

NOTICE  
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2017 IL App (5th) 160436-U

NO. 5-16-0436

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> GUARDIANSHIP OF S.M.T., a Minor	)	Appeal from the
	)	Circuit Court of
(Linda T.,	)	St. Clair County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 16-P-163
	)	
Chatelle K.,	)	Honorable
	)	Stephen P. McGlynn,
Respondent-Appellant).	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Presiding Justice Moore and Justice Overstreet concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in finding that the petitioner-grandmother had standing to petition for guardianship because she failed to rebut the statutory presumption that the respondent-mother was willing and able to make and carry out day-to-day child-care decisions for her daughter; and the respondent-mother's attorneys, who represented her *pro bono* in the trial court and on appeal, are not entitled to be paid out of public funds.

¶ 2 The respondent-mother, Chatelle K., appeals the trial court's order appointing the petitioner-grandmother, Linda T., guardian of the minor child, S.M.T. We reverse and remand with directions to dismiss the guardianship petition for lack of jurisdiction.

¶ 3

## BACKGROUND

¶ 4 S.M.T. was born on May 10, 2010, to Chatelle K. (Chatelle) and Nishaun T. (Nishaun), who lived together but were not married. On March 10, 2016, Linda T. (Linda), Nishaun's mother, filed a petition for guardianship of S.M.T. She alleged that she had "custody" of S.M.T.; that she was unemployed and lived in Belleville, Illinois; that Nishaun lived at an unknown address in Chicago, Illinois; that Chatelle's address was P.O. Box 271, Charleston, Illinois; and that it was necessary to appoint a guardian for S.M.T. because her father had mental health issues and was unable to provide for her care and her mother had "not been involved in years."

¶ 5 On April 13, 2016, Chatelle filed a motion to dismiss Linda's guardianship petition for lack of jurisdiction, alleging the following. During the summer of 2015, Chatelle and Nishaun agreed that she would have "primary custody" of S.M.T. but that he would have "primary care" of S.M.T. A copy of that agreement was attached to the motion. In late 2015, Chatelle learned that Nishaun was no longer able to care for S.M.T. and that Linda was caring for her. In early 2016, Linda cut off contact between Chatelle and S.M.T. and refused to allow S.M.T. to return to Chatelle, relying on a document allegedly signed by Nishaun, purportedly assigning his "rights" to Linda. After seeing the document, the sheriff told Chatelle she would need a court order. In her motion to dismiss, Chatelle argued that the trial court lacked jurisdiction to proceed on Linda's guardianship petition because Linda lacked standing.

¶ 6 The trial court held an evidentiary hearing on April 14, 2016. Linda was present, proceeding *pro se*, and Chatelle was present, with counsel. Nishaun had consented to the guardianship and was not present. The following evidence was introduced at the hearing.

¶ 7 Chatelle testified that, after S.M.T. was born on May 10, 2010, she, Nishaun, and S.M.T. lived together as a family in Mattoon, Illinois, for about two years. She stated that she then took S.M.T. and went to her mom's house because Nishaun was abusive. She testified that, after she learned that her mom's house had high levels of lead, she and Nishaun agreed that S.M.T. would alternate staying with each of them so they could get her lead level to a normal range.

¶ 8 Chatelle testified that, during the next couple of years, Nishaun moved frequently and did not have a car, so she traveled to see S.M.T. She stated that she also called every couple of days to keep in contact and that she sent Nishaun money when he needed it. She testified that, in late 2014 or early 2015, Nishaun moved to Belleville and enrolled S.M.T. in school there.

¶ 9 Chatelle testified that, in late March or early April 2015, S.M.T. came to Charleston to visit her. She stated that S.M.T. wanted to stay with her and that she enrolled S.M.T. in school there. She testified that S.M.T. stayed with her until S.M.T.'s birthday in May 2015, when Nishaun took S.M.T. She stated that Nishaun broke his agreement with her because she was supposed to be able to see S.M.T. every other weekend, but he would not allow her to do so.

¶ 10 Chatelle testified that in November 2015 she learned that something had happened to Nishaun.<sup>1</sup> She stated that she called Linda and was told that Linda had "guardianship" of S.M.T.

¶ 11 Chatelle testified that she lost her job in December 2015 and got behind on her child support payments. She stated that Linda then cut off all communication between her and S.M.T. She testified that she soon got a new job working with disabled people and that she still had that job at the time of the hearing. She stated that she sent Linda \$300 in February 2016.

¶ 12 Chatelle testified that she called the Illinois Department of Children and Family Services (DCFS) in February 2016 and learned that DCFS had not placed S.M.T. in the guardianship of Linda. She stated that she then went to Belleville and talked to the sheriff about getting S.M.T. from Linda. She testified that the sheriff went to Linda's house to talk to her and that Linda showed him a document indicating that Nishaun had given her "rights" to S.M.T. Chatelle stated that the sheriff then told her that she would need a court order.

¶ 13 Chatelle testified that she had another child, a two-year-old son, and that she had taken care of him since birth. She stated that she was in a relationship with his father, Ernie Winnett (Ernie), and anticipated marrying him. She testified that Ernie had his own business and also worked for another company.

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<sup>1</sup>Nishaun had attempted suicide, but Chatelle did not testify about that at that time.

¶ 14 Chatelle testified that Ernie's mother, Debbie Winnett (Debbie), who was present at the hearing, took care of her son while she worked. She stated that Debbie would also take care of S.M.T. for about one hour after school until she could get home from work.

¶ 15 On questioning by the court, Chatelle testified that her home was in Charleston, that she graduated high school and attended some college, and that she had no disabilities. She stated that she and Ernie had dated for about one year when they were in high school before breaking up. She testified that they had gotten back together sometime between 2011 and 2013, that they had been together ever since, and that their relationship was good.

¶ 16 When called as an adverse witness by Chatelle, Linda denied that Chatelle had tried to call S.M.T. regularly. She also denied that she had cut off communication with Chatelle in January 2016 and that she was now holding S.M.T. against Chatelle's will.

¶ 17 On questioning by the court, Linda testified that Nishaun had a drug problem and had attempted suicide. She stated that he had moved to Belleville in 2014 and that she had gotten an apartment for him, his wife, and S.M.T. She testified that S.M.T. had been in her care almost every day since then and had lived with her since September 30, 2015. She stated that she was not employed and that she lived with her significant other, Michael Ervin (Michael).

¶ 18 Debbie testified that her son, Ernie, was 28 years old, had his own business, and also worked for someone else. She stated that he and Chatelle had a two-year-old son together, Jase Winnett (Jase). She testified that she watched Jase while Chatelle and Ernie worked and that she would also watch S.M.T. On cross-examination, she denied

that Ernie is "a racist" and stated that she is not a racist, either. She testified that it did not matter to her that S.M.T. is biracial.

¶ 19 Linda testified, in pertinent part, as follows:

"I don't have a problem with Chatelle. I \*\*\* have a problem with when [she] and [Nishaun] got together, she stated that he was abusive. However, [she] still gave [him] custody of [S.M.T.] when she \*\*\* worked. [He] had no job. He had an addiction and she said he was violent. \*\*\* When she threw [him] out[,] she threw [S.M.T.] out with [him]. So [he] went from place to place to place.

All this time[,] I'm still taking care of [S.M.T.]. \*\*\* She always had a job. She was taking care of the house financially. [Nishaun] was taking care of [S.M.T.]. When [S.M.T.] was born[,] [Chatelle] called me and said, in tears, I am not bonding with [her]; I am going to give her to you. I'm like, well, you know what; \*\*\* you're a new mother.

\*\*\* Then she gave her to [Nishaun]. \*\*\* [S]he did not call [S.M.T.] all the time. \*\*\* Even when the situation happened with [Nishaun], she waited. [Nishaun's] wife called her \*\*\*. She waited for three days \*\*\* to call to see how her daughter was doing.

Then once she's had [Jase] she would see [S.M.T.] once or twice a year. She said it was because of transportation. \*\*\* But she bought a new car. \*\*\*

\*\*\* Since [S.M.T. has] been in Belleville, every time [she] went to see Chatelle was because we took [her] and picked her back up. [Chatelle] \*\*\* has driven to Belleville maybe twice. \*\*\* Then one time we get a phone call. She's

in tears. What's the problem? Oh, my God, they do not like her. Then I go on Facebook. There was a situation with Ernie \*\*\*. What happened? He slapped her. \*\*\* Then when I talk to [Chatelle's] mother[,] \*\*\* [h]er mother says yes, he was mean to her.

And when [Chatelle] came and got [S.M.T.] last year and \*\*\* said she was going to keep her, \*\*\* [I was told] that she was going to live with Ernie and somebody else in an apartment. Her mother was going to take care of [S.M.T.]. [Her] mother told me that she got kicked out of the apartment because Ernie does not like her. \*\*\*

\* \* \*

\*\*\* I would let her talk to [S.M.T.] just about every day since I've had her. There were times when [Nishaun] would say did Chatelle call? No. I've got to call her to tell her to call her daughter. \*\*\*

\*\*\* I sent her pictures. What happened to her Christmas presents? I'm on Facebook looking at what she's buying for Ernie, for [Jase][.] \*\*\* [S.M.T.] is six. \*\*\* [S]he didn't have [another] child for two years. Why didn't she try and get [S.M.T.] back if she knew [Nishaun] was having a problem? Because she told me he's got problems. And that's where I come in."

¶ 20 Linda called Michael to testify. On questioning by the court, he testified that he was a transportation manager for a trucking company in St. Louis. He stated that he and Linda had lived together since 2008 and that S.M.T. had lived with them since September

30, 2015. He testified that, even before she moved in with them, S.M.T. came over all the time; they watched her at least once or twice per week; and she often spent the night.

¶ 21 Michael testified that Chatelle had only tried to visit S.M.T. once since September 30, 2015. He stated that she seldom called but acknowledged that she had called once or twice when he was there. He testified that, to his knowledge, she had not been told that she was not welcome to visit or call their home; nor had they tried to prevent her from communicating with S.M.T.

¶ 22 Michael stated that he and Linda had enrolled S.M.T. in a different school. He testified that her teacher said that she was slightly behind her peers; that they had been working with her every night; and that, according to her teachers, she had made tremendous progress.

¶ 23 Michael stated that S.M.T.'s health had also improved. He testified that she was often sick when she lived with Nishaun and had missed school as a result. He stated that she had not missed any school due to illness since moving in with him and Linda.

¶ 24 Michael testified that he was over the age of 18 and that he was a United States citizen. He also stated that he had not been convicted of any felonies and that he had not been the subject of any investigations regarding child custody or incidents involving minors.

¶ 25 On cross-examination, Michael acknowledged that he was aware that Chatelle had enrolled S.M.T. in school in Charleston during the summer of 2015 and that Nishaun had enrolled her in school in Belleville for the fall of 2015. He also acknowledged that he

and Linda had changed S.M.T.'s school without consulting with Chatelle or obtaining her consent.

¶ 26 Chatelle testified in rebuttal that, even though Nishaun had been abusive toward her in the past, she had allowed S.M.T. to be with him because he had told her that he was going to get help, he had made steps to get help, and she did not know he was using drugs. She stated that she was also trying to protect S.M.T. from the high level of lead at her mom's house.

¶ 27 Chatelle also responded to Linda's testimony that, after S.M.T. was born, she said that she and S.M.T. were not bonding. She explained that she had suffered from postpartum depression, that she had sought professional help, and that the situation had resolved after about six months.

¶ 28 When the court asked her if she had any criticism of the care S.M.T. had received while living with Linda and Michael, Chatelle stated that she did not know how S.M.T. was doing because Linda would not allow her speak to S.M.T. When asked when Linda had last allowed her to speak to S.M.T., she stated:

"It was mid January. She cut off all communications. I can call her every day. It'll ring once, go straight to a voice mail. \*\*\* I leave the voice mail hoping for a phone call. I text her, ask her how [S.M.T.] is doing. She won't answer my text. The only time she text[ed] me back once was about her health and that she's holding [S.M.T.] back in kindergarten. \*\*\* I told her give the school my information; I will talk to them. \*\*\* [S]he said no, you abandoned your child; you have no rights to her."

¶ 29 The court then stated:

"[W]e're going to have to have a further hearing on fitness of the mom. It's an open question. [There are] things that you've got going for you. [There are] things that are red flags.

I would like to have a hearing, leave the temporary guardianship to Linda. It's only temporary. She's there now. If something happens you don't live in the same town. She's there and has been providing a suitable environment for [S.M.T.].

\*\*\* I would like to have one more hearing in which [S.M.T.] is present and also Ernie. If you're going to be living with Ernie[,] I would like to have a hearing in which he is available to testify.

\*\*\* The law is heavily stacked in the favor of a parent. So long as the parent is fit, they win, even if there are much better places for the children to go. Mom is to be allowed to communicate with [S.M.T.][,] but you're not to talk about this proceeding. \*\*\*

\*\*\* [W]hat it looks like objectively is that there were times \*\*\* you couldn't be there for [S.M.T.]. There were times \*\*\* you preferred [that she] be with Nishaun[,] who is a mess. \*\*\* [W]hen he couldn't do it[,] Linda stepped up. That means a lot to the Court.

\*\*\* [L]et's come back in \*\*\* June. That way you have enough notice to bring Ernie with you. You can also bring [Jase] with you.

\*\*\*

\*\*\* Linda, you are to bring [S.M.T.]. \*\*\* [I]n the meantime[,] \*\*\* you are allowed to communicate with [S.M.T.]. \*\*\* [W]e should work out some kind of visitation \*\*\*. \*\*\*

\*\*\*

\*\*\* [W]e'll come back in June and try to get this squared away. But[,] \*\*\* [S.M.T.] is your daughter[,] and if [Linda has] been providing a good house for her and safety and she's been doing well, then you owe her a big debt of gratitude.

\*\*\*

\*\*\* [E]ven if I make the guardianship longer term, [mom's] going to be involved in [S.M.T.'s] life. \*\*\* That's what the law requires unless I find her to be completely unfit."

¶ 30 After the hearing, the court entered an order dated April 14, 2016, finding there was an "issue involving competency of mother," which would require further hearing and that "temporary guardianship" was in S.M.T.'s best interests. The court gave Linda "temporary guardianship" of S.M.T. until the next hearing, gave Chatelle visitation every other weekend from Friday night until Sunday night, ordered Linda to have S.M.T. available at the next hearing, and ordered Chatelle to have Ernie and Jase available at the next hearing.

¶ 31 On April 15, 2016, a DCFS extended family support program referral form was filed with the court. The form, which was dated October 16, 2015, indicates that S.M.T. had been living with Linda and Michael since September 29, 2015; that Linda was willing to continue caring for her; that there was a pending abuse or neglect investigation;

that the intact family had been indicated for abuse or neglect within the past 60 days; that protective issues were present and/or a safety plan was in effect; and that the intact family case had been closed. The form further indicates that Nishaun had used cocaine for the past few months, that he had attempted suicide in front of S.M.T., that he had been admitted to the hospital, that he had since been released, that he was not cooperative with recommended mental health treatment, that he had not participated in substance abuse treatment, that he was a single father, that he had signed a form giving Linda "temporary guardianship" of S.M.T., that the living arrangement was stable, that S.M.T. was close to Linda and had a good relationship with her before this incident, and that Chatelle's address was unknown.

¶ 32 At the outset of the next hearing on June 7, 2016, the court stated:

"The initial petition for a guardianship was filed March the 10th, 2016. I had appointed a guardian on a temporary basis, finding \*\*\* exigent circumstances required such. On April the 14th[,] I entered an order continuing the temporary guardianship and setting the hearing today on the mother's willingness to serve as the parent.

The issue is not \*\*\* who would do the best job for [S.M.T.]. If I find that the mother is competent and is ready, willing, and able to serve as a full-time parent to [S.M.T.], that ends the case. \*\*\* I do not have jurisdiction then to consider whether someone else should be made the guardian if I find a biological parent is fit.

\*\*\* I intend to \*\*\* let you \*\*\* offer evidence with respect to \*\*\* whether [the mother] is willing and able to serve as the parent for [S.M.T.]. I will then interview [S.M.T.] myself, and then I will make a determination if there should be a [guardian *ad litem*] appointed for [her]."

¶ 33 Chatelle testified that, because Linda had raised an issue about her lack of contact with S.M.T., she had obtained her phone records from Cellular One for the period from September 2015 through April 2016. She stated that the phone records show numerous calls to Linda's phone number. The phone records were admitted into evidence without objection.

¶ 34 Chatelle testified that the phone records show one 70 or 80 minute call to Linda's phone number in late November 2015. Chatelle stated that it was during that call that Linda told her that she had been taking care of S.M.T., that Nishaun had given her "rights" to S.M.T., and that she had "guardianship" of S.M.T. Chatelle's phone records corroborate her testimony that she called Linda numerous times in early 2016 and that her calls went directly to voicemail and were not returned. The phone records also corroborate her testimony that she sent Linda frequent text messages during that time period and that Linda did not respond to those text messages.

¶ 35 Chatelle testified that she was ready to care for S.M.T. She stated that she and Ernie had full-time jobs; that they had a permanent day care provider; that they lived in Charleston; that they had a house; and that, if S.M.T. lived with them, she would go to school at Carl Sandburg. She testified that she did not know what grade S.M.T. would be in because Linda had not told her whether S.M.T. had passed kindergarten. She stated

that she missed S.M.T. and knew she had made mistakes as a mother in the past but was now ready to care for S.M.T.

¶ 36 On cross-examination, Chatelle acknowledged that, when she and Nishaun signed the parenting agreement, he did not know that she had gotten an order of protection against Ernie. She denied that Ernie had abused her and stated that she and Ernie would take care of S.M.T.

¶ 37 On questioning by the court, Chatelle acknowledged that, on July 4 and 5, 2015, Ernie had gotten drunk and verbally aggressive, and she had obtained an emergency order of protection against him, directing him to stay away from her; she was not sure if he was also directed to stay away from Jase. She stated that the order of protection had lasted for 11 days, that she and Ernie had reconciled, and that she had not sought further protection because he had quit drinking. She denied that he had physically abused her or that she had alleged that he had, but she acknowledged that she had alleged that he had threatened her.

¶ 38 Chatelle stated that on July 23, 2015, she and Nishaun had entered into a written agreement, under which she would be S.M.T.'s "primary custodian" and he would be her "primary caregiver." She testified that, despite that agreement, she was not actually exercising "primary custody" over S.M.T. because no one told her that Nishaun had attempted suicide. She stated that she knew that S.M.T. was enrolled in school in St. Clair County, but she did not know that Linda and Michael had enrolled S.M.T. at Ellis. She testified that she thought S.M.T. was living with Nishaun until the day after

Thanksgiving of 2015, when she learned that S.M.T. was living with Linda. She stated that Linda would not let her see S.M.T. over Christmas of 2015.

¶ 39 Chatelle testified that she and Ernie had dated for a couple of years in high school before breaking up, that they had been back together for about three years, that they had been engaged since March 2015, that they lived together, and that they had a two-year-old son together. When asked if Ernie had a criminal record, she stated, "I don't know his background." However, she testified that she did not know of any criminal charges filed against him since they had been back together. She stated that he had his own business and that he also worked for another company.

¶ 40 Chatelle testified that Ernie did not drink regularly and that she did not consider him an alcoholic, but she acknowledged that he had gotten "really aggressive and mean" during the July incident. She stated that she was doing the best she could to protect herself and Jase. She denied that she had ever told anyone that Ernie had been abusive toward Jase.

¶ 41 Chatelle testified that she had been allowed visitation with S.M.T. during the last few months. She stated that the visitation had been good.

¶ 42 Chatelle testified that she did not know that Nishaun had attempted suicide in front of S.M.T. She stated that she did not even know how or where he had attempted suicide.

¶ 43 On cross-examination, Chatelle acknowledged that the house where she and Ernie lived was owned by their roommate, Paul Howard (Paul). She testified that Paul left early in the morning and came back at 9 p.m., when she and S.M.T. were already in bed. She acknowledged that S.M.T. had seen Paul but testified that they did not "hang out."

¶ 44 Chatelle again testified that Ernie had quit drinking after the July 2015 incident. She stated that he had done so because he knew that she was going to leave him if he did not change.

¶ 45 Chatelle acknowledged that S.M.T. and Jase slept in the same bedroom as her and Ernie. She testified that S.M.T. had her own bedroom and her own bed but that they had not yet put an air conditioner in the living room so that the entire house could be cooled. She stated that there was an air conditioner in their room and that S.M.T. slept on a toddler bed next to their bed.

¶ 46 On questioning by the court, Chatelle testified that Paul was in his forties, that he and Ernie were good friends, and that Ernie had lived with him in the past. When asked if he had a criminal record, she responded, "[n]ot [to] my knowledge." She stated that he had been in an accident and was on disability. When asked what he did when he left early in the morning and returned at 9 p.m., she responded that he rode his bike, went to his mom's or sister's house, and made things. She denied that he had suffered any brain damage or that he had a mental problem.

¶ 47 Michael was called as the court's witness. He testified that he was a manager at a trucking company and did not have a criminal record. He stated that he and Linda had been in a relationship for 12 years and lived together and that S.M.T. had lived with them since September 30, 2015. He testified that Nishaun was incarcerated in Indiana for drug possession.

¶ 48 Michael testified that he had known Chatelle since she was in a relationship with Nishaun and that he had concerns about her fitness as a parent for S.M.T. He stated that

he did not believe she supervised S.M.T. well; that he believed she was more concerned with S.M.T. having fun than about S.M.T.'s education; that he did not think she spent enough time focusing on S.M.T.'s learning disability; that he did not believe she took care of S.M.T. "in a motherly fashion"; that he thought she was "more interested in maybe a monetary thing," like claiming S.M.T. on her taxes; and that he did not think she had S.M.T.'s best interest in mind, or she would have been more involved in S.M.T.'s life over the past few years.

¶ 49 Michael testified that he and Linda had to go get S.M.T. unexpectedly on three separate occasions when she was visiting Chatelle. He stated that, on one occasion about two years earlier, Ernie had called and was calling Linda names, including "the N word." He testified that Chatelle had begged him and Linda to drive to Effingham to meet her halfway to pick up S.M.T. because she did not want S.M.T. involved in this situation. He stated that he and Linda had met Chatelle at Culver's restaurant in Effingham to pick up S.M.T.

¶ 50 In rebuttal, Chatelle testified that, when Linda and Michael had met her at Culver's restaurant in Effingham to pick up S.M.T. about two years earlier, it had been preplanned by agreement between her and Nishaun. She stated that Linda and Michael had bought her lunch that day and that they had a good conversation during lunch.

¶ 51 Ernie was present for the hearing, pursuant to the court's prior order requiring Chatelle to have him available for the hearing. However, no one called him to testify at the hearing.

¶ 52 The court interviewed S.M.T. in chambers after the hearing. However, the record does not indicate what was said during that interview.

¶ 53 The court then entered an order dated June 7, 2016, appointing a guardian *ad litem* for S.M.T. and setting the matter for further hearing. The court stated that it could not "find mother is fit without further evidence regarding other adults living with [her] [and] facts surrounding order of protection against [Ernie]." The court ordered that Chatelle was to have S.M.T. starting immediately through June 12, 2016, at 4:30 p.m., and that Linda was to have her from that time until the next hearing. The court ordered that, when Chatelle had her, no alcohol was to be consumed in the home, and no intoxicated persons were to be allowed in the home.

¶ 54 The court held a third hearing on July 26, 2016, but the record contains no report of proceedings from that hearing. In her appellate brief, Chatelle indicates that no evidence was presented at that hearing.<sup>2</sup>

¶ 55 After the hearing, the court entered an order dated July 26, 2016, appointing Linda guardian of the person and estate of S.M.T. and giving Chatelle liberal visitation. The court reset the matter to August 18, 2016, for all pending issues and ordered Chatelle to cooperate with a home study evaluation.

¶ 56 On August 17, 2016, Chatelle filed a motion to reconsider. The court held a hearing on the motion on September 22, 2016. At that hearing, the following colloquy ensued:

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<sup>2</sup>Linda did not file an appellate brief.

"THE COURT: So ready, willing, and able to do what? What is it she has to \*\*\* do to be ready, willing, and able to be a parent?

\* \* \*

\*\*\* She has to be able to \*\*\* carry out day-to-day decisions and provide care, right?

[CHATELLE'S COUNSEL]: And she's testified to that.

THE COURT: \*\*\* [W]asn't there another adult in her same household?

[CHATELLE'S COUNSEL]: Yes, sir.

THE COURT: And there was an order of protection?

[CHATELLE'S COUNSEL]: Yes, sir.

THE COURT: \*\*\* I can consider whether the person is \*\*\* ready and willing to make the proper decisions for the child, and if it looks like the parent is making decisions that put[ ] the child in harm, I think that \*\*\* rebuts the presumption, and so that's what I want to know about.

\*\*\*

\*\*\* Who's the guy? What's this order of protection? I want to know what kind of household I'm sending this child back to. \*\*\*

\*\*\*

So is there a problem—tell me more about the adult that's \*\*\* in the house.

\* \* \*

\*\*\* [I]f I gave you a quick turnaround, do you have a problem bringing in the other adults that live in the house with mom and \*\*\* giving some further testimony with respect to who these people are \*\*\*?

[CHATELLE'S COUNSEL]: The answer is maybe we could, but–

THE COURT: \*\*\* [Y]ou want a ruling on \*\*\* your motion? \*\*\* I understand. \*\*\* I want to read some case law but take this matter under advisement. \*\*\* If you win, guardianship is terminated. If you lose your motion, I'll set it for a quick status."

¶ 57 On September 23, 2016, the court entered an order, denying Chatelle's motion to reconsider, finding that the presumption as to her "readiness" was rebutted and that the "evidence justified temporary guardianship until [a] full hearing on the merits could be conducted."

¶ 58 On October 11, 2016, Chatelle filed a notice of appeal.

¶ 59 ANALYSIS

¶ 60 Section 11-5 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/11-5 (West 2014)) governs the appointment of a guardian of a minor. In order to grant a petition for guardianship of a minor under section 11-5 of the Probate Act, a court must make two evidentiary findings. *In re Guardianship of A.G.G.*, 406 Ill. App. 3d 389, 393 (2011). Section 11-5(a) of the Probate Act provides, in pertinent part, that "[u]pon the filing of a petition for the appointment of a guardian \*\*\*, the court may appoint a guardian \*\*\* of a minor \*\*\* as the court finds to be in the best interest of the minor." 755 ILCS 5/11-5(a) (West 2014). However, section 11-5(b) of the Probate Act provides, in pertinent part,

that "[t]he court lacks jurisdiction to proceed on a petition for the appointment of a guardian of a minor if it finds that (i) the minor has a living parent \*\*\* whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor, unless: (1) the parent or parents voluntarily relinquished physical custody of the minor; (2) after receiving notice of the hearing \*\*\*, the parent or parents fail to object to the appointment at the hearing on the petition; or (3) the parent or parents consent to the appointment."

755 ILCS 5/11-5(b) (West 2014). In addition, there is "a rebuttable presumption that a parent of a minor is willing and able to make and carry out day-to-day child care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence." *Id.* The standards of the best interest of the minor, in section 11-5(a) of the Probate Act, and a parent who is "willing and able," in section 11-5(b) of the Probate Act, are separate questions of fact. *In re Guardianship of A.G.G.*, 406 Ill. App. 3d at 393.

¶ 61 Section 11-5(b) of the Probate Act was intended to prevent the trial court from exercising jurisdiction when the petitioner lacks standing. *In re R.L.S.*, 218 Ill. 2d 428, 436 (2006). When used in this way, "standing" refers to a threshold statutory requirement that must be met before the court can proceed to a decision on the merits. *Id.*

Thus, in order to have standing to proceed on a petition for guardianship under the Probate Act in a case like this one—where the minor has a living parent whose parental rights have not been terminated, whose whereabouts are known, who has not voluntarily relinquished physical custody to the petitioner, who has not consented to the appointment, and who has objected to the appointment at the hearing on the petition—the

petitioner must rebut, by a preponderance of the evidence, a statutory presumption that the parent is "willing and able to make and carry out day-to-day child care decisions concerning the minor." 755 ILCS 5/11-5(b) (West 2014); *In re R.L.S.*, 218 Ill. 2d at 436.

¶ 62 By allowing a guardianship petition to proceed to a hearing on the merits over the wishes of a parent only when the petitioner has shown that the parent is unwilling or unable to carry out day-to-day child-care decisions concerning the minor, section 11-5(b) of the Probate Act respects the superior rights of parents while also protecting the health, safety, and welfare of children. *In re R.L.S.*, 218 Ill. 2d at 441. If the petitioner fails to meet the threshold requirement, she lacks standing, and the trial court lacks jurisdiction to proceed on the petition. See 755 ILCS 5/11-5(b) (West 2014); *In re R.L.S.*, 218 Ill. 2d at 448.

¶ 63 "Generally, the question of standing is reviewed *de novo*." *In re Guardianship of K.R.J.*, 405 Ill. App. 3d 527, 535 (2010). However, where, as here, the trial court makes factual findings, those factual findings are reviewed under the manifest-weight-of-the-evidence standard. *Id.* Thus, we will review the trial court's factual findings under the manifest-weight-of-the-evidence standard and apply those facts *de novo* to the question of whether Linda had standing. See *id.*

¶ 64 After a careful review of the record, we conclude that the evidence does not support the trial court's finding that Linda overcame the statutory presumption that Chatelle was willing and able to make and carry out day-to-day child-care decisions concerning S.M.T.

¶ 65 The evidence demonstrates the following. Chatelle has a steady job and can provide a home and bedroom for S.M.T. She helped care for S.M.T. when she, Nishaun, and S.M.T. all lived together during the first two years of S.M.T.'s life. She left Nishaun and took S.M.T. with her to her mom's house when S.M.T. was two years old because Nishaun was abusive. Because her mom's house had high levels of lead and she thought that Nishaun had gotten help, she and Nishaun later agreed that S.M.T. would alternate living with each of them in order to get her lead level to a normal level. That arrangement lasted for about one year. During that time, Chatelle cared for S.M.T. when S.M.T. was with her.

¶ 66 Sometime in 2014, Nishaun moved to Belleville with his wife and S.M.T. In March or April 2015, S.M.T. went to Charleston to visit Chatelle and wanted to stay. Chatelle enrolled her in school there, and she stayed there until her fifth birthday on May 10, 2015, when Nishaun took her back to Belleville. Nishaun then refused to let Chatelle see S.M.T. every other weekend, which he had previously agreed to do.

¶ 67 On July 4 and July 5, 2015, Ernie got drunk, slapped Chatelle, and threatened her. In order to protect herself and Jase, she obtained an emergency order of protection against Ernie. However, the two of them soon reconciled, and she did not seek further orders of protection against him. She testified several times that he had quit drinking as a result of this incident.

¶ 68 On July 23, 2015, Chatelle and Nishaun entered into a written agreement, under which she would be S.M.T.'s "primary custodian" and he would be her "primary

caregiver." Chatelle testified that, when S.M.T. lived with Nishaun, she sent Nishaun money, called S.M.T. regularly, visited S.M.T., and cared for S.M.T. during those visits.

¶ 69 Unbeknownst to Chatelle, Nishaun attempted suicide in front of S.M.T. on September 30, 2015. Instead of notifying Chatelle that Nishaun was no longer able to care for S.M.T., Linda hid that information from Chatelle and moved S.M.T. in with her without Chatelle's knowledge or consent. Although Chatelle frequently called and texted Linda during the next few weeks and months, it was not until November 27, 2015, the day after Thanksgiving, that Linda finally told Chatelle that Nishaun had attempted suicide and that she had "guardianship" of S.M.T.

¶ 70 Chatelle let Linda know that she wanted S.M.T. back, but Linda would not give S.M.T. to her. In fact, Linda would not even allow Chatelle to see S.M.T. over Christmas of 2015, and, during the first part of 2016, Linda stopped responding to Chatelle's phone calls and text messages, effectively cutting off all communication between Chatelle and S.M.T.

¶ 71 In February 2016, Chatelle went to Belleville and sought the sheriff's help. The sheriff went to Linda's house, but Linda showed him a document allegedly signed by Nishaun purportedly giving her "rights" to S.M.T. The sheriff told Chatelle she would need a court order.

¶ 72 Chatelle has cared for her two-year-old son since his birth, and there is no indication that she is not able to make and carry out the day-to-day child-care decisions concerning him. Ernie's mother babysits him while Chatelle and Ernie work and testified

that she would also watch S.M.T. after school until Chatelle got home from work. Chatelle testified that she was willing and able to care for S.M.T.

¶ 73 There is a statutory presumption that Chatelle is willing and able to make and carry out day-to-day child-care decisions concerning S.M.T. Linda had the burden of rebutting that presumption by a preponderance of the evidence. She failed to meet that burden. Instead of so finding, however, the trial court erroneously shifted the burden to Chatelle, finding that it could not find her "fit without further evidence regarding other adults living with [her] [and] facts surrounding [the] order of protection against [Ernie]."

¶ 74 The court held three hearings in this case and ordered Ernie to be present for the second one. Ernie was present for that hearing, but no one called him to testify. If the court thought that it was necessary to hear testimony from Ernie, it could have called him as its own witness, as it did Michael, but it did not. Moreover, Linda could have called him as a witness, but she did not.

¶ 75 Chatelle did not have the burden of proving that she was "fit"; instead, Linda had the burden of proving, by a preponderance of the evidence, that Chatelle was unwilling or unable to make and carry out day-to-day child-care decisions concerning S.M.T. The lack of evidence, which was so troubling to the trial court, was a failure of proof on Linda's part, not Chatelle's.

¶ 76 Accordingly, we conclude that the trial court's finding that Linda rebutted the statutory presumption that Chatelle was willing and able to make and carry out day-to-day child-care decisions concerning S.M.T. was against the manifest weight of the

evidence. Linda, therefore, lacked standing to file the guardianship petition, and the trial court lacked jurisdiction to proceed on the petition.

¶ 77 Chatelle also argues that her attorneys should be paid from public funds. She argues that, because the trial court relied on the standards set out in section 2-23 of the Juvenile Court Act (705 ILCS 405/2-23 (West 2014)) instead of the standards set out in section 11-5(b) of the Probate Act, she should have been afforded all of the protections contained in the Juvenile Court Act, including the right to appointed counsel. See 705 ILCS 405/1-5 (West 2014).

¶ 78 In support of her argument, Chatelle relies upon our supreme court's decision in *In re Adoption of K.L.P.*, 198 Ill. 2d 448 (2002). There, the State initially removed the minors from the mother's custody and placed them with their father and his wife. *Id.* at 453. The trial court, pursuant to section 1-5(1) of the Juvenile Court Act (705 ILCS 405/1-5(1) (West 1998)), appointed the public defender to represent the mother, who was indigent and unable to retain counsel. *Id.* at 454. The court entered orders, authorizing the State to file a petition to terminate the mother's parental rights, but the State did not do so. *Id.* After a hearing, the court entered an order awarding custody and guardianship of the minors to their father and stepmother, and referring any motions or requests for visitation to the family court. *Id.* The court ordered the cases dismissed and the files terminated. *Id.*

¶ 79 The father and stepmother subsequently filed adoption petitions under the Adoption Act (750 ILCS 50/5(C) (West 1998)), alleging that the mother was an unfit

parent and seeking termination of her parental rights so that the stepmother could adopt the minors. *Id.*

¶ 80 The mother, who had received the assistance of counsel in the earlier juvenile court proceedings, again requested court-appointed counsel. *Id.* The court denied her request but gave her additional time to hire counsel. *Id.* At the next hearing, she advised the court that she could not afford to hire counsel and that the local legal services agency had rejected her as a client. *Id.* The court again refused her request for appointed counsel and set the matter for hearing. *Id.*

¶ 81 At the fitness hearing, the mother, appearing *pro se*, testified on her own behalf but called no other witnesses, and the court found her unfit. *Id.* at 455. At the best interests hearing, she did not testify or call any witnesses, and the court found that it was in the best interests of the minors that the adoption petition be granted. *Id.*

¶ 82 The mother appealed, and the appellate court, *sua sponte*, appointed counsel to represent her on appeal. *Id.* On appeal, she argued that the trial court's refusal to appoint counsel for her in the adoption proceeding violated the constitutional guarantees of due process and equal protection because she would have been entitled to court-appointed counsel had the proceedings continued under the Juvenile Court Act. *Id.* The appellate court agreed, holding that, to pass constitutional muster, the Adoption Act must be construed to require the same procedural safeguards, including the right to counsel, as the Juvenile Court Act. *In re Adoption of K.L.P.*, 316 Ill. App. 3d 110, 122 (2000). The father and stepmother did not seek to appeal that decision, but the supreme court granted the county's petition for leave to appeal. *In re Adoption of K.L.P.*, 198 Ill. 2d at 455. The

supreme court held that "where \*\*\* significant state action has resulted in the custody or guardianship of the minor child being placed with a person other than the parent, equal protection requires that the parent be provided with the assistance of counsel, if she is indigent, in a subsequent action to terminate her parental rights, whether that action is brought pursuant to the Juvenile Court Act or by the child's guardian or custodian pursuant to the Adoption Act." *Id.* at 469.

¶ 83 *In re Adoption of K.L.P.* is easily distinguishable from the present case. First, the proceedings in *In re Adoption of K.L.P.* were initially brought by the State under the Juvenile Court Act and later by the father and stepmother under the Adoption Act, whereas the proceedings here were brought by Linda under the Probate Act. Chatelle argues that Linda was acting on the State's behalf when she filed the guardianship petition, but we find no merit to that argument. In addition, the father and stepmother in *In re Adoption of K.L.P.* were seeking to terminate the mother's parental rights to her children so the stepmother could adopt them, whereas in the present case Linda was seeking guardianship of S.M.T. Moreover, the procedural requirements under the Probate Act are very different than the procedural requirements under the Juvenile Court Act and the Adoption Act. Finally, the mother in *In re Adoption of K.L.P.* repeatedly requested appointed counsel and was forced to proceed *pro se* when those requests were denied, whereas here, Chatelle was represented by counsel in the trial court and on appeal and never requested appointed counsel. Accordingly, we reject her argument that her attorneys, who represented her *pro bono* in the trial court and on appeal, should be paid from public funds.

¶ 84 Our decision restores Chatelle's prerogative, as a biological parent, to exercise her superior parental rights and act as (or designate another person to act as) the guardian of her own child. See *In re Estate of H.B.*, 2012 IL App (3d) 120475, ¶ 46.

¶ 85 **CONCLUSION**

¶ 86 For the foregoing reasons, we reverse the July 26, 2016, order appointing Linda guardian of the person and estate of S.M.T. and remand to the circuit court of St. Clair County with directions to dismiss Linda's petition for guardianship for lack of jurisdiction because Linda lacked standing.

¶ 87 Reversed and remanded with directions.