2018 IL App (5th) 180394-U

NO. 5-18-0394

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

COURTNEY VAIL,	)	Appeal from the
	)	Circuit Court of
Petitioner,	)	Christian County.
	)	
v.	)	No. 10-F-1
	)	
HAYDEN BROWN,	)	
	)	
Respondent-Appellant	)	Honorable
	)	Christopher W. Matoush,
(Tammy Miloncus, Intervenor-Appellee).	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment awarding primary allocation of parental responsibilities to maternal grandmother vacated and cause remanded for further proceedings where circuit court granted maternal grandmother's petition to intervene as to father's petition for primary allocation of parental responsibilities and made best interest determination without making threshold determinination, after an evidentiary hearing, that father voluntarily relinquished physical custody of child to maternal grandmother, as required before a nonparent may seek custody pursuant to section 601.2(b)(3) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/601.2(b)(3) (West 2016)).

¶ 2 The respondent, Hayden Brown, appeals the July 20, 2018, order of the circuit court of Christian County, which awarded primary allocation of parental responsibilities

and decision-making regarding R.B., the minor child of Hayden and the petitioner, Courtney Vail, to the child's maternal grandmother, Tammy Miloncus. In addition, Hayden appeals the circuit court's October 2, 2017, order, which granted Tammy's motion to intervene in the proceedings regarding R.B. For the reasons that follow, we vacate both orders and remand with directions, as detailed below.

¶ 3 FACTS

¶ 4 In 2010, the Department of Healthcare and Family Services initiated this proceeding by filing a petition, on behalf of Courtney, to determine the existence of a father and child relationship between the respondent, Hayden Brown, and Courtney's minor child, R.B., born June 8, 2009. The parties agreed to DNA testing, and in May 2010, the circuit court entered an order finding that Hayden is the father of R.B. The circuit court noted that Hayden was still a minor at the time of the order, and would turn 18 in August 2010. The circuit court ordered Hayden to seek employment so that an appropriate support order could be determined. On September 1, 2010, the circuit court entered a support order. Numerous orders regarding Hayden's support of R.B. followed.

¶ 5 According to the record on appeal, on April 26, 2017, Hayden appeared at a hearing in the circuit court in case number 17-JA-7, before the Honorable Amanda Ade-Harlow. From the transcript of that hearing, it appears that the Department of Children and Family Services (DCFS) had filed a petition for adjudication of wardship regarding R.B. Courtney did not appear at the hearing. At the hearing, the circuit court advised Hayden of the petition and noted that DCFS had placed R.B. with Tammy. The circuit court then asked the DCFS caseworker whether any inquiry had been made as to

Hayden's "availability or ability to parent his own child." Hayden began to answer, stating, "I've been working—," but was interrupted by Tammy, who stated, "He hasn't been around that much in [R.B.'s] life. The only one [R.B.'s] ever really been with is her mother or myself or my husband." The DCFS caseworker agreed this was true. The circuit court set the case for a pretrial hearing and noted that Hayden should file proof of his paternity in the juvenile case, execute medical consents with regard to R.B., and cooperate with DCFS.[1]

¶ 6 On June 12, 2017, Hayden filed, in the instant case, a motion for temporary and permanent custody of R.B. [2] In the motion, Hayden noted the juvenile neglect petition, and alleged no shelter care hearing had taken place and R.B. was residing with Tammy by Courtney's consent. Hayden alleged he is a fit and proper person to care for R.B., has stable housing, a job, and resides in the same school district as R.B. On June 27, 2017, Tammy filed a petition to intervene, alleging that she was appointed temporary guardian of R.B. in the juvenile matter, has provided care and support for the minor child "for the last four months," and has standing to intervene in the matter, citing section 602(g) of the Illinois Parentage Act of 2015 (750 ILCS 46/602(g) (West 2016)). Hayden objected to Tammy's petition to intervene, alleging Courtney unilaterally gave Tammy temporary custody of R.B. to avoid DCFS obtaining custody, and stating he did not consent.

[1]We note the circuit court erroneously identified Tammy as R.B.'s paternal grandmother.

[2]We note that under current law, the motion is properly identified as a motion for allocation of parental responsibilities. See 750 ILCS 5/602.5, 602.7 (West 2016). We refer to the motion as such throughout the remainder of this order.

¶ 7 On October 2, 2017, the circuit court, the Honorable Marc Kelly presiding, held a hearing on Tammy's petition to intervene. The hearing consisted of oral argument only. The only evidence presented was the transcript of the April 26, 2017, hearing in the juvenile case, which Hayden presented in order to establish that he did not consent to Tammy having temporary custody. At one point during the hearing, Hayden's counsel stated that he wished to have Hayden testify to rebut Tammy's argument that Hayden has not been part of R.B.'s life, but after inquiry by the circuit court as to whether Hayden's testimony would be needed, additional oral argument ensued. At the conclusion of the hearing, the circuit court granted the petition to intervene, stating on the record that "[Tammy] has standing due to her current providing of support, shelter[,] and care of [R.B.] since February 2017. [Hayden] granted leave to appeal standing issue."

¶ 8 A hearing commenced on Hayden's petition for allocation of parental responsibilities on March 22, 2018, before the Honorable Christopher Matoush. Courtney was present at the hearing *pro se*. At the commencement of the hearing, Hayden renewed his objection to Tammy's intervention, which the circuit court recognized for the purposes of appeal. We limit our recitation of the evidence presented at this hearing to that evidence relevant to Tammy's petition to intervene in the proceedings and to seek primary parental responsibilities and decision-making for R.B.

¶ 9 Hayden testified he was 25 years old and had been a union cement mason for eight years. He had lived at his current address in Kinkaid for four years. He was engaged, had no felony convictions, no pending charges against him, and no adult criminal record. He is R.B.'s father, and R.B. was eight years old at the time of the hearing. Hayden was 16

years old when R.B. was born. He was still in high school at that time. He testified he never attempted to surrender his rights to R.B. He did explain a text message he sent to Courtney, marked as Respondent's Exhibit 1A, in which he offered to give Courtney full custody and for him to "see [R.B.] from time to time on [Courtney's] schedule." He testified that, at the time, he was trying to give Courtney "parental custody and exercise [his] rights to visitation." He testified that he was no longer making such an offer, and he was trying to get "full custody" of R.B.

¶ 10 Hayden testified R.B. was born in Missouri and he did not attend the birth because he was 16 years old, in high school, and was not notified when R.B. was being born. He started exercising visitation in 2010.[3] Between 2010 and 2012, he was only able to see R.B. "as per Courtney's schedule when [he] could find her, [as] [h]er number changed all the time." After 2012, when R.B. was residing in Taylorville with Courtney, his visitations increased to two or three weekends per month. His stepmother picked R.B. up in Taylorville to facilitate the visitations.

¶ 11 Hayden testified he was aware of a juvenile case pending against Courtney due to allegations of domestic violence and drug abuse. When the juvenile case was opened, Courtney's husband, Randy Vail, was listed as R.B.'s father. Hayden only knew about the juvenile case because he spoke with Tammy about it. Although he was not served with any notice of the proceedings, he appeared at the April 26, 2017, hearing. He testified that, during the hearing on the juvenile case, the court never asked him if he agreed to allow R.B. to stay with Tammy. He said he appeared at that hearing "without

[3]We note R.B. was approximately two years old in 2010.

knowing anything that was going on." He testified that he never agreed to give Tammy custody or possession of R.B. After this date, he met with an attorney and filed the petition for allocation of parental responsibilities in the instant case.

¶ 12 Hayden testified he has a very good relationship with R.B., and they have bonded. They do math together and play outside all the time during their visitations, which are every other weekend. He introduced into evidence pictures of himself, his fiancée, and R.B. together. He lives one house away from R.B.'s elementary school. He is willing to facilitate a relationship between R.B. and her siblings, who are Courtney's children in the custody of their father. He is also willing to facilitate a relationship between R.B. and Tammy and Courtney on any terms DCFS sets as to supervision.

¶ 13 On cross-examination, Hayden admitted that he never before came to court in order to enforce his rights as a father to R.B., stating that he was not a lawyer and did not know the law. He did not correct any statement made by Tammy and the caseworker during the juvenile proceeding because he did not know what the case was about or how to proceed. He testified that he sent the settlement offer via text to Courtney in 2016. He testified that he was aware in 2011 that Tammy had gotten an order of protection against Courtney and had temporary custody of R.B. for a period of time, and he did not object during that period.

¶ 14 Tammy testified, as an adverse witness, that she is Courtney's mother and R.B.'s grandmother. Tammy testified that R.B. has lived with her since DCFS placed R.B. with her in September 2016. Prior to that time, R.B. was living with Courtney in Taylorville from the time she was midway through kindergarten. Prior to that, R.B. and Courtney

resided with Tammy in Kinkaid. Since R.B. has been with Tammy, Courtney was living with her, but in and out of the home for a time when she was abusing drugs. Courtney had completed drug rehabilitation and was living back in the home with Tammy and R.B. Courtney was under a DCFS service plan and was not supposed to have unsupervised visistation with R.B.

¶ 15 Courtney testified that she is R.B.'s mother. For the first year of her life, R.B. resided with Courtney in Missouri. R.B. and Courtney moved back to Illinois in late 2010 and lived with Tammy. When Tammy got an order of protection against Courtney in 2011, Courtney moved out and R.B. lived with Tammy, who was granted temporary guardianship. Hayden did not have contact with R.B. during any of this time, and did not object when Tammy was granted temporary guardianship. When the order of protection expired in 2012, Courtney moved back in with Tammy and R.B. When R.B. was almost five, she moved with Courtney, first down the block, and ultimately to Taylorville, where she stayed until the juvenile case commenced in 2016. During that period, R.B. visited Tammy frequently. Hayden was exercising very limited visitation, according to Courtney.

¶ 16 Courtney testified Hayden asked her on at least three occasions if they could sign papers where Courtney would receive full allocation of parental responsibilities concerning R.B. if she would "drop child support." She testified she is in recovery from drug addiction and is not able to care for R.B. in a full capacity. She signed all of her kids, including R.B., over to their grandparents to prevent DCFS from taking them and so she could receive in-patient treatment. Courtney testified that, prior to April 2017,

Hayden had no interactions with R.B. and they never had a bond. He never tried to assert rights to R.B. in court prior to his filing the instant petition for allocation of parental responsibilities as to R.B. Courtney testified she did not tell DCFS that Randy Vail was R.B.'s father. She gave DCFS Hayden's name, and the caseworker told her DCFS could not contact Hayden, and DCFS put Randy Vail down as father.

¶ 17 Tammy testified after she got the order of protection against Courtney, she contacted Hayden to visit R.B. He came a couple times in early or middle 2010, "and that was it." She testified that during one of those visits, Hayden told her and her husband that when R.B. was old enough to bathe herself, wipe herself, and dress herself, he would fight to get her. On a couple of occasions, during child support hearings, he asked to "sign away" his rights to primary parental responsibility for R.B. in exchange for visitation and no child support.

¶ 18 Courtney, who was *pro se*, submitted to examination by the court. Therein, she testified that she currently resides with Tammy. She had been using controlled substances since age 16, but for the past 10 years, has used methamphetamine the most. She has not used since December 2017. She testified that R.B.'s best interests would be served by continuing to reside with Tammy. She does not believe that R.B. should live with her on her own because she has no stable income or housing. She signed temporary guardianship rights of R.B. to Tammy to avoid DCFS.

¶ 19 On July 20, 2018, the circuit court entered an order denying Hayden's petition for an allocation of primary parental responsibilities and parenting time. In the order, the circuit court made several findings of fact. The circuit court found that R.B. had resided

with Tammy after Courtney consented to guardianship in February 2017, after the juvenile case was filed. The circuit court further found that Hayden did not object to R.B. residing with Tammy when he appeared in court in the juvenile case in April 2017, but had maintained a continuing objection to Tammy's standing in the instant case. In regard to Tammy's standing, the circuit court stated:

> "[Tammy] has been granted standing previously by the court. [Hayden] has asked this court to reconsider the previous ruling issued by Judge Kelly regarding the issue of standing by [Tammy]. The [c]ourt does not believe it has jurisdiction to revisit that issue and notes that [Hayden] was granted leave to appeal the finding regarding the issue of [Tammy]'s standing and has not sought appeal on that issue. Therefore, the [c]ourt will use the statutory 'best interests' factors to determine the issue of permanent custody and primary allocation of parental responsibilities ***."

¶ 20 The circuit court went on to analyze the best interest factors set forth in section 602.5 of the Act (750 ILCS 5/602.5 (West 2016)), concluding that Tammy had "presented sufficient evidence and good cause to overcome the rebuttable presumption that granting custody of R.B. to [Hayden], R.B.'s natural parent, would not be in the best interests of the child." The circuit court found that it is in the best interests of R.B. that Tammy is awarded primary allocation of parental responsibilities and decision-making. The circuit court ordered that Hayden be awarded parenting time as agreed to by the parties. On August 2, 2018, Hayden filed a notice of appeal.

¶ 21 ANALYSIS

¶ 22 As explained by our supreme court in *In re Petition of Kirchner*, 164 Ill. 2d 468, 490 (1995) (abrogated on other grounds by *In re R.L.S.*, 218 Ill. 2d 428 (2006)), "[t]he superior right of the natural parents to the care, custody, and control of their child is the law of the land and is also embodied in Illinois statutory law."[4] "Unless a parent consents or is adjudged unfit a child may not be placed in the custody of a nonparent." *Id.* (citing *In re Custody of Peterson*, 112 Ill. 2d 48, 51 (1986)). "Given that [former] section 601(b)(2) of the [Act] allows for custody to be vested in a nonparent without first finding unfitness, its application must be narrowly construed to ensure the sanctity of the family and the reciprocal familial rights of parents and their children." *Id.* (citing *Peterson*, 112 Ill. 2d at 54).

¶ 23 Pursuant to section 601.2(b)(3) of the Act (750 ILCS 5/601.2(b)(3) (West 2016)), a nonparent may seek an allocation of parental responsibilities for a child only if that child is not in the physical custody of one of his or her parents. However, our supreme court has established that, in order to ensure that the superior right of natural parents to the care and custody of their children is safeguarded, this "extraordinary" provision allowing a nonparent to seek parental responsibilities requires more than a showing that the child is not in the possession of the parent. *Kirchner*, 164 Ill. 2d at 491. Rather, a

[4]The only statements in the *Kirchner* opinion that were abrogated by *In re R.L.S.* are the statements that the guardianship provisions of the Probate Act of 1975 (755 ILCS 5/11-1 *et seq.* (West 2004)) are triggered only upon the death of a parent and do not mandate a finding of unfitness as a condition precedent to divesting a parent of custody. See *In re R.L.S.*, 218 Ill. 2d at 445-47. The entire discussion made by the *Kirchner* court regarding standing under former section 601(b)(2) of the Act (750 ILCS 5/601(b)(2) (West 1992)), which is the exact provision embodied in current section 601.2(b)(3) of the Act (750 ILCS 5/601.2(b)(3) (West 2016)), remains authoritative as to the issues raised in this appeal.

showing that a parent does not have physical custody of his child requires that the parent somehow voluntarily and indefinitely relinquished custody of the child, whether by a calculated decision on the parent's part or by way of abandonment. *Id.* In addition, a unilateral relinquishment by one parent cannot serve as the basis for establishing relinquishment as against the other parent. *Id.* at 493. While courts have pointed to factors such as (1) who was responsible for the care and welfare of the child prior to the initiation of custody proceedings; (2) the manner in which physical possession of a child was acquired; and (3) the nature and duration of the possession (see *Young v. Herman*, 2018 IL App (4th) 170001, ¶ 54), the supreme court in *Kirchner* made clear that no combination of factors can meet the requirements for a nonparty to seek parental responsibilities under the Act absent some measure of voluntary relinquishment. 164 Ill. 2d at 493.

¶ 24 As our colleagues in the Fourth District recently noted, although courts have traditionally referred to the requirement in section 601.2(b)(3) of the Act (750 ILCS 5/601.2(b)(3) (West 2016)) as one of standing, it is actually an element of the nonparent's cause of action that must be pled and proven by the nonparent. *Young*, 2018 IL App (4th) 170001, ¶ 49. However, it is crucial that a determination on this element be made by the circuit court before proceeding to an allocation of parental responsibilities hearing to determine the best interests of the child. *Kirchner*, 164 Ill. 2d 468. A circuit court's finding of physical custody will be affirmed on appeal unless it is against the manifest weight of the evidence. *Young*, 2018 IL App (4th) 170001, ¶ 56. This, of course, requires that the circuit court hold an evidentiary hearing on this issue.

¶ 25 Turning to the facts in the case at bar, it is important to note that Hayden was the party who initially filed the motion for allocation of parental responsibilities as to R.B, alleging R.B. was residing with Tammy by Courtney's consent after DCFS filed a juvenile neglect petition against Courtney. Tammy filed a petition to intervene, citing section 602(g) of the Parentage Act (750 ILCS 46/602(g) (West 2016)) as her basis for seeking an allocation of primary parental responsibilities. On October 2, 2017, without holding an evidentiary hearing, the circuit court granted Tammy's petition to intervene, finding Tammy had standing "due to her current providing of support, shelter[,] and care of [R.B.] since February 2017." This was clearly in error. Contrary to the law as set forth above, the circuit court granted Tammy, a nonparent, standing to seek primary parental responsibilities as to R.B. without requiring Tammy to present any evidence regarding whether Hayden, as R.B.'s natural parent, had voluntarily and indefinitely relinquished custody of R.B. to Tammy. The only evidence entered into the record at that time was a transcript of the juvenile proceedings which Hayden introduced into evidence to show that he did not give his consent for Tammy to have custody of R.B. Hayden, at that time, appeared at the hearing without having been served and without counsel. Shortly thereafter, Hayden retained counsel and filed the petition for primary allocation of parental responsibilities. We find that, as a matter of law, the transcript of the juvenile proceeding, standing alone, is insufficient to meet Tammy's burden to prove that Hayden voluntarily and indefinitely relinquished physical custody of R.B. to her.

¶ 26 For the foregoing reasons, the circuit court's October 2, 2017, order was contrary to section 601.2(b)(3) of the Act (750 ILCS 5/601.2(b)(3) (West 2016)) and a violation of

the superior rights doctrine. See *Kirchner*, 164 Ill. 2d at 490-91. Accordingly, it must be vacated. Moving to the circuit court's July 20, 2018, order, the circuit court found, after the evidentiary hearing, that it did not have jurisdiction to revisit the issue of Tammy's "standing" and noted that Hayden was granted leave to appeal the circuit court's previous finding and had not pursued such an appeal. The circuit court went on to evaluate the evidence presented to it based on the best interests of the child without making the threshold determination required by section 601.2(b)(3) of the Act. This was also erroneous. The rules allowing appeals from certain interlocutory orders do not require such appeals. See *Salsitz v. Kreiss*, 198 Ill. 2d 1, 12 (2001). A party has the option of waiting until after final judgment has been entered to seek review of the circuit court's interlocutory order. *Id.* In any event, a circuit judge may review, modify, or vacate an interlocutory order at any time before final judgment, even if the original order was entered by another circuit judge, and regardless of whether the order was immediately appealable. *Lake County Riverboat L.P. v. Illinois Gaming Board*, 313 Ill. App. 3d 943, 950 (2000). For these reasons, we also vacate the circuit court's July 20, 2018, order.

¶ 27 We remand with directions that the circuit court conduct further proceedings on Tammy's petition, as a nonparent, to intervene and seek an allocation of primary parental responsibilities as to R.B., in accordance with the principles set forth herein. The circuit court first must make a threshold determination, based on evidence, as to whether Hayden voluntarily and indefinitely relinquished physical custody of R.B. to Tammy. See *Kirchner*, 164 Ill. 2d at 491-93. As an element of Tammy's petition, she has to be held to the burden of proof on this issue. See *Young*, 2018 IL App (4th) 170001, ¶ 49. Only if the

circuit court finds, based upon the evidence, that Tammy has met her burden of proof as to this issue, may the court consider whether the best interests of R.B. are served by an allocation of parental responsibilities to Tammy. Otherwise, the circuit court must consider Hayden's petition for allocation of primary parental responsibilities as to R.B. as between Hayden and Courtney. A new evidentiary hearing for this purpose is warranted due to the passage of time and the focus of the threshold inquiry the circuit court must make.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the October 2, 2017, and July 20, 2018, orders of the circuit court of Christian County are vacated, and this cause is remanded with directions, as detailed above.

¶ 30 Orders vacated; cause remanded with directions.