2011 IL App (5th) 110185-U

NO. 5-11-0185

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re GUARDIANSHIP OF L.T.G., S.L.G., and I.J.G., Minors	)	Appeal from the Circuit Court of Bond County.
(Isaac M.,	)	
Petitioner-Appellee,	)	No. 11-P-7
v.	)	
Lewis G., Jr., III,	)	Honorable Keith Jensen,
Respondent-Appellant).	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

O R D E R

¶ 1 *Held*: In a hearing to determine grandparents' standing to bring a petition for the guardianship of their grandchildren under the Probate Act, the circuit court's finding that the natural father was unwilling and unable to make and carry out the day-to-day care decisions of the minor children was not against the manifest weight of the evidence. The father waived his constitutional challenge to section 11-5(b) of the Probate Act by failing to assert the claim in the circuit court. The circuit court did not commingle standing issues with issues concerning the best interests of the children.

¶ 2 The respondent, Lewis G., Jr., III, is alleged to be the natural father of three minor children, L.T.G., S.L.G., and I.J.G., who are the subject of the present guardianship proceeding. The petitioner, Isaac M., is married to Jessie M., the maternal grandmother of the minor children. On January 14, 2011, the petitioner filed a petition for guardianship of the minor children pursuant to section 11-5 of the Probate Act of 1975 (the Act) (755 ILCS 5/11-5 (West 1998)). The petitioner alleged that the children's mother died on December 21,

2010, and that the children were in Jessie's physical care and custody. The petition further alleged that the respondent had been convicted of arson for burning the children's home, had little to no contact with the children since 2008, and was unwilling and unable to make and carry out day-to-day child care decisions concerning the minors. The petitioner requested the court to appoint himself and Jessie as coguardians of the children.

¶ 3 The respondent filed an objection to the petition for guardianship. He alleged that he was the natural father of the children, that he was able and willing to make and carry out the day-to-day child care decisions concerning the minors, and that he objected to the petitioner's request to be appointed guardian over his children.

¶ 4 On March 9, 2011, the circuit court conducted a hearing on the issue of whether the petitioner had standing to seek guardianship of the children. Pursuant to section 11-5(b) of the Act (755 ILCS 5/11-5(b) (West 2010)), a circuit court lacks jurisdiction to proceed on a guardianship petition if a natural parent is willing and able to make and carry out day-to-day care decisions for the children. In addition, under the statute, there is a rebuttable presumption that the parent is willing and able to do so. On March 9, 2011, the circuit court conducted a hearing on the issue of standing under section 11-5(b) of the Act.

¶ 5 The evidence at the hearing established that the mother of the three children, Natasha, was married to the respondent. She passed away on December 21, 2010. When Natasha and the respondent first started dating, Natasha was already pregnant with the oldest child, L.T.G. L.T.G. was born on December 1, 1998, and the testimony at the hearing suggested that the respondent might not be the father of L.T.G. S.L.G. was born on October 24, 1999, and I.J.G. was born on October 14, 2001.

¶ 6 At some point in their relationship, Natasha and the respondent separated, and Natasha lived in a trailer with her children. The record does not establish where the respondent lived at this time. During their period of separation, the respondent was upset with Natasha, and

he set fire to the trailer where she lived with the children. In December 2008, he pleaded guilty to arson and served four months in jail. At the time of the hearing, he had served approximately two years of probation and had two years of probation left to serve. He testified that he was intoxicated when he set the fire and that while he was in jail, he attempted suicide.

¶ 7 When the respondent was released from jail, he and Natasha attempted to reconcile. Natasha and the children moved from Greenville, Illinois, to Alorton, Illinois, to live with the respondent at his parents' house. The respondent's mother testified that she had 14 acres with two houses. The parents lived on the property along with the respondent's brothers, nephews, and niece.

¶ 8 The evidence in the record established that they lived at the respondent's parents' house for only a few months. They then moved into the second house on the property that was occupied by the respondent's uncle and stayed there for only a few months. At that point, the respondent, Natasha, and the children were homeless and lived out of a minivan. The respondent moved the minivan around to various parking lots where they all slept at night. The children washed and prepared for school at a truck stop and at their school before classes started. The respondent also testified that at one point, they lived in a one-room cabin at a campsite.

¶ 9 The respondent and Natasha's attempt at reconciliation apparently failed, and Natasha and the respondent parted ways. Natasha returned to Greenville with the children and worked for her mother until she passed away unexpectedly from a heart complication in December 2010.

¶ 10 The respondent testified that he had graduated from Vatterott College in December 2010 with a degree in welding and had been working as a welder for three weeks prior to the hearing. He testified that he provided the children with $700, but he did not provide any

receipts, records, or other evidence other than his testimony.

¶ 11 The evidence established that the respondent's youngest son, I.J.G., has asthma and a speech impediment and is mentally challenged. The evidence also established that two of the children have problems with wetting their beds and that the respondent had addressed their problems by whipping them when they were with him.

¶ 12 The circuit court considered all of the evidence presented at the hearing and made the following factual findings:

> "I would specifically find that as far as living arrangements, [the respondent], until very recently, has had very few contacts with the minor children. He did not provide a place for the kids; that although they resided with him and Natasha for some period of time, they've lived in a minivan; they've lived in several different households, and been thrown out of those households, and the kids have not been taken care of when they were in the custody of [the respondent]. Until three weeks ago he didn't have the financial resources to take care of them. He's just recently acquired a job as a welder, and I'm not sure what all's involved in that as far as his hours or anything else.
>
> I also make a specific finding that he's not able to care for the needs of these children in that he hasn't taken care of the children, but, let alone, we have three children here that have special needs as far as [L.T.G.], the bed-wetting issue; as far as [S.L.G.], she is a young female who is very shy and reserved; and as far as [I.J.G.], he does have some issues as far as either ADD or ADHD, and may be mentally challenged. So these are kids that need special care as far as schooling.
>
> [The respondent] has not provided as far as clothes, comfort and help. There is some testimony that he, himself, said he's provided $700 to the children. No one seems to know that or confirm that other than [the respondent] himself, and there is

no bank account record or check stub or anything that would convince that. Also, [the respondent] has admitted to [the petitioner] that he had been living in a car with the kids. The kids look back on that, and I don't think that's able to provide for them when they proceed parking lot to parking lot in the back of a vehicle, and they are all required to sleep *** in the vehicle.

I've considered the testimony of [the respondent's mother] and her statements regarding what has happened, and a lot of it seems to be from hearsay from her own son. And specifically with the testimony of [the respondent], he's said that he took care of the kids; that he cooked most of the meals for the kids; that they always had a place to stay, and I find that he has something less than been candid about those statements. He also indicated that he's never disciplined these kids, and I think the testimony is directly contrary to that. He couldn't even remember when he got married the first or second time, and to assume that he would be able to take care of these kids, get them to school on time, get them everyplace that they need to be when he can't even remember normal occurrences in life, that would have some significance.

I think that while the presumption is, in effect, that he would be the proper custodian for the kids, that that presumption has been overcome. I make a specific finding at this point in time that [the respondent] is not willing and able to care for [L.T.G., S.L.G., and I.J.G.]"

¶ 13 In its written order finding that the petitioner had standing, the circuit court added the following factual findings:

"1. [The respondent] has been unable to care for or provide for the minor children;

2. That the children when they were with him lived in a minivan and were

kicked out of several homes in which they resided;

3. Until three weeks ago [the respondent] did not have any financial resources to support the children;

4. [The respondent] stated that he was ready to get back with the children's mother. However, the evidence indicates that Natasha *** was living with another man and intending to marry the other man, in direct contradiction to his testimony;

5. [The respondent] testified that he has not administered corporal punishment or hit the minors. The evidence proves to the contrary;

6. [The respondent] testified that he cooked and provided for the children. The evidence is contrary;

7. [The respondent's] testimony contradicts the other witnesses' testimony and the Court finds that [the respondent] is not credible on several relevant points;

8. The ability of [the respondent] to care for the minors would be greatly hampered by the minors' fear of [the respondent]."

¶ 14 At a subsequent hearing, the parties stipulated that "in the best interest portion, evidence would favor the Petitioners." The court, therefore, found that it was in the children's best interests to award the guardianship of the minors to the petitioner and to his wife, Jessie.

¶ 15 On appeal, the respondent raises three arguments: (1) that the circuit court's finding that the respondent was unwilling and unable to provide the day-to-day care for the children was against the manifest weight of the evidence, (2) that the respondent was denied due process, and (3) that the circuit court improperly commingled issues of standing with issues concerning the best interests of the child. We will address each of the respondent's contentions in turn.

¶ 16 First, we note that the petitioner has not submitted a brief on appeal. "[T]he supreme

court set forth three distinct, discretionary options a reviewing court may exercise in the absence of an appellee's brief: (1) it may serve as an advocate for the appellee and decide the case when the court determines justice so requires, (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 that is supported by the record." *Thomas v. Koe*, 395 Ill. App. 3d 570, 577, 924 N.E.2d 1093, 1098-99 (2009). In the present case, the record is simple, and the issues can be easily decided without the aid of the appellee's brief. Therefore, we will decide the merits of the case.

¶ 17 Section 11-5(b) of the Act states, in pertinent part, as follows:

> "The 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, adoptive parent or adjudicated 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 ***. There shall be 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." 755 ILCS 5/11-5(b) (West 2010).

¶ 18 Section 11-5(b) of the Act provides the standing requirement that a nonparent must meet in order to proceed with a petition for guardianship of minor children under the Act. *In re R.L.S.*, 218 Ill. 2d 428, 435-36, 844 N.E.2d 22, 27-28 (2006). It establishes the threshold statutory requirement that has to be met before the court can proceed to a decision on the merits. *In re R.L.S.*, 218 Ill. 2d at 436, 844 N.E.2d at 28. Therefore, to have standing to proceed on a petition for guardianship under the Act, when the minor has a parent whose whereabouts are known, the petitioner must rebut the statutory presumption that the parent

is willing and able to make and carry out day-to-day child care decisions concerning the minor. *In re R.L.S.*, 218 Ill. 2d at 436, 844 N.E.2d at 28. This statutory presumption in favor of the respondent may be rebutted by a preponderance of the evidence. *In re Guardianship of K.R.J.*, 405 Ill. App. 3d 527, 534, 942 N.E.2d 598, 604 (2010).

¶ 19 Generally, the question of standing is reviewed *de novo*. *In re Guardianship of K.R.J.*, 405 Ill. App. 3d at 536, 942 N.E.2d at 604. However, in cases where the circuit court hears evidence and makes factual findings, the court views the factual findings under the manifest-weight-of-the-evidence standard. *In re Guardianship of K.R.J.*, 405 Ill. App. 3d at 536, 942 N.E.2d at 604. In the present case, the circuit court's decision was based on testimony given at an evidentiary hearing and its evaluation of the credibility of the witnesses who testified at the hearing. "The trial court is in the best position to evaluate the credibility of the witnesses and weigh the evidence." *In re Custody of T.W.*, 365 Ill. App. 3d 1075, 1084, 851 N.E.2d 881, 889 (2006).

¶ 20 The evidence that was presented at the hearing supports the trial court's factual findings and conclusion that the respondent is not willing and able to make and carry out day-to-day child care decisions concerning the children. The evidence supports the trial court's finding that, when the respondent had the children, they lived out of a minivan. The children lived and slept in the back of the van, and they washed and prepared for school in the school's bathroom or a truck stop. While the respondent claimed that he visited with his children after they left his care and gave them money, other evidence suggested that the respondent had very little to do with the children when he separated from Natasha. The circuit court did not find the respondent or his mother to be credible witnesses on the issue of the respondent's ability to provide day-to-day care for the children. The respondent's testimony was evasive, vague, and inconclusive about his ability to take care of the children and his efforts to care for the children prior to the hearing. Two of the children have special

needs, and the petitioner rebutted the presumption that the respondent had the ability to provide the day-to-day needs of a normal child, much less children with special needs. The respondent denied disciplining the children, but other testimony established that he whipped two of the children for wetting the bed, leaving marks on one of them.

¶ 21 A trial court's findings are against the manifest weight of the evidence only if an opposite finding is clearly evident. *In re Custody of T.W.*, 365 Ill. App. 3d 1075, 1084, 851 N.E.2d 881, 890 (2006). In the present case, the circuit court's finding that the petitioner had standing to proceed with a guardianship petition under the Act was not against the manifest weight of the evidence.

¶ 22 The respondent also contends, for the first time on appeal, that the Act's standing requirement does not pass constitutional muster under the parent's superior rights doctrine. Specifically, the respondent argues, "As a result of the repeal of section 11-7 of the Probate Act, section 11-5(b) by itself denies fit parents due process since the petitioner would no longer be required to establish that the parent is not fit and competent to transact his or her own business." However, our examination of the record indicates that neither this constitutional claim nor a similar one was presented to the circuit court. It is a well-settled principle of judicial restraint that constitutional questions not presented to the trial court may not be raised for the first time on appeal. *People ex rel. Madigan v. Leavell*, 388 Ill. App. 3d 283, 290, 905 N.E.2d 849, 856 (2009).

¶ 23 Accordingly, the respondent has forfeited this constitutional contention by failing to assert it in the trial court. See *In re S.J.*, 407 Ill. App. 3d 63, 943 N.E.2d 174 (2011) (father did not object to evidence on constitutional grounds at a termination hearing, and he could not raise the constitutional issue for the first time on appeal).

¶ 24 The final argument that the respondent raises on appeal is that the circuit court erred in "conducting a standing hearing which commingled the 11-5(b) evidence with that of the

11-5(a) best interests evidence." We disagree.

¶ 25 Section 11-5(b) contains the standing requirement, which we discussed above. Once the petitioner rebuts the presumption contained in section 11-5(b), then the court may proceed with the petition on its merits and determine the best interest of the children pursuant to section 11-5(a). Section 11-5(a) of the Act provides as follows:

> "Upon the filing of a petition for the appointment of a guardian or on its own motion, the court may appoint a guardian of the estate or of both the person and estate, of a minor, or may appoint a guardian of the person only of a minor or minors, as the court finds to be in the best interest of the minor or minors." 755 ILCS 5/11-5(a) (West 2010).

¶ 26 We have reviewed the transcript of the proceeding, and it is clear to us that there was no confusion by the trial court or by the parties that the only contested issue that the court considered at the standing hearing was whether the respondent was willing and able to make and carry out the day-to-day care decisions of the minor children. Given the nature of this issue, there is obviously certain evidence and testimony that is relevant to standing as well as the best interests of the children. The respondent has not established that the circuit court commingled the evidence on the issue of standing with the evidence concerning the best interest of the children. The court conducted separate hearings on the separate issues. The respondent conceded the issue of best interest at the second hearing after the court made the separate findings on the issue of standing. The circuit court's procedure complied with the requirements of the Act.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 29 Affirmed.