

NOTICE
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2017 IL App (5th) 160463-U

NO. 5-16-0463

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> CURTIS)	Appeal from the
)	Circuit Court of
(Rick Curtis and Paula Curtis,)	Williamson County.
)	
Petitioners-Appellees,)	
)	
v.)	No. 15-F-88
)	
Bridget Curtis,)	
)	
Respondent-Appellant,)	
)	
and)	
)	
Ricky Curtis,)	Honorable
)	Carolyn B. Smoot,
Respondent).)	Judge, presiding.

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

ORDER

¶ 1 *Held:* The trial court's order finding the grandparents of the minor children have standing to proceed with the petition for custody is affirmed where the minor children were in the physical custody of the grandparents at the time the petition was filed as a result of each parent's incarceration and where the grandparents have been involved in the children's lives since birth.

¶ 2 Respondent, Bridget Curtis, appeals from the trial court's finding that petitioners, Rick and Paula Curtis, have standing as the paternal grandparents of respondent's minor children to proceed with their petition for custody. We affirm.

¶ 3 **FACTS**

¶ 4 The facts necessary to reach our decision are as follows. Respondent is the mother of two minor children: Tristan C. born December 9, 2007, and Trevor C. born October 5, 2009. The father of the children is Ricky Curtis, Jr., whom respondent married on April 19, 2013.

¶ 5 When Tristan C. was born, respondent and Ricky lived together in a home located in Johnston City, Illinois. In the summer of 2008, when Tristan C. was approximately six months old, respondent and Ricky moved in with petitioners, who are the paternal grandparents of the minor children. As we indicate above, Trevor C. was born in October 2009. Respondent, Ricky, and the children lived with petitioners until January 2010, at which time they moved into a separate home. Approximately one year later, respondent, Ricky, and the children returned to petitioners' home for financial reasons. Respondent and the children lived with petitioners until March 2014, which was approximately four months after Ricky was incarcerated. After respondent moved out of petitioners' home in March 2014, she stayed at a shelter with the children for approximately one month before moving into an apartment in Carbondale, Illinois. The children lived with respondent in Carbondale until respondent began serving a two-year prison sentence in December 2014.

¶ 6 On March 21, 2014, prior to respondent's incarceration, petitioners filed a petition for guardianship. Thereafter, on November 12, 2014, respondent executed two appointments of short term guardian for each of her minor children, appointing petitioner Paula as the short term guardian. The first appointments commenced on December 1, 2014, and were to terminate 365 days after the effective date unless respondent was released from prison on an earlier date. Similarly, the second appointments commenced December 1, 2015, and were to terminate 365 days after the effective date unless respondent was released from prison on an earlier date. The trial court entered an order approving the appointments in case No. 2014-P-38.

¶ 7 Petitioners filed a petition for custody in case No. 2015-F-88 on June 4, 2015, approximately six months after respondent was incarcerated. Case No. 2014-P-38 was consolidated into case No. 2015-F-88, which remains the subject of this appeal. On November 16, 2015, the court entered an order granting temporary custody of the minor children to petitioners. The court noted that sufficient evidence had been submitted to warrant standing on behalf of petitioners to seek custody, and it was in the best interest of the minor children that their temporary custody be placed with petitioners.

¶ 8 Respondent was released from prison and entered a halfway house on December 8, 2015, and was released from the halfway house on February 25, 2016. Respondent filed a motion to dismiss petitioners' petition for custody on July 12, 2016. Specifically, respondent argued petitioners did not have standing to petition the court for custody of the minor children under the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/601.2(b)(3) (West Supp. 2015)) because the children were in the physical

custody of respondent at the time the petition was filed. In her affidavit attached to the motion to dismiss the petition for custody, respondent asserted that but for her incarceration, she would have never permitted her children to reside separately from her. Respondent further asserted it was never her intent to voluntarily relinquish custody of her children, and her appointment of petitioners as short term guardians was intended to be a temporary solution to provide care for her children during the period of her incarceration.

¶ 9 The court held hearings on respondent's motion to dismiss the petition for custody on August 15 and September 9, 2016, where the court heard testimony from respondent. Exhibits were also introduced into evidence.

¶ 10 On October 20, 2016, the trial court entered an order finding that petitioners, as the paternal grandparents of the children, have standing to proceed with their petition for custody. In support of its finding, the court noted: (1) at the time the petition for custody commenced, the children were not in the physical custody of respondent or Ricky; rather, the children were in the physical custody of petitioners by way of a short term guardianship as a result of respondent and Ricky's incarceration; and (2) petitioners have had a major involvement with the children since their birth, the children have lived with petitioners for approximately two years, and petitioners have bonded with the children.

¶ 11 This appeal followed.

¶ 12

ANALYSIS

¶ 13 The single issue raised on appeal is whether the trial court erred in finding petitioners have standing to seek custody of the minor children. Initially, we observe that the determination of whether a nonparent has standing to seek custody of a minor child is a question of law subject to *de novo* review. *In re Marriage of Archibald*, 363 Ill. App. 3d 725, 735, 843 N.E.2d 446, 455 (2006).

¶ 14 Illinois law presumes the natural parent's right to the physical custody of his or her child is superior to that of a nonparent 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, 892 N.E.2d 1092, 1096 (2008). However, section 601.2(b)(3) under the Act provides that a nonparent 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 that child custody is referred to as allocation of parental responsibilities.

¶ 15 The nonparent bears the burden of proving that he or she has standing to seek custody of a minor child. *In re Marriage of Archibald*, 363 Ill. App. 3d at 735, 843 N.E.2d at 455. In the context of a nonparent seeking child custody, standing refers to the statutory requirement the nonparent must meet before a trial court may proceed to the merits of the nonparent's petition for custody. *In re Custody of M.C.C.*, 383 Ill. App. 3d at 917, 892 N.E.2d at 1096. This standing requirement is intended to safeguard a natural

parent's superior right to the care and custody of his or her children. *In re Marriage of Archibald*, 363 Ill. App. 3d at 736, 843 N.E.2d at 456.

¶ 16 Determining whether the nonparent has standing to seek custody requires an initial finding that the child is not in the physical custody of one of his or her parents. *In re Marriage of Archibald*, 363 Ill. App. 3d at 735, 843 N.E.2d at 455-56. We reiterate that in child custody disputes, it is a recognized presumption that a natural parent's right or interest in the care, custody, and control of the child is superior to a third person's claim. *In re Marriage of Archibald*, 363 Ill. App. 3d at 738, 843 N.E.2d at 458. However, this presumption is not absolute and serves only as one of several factors the court uses in resolving the ultimately controlling question of where the child's best interests lie. *In re Marriage of Archibald*, 363 Ill. App. 3d at 738, 843 N.E.2d at 458.

¶ 17 Whether a nonparent has the custody of the minor child is determined by examining the nonparent's status on the date relief is sought. *In re Custody of Groff*, 332 Ill. App. 3d 1108, 1112, 774 N.E.2d 826, 830 (2002). In determining whether a nonparent has physical custody of a minor child, the trial court must consider factors such as who was responsible for the child's care and welfare before the initiation of custody proceedings, how physical possession of the child was acquired, and the nature and duration of possession. *In re Custody of Groff*, 332 Ill. App. 3d at 1112, 774 N.E.2d at 830.

¶ 18 Moreover, the nonparents must show that the natural parents relinquished legal custody of the child as opposed to just physical possession. *In re Custody of Groff*, 332

Ill. App. 3d at 1113, 774 N.E.2d at 830. This requirement places the burden 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, 843 N.E.2d at 456. The trial court can only turn to the issue of custody after a finding that the nonparent has standing. *In re Marriage of Archibald*, 363 Ill. App. 3d at 736, 843 N.E.2d at 456. Once the trial court determines the nonparent has standing, the court must determine custody utilizing the best-interest-of-the-child standard. *In re Marriage of Archibald*, 363 Ill. App. 3d at 736, 843 N.E.2d at 456.

¶ 19 After careful consideration, we find the trial court properly determined petitioners have standing to seek custody of the minor children. As previously discussed, section 601.2(b)(3) of the Act provides that a nonparent may commence a custody proceeding, "but only if [the child] is not in the physical custody of one of [the child's] parents." 750 ILCS 5/601.2(b)(3) (West Supp. 2015). This section is a standing requirement for nonparents. *In re Parentage of Scarlett Z.-D.*, 2015 IL 117904, ¶ 34, 28 N.E.3d 776.

¶ 20 In her brief, respondent concedes that in order for petitioners to prove they have standing, petitioners must establish that the children were not in the physical custody of respondent on the date the petition for custody was filed. Here, the record indicates the children were in the physical care of petitioners at the time the petition for custody was filed due to respondent's incarceration (Ricky, the children's father, was unable to care for the children during this time due to his own incarceration). It is undisputed that respondent voluntarily relinquished custody of her children to petitioner Paula in November 2014 by way of short term guardianships in anticipation of her prison

sentence. Because the children were in the physical custody of petitioners on the date the petition for custody was filed, petitioners satisfy the statutory standing requirement. Although respondent argues the guardianships were only effective for a limited period of time and "she had no choice" due to her pending incarceration, this does not change the fact that petitioners had guardianship of the children and the children were in the physical care of petitioners at the time the petition for custody was filed.

¶ 21 Moreover, Illinois courts have held that an incarcerated parent does not have physical custody of the child. *Naylor v. Kindred*, 250 Ill. App. 3d 997, 1009, 620 N.E.2d 520, 528 (1993). For this reason, we reject respondent's argument that the children were in respondent's physical custody during a time in which she was serving a prison sentence. As the Fourth District has explained, in relevant part:

"[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 the child. In short, an incarcerated parent cannot fulfill the role of a physical custodian of the child. Although incarceration may not absolutely prevent a parent from fulfilling the role of the child's legal custodian, it does impair this ability. The parent is not readily available to give advice or console the child, or to be an example." *Naylor*, 250 Ill. App. 3d at 1009, 620 N.E.2d at 528.

¶ 22 Finally, the record indicates the children have resided with petitioners for a majority of their lives and petitioners have tended to the children's care throughout their lives, both prior to and after respondent relinquished custody by way of short term

guardianships. Although there were brief periods of time where respondent moved the children to dwellings outside petitioners' home, respondent ultimately returned to petitioners' home with the children. For the foregoing reasons, the trial court appropriately determined petitioners have standing to seek custody of the minor children.

¶ 23

CONCLUSION

¶ 24 For the reasons stated herein, the judgment of the circuit court of Williamson County is hereby affirmed.

¶ 25 Affirmed.