2012 IL App (2d) 110472-U
No. 2-11-0472
Order filed January 25, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re PARENTAGE OF J.J.B., a minor	)	Appeal from the Circuit Court
	)	of Du Page County.
	)	
	)	No. 10-F-0535
	)	
	)	Honorable
(Nathan H., Petitioner-Appellant,	)	Mary E. O'Connor,
v. Undrea B., Respondent-Appellee).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Birkett concurred in the judgment, and Justice Hutchinson dissented in the judgment.

ORDER

Held: The trial court's decision awarding sole custody of the parties' minor child to respondent was not against the manifest weight of the evidence.

¶ 1 J.J.B., a minor, was born on June 2, 2008. Her parents, petitioner, Nathan H., and respondent, Undrea B., were not married to each other at the time of the minor's birth and have not married in the three years since her birth. At the time J.J.B. was born, and at the time of trial, petitioner was married to Tiffany H. Respondent had two other minor children, Maurice and Marlena, half siblings of J.J.B.

¶ 2 On August 13, 2010, petitioner brought an action to declare his parentage of J.J.B., seeking custody of the minor, and requesting permission to remove the minor from Illinois to Atsugi, Japan, where Tiffany H. is currently stationed as a member of the United States Navy and he is employed on the base. After a two-day bench trial, at which respondent appeared *pro se*, the trial court accepted petitioner's voluntary acknowledgment of the paternity of the minor and then awarded sole custody of the minor to respondent. After entering the orders reflecting paternity and custody, the trial court found that the petition for removal was moot.

¶ 3 In petitioner's case-in-chief, the trial court heard testimony from petitioner, Sean Martin McCumber, as J.J.B's guardian *ad litem* (GAL), petitioner's mother, Faylicia H., and respondent as an adverse witness. Respondent called her brother, Brandon B., her first cousin, Jacqueline Herbert Townsend, and a friend, Samantha Bagwell, as witnesses. Respondent chose not to testify on her own behalf, although throughout the proceedings she made narrative statements.

¶ 4 Petitioner testified that he was seeking custody of J.J.B. because during much of the first two years of her life, J.J.B. had lived with either him or his mother. Petitioner testified that at one point respondent had asked him to care for J.J.B. because of "stress" in her life. He further testified that at the time in question, respondent was a single mother with two other children and that her own mother had died, leaving her with the responsibility to manage her mother's estate. Petitioner testified that respondent was regularly employed, although he understood that she was unemployed at the time of the trial. Petitioner acknowledged that he was not present when J.J.B. was born because respondent had delivered J.J.B. early, and he was living in California with Tiffany H.; however, he indicated that he had intended to be present for J.J.B.'s birth. Petitioner also testified that respondent had offered to allow him to have custody of J.J.B. if he were not with Tiffany H.

¶ 5 Petitioner testified that, while he had not paid child support, he regularly sent things that J.J.B. needed to his mother for her use, and he contributed to his mother's daycare costs. He related the nature of his employment in Japan as the assistant coordinator of the teen center for the child development center on base, the location of the daycare center that J.J.B. could attend, and the government housing that he occupied. He indicated that J.J.B. would have her own room. While in daycare, and then later in school, J.J.B. would be exposed to excellent educational and social experiences. Petitioner also testified that he and his wife were expecting a child of their own in August 2011.

¶ 6 Petitioner testified that J.J.B. lived with him and his wife in Arizona from April 2009 until February 2010, when they returned to Illinois to prepare for deployment to Japan. Respondent had asked them to take custody of J.J.B. because, as respondent admitted to the trial court, "I just wasn't stable enough, I can honestly say mentally, physically. I wasn't stable enough." Soon after petitioner returned J.J.B. to respondent and deployed to Japan, respondent brought J.J.B. to petitioner's mother with her clothing, supplies, and pack-and-play. J.J.B. stayed with petitioner's mother for approximately six weeks. Respondent left J.J.B. with petitioner's mother because her life was not yet stable. During the time that J.J.B. was with petitioner, respondent called occasionally to check on J.J.B., and petitioner also testified that it was his understanding that while J.J.B. was with his mother, respondent seldom called and did not visit J.J.B.

¶ 7 Petitioner also expressed his concerns that respondent had moved several times since J.J.B.'s birth, that respondent was involved in an abusive relationship with a man who spent significant time at her home and often watched the children, and that respondent had a history of blackouts and panic attacks. Petitioner testified that he was aware that respondent did not have a valid driver's license,

yet she drove with the children in the car. He also testified that he was aware that respondent had been arrested in 2008 for an offense relating to alcohol and minors. Finally, petitioner testified that J.J.B. had been diagnosed with asthma, and he was aware that respondent smoked and that many of the persons who visited her home also smoked.

¶ 8 Faylicia H., petitioner's mother, testified and confirmed that she often cared for J.J.B. when respondent requested assistance. Faylicia testified that she thought of respondent as a daughter, especially after respondent's mother died. When J.J.B. was with Faylicia, J.J.B. communicated with petitioner by Skype and telephone and attended a daycare/preschool program that Faylicia arranged. Faylicia described the interaction between petitioner and J.J.B. as very positive and loving, and J.J.B. often cried when the phone and Skype conversations ended. She opined that J.J.B. would be better off living with petitioner.

¶ 9 Faylicia also testified that she believed that respondent's boyfriend, Ramone Jackson, stayed with respondent and her children on a regular basis, because she always saw his vehicle there when she picked up or dropped off J.J.B. She expressed concerns about J.J.B.'s environment with respondent, which included Jackson's physical violence against respondent and Jackson's watching the children when respondent was out. According to Faylicia, on one occasion she arrived at respondent's home to find Jackson spraying an air freshener around the apartment, but she believed that she smelled marijuana anyway. At the same time, she also found J.J.B. chewing on a small, plastic toy that she believed to be a choking hazard. Faylicia testified that, on another occasion, respondent told her that while the children were with Jackson, she came home to find Jackson sleeping and the children playing with some powdered cleanser. Finally, Faylicia reported that she was concerned about a torn screen in the children's bedroom big enough for J.J.B. to crawl through

and the presence of a pit bull in the apartment where respondent and the children currently lived. Faylicia testified that she discussed these concerns with respondent and even offered to help repair the screen, but at the time of the trial, she believed the conditions still existed.

¶ 10 Sean Martin McCumber, the court-appointed GAL, testified that he reviewed the court file "to determine what was at issue," spoke with the minor child, the father (who flew in from Japan), the paternal grandmother, and the stepmother. When asked on direct examination why he did not speak with respondent, McCumber answered, "She did not contact me." McCumber opined that petitioner should have custody of J.J.B. He gave the bases for his opinion. He testified that he spoke with J.J.B. and petitioner "about the home situation" and petitioner's "involvement." McCumber then testified:

> "The other side of the coin is the mother did not participate in the investigation. She was given a [c]ourt order. There were several court dates in between that appointment and today's trial.
>
> She's not contacted us. We sent out a letter informing her of who we are, no response.
>
> To me, if someone is not going to even take an interest in a custody or removal action, that speaks to their [*sic*] interest and their [*sic*] well-being as far as whether or not they [*sic*] should be the custodial parent of a minor child."

¶ 11 McCumber further testified on direct examination that he learned about the relationship among petitioner, his mother, respondent, and J.J.B. and concluded that J.J.B. was "very well cared for" and "very well" bonded to petitioner and Tiffany. When asked on direct examination by petitioner's counsel whether he had "any information" about "anyone" respondent resided with that would cause McCumber concern regarding respondent's custody of J.J.B., McCumber stated there

was a boyfriend who allegedly committed an act of domestic violence against respondent, "as reported by the minor child." However, when the court questioned McCumber, "And you said you learned that from the child? Is that correct?" McCumber stated, "Secondhand from the child." The following exchange between McCumber and the court then occurred:

> "[The Court]: The child is about two and a half?
>
> [The witness]: That was reported directly from the paternal grandmother."
>
> [The Court]: So, not from the child? The child is two and a half, right? ***
>
> [The witness]: Yeah. ***"

¶ 12 McCumber then admitted, "As to your question as to the domestic violence, no, I did not learn that directly from [J.J.B.]." McCumber also admitted that he did not have a way to "independently verify whether that [allegation of domestic violence] is true."

¶ 13 McCumber opined that removal would be in J.J.B.'s best interests, because J.J.B.'s quality of life on the navy base in Japan would be superior to that in respondent's home, the conditions of which he learned from Faylicia H. According to McCumber, both Faylicia H. and petitioner "intimated" that respondent "makes visitation an issue, almost as if she's trying to control the issues on those issues." McCumber questioned respondent's motives in opposing removal, because he never spoke to respondent. McCumber testified that he had no recommendations or opinions regarding visitation. McCumber concluded his direct testimony by saying that he was not aware of any mental or physical problems that would prevent petitioner from having custody of J.J.B.

¶ 14 On cross-examination, McCumber testified that he was "positive" that respondent never contacted him. When respondent said she spoke with someone from his office and asked to speak

with McCumber, McCumber testified that his staff does not "take messages for me. *** They don't take times that I can call back." He explained:

"[Respondent's] statement is that she called my office, gave her phone number, and told them that I have to call during a specific time. That is not how my appointment system works. I made it very clear to all of my staff that the way it works is that you schedule an appointment. Whether you like it or not, that's how I operate and I don't call people. So, I never got a message because you didn't schedule an appointment. So, as far as what has happened in this case is you haven't scheduled an appointment. You haven't contacted me."

¶ 15 Respondent testified as an adverse witness. She acknowledged that there was a time in her life when she went "through a lot of emotional distress," and during that time, she relied on Faylicia H. or petitioner to care for J.J.B. Respondent was shown an exhibit that memorialized her plea of guilty to an ordinance violation charging her with providing alcoholic beverages to underage persons. She testified that she was never charged with, nor pleaded guilty, to a criminal alcohol offense. She later acknowledged that she did appear in court for a charge involving underage drinking, was excused from the courtroom until her case was called because she had her daughter with her, and then was approached by a public defender who told her that the case was dismissed. She also acknowledged that she had just finished paying her fines to Du Page County, but it was unclear whether those fines related to the ordinance violation or a suspended license charge.

¶ 16 Respondent also testified that her relationship with Jackson had ended, but they remained friends. Respondent added that Jackson would occasionally visit her home and might stay overnight if the hour became too late. She acknowledged an incident when they had argued and Jackson had hit her. She testified that since J.J.B. was born, she and the children had lived in several different

residences. Respondent also testified that she has generally been employed, but had recently been fired from her employment due to tardiness. She explained that Jackson had called petitioner after she was served with the summons in this case, and she testified that the conversation was not threatening, as petitioner indicated, but rather was simply about why Jackson was somehow involved. Finally, she acknowledged that petitioner had sent her a webcam, but that she only allowed J.J.B. to talk to petitioner on the telephone rather than the webcam because J.J.B. was an active little girl who would not sit still in front of the webcam and often turned the telephone receiver upside down.

¶ 17 Tiffany H., petitioner's wife, testified that she was willing to have J.J.B. live with her, petitioner, and the new baby she and petitioner were expecting, wherever they lived. She testified that her assignment in Japan was scheduled to end in May 2013, and they were already planning to request a location closer, maybe even the Great Lakes base in Illinois, for her next posting. Tiffany also testified that she communicated with respondent by email, and when she was posted in Iraq, she received what she characterized as a threatening email from respondent. A copy of that email was entered as evidence in this case. The email is part of the record. It is incoherent and semi-literate but not threatening in content or tone.

¶ 18 Respondent presented three witnesses: her brother, Brandon B.; her friend, Samantha Bagwell; and her cousin, Jacqueline Herbert Townsend. On occasion, during respondent's direct examination of the witnesses and during her objections to cross-examination questions, her questions and responses came close to testimony, but she chose not to testify formally on her own behalf, saying she did not know where to begin.

¶ 19 Brandon B., respondent's brother, testified that he believed respondent was a good parent, and she maintained her family well despite being a single mother and turmoil happening in her extended family. He testified that he was not able to visit as often as he would like due to his employment, but he talked with respondent and the children, including J.J.B., whenever he had the opportunity. Brandon testified that he thought that J.J.B. should stay with respondent in Illinois because "she needs to be with her mother, her uncle, and her siblings. She needs to be around family."

¶ 20 Samantha Bagwell, respondent's best friend, testified that respondent was a good person, very loyal, and a great mom. Samantha acknowledged that she had seen growth in respondent since the birth of her children, and that respondent worked hard and took very good care of her children and their needs. Samantha testified that she occasionally stayed at respondent's home and that she had observed positive interaction and love among respondent and her three children. She also testified that the children did everything together and that they expressed love for one other.

¶ 21 On cross-examination, Samantha testified that she did not live with respondent but that she might spend two or three days and nights in a week with respondent and her family. Samantha had a child who would often be with her. She testified that she was aware of an incident where respondent's son took a scissors, cut into the pack-and-play where J.J.B. was, and then cut off J.J.B.'s ponytails, but that she was not aware of any incident where respondent's son was carrying J.J.B. and then dropped her. Finally, Samantha testified that she was aware of a stressful period in respondent's life, approximately two years before the trial, when respondent's mother died and respondent had to take care of the estate. Samantha did not believe that respondent had sought any therapy or professional help for her emotional distress.

¶ 22 Jacqueline Herbert Townsend testified that she was respondent's first cousin, a child welfare supervisor for Lutheran Child and Family Services of Illinois, and a careful observer of respondent's life and interaction with her children. She testified that respondent was a "sweet and charismatic particular person *** a good mother *** loving *** kind *** a Christian woman who has worked very hard since the death of [her] dad at age 14." She also testified that respondent and her older two children lived with her while J.J.B. was with petitioner in Arizona. Jacqueline testified that she was present with respondent during her labor with J.J.B. and overheard conversations that respondent had with petitioner during that labor. She testified that she overheard petitioner say that the child was not his child and that he was not coming to the hospital. She believed that petitioner returned to Illinois about two months later to see J.J.B., and he soon wanted to have a relationship with her. Jacqueline testified that respondent allowed J.J.B. to live with petitioner in Arizona because he wanted to have a closer relationship with J.J.B.

¶ 23 The trial court allowed the parties to argue orally at the end of the evidence, and the trial court also allowed written arguments by the parties. On April 12, 2011, the trial court issued its ruling in open court. The court recited that it considered all of the evidence presented, the credibility of the witnesses, including their demeanor and manner while testifying, the exhibits, the parties' arguments, the relevant portions of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq*. (West 2010)), the Illinois Parentage Act (750 ILCS 40/1 *et seq*. (West 2010)), and applicable case law. The court indicated that it also considered the weight and quality of the evidence presented and drew reasonable inferences where appropriate, applying the requisite standards and burdens of proof.

¶ 24 The first order of business was the petitioner's voluntary acknowledgment of paternity, filed August 19, 2010, and accepted by the trial court. The trial court then recounted the testimony that had been presented. The trial court indicated that the best interests of the child governed custody proceedings and found that, from the evidence, it was obvious that petitioner and respondent were not able consistently to cooperate in matters directly impacting the minor child. Therefore, the trial court found that joint custody was not a valid consideration in this case.

¶ 25 The trial court made the following findings. J.J.B. was 34 months old. Petitioner was not present at the time of her birth, and J.J.B. remained in respondent's physical possession until May 2009, when respondent requested that petitioner care for J.J.B. J.J.B. resided in Arizona with petitioner and Tiffany H. until February 2010, when she returned to Illinois. Upon J.J.B.'s return to Illinois, she stayed with Faylicia H. for about a month until she again resided with respondent. J.J.B. visited with Faylicia H. on alternate weekends. Petitioner had not provided financial support to respondent, although he provided financial support to Faylicia H., as well as having provided for daycare expenses. J.J.B. had strong bonds with both petitioner and respondent. J.J.B. has two siblings, with whom she has a strong relationship, who live with her and respondent. J.J.B. had a good relationship with her maternal uncle and maternal cousin. J.J.B. had a very strong bond with Faylicia H., her paternal grandmother, who resides in Illinois and sees and cares for J.J.B. on a regular basis. All of the evidence revealed that J.J.B. was well adjusted, well cared for, in good health, other than for a diagnosis of asthma. There was no evidence that there was physical violence or a threat of physical violence toward J.J.B. by either petitioner or respondent. With respect to domestic abuse, the only credible evidence was of one incident in the summer of 2010. There was no credible testimony with respect to any ongoing or repeated abuse. Both parties testified to their

willingness and ability to facilitate and encourage a close and continuous relationship between the other parent and J.J.B. Both parties appeared to be in good physical health. Respondent had "some emotional issues" for some months after J.J.B.'s birth, which was in close proximity to respondent's own mother's death. It was at that time that respondent asked petitioner to take care of J.J.B. and J.J.B. resided with petitioner in Arizona. Respondent was a good parent to her children at the present time. Petitioner offered "no plausible scenario" or alternative custodial arrangement for J.J.B. other than his residence in Japan. The duration of his stay in Japan depended on Tiffany H.'s tour of duty, which would extend to at least May 2013. Petitioner lived with Tiffany H. in a two-bedroom residence on a military base in Japan. Petitioner and Tiffany H. were expecting a child in approximately August 2011. Respondent had a two-bedroom residence in Illinois where she lived with her two children in addition to J.J.B. Respondent's residence was close to that of Faylicia H.'s, as well as the residences of the maternal uncle and cousin. Respondent never met with McCumber, the GAL, so he did not testify with respect to any observations he had regarding respondent's and J.J.B.'s interaction. McCumber testified that J.J.B. was very well cared for, and the evidence showed that respondent was the primary caregiver. Both parents were fit and proper parents. J.J.B. resided with respondent for 24 months of her 34 months of life. During that time, J.J.B. had significant contacts with Faylicia H., her uncle, and cousins, who all reside in Illinois. While respondent changed residences about four times, petitioner also had resided in "numerous locations" based upon where Tiffany H. was stationed. J.J.B. was well adjusted and happy. The mental and physical health of both parties appeared "stable."

¶ 26 The court concluded, "I don't find that it is in the best interest of [J.J.B.] to reside half a world away from her siblings, her grandmother, and the extended family she has here in Illinois."

The court then ruled that, "based on all the relevant factors," it was in J.J.B.'s best interests that respondent be awarded sole custody and that petitioner receive substantial visitation. The court ordered that petitioner, upon seven days' notice to respondent of his return to Illinois, shall have parenting time with J.J.B. for 72 consecutive hours. In addition, the court required that respondent furnish visitation to petitioner via instant messenger and webcam three days per week at 8 a.m. Central time. The court observed that there never had been a support order entered. The court stated that, because no evidence on the issue of child support had been presented, it would reserve "financial issues" until respondent brought a petition seeking child support.

¶ 27 Petitioner's counsel inquired whether petitioner would be entitled to have visitation with J.J.B. in Japan. The trial court replied, "I didn't hear any testimony regarding any reasonable visitation for the child to get back and forth from Japan." The court stated that the only testimony was that "something could be worked out," and that the airplane ride was at least 10 to 12 hours. The court ruled, "At this time I'm not going to order that somebody take a child of less than three years of age on a 12-hour" flight. When petitioner's counsel said, "So my client is limited to 72-hour chunks of visitation here in Illinois when he's here?" the trial court answered:

> "And, you know, the [c]ourt has never been given any information regarding when he is here nor not. So I believe if he's here—the only testimony I heard was at some period during the course of their year, they have 30 days of leave. I don't know in what sections or chunks he takes it.
>
> So at this point in time, with this young child, if he's here for seven days, then he has 72 consecutive hours. If he's here for 14 days, then he'll have two terms of 72 consecutive hours."

This timely appeal followed.

¶ 28 Before turning to the merits, we note that respondent did not file an appellee's brief. We attach no significance to the lack of an appellee's brief beyond that mandated by our supreme court in *First Capitol Mortgage Corp. v. Talandis*, 63 Ill. 2d 128 (1976). In the absence of an appellee's brief, we have three options for reviewing an appeal. The first is to serve as an advocate for the appellee and decide the case when the court determines justice so requires. *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009). The second option is to decide the case on the merits if the record is simple and the issues can easily be decided without the aid of an appellee's brief. *Thomas*, 395 Ill. App. 3d at 577. The third option is to reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record. *Thomas*, 395 Ill. App. 3d at 577. Here, we elect not to act as an advocate for the appellee, not because, as the dissent suggests, respondent somehow forfeited that option by not testifying in the defense case-in-chief at trial (she testified in petitioner's case-in-chief), but because the second option is the one applicable to the facts of this case. The record is not lengthy, and the issue on appeal is simple: was the trial court's decision against the manifest weight of the evidence? Moreover, the dissent uses *Talandis*'s third option as a substitute for the applicable standard of review, a flaw in analysis that we will explore below.

¶ 29 On appeal, petitioner contends that (1) the trial court erred in granting sole custody of J.J.B. to respondent, and (2) the trial court erred in not granting petitioner's request for removal. In petitioner's issues statement in his brief, he includes a third contention, whether the trial court erred in limiting his visitation with J.J.B. However, petitioner did not make any argument regarding visitation. Accordingly, that issue is forfeited. "[F]ailure to argue a point in the appellant's opening brief results in forfeiture of the issue." *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010).

¶ 30 We first consider petitioner's contention that the trial court erred in granting sole custody to respondent. With respect to child custody, a trial court's decision is afforded " 'great deference' " because the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child. *In re Marriage of Divelbiss*, 308 Ill. App. 3d 198, 207 (1999) (quoting *In re Marriage of Gustavson*, 247 Ill. App. 3d 797, 801 (1993)). A reviewing court "should only reverse if the determination is against the manifest weight of the evidence or it appears a manifest injustice has occurred." *In re A.S.*, 394 Ill. App. 3d 204, 212 (2009). In determining whether a judgment is against the manifest weight of the evidence, the reviewing court reviews the evidence in the light most favorable to the appellee, accepts those inferences that support the trial court's order, and will affirm if there is any basis to support the trial court's findings. *Divelbiss*, 308 Ill. App. 3d at 206-7. In cases regarding child custody, there is a "strong and compelling presumption" in favor of the result reached by the trial court. *In re Marriage of Willis*, 234 Ill. App. 3d 156, 161 (1992).

¶ 31 After a careful review of the evidence presented and the trial court's order, we conclude that the trial court's decision was not against the manifest weight of the evidence. In making custody, visitation, and removal determinations in a parentage case, a trial court "shall apply the relevant standards of the Illinois Marriage and Dissolution Act, including Section 609." 750 ILCS 45/14(a)(1) (West 2010). Custody determination factors are found in section 602 of the Act. 750 ILCS 5/602 (West 2010). There are 10 factors identified, and each factor applicable should be taken into account. However, "the trial court is not required to make specific findings regarding each section 602 factor, as long as evidence was presented from which the court could consider the factors prior to making its decision." *In re A.S.*, 394 Ill. App. 3d at 213.

¶ 32 The factors applicable to the custody determination in this case include:

> "(1) the wishes of the child's parent or parents as to his custody;
>
> ***
>
> (3) the interaction and interrelationship of the child with his parents, his siblings and any other person who may significantly affect the child's best interest;
>
> (4) the child's adjustment to his home, school and community;
>
> (5) the mental and physical health of all individuals involved;
>
> (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
>
> (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;
>
> (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
>
> ***
>
> (10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed." 750 ILCS 5/602(a) (West 2010).

¶ 33 In this case, the trial court stated that it had considered the Act and the factors relating to custody. The trial court's lengthy findings are set forth above, and we will not reiterate them here. Petitioner argues that the evidence with respect to each factor favored him. However, preliminarily, he contends that (1) the trial court ignored the testimony and recommendations of McCumber, the

GAL; (2) the trial court should have disregarded respondent's testimony due to her lack of credibility and impeachment; and (3) the trial court erred in finding that respondent testified to her willingness and ability to facilitate and encourage a close and continuing relationship between the other parent and J.J.B. We will not separately address these preliminary issues, but we will address them in our discussion of the statutory factors.

¶ 34 As to the first factor, the wishes of the parents with regard to custody, the trial court found that both parents desired custody of J.J.B., and the record supports that conclusion.[1] Petitioner argues that the trial court failed to consider that respondent had consented to petitioner having extended periods of custody in the past; that respondent's motive in objecting to petitioner's request for custody in the instant action was her dislike of Tiffany H; and that respondent "took issues as important as custody and removal so lightly and took the court proceedings so flippantly" that she refused to participate in the GAL's investigation. Petitioner's argument is without merit. The trial court, although not specifically with regard to this factor, considered that respondent gave J.J.B. to petitioner for a nine-month period while respondent was going through a difficult emotional time following J.J.B.'s birth and respondent's own mother's death. Petitioner testified that respondent told him at one point that she would give him custody of J.J.B. if he were not married to Tiffany, but this was not corroborated, and we are mindful that the trial court is in a superior position to judge

[1]The dissent highlights the fact that respondent did not testify in her case-in-chief that she desired custody of J.J.B. A reading of the entire record does not support the dissent's reasoning that respondent, therefore, was acting out of some ulterior motive in resisting petitioner's bid for custody of J.J.B. Respondent was *pro se*, and she presented witnesses in her behalf who testified to the love and strong bond between herself and J.J.B.

the credibility of the witnesses. *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004). Moreover, it was clear through respondent's own conduct of the case and the testimony of the witnesses she presented that she was motivated to keep custody of J.J.B. by her love for the child. McCumber, the GAL, demonstrated an overt bias against respondent. If the trial court gave his testimony and opinion little or no weight, we cannot say that was against the manifest weight of the evidence. McCumber testified that J.J.B. had told him about Jackson's act of violence toward respondent. Then, when the trial court expressed disbelief that a child of two and a half years would have told him that, McCumber said that he heard it "secondhand" from the child; when the trial court again expressed disbelief, McCumber finally admitted that it was Faylicia H. who related that incident to him. On direct examination, McCumber testified that respondent did not show any interest in the proceedings. Yet, on cross-examination, respondent made it clear that she had contacted his office and requested to speak with the GAL. It was McCumber who refused to make contact, because he testified that his practice is for his staff never to take messages, and he never returns telephone calls. It simply was not true that respondent had demonstrated no interest, something McCumber would have known had he conducted his business in the usual fashion. When respondent pointed out to him on cross-examination that she had contacted his office, he told her he did not return phone calls, "whether [she liked] it or not." The evidence showed that respondent was the mother of three minor children. Petitioner makes no cogent argument for why McCumber's schedule was more sacrosanct than respondent's.

¶ 35 The evidence on the third factor, the interaction and interrelationship of the child with his parents, siblings, and any other person who may significantly affect the child's bests interests, showed that J.J.B. had strong bonds with both petitioner and respondent and with her paternal

grandmother, Faylicia H. J.J.B. lived with respondent for 24 months of her 34-month life, and was close to her extended family on her mother's side. Petitioner called no witnesses to testify to J.J.B.'s relationship with Tiffany H., other than Tiffany H., while respondent presented several witnesses who had observed her over a long period of time with J.J.B. The testimony revealed that J.J.B. was close to her half-siblings, "best friends." Of course, since Tiffany H.'s baby had not arrived at the time of trial, there was no evidence of J.J.B.'s relationship with the unborn half-sibling.

¶ 36 Petitioner argues that respondent "failed to present any credible or substantive evidence regarding the interaction or interrelationship between J.J.B. and herself; J.J.B. and her siblings; or J.J.B. and any others who might significantly affect J.J.B.'s best interest." We disagree. Respondent's brother, Brandon, testified that J.J.B. called him "Unkie B." Brandon testified that his relationship with J.J.B. was "very good," and that J.J.B. "just smiles, from ear to ear, big eyes, just happy to see me." Brandon testified that he had never seen respondent put her children in any kind of danger. He testified that J.J.B. was "very happy" whenever he talked to her, which was whenever his work schedule permitted him to call. Brandon testified that J.J.B. "needs to be with her mother, her uncle, and her—siblings." He testified, "[I]t's us; that's all we have." Samantha Bagwell, respondent's best friend, testified that J.J.B. "loves her mom. Like, she'll go to her mom for anything." She testified that J.J.B. and her half-siblings were "best friends." She stated that Maurice took care of his sisters "as good as, I mean, anyone else. Like, they love each other." She testified that "the kids are very close, very close." On cross-examination, Samantha testified that she heard of an incident when Maurice cut off J.J.B.'s hair while she was sleeping. Jacqueline Herbert Townsend, respondent's first cousin, testified that respondent was a good mother and a fit parent, one who had been able to maintain employment, except for the present, and who provided housing,

food, clothing, education, met the children's medical needs, and sought recreational activities for the children. In his brief, petitioner isolates the hair-cutting incident as though it represented some form of aggression by Maurice toward J.J.B. The record does not indicate how old Maurice was when he cut J.J.B.'s hair, but at the time of trial he was five. In context, the incident does not indicate that Maurice poses a physical threat to J.J.B.

¶ 37 As to the fourth factor—the child's adjustment to her home, school, and community—by everyone's account at trial, J.J.B. was a well-adjusted, well cared-for, happy child. Petitioner argues that respondent's living conditions stand "in stark contrast" to those petitioner would be able to provide. Petitioner argues that respondent changed residences numerous times; respondent's living conditions were "crowded"; and Jackson was a physically abusive person who continued to stay on a regular basis at respondent's home. The evidence showed that petitioner had moved as many times as respondent. Respondent had a two-bedroom home, and petitioner had a two-bedroom home. Respondent denied that she and Jackson were still in a romantic relationship or that he continued to live with her. Again, we defer to the trial court's assessment of credibility.

¶ 38 The fifth factor is the mental and physical health of the individuals involved. The trial court found that both parties were stable. The evidence supports this conclusion despite the fact that respondent admittedly had emotional problems at the time J.J.B. was born. It was at that time that respondent's own mother died. Rather than neglect J.J.B. while respondent cared for herself, she sent J.J.B. to live with petitioner in Arizona and then enlisted Faylicia H.'s help in caring for J.J.B.

¶ 39 Nevertheless, petitioner contends that the trial court ignored "substantive and uncontroverted" evidence concerning respondent's and J.J.B.'s health. Specifically, petitioner argues there was no evidence that respondent's emotional issues had resolved at the time of trial. The

record indicates otherwise. At the time of trial, respondent was parenting all three of her children. The period of emotional instability occurred during the nine-month time period that respondent gave petitioner custody of J.J.B. and then after that when respondent depended upon Faylicia H. to care for J.J.B. Respondent testified that the year J.J.B. was born her mother died and she went through something that she did not want her children to see. Respondent testified that she asked petitioner to "step in" until she could "get on [her] feet." Samantha Bagwell testified that the period of instability was two years before trial, "when [respondent's] mom passed away." At the time of trial, the evidence was that respondent was taking care of her children, they had appropriate bedtimes, Maurice was in school and sports, and J.J.B. was very close to her mother and her half-siblings. Petitioner faults respondent for not having sought counseling during the period of instability, but respondent's decision not to seek therapy did not detrimentally affect J.J.B., as J.J.B. was in Arizona with petitioner. Petitioner also raises his testimony that respondent suffered from panic attacks and blackouts. Petitioner testified that a blackout occurred while respondent was shopping in a mall with his sister. At the time, respondent was pregnant with J.J.B. Petitioner presented no evidence that respondent suffered from blackouts at the time of trial. The last health-related issue petitioner raises is that J.J.B. suffers from asthma and respondent smokes. Respondent admitted that she used to smoke in the car with the window cracked and in the presence of the children generally but that she ceased that behavior a year prior to trial. Petitioner presented no evidence that respondent currently smoked around J.J.B.

¶ 40 On the sixth factor, physical violence or threat of physical violence, the trial court found that the credible evidence showed that there had been one incident of physical violence by Jackson against respondent. The trial court also found that there was no credible evidence of ongoing abuse.

Petitioner argues that the trial court ignored other evidence of abuse, which ties into the seventh factor, the occurrence of ongoing or repeated abuse. Respondent testified to one incident when Jackson physically abused her. Petitioner relies on Faylicia H.'s testimony that Jackson hit respondent "a couple of times." Faylicia H. testified that she heard that from several sources, including respondent. Faylicia H. also testified that Jackson was continuing to live at respondent's home. Faylicia H. was not an unbiased witness, as she opined that petitioner should have custody of J.J.B. The trial court, in saying that it found no credible evidence of ongoing abuse, rejected Faylicia H.'s testimony.

¶ 41 Petitioner points to another incident involving Jackson. When respondent was served with the petition for change of custody, Jackson called petitioner and was verbally insulting. This, however, was not an incident of physical abuse toward respondent or J.J.B. Moreover, the trial court weighed the credibility of the witnesses and was in a superior position than are we to observe the temperaments and personalities of the parties and to assess the credibility of the witnesses. *In re Marriage of Stopher*, 328 Ill. App. 3d 1037, 1041 (2002).

¶ 42 The eighth factor is the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. Petitioner points out the trial court's "faulty" recollection that both parties testified to their ability and willingness to foster a relationship. While respondent did not testify to this issue, the evidence showed that both parents were willing. McCumber, the GAL, testified that, in his opinion, respondent tried to make petitioner's visitation an issue. However, for the reasons discussed above, the trial court seemingly did not give McCumber's testimony any weight. He centered his opinions on respondent's supposed lack of interest in the proceedings, which turned out not to be true. There were difficulties with the

webcam visitation. However, respondent's statement that J.J.B. had a hard time sitting still in front of the webcam was not implausible, given that J.J.B. was less than three years old. Petitioner testified that respondent facilitated his relationship with J.J.B. until the time he served her with the petition for change of custody. Petitioner testified that at that time respondent became concerned that petitioner would kidnap J.J.B., take her to Japan, and respondent would never see her daughter again. On cross-examination, petitioner admitted that prior to his filing for sole custody, respondent never interrupted his visitation. Petitioner also admitted that respondent would not allow J.J.B. to travel to Japan because it was too far, and respondent was concerned that petitioner would not return her to Illinois. Even if respondent's concerns were misplaced, they were not farfetched.

¶ 43 We take the trial court's comments on the distance between Illinois and Japan to be directed toward petitioner's ability to facilitate a relationship among J.J.B., her mother, and her extended family. Petitioner presented no evidence regarding how and when he would bring the child to Illinois, and the GAL admitted that he had no suggestions and no plan. Petitioner thus demonstrated no ability to facilitate the child's continuing relationship with respondent. Moreover, there was no evidence of where in the world Tiffany H.'s next tour of duty would take her and petitioner. There was testimony that Great Lakes in Illinois could be an "option," but there was no evidence that the navy would station Tiffany H. at Great Lakes.

¶ 44 Petitioner presented no evidence on the tenth and final applicable factor, the terms of a parent's military family-care plan, and he does not argue the point on appeal. Therefore, he has forfeited any argument on this issue. *Vancura*, 238 Ill. 2d at 369.

¶ 45 Based upon the evidence adduced on each of the above factors, we cannot say that the trial court's determination that respondent should have sole custody was "manifestly unjust," or that it

"exceeded the bounds of reason and ignored recognized principles of law so that a substantial injustice resulted." See *In re Marriage of Marsh*, 343 Ill. App. 3d 1235, 1240 (2003). In *Stopher*, the court held that an award of custody to a developmentally disabled mother was not against the manifest weight of the evidence. *Stopher*, 328 Ill. App. 3d at 1040, 1047. Here, the evidence showed, and respondent admitted, that she was psychologically and emotionally unstable for a period around the time of J.J.B.'s birth. The record also established that respondent overcame these difficulties. Respondent's prior mental health issues do not prevent her from being awarded sole custody of J.J.B. In *In re Marriage of Craig*, 326 Ill. App. 3d 1127 (2002), the appellate court affirmed the trial court's award of custody to the mother despite the mother's "moral indiscretions" that showed a "deficiency in the maturity and sensibility expected of parents as role models to their children." *Craig*, 326 Ill. App. 3d at 1130-31, (quoting *In re Marriage of Apperson*, 215 Ill. App. 3d 378, 383 (1991)). In our case, the worst the evidence showed was that respondent smoked, had smoked marijuana in the past (as had petitioner), was unemployed at the time of trial, had been in an abusive relationship with Jackson, had a suspended driver's license, and had pleaded guilty to an ordinance violation involving underage drinking. Petitioner describes respondent as unfit because of her supposed untruthfulness about the ordinance violation, which petitioner mischaracterizes as a criminal conviction. Respondent denied that she was arrested or that she pleaded guilty. Because the matter was an ordinance violation rather than a criminal charge, she may well have been given a notice to appear as opposed to being arrested. Respondent testified that she understood that the case was dismissed. An exhibit in evidence shows that she received supervision and a fine. Her attorney may have described supervision in terms of the case being dismissed. In any event, we cannot agree that the incident should result in her loss of custody.

¶ 46 On the other side of the ledger, we note that for the first two and a half years of J.J.B.'s life petitioner did not come forward formally to acknowledge paternity so that he could assume those duties attendant thereto. Conspicuous in the record was his lack of child support payments. His contributions toward the daycare his mother provided, and his other sporadic contributions, were commendable but not a substitute for actual child support.

¶ 47 We turn our remaining comments to the dissent. The dissent first determines that the third option under *Talandis* is applicable, and then the dissent concludes that because there was some evidence in the record to support the arguments petitioner makes in his brief, petitioner demonstrated *prima facie* reversible error. This analysis is erroneous for three reasons: (1) the third option is not applicable to the facts of the instant case; (2) even if the third option were applicable, petitioner's brief does not demonstrate *prima facie* reversible error that is supported by the record; and (3) the dissent acknowledges but does not utilize the applicable standard of review.

¶ 48 In *Talandis*, our supreme court held that a trial court's judgment should not be reversed *pro forma* for the appellee's failure to file a brief. *Talandis*, 63 Ill. 2d at 131. The court then considered how to review a case in the absence of an appellee's brief and enunciated the three options we cited above in *Thomas*. In cases where the "record is simple and the claimed errors are such that the court can easily decide them" without the aid of an appellee's brief, the court of review should decide the merits of the appeal. *Talandis*, 63 Ill. 2d at 133. This is the second option, and the dissent is correct that we employ it in deciding the instant case. The third option, the one the dissent employs, is to be used only where options one and two do not apply. *Talandis*, 63 Ill. 2d at 133. ("In other cases ***.") Here, the record is simple because each side presented a limited number of witnesses who

testified to their observations of J.J.B.'s environment and the parties' abilities to parent J.J.B.[2] The claimed errors are such that we can easily decide them without the aid of an appellee's brief because the only question before us is whether there is any basis in the record to support the trial court's judgment. *Divelbiss*, 308 Ill. App. 3d at 206-7. To say that the record in this case is simple is not to say that the issue of child custody is unimportant. "Simple" in this context means that the issue is straightforward enough for us to decide it without the aid of an appellee's brief. Consequently, we cannot, under *Talandis*, move on to the third option.

¶ 49 However, even if we could use the third option to dispose of this appeal, applied properly, it would not lead to the result the dissent reaches. The dissent cites petitioner's arguments and evidence in support of them, while ignoring the rest of the evidence in the record, and then concludes that petitioner demonstrated *prima facie* reversible error. This methodology is not sanctioned by *Talandis*, because it would result in *pro forma* reversals, as the record in every case will undoubtedly contain *some* evidence to support the appellant's arguments.

¶ 50 Nor do we agree with the dissent that petitioner's brief alleges *prima facie* reversible error. *Prima facie* reversible error is some error that is apparent on its face, such as the trial court's misapplying a statute (see *Thomas*, 395 Ill. App. 3d at 578 (trial court erred in applying a statutory privilege where the statute in question did not confer the privilege.) Here, the claim that the trial

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[2]The dissent refers to petitioner's witnesses as having provided "direct evidence," while it claims that respondent's witnesses provided only "anecdotal testimony." Our review of the record reveals that respondent's witnesses testified to events that they observed firsthand and of which they had personal knowledge, which is direct evidence. Black's Law Dictionary 596 (8th ed. 2004).

court's custody determination was against the manifest weight of the evidence is not an error that is plain on its face.

¶ 51 Even if we were to say the error alleged by petitioner is plain on its face, *Talandis*'s third option requires the alleged *prima facie* reversible error to be supported by the record. In this case, that means that petitioner must make a *prima facie* showing that the trial court's ruling was against the manifest weight of the evidence. Petitioner cannot rely only on the evidence that favors him to make such a showing, because the record reveals evidence that goes the other way. In other words, petitioner's showing is supported by the record only if contrary evidence in the record is disregarded. This is not what *Talandis* permits.

¶ 52 Finally, the three options for reviewing a case without an appellee's brief are not substitutes for the standard of review. Those options are vehicles to ensure that the "considered judgment of the trial court should not be set aside without some consideration of the merits of the appeal." *Talandis*, 63 Ill. 2d at 131. The options get us to the merits, but they do not dictate by what standard we decide the merits. In this case, the standard of review is clear. If there is any basis in the record to support the trial court's judgment, we must affirm. *Divelbiss*, 308 Ill. App. 3d at 206-7. Furthermore, we must indulge the "strong and compelling presumption" in favor of the trial court's judgment. *Willis*, 234 Ill. App. 3d at 161. Thus, if petitioner in our case were to demonstrate *prima facie* reversible error, he would have to demonstrate that the trial court's decision was against the manifest weight of the evidence, not just that there was some evidence in the record to support the arguments he raises. The dissent does not hold petitioner to the standard he must meet.

¶ 53 Accordingly, for all the above reasons, we affirm the trial court's order granting sole custody of J.J.B. to respondent.

¶ 54 Because we affirm the custody order, we do not reach the issue of removal.

¶ 55 Affirmed.

¶ 56 JUSTICE HUTCHINSON, dissenting:

¶ 57 I believe the instant case presents a prime example of our supreme court's directive in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976), and reversal is warranted. Accordingly, I respectfully dissent.

¶ 58 In *First Capitol Mortgage Corp.*, our supreme court explained the options a reviewing court may carry out when an appellee fails to file a brief:

> "We do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases[,] 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.*, 63 Ill. 2d at 133.

¶ 59 In other words, a reviewing court may exercise one of three options to resolve a case in the absence of an appellee's brief: (1) it may serve as an advocate on behalf of the appellee and decide the case if justice requires that it do so; (2) it may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of the appellee's brief, or (3) it may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error and is supported by the record. *Thomas v. Koe*, 395 Ill. App. 3d 570 (2009) (citing *First Capitol Mortgage Corp.*, 63

Ill. 2d at 133; see also *Myers v. Brantley*, 204 Ill. App. 3d 832, 833 (1990) (describing the three discretionary options an appellate court may exercise when an appellee fails to file a brief).

¶ 60 In the present case, the majority employed the second option, that is, it found that the record was simple and the errors could be easily decided without the aid of an appellee's brief. See *In re Parentage of J.J.B.*, 2011 IL App (2d) 110472, ¶ 28. This is where I part ways with the majority. The record may not be lengthy as to the number of pages, but it is far from being "simple." Furthermore, the errors are not so easily decided without the aid of an appellee's brief. I would also maintain that this case would be aided tremendously by a brief submitted by the guardian *ad litem*.

¶ 61 This case concerns petitioner, who brought a petition seeking sole custody of J.J.B. Petitioner testified regarding his reasons for requesting custody; his willingness to facilitate a relationship between J.J.B. and respondent; his willingness to be responsible for J.J.B.'s travel arrangements in facilitating the relationship; and J.J.B.'s stability and quality of life with him and Tiffany H. In short, petitioner testified that J.J.B. "would be *** the center of our life." Petitioner's wife, Tiffany H., and petitioner's mother, Faylicia H., testified similarly. McCumber, the guardian *ad litem*, testified regarding his expertise, experience, and investigation of custody and visitation matters. Based on McCumber's investigation of the current matter, he opined that petitioner should be awarded custody of J.J.B. Among his reasons in support of his opinion, McCumber plainly testified, "the mother did not participate in the investigation." With respect to respondent, she testified, but only as an adverse witness called by petitioner. Respondent chose not to testify and instead called on her brother, a friend, and a cousin to testify as to why they believed respondent should have custody of J.J.B. The trial court, despite respondent never once testifying under oath

to express her love for J.J.B. or to express a desire for custody of J.J.B., nevertheless found in favor of respondent, and now this majority does as well.

¶ 62 Our supreme court has considered child custody proceedings to be of such importance, it created rules concerning the care and custody of children. See Ill. S. Ct. Rs. 900-42 (eff. July 1, 2006) (ensuring expeditious proceedings that are child-focused and fair to all parties). Moreover, the issue, whether the trial court's decision was against the manifest weight of the evidence, is not easily decided. "[A child custody award] is probably one of the most difficult and important tasks a trial judge undertakes." *King v. Vancil*, 34 Ill. App. 3d 831, 834 (1975). Appellate review of a trial court's decision should be no less difficult or important. Because I, too, believe the circumstances of this case are of such importance, I decline to side with the majority in its determination that the record is simple and the issues are easily decided without an appellee's brief, or for that matter, a guardian *ad litem*'s brief.

¶ 63 I understand that reversal is not automatic when the party who received a favorable ruling in the court below fails to file a brief on appeal. See *First Capitol Mortgage Corp.*, 63 Ill. 2d at 132 (stating that "the burden remains on the appellant to show error"). However, a reviewing court should not compel itself to serve as an advocate for an appellee, unless justice so requires. See *First Capitol Mortgage Corp.*, 63 Ill. 2d at 133; *Benjamin v. McKinnon*, 379 Ill. App. 3d 1013, 1019 (2008); *In re Marriage of Purcell*, 355 Ill. App. 3d 851, 855 (2005). In this case, and on this option, neither the majority or I disagree that justice would require this reviewing court to serve as respondent's advocate. Respondent was afforded the opportunity to testify at trial, and the trial court told her as much on numerous occasions when she attempted to represent her questions to witnesses as fact based or as if her questions were testimony under oath. Despite the opportunity to testify

under oath at trial, respondent chose not to do so, and instead relied on her brother, a friend, and a cousin to present their testimony as to whether respondent loved J.J.B. and whether respondent should have custody of J.J.B. Despite the opportunity to present a brief on appeal to persuade this court to uphold the trial court's judgment, respondent apparently declined to do so. Respondent's choice to not testify on her own behalf; respondent's choice not to make any expression of love for J.J.B. under oath; and respondent's choice not to express a desire for custody of J.J.B. under oath all support an inference that respondent also chose not to present a brief on appeal to persuade this court to uphold the trial court's judgment. I find no reason, in the interests of justice, to search the record for the purpose of sustaining the trial court's judgment, especially when respondent chose not to do so herself.

¶ 64 In this case, I would employ the third option, *i.e.*, this court may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record. See *First Capitol Mortgage Corp.*, 63 Ill. 2d at 133. Our supreme court has defined "*prima facie*" as "first view–that is, as it first appears." *Morrison v. Flowers*, 308 Ill. 189, 195 (1923). In the present case, I believe that petitioner has met his burden. Petitioner presented direct evidence, not merely anecdotal testimony from others, that he wanted custody of J.J.B. and wanted her to be "the center" of his and his wife's life. Petitioner presented direct evidence regarding his nine-month period of custody with J.J.B. Petitioner presented direct evidence from the guardian *ad litem* regarding his opinion that petitioner should have custody of J.J.B. and his reasons therefor. Petitioner presented direct evidence from respondent regarding her personal and emotional stability; an event of domestic or physical violence; legal matters, employment matters, all of which were supported by the record.

On my review of the record, I believe that petitioner has met the *prima facie* standard for reversible error. *First Capitol Mortgage Corp.*, 63 Ill. 2d at 133.

¶ 65 Accordingly, and pursuant to *First Capitol Mortgage Corp.*, I would reverse and remand for further proceedings. In doing so, the parties and the trial court should understand that, pursuant to *Thomas*, my conclusion is not a disposition on the merits. See *Thomas*, 395 Ill. App. 3d at 578. My conclusion is that petitioner met the *prima facie* standard discussed in *First Capitol Mortgage Corp.* See *Thomas*, 395 Ill. App. 3d at 578.

¶ 66 For these reasons, I dissent.