

No. 1-12-3598

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KEVIN DANDURAND,)	Appeal from the Circuit
)	Court of Cook County,
Petitioner,)	
)	
v.)	No. 05 D 79366
)	
ANNE PITEJ,)	
)	The Honorable
Respondent.)	Martha A. Mills,
)	Judge Presiding.

ROBERTA DANDURAND,)
)
Third-Party Petitioner.)

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* A grandmother who filed a petition for visitation of her grandson forfeited the argument that she had visitation rights pursuant to a consent decree by failing to seek its enforcement at the trial court. Further, she failed to rebut the presumption that the child's mother's decision to deny her visitation was not harmful to the

child's physical, mental, or emotional health where the only potential harm suffered by the child was the lost opportunity to have a loving relationship with his grandmother.

¶ 2 Petitioner Roberta Dandurand, appeals from an order from the circuit court of Cook County denying her petition for grandparent visitation with her grandson Joshua. She contends that the trial court erred in denying her visitation pursuant to a consent decree entered into by the child's parents, and that, contrary to the trial court's finding, Roberta rebutted the presumption that the decision by the child's mother to deny grandparent visitations was in the best interest of the child.

¶ 3 BACKGROUND

¶ 4 The record shows that on May 6, 2011, Roberta filed a petition for leave to intervene to file a verified petition for permanent and temporary grandparent visitation with Joshua, who was eight years old at that time. Roberta sought visitation pursuant to section 607(a-3), (a-5)(1)(E) of the Illinois Marriage and Dissolution of Marriage Act ("Marriage Act") (750 ILCS 5/607(a-3), (a-5)(1)(E) (West 2010)), which allows paternal grandparents of a child born out of wedlock to bring a petition for visitation that is unreasonably denied. In her actual petition for permanent and temporary grandparent visitation, Roberta stated that she is Joshua's paternal grandmother, and that on May 18, 2010, Johua's mother Anne Pitej and his father Kevin Dandurand, who were never married, entered into an agreement pursuant to which Roberta would have visitation with the child every other weekend, coinciding with the Saturdays when Kevin had visitation. Roberta further explained that the agreement was part of an agreed order which awarded Anne

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sole custody of the minor child. The agreed order was entered after almost 5 years of litigation between Anne and Kevin, during which Roberta had already filed prior petitions to intervene and for grandparent visitation, along with her husband Gary Dandurand, who is now deceased.

¶ 5 Roberta further alleged that on April 29, 2011, the trial court entered an order of protection against Kevin, which protected both Anne and Joshua. Roberta stated that since that order was entered, Anne has denied Roberta any visitation with Joshua, even though the order of protection was only against Kevin and did not involve Roberta. She then alleged that she had a close, loving and caring relationship with her grandson, and that Anne's denial of visitation with Joshua would cause him to suffer emotional and mental harm. In support of her claim, Roberta stated that Joshua had been visiting her his entire life, that he has his own room at her house, enjoys spending time with Roberta, and feels comfortable talking about his recently deceased grandfather, to whom Joshua was quite close. Roberta then alleges that Anne's decision to deny her visitation is unreasonable because Anne's concerns are only related to Kevin, and again claims that due to the emotional bond between Roberta and Joshua, the child would be harmed by such a denial of a relationship with Roberta.

¶ 6 Attached to the petition was the agreed order entered on May 18, 2010, which stated, in pertinent part, that Kevin and Anne will allow the paternal grandparents to have visits with Joshua on the Saturday of Kevin's weekend with him from 11 am to 7 pm. It also stated that Kevin and Anne agreed that this arrangement in no way gave the grandparents standing for custody.

¶ 7 In her answer to Roberta's petition, Anne states that while she entered into an agreed

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order with Kevin on May 18, 2010, Roberta was not granted visitation rights pursuant to that order. She alleged that Joshua's paternal grandparents were merely granted limited time with Joshua on Kevin's weekends with him. Anne further explains that the order of protection against Kevin reserves the issue of visitation for him, that Roberta is not a party to the order of protection and has no legal right to visit the child.

¶ 8 The common law record contains the order of protection entered against Kevin, which reserved visitation of Joshua, and ordered Kevin to have no contact with Anne, Joshua or Anne's mother Mary Pitej. It appears that the order was entered after Kevin threatened to kill Anne. The trial court extended the order of protection on April 29, 2011, and entered a plenary order on September 29, 2011, but both orders were silent on whether Roberta would have any visitation with Joshua.

¶ 9 While the record on appeal does not contain a transcript of the hearing on Roberta's petition, we were provided with a bystander's report, which indicates that the hearing was held on October 24, 2012, in which the trial court heard testimony and accepted documentary evidence, such as records from Joshua's psychiatric hospitalizations, school records and a 2007 custody evaluation. At the hearing, Anne appeared *pro se* and Joshua was represented by a child representative from the Office of the Public Guardian. Roberta's first witness was her brother John Nelson, who testified that during the first five years of Joshua's life, he saw the child several times a year, and would stop by for three hours at a time. John last saw Joshua around March or April, 2011, during a visit with both Roberta and Kevin, at which time Joshua did not appear upset. According to John, Joshua seemed to have a close relationship with Roberta when he saw

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the child at family parties and other gatherings. John testified that he knew Roberta had to help Kevin with parenting and had not observed Kevin alone with the child. Further, John explained that Kevin had struggled with alcohol in the past, but that he had not seen anything of an alcohol problem for the past five years. When questioned about Roberta's need to help Kevin because of his alcohol problem, John stated that "he may not have been as emotionally prepared as an adult should be – not as mature as he should have been."

¶ 10 The next witness who testified for Roberta was her cousin, Marilyn Melligan, who testified to seeing Joshua on holidays when he was with Roberta, and that she saw the child five or six times per year. Marilyn further stated that Joshua and Roberta had a normal grandmother-grandson relationship in which they loved each other, and that Joshua seemed comfortable and happy around Roberta. She also noted that Roberta had gifts and toys for Joshua at her home.

¶ 11 Roberta next called Anne as an adverse witness. Anne testified that she and Kevin dated for about 12 months before Joshua was born. Kevin resided with Anne, in her mother's home, for about three to six months off and on, but was kicked out because of his drinking and drug use. Anne acknowledged that she used marijuana and cocaine one time after Joshua was born, and that she was arrested once for possession, but noted that she has no other arrests. According to Anne, the agreement in which she entered with Kevin on May 18, 2010 did not define Roberta's visitation, but merely specifies Kevin's parenting time. Anne further testified that Joshua does not want to visit with Roberta and wants the visitation dispute to be over. She stated that Joshua had told her that Roberta would not let him go home when he wanted and would hide the telephone from the child. Joshua had to wait for Roberta to fall asleep maybe around 10 pm

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to midnight to call Anne, who would then pick him up at about 1 or 2 am. Anne stated that about two years ago, Roberta brought police to Anne's home and Joshua felt threatened, and that while Anne never saw Roberta strike Joshua, she once saw her drag him to the car for a visit.

¶ 12 Anne further explained that Kevin does not participate in Joshua's life and that when he did exercise parenting time, it was with the help of others. Furthermore, Anne testified that Joshua suffered psychological problems because of Kevin and Roberta, and that the child was hospitalized twice in 2011. During his first hospitalization, Joshua stated that he would rather die than see Kevin or Roberta, and during his second one, Joshua claimed that he was afraid to go home to Anne. While Anne acknowledged that Joshua made complaints about herself and her mother, she averred that they had not harmed him.

¶ 13 Roberta then testified on her own behalf. She explained that Kevin had gone to court for visitation, starting when Joshua was 1 year old, because Anne would not allow visitation. Roberta stated that before 2007, she would see Joshua at her home during the weekends when Kevin had visitation, and averred that since 2007, she and Gary had grandparent visitation. She further testified that Joshua loved going on walks to the park with her and talking, and the two of them would also build models together and worked on craft projects. Joshua and Roberta talked about Gary, who passed away in December 2010, and who had a close relationship with the child. Roberta testified that Joshua loved playing in the neighborhood around her house and had friends there, and Roberta keeps a bedroom in her house for Joshua. According to Roberta, Kevin is not very attentive to Joshua.

¶ 14 On cross examination, Roberta acknowledged that she has not seen Joshua since 2011

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and has not sent letters or birthday cards to Joshua, nor has she inquired about how the child is doing. Roberta further stated that she thinks that she can prevent Kevin from visiting Joshua, but, as the bystander's report states, "it was unclear how she will do that." Roberta later stated that she would be willing to call the police if Kevin appeared during visitation.

¶ 15 After Roberta's case-in-chief, Anne called her sister Leona Pitej, who lives with their mother, Anne and Joshua. She testified that Joshua had a good relationship with his late grandfather Gary, was sad about his passing, and that the child continued to visit Roberta until April 2011. Leona explained that on April 16, 2011, during Kevin's normally scheduled visit, Roberta picked up Joshua from a birthday party, which Leona was also attending. Joshua did not want to leave the party, and Roberta insisted that she had rights and would do anything to protect them, and that she would see Leona in court. According to Leona, Joshua was scared, and that was the last time that he saw Roberta.

¶ 16 Leona also testified that between August 2010 and April 2011, Joshua was secretive and tired upon returning from visits, and would either not speak or say "that's a secret" when asked about visits. However, Joshua told Leona that sometimes when he spent the night on a visit, he would be given only one meal, so Anne and Leona began to pack lunches for him to take on visits. In addition, Leona stated that in 2011, Joshua played basketball and was reluctant to go with Roberta when he had a game or practice. Leona expressed that Joshua's relationship with Roberta is non-existent and that she had not seen the child show affection for Roberta without being prompted. She explained that the child is scared and did not want to go to visits. According to Leona, Joshua had problems acting up in class following visits and his mood was

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agitated before going to school on the day he was hospitalized.

¶ 17 Anne then returned to the stand to testify on her own behalf that she believes Roberta tells Joshua to lie to her. Anne further testified that if Joshua visits Roberta, there is a danger that Kevin might show up, and that Roberta has no control over Kevin, who has threatened to torture Anne before he kills her. When Joshua was hospitalized due to stress, he revealed that he did not want to visit with Roberta, and Anne explained, consistently with her sister's testimony, that Joshua would be hungry when he returned from visits with Roberta. Anne stated that she does not know if Roberta wants to hurt Joshua, but stated that if Joshua asked to see Roberta, Anne would allow it. According to Anne, she is not harming Joshua by not allowing visits with Roberta.

¶ 18 During closing arguments, Roberta's counsel argued that "the grandparent visitation statute exists for cases such as this because Roberta, not Kevin, parented Joshua," and claimed that actual harm had occurred to Joshua as a result of Anne's denial of visitation with Roberta. The child representative stated that in this case, the statutory requirements for court-ordered grandparent visitation was simply not met, and that Joshua had become suicidal because he was afraid of being forced to visit with his father and grandmother. Anne argued that as a fit mother, she is entitled to deny grandparent visitation because Joshua is not interested in visiting Roberta.

¶ 19 On October 29, 2012, the trial court entered an order denying Roberta's petition for grandparent visitation. In its written order, the court noted that Roberta's petition was made pursuant to the provisions of section 607 of the Marriage Act, which requires a party filing a petition for visitation under the Act to rebut the presumption that a fit parent's decisions

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regarding grandparent visitation are not harmful to the child's mental, physical or emotional health. The court further noted that a plenary order of protection was entered against Kevin, which denied him visitation with Joshua, and that when Kevin's visits were terminated, Roberta's visits also stopped. It found that while Roberta argued that Joshua's meltdown from May 2011 was related to not being permitted to visit with her, it was more likely possible that it was the result of Joshua's history with his father and the "very real" threats from April 2011. The court also found that from Joshua's point of view, visiting Roberta meant that he would see Kevin. In its conclusion, the court ruled that any harm to Joshua as a result of not having a relationship with Roberta was "speculative" and did not overcome the presumption that Anne, a clearly fit parent, made a decision that the lack of visitation with Roberta would not cause harm to Joshua's mental, physical or emotional health.

¶ 20 On appeal from that order, Roberta now contends that the trial court improperly denied her petition for grandparent visitation because her visitation schedule had been set as part of a consent decree entered into between Joshua's parents. She notes that when the trial court granted Anne an order of protection against Kevin, it improperly refused to enforce Roberta's visitation schedule because the allegations on which the order was based were solely related to Kevin's actions and not Roberta's. Thus, Roberta maintains that since her visitation schedule was part of a consent decree, the court was obligated to uphold it regardless of whether Roberta proved that disallowing that visitation was harmful to Joshua.

¶ 21 Joshua, through the office of the Public Guardian, first responds that Roberta has forfeited that argument because she never sought enforcement of the consent decree at the trial

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court. We agree.

¶ 22 Section 214(b)(7) of the Domestic Violence Act provides that a trial court may stop visitation of a non-custodian parent as a remedy where that parent has acted in a manner that may be harmful to the child (750 ILCS 60/214(b)(7)(West 2011)), as the court has done in this case. As noted above, Roberta's visitation schedule, under the agreement between Kevin and Anne, was limited to a portion of the time when Kevin himself had visitation with Joshua. Thus, when Kevin's visitation was reserved, Roberta's visits stopped as well. The parties do not appear to challenge the court's decision to reserve Kevin's visitation with Joshua pursuant to the order of protection, but Roberta now claims her own visitation schedule should nevertheless be enforced, as separate from Kevin's.

¶ 23 However, it is well established that the theory under which a case is brought at the trial court cannot be changed on review, and an issue not presented or considered by the trial court cannot be raised for the first time on review. *In re Marriage of Schneider*, 214 Ill. 2d 152, 172 (2005), citing *Daniels v. Anderson*, 162 Ill. 2d 47, 58 (1994); see also *Village of Roselle v. Commonwealth Edison Co.*, 368 Ill. App. 3d 1097, 1109 (2006) (arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal). Here, in Roberta's petition for visitation, which she filed after the trial court reserved Kevin's visitation, she did not appear to challenge the trial court's decision in failing to somehow separate her visitation schedule from Kevin's in the order of protection. While she correctly noted that the agreed order from May 18, 2010 included a visitation schedule with Joshua during Kevin's visits, she did not appear to seek enforcement of that portion of the agreed order after Kevin's visits were reserved.

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Instead, Roberta seeks an order for temporary and permanent visitation based on the allegation that Joshua will suffer "emotional and mental harm" if Anne continues to deny her visitation with him. As previously noted, Roberta bases her entire petition not on the enforcement of a consent decree, but solely on section 607 of the Marriage Act (750 ILCS 5/607(a-3), (a-5)(E)(1)(West 2011)), which allows a grandparent to petition the court for visitation of a child when that child's parent unreasonably denies such visitation thereby causing the child mental, physical or emotional harm. Thus, she forfeited her argument that she should be granted visitation with Joshua pursuant to the consent decree between Anne and Kevin, and cannot raise it for the first time now.

¶ 24 Roberta next contends, however, that regardless of whether the consent decree is enforced, the circuit court's ruling denying her petition for visitation should nevertheless be reversed because, contrary to the court's findings, she proved, as required by section 607(a-5)(3), that Anne's refusal to allow Roberta to visit Joshua will result in harm to his health. The statute provides, in pertinent part:

¶ 25 "[T]here is a rebuttable presumption that a fit parent's actions and decisions regarding grandparent, great-grandparent, or sibling visitation are not harmful to the child's mental, physical, or emotional health. The burden is on the party filing a petition under this Section to prove that the parent's actions and decisions regarding visitation times are harmful to the child's mental, physical, or emotional health." 750 ILCS 5/607(a-5)(3) (West 2011).

¶ 26 A trial court's ruling that a fit parent's decision regarding whether grandparent visitation

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is or is not harmful to the child's mental, physical or emotional health will not be disturbed on review unless it is contrary to the manifest weight of the evidence. *Flynn v. Henkel*, 227 Ill. 2d 176, 181 (2007). The reasons for such a deferential standard is that "the trial court is in a superior position to assess the credibility of the witnesses and weight of the evidence" than we are. *In re Stephen K.*, 373 Ill. App. 3d 7, 25 (2007). A finding is against the manifest weight of the evidence only if it is unreasonable, arbitrary and not based on the evidence presented, or if the opposite conclusion is clearly evident. *Best v. Best*, 223 Ill. 2d 341, 350 (2006).

¶ 27 According to Roberta, the trial court's finding that she failed to rebut the statutory presumption was against the manifest weight of the evidence because she presented evidence that she had a close relationship with Joshua, and that he suffered emotional and mental harm, leading to hospitalizations after his visitations with Roberta stopped. That contention is unpersuasive.

¶ 28 Our supreme court has held that the denial of the opportunity to have a normal grandparent-grandchild relationship through visits is insufficient to establish the kind of "harm" that will rebut the presumption that a fit parent's decision regarding visitation is not harmful to the child. *Henkel*, 227 Ill. 2d at 183. In doing so, the court stated that "[n]either denial of an opportunity for grandparent visitation, as the trial court found, nor a child 'never knowing a grandparent who loved him and did not undermine the child's relationship with his mother,' as the appellate court held, is 'harm' that will rebut the presumption stated in section 607(a-5)(3) that a fit parent's denial of grandparent's visitation is not harmful to the child's mental, physical, or emotional health." *Id.* Furthermore, in *In re Anaya R.*, 2012 IL App. 121101, ¶57, this court

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held that even where the grandparent in question was more "heavily involved" in the child's life than the grandmother in *Flynn*, that does not demonstrate that the "harm" resulting from denial of visitation was any different from that described in *Flynn*, and therefore insufficient to rebut the statutory presumption. In fact, as our supreme court had earlier stated in *Wickham v. Byrne*, 199 Ill. 2d 309, 321 (2002), in finding unconstitutional a former version of the Marriage Act that provided for grandparent visitation under the "best interests of the child" standard:

¶ 29 "In most cases, the relationship between a child and his or her grandparents is a nurturing, loving relationship that provides a vital connection to the family's history and roots. However, as with all human relationships, conflicts may arise between a child's parents and grandparents. In many cases, this conflict will concern disagreements about how a parent is raising his or her children. Yet, this conflict has no place in the courtroom. *** The presumption that fit parents act in their children's best interest prevents the court from second guessing parents' visitation decisions. Moreover, a fit parent's constitutionally protected liberty interest to direct the care, custody, and control of his or her children mandates that parents – not judges – should be the ones to decide with whom their children will and will not associate." *Id.*

¶ 30 In this case, the evidence presented by Roberta to show that Anne's decision to stop visitation with Joshua resulted in harm to his health consisted of testimony that the child had a close and loving relationship with Roberta. While she notes that her relationship with Joshua was more involved than that in *Flynn* because Roberta had regular contact with Joshua

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throughout his entire life, that distinction is insufficient to demonstrate that the "harm" that she alleges is more serious than the mere denial of an opportunity to have a loving relationship with her. Furthermore, while Roberta's relationship with Anne may not have been as contentious as that between the child's mother and grandmother in *Anaya*, such lack of tension does not change the conclusion that the lack of a relationship with Roberta is not the type of harm that would rebut the presumption that Anne's decision is in line with Joshua's best interests. In fact, while Anne's relationship with Roberta may be amicable, it appears that on at least one occasion Roberta threatened Anne's sister Leona with court action when Joshua did not want to leave a birthday party for a visit with Roberta. Furthermore, while Roberta notes that during one of Joshua's two psychiatric hospitalizations, he complained about Anne and his maternal grandmother, his first hospitalization happened when he said he would rather die than visit with Roberta and Kevin. His complaints about visits with Roberta are corroborated by the fact that it could mean that he would see his father, who had threatened to kill Anne. Further, according to Anne and Leona, Roberta once had to drag Joshua to her car for a visit, called the police and the child complained about having only one meal while at Roberta's house and not being able to go home when he wanted. Thus, we conclude that the trial court's finding that Roberta failed to rebut the presumption that Anne's decision with regard to visitation did not result in harm to Joshua's physical, mental, or emotional health, was not against the manifest weight of the evidence.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.

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