APPENDIX A

Illinois Appellate Court, Fourth District Opinion,
92 N.E.3d 1070, (Ill. App 4th 2018)

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2017 IL App (4th) 170001

NO. 4-17-0001

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 3, 2018
Carla Bender
4th District Appellate
Court, IL

CRYSTAL YOUNG and MICHAEL YOUNG, Petitioners-Appellees, v. KOURTNEY HERMAN and DAVID HERRON, Respondents (Kourtney Herman, Respondent-Appellant).	) Appeal from) Circuit Court of) McLean County) No. 15F370)) Honorable) William A. Yoder,) Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.
Presiding Justice Harris and Justice DeArmond concurred in the judgment and opinion.

OPINION

¶ 1 In December 2015, petitioners, Crystal Young and her husband Michael Young, filed a "petition to establish custody" of Crystal's granddaughter, J.H. (born November 20, 2006), pursuant to section 601 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/601 (West 2014) (recodified as amended by Pub. Act 99-90 (eff. Jan. 1, 2016) at 750 ILCS 5/601.2). In their petition, the Youngs alleged that they had cared for and made decisions on behalf of J.H. since she was an infant, in cooperation with J.H.'s mother, respondent Kourtney Herman. Kourtney claimed that the Youngs lacked standing to bring their petition and that it was not in J.H.'s best interests for the Youngs to have custody.

¶ 2 Over a series of hearings in July, August, September, and October 2016, the trial court heard evidence. In October 2016, the court determined that the Youngs had standing and that it was in J.H.'s best interests to award the Youngs primary parental decision-making responsibility for J.H. This appeal followed.

¶ 3 I. BACKGROUND

¶ 4 A. The Youngs' Petition to Establish Custody

¶ 5 In December 2015, the Youngs filed a petition to establish custody of J.H. pursuant to section 601 of the Dissolution Act (750 ILCS 5/601 (West 2014)). The petition alleged that Crystal was J.H.'s paternal grandmother and that Michael was her husband. The Youngs claimed that J.H. had been in their "physical care, custody, and control" since she was two months old. The Youngs further claimed that J.H.'s mother, Kourtney, had recently removed J.H. from the Youngs' care. The Youngs argued that it was in J.H.'s best interests that the trial court award them custody of J.H. The Youngs requested that the court (1) award the Youngs the "primary care, control and education of [J.H.]" and (2) adjudicate parenting time between the Youngs and Kourtney.

¶ 6 Two days later, the Youngs filed a petition for an emergency order of protection, requesting that J.H. be returned to their care. Shortly thereafter, the trial court entered an emergency order of protection, ordering Kourtney to return J.H. to the physical care of the Youngs. The court later modified the emergency order to allow Kourtney visitation time with J.H. twice a week. (The emergency order of protection was subsequently extended several times by the court.)

¶ 7 B. Kourtney's Motion to Dismiss

¶ 8 In June 2016, Kourtney filed a combined motion to dismiss the Youngs' petition to establish custody under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)).

¶ 9 Kourtney argued that the Youngs' petition should be dismissed under section 2-

615 of the Code (*id.* § 2-615) because the petition failed to state a cause of action upon which relief could be granted. Kourtney argued that a nonparent could file a petition for custody only if the child in question was not in the "physical custody" of either of the child's parents. 750 ILCS 5/601(b)(2) (West 2014). Kourtney reasoned that, when the Youngs filed their petition, J.H. was in Kourtney's custody and, therefore, the Youngs' petition failed to state a cause of action.

¶ 10 Kourtney argued further that the Youngs' petition should be dismissed pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)) because the claim was barred by other affirmative matter. Specifically, Kourtney argued that the Youngs lacked standing to bring their claim because J.H. was in the physical custody of Kourtney when the Youngs filed their petition.

¶ 11 The trial court declined to immediately rule on the motion to dismiss and, instead, scheduled a trial, after which the court would decide both the motion to dismiss and best-interests issues.

¶ 12 C. The Guardian *Ad Litem* Report

¶ 13 In July 2016, the guardian *ad litem*, Helen Ogar, filed a report containing her observations and recommendations concerning J.H. Ogar observed J.H. in Kourtney's home and in the Youngs' home. Ogar stated that both homes showed J.H. a lot of love. When Ogar asked J.H. how much time she spent at each home, J.H. was unable to answer because she did not see a distinction between the two homes. J.H. considered her different family members "one big family." Ogar could not determine whose custody J.H. had been in, as Ogar learned that J.H. spent considerable time with both parties.

¶ 14 Ogar recommended that both Kourtney and the Youngs be involved in J.H.'s life. The Youngs provided a "stability" that J.H. otherwise lacked. Ogar recommended that decision-making should be split evenly between Kourtney and the Youngs, who had been contributing to the decision-making.

¶ 15 D. Evidentiary Hearings in July, August, September, and October 2016

¶ 16 In July, August, September, and October 2016, the trial court conducted six evidentiary hearings to resolve Kourtney's motion to dismiss and the Youngs' petition to establish custody. The following pertinent evidence was presented at those hearings.

¶ 17 Autymne Huerta testified that she lived in the same apartment complex as Kourtney and J.H. from August 2011 through July 2015. During that time, Huerta saw Kourtney bring J.H. to the bus stop every morning. Every time Huerta saw Kourtney, J.H. was with her. However, Huerta also testified that she occasionally saw Crystal dropping off J.H. and picking her up from the school bus.

¶ 18 Derek Riebe testified that he was Kourtney's next-door neighbor from 2010 to 2014. During that time he saw J.H. with Kourtney nearly every day. J.H. and Riebe's daughter played together almost every day after school. Riebe saw Crystal picking J.H. up from school and dropping her off at the bus stop, which he believed she did every day. On most of the occasions when Riebe saw J.H., she was with Kourtney, but the Youngs "were very active grandparents." Riebe believed that Kourtney's mom and sister lived in the apartment with her and J.H. Riebe assumed he saw Crystal more than Kourtney because Crystal was J.H.'s ride to and from preschool.

¶ 19 Crystal testified that she lived with her husband, Michael, and her granddaughter, J.H., who was the daughter of Crystal's son, David Herron, who was no longer involved in the child's life. In December 2006, David told Crystal that Kourtney had given birth to his child, J.H. That month, Crystal visited Kourtney's home between three and six times. In January 2007, Kourtney agreed to have parentage testing conducted, which showed that David was J.H.'s biological father.

¶ 20 Crystal testified further that beginning in February 2007, Kourtney allowed J.H. to spend the night at Crystal's home anywhere from two to four times per week. Meanwhile, Crystal was supplying J.H. with necessities such as diapers, clothing, and milk. In March or April 2007, after Kourtney had a disagreement with David, she told Crystal that she wanted nothing to do with David and asked Crystal to coparent J.H. with her. From that time until mid-2008, J.H. spent four nights a week at Crystal's home and three nights at Kourtney's. From mid-2008 through October 2015, J.H. spent five or six nights a week at Crystal's home.

¶ 21 Crystal testified further that it was her idea for J.H. to attend preschool, starting when J.H. was 18 months old, which Crystal arranged and paid for. Kourtney accompanied Crystal to appointments with different learning centers during the selection process. Crystal arranged for J.H. to have her first immunizations so that she could start preschool. After preschool started, Crystal took J.H. to and from preschool and bought her supplies. In addition, Crystal located tutoring programs and extracurricular activities for J.H. Crystal scheduled almost all of J.H.'s medical appointments, which both Kourtney and Crystal attended. From 2007 to 2015, Crystal provided Kourtney with transportation because Kourtney's driver's license was revoked, and Crystal also paid some of Kourtney's bills. Crystal also took J.H. on several trips and regularly took her to church. Crystal was concerned because Kourtney smoked cigarettes in her home and sometimes drank alcohol in excess.

¶ 22 Crystal also testified that one afternoon in October 2015, she and Kourtney had a confrontation while waiting for J.H. at the bus stop. Kourtney approached Crystal's car and threatened to physically hurt Crystal because she was "so messy." When the bus dropped off

J.H., Kourtney told Crystal that she would never see J.H. again. Kourtney stood nose-to-nose with Crystal and called her profane names. Crystal responded by using a profane insult toward Kourtney. Kourtney took J.H. to Kourtney's home and allowed Crystal only minimal contact with her since.

¶ 23 Henry Guenther testified that he had been the Youngs' next-door neighbor since 2010. Guenther frequently saw J.H. at the Youngs' home. He could see the Youngs' television playing cartoons almost every weekend. In addition, Guenther worked in his yard between three and five times a week and would notice J.H. playing outside.

¶ 24 Michael Young testified that from the time J.H. was a baby, she spent four to five nights per week with the Youngs. Michael was a physician and helped arrange J.H.'s medical care. He and Crystal arranged and paid for J.H.'s day care, preschool, extracurricular activities, and tutoring. Every time Michael visited Kourtney's home, the windows were shut, and the home "reeked" of cigarette smoke. Once in 2011 and once in 2012, Michael received a call from J.H. stating that Kourtney was asleep and would not wake up. When Michael went to Kourtney's home to investigate, he discovered that Kourtney was intoxicated.

¶ 25 Kourtney testified that her driver's license was suspended after a January 2006 conviction for driving under the influence of alcohol. Kourtney testified that at the time of her testimony, her license remained suspended. Kourtney did not work from 2006 through 2013. Since 2013 she has worked as a certified nursing assistant for Aperion Care. Kourtney stated that she planned to move to Florida but that nothing was "set in stone" and she needed to get her driving privileges back and make arrangements in Florida before any move could happen.

¶ 26 Shannon Baxter testified that she was the mother of two of Crystal's other grandchildren. Crystal, Shannon, J.H., and Shannon's son, T.B., once took a trip to Chicago to see a concert. Crystal drove. When Crystal got lost in Chicago, she considered returning to Bloomington and missing the concert. Shannon suggested that T.B. should decide. Crystal responded, “I don’t give a fuck about [T.B.] or his birthday.” T.B. was “crushed” and began to cry. Crystal then made Shannon and T.B. get out of the car.

¶ 27 In October 2016, after the final evidentiary hearing, the trial court heard arguments from the parties. The Youngs argued that Kourtney had forfeited her standing argument by failing to timely plead it. Alternatively, the Youngs argued that, even if Kourtney properly pled lack of standing, the Youngs had standing to bring their claim because J.H. was not in the “physical custody” of Kourtney or David when the Youngs filed their petition.

¶ 28 The trial court determined that “there was no challenge to standing filed during the time of pleadings.” As a result, the court concluded “that issue would be waived.” Nonetheless, the court went on to address the merits of the standing issue. The court stated the following about standing:

> “As it relates to the issue of standing as whether or not a parent had, had custody of this child at the time of the pleadings, at the time of the initiation of this proceeding, the, the evidence in this case I think is, is extensive. And the evidence in this case, I believe, demonstrates that [J.H.] was removed from the Youngs’ ‘custody’ a short time prior to the filing of these proceedings. And that I don’t believe because [J.H.] was in the physical custody of her biological mother, [Kourtney], at the time of the filling of the proceedings would prohibit the [Youngs] to file this petition, because she was, in essence, yanked from their custody which caused them to initiate these proceedings to seek her return.”

The trial court found the testimony of the Youngs, Guenther, and Riebe to be credible.

¶ 29 The trial court also found that Crystal "became the primary caregiver for [J.H.] and that *** Kourtney surrendered that *** duty to Crystal. And that that surrender was an indefinite surrender." The trial court found further that the Youngs provided J.H.'s medical care, oversaw her education, provided for her extracurricular activities, and fostered her spiritual life. In addition, the Youngs provided J.H.'s day-to-day care. The court was not persuaded that Kourtney had "physical custody" of J.H. when the petition for custody was filed.

¶ 30 The trial court concluded that it was in J.H.'s best interests for parental responsibilities to return to the status quo prior to Kourtney's removing J.H. from the Youngs' care. That is, that the Youngs should have primary decision-making responsibility, with parenting time awarded to Kourtney in the amount of every other weekend and one weeknight per week.

¶ 31 In November 2016, Kourtney filed an application for leave to defend as an indigent person and, in December 2016, a petition for attorney fees. At a December 2016 hearing, the trial court denied both of those motions.

¶ 32 Later that month, the trial court entered a written order incorporating its oral rulings from the October 2016 hearing. Specifically, the court determined that it was in J.H.'s best interests to award the Youngs custody of J.H. and to award Kourtney parenting time on Wednesday evenings and every other weekend.

¶ 33 In January 2017, Kourtney filed a notice of appeal.

¶ 34 II. ANALYSIS

¶ 35 Kourtney argues that the trial court erred by (1) denying her motion to dismiss the Youngs' petition to establish custody and (2) concluding that it was in J.H.'s best interests to award the Youngs primary parenting responsibility. For the following reasons, we disagree with both of Kourtney's arguments and, therefore, affirm the trial court's judgment.

¶ 36 A. Motion To Dismiss

¶ 37 Kourtney argues the trial court erred by denying her motion to dismiss the Youngs' petition to establish custody. Kourtney makes the following assertions to support that argument: (1) the Youngs lacked standing to file their petition because Kourtney had physical custody of J.H. when the Youngs filed their petition, and (2) the court addressed the issues of standing and best interests in the same hearing, which confused the issues and prejudiced Kourtney.

¶ 38 1. *Section 601.2 of the Dissolution Act*

¶ 39 On appeal, both parties cite the version of the Dissolution Act that became effective on January 1, 2016. 750 ILCS 5/601.2(b)(3) (West 2016). Although the Youngs filed their petition in December 2015, neither party contends that the prior version of the Dissolution Act should apply, which would be section 601 of the Dissolution Act (750 ILCS 5/601(b)(2) (West 2014)). Because the portions of the Dissolution Act relevant to this appeal are essentially unchanged by the January 1, 2016, amendments, we apply the 2016 version (which is section 601.2 of the Dissolution Act) throughout our discussion, as do the parties in their briefs.

¶ 40 Section 601.2(b)(3) of the Dissolution Act provides that a proceeding for allocation of decision-making responsibilities (formerly known as "custody") of a child may be commenced in the following manner by a person who is not the child's parent:

> "by a person other than a parent, by filing a petition for allocation of parental responsibilities in the county in which the child is permanently resident or found, but only if he or she is not in the physical custody of one of his or her parents." 750 ILCS 5/601.2(b)(3) (West 2016).

Thus, the appropriateness of the Youngs' petition for custody turns on whether J.H. was in the "physical custody" of Kourtney when the present action was commenced. See *In re R.L.S.*, 218 Ill. 2d 428, 436, 844 N.E.2d 22, 28 (2006) (interpreting section 601(b)(2) of the Dissolution Act as having the following requirement: "to have standing to proceed on a petition for custody under the [Dissolution] Act, a petitioner must show that the child is not in the physical custody of one of his or her parents").

¶ 41 2. *"Standing" in This Case*

¶ 42 Kourtney argues that the trial court erred by denying her motion to dismiss the Youngs' petition under section 2-619(a)(9) of the Code for lack of standing. Kourtney claims that J.H. was "in the physical custody of one of his or her parents" at the time the Youngs filed their petition. We disagree that section 601.2 of the Dissolution Act, which allows for a nonparent to file a petition for allocation of parental responsibilities (formerly known as a petition for custody) only if the child "is not in the physical custody of one of his or her parents," addresses the standing of the petitioner. See 750 ILCS 5/601.2(b)(3) (West 2016). Instead, we view that requirement as an element of the cause of action that must be pleaded by the petitioner.

¶ 43 Section 601.2 of the Dissolution Act provides that a person who is not a parent or stepparent of a child may commence a proceeding for allocation of parental responsibilities for that child by filing a petition, but only if the child "is not in the physical custody of one of his or her parents." *Id.* That same limitation appeared in the precursor to section 601.2—section 601—which similarly provided that a "child custody proceeding" could be commenced by a nonparent only if the child was not in the physical custody of one of his or her parents. 750 ILCS 5/601(b)(2) (West 2014).

¶ 44 Several Illinois cases have referred to the above-described limitation as an issue of "standing." See, *e.g.*, *In re Petition of Kirchner*, 164 Ill. 2d 468, 491, 649 N.E.2d 324, 334 (1995) (abrogated on other grounds by *R.L.S.*, 218 Ill. 2d 428); *In re Custody of Peterson*, 112 Ill. 2d 48, 53, 491 N.E.2d 1150, 1152 (1986); *In re Parentage of Scarlett Z.-D.*, 2014 IL App (2d) 120266-B, ¶ 19, 11 N.E.3d 360; *In re Custody of Groff*, 332 Ill. App. 3d 1108, 1112, 774 N.E.2d 826, 830 (2002); *In re Custody of K.P.L.*, 304 Ill. App. 3d 481, 486-87, 710 N.E.2d 875, 878-79 (1999); *In re Marriage of Feig*, 296 Ill. App. 3d 405, 408, 694 N.E.2d 654, 656 (1998). However, traditional notions of "standing" do not apply to proceedings under section 601.2 of the Dissolution Act.

¶ 45 In Illinois, the doctrine of standing "assures that issues are raised only by those parties with a real interest in the outcome of the controversy." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221, 720 N.E.2d 1034, 1039 (1999). To have standing, a party must have "some injury in fact to a legally cognizable interest." *Id.* "Lack of standing is an affirmative defense, which the defendant bears the burden to plead and prove." *Id.* at 224. As such, lack of standing is as an affirmative matter properly raised in a section 2-619(a)(9) motion to dismiss. *Id.* at 220.

¶ 46 The language contained in section 601.2(b)(3) of the Dissolution Act, limiting a nonparent's authority to file a petition to allocate parental responsibilities, does not raise traditional notions of standing. Instead, the limitation is a statutory threshold restricting a trial court's authority to address a petition for allocation of parental responsibilities. A petitioner under section 601.2(b)(3) must plead as an element of a petition for allocation of parental responsibilities that this threshold has been crossed, and then the petitioner must prove it at trial.

¶ 47 In support of this conclusion, we note the supreme court's statement in *In re A.W.J.*, 197 Ill. 2d 492, 496, 758 N.E.2d 800, 803 (2001), that "a nonparent's 'standing' under section 601(b)(2) does not refer to whether a litigant has a justiciable interest in a controversy."

Instead, "[i]t is merely a threshold issue." *Id.* at 496-97; see also *R.L.S.*, 218 Ill. 2d at 436 ("[W]hen used in this sense, 'standing' simply referred to a threshold statutory requirement that had to be met before the court could proceed to a decision on the merits [citation].").

¶ 48 The same considerations were noted in *In re Custody of McCuan*, 176 Ill. App. 3d 421, 425, 531 N.E.2d 102, 105 (1988). The *McCuan* court noted that the "standing" requirement of section 601(b)(2) of the Dissolution Act "is distinct from the definition [of standing] familiar to most students of the law." *Id.* The court explained that, although this requirement was referred to as one of "standing," the burden to prove it lay with the petitioner: "the nonparent must show that the child is 'not in the physical custody of one of his parents.' " *Id.*; see also *Peterson*, 112 Ill. 2d at 53 ("nonparents must first show that the child is 'not in the physical custody of one of his parents' "); *Groff*, 332 Ill. App. 3d at 1112 ("The nonparent bears the burden of proving that he or she has standing.").

¶ 49 Given that the requirement contained in section 601.2(b)(3) has frequently been mischaracterized as an issue of standing, we understand why the parties and the trial court in this case did the same. However, the limitation contained in section 601.2(b)(3) does not relate to whether the petitioner has an interest in the outcome of the controversy or whether the petitioner has an injury that can be remedied by the court. The limitation is properly understood as an element that must be pleaded and proved by a nonparent petitioner seeking an allocation of parental responsibilities.

¶ 50 Because we conclude that lack of physical custody by the parents is not an issue of standing, we need not address the Youngs' argument that Kourtney failed to timely plead the issue as one of standing under section 2-619(a)(9) of the Code.

¶ 51 3. *What Does "Physical Custody" Mean?*

¶ 52 Section 601.2 of the Dissolution Act does not define "physical custody." However, extensive case law exists interpreting "physical custody" in the context of section 601 of the Dissolution Act—the precursor to section 601.2 of the Dissolution Act.

¶ 53 Whether a child is in the physical custody of a parent "is not subject to a clear test." *In re Custody of M.C.C.*, 383 Ill. App. 3d 913, 917, 892 N.E.2d 1092, 1096 (2008). Resolving the issue of physical custody "should not turn on who is in physical possession, so to speak, of the child at the moment of filing the petition for custody." *Peterson*, 112 Ill. 2d at 53-54. "Physical possession of a child does not necessarily translate into physical custody ***." *M.C.C.*, 383 Ill. App. 3d at 917. For example, "[n]o one could legitimately suggest that the headmaster of a boarding school or the director of a children's summer camp would have 'custody' under the [Dissolution Act]." *Kirchner*, 164 Ill. 2d at 492 (abrogated on other grounds by *R.L.S.*, 218 Ill. 2d 428).

¶ 54 Some cases have held that to establish physical custody the nonparent must show that the biological parents " 'voluntarily and indefinitely relinquished custody of the child.' " See, *e.g.*, *M.C.C.*, 383 Ill. App. 3d at 917 (quoting *In re Custody of Ayala*, 344 Ill. App. 3d 574, 588, 800 N.E.2d 524, 538 (2003)); *Feig*, 296 Ill. App. 3d at 408; *In re Marriage of Rudsell*, 291 Ill. App. 3d 626, 632, 684 N.E.2d 421, 425 (1997). In addition, when determining whether a parent had physical custody, a court should consider factors including the following: "(1) who was responsible for the care and welfare of the child prior to the initiation of custody proceedings; (2) the manner in which physical possession of a child was acquired; and (3) the nature and duration of the possession." *In re A.W.J.*, 316 Ill. App. 3d 91, 96, 736 N.E.2d 716, 721 (2000).

¶ 55 4. *Did "Physical Custody" Exist in This Case?*

¶ 56 Kourtney argues that the Youngs' petition for allocation of parental responsibilities should have been denied because J.H. was in Kourtney's physical custody when the petition was filed. A trial court's finding of physical custody will be affirmed on appeal unless the finding was against the manifest weight of the evidence. *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177, 768 N.E.2d 834, 837 (2002). A finding is against the manifest weight of the evidence when the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Id.* at 181-82. For the following reasons, we conclude that the trial court's finding that J.H. was not in Kourtney's physical custody was not against the manifest weight of the evidence.

¶ 57 Kourtney voluntarily relinquished her parenting responsibilities. Crystal testified that in March or April 2007, Kourtney asked Crystal to coparent J.H. Since that time, the Youngs have steadily taken on additional parenting responsibilities while J.H. has spent more time in their care. Kourtney's allowing the Youngs to "coparent" J.H. constituted a voluntary relinquishment of her parental responsibilities that continued for several years.

¶ 58 Under the three-factor test provided by *A.W.J.*, the trial court's determination that J.H. was not in Kourtney's physical custody was not against the manifest weight of the evidence. The trial court found that the Youngs were responsible for J.H.'s day-to-day care, medical care, education, extracurricular activities, and social life. That factor works in favor of the Youngs' physical custody. As to the second factor—the manner in which physical possession of the child was acquired—Kourtney voluntarily requested that the Youngs help parent J.H. As to the third factor—nature and duration of the possession—the Youngs helped parent J.H. for approximately eight years, a significant period of time.

¶ 59 Kourtney's physical possession of J.H. at the time the Youngs petitioned for custody did not establish that Kourtney had physical custody of J.H. As noted above, mere physical possession of a child at the time a petition is filed is insufficient to establish physical custody. See, *e.g.*, *M.C.C.*, 383 Ill. App. 3d at 917. The approximately two months of nearly exclusive care of J.H. was not enough to overcome the previous eight years during which Kourtney voluntarily relinquished many of her parenting responsibilities to the Youngs.

¶ 60 B. Best Interests of J.H.

¶ 61 Kourtney argues that the trial court's allocating primary decision-making responsibilities to the Youngs was not in J.H.'s best interests. We disagree.

¶ 62 1. *Statutory Language and the Standard of Review*

¶ 63 The Dissolution Act provides that "[t]he court shall allocate decision-making responsibilities according to the child's best interests." 750 ILCS 5/602.5(a) (West 2016). When determining the child's best interests, the court shall consider all relevant factors, including the following:

> "(1) the wishes of the child ***;
>
> (2) the child's adjustment to his or her home, school, and community;
>
> (3) the mental and physical health of all individuals involved;
>
> (4) the ability of the parents to cooperate to make decisions, or the level of conflict between the parties that may affect their ability to share decision-making;
>
> (5) the level of each parent's participation in past significant decision-making with respect to the child;
>
> (6) any prior agreement or course of conduct between the parents relating to decision-making with respect to the child;
>
> (7) the wishes of the parents;

(8) the child's needs;

(9) the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement;

(10) whether a restriction on decision-making is appropriate under Section 603.10;

(11) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;

(12) the physical violence or threat of physical violence by the child's parent directed against the child;

(13) the occurrence of abuse against the child or other member of the child's household;

(14) whether one of the parents is a sex offender, and if so, the exact nature of the offense and what, if any, treatment in which the parent has successfully participated; and

(15) any other factor that the court expressly finds to be relevant." *Id.* § 602.5(c).

¶ 64 "The trial court is in the best position to judge witness credibility and determine the child's best interests." *In re Marriage of Young*, 2015 IL App (3d) 150553, ¶ 12, 47 N.E.3d 1111. "In child custody cases, there is a strong and compelling presumption in favor of the result reached by the trial court because it is in a superior position to evaluate the evidence and determine the best interests of the child." *In re Marriage of Agers*, 2013 IL App (5th) 120375, ¶ 25, 991 N.E.2d 944. "We will not disturb a trial court's custody determination unless it is against the manifest weight of the evidence." *Young*, 2015 IL App (3d) 150553, ¶ 12. Although the Dissolution Act now refers to "decision-making responsibilities" instead of "custody" (750 ILCS 5/602.5 (West 2016)), we continue to apply the same standard of review, which is the manifest weight of the evidence.

¶ 65 2. *This Case*

¶ 66 Kourtney raises multiple arguments in support of her contention that the trial court's allocation of decision-making responsibilities was against the manifest weight of the evidence.

¶ 67 First, Kourtney argues that the trial court considered evidence prohibited by section 602.5(e) of the Dissolution Act, which provides that "[i]n allocating significant decision-making responsibilities, the court shall not consider conduct of a parent that does not affect that parent's relationship to the child." *Id.* § 602.5(e). Kourtney cites a long list of evidence that she claims was barred by section 602.5(e) and was prejudicial. But Kourtney provides no analysis as to *why* the evidence she cites should have been barred by section 602.5(e).

¶ 68 Next, Kourtney argues that the trial court failed to consider relevant evidence. Kourtney explains that the court "did not reference certain evidence and therefore seemingly did not consider such evidence in its ruling." In particular, Kourtney argues that the trial court failed to consider Crystal's use of profanity toward Kourtney and the violent criminal history of Crystal's sons. Kourtney does not explain how that evidence was relevant to the best-interests analysis. Nor does she point to anything in the record to affirmatively establish that the court failed to consider the evidence in question. A court need not explicitly mention every piece of evidence that it considers in reaching its decision.

¶ 69 Kourtney next contends that the trial court failed to properly weigh the various best-interests factors. We disagree. The court addressed each of the statutory best-interests factors on the record. The court found that J.H. wished for her situation to return to how it had been prior to October 2015. Under that former arrangement, J.H. had adjusted well to home and school life. The court was concerned about Kourtney's health as it related to her consumption of alcohol. The court determined that the Youngs and Kourtney would struggle to return to a cooperative relationship, which supported the court's decision to award the Youngs primary decision-making responsibility instead of an even split of decision-making duties. The court found further that moving to Florida would not be in J.H.'s best interests. In addition, the court found that the Youngs provided J.H. a level of stability that (1) she needed and (2) Kourtney had not provided. Based on the aforementioned evidence, we conclude that the court's decision to award the Youngs primary decision-making responsibility was not against the manifest weight of the evidence.

¶ 70 Finally, Kourtney argues that the trial court evaluation of the witnesses' credibility was flawed. We reject that contention. "We give great deference to the trial court's credibility determinations, and we will not substitute our judgment for that of the trial court." *Vician v. Vician*, 2016 IL App (2d) 160022, ¶ 29, 64 N.E.3d 159.

¶ 71 In sum, the trial court's best-interests determination was not against the manifest weight of the evidence.

¶ 72 III. CONCLUSION

¶ 73 We thank the trial court for its careful, extensive evaluation of the evidence in this case, which we found very helpful.

¶ 74 For the reasons stated, we affirm the trial court's judgment.

¶ 75 Affirmed.

APPENDIX B

Illinois Appellate Court, Fourth District Rule 23 Order,
2017 IL App (4^{th}) 170001-U

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Illinois Appellate Court, Fourth District Rule 23 Order,
2017 IL App (4^{th}) 170001-U

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).

2017 IL App (4th) 170001-U

NO. 4-17-0001

FILED
November 6, 2017
Carla Bender
4th District Appellate Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

CRYSTAL YOUNG and MICHAEL YOUNG,	)	Appeal from
Petitioners-Appellees,	)	Circuit Court of
v.	)	McLean County
KOURTNEY HERMAN and DAVID HERRON,	)	No. 15F370
Respondents	)	
(Kourtney Herman, Respondent-Appellant).	)	Honorable
	)	William A. Yoder,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Harris and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment granting primary parental decision-making responsibility to the minor's grandmother and step-grandfather.

¶ 2 In December 2015, petitioners, Crystal Young and her husband Michael Young, filed a "petition to establish custody" of Crystal's granddaughter, J.H. (born November 20, 2006), pursuant to section 601 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/601 (West 2014)). In their petition, the Youngs alleged that they had cared for and made decisions on behalf of J.H. since she was an infant, in cooperation with J.H.'s mother, respondent Kourtney Herman. Kourtney claimed that the Youngs lacked standing to bring their petition and that it was not in J.H.'s best interests for the Youngs to have custody.

¶ 3 Over a series of hearings in July, August, September, and October 2016, the trial court heard evidence. In October 2016, the court determined that the Youngs had standing and that it was in J.H.'s best interests to award the Youngs primary parental decision-making responsibility for J.H. This appeal followed.

¶ 4 I. BACKGROUND

¶ 5 A. The Youngs' Petition To Establish Custody

¶ 6 In December 2015, the Youngs filed a petition to establish custody of J.H. pursuant to section 601 of the Dissolution Act (750 ILCS 5/601 (West 2014)). The petition alleged that Crystal was J.H.'s paternal grandmother and that Michael was her husband. The Youngs claimed that J.H. had been in their "physical care, custody, and control" since she was two months old. The Youngs further claimed that J.H.'s mother, Kourtney, had recently removed J.H. from the Youngs' care. The Youngs argued that it was in J.H.'s best interests that the trial court award them custody of J.H. The Youngs requested that the court (1) award the Youngs the "primary care, control and education of [J.H.]" and (2) adjudicate parenting time between the Youngs and Kourtney.

¶ 7 Two days later, the Youngs filed a petition for an emergency order of protection, requesting that J.H. be returned to their care. Shortly thereafter, the trial court entered an emergency order of protection, ordering Kourtney to return J.H. to the physical care of the Youngs. The court later modified the emergency order to allow Kourtney visitation time with J.H. twice a week. (The emergency order of protection was subsequently extended several times by the court.)

¶ 8 B. Kourtney's Motion To Dismiss

¶ 9 In June 2016, Kourtney filed a combined motion to dismiss the Youngs' petition to establish custody under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)).

¶ 10 Kourtney argued that the Youngs' petition should be dismissed under section

2-615 of the Code (735 ILCS 5/2-615 (West 2016)) because the petition failed to state a cause of action upon which relief could be granted. Kourtney argued that a nonparent could file a petition for custody only if the child in question was not in the "physical custody" of either of the child's parents. 750 ILCS 5/601(b)(2) (West 2014). Kourtney reasoned that when the Youngs filed their petition, J.H. was in Kourtney's custody, and, therefore, the Youngs petition failed to state a cause of action.

¶ 11 Kourtney argued further that the Youngs' petition should be dismissed pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)) because the claim was barred by other affirmative matter. Specifically, Kourtney argued that the Youngs lacked standing to bring their claim because J.H. was in the physical custody of Kourtney when the Youngs filed their petition.

¶ 12 The trial court declined to immediately rule on the motion to dismiss and, instead, scheduled a trial, after which the court would decide both the motion to dismiss and best-interests issues.

¶ 13 C. The Guardian *Ad Litem* Report

¶ 14 In July 2016, the guardian *ad litem*, Helen Ogar, filed a report containing her observations and recommendations concerning J.H. Ogar observed J.H. in Kourtney's home and in the Youngs' home. Ogar stated that both homes showed J.H. a lot of love. When Ogar asked J.H. how much time she spent at each home, J.H. was unable to answer because she did not see a distinction between the two homes. J.H. considered her different family members "one big family." Ogar could not determine whose custody J.H. had been in, as Ogar learned that J.H. spent considerable time with both parties.

¶ 15 Ogar recommended that both Kourtney and the Youngs be involved in J.H.'s life.

The Youngs provided a "stability" that J.H. otherwise lacked. Ogar recommended that decision-making should be split evenly between Kourtney and the Youngs, who had been contributing to the decision-making.

¶ 16 D. Evidentiary Hearings in July, August, September, and October 2016

¶ 17 In July, August, September, and October 2016, the trial court conducted six evidentiary hearings to resolve Kourtney's motion to dismiss and the Youngs' petition to establish custody. The following pertinent evidence was presented at those hearings.

¶ 18 Autymne Huerta testified that she lived in the same apartment complex as Kourtney and J.H. from August 2011 through July 2015. During that time, Huerta saw Kourtney bring J.H. to the bus stop every morning. Every time Huerta saw Kourtney, J.H. was with her. However, Huerta also testified that she occasionally saw Crystal dropping off J.H. and picking her up from the school bus.

¶ 19 Derek Riebe testified that he was Kourtney's next-door neighbor from 2010 to 2014. During that time he saw J.H. with Kourtney nearly every day. J.H. and Riebe's daughter played together almost every day after school. Riebe saw Crystal picking J.H. up from school and dropping her off at the bus stop, which he believed she did every day. Most of the occasions when Riebe saw J.H., she was with Kourtney, but the Youngs "were very active grandparents." Riebe believed that Kourtney's mom and sister lived in the apartment with her and J.H. Riebe assumed he saw Crystal more than Kourtney because Crystal was J.H.'s ride to and from preschool.

¶ 20 Crystal testified that she lived with her husband, Michael, and her granddaughter, J.H., who was the daughter of Crystal's son, David Herron, who was no longer involved in the child's life. In December 2006, David told Crystal that Kourtney had given birth to his child, J.H. That month, Crystal visited Kourtney's home between three and six times. In January 2007, Kourtney agreed to have parentage testing conducted, which showed that David was J.H.'s biological father.

¶ 21 Crystal testified further that beginning in February 2007, Kourtney allowed J.H. to spend the night at Crystal's home anywhere from two to four times per week. Meanwhile, Crystal was supplying J.H. with necessities such as diapers, clothing, and milk. In March or April 2007, after Kourtney had a disagreement with David, she told Crystal that she wanted nothing to do with David and asked Crystal to coparent J.H. with her. From that time until mid-2008, J.H. spent four nights a week at Crystal's home and three nights at Kourney's. From mid-2008 through October 2015, J.H. spent five or six nights a week at Crystal's home.

¶ 22 Crystal testified further that it was her idea for J.H. to attend preschool, starting when J.H. was 18 months old, which Crystal arranged and paid for. Kourtney accompanied Crystal to appointments with different learning centers during the selection process. Crystal arranged for J.H. to have her first immunizations so that she could start preschool. After preschool started, Crystal took J.H. to and from preschool and bought her supplies. In addition, Crystal located tutoring programs and extracurricular activities for J.H. Crystal scheduled almost all of J.H.'s medical appointments, which both Kourtney and Crystal attended. From 2007 to 2015, Crystal provided Kourtney with transportation because Kourtney's driver's license was revoked, and Crystal also paid some of Kourtney's bills. Crystal also took J.H. on several trips and regularly took her to church. Crystal was concerned because Kourtney smoked cigarettes in her home and sometimes drank alcohol in excess.

¶ 23 Crystal also testified that one afternoon in October 2015, she and Kourtney had a confrontation while waiting for J.H. at the bus stop. Kourtney approached Crystal's car and threatened to physically hurt Crystal because she was "so messy." When the bus dropped off J.H., Kourtney told Crystal that she would never see J.H. again. Kourtney stood nose-to-nose with Crystal and called her profane names. Crystal responded by using a profane insult toward Kourtney. Kourtney took J.H. to Kourtney's home and allowed Crystal only minimal contact with her since.

¶ 24 Henry Guenther testified that he had been the Youngs' next-door neighbor since 2010. Guenther frequently saw J.H. at the Youngs' home. He could see the Youngs' television playing cartoons almost every weekend. In addition, Guenther worked in his yard between three and five times a week and would notice J.H. playing outside.

¶ 25 Michael Young testified that from the time J.H. was a baby, she spent four to five nights per week with the Youngs. Michael was a physician and helped arrange J.H.'s medical care. He and Crystal arranged and paid for J.H.'s day care, preschool, extracurricular activities, and tutoring. Every time Michael visited Kourtney's home, the windows were shut and the home "reeked" of cigarette smoke. Once in 2011, and once in 2012, Michael received a call from J.H. stating that Kourtney was asleep and would not wake up. When Michael went to Kourtney's home to investigate, he discovered that Kourtney was intoxicated.

¶ 26 Kourtney testified that her driver's license was suspended after a January 2006 conviction for driving under the influence of alcohol. Kourtney testified that at the time of her testimony, her license remained suspended. Kourtney did not work from 2006 through 2013. Since 2013 she has worked as a certified nursing assistant for Aperion Care. Kourtney stated that she planned to move to Florida but that nothing was "set in stone," and she needed to get her driving privileges back and make arrangements in Florida before any move could happen.

¶ 27 Shannon Baxter testified that she was the mother of two of Crystal's other grandchildren. Crystal, Shannon, J.H., and Shannon's son, T.B., once took a trip to Chicago to see a concert. Crystal drove. When Crystal got lost in Chicago, she considered returning to Bloomington and missing the concert. Shannon suggested that T.B. should decide. Crystal responded, "I don't give a fuck about [T.B.] or his birthday." T.B. was "crushed" and began to cry. Crystal then made Shannon and T.B. get out of the car.

¶ 28 In October 2016, after the final evidentiary hearing, the trial court heard arguments from the parties. The Youngs argued that Kourtney had forfeited her standing argument by failing to timely plead it. Alternatively, the Youngs argued that, even if Kourtney properly pled lack of standing, the Youngs had standing to bring their claim because J.H. was not in the "physical custody" of Kourtney or David when the Youngs filed their petition.

¶ 29 The trial court determined that "there was no challenge to standing filed during the time of pleadings." As a result, the court concluded, "[T]hat issue would be waived." Nonetheless, the court went on to address the merits of the standing issue. The court stated the following about standing:

> "As it relates to the issue of standing as whether or not a parent had, had custody of this child at the time of the pleadings, at the time of the initiation of this proceeding, the, the evidence in this case I think is, is extensive. And the evidence in this case, I believe, demonstrates that [J.H.] was removed from the Youngs' 'custody' a short time prior to the filing of these proceedings. And that I don't believe because [J.H.] was in the physical custody of her biological mother, [Kourtney], at the time of the filling of the proceedings would prohibit the [Youngs] to file this petition, because she was, in essence, yanked from their custody which caused them to initiate these proceedings to seek her return."

The trial court found the testimony of the Youngs, Guenther, and Riebe to be credible.

¶ 30 The trial court also found that Crystal "became the primary caregiver for [J.H.] and that *** Kourtney surrendered that *** duty to Crystal. And that that surrender was an indefinite surrender." The trial court found further that the Youngs provided J.H.'s medical care, oversaw her education, provided for her extracurricular activities, and fostered her spiritual life. In addition, the Youngs provided J.H.'s day-to-day care. The court was not persuaded that Kourtney had "physical custody" of J.H. when the petition for custody was filed.

¶ 31 The trial court concluded that it was in J.H.'s best interests for parental responsibilities to return to the status quo prior to Kourtney's removing J.H. from the Youngs' care. That is, that the Youngs should have primary decision-making responsibility, with parenting time awarded to Kourtney in the amount of every other weekend and one weeknight per week.

¶ 32 In November 2016, Kourtney filed an application for leave to defend as an indigent person and, in December 2016, a petition for attorney fees. At a December 2016 hearing, the trial court denied both of those motions.

¶ 33 Later that month, the trial court entered a written order incorporating its oral rulings from the October 2016 hearing. Specifically, the court determined that it was in J.H.'s best interests to award the Youngs custody of J.H. and to award Kourtney parenting time on Wednesday evenings and every other weekend.

¶ 34 In January 2017, Kourtney filed a notice of appeal.

¶ 35 II. ANALYSIS

¶ 36 Kourtney argues that the trial court erred by (1) denying her motion to dismiss the Youngs' petition to establish custody and (2) concluding that it was in J.H.'s best interests to award the Youngs primary parenting responsibility. For the following reasons, we disagree with both of Kourtney's arguments and, therefore, affirm the trial court's judgment.

¶ 37 A. Motion To Dismiss

¶ 38 Kourtney argues the trial court erred by denying her motion to dismiss the Youngs' petition to establish custody. Kourtney makes the following assertions to support that argument: (1) the Youngs lacked standing to file their petition because Kourtney had physical custody of J.H. when the Youngs filed their petition; and (2) the court addressed the issues of standing and best interests in the same hearing, which confused the issues and prejudiced Kourtney.

¶ 39 1. *Section 601.2 of the Dissolution Act*

¶ 40 On appeal, both parties cite to the version of the Dissolution Act that became effective on January 1, 2016. 750 ILCS 5/601.2(b)(3) (West 2016). Although the Youngs filed their petition in December 2015, neither party contends that the prior version of the Dissolution Act should apply, which would be section 601 of the Dissolution Act (750 ILCS 5/601(b)(2) (West 2014)). Because the portions of the Dissolution Act relevant to this appeal are essentially unchanged by the January 1, 2016, amendments, we apply the 2016 version (which is section 601.2 of the Dissolution Act) throughout our discussion, as do the parties in their briefs.

¶ 41 Section 601.2(b)(3) of the Dissolution Act provides that a proceeding for allocation of decision-making responsibilities (formerly known as "custody") of a child may be commenced in the following manner by a person who is not the child's parent:

> "by a person other than a parent, by filing a petition for allocation of parental responsibilities in the county in which the child is permanently resident or found, but only if he or she is not in the physical custody of one of his or her parents."

750 ILCS 5/601.2(b)(3) (West 2016).

Thus, the appropriateness of the Youngs' petition for custody turns on whether J.H. was in the "physical custody" of Kourtney when the present action was commenced. See *In re R.L.S.*, 218 Ill. 2d 428, 436, 844 N.E.2d 22, 28 (2006) (interpreting section 601(b)(2) of the Dissolution Act as having the following requirement: "to have standing to proceed on a petition for custody under the [Dissolution] Act, a petitioner must show that the child is not in the physical custody of one of his or her parents").

¶ 42 2. *"Standing" in This Case*

¶ 43 Kourtney argues that the trial court erred by denying her motion to dismiss the Youngs' petition under section 2-619(a)(9) of the Code for lack of standing. Kourtney claims that J.H. was "in the physical custody of one of his or her parents" at the time the Youngs filed their petition. We disagree that section 601.2 of the Dissolution Act, which allows for a nonparent to file a petition for allocation of parental responsibilities (formerly known as a petition for custody) only if the child "is not in the physical custody of one of his or her parents," addresses the standing of the petitioner. Instead, we view that requirement as an element of the cause of action that must be pleaded by the petitioner.

¶ 44 Section 601.2 of the Dissolution Act provides that a person who is not a parent or stepparent of a child may commence a proceeding for allocation of parental responsibilities for that child by filing a petition, but only if the child "is not in the physical custody of one of his or her parents." 750 ILCS 5/601.2(b)(3) (West 2016). That same limitation appeared in the precursor to section 601.2—section 601—which similarly provided that a "child custody proceeding" could be commenced by a nonparent only if the child was not in the physical custody of one of his or her parents. 750 ILCS 5/601(b)(2) (West 2014).

¶ 45 Several Illinois cases have referred to the above-described limitation as an issue of "standing." See, *e.g.*, *In re Petition of Kirchner*, 164 Ill. 2d 468, 491, 649 N.E.2d 324, 334 (1995) (abrogated on other grounds by *In re R.L.S.*, 218 Ill. 2d 428, 844 N.E.2d 22 (2006)); *In re Custody of Peterson*, 112 Ill. 2d 48, 53, 491 N.E.2d 1150, 1152 (1986); *In re Scarlett Z.-D.*, 2014 IL App (2d) 120266-B, ¶ 19, 11 N.E.3d 360; *In re Custody of Groff*, 332 Ill. App. 3d 1108, 1112, 774 N.E.2d 826, 830 (2002); *In re Custody of K.P.L.*, 304 Ill. App. 3d 481, 486-87, 710 N.E.2d 875, 878-79 (1999); *In re Marriage of Feig*, 296 Ill. App. 3d 405, 408, 694 N.E.2d 654, 656 (1998). However, traditional notions of "standing" do not apply to proceedings under section 601.2 of the Dissolution Act.

¶ 46 In Illinois, the doctrine of standing "assures that issues are raised only by those parties with a real interest in the outcome of the controversy." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221, 720 N.E.2d 1034, 1039 (1999). To have standing, a party must have "some injury in fact to a legally cognizable interest." *Id.* "Lack of standing is an affirmative defense, which the defendant bears the burden to plead and prove." *Id.* at 224, 720 N.E.2d at 1041. As such, lack of standing is as an affirmative matter properly raised in a section 2-619(a)(9) motion to dismiss. *Id.* at 220, 720 N.E.2d at 1039.

¶ 47 The language contained in section 601.2(b)(3) of the Dissolution Act, limiting a nonparent's authority to file a petition to allocate parental responsibilities, does not raise traditional notions of standing. Instead, the limitation is a statutory threshold restricting a trial court's authority to address a petition for allocation of parental responsibilities. A petitioner under section 601.2(b)(3) must plead as an element of a petition for allocation of parental responsibilities that this threshold has been crossed, and then the petitioner must prove it at trial.

¶ 48 In support of this conclusion, we note the supreme court's statement in *In re*

A.W.J., 197 Ill. 2d 492, 496, 758 N.E.2d 800, 803 (2001), that "a nonparent's 'standing' under section 601(b)(2) does not refer to whether a litigant has a justiciable interest in a controversy [citation]." Instead, "[i]t is merely a threshold issue[.]" *Id.* at 496-97, 758 N.E.2d at 803; see also *In re R.L.S.*, 218 Ill. 2d 428, 436, 844 N.E.2d 22, 28 (2006) ("[W]hen used in this sense, 'standing' simply referred to a threshold statutory requirement that had to be met before the court could proceed to a decision on the merits[.]").

¶ 49 The same considerations were noted in *In re Custody of McCuan*, 176 Ill. App. 3d 421, 425, 531 N.E.2d 102, 105 (1988). The *McCuan* court noted that the "standing" requirement of section 601(b)(2) of the Dissolution Act "is distinct from the definition [of standing] familiar to most students of the law." *Id.* The court explained that that although this requirement was referred to as one of "standing," the burden to prove it lay with the petitioner: "the nonparent must show that the child is 'not in the physical custody of one of his parents.' " *Id.*; see also *Peterson*, 112 Ill. 2d at 53, 491 N.E.2d at 1152 ("nonparents must first show that the child is 'not in the physical custody of one of his parents' "); *Groff*, 332 Ill. App. 3d at 1112, 774 N.E.2d at 830 ("The nonparent bears the burden of proving that he or she has standing.").

¶ 50 Given that the requirement contained in section 601.2(b)(3) has frequently been mischaracterized as an issue of standing, we understand why the parties and the trial court in this case did the same. However, the limitation contained in section 601.2(b)(3) does not relate to whether the petitioner has an interest in the outcome of the controversy or whether the petitioner has an injury that can be remedied by the court. The limitation is properly understood as an element that must be pleaded and proved by a nonparent petitioner seeking an allocation of parental responsibilities.

¶ 51 Because we conclude that lack of physical custody by the parents is not an issue of standing, we need not address the Youngs' argument that Kourtney failed to timely plead the issue as one of standing under section 2-619(a)(9) of the Code.

¶ 52 3. *What Does "Physical Custody" Mean?*

¶ 53 Section 601.2 of the Dissolution Act does not define "physical custody." However, extensive case law exists interpreting "physical custody" in the context of section 601 of the Dissolution Act—the precursor to section 601.2 of the Dissolution Act.

¶ 54 Whether a child is in the physical custody of a parent "is not subject to a clear test." *In re Custody of M.C.C.*, 383 Ill. App. 3d 913, 917, 892 N.E.2d 1092, 1096 (2008). Resolving the issue of physical custody "should not turn on who is in physical possession, so to speak, of the child at the moment of filing the petition for custody." *Peterson*, 112 Ill. 2d at 53-54, 491 N.E.2d at 1152. "Physical possession of a child does not necessarily translate into physical custody ***." *M.C.C.*, 383 Ill. App. 3d at 917, 892 N.E.2d at 1096. For example, "[n]o one could legitimately suggest that the headmaster of a boarding school or the director of a children's summer camp would have 'custody' under the [Dissolution Act]." *Kirchner*, 164 Ill. 2d at 492, 649 N.E.2d at 335 (abrogated on other grounds by *R.L.S.*, 218 Ill. 2d 428, 844 N.E.2d 22).

¶ 55 Some cases have held that to establish physical custody the nonparent must show that the biological parents "voluntarily and indefinitely relinquished custody of the child." See, *e.g.*, *M.C.C.*, 383 Ill. App. 3d at 917, 892 N.E.2d at 1097-98 (quoting *In re Ayala*, 344 Ill. App. 3d 574, 588, 800 N.E.2d 524, 538 (2003)); *Feig*, 296 Ill. App. 3d 405, 408, 694 N.E.2d 654, 656; *In re Marriage of Rudsell*, 291 Ill. App. 3d 626, 632, 684 N.E.2d 421, 425 (1997). In addition, when determining whether a parent had physical custody, a court should consider factors including the following: "(1) who was responsible for the care and welfare of the child prior to the initiation of custody proceedings; (2) the manner in which physical possession of a child was acquired; and (3) the nature and duration of the possession." *In re A.W.J.*, 316 Ill. App. 3d 91, 96, 736 N.E.2d 716, 721 (2000).

¶ 56 4. *Did "Physical Custody" Exist in this Case?*

¶ 57 Kourtney argues that the Youngs' petition for allocation of parental responsibilities should have been denied because J.H. was in Kourtney's physical custody when the petition was filed. A trial court's finding of physical custody will be affirmed on appeal unless the finding was against the manifest weight of the evidence. *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177, 768 N.E.2d 834, 837 (2002). A finding is against the manifest weight of the evidence when the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Id.* at 181-82, 768 N.E.2d at 840-41. For the following reasons, we conclude that the trial court's finding that J.H. was not in Kourtney's physical custody was not against the manifest weight of the evidence.

¶ 58 Kourtney voluntarily relinquished her parenting responsibilities. Crystal testified that in March or April 2007, Kourtney asked Crystal to coparent J.H. Since that time, the Youngs have steadily taken on additional parenting responsibilities while J.H. has spent more time in their care. Kourtney's allowing the Youngs to "coparent" J.H. constituted a voluntary relinquishment of her parental responsibilities that continued for several years.

¶ 59 Under the three-factor test provided by *A.W.J.*, the trial court's determination that J.H. was not in Kourtney's physical custody was not against the manifest weight of the evidence. The trial court found that the Youngs were responsible for J.H.'s day-to-day care, medical care, education, extracurricular activities, and social life. That factor works in favor of the Youngs' physical custody. As to the second factor—the manner in which physical possession of the child was acquired—Kourtney voluntarily requested that the Youngs help parent J.H. As to the third factor—nature and duration of the possession—the Youngs helped parent J.H. for approximately eight years, a significant period of time.

¶ 60 Kourtney's physical possession of J.H. at the time the Youngs petitioned for custody did not establish that Kourtney had physical custody of J.H. As noted above, mere physical possession of a child at the time a petition is filed is insufficient to establish physical custody. See, *e.g.*, *M.C.C.*, 383 Ill. App. 3d at 917, 892 N.E.2d at 1096. The approximately two months of nearly exclusive care of J.H. was not enough to overcome the previous eight years during which Kourtney voluntarily relinquished many of her parenting responsibilities to the Youngs.

¶ 61 B. Best Interests of J.H.

¶ 62 Kourtney argues that the trial court's allocating primary decision-making responsibilities to the Youngs was not in J.H.'s best interests. We disagree.

¶ 63 1. *Statutory Language and the Standard of Review*

¶ 64 The Dissolution Act provides that "[t]he court shall allocate decision-making responsibilities according to the child's best interests." 750 ILCS 5/602.5(a) (West 2016). When determining the child's best interests, the court shall consider all relevant factors, including the following:

> "(1) the wishes of the child ***;
>
> (2) the child's adjustment to his or her home, school, and community;
>
> (3) the mental and physical health of all individuals involved;
>
> (4) the ability of the parents to cooperate to make decisions, or the level of conflict between the parties that may affect their ability to share decision-making;

(5) the level of each parent's participation in past significant decision-making with respect to the child;

(6) any prior agreement or course of conduct between the parents relating to decision-making with respect to the child;

(7) the wishes of the parents;

(8) the child's needs;

(9) the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement;

(10) whether a restriction on decision-making is appropriate under Section 603.10;

(11) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;

(12) the physical violence or threat of physical violence by the child's parent directed against the child;

(13) the occurrence of abuse against the child or other member of the child's household;

(14) whether one of the parents is a sex offender, and if so, the exact nature of the offense and what, if any, treatment in which the parent has successfully participated; and

(15) any other factor that the court expressly finds to be relevant." 750 ILCS 5/602.5(c) (West 2016).

¶ 65 "The trial court is in the best position to judge witness credibility and determine the child's best interests." *In re Marriage of Young*, 2015 IL App (3d) 150553, ¶ 12, 47 N.E.3d 1111. "In child custody cases, there is a strong and compelling presumption in favor of the result reached by the trial court because it is in a superior position to evaluate the evidence and determine the best interests of the child." *In re Marriage of Agers*, 2013 IL App (5th) 120375, ¶ 25, 991 N.E.2d 944. "We will not disturb a trial court's custody determination unless it is against the manifest weight of the evidence." *Young*, 2015 IL App (3d) 150553, ¶ 12, 47 N.E.3d 1111. Al-though the Dissolution Act now refers to "decision-making responsibilities" instead of "custody" (750 ILCS 5/602.5 (West 2016)), we continue to apply the same standard of review, which is the manifest weight of the evidence.

¶ 66 2. *This Case*

¶ 67 Kourtney raises multiple arguments in support of her contention that the trial court's allocation of decision-making responsibilities was against the manifest weight of the evidence.

¶ 68 First, Kourtney argues that the trial court considered evidence prohibited by section 602.5(e) of the Dissolution Act, which provides that "[i]n allocating significant decision-making responsibilities, the court shall not consider conduct of a parent that does not affect that parent's relationship to the child." 750 ILCS 5/602.5(e) (West 2016). Kourtney cites a long list of evidence that she claims was barred by section 602.5(e) and was prejudicial. But Kourtney provides no analysis as to *why* the evidence she cites should have been barred by section 602.5(e).

¶ 69 Next, Kourtney argues that the trial court failed to consider relevant evidence. Kourtney explains that the court "did not reference certain evidence and therefore seemingly did not consider such evidence in its ruling." In particular, Kourtney argues that the trial court failed to consider Crystal's use of profanity toward Kourtney and the violent criminal history of Crystal's sons. Kourtney does not explain how that evidence was relevant to the best-interests analysis. Nor does she point to anything in the record to affirmatively establish that the court failed to consider the evidence in question. A court need not explicitly mention every piece of evidence that it considers in reaching its decision.

¶ 70 Kourtney next contends that the trial court failed to properly weigh the various best-interests factors. We disagree. The court addressed each of the statutory best-interests factors on the record. The court found that J.H. wished for her situation to return to how it had been prior to October 2015. Under that former arrangement, J.H. had adjusted well to home and school life. The court was concerned about Kourtney's health as it related to her consumption of alcohol. The court determined that the Youngs and Kourtney would struggle to return to a cooperative relationship, which supported the court's decision to award the Youngs primary decision-making responsibility instead of an even split of decision-making duties. The court found further that moving to Florida would not be in J.H.'s best interests. In addition, the court found that the Youngs provided J.H. a level of stability that (1) she needed and (2) Kourtney had not provided. Based on the aforementioned evidence, we conclude that the court's decision to award the Youngs primary decision-making responsibility was not against the manifest weight of the evidence.

¶ 71 Finally, Kourtney argues that the trial court evaluation of the witnesses' credibility was flawed. We reject that contention. "We give great deference to the trial court's credibility determinations, and we will not substitute our judgment for that of the trial court." *Vician v. Vician*, 2016 IL App (2d) 160022, ¶ 29, 64 N.E.3d 159.

¶ 72 In sum, the trial court's best-interests determination was not against the manifest weight of the evidence.

¶ 73 III. CONCLUSION

¶ 74 We thank the trial court for its careful, extensive evaluation of the evidence in this case, which we found very helpful.

¶ 75 For the reasons stated, we affirm the trial court's judgment.

¶ 76 Affirmed.

APPENDIX C

Circuit Court of The Eleventh Judicial
Circuit, McLean County, Illinois, Judgment

APPENDIX C

Circuit Court of The Eleventh Judicial
Circuit, McLean County, Illinois, Judgment

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF McLEAN

CRYSTAL YOUNG and MICHAEL YOUNG, Petitioners,	)	
and	)	15-F-370
KOURTNEY HERMAN and DAVID HERRON, Respondents.	)	

FILED
DEC 16 2016
McLEAN COUNTY CIRCUIT CLERK

ORDER

THIS CAUSE coming before the Court July 25, 2016, August 11, 2016, August 12, 2016, September 6, 2016, and October 4, 2016, for hearing on the Petitioners' Petition to Establish Custody, Petitioners' Petition for Plenary Order of Protection and Respondent's Motion Verified Combined Motion to Dismiss and Motion to Reconsider, the parties appearing personally and by their attorneys, the Court having heard the evidence, arguments, report of Guardian Ad Litem, Helen Ogar, and having been fully advised in the premises, HEREBY FINDS AND ORDERS:

1. The Court has jurisdiction over the subject matter and the parties herein.

2. The Respondent, DAVID HERRON, is adjudged in default.

3. The Court specifically finds that it is in the best interest of the minor child, Journey Herron, that her sole custody, care, control and education be awarded to Petitioners, Michael Young and Crystal Young.

4. The Court's specific findings are included within the transcript of the Court's verbal Order issued to the parties and counsel in open Court on October 4, 2016, attached hereto as Exhibit A.

5. The Court finds that it is in the child's best interest that she have visitation/parenting time with the Respondent, Kourtney Herman, alternate weekends from Friday after school (or 4:00 p.m. if there is no school) through Sunday at 7:00 p.m. The first weekend the child shall be scheduled to be with the Respondent following the entry of this Order is the weekend of October 14th through the October 16th. The Respondent shall also have visitation with the child every Wednesday from after school (or 4:00 p.m. if there is no school) until Thursday morning returning the child to school or the Petitioners' care if there is no school.

6. The parties shall share holidays with the child pursuant to the following schedule:

HOLIDAY	EVEN NUMBERED YEARS	ODD NUMBERED YEARS
Spring Break - commencing the first day of the child's break from school at 5:00 p.m. and ending the Sunday before the child resumes school at 5:30 p.m.	Petitioners	Respondent
Easter 9:00 a.m. until 5:30 p.m.	Respondent	Petitioners
Memorial Day Weekend (Friday at 5:30 p.m. until Monday at 5:30 p.m.)	Respondent	Respondent
July 3rd at 5:30 p.m. until July 5th at 8:00 a.m.	Petitioners	Petitioners
Labor Day Weekend (Friday after school until Monday at 7:00 p.m.)	Respondent	Respondent

Thanksgiving Weekend (Wednesday 5:30 p.m. until Friday at 5:30 p.m.)	Respondent	Petitioners
Christmas Eve - commencing on December 23rd at 5:30 p.m. until noon December 25th	Respondent	Petitioners
Christmas Day - commencing at noon on December 25th until 6:00 a.m. on December 27th	Petitioners	Respondent
Mother's Day - commencing at 9:00 a.m. until 5:30 p.m.	Respondent	Respondent
Father's Day - commencing at 8:00 a.m until 5:30 p.m.	Petitioners	Petitioners

Each party also shall be entitled to spend 2 weeks (14 days) extended time with the child annually uninterrupted by the other party's parenting time. A party's week shall be inclusive of that party's weekend with the child so that the alternating weekend schedule is not conflicted. The parties agree to give one another written notice of their proposed extended week of visitation on or before May 1st of each year. If both parties choose the same week, the parties agree that in even-numbered years Petitioners shall have first choice and in odd-numbered years Respondent shall have first choice. The parties agree that the vacation time shall take precedence over the regular parenting schedule but shall not interfere with the other party's holiday or weekend parenting time. Holiday parenting time shall take precedence over regular parenting time and vacation time.

Each year, the child shall spend the "first half" of her winter break from school with the Respondent, KOURTNEY HERMAN, subject to the allocation of Christmas Eve and Christmas Day as outlined above. Each year the child shall spend the "second half" of winter break with the Petitioners as this has traditionally been a time the Petitioners have traveled with the child each year. This would commence December 27th at 6:00 a.m. each year and end January 2nd at 5:30 p.m.

7. The Petitioners elected not to pursue the Plenary Order of Protection, therefore the Interim Order of Protection previously entered herein expired on October 4, 2016.

8. The Respondent's Verified Combined Motion to Dismiss (June 6, 2016) and Motion to Reconsider (July 19, 2016) are denied.

9. This is a final order.

Date: 12/16/16

Judge William Yoder

Approved as to form:

Gina L. Wood
Attorney for Petitioners

Jeffrey Lindsay
Attorney for Respondent

Helen Ogar
Guardian Ad Litem

Prepared by:
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Telephone: (309) 829-7069

IN THE ELEVENTH JUDICIAL CIRCUIT OF THE
STATE OF ILLINOIS -- MCLEAN COUNTY

CRYSTAL YOUNG,)
Petitioner,)
vs.) No. 15-F-370
KOURTNEY HERMAN,)
DAVID HERRON,)
Defendant.)

REPORT OF THE SPECIFIED EXCERPT OF THE PROCEEDINGS TAKEN BY ELECTRONIC RECORDING before the HONORABLE WILLIAM YODER, on the 4th day of October, 2016.

APPEARANCES:

MS. GINA WOOD -- Attorney at law, on behalf of the petitioner;

MR. JEFFREY LINDSAY -- Attorney at law, on behalf of the respondent;

MS. HELEOGAR -- Guardian Ad Litem.

Reported by:

Donna F. Banks, CSR.

License #084-003612.

(Specified excerpt of proceedings.)

PETITIONER'S EXHIBIT
A

THE COURT: Okay. So I'm going to address the standing issue first of all, given that I'm in a good position having viewed the witnesses in this case, listened to their testimony, having observed their demeanor while testifying. I think this case has taken place over a number of court hearings, and I have taken extensive notes at each court hearing. I have a good recollection of the testimony that's presented in this case, the witnesses that testified. Again, their demeanor while testifying and the credibility to give to each of their testimony.

When we started this hearing one of the first questions I asked counsel, Mr. Lindsay, was not a question but I asked for a comment, do you acknowledge that there was no affirmative challenge to standing filed at any time of the pleadings, and your response was there was not. And I think it's clear from the evidence and the court file and pleadings that there was no challenge to standing filed during

the time of the pleadings. So in that regard that issue would be waived.

As it relates to the issue of standing as whether or not a parent had custody of this child at the time of pleadings, or at the time of the initiation of this proceeding, the evidence in this case I think is extensive. The evidence in this case I believe demonstrates that Journey was removed from the Youngs', quote-unquote, custody for a short time prior to the filing of these proceedings, and that I don't believe that that -- because Journey was in physical custody of her biological mother, Ms. Herman, at the time of the filing of the proceedings would prohibit the petitioners to file this petition because she was in essence yanked from their custody which initiated -- which caused them to initiate these proceedings to seek her return.

The question of physical custody, in listening to the evidence, I believe that the Youngs' testimony was that it appeared pretty credible. I think that their demeanor while

testifying was such that they expressed what their recollections were of their life with Journey, and it didn't seem to me that there was fabrication. I think that they acknowledge that they attempted to create a good life for Journey, that they, especially Crystal, attempted to involve Kourtney in just about every part of Journey's upbringing, and the parties all got along.

I agree with counsel that the neighbor, Hank Guenther, was a credible witness. His testimony was that -- and it went on for hours under the cross-examination -- that he thought that she lived there with the Youngs. That was his opinion when repeatedly asked by Mr. Lindsay. You know, asked specific day back in 2000 and whatever the year it was, and of course no one can remember what took place on a specific day six or seven years ago, or five years ago, or even three years ago. But after being pressed on why can't you remember, you know, January 31st of 2012, or whatever it was, he finally said, look, I can't remember, I

just know that I thought she lived there. To which there was an objection which was overruled because it was an invited comment. I thought Mr. Guenther was very credible. Derek Riebe I also agree was credible, and my notes are that he saw Crystal at the bus stop nearly every day, over there often, saw Crystal for three-and-a-half years repeatedly, often at the bus stop. I also thought his testimony was credible. I think he just wanted to testify as honestly and as credibly as he could.

I appreciate the thorough report the

Guardian Ad Litem supplemented by the testimony and additional evidence today. I think that the Guardian Ad Litem has gone overboard with this case to try to report to the Court exactly kind of what she believed the -- you know, the status of these parties. I know that based on her testimony she's had a very close and I think continuing relationship with Journey, and the Court found it to be very thorough, the written report and the updated report be very thorough, and the portions that took place or referred to as far as her argument -- or

position, not argument, but position today to be consistent with the evidence that was presented in this case and her positions arguing on behalf of Journey's best interest.

As it relates to physical custody, or custody, or responsibility for a child's welfare in this case, there is no question, there's no question in my mind that early on in Journey's life -- and this started way back before, I think before Journey was born, she was reported dead to be honest. The child died, was stillborn, or did not survive until birth. And then they found out about the fact that there was in fact a child, Journey, sometime after her birth, and from that point forward Crystal Young worked hard to develop a strong relationship with Journey, and at the same time -- shortly thereafter, I believe, the evidence demonstrates that Crystal in essence became the primary caregiver for Journey and that Kourtney surrendered that duty to Crystal, and that that surrender was an indefinite surrender because the only thing that ended it was when a dispute arose at a

bus stop shortly before the initiation of these proceedings and Journey was yanked from the Youngs' custody.

The medical care for this child, there is no dispute that the medical has been provided by the Youngs. There's also no dispute that sometimes Kourtney attended the doctors' visits. But the medical care in this case was provided by the Youngs or overseen by the Youngs throughout Journey's life. Her education has been overseen by the Youngs, and Kourtney has been invited to participate. Extra-curricular activities have been provided by the Youngs almost exclusively with maybe one or two exceptions, and Kourtney has been invited to participate. Spiritual life, there's no doubt that any spiritual life has been fostered by the Youngs, and Kourtney has been invited if she wants to participate. The primary day-to-day care, I believe based on the testimony, and listening to the witnesses, and determining credibility of those witnesses to have been provided by the Youngs. I think that Kourtney's continued relationship with Journey

was more as a visitation with her. It was agreed to by the Youngs so that she could maintain a good relationship with her biological mother.

There's no doubt in my mind based on this record, the evidence, the witnesses that have testified, the exhibits that have been doctored, pages missing, doctored exhibits presented, that the credibility issue, the credibility determination strongly favors the Youngs as the more credible witnesses, and I find that they do have standing as the custodial parent at the time of filing this petition for custody.

As it relates to best interests of Journey, in going through statutory factors that have been laid out, Journey's desire was for the status quo. Journey is nine or ten. I believe her birthday is November something. So I think she is still nine. She may be ten.

MS. OGAR: She's nine.

THE COURT: But Journey's state of desire was I want things to be the way they were, and that's about as detailed as she would get with

the Guardian Ad Litem. My finding is the status quo is the Youngs as the custodial or caregiving, quote-unquote, parent, albeit grandparent, and that that is Journey's desire to return to that with visitation with her mother and her siblings, who she loves very much and enjoys participating in activities with, playing with, interacting with.

But this child, based on the evidence in this case, has adjusted well to her home, school, community, and I think I agree wholeheartedly with the Guardian Ad Litem's report that that adjustment to the situation that she was in was because these parties were cooperating, and that cooperation needs to continue, or it needs to be restored, actually, because it's gone.

The physical health of all individuals involved as far as custody is concerned, I do have some concerns of Ms. Herman's continued use of alcohol and some of the evidence as it relates to. Especially the exit of the RT Dunn apartment and how that occurred, and the leaving behind Journey's property in that apartment only to be found by Crystal Young. The drinking is an issue that I find concerning, although it was possibly unrelated, a fire in the, I think it was the RT Dunn apartment. I don't know what caused that, but all of this as it relates to that issue I think favors the Youngs as well.

The ability of the parents to cooperate and make decisions, the level of conflict between the parties. That was great back prior to this case being initiated, but it's entirely deteriorated at this point such that I don't believe the parties are able to resolve any differences or cooperate in making decisions in Journey's best interests at this point.

Passing decision making with respect to the child, again, I think is -- although it should be considered because of the breakdown of the relationship. You know, it is significant that the parties work together primarily because, Crystal, you're almost forcing the issue. When we start talking about the immunizations of this child and just

questioning whether or not she'd be immunized, the best response from Kourtney Herman would have been, you know what, she hasn't been immunized and so let's get that going. But it wasn't. It was, yeah, I think she was immunized over here or over there, and then it turned out not to be the case.

Both these sets of -- both of these parties want Journey in their custody. There's been some indication that, you know, in the testimony in this case that if custody were granted to Kourtney Herman that she would then almost immediately move to Florida to pursue some other life in Florida, no prospects though having been established. It would totally uproot Journey, and I find it to not be in her best interests. It would also cut off the relationship with the people I believe to be the primary parents or caretakers for the majority of her life. The willingness and ability of each parent to facilitate and encourage a close continued relationship, I find that favors the Youngs.

All of this having been said, I find

that the Youngs do have standing. That there is -- that the best interests of this child are such that custody or primary parental responsibility, if that's what the language is, of parenting time be given to the Youngs.

APPENDIX D

Illinois Supreme Court Summary Denial

APPENDIX D

Illinois Supreme Court Summary Denial

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

Jeffrey Wendell Lindsay
Jeff W. Lindsay, P.C.
318 W. Washington Street
Bloomington IL 61701

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

March 21, 2018

In re: Crystal Young et al., respondents, v. Kourtney Herman, petitioner.
Leave to appeal, Appellate Court, Fourth District.
123247

The Supreme Court today DENIED the Petition for Appeal as a Matter of Right or, in the alternative, Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 04/25/2018.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

APPENDIX E

Relevant provisions of the Illinois Marriage
and Dissolution of Marriage Act, 750 ILCS 5/600 et seq

APPENDIX E

Relevant provisions of the Illinois Marriage
and Dissolution of Marriage Act, 750 ILCS 5/600 et seq

Illinois Marriage and Dissolution of Marriage Act *Repealed January 1, 2016*

(b) A child custody proceeding is commenced in the court:

* * * * * *

"(2) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents." 750 ILCS 5/601(b)(2)

Illinois Marriage and Dissolution of Marriage Act *Effective January 1, 2016*

Part VI – Allocation of Parental Responsibilities

§ 600. Definitions. For purposes of this Part VI:

(a) "Abuse" has the meaning ascribed to that term in Section 103 of the Illinois Domestic Violence Act of 1986.[1]

(b) "Allocation judgment" means a judgment allocating parental responsibilities.

(c) "Caretaking functions" means tasks that involve interaction with a child or that direct, arrange, and supervise the interaction with and care of a child provided by others, or for obtaining the resources allowing for the provision of these functions. The term includes, but is not limited to, the following:

(1) satisfying a child's nutritional needs; managing a child's bedtime and wake-up routines; caring for a child when the child is sick or injured; being attentive to a child's personal hygiene needs, including washing, grooming, and dressing; playing with a child and ensuring the child attends scheduled extracurricular activities; protecting a child's physical safety; and providing transportation for a child;

(2) directing a child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;

(3) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to a child's needs for behavioral control and self-restraint;

(4) ensuring the child attends school, including remedial and special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;

(5) helping a child develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(6) ensuring the child attends medical appointments and is available for medical follow-up and meeting the medical needs of the child in the home;

(7) providing moral and ethical guidance for a child; and

(8) arranging alternative care for a child by a family member, babysitter, or other child care provider or facility, including investigating such alternatives, communicating with providers, and supervising such care.

(d) "Parental responsibilities" means both parenting time and significant decision-making responsibilities with respect to a child.

(e) "Parenting time" means the time during which a parent is responsible for exercising caretaking functions and non-significant decision-making responsibilities with respect to the child.

(f) "Parenting plan" means a written agreement that allocates significant decision-making responsibilities, parenting time, or both.

(g) "Relocation" means:

(1) a change of residence from the child's current primary residence located in the county of Cook, DuPage, Kane, Lake, McHenry, or Will to a new residence

within this State that is more than 25 miles from the child's current residence, as measured by an Internet mapping service;

(2) a change of residence from the child's current primary residence located in a county not listed in paragraph (1) to a new residence within this State that is more than 50 miles from the child's current primary residence, as measured by an Internet mapping service; or

(3) a change of residence from the child's current primary residence to a residence outside the borders of this State that is more than 25 miles from the current primary residence, as measured by an Internet mapping service.

(h) "Religious upbringing" means the choice of religion or denomination of a religion, religious schooling, religious training, or participation in religious customs or practices.

(i) "Restriction of parenting time" means any limitation or condition placed on parenting time, including supervision.

(j) "Right of first refusal" has the meaning provided in subsection (b) of Section 602.3 of this Act.

(k) "Significant decision-making" means deciding issues of long-term importance in the life of a child.

(*l*) "Step-parent" means a person married to a child's parent, including a person married to the child's parent immediately prior to the parent's death.

(m) "Supervision" means the presence of a third party during a parent's exercise of parenting time. 750 ILCS 5/600

§ 601.2. Jurisdiction; commencement of proceeding.

(a) A court of this State that is competent to allocate parental responsibilities has jurisdiction to make such an allocation in original or modification proceedings as provided in Section 201 of the Uniform Child-Custody Jurisdiction and Enforcement Act as adopted by this State.

(b) A proceeding for allocation of parental responsibilities with respect to a child is commenced in the court:

(1) by filing a petition for dissolution of marriage or legal separation or declaration of invalidity of marriage;

(2) by filing a petition for allocation of parental responsibilities with respect to the child in the county in which the child resides;

(3) by a person other than a parent, by filing a petition for allocation of parental responsibilities in the county in which the child is permanently resident or found, but only if he or she is not in the physical custody of one of his or her parents;

(4) by a step-parent, by filing a petition, if all of the following circumstances are met:

(A) the parent having the majority of parenting time is deceased or is disabled and cannot perform the duties of a parent to the child;

(B) the step-parent provided for the care, control, and welfare of the child prior to the initiation of proceedings for allocation of parental responsibilities;

(C) the child wishes to live with the step-parent; and

(D) it is alleged to be in the best interests and welfare of the child to live with the step-parent as provided in Section 602.5 of this Act; or

(5) when one of the parents is deceased, by a grandparent who is a parent or step-parent of a deceased parent, by filing a petition, if one or more of the following existed at the time of the parent's death:

(A) the surviving parent had been absent from the marital abode for more than one month without the spouse knowing his or her whereabouts;

(B) the surviving parent was in State or federal custody; or

(C) the surviving parent had: (i) received supervision for or been convicted of any violation of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 11-1.70, 12C-5, 12C-10, 12C-35, 12C-40, 12C-45, 18-6, 19-6, or Article 12 of the Criminal Code of 1961 or the Criminal Code of 2012[1] directed towards the deceased parent or the child; or (ii) received supervision or been convicted of violating an order of protection entered under Section 217, 218, or 219 of the Illinois Domestic Violence Act of 1986[2] for the protection of the deceased parent or the child.

(c) When a proceeding for allocation of parental responsibilities is commenced, the party commencing the action must, at least 30 days before any hearing on the petition, serve a written notice and a copy of the petition on the child's parent, guardian, person currently allocated parental responsibilities pursuant to subdivision (b)(4) or (b)(5) of Section 601.2, and any person with a pending motion for allocation of parental responsibilities with respect to the child. Nothing in this Section shall preclude a party in a proceeding for allocation of parental responsibilities from moving for a temporary order under Section 603.5.

750 ILCS 5/601.2

§ 602.5. Allocation of parental responsibilities: decision-making.

(a) Generally. The court shall allocate decision-making responsibilities according to the child's best interests. Nothing in this Act requires that each parent be allocated decision-making responsibilities.

(b) Allocation of significant decision-making responsibilities. Unless the parents otherwise agree in writing on an allocation of significant decision-making responsibilities, or the issue of the allocation of parental responsibilities has been reserved under Section 401, the court shall make the determination. The court shall allocate to one or both of the parents the significant decision-making responsibility for each significant issue affecting the child. Those significant issues shall include, without limitation, the following:

(1) Education, including the choice of schools and tutors.

(2) Health, including all decisions relating to the medical, dental, and psychological needs of the child and to the treatments arising or resulting from those needs.

(3) Religion, subject to the following provisions:

(A) The court shall allocate decision-making responsibility for the child's religious upbringing in accordance with any express or implied agreement between the parents.

(B) The court shall consider evidence of the parents' past conduct as to the child's religious upbringing in allocating decision-making responsibilities consistent with demonstrated past conduct in the absence of an express or implied agreement between the parents.

(C) The court shall not allocate any aspect of the child's religious upbringing if it determines that the parents do not or did not have an express or implied agreement for such religious upbringing or that there is insufficient evidence to demonstrate a course of conduct regarding the child's religious upbringing that could serve as a basis for any such order.

(4) Extracurricular activities.

(c) Determination of child's best interests. In determining the child's best interests for purposes of allocating significant decision-making responsibilities, the court shall consider all relevant factors, including, without limitation, the following:

(1) the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to decision-making;

(2) the child's adjustment to his or her home, school, and community;

(3) the mental and physical health of all individuals involved;

(4) the ability of the parents to cooperate to make decisions, or the level of conflict between the parties that may affect their ability to share decision-making;

(5) the level of each parent's participation in past significant decision-making with respect to the child;

(6) any prior agreement or course of conduct between the parents relating to decision-making with respect to the child;

(7) the wishes of the parents;

(8) the child's needs;

(9) the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement;

(10) whether a restriction on decision-making is appropriate under Section 603.10;

(11) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; 750 ILCS 5/602.5

(12) the physical violence or threat of physical violence by the child's parent directed against the child;

(13) the occurrence of abuse against the child or other member of the child's household;

(14) whether one of the parents is a sex offender, and if so, the exact nature of the offense and what, if any, treatment in which the parent has successfully participated; and

(15) any other factor that the court expressly finds to be relevant.

(d) A parent shall have sole responsibility for making routine decisions with respect to the child and for emergency decisions affecting the child's health and safety during that parent's parenting time.

(e) In allocating significant decision-making responsibilities, the court shall not consider conduct of a parent that does not affect that parent's relationship to the child.

APPENDIX F

Pending changes in Illinois law since the Opinion
2018 Ill. Legis. Serv. P.A. 100-706 (S.B. 2498) (WEST)

APPENDIX F

Pending changes in Illinois law since the Opinion
2018 Ill. Legis. Serv. P.A. 100-706 (S.B. 2498) (WEST)

2018 Ill. Legis. Serv. P.A. 100-706 (S.B. 2498) (WEST)

ILLINOIS 2018 LEGISLATIVE SERVICE

One-Hundredth General Assembly, 2018

Additions are indicated by **Text**; deletions by

~~Text~~.

Vetoes are indicated by ~~Text~~;

stricken material by **~~Text~~**.

PUBLIC ACT 100–706

S.B. 2498

AN ACT concerning civil law.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Illinois Marriage and Dissolution of Marriage Act is amended by changing Section 602.9 as follows:

<< IL ST CH 750 § 5/602.9 >>

[S.H.A. 750 ILCS 5/602.9] (750 ILCS 5/602.9)

§ 602.9. Visitation by certain non-parents.

(a) As used in this Section:

(1) “electronic communication” means time that a grandparent, great-grandparent, sibling, or step-parent spends with a child during which the child is not in the person's actual physical custody, but which is facilitated by the use of communication tools such as the telephone, electronic mail, instant messaging, video conferencing or other wired or wireless technologies via the Internet, or another medium of communication;

(2) “sibling” means a brother or sister either of the whole blood or the half blood, stepbrother, or stepsister of the minor child;

(3) “step-parent” means a person married to a child's parent, including a person married to the child's parent immediately prior to the parent's death; and

(4) “visitation” means in-person time spent between a child and the child's grandparent, great-grandparent, sibling, step-parent, or any person designated under subsection (d) of Section 602.7. In appropriate circumstances, visitation may include electronic communication under conditions and at times determined by the court.

(b) General provisions.

(1) An appropriate person, as identified in subsection (c) of this Section, may bring an action in circuit court by petition, or by filing a petition in a pending dissolution proceeding or any other proceeding that involves parental responsibilities or visitation issues regarding the child, requesting visitation with the child pursuant to this Section. If there is not a pending proceeding involving parental responsibilities or visitation with the child, the petition for visitation with the child must be filed in the county in which the child resides. Notice of the petition shall be given as provided in subsection (c) of Section 601.2 of this Act.

(2) This Section does not apply to a child:

(A) in whose interests a petition is pending under Section 2–13 of the Juvenile Court Act of 1987; or

(B) in whose interests a petition to adopt by an unrelated person is pending under the Adoption Act; or

(C) who has been voluntarily surrendered by the parent or parents, except for a surrender to the Department of Children and Family Services or a foster care facility; or

(D) who has been previously adopted by an individual or individuals who are not related to the biological parents of the child or who is the subject of a pending adoption petition by an individual or individuals who are not related to the biological parents of the child; or

(E) who has been relinquished pursuant to the Abandoned Newborn Infant Protection Act.

(3) A petition for visitation may be filed under this Section only if there has been an unreasonable denial of visitation by a parent and the denial has caused the child undue mental, physical, or emotional harm.

(4) There is a rebuttable presumption that a fit parent's actions and decisions regarding grandparent, great-grandparent, sibling, or step-parent visitation are not harmful to the child's mental, physical, or emotional health.The burden is on the party filing a petition under this Section to prove that the parent's actions and decisions regarding visitation will cause undue harm to the child's mental, physical, or emotional health.

(5) In determining whether to grant visitation, the court shall consider the following:

(A) the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to visitation;

(B) the mental and physical health of the child;

(C) the mental and physical health of the grandparent, great-grandparent, sibling, or step-parent;

(D) the length and quality of the prior relationship between the child and the grandparent, great-grandparent, sibling, or step-parent;

(E) the good faith of the party in filing the petition;

(F) the good faith of the person denying visitation;

(G) the quantity of the visitation time requested and the potential adverse impact that visitation would have on the child's customary activities;

(H) any other fact that establishes that the loss of the relationship between the petitioner and the child is likely to unduly harm the child's mental, physical, or emotional health; and

(I) whether visitation can be structured in a way to minimize the child's exposure to conflicts between the adults.

(6) Any visitation rights granted under this Section before the filing of a petition for adoption of the child shall automatically terminate by operation of law upon the entry of an order terminating parental rights or granting the adoption of the child, whichever is earlier. If the person or persons who adopted the child are related to the child, as defined by Section 1 of the Adoption Act, any person who was related to the child as grandparent, great-grandparent, or sibling prior to the adoption shall have standing to bring an action under this Section requesting visitation with the child.

(7) The court may order visitation rights for the grandparent, great-grandparent, sibling, or step-parent that include reasonable access without requiring overnight or possessory visitation.

(c) Visitation by grandparents, great-grandparents, step-parents, and siblings.

(1) Grandparents, great-grandparents, step-parents, and siblings of a minor child who is one year old or older may bring a petition for visitation and electronic communication under this Section if there is an unreasonable denial of visitation by a parent that causes undue mental, physical, or emotional harm to the child and if at least one of the following conditions exists:

(A) the child's other parent is deceased or has been missing for at least 90 days. For the purposes of this subsection a parent is considered to be missing if the parent's location has not been determined and the parent has been reported as missing to a law enforcement agency; or

(B) a parent of the child is incompetent as a matter of law; or

(C) a parent has been incarcerated in jail or prison for a period in excess of 90 days immediately prior to the filing of the petition; or

(D) the child's parents have been granted a dissolution of marriage or have been legally separated from each other or there is pending a dissolution proceeding involving a parent of the child or another court proceeding involving parental responsibilities or visitation of the child (other than an adoption proceeding of an unrelated child, a proceeding under Article II of the Juvenile Court Act of 1987, or an action for an order of protection under the Illinois Domestic Violence Act of 1986 or Article 112A of the Code of Criminal Procedure of 1963) and at least one parent does not object to the grandparent, great-grandparent, step-parent, or sibling having visitation with the child. The visitation of the grandparent, great-grandparent, step-parent, or sibling must not diminish the parenting time of the parent who is not related to the grandparent, great-grandparent, step-parent, or sibling seeking visitation; or

(E)**(i)** the child is born to parents who are not married to each other**; (ii)**~~,~~ the parents are not living together**; (iii)**~~, and~~ the petitioner is a grandparent, great-grandparent, step-parent, or sibling of the child**; and (iv) the parent-child relationship**~~, and parentage~~ has been **legally** established**. For purposes of this subdivision (E), if the petitioner is a grandparent or great-grandparent, the parent-child relationship need be legally established only with respect to the parent who is related to the grandparent or great-grandparent. For purposes of this subdivision (E), if the petitioner is a step-parent, the parent-child relationship need be legally established only with respect to the parent who is married to the petitioner or was married to the petitioner immediately before the parent's death.** ~~by a court of competent jurisdiction.~~

(2) In addition to the factors set forth in subdivision (b)(5) of this Section, the court should consider:

(A) whether the child resided with the petitioner for at least 6 consecutive months with or without a parent present;

(B) whether the child had frequent and regular contact or visitation with the petitioner for at least 12 consecutive months; and

(C) whether the grandparent, great-grandparent, sibling, or step-parent was a primary caretaker of the child for a period of not less than 6 consecutive months within the 24–month period immediately preceding the commencement of the proceeding.

(3) An order granting visitation privileges under this Section is subject to subsections (c) and (d) of Section 603.10.

(4) A petition for visitation privileges may not be filed pursuant to this subsection (c) by the parents or grandparents of a parent of the child if parentage between the child and the related parent has not been legally established.

(d) Modification of visitation orders.

(1) Unless by stipulation of the parties, no motion to modify a grandparent, great-grandparent, sibling, or step-parent visitation order may be made earlier than 2 years after the date the order was filed, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously the child's mental, physical, or emotional health.

(2) The court shall not modify an order that grants visitation to a grandparent, great-grandparent, sibling, or step-parent unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior visitation order or that were unknown to the court at

the time of entry of the prior visitation order, that a change has occurred in the circumstances of the child or his or her parent, and that the modification is necessary to protect the mental, physical, or emotional health of the child. The court shall state in its decision specific findings of fact in support of its modification or termination of the grandparent, great-grandparent, sibling, or step-parent visitation. A child's parent may always petition to modify visitation upon changed circumstances when necessary to promote the child's best interests.

(3) Notice of a motion requesting modification of a visitation order shall be provided as set forth in subsection (c) of Section 601.2 of this Act.

(4) Attorney's fees and costs shall be assessed against a party seeking modification of the visitation order if the court finds that the modification action is vexatious and constitutes harassment.

(e) No child's grandparent, great-grandparent, sibling, or step-parent, or any person to whom the court is considering granting visitation privileges pursuant to subsection (d) of Section 602.7, who was convicted of any offense involving an illegal sex act perpetrated upon a victim less than 18 years of age including, but not limited to, offenses for violations of Section 11–1.20, 11–1.30, 11–1.40, 11–1.50, 11–1.60, 11–1.70, or Article 12 of the Criminal Code of 1961 or the Criminal Code of 2012, is entitled to visitation while incarcerated or while on parole, probation, conditional discharge, periodic imprisonment, or mandatory supervised release for that offense, and upon discharge from incarceration for a misdemeanor offense or upon discharge from parole, probation, conditional discharge, periodic imprisonment, or mandatory supervised release for a felony offense. Visitation shall be denied until the person successfully completes a treatment program approved by the court. Upon completion of treatment, the court may deny visitation based on the factors listed in subdivision (b)(5) of this Section.

(f) No child's grandparent, great-grandparent, sibling, or step-parent, or any person to whom the court is considering granting visitation privileges pursuant to subsection (d) of Section 602.7, may be granted visitation if he or she has been convicted of first degree murder of a parent, grandparent, great-grandparent, or sibling of the child who is the subject of the visitation request. Pursuant to a motion to modify visitation, the court shall revoke visitation rights previously granted to any person who would otherwise be entitled to petition for visitation rights under this Section or granted visitation under subsection (d) of Section 602.7, if the person has been convicted of first degree murder of a parent, grandparent, great-grandparent, or sibling of the child who is the subject of the visitation order. Until an order is entered pursuant to this subsection, no person may visit, with the child present, a person who has been convicted of first degree murder of the parent, grandparent, great-grandparent, or sibling of the child without the consent of the child's parent, other than a parent convicted of first degree murder as set forth herein, or legal guardian.

(Source: P.A. 99–90, eff. 1–1–16; 99–763, eff. 1–1–17.)

Approved: August 3, 2018

Effective: January 1, 2019

APPENDIX G

Summary of Relevant Facts

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Until the emergency order of protection was entered, Kourtney was active in Journey's life (Exhibit A, C340-C343, Exhibit G, C390-C404 and Exhibit U, C425-C447), that all times, Respondent, mother provided health insurance for the minor child (Exhibit B, C344), attended all of Journey's doctor's appointments and made medical decisions for the minor (Exhibit F, Sealed and F2, Sealed;), provided Journey with food (Exhibit C, C346), housing (Exhibit L, C407 and testimony from; and David Herron's testimony that Journey has always lived with Respondent, mother and that sometimes Respondent would allow her "Journey" to maybe spend the night throughout the week" with Petitioners and that Respondent, regularly communicated with Respondent, father and provided him with copies of report cards and pictures of the minor child and that on July 4, 2015, he was in town visiting Petitioner's and called Respondent, mother to ask if he could see Journey. (Exhibit Y, C480-C488) Pgs. 32 and 33 of Appellant-Respondent's "Brief"

Dr. Rosa, the minor child's treating physician, testified that Kourtney participated in all of the medical visits for the minor child. (*Testimony of Dr. Rosa,* Supplement to Record, Vol X, Part 2 of 2, page 157, line 13) and that Journey has been a "very healthy girl" throughout her life but acknowledged a note from another provider indicating that Journey exhibited signs of an ******** and or ********** on February 12, 2016 (Exhibit F2. *Sealed*, page 3 *marked as 27*) (*two months after the order of protection was granted*) but that she could not formulate an opinion on that issue because she was not that provider. (*Testimony of Dr. Rosa,* Supplement to

Record, Vol X, Part 2 of 2, page 160, line 24) Dr. Rosa also testified that based on the records (Exhibit F, page 25) that Journey lived with Kourtney pursuant to the encounter date of August 24, 2011. (*Testimony of Dr. Rosa,* Supplement to Record, Vol X, Part 2 of 2, page 162, line 8 through line 24 and page 175, line 1-3) Further physical and the most credible evidence of Respondent's presence and involvement in medical decisions for the minor child can be found by reviewing the minor child's medical records. 2.8.10 (Exhibit F, page 3), 4.5.10 (Id., page 6), 10.4.10 (Id., page 16), 2.23.11 (Id., page 20), 8.24.11 (Id., page 25), 7.17.12 (Id., page 34), 12.17.12 (Id., page 39), 4.29.13 (Id., page 43), 1.14.14 (Id., page 52), and 3.17.15 (Id., page 57) (Exhibit F2) and (*Testimony of Kourtney Herman*, Vol V, Page 41)

Kourtney would take Valentines gift bags to school every year, (***Id.*** page 102, line 21); signed the application to enroll Journey in Sylvan tutoring from 2014 to 2015, (*Id.* page 110, line 20, page 112, line 22), participated in "Mom and Me" swimming classes through Bloomington Park's and Recreation. (*Id.* page 113, line 3-8); attended her daughters ballet recitals through Victory Academy. (*Id.* page 114, line 14 through page 155, line 15) and provide presumed father Respondent, David Herron with photographs of Journey's extracurricular activities, phone calls, grade reports, honor roll and other pictures. (*February 23, 2017 Testimony of Respondent, David Herron,* Supplement to the Record, Page 35, line 6 – 8) and most notably, a brother, *Ivan. (8.24.11 Progress Note, Exhibit F2, page 1, "Lives with mother Kourtney and has an older half-brother who 10 years of age" Exhibit F2, page 2 marked as 26A)*

APPENDIX H

Relevant portions of Illinois relating to bifurcated hearings.

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Both the sequence in which the court allowed the evidence to be presented at the hearing and the court's ruling indicate that threshold issues and the child's best interest were impermissibly commingled. *In re V.S.*, 285 Ill. App. 3d 372, 376, 674 N.E.2d 437, 440 (3d Dist. 1996) A single hearing consolidating threshold issues and best interests carries a risk of prejudice from considering evidence irrelevant to the threshold question before determining that issue. See *Syck,* 138 Ill.2d 255, 275–76, 149 Ill.Dec. 710, 719, 562 N.E.2d 174, 183. To ensure a proper focus, separate hearings are mandatory. *In* re *A.P.,* 277 Ill.App.3d 593, 600, 214 Ill.Dec. 299, 305, 660 N.E.2d 1006, 1012 (1996). The trial judge may hear best interest evidence immediately after the threshold hearing. *In re B.R.,* 282 Ill.App.3d 665, 671, 218 Ill.Dec. 404, 409, 669 N.E.2d 347, 352 (1996). “Separate hearings are clearly the better procedure, because they avoid the possibility of prejudice to a respondent. Therefore, unless it clearly appears that no prejudice resulted, the conduct of a single hearing commingling the issues is reversible error.” *In re V.S.*, 285 Ill. App. 3d 372, 375, 674 N.E.2d 437, 439 (3d Dist. 1996) The proceedings before the trial court were, at best, muddled. *In re V.S.*, 285 Ill. App. 3d 372, 375, 674 N.E.2d 437, 439 (3d Dist. 1996) The process both diverged from the burden created by a rebuttable presumption and undermined any claim that the issue of standing was heard. *In re Guardianship of A.G.G.*, 406 Ill. App. 3d 389, 394, 948 N.E.2d 81, 85 (5th Dist. 2011)

APPENDIX I

Relevant portions of Illinois relating to Voluntary Relinquishment

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In 2006, The Illinois Supreme Court clarified that under the Marriage and Dissolution Act, "standing" merely refers to a threshold issue that must be determined before the court may proceed to a "best interests" determination. In re R.L.S., 218 Ill. 2d 428, 435, 844 N.E.2d 22, 27 (2006) It went on to state that under the Marriage Act, the nonparent must first show that the child is not in the physical custody of one of his parents. In re R.L.S., 218 Ill. 2d 428, 435, 844 N.E.2d 22, 27 (2006). This language has been interpreted to mean that the nonparent must show that the parent has voluntarily and indefinitely relinquished custody of the child. *In re R.L.S.*, 218 Ill. 2d 428, 432, 844 N.E.2d 22, 25 (2006)

Not every voluntary turnover of a child will deprive the parent of physical custody. Rather, the court must consider such factors as (1) who was responsible for the care and welfare of the child prior to the initiation of custody proceedings; (2) the manner in which physical possession of a child was acquired; and (3) the nature and duration of the possession." In re Guardianship of Tatyanna T., 2012 IL App (1st) 112957, ¶ 31, 976 N.E.2d 431, 439"Overnight contact with third parties fails to fulfill the statutory provision that the child not be in the physical custody of one of her parents. In re Marriage of Sechrest, 202 Ill. App. 3d 865, 873, 560 N.E.2d 1212, 1216–17 (4th Dist. 1990)

Custody may not be relinquished by default if a parent performs the task of parenting in a less than adequate manner." In re Marriage of Sechrest, 202 Ill. App. 3d 865, 873, 560 N.E.2d 1212, 1216–17 (4th Dist. 1990)

However, whether the nonparent has the custody of the minor child is determined by examining the nonparent's status on the date relief is sought. In re Custody of Groff, 332 Ill. App. 3d 1108, 1112, 774 N.E.2d 826, 830 (5th Dist. 2002)