



appeal, the grandparents argue that they met the section 601(b)(2) standing requirements where B.H. had been removed from the custody of her biological father and placed in their physical custody as a result of a two-year, plenary order of protection issued against her father. We affirm.

¶ 3 B.H. was born on September 4, 1998. Her biological mother was killed in a traffic accident when she was just four months old. B.H. resided with her maternal grandparents until she was five years old. She then went to live with her biological father. On February 22, 2010, B.H. was removed from her father's possession and placed with her maternal grandparents pursuant to an emergency order of protection issued under the Illinois Domestic Violence Act of 1986 (Domestic Violence Act) (750 ILCS 60/101 *et seq.* (West 2008)). As a result of several continuances, the emergency order was extended three times and an interim order of protection was entered and extended as well. The evidentiary hearing on the petition for a plenary order of protection was held on May 13, 2010. At the close of the testimony, the circuit court issued a plenary order of protection pursuant to section 219 of the Domestic Violence Act (750 ILCS 60/219 (West 2008)). The order was to remain in effect for up to two years. According to the plenary order of protection, the maternal grandparents were granted physical care and possession of B.H. and the biological father was denied visitation. The father filed a motion to reconsider, which was denied. The father appealed, but he later dismissed that appeal.

¶ 4 On April 14, 2010, the maternal grandparents filed a petition pursuant to section 602 of the Marriage Act, seeking sole custody of B.H. The biological father filed a motion to strike the petition pursuant to section 601(b)(2) of the Marriage Act and therein alleged that the grandparents lacked standing to pursue custody. After considering the oral and written arguments of the parties, the circuit court granted the father's motion to strike and dismissed the grandparents' petition for custody. The court found that the grandparents failed to

establish that the biological father had voluntarily relinquished his parental rights to B.H. where the father had legal custody of B.H. after the death of her mother and where the grandparents came into possession of B.H. by means of a court order after a lengthy and contested hearing. The grandparents appealed.

¶ 5 The presumption that a natural parent's right to the care, custody, and control of his or her child is superior to that of a nonparent is well recognized in Illinois and is incorporated in our statutory law. *In re R.L.S.*, 218 Ill. 2d 428, 434-35, 844 N.E.2d 22, 27 (2006); *In re Custody of Peterson*, 112 Ill. 2d 48, 51-52, 491 N.E.2d 1150, 1151-52 (1986). The presumption is not absolute and serves as one of several factors used by courts to ultimately determine where the best interests of the child lie. *In re Custody of Peterson*, 112 Ill. 2d at 51-52, 491 N.E.2d at 1151-52.

¶ 6 The Marriage Act sets forth a statutory requirement to establish a nonparent's standing to pursue a custody action. 750 ILCS 5/601(b)(2) (West 2008); *In re Custody of Peterson*, 112 Ill. 2d at 52, 491 N.E.2d at 1152. Lack of standing is a threshold issue that, if raised, must be decided before the "best interests of the child" issue can be considered. *In re A.W.J.*, 197 Ill. 2d 492, 496-97, 758 N.E.2d 800, 803 (2001); *In re Custody of Peterson*, 112 Ill. 2d at 53, 491 N.E.2d at 1152. A challenge to a nonparent's standing is not a jurisdictional issue. *In re A.W.J.*, 197 Ill. 2d at 496, 758 N.E.2d at 803. A challenge to a nonparent's standing is an affirmative defense that can be waived if not raised by the respondent or by the circuit court, *sua sponte*. *In re Marriage of Sechrest*, 202 Ill. App. 3d 865, 874-74, 560 N.E.2d 1212, 1217-18 (1990).

¶ 7 The standing requirement for a nonparent is set forth in section 601(b)(2) of the Marriage Act. Section 601(b)(2) states that a nonparent may commence a custody proceeding by filing a petition for custody of a child, but only if the child "is not in the physical custody of one of his parents." 750 ILCS 5/601(b)(2) (West 2008). Physical

custody is not synonymous with physical possession. The determination of physical custody should not be based on who has physical possession of the child at the time the petition for custody is filed. *In re Custody of Peterson*, 112 Ill. 2d at 53-54, 491 N.E.2d at 1152.

¶ 8 In order to satisfy the standing requirement under section 601(b)(2), a nonparent must show that the natural parent no longer has physical custody of the child because he relinquished custody of the child and not because of some fortuitous occurrence. *In re Custody of Peterson*, 112 Ill. 2d at 54-55, 491 N.E.2d at 1152-53. In order to determine whether a relinquishment of physical custody has taken place, the court considers who provided for the care and welfare of the child before the custody petition was filed, how the nonparent came into physical possession of the child, and the nature and duration of the possession. *In re A.W.J.*, 316 Ill. App. 3d 91, 96, 736 N.E.2d 716, 721 (2000), *aff'd*, 197 Ill. 2d 492, 758 N.E.2d 800 (2001); *In re Marriage of Carey*, 188 Ill. App. 3d 1040, 1047-48, 544 N.E.2d 1293, 1297-98 (1989). No one factor is controlling, and the outcome of each case is highly fact-dependent. *In re Marriage of Carey*, 188 Ill. App. 3d at 1047-48, 544 N.E.2d at 1297-98. Whether a nonparent has standing to pursue a custody petition is a question of law that is reviewed *de novo*. *In re A.W.J.*, 316 Ill. App. 3d at 96, 736 N.E.2d 716.

¶ 9 The crux of the pending appeal is whether the father relinquished physical custody of the minor child. The grandparents argue that for purposes of satisfying the standing requirement under the Marriage Act, the father essentially chose to relinquish custody of B.H., by virtue of his decision to engage in conduct which led to the entry of the plenary order of protection against him and the denial of his request for visitation.

¶ 10 The record indicates that the grandparents came into possession of B.H. when the circuit court granted a series of orders of protection. The record further indicates that the father vigorously defended against the plenary order of protection and the petition for

custody. During the evidentiary hearing on the plenary order of protection, there was conflicting testimony in regard to whether the father had engaged in abusive and inappropriate behavior toward B.H. Relinquishment is defined as a forsaking, abandoning, renouncing, or giving over a right. Black's Law Dictionary 1161 (5th ed. 1979). In our view, the fact that an order of protection has been issued, by itself, is not sufficient to establish either a voluntary forfeiture or an abdication of parental rights by act or omission. We can envision situations where the acts or omissions that led to the entry of an order of protection may be sufficient to establish a relinquishment of custody. After reviewing the record, we have concluded that this is not such a case and that the circuit court did not err in finding that the grandparents failed to meet the standing requirement set forth in section 601(b)(2) of the Marriage Act.

¶ 11 A word of caution to the parties is in order. Because the standing of the grandparents was not established, the issue of the child's best interest was never addressed. The record certainly reflects concerns as to the parental fitness of the father and the welfare of the minor child in his custody, and this order affirming that lack of standing should not be taken to diminish those concerns. A nonparent, who cannot meet the standing requirement set forth in the Marriage Act, can seek an extension to the plenary order of protection (750 ILCS 60/220(e) (West 2008)) or a guardianship under the Probate Act of 1975 (Probate Act) (755 ILCS 5/11-5 (West 2008)). In order to meet the standing requirement under the Probate Act, a nonparent must rebut the presumption that the parent is willing and able to make and carry out daily child-care decisions concerning the minor child. *In re R.L.S.*, 218 Ill. 2d at 436, 844 N.E.2d at 28.

¶ 12 The judgment of the circuit court of Madison County is affirmed.

¶ 13 Affirmed.