

NOTICE
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2018 IL App (5th) 170062-U

NO. 5-17-0062

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 E.L.W.S., a Minor)	Appeal from the
(Angela Mason Howser and Jack Howser,)	Circuit Court of
)	Richland County.
Petitioners-Appellants,)	
)	
v.)	No. 14-P-49
)	
Jade Valerie Wingard Green,)	Honorable
)	Mark R. Stanley,
Respondent-Appellee).)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err by granting a motion to dismiss grandparents' guardianship petition after a hearing where only the mother presented evidence on the question of standing and where the grandparents' attorney indicated that he was not prepared to present evidence on the question but did not request a continuance.

¶ 2 The petitioners, Jack and Angela Howser, filed a petition asking to be appointed guardians of Angela's granddaughter, E.L.W.S. This case involves an unusual and complicated procedural history, as a result of which, the Howsers' petition remained pending for nearly two years. The respondent, Jade Green, is the mother of E.L.W.S. and the daughter of Angela Howser. She filed a motion to dismiss the guardianship petition,

arguing that she now was able to care for her child. At the hearing on that motion, counsel for the Howsers indicated that he was not prepared to present evidence because the matter was set for a "summary" hearing on the motion to dismiss; however, he did not request a continuance. After two witnesses testified for Jade, the court found that she was ready, willing, and able to care for her child. The court therefore concluded that the Howsers lacked standing and granted Jade's motion to dismiss. The Howsers appeal, arguing that the court erred by ruling on the question of standing without conducting an evidentiary hearing. We affirm.

¶ 3 E.L.W.S. was born to Jade W. (n/k/a Jade Green) and Alex S. in March 2010. Jade and Alex never married, and Alex has never acted as E.L.W.S.'s caregiver. In November 2010, Jade was arrested and incarcerated for possession of methamphetamine. The Howsers were appointed guardians of E.L.W.S. in case number 2010-P-58. Upon Jade's release from prison, she attended a court-ordered drug rehabilitation program. She moved in with the Howsers in September 2011. The guardianship in 2010-P-58 was dissolved by court order in March 2014. However, Jade and E.L.W.S. continued to reside with the Howsers.

¶ 4 In May 2014, Jade married Josh Green over the disapproval of her mother and stepfather. Jade, Josh, and E.L.W.S. lived with the Howsers for the next few months, but their relationship deteriorated. Jade and Josh moved out of the Howsers' home with E.L.W.S. on September 19, 2014. On September 24, DCFS began investigating allegations that Josh abused E.L.W.S. The allegations were determined to be unfounded.

¶ 5 The Howsers filed a petition for a temporary and permanent guardianship in this case on November 7, 2014. The petition alleged that Jade was arrested on a charge of child endangerment on November 3. We note that the charge was subsequently dismissed. The petition further alleged that Alex S., E.L.W.S.'s biological father, was found unfit to have custody in a family law case, but had court-ordered supervised visits with E.L.W.S. at his mother's home. The petition alleged that Jade was unable and unwilling to carry out day-to-day childcare decisions. It further alleged that she had a history of drug addiction and alcohol abuse, failed to provide proper supervision for E.L.W.S., and failed to take her to doctor and dentist appointments. The petition alleged that Josh was arrested for the domestic battery of a former girlfriend in 2014, and that Josh and Jade's home was not a clean living environment. The court entered an order appointing the Howsers as temporary guardians that day.

¶ 6 In December 2014, Jade filed a motion to dismiss, alleging that she and Alex were both willing and able to care for E.L.W.S., and arguing that the Howsers thus lacked standing to seek a guardianship. Both Jade and Alex filed motions to vacate the temporary guardianship. On December 22, the court entered an order vacating the temporary guardianship. On the same date, the court entered an agreed order in a family law case involving most of the same parties, case number 10-F-44. Although that order does not appear in the record in this case, the Howsers asked the court to take judicial notice that the order provided that they were to continue to take the child for counseling sessions and dental appointments and to provide transportation for her scheduled visits with Alex. The agreed order apparently included some sort of agreed visitation schedule.

During early 2015, the Howsers filed multiple petitions for rules to show cause related to alleged violations of the agreed order.

¶ 7 On May 28, 2015, the Howsers filed a new petition seeking to be appointed permanent guardians for E.L.W.S. They reiterated the allegations of the first petition regarding Alex. They also reiterated their allegation that Jade was unwilling and unable to make day-to-day decisions concerning the care of her child. However, they did not allege that she continued to abuse drugs or alcohol. They alleged that Josh was abusive to E.L.W.S. In particular, they alleged that he punched her in the eye and that Angela took her to see an eye doctor as a result. They further alleged that Jade's decision to live with Josh put E.L.W.S. at risk. We note that although the petition contained no allegations concerning the eye doctor's findings, testimony at a later hearing indicated that the doctor found no indication of any injury to E.L.W.S.'s eye.

¶ 8 On July 6, 2015, Alex filed a response to the guardianship petition in which he asked that the petition be dismissed. On the same day, the Howsers filed a response to the motion to dismiss. We note that the record does not contain any motion to dismiss filed by Jade during this period. It is not clear whether the Howsers' response was addressing Jade's previously-filed motion to dismiss the November 2014 guardianship petition or a new motion to dismiss that was served on them but somehow it did not end up in the court file. The Howsers argued in their response that they had been E.L.W.S.'s primary caregivers for most of her life.

¶ 9 On July 23, 2015, the Howsers filed a motion for an evaluation pursuant to section 604.5 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/604.5 (West

2014) (pertinent provisions now at 750 ILCS 5/604.10(d) (West 2016))). The court appointed Dr. Thomas Campion to conduct the evaluation.

¶ 10 On September 1, 2015, Alex's mother, Lorraine McFarland, filed an emergency petition for temporary guardianship. She alleged that Jade was unable to care for E.L.W.S. due to her incarceration on a pending charge of child endangerment, and that Alex did not oppose the appointment of Lorraine as temporary guardian. She further alleged that E.L.W.S.'s maternal grandparents, the Howsers, were not appropriate temporary guardians at that time "due to the ongoing strife between mother and maternal grandparents." Lorraine further alleged that she was the "only party that has not been accused of undue influence of the minor child." The court granted the petition and appointed Lorraine to serve as E.L.W.S.'s temporary guardian. At some point, the child endangerment charge was dropped.

¶ 11 Dr. Campion's evaluation report was dated November 30, 2015, and filed with the court on December 14, 2015. At this time, E.L.W.S. was still in the custody of Lorraine. In preparing his report, Dr. Campion interviewed and conducted psychological testing of E.L.W.S., Jade, Josh, Jack, and Angela. He found that Jade, Josh, and Jack were all capable of parenting. Although he did not specifically find Angela to be incapable of parenting E.L.W.S., he did find her to be manipulative, which he believed could impact her parenting ability. He noted that E.L.W.S. had formed a bond with the Howsers, and he felt that visits with them would be appropriate, but he recommended that overnight visits with them be limited. Dr. Campion recommended that custody of E.L.W.S. be returned to Jade after a three-month transition period. He recommended that during that

period, Jade and Josh take a parenting class. He also recommended family counseling for E.L.W.S., Jade, and Josh. Finally, Dr. Champion recommended that if any of the adults involved in this case were "unable to refrain from negative or unsupportive" comments about each other to E.L.W.S. or in front of her, their contact with E.L.W.S. should be limited.

¶ 12 On January 11, 2016, Jade filed a motion to return the child to her custody. She alleged that there was no longer any reason that she could not care for her child. She also alleged that she believed that Lorraine "relegated custodial shift to the grandparents in violation of the Court's Order." The Howsers filed a response on January 26, denying the allegation that the child was in their custody. They filed an amended response on February 5, arguing that E.L.W.S. should not be returned to her mother's custody because (1) Dr. Champion recommended a three-month transition period before returning the child to Jade's custody; (2) Jade failed to make efforts to contact E.L.W.S. after a December 23 phone call to Lorraine; and (3) Jade was unwilling and unable to make decisions for her child.

¶ 13 On February 26, 2016, the Howsers filed a motion *in limine* seeking to exclude Dr. Champion's report and any expert testimony he might give. They argued that he had a conflict of interest. They explained that they expressed "serious concerns" to Dr. Champion about the involvement of the Illinois State Police in matters related to this case, and they later discovered that his practice had a contract with the Illinois State Police. The motion was denied.

¶ 14 The court held a hearing on March 17, 2016. The focus of much of the hearing was on a motion for contempt filed by Jade against Lorraine for refusing to allow a scheduled visit with the child. The court found Lorraine to be in contempt, but allowed her to purge the contempt by complying with a visitation schedule established by the court that day. The schedule called for Jade to spend increasingly more time with E.L.W.S., and for full custody to be restored to her on April 22. At the hearing, Lawrence County sheriff's deputies arrived and arrested both Josh and Jade. Judge Stanley stated that he found it "very disturbing" that the arrest took place in front of him. He explained that "[s]omeone obviously told Lawrence County that they would be here today and that they would be available to be arrested today or there would be no way for Lawrence County to know that."

¶ 15 On March 31, 2016, the Howsers filed a motion for a substitution of judge for cause. They argued that Judge Stanley's comments about the arrest of Jade and Josh in his courtroom demonstrated a bias against them. The matter was assigned to Judge Crisel, who denied the motion for substitution of judge. Judge Crisel also denied a subsequent motion to reconsider that ruling.

¶ 16 On April 22, 2016, E.L.W.S. was returned to the custody of Jade pursuant to the schedule ordered by the court at the March 17 hearing. In September 2016, during a hearing in case number 10-F-44, the court dissolved the temporary guardianship that named Lorraine as the temporary guardian. The Howsers are not parties in the family law case, so they were not present.

¶ 17 Jade filed a motion to dismiss the pending guardianship petition in this case on November 17, 2016. She alleged that (1) there was no longer a need for guardianship proceedings; (2) the child was currently living with her mother, "who [was] capable of taking care of her day-to-day needs"; (3) the temporary guardianship had been dissolved; and (4) the Howsers had taken no action on this case in over six months.

¶ 18 The matter came for a hearing on January 20, 2017. The court first allowed the parties to present opening arguments. Counsel for Jade noted that the child had been in Jade's custody since May 2016 and that there had been no activity in the case since June 2016. He argued that, as such, the case could be dismissed either for lack of standing or for lack of prosecution. In response, counsel for the Howsers asserted that there *had* been activity in the case—specifically, proceedings on their motion for a substitution of judge. He went on to argue that the fact that the child was living with Jade did not necessarily mean that Jade was ready, willing, and able to provide proper care. Counsel noted that the Howsers' petition had been pending for two years, and urged the court to set a hearing on the question of standing if it was concerned with that question.

¶ 19 After hearing these arguments, the court emphasized that the purpose of the hearing was to rule on Jade's motion to dismiss. The court explained, "The standard is whether the parent stands ready, willing, and able to assume the parental responsibilities and duties." The court then asked, "Does anyone wish to present evidence on that issue today?"

¶ 20 At this point, the Howsers' attorney interjected, stating, "It's not set for our petition for guardianship today." In response, the court noted that the matter set for that day was

Jade's motion to dismiss, which raised the question of whether there was still a need for a guardianship. The court explained that this issue "looks like a standing issue."

¶ 21 Jade testified as a witness in her own behalf. She testified that E.L.W.S. was in first grade and was doing well in school. Jade testified that she believed she was able to provide for E.L.W.S.'s daily needs. She noted that she and her husband, Josh, had a lot of support from Josh's family and from relatives on Jade's father's side of the family.

¶ 22 Lorraine McFarland, the child's paternal grandmother, also testified for Jade. McFarland testified that at the time, she and her son, Alex, had visitation with E.L.W.S. every other weekend. She described E.L.W.S. as a "sweet-natured" six-year-old girl. McFarland testified that when E.L.W.S. arrived for visits, she seemed to be healthy, clean, and dressed appropriately. McFarland saw no indication that E.L.W.S. was not being properly cared for. She acknowledged, however, that she did not witness the day-to-day care provided by Jade and her husband in their home. She also acknowledged that she and Jade were not always able to communicate effectively regarding care of E.L.W.S., but she testified that their ability to communicate had improved.

¶ 23 After both witnesses testified, the court asked counsel for the Howsers if he had any evidence to present. Counsel replied, "As I was not prepared to proceed with our petition for guardianship, I have no witnesses today." He argued that the hearing set for Jade's motion to dismiss was "a very summary hearing." He did not request a continuance. Counsel further argued that because the Howsers' petition had been delayed for two years, it was "disingenuous at best" for Jade's attorney to argue that there was no "present evidence of any abuse [or] unfitness."

¶ 24 The court then ruled from the bench. The court explained, "The case law and the statute is clear that we do not take children away from parents when the parents stand ready, willing, and able to properly care for, protect, train, and educate the child." The court went on to note that there may have been a problem with Jade's ability to properly care for her child two or three years earlier. The court emphasized, however, "that's not when we measure that." The court found that Jade was "ready, willing, and able to properly train, protect, care for, educate, and nurture the child." As such, the court announced that it would dismiss the case.

¶ 25 Counsel for the Howsers asked the court, "So you're ruling that today, because the child is with the minor child [*sic*], that my clients lack standing?" The court responded, "I'm ruling that the mother is ready, willing, and able to properly care for, nurture, protect, train, and educate the child." Counsel then asked whether the court was ruling on standing. The court stated that it was ruling on standing. Counsel inquired, "Because the child is with the mother today?" The court responded, "Because the mother can properly educate train, protect, nurture, and stands ready, willing, and able to do that per the testimony elicited, solicited today."

¶ 26 The court entered a docket entry dismissing the Howsers' petition that day. This appeal followed.

¶ 27 The Howsers argue that the court erred in dismissing their petition without holding an evidentiary hearing on the question of standing. We disagree.

¶ 28 As the Howsers acknowledge, a court may not proceed on a petition for guardianship if the child has a living parent whose whereabouts are known if the parent is

willing and able to make and carry out day-to-day decisions involving the child's care unless the parent consents to the guardianship. 755 ILCS 5/11-5(b) (West 2014). There is a rebuttable presumption that a parent whose parental rights have not been terminated is willing and able to make these decisions. *Id.* To have standing to seek a guardianship, a petitioner must rebut this statutory presumption. *In re R.L.S.*, 218 Ill. 2d 428, 436 (2006).

¶ 29 Whether this presumption has been overcome—that is, whether the petitioner has shown that the parent is unable or unwilling to make or carry out day-to-day childcare decisions—is a question of fact that the court must resolve before moving on to consider the separate question of whether a guardianship would be in the child's best interests. *In re Guardianship of A.G.G.*, 406 Ill. App. 3d 389, 393 (2011). Resolution of this factual question "necessarily requires an evidentiary hearing, unless the allegations contained in the petition would not, if true, rebut such a presumption." *In re A.W.*, 2013 IL App (5th) 130104, ¶ 15.

¶ 30 The standing requirement exists to protect the parent's superior right to the care and custody of her child, a right of constitutional dimension. *Id.* ¶ 13. However, a nonparent is entitled to review of a court's erroneous decision to rule on the question of standing without considering evidence relevant to the question. See *In re Guardianship of A.G.G.*, 406 Ill. App. 3d at 396.

¶ 31 The Howsers argue that the court erred in this case because (1) the allegations of their petition, if true, would rebut the presumption that Jade was willing and able to make and carry out day-to-day decisions about the care of her daughter; and (2) the court ruled

on the question of standing without holding an evidentiary hearing. Although we agree with their first contention, we do not agree with their second contention.

¶ 32 In the second guardianship petition they filed in this case—the petition at issue—the Howsers alleged that Jade demonstrated that she was unwilling or unable to make day-to-day childcare decisions for E.L.W.S. and that she put her child at risk by living with Josh, who, they alleged, was abusive toward E.L.W.S. These allegations, if proven, would have rebutted the presumption that Jade was willing and able to make decisions concerning the day-to-day care of her child. We note that, contrary to Jade's contention, the mere fact that the petition was filed nearly two years before the hearing does not change this fact. Jade argued to the trial court that the Howsers should be required to file a new petition if they wanted to proceed. The trial court rejected this argument, but it noted that the Howsers would be required to prove that the allegations in their petition were still true at the time of the hearing. The question for this court is whether the trial court gave them an opportunity to do so. We find that it did.

¶ 33 The Howsers' claim that the trial court ruled on the question of standing without an evidentiary hearing is belied by the record. By the time the court ruled in this matter, it had evidence before it that the allegations of abuse made against Josh had been determined to be unfounded. It also had before it the report of the Dr. Campion, an expert appointed at the request of the Howsers, who concluded that Jade was willing and able to make and carry out decisions related to the care of her daughter. The court also allowed both parties to present additional evidence on the question at the hearing on Jade's motion to dismiss. As the court observed, that motion raised the question of standing. Jade

presented the testimony of two witnesses, which the court considered in making its ruling. Although the Howsers' attorney indicated that he was not prepared to present evidence because he believed that the hearing was meant to be only a "summary" proceeding, he did not request a continuance. In light of this record, we find that (1) the Howsers were given an opportunity to present evidence to rebut the presumption that Jade was willing and able to make and carry out day-to-day childcare decisions; and (2) the court made its factual determination on standing based on evidence presented to it on that question. We thus find no error.

¶ 34 For the foregoing reasons, we affirm the judgment of the trial court dismissing the Howsers' guardianship petition for lack of standing.

¶ 35 Affirmed.