

NOTICE

Decision filed 01/18/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-10-0325
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).

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|------------------------------|---|-------------------|
| <i>In re</i> S.J.F., a Minor |) | Appeal from the |
| |) | Circuit Court of |
| (Patrick F., |) | Madison County. |
| |) | |
| Petitioner-Appellee, |) | |
| |) | |
| v. |) | No. 05-P-458 |
| |) | |
| Lillian F., |) | Honorable |
| |) | Ellar Duff, |
| Respondent-Appellant). |) | Judge, presiding. |

NO. 5-10-0326
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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|------------------------------|---|-------------------|
| <i>In re</i> P.W.F., a Minor |) | Appeal from the |
| |) | Circuit Court of |
| (Patrick F., |) | Madison County. |
| |) | |
| Petitioner-Appellee, |) | |
| |) | |
| v. |) | No. 04-P-234 |
| |) | |
| Lillian F., |) | Honorable |
| |) | Ellar Duff, |
| Respondent-Appellant). |) | Judge, presiding. |

JUSTICE DONOVAN delivered the judgment of the court.
Presiding Justice Chapman and Justice Wexstten concurred in the judgment.

RULE 23 ORDER

Held: The court properly terminated the maternal grandmother's guardianship of her

two grandsons in favor of awarding custody to the father, who was a willing and able parent.

Respondent, Lillian F. (Mother), appeals the dissolution of guardianship and the award of the custody of the parties' children to Patrick F. (Father), as entered by the circuit court of Madison County. We affirm.

The appellee did not file a brief in this matter, but since the appellant's brief and the record are sufficient to resolve this appeal, we will consider the appeal pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 345 N.E.2d 493 (1976).

Mother and Father were married in December of 1999. Their marriage was dissolved in March of 2006, and Mother was awarded the custody of the parties' two children, two boys ages six and nine. Prior to the dissolution, in April of 2004, the boys' maternal grandmother assumed the guardianship of the boys in order to help Mother and Father get back on their feet. The guardianship was still in place at the time of the dissolution of the parties' marriage.

In June of 2009, Father filed a petition to terminate the guardianship. While both children were doing well under the care of their grandmother, Father believed he was capable of caring for them himself. The court agreed and entered an order terminating the guardianship and changing the custody from Mother to Father. Mother appeals, contending that the court did not hear sufficient evidence to dissolve the guardianship and change the custody of the minor children to Father, who now resides out-of-state. She believes that it is in the best interest of the children to continue the guardianship.

The record reveals that Father currently lives in his father's house with 10 family members and drives his father's vehicle to work. At the time of the hearing he had only been working at his new job a week and a half and his pay rate was \$8 an hour. Father testified, however, that he would do whatever it took to provide for his sons and that he and his new

wife were looking for a home of their own. The court noted that Father had consistently exercised visitation with the boys while they were under the care of their grandmother, and the boys, as expressed in their *in camera* interviews, desired to live with their father and his new wife. Both stated that they liked the area where he lived and were eager to move to spend more time with him. The court also found that the boys had established a positive relationship with Father's new wife, voluntarily calling her "mom," and that neither of them had been adversely affected by having extended families living under the same roof. Mother, on the other hand, testified that she still is not able to care for her sons on her own and wanted her mother to continue to serve as the guardian.

It is clear that the rights of a parent are superior to other custodial rights except where the best interests of the child or children dictate otherwise. See *In re R.L.S.*, 218 Ill. 2d 428, 844 N.E.2d 22 (2006). Consequently, if a willing and capable parent steps forward, custody should be restored to that parent and any guardianship terminated absent a finding that it is in the best interest of the child or children that the guardianship be continued. Father expressed his willingness to accept the responsibility for caring for his sons. And, while his job is new and his living arrangements are temporary, Father has established a steady family unit and has shown an active involvement in caring for the boys during visitation periods. More importantly, no real evidence was presented that Father is unfit or unable to care for the needs of his children. The burden is on the guardian to rebut Father's presumptive right to the custody of his children when he is willing to support them and is able to attend to their day-to-day needs. See *In re Estate of Webb*, 286 Ill. App. 3d 99, 101, 675 N.E.2d 192, 194 (1996). Here, the guardian did not meet that burden. Accordingly, the court correctly found that it was in the best interests of the boys that the guardianship be terminated and that custody be restored to Father. We cannot say that court's decision is in error under the circumstances presented.

Finally, we note that the court properly determined that it was in the best interests of the children that they also be allowed to move out-of-state with their father even though neither party raised the issue until this appeal. See *In re Marriage of Eckert*, 119 Ill. 2d 316, 328, 518 N.E.2d 1041, 1046 (1988).

For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

Affirmed.