorie had thrown away clothes she had sent in the past. Marjorie acknowledged that she had given away clothes Mignon had sent with the girls.

¶ 14 Arty testified that Mignon approached him at Kevin's funeral and told him that she planned to start picking up the girls' "stuff" the next day. He said that he would not discuss it at that time. She said she did not want to have to call the police, and he reiterated that he would not discuss it at that time. Arty stated that Mignon then approached Kevin's fiancé causing a scene and that the funeral director had to escort her out.

¶ 15 Mignon testified that she spoke to Arty at Kevin's funeral. She then went to talk to Christina and Madilyn to arrange a time to discuss coming to live with her. The conversation was interrupted when her ex-husband, the father of her oldest daughter, Ashley, came over and started a big scene. She said numerous people came over and ganged up on her telling her to "get out." She left and went out to her vehicle. Her ex-husband took her daughters and drove away.

¶ 16 Mignon testified that she had not seen Christina and Madilyn since Kevin's funeral and had been attempting to find out where they were staying. She texted her daughter and asked where they were and her daughter claimed she did not know where they were staying. Mignon stated that the Phelps' would not let her see her daughters. Mignon testified that she contacted the police to help find her daughters, but they told her they could merely accompany her to the Phelps' home and could not do anything else. Because she felt the police could not help, she did not ask them to go to the Phelps' house.

¶ 17 Mignon testified that she had texted Madilyn every other day since Kevin died but had received no response. She stated that the girls had not texted her since Kevin's death

and that Christina had only responded to her texts. Mignon testified that she had not voluntarily relinquished custody of her daughters following Kevin's death and had never given the Phelpses or anyone any indication that she did not want custody of them. Arty testified that Mignon had not taken any steps to obtain custody of the girls since Kevin's death.

¶ 18 The court took the motion to dismiss under advisement and entered a temporary order granting the Phelpses physical custody of the children and Mignon visitation two days per week with no overnight visitation. On February 23, 2016, the trial court entered an order dismissing the Phelpses' petition for custody finding that they lacked standing. On March 8, 2016, the Phelpses filed a timely notice of appeal. The same day, they filed a motion for stay pending the appeal.

¶ 19

ANALYSIS

¶ 20 The Phelpses argue that the trial court erred in dismissing their petition for custody for lack of standing. Whether a nonparent has standing to seek custody is a question of law and is, therefore, subject to *de novo* review. *In re Custody of Groff*, 332 Ill. App. 3d 1108, 1112 (2002). Before it can address the issue of custody, the trial court must first determine whether a nonparent has standing. *Id.* The burden of proving standing falls on the nonparent. *Id.* The standing requirement is designed to safeguard the natural parent's superior right to the care and custody of her child. *In re Marriage of Archibald*, 363 Ill. App. 3d 725, 736 (2006).

¶ 21 On January 1, 2016, the section in the Act on standing for commencement of proceedings for allocation of parental responsibilities was revised. 750 ILCS 5/601.2

(West Supp. 2015). Section 601.2(b)(5) specifically sets out when a grandparent may commence a proceeding for allocation of parental responsibilities with respect to a child when one of the parents is deceased. 750 ILCS 5/601.2(b)(5) (West Supp. 2015). It provides that a grandparent may commence a proceeding if the surviving parent had been absent from the marital abode for more than one month without the spouse knowing her whereabouts; if the surviving spouse was in State or federal custody; or if the surviving parent had received supervision for or been convicted of various crimes or for violating an order of protection. 750 ILCS 5.601.2(b)(5)(A), (B), (C) (West Supp. 2015). The Phelpses do not allege any of these conditions; nor was any evidence presented at the hearing relevant to these factors. Rather, the Phelpses allege that this section does not bar their claim of standing and that they have standing pursuant to section 601.2(b)(3).

¶ 22 Section 601.2(b)(3) provides that a person, other than a parent, may file a petition for allocation of parental responsibilities if the child is not in the physical custody of one of his or her parents. 750 ILCS 5/601.2(b)(3) (West Supp. 2015). This section is identical to its predecessor section 601(b)(2) except child custody is referred to as allocation of parental responsibilities. The Phelpses assert that Christina and Madilyn were in their physical custody and not in the physical custody of Mignon.

¶ 23 The law presumes that a natural parent has a superior right to the care, custody, and control of his child and that it is in the best interest of the child to be raised by natural parents. *In re Custody of M.C.C.*, 383 Ill. App. 3d 913, 917 (2008). To establish standing, a nonparent has the burden of showing that the child is not in the physical

custody of one of his parents. *In re Marriage of Houghton*, 301 Ill. App. 3d 775, 780-81 (1998).

¶ 24 In *In re Custody of Peterson*, the Illinois Supreme Court set forth the standards to be applied in determining whether a nonparent has standing to seek custody of a child. *In re Custody of Peterson*, 112 Ill. 2d 48 (1986). In that case, the maternal grandparents sought custody of their granddaughter after the child's mother died. *Id.* at 51. Following her divorce, the mother was awarded physical custody of her daughter, and the mother and child lived with the grandparents until the mother died. *Id.* at 54. The grandparents asserted a claim to custody following the mother's funeral, and the father immediately challenged the claim. *Id.* at 55. The grandparents asserted that they had standing pursuant to section 601(b)(2) because their granddaughter was not in the physical custody of one of her parents. *Id.* at 52. The supreme court found that the standing requirement under section 601(b)(2) should not turn on who has physical possession of the child at the moment of filing the petition for custody because to hold differently would encourage abduction of minors to satisfy the literal terms of the standing requirement and would defeat the statutory intent. *Id.* at 53-54. The court found that there was no transfer of physical custody to the grandparents because the mother had legal custody of the child and continued to live with her until her death. *Id.* at 54. The court found that the father exercised his visitation with the child, and determined that, for standing purposes, the child "must be considered to have been, upon her mother's death, in the physical custody of her father." *Id.* It found that the child was in the sole care of the grandparents only

through the fortuitous occurrence of the mother's death. *Id.* The court held that the grandparents did not have standing under section 601(b)(2). *Id.* at 55.

¶ 25 Physical possession of a child does not necessarily translate into physical custody of the child. *In re Custody of M.C.C.*, 383 Ill. App. 3d at 917. Upon the death of the custodial parent, the minor child will be considered to be in the physical custody of the surviving natural parent even if the child is living with someone else. *Id.* at 918. Even a voluntary turnover of a child does not necessarily deprive the parent of physical custody. *In re Marriage of Houghton*, 301 Ill. App. 3d at 781. The burden is on the nonparent to show that the parent somehow voluntarily and indefinitely relinquished the custody of the child. *In re Marriage of Archibald*, 363 Ill. App. 3d at 736. There is no clear test to determine whether a child is not in the physical custody of one of his parents. *In re Custody of M.C.C.*, 383 Ill. App. 3d at 917. The court looks to see who was responsible for the care and welfare of the child prior to the initiation of custody proceedings, the manner in which physical possession of the child was acquired, and the nature and duration of the possession. *In re Marriage of Houghton*, 301 Ill. App. 3d at 781.

¶ 26 In the present case, Kevin had custody of Christina and Madilyn prior to his death. Kevin's death resulted in the Phelps having physical possession of the girls. The burden fell to the Phelps to prove that Mignon voluntarily and indefinitely relinquished custody of her daughters to them.

¶ 27 Mignon testified that she exercised regular visitation with her daughters and that she had contact with them every week. Arty testified that Mignon had exercised her visitation at times and had not at other times. He admitted that the longest she had gone

without seeing her children was one month. He also stated that she had always exercised her summer and Christmas visitation and that she had kept the children for the entire visitation period unless one of the girls fell ill. Christina and Madilyn had stayed with Mignon on weekends and had been with her the weekend before Kevin's death. Mignon had taken her daughters on various trips. Although Mignon had been in arrears in her child support payments in the past, she had gone to school and earned a degree enabling her to obtain a good job and was current on her payments. Arty testified that Mignon had contributed to the girls' school lunch fund. Marjorie testified that Mignon had helped pay for school supplies. Mignon testified that she had contributed to the cost of Christina and Madilyn's extracurricular activities when she was able.

¶ 28 Mignon testified that she approached Christina and Madilyn at Kevin's funeral to set up a time to discuss them coming to live with her. Arty testified that Mignon told him at the funeral that she planned to pick up the girls' "stuff" the next day. There is differing testimony about what ensued, but a scene was created, and Mignon left before any further discussions took place.

¶ 29 Mignon testified that she had not voluntarily relinquished custody of Christina and Madilyn following Kevin's death and that she had never given anyone any indication that she did not want custody of them. Mignon testified that she did not know where her daughters were staying following Kevin's death; that she asked one of her daughters, who claimed not to know; and that she sought assistance from the police, who were unable to help her. Mignon testified that she texted Madilyn every other day following Kevin's death and that she maintained contact with Christina.

¶ 30 The Phelps acquired physical possession of Christina and Madilyn due to Kevin's death. Prior to that, the girls were in Kevin's custody, and he was responsible for their care. Mignon regularly exercised visitation with her daughters. Upon Kevin's death, she timely requested physical custody of Christina and Madilyn. We agree with the circuit court that the Phelps failed to prove that Mignon voluntarily and indefinitely relinquished custody of her daughters, and that the Phelps did not have standing to seek custody of Christina and Madilyn.

¶ 31 The Phelps also argue that they were not afforded a full evidentiary hearing on the issue of standing. They assert that they were only allowed 1.5 hours to present their case of standing, that the court did not interview the children in chambers, that they were foreclosed from calling all their witnesses, and that they were not allowed to fully examine the witnesses called. The Phelps cite no authority in support of this argument. Illinois Supreme Court Rule 341(h)(7) requires that an appellant's brief contain contentions along with citation to the authorities. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). "A failure to cite relevant authority violates Rule 341 and can cause a party to forfeit consideration of the issue." *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23. Arguments that violate Rule 341 can be rejected solely for that reason. *Id.* Forfeiture aside, we note that the Phelps made no offer of proof in the trial court detailing the additional evidence they would have offered, and have given no explanation in their briefs of the nature of the additional evidence. Without knowledge of what any additional evidence would show, we cannot determine that the Phelps were prejudiced. In addition, in their notice of appeal and in their brief, they make no request that the case

be remanded for the presentation of additional evidence. Finally, we have carefully reviewed the record and have determined that the Phelps were given an adequate opportunity to present evidence on the issue of standing.

¶ 32

CONCLUSION

¶ 33 For the reasons stated, we affirm the judgment of the circuit court of Madison County.

¶ 34 Affirmed.