

NOTICE
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2011 Ill. App. (4th) 110124-U

Filed 7/7/11

NO. 4-11-0124

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: J.B., a Minor,)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS and)	Circuit Court of
JEFFREY YOUNG,)	McLean County
Petitioners-Appellees,)	No. 08P1
v.)	
ANDREW NIEMANN,)	Honorable
Respondent-Appellant.)	Stephen R. Pacey,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Steigmann and McCullough concur in the judgment.

ORDER

¶ 1 *Held:* The trial court’s denial of a biological father’s petition to terminate the guardianship of his son by a third party, son’s former stepfather, was not against the manifest weight of the evidence.

¶ 2 Andrew Niemann, respondent father of J.B., a minor born June 26, 2004, appeals the trial court's denial of his motion to reconsider his petition to terminate Jeffrey Young's guardianship of J.B. Young is the former stepfather of J.B.

¶ 3 Niemann and Melissa Linardos, formerly known as Melissa Baum and Melissa Young, were involved in a romantic relationship in which J.B. was conceived. Niemann’s paternity was confirmed through DNA testing. At the time of J.B.’s birth, Niemann resided in Ohio.

¶ 4 While pregnant with J.B., Linardos become involved in a romantic relationship

with Young. The couple was married on March 18, 2005. Until December 2007, Young, Linardos, and J.B. resided together in Normal, Illinois. In December 2007, Linardos moved back to her hometown of Cincinnati, Ohio, to address some mental-health issues. Linardos left J.B. with Young. Linardos and Young divorced the following year. Even after the couple divorced, Young continued to care for J.B.

¶ 5 On January 2, 2008, Young petitioned for temporary and permanent guardianship of J.B. Both Niemann and Linardos consented to the permanent guardianship. Later that year, the trial court appointed Young guardian of the person for J.B. On September 29, 2008, Niemann filed a petition to terminate Young's guardianship. In April 2009, Linardos also filed a petition to terminate Young's guardianship. After a hearing, the court denied both petitions to terminate.

¶ 6 On October 21, 2010, Niemann filed a motion to reconsider his petition to terminate guardianship. The trial court denied the motion. On appeal, Niemann argues the court erred in denying his motion to reconsider, because the court (1) failed to consider his superior rights as a biological parent and (2) improperly interpreted the provisions of the Probate Act of 1975 (Probate Act) (755 ILCS 5/1-1 et seq. (West 2008)) that govern guardianships. See 755 ILCS 5/art. 11 (West 2008). We affirm.

¶ 7 I. BACKGROUND

¶ 8 Niemann and Linardos were involved in a romantic relationship. The couple conceived a child, J.B., who was born on June 26, 2004. Niemann was notified of his potential paternity in fall 2003. Several months after J.B.'s birth, Niemann's paternity was confirmed through DNA testing. At the time of J.B.'s birth, Niemann resided in Ohio. He continues to live

in Ohio. In early fall 2004, Niemann met J.B. for the first time. In the subsequent months, Niemann made one or two trips to Illinois to visit with J.B.

¶ 9 While pregnant with J.B., Linardos become involved in a relationship with Young. Linardos and Young were married on March 18, 2005. They resided in Normal, Illinois, where they jointly raised J.B. Sometime during summer 2005, Young expressed to Niemann his desire to adopt J.B. Niemann was agreeable to Young's adoption of J.B. However, the adoption never occurred.

¶ 10 In December 2007, Linardos returned to her hometown of Cincinnati, Ohio, to address her mental-health issues. She left J.B. in Young's care. The following year, Linardos and Young divorced. Shortly thereafter, Linardos married Peter Linardos. They reside in Ohio.

¶ 11 On January 2, 2008, Young petitioned for temporary and permanent guardianship of J.B. Linardos consented to Young's appointment as temporary and permanent guardian of J.B. On May 8, 2008, the trial court appointed Young the temporary guardian of J.B. Subsequently, on June 19, 2008, the court appointed Young the guardian of the person for J.B. Before the court made its determination on June 19, Niemann appeared before the court and consented to Young's guardianship. Niemann testified that he believed Young's guardianship to be temporary.

¶ 12 On September 29, 2008, Niemann filed a petition to terminate Young's guardianship and for an award of guardianship or custody. In early 2009, Niemann, Young, and Linardos entered into mediation. The mediation did not provide a resolution as to who should serve as the guardian of J.B., but visitation was established for Niemann and Linardos. As a result of the mediation, Niemann began traveling once a month to Normal to visit J.B. The monthly visits were supervised by Young. In April 2009, Linardos filed a petition to terminate

Young's guardianship. On July 7, 2009, the trial court appointed Alan Novick to serve as the guardian *ad litem* for J.B. In Novick's memorandum to the court, he recommended that Young continue as the guardian of J.B. On August 5, 2010, there was a hearing concerning Niemann's and Linardos' petitions to terminate guardianship. After the hearing, the court denied the petitions. The court found it was in the best interest of J.B. that the guardianship continue, because Young "has been involved in the child's life since birth, has been the sole custodial 'parent' for 2 ½ years[,] and has facilitated the child's relationship with the biological parents."

¶ 13 On October 21, 2010, Niemann filed a motion to reconsider his petition to terminate guardianship. The trial court denied the motion. In denying the motion, the court distinguished this case from *In re R.L.S.*, 218 Ill. 2d 428, 844 N.E.2d 22 (2006). Niemann relied on *R.L.S.* to argue that the court should first look to the fitness of the biological parent in deciding petitions to terminate guardianship. The court found *R.L.S.* does not provide standards for terminating a guardianship originally consented to by biological parents, because *R.L.S.* involves the standing of a third party to petition for guardianship against the wishes of a biological parent. Further, the court determined that Niemann's view of the law "would allow a natural parent to consent to guardianship of a child at its birth, have no involvement in the child's life for years and reappear at anytime during the child's minority to automatically terminate the guardianship and reclaim custody." The court also determined that, at the time of the hearing, the Probate Act provided no guidance for terminating a guardianship originally consented to by the biological parents. The standards for terminating a guardianship originally consented to by biological parents were added to the Probate Act by Public Act 96-1338. Pub. Act 96-1338 (eff. Jan. 1, 2011) (amending 755 ILCS 5/11-14.1 (West 2008)). Public Act 96-1338 did not become

effective until January 1, 2011.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 In this appeal, the appellee has failed to file a brief. A reviewing court is not compelled to serve as an advocate for the appellee and is not required to search the record for the purpose of sustaining the trial court's judgment. If the record is simple, and the claimed errors can be easily decided without the aid of an appellee's brief, then the reviewing court should decide the appeal on its merits. However, if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record, the judgment of the trial court may be reversed. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493, 495 (1976). In this case, the record is simple and the issues can be decided without the aid of the appellee's brief, therefore we decide the appeal on its merits.

¶ 17 The trial court is granted great deference in deciding custody issues as it is in the best position to judge the credibility of witnesses and determine the needs of the child. *Gren v. Gren*, 59 Ill. App. 3d 624, 626, 375 N.E.2d 999, 1000 (1978). A trial court's custody determinations will not be disturbed unless they are against the manifest weight of the evidence. *In re Marriage of Karonis*, 296 Ill. App. 3d 86, 88, 693 N.E.2d 1282, 1284 (1998). A judgment is against the manifest weight of the evidence if the opposite conclusion is apparent or if the findings appear to be unreasonable, arbitrary, or not based upon evidence. *In re Marriage of Hefer*, 282 Ill. App. 3d 73, 80, 667 N.E.2d 1094, 1100 (1996) (citing *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 242, 665 N.E.2d 1260, 1274 (1996)).

¶ 18 On appeal, Niemann argues the trial court erred in denying his motion to

reconsider his petition to terminate guardianship, because the court (1) failed to consider his superior rights as a biological parent and (2) improperly interpreted the provisions of the Probate Act that govern guardianships by failing to apply the fitness standard from *R.L.S.* to the termination of guardianships. See 755 ILCS 5/art. 11 (West 2008).

¶ 19 At the time of trial, the Probate Act did not include express standards for terminating a guardianship of a minor who has not reached the age of majority. See *In re Estate of Wadman*, 110 Ill. App. 3d 302, 304, 442 N.E.2d 333, 334 (1982). Standards for terminating a guardianship of a minor who has not reached the age of majority were added to the Probate Code by Public Act 96-1388. However, Public Act 96-1388 did not become effective until January 1, 2011. Section 11–14.1 of the Probate Act, as amended by Public Act 96-1388, provides that if a parent files a petition to terminate a guardianship, the court:

“shall *** terminate the guardianship if the parent establishes, by a preponderance of the evidence, that a material change in the circumstances of the minor or the parent has occurred ***; unless the guardian establishes, by clear and convincing evidence, that termination of the guardianship would not be in the best interests of the minor.” Pub. Act 96-1338 (eff. Jan. 1, 2011) (amending 755 ILCS 5/11-14.1 (West 2008)).

¶ 20 Absent statutory standards for terminating a guardianship of a minor who has not reached the age of majority, the *Townsend-Wadman* standards govern a biological parent's attempt to terminate a guardianship established under the Probate Act. *In re Guardianship of Jordan M.C.-M.*, 351 Ill. App. 3d 700, 706, 814 N.E.2d 232, 237 (2004). The

Townsend-Wadman standards consist of a three-part test. First, the guardian must overcome the superior-rights doctrine that a parent has a superior right to custody of his or her children. *In re Estate of Webb*, 286 Ill. App. 3d 99, 101, 675 N.E.2d 192, 194 (1996). To satisfy the burden of overcoming the superior-rights doctrine, a guardian must "demonstrate good cause or reason to overcome" the superior-rights doctrine. *In re Custody of Townsend*, 86 Ill. 2d 502, 510-11, 427 N.E.2d 1231, 1235-36 (1981). If the guardian is able to overcome the initial burden, then the burden shifts to the biological parent to show some change in circumstances. *Webb*, 286 Ill. App. 3d at 101, 675 N.E.2d 194. Otherwise, the court would be ruling on the same issue it previously decided in awarding the guardianship. *Wadman*, 110 Ill. App. 3d at 305, 442 N.E.2d at 335. Lastly, the burden shifts back to the guardian to show that it is in the child's best interest that he or she remains the guardian. *Webb*, 286 Ill. App. 3d at 101, 675 N.E.2d at 194; *Jordan M. C.-M.*, 351 Ill. App. 3d at 706, 814 N.E.2d at 237.

¶ 21 In this case, Young satisfied the initial burden of overcoming the superior-rights doctrine. As the guardian, Young is required to show "good cause" for overcoming the superior-rights doctrine. *Townsend*, 86 Ill. 2d at 510-11, 427 N.E.2d at 1235-36. Young is similar to the guardian, adoptive mother, in *Jordan M. C.-M.* In *Jordan M. C.-M.*, 351 Ill. App. 3d at 702, 814 N.E.2d at 233, the biological mother petitioned to terminate her adoptive mother's guardianship of her son, Jordan. However, the biological mother had earlier consented to the adoptive mother's guardianship. Since his birth, Jordan had primarily lived with and been cared for by the adoptive mother. The court found the adoptive mother showed good cause to overcome the superior-rights doctrine because she (1) was granted guardianship over the minor with the consent of the biological mother and (2) maintained consistent care, custody, and control

of the minor. *Jordan M. C.-M*, 351 Ill. App. 3d at 706, 814 N.E.2d at 237. Like in *Jordan M.C.-M*, Niemann voluntarily consented to Young's guardianship. On June 19, 2008, Niemann appeared before the trial court and consented to the guardianship. Similar to the adoptive mother in *Jordan M.C.-M*, Young has cared for J.B. since his birth. Further, as the temporary and permanent guardian of J.B., Young has maintained consistent custody and control of J.B. for the past 2 ½ years. Young showed good cause to overcome the superior-rights doctrine; consequently, the burden shifts to Niemann to show a change in circumstances.

¶ 22 Niemann satisfied the burden of showing a change in circumstances. Prior to September 2008, Niemann visited J.B. on an infrequent basis and provided little financial support to Linardos or Young. Until Linardos moved back to Ohio, he was also willing to consent to Young's adoption of J.B., because he believed it would be best for J.B. to be raised in a two-parent home. In 2008, Niemann consented to Young's guardianship of J.B. The trial court found Niemann's failure to maintain a relationship with J.B. was primarily the result of distance. "[T]here is little dispute that other than being 'conflicted' about what was best for his child, no impediment, other than distance, existed which prevented his maintaining a relationship with the child." However, after September 2008, Niemann demonstrated an intention to have a relationship with J.B. On September 28, 2008, Niemann filed a petition to terminate Young's guardianship. As agreed to in mediation, Niemann also began monthly visitation with J.B. On June 29, 2009, in order to increase the frequency and duration of his visitation, Niemann filed a petition for visitation. The court determined that there was a change in circumstances, since the time the guardianship had been instituted. The court found a change of circumstances in regard to Niemann's intent to form a relationship with J.B. Because Niemann met the burden of

showing a change in circumstances, the burden shifts back to Young to show that it is in the best interest of J.B. for him to retain guardianship.

¶ 23 We agree with the trial court, it is in the best interest of J.B. for Young to retain guardianship. In making its determination as to J.B.'s best interests, the court looked to the duration and nature of Young's and J.B.'s relationship. Young has been involved in J.B.'s life since his birth and served as J.B.'s sole custodial parent for 2 ½ years. Young has provided J.B. with stability and care throughout the duration of his life. In contrast, until 2009, Niemann had minimal involvement in J.B.'s life. Niemann's involvement with J.B. consisted of making a couple trips to Illinois to visit with his son. The court also found that Young helped to facilitate J.B.'s relationship with his biological parents.

¶ 24 Lastly, Niemann argues that the supreme court's holding in *R.L.S.* applies to this case. In *R.L.S.*, the supreme court interpreted section 11-7 of the Probate Act as entitling fit parents to custody. *R.L.S.*, 218 Ill. 2d at 444, 844 N.E.2d at 32. Niemann claims the fitness standard set forth in *R.L.S.* should be applied to the termination of guardianships. If a parent is found to be fit, then the guardianship should be terminated and the parent awarded custody. Niemann asserts that the trial court erred in denying his petition for termination, because the court did not make a finding as to whether he was a fit parent.

¶ 25 We agree with the trial court's determination that *R.L.S.* does not apply to this case, because *R.L.S.* concerns a third-party's standing to petition for guardianship of a minor. This case does not involve a third-party's standing to file for guardianship because that issue has already been determined. Niemann voluntarily consented to Young's guardianship of J.B. Further, in *R.L.S.*, the supreme court does not indicate that the fitness standard applies to all guardianship related

provisions within the Probate Act, specifically petitions to terminate guardianships. The fitness standard set forth in *R.L.S.* does not apply to Niemann's petition to terminate.

¶ 26 The trial court's decision to deny Niemann's motion to reconsider his petition to terminate guardianship was not against the manifest weight of the evidence. Although the court did not expressly find that the superior-rights doctrine was overcome, the court did determine that Niemann voluntarily consented to Young's guardianship and Young provided J.B. with care from the time of his birth. The court expressly found that there was a material change in circumstances since the order appointing Young as guardian. We agree, after the order appointing Young as guardian, Niemann showed an intent to have a relationship with J.B. In making its determination, the court also assessed the best interests of the child. The court considered a variety of factors including stability, the length of J.B.'s relationship with the respective parties, and Young's relationship with the other parties.

¶ 27

III. CONCLUSION

¶ 28

For the foregoing reasons, we affirm the trial court's judgment.

¶ 29

Affirmed.