2012 IL App (2d) 120626-U
No. 2-12-0626
Order filed October 12, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re D'MAIAH J., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 07-JA-112
	)	
	)	Honorable
(The People of the State of Illinois, Petitioner-	)	Mary Linn Green,
Appellee, v. Nikole J., Respondent-Appellant.)	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's determinations that the mother was unfit and her parental rights should be terminated were not against the manifest weight of the evidence.

¶ 2 This case involves the termination of the parental rights of the respondent, Nikole J., to her daughter, D'Maiah. Nikole appeals the trial court's decision to terminate her parental rights, arguing that none of the bases for the trial court's finding of unfitness were adequately supported by the record; that the State's failure to file and serve proper notice of one of the counts against her means that that count cannot be considered; and that the termination of her rights was not in the best interests of D'Maiah. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 D'Maiah J. was born on January 8, 2003. On April 19, 2007, the Illinois Department of Children and Family Services (DCFS) received a report that D'Maiah's older brother Emarian had been struck with a coat hanger by their mother Nikole as a punishment for pushing a screen out of a window. D'Maiah and Emarian were taken into protective custody by DCFS soon afterwards.

¶ 5 On April 23, 2007, the State of Illinois filed a three-count neglect petition as to D'Maiah. [1] In count I, the State alleged that D'Maiah was neglected in that Nikole had created a substantial risk of physical injury to Emarian. Count II alleged neglect in that Nikole had inflicted excessive corporal punishment on Emarian, thereby creating an environment injurious to D'Maiah. Count III likewise alleged that Nikole had created an injurious environment, through her own substance abuse. Nikole waived her right to a shelter care hearing.

¶ 6 On August 2, 2007, Nikole stipulated to count I of the neglect petition. With the agreement of the parties, the trial court entered an order of continuance under supervision. No finding of abuse or neglect was entered at that time. DCFS was appointed as the temporary guardian and custodian of D'Maiah, and Nikole was ordered to cooperate with the DCFS service plan. Service plans, each lasting six months, were entered regularly after that. Under the plans, Nikole was asked to complete a protective parenting assessment; complete parenting and anger management classes; submit to regular drug tests; attend visits with her children and demonstrate appropriate parenting skills; and engage in individual counseling (with family counseling to follow once that was completed). By the

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[1]The State also filed a neglect petition with respect to Emarian. That petition is not before us at the present time. In addition, this disposition does not address the termination of D'Maiah's father's parental rights, as he has not challenged that termination.

close of the third service plan, Nikole had completed the first four of these items, her drug tests were clean, and she had begun to attend individual counseling. Around that time, however, Nikole's employment and living situation became less stable and she began to have more difficulty attending services.

¶ 7 On April 16, 2009, the State filed a motion to vacate the order of continuance under supervision on the ground that there had been no adjudication of neglect. The trial court granted this motion and adjudicated D'Maiah as neglected in July 2009. On August 4, 2009, and February 1, 2010, the trial court made findings that Nikole had not made reasonable efforts during the preceding service plans. On August 2, 2010, the trial court found that Nikole had made reasonable efforts during the most recent service plan. However, on January 31, 2011, the trial court again found a lack of reasonable effort.

¶ 8 In April 2011, the State filed a motion to terminate parental rights. Count I alleged that Nikole had failed to maintain a reasonable degree of interest, concern or responsibility as to D'Maiah's welfare (750 ILCS 50/1(D)(b) (West 2010)). Count II alleged that Nikole had failed to protect D'Maiah from conditions within her environment injurious to her welfare (750 ILCS 50/1(D)(g) (West 2010)). Finally, Count III alleged that Nikole had "failed to make reasonable progress toward the return of the child to her during any nine (9) month period after the end of the initial nine (9) month period following the adjudication" of neglect (750 ILCS 50/1(D)(m)(iii) (West 2010)). In June 2011, Nikole moved to Texas to be near family members who could assist her in supporting herself.

¶ 9 The fitness hearing was held on October 28, 2011. Immediately before the hearing started, the State filed a "Notice to Comply with 750 ILCS 50/1(m) [*sic*]" that stated:

> "The People may rely on one or more of the following nine[-]month periods in which the parent(s) have failed to make reasonable progress toward the return of the child toward their care after the initial nine[-]month period. The initial nine[-]month period began to run on July 10th, 2009.
>
> 4/10/2010-1/10/11 5/10/10-2/10/11 6/10/10-3/10/11 7/10/10-4/10/11
>
> 8/10/10-5/10/11 9/10/10-6/10/11 10/10/10-7/10/11 11/10/10-8/10/11
>
> 12/10/10-9/10/11 1/10/11-10/10/11"

Among other provisions, section 50/1(D)(m) of the Illinois Adoption Act (Act) (750 ILCS 50/0.01 *et seq*. (West 2008)) provides that "when a petition or motion seeks to terminate parental rights on the basis of item (iii) of this subsection (m), the petitioner shall file with the court and serve on the parties a pleading that specifies the 9-month period or periods relied on." 750 ILCS 50/1(D)(m) (West 2008). The statute states that the pleading or notice must be filed and served on the parties "no later than 3 weeks before the date set by the court for closure of discovery." *Id*. The sole mention of the notice at the hearing was the State's comment during closing argument that the notice had been "filed by the State today and provided to all parties." The record does not reflect any response or objection to this comment by Nikole's attorney.

¶ 10 The fitness hearing included testimony from Nikole, including the admission that she had struck Emarian with a belt, and testimony from Nikole's most recent caseworker, who had begun working with Nikole in January 2010. As much of the testimony is not relevant to our disposition here, we omit a description of it at this point and will discuss it as needed later in this order. At the close of the hearing, copies of the notes from the initial DCFS investigation into the report of neglect were admitted into evidence without objection.

¶ 11 On May 4, 2012, the trial court ruled that the State had met its burden of proving Nikole unfit on all three counts of the petition for termination of parental rights. It did not make any written or oral findings with respect to this ruling. The best-interests hearing was held immediately after the ruling on fitness, and again included testimony from the caseworker and from Nikole. On May 30, 2012, the trial court ruled that it would be in D'Maiah's best interests to terminate Nikole's parental rights. The goal in D'Maiah's case was then changed to adoption. The final written order terminating Nikole's parental rights was entered on June 7, 2012. Nikole timely appealed.

¶ 12 ANALYSIS

¶ 13 On appeal, Nikole argues that the trial court's findings that the State had proven her unfitness on each of the three grounds alleged in the termination petition were against the manifest weight of the evidence. Nikole also argues that the State's failure to give her timely notice of which nine-month period it would rely upon in connection with count III of the termination petition invalidates the trial court's finding with respect to that count. Finally, Nikole contends that the trial court's finding that it was in D'Maiah's best interests to terminate Nikole's parental rights was against the manifest weight of the evidence.

¶ 14 Termination of parental rights is a two-step process. *In re Julian K.*, 2012 IL App (1st) 112841, ¶ 1. First, the trial court must find, by clear and convincing evidence, that the parent is unfit. *Id.* ¶ 63. Second, the court must determine, by a preponderance of the evidence, whether termination of parental rights is in the minors' best interests. *Id.* We begin by considering Nikole's arguments relating to the trial court's findings of unfitness.

¶ 15 Because the termination of parental rights constitutes a complete severance of the relationship between the parent and child, proof of parental unfitness must be clear and convincing. *In re*

Shauntae P., 2012 IL App (1st) 112280, ¶ 88. The trial court is in the best position to assess the credibility of witnesses, and a reviewing court may reverse a trial court's finding of unfitness only where it is against the manifest weight of the evidence. *Id.* ¶ 89. A decision regarding parental unfitness is against the manifest weight of the evidence where the opposite conclusion is clearly the proper result. *In re C.E.*, 406 Ill. App. 3d 97, 108 (2010).

¶ 16 In this case, the trial court found respondent unfit on three grounds. Although section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2010)) sets forth several grounds under which a parent may be deemed unfit, any one ground, properly proven, is sufficient to sustain a finding of unfitness. *Shauntae P.*, 2012 IL App (1st) 112280, ¶ 89. Accordingly, if any of the three grounds alleged here is properly supported by the record, we must affirm the finding of unfitness.

¶ 17 We affirm on the basis that the trial court's ruling on count II—finding Nikole unfit under section 50/1(D)(g) of the Act because Nikole did not protect D'Maiah from conditions in her environment injurious to her welfare—was not against the manifest weight of the evidence. In evaluating whether the State has proved unfitness under this section, a trial court may not consider evidence of a parent's conduct after the child was removed from his or her care. *In re C.W.*, 199 Ill. 2d 198, 212 (2002) ("[W]here a child has been removed from an injurious home environment and placed in foster care, a parent cannot be found unfit based on a 'failure to protect' during the period the child is in foster care."). Rather, the court must consider only conditions or conduct that occurred prior to the removal. In doing so, a court may find a parent unfit based on the same injurious environment that initially led to the removal of the child. *Id.* at 219.

¶ 18 Here, the primary reason for removing D'Maiah from Nikole's care was evidence that Nikole had failed to protect both D'Maiah and Emarian from physical abuse. The DCFS investigators'

notes, which were admitted without objection at the fitness hearing, contained reports by both children that their mother had whipped them both on more than one occasion. A physical examination of D'Maiah revealed old marks and bruises on her back. According to the same investigation notes, Nikole admitted hitting both of the children with her hand, although she denied hitting them with a hanger as initially reported or with a belt. Nikole first told an investigator that she did not remember what happened when the children pushed the screen out of the window, then later told an investigator that she had been drinking at the time and struck the children. This evidence supports the trial court's finding that Nikole was unfit because she failed to protect D'Maiah from an injurious environment.

¶ 19 Nikole argues that both the State's closing argument and the evidence presented at trial focused on her striking of Emarian, not D'Maiah. She notes that evidence that a parent neglected or failed to protect one child is not conclusive evidence that the parent also neglected a different child in the same household. *In re Arthur H.*, 212 Ill. 2d 441, 468 (2004). Although such evidence about one child is admissible in considering whether a parent has also neglected the child at issue, the trial court ultimately must focus on the care and condition of the child at issue. *Id*. Here, however, the evidence that D'Maiah herself was struck by Nikole was more than sufficient to support the trial court's determination that Nikole failed to protect D'Maiah from an injurious environment. Accordingly, the trial court's finding that Nikole was unfit was not against the manifest weight of the evidence.

¶ 20 Before proceeding to the issue of best interests, we pause to note our concern over the notice procedure used by the State in connection with count III in this case. That count alleged that Nikole had failed to make reasonable progress toward the goal of D'Maiah's return home during a nine-

month period after the expiration of the initial nine-month period following the adjudication of neglect. 750 ILCS 50/1(D)(m)(iii) (West 2008). As previously mentioned, section 50/1(D)(m) of the Act requires the State to tell the parents, three weeks before the close of discovery, which nine-month period or periods it intends to rely upon in seeking to terminate parental rights under subsection (iii). Here, the State did not give Nikole its "Notice to Comply with 750 ILCS 50/1(m)" until the very day of the fitness hearing, and even then the notice simply stated that the State might rely on any or all of 10 possible nine-month periods that covered the entire time between the expiration of the initial nine-month period and the hearing date. We think it highly unlikely that this procedure complied with the demands of the Act, inasmuch as it gave Nikole *no* actual notice of which periods the State would focus on, so that she could prepare her defense. Our supreme court has emphasized that, at the fitness stage, courts may not consider evidence of parents' progress outside of the relevant nine-month window. *In re Haley D.*, 2011 IL 110886, ¶88; *In re D.L.*, 191 Ill. 2d 1, 10 (2000). Accordingly, identifying that window with specificity is essential so that all parties can focus appropriately on the timeframe at issue. (This focus is important for the State as well as the parents. We note that here, despite the number of post-adjudication nine-month periods at the State's disposal, at trial it attempted to prove the lack of reasonable progress by referring to a one-year period *outside* of any of those periods.)

¶ 21 Ultimately, however, we need not resolve whether the notice procedure used by the State with respect to count III was fatally defective, because the trial court's finding of unfitness can be upheld on the basis of count II, to which the nine-month notice requirement does not apply. See *People v. White*, 2011 IL 109689, ¶ 153 (the appellate court should not engage in analysis of issues

that are unnecessary to the resolution of the appeal). We merely urge the State to reconsider its procedures for providing notice pursuant to section 50/1(D)(m) of the Act.

¶ 22 We therefore turn our attention to Nikole's argument that the trial court erred in finding termination of her parental rights to be in D'Maiah's best interests. Under the Juvenile Court Act of 1987, the best interests of a child is the paramount consideration. *In re I.H.*, 238 Ill. 2d 430, 445 (2010). Thus, a child's best interest is not to be balanced against any other interest; it must remain inviolate and impregnable from all other factors. *In re Austin W.*, 214 Ill. 2d 31, 49 (2005). Even the superior right of a natural parent must yield unless it is in accord with the best interests of the child involved. *Id*. at 50.

¶ 23 The State must prove by a preponderance of the evidence that it is in the child's best interests to terminate parental rights. *In re D.T.*, 212 Ill. 2d 347, 366 (2004). We review a trial court's best-interest determination deferentially due to its superior ability to observe the witnesses, and will reverse only if that determination is against the manifest weight of the evidence. *In re Tiffany M.*, 353 Ill. App. 3d 883, 892 (2004).

¶ 24 The Juvenile Court Act sets forth the factors to be considered whenever a best-interests determination is required, all of which are to be considered in the context of a child's age and developmental needs: the physical safety and welfare of the child; the development of the child's identity; the child's family, cultural, and religious background and ties; the child's sense of attachments, including feelings of love, being valued, and security, and taking into account the least disruptive placement for the child; the child's own wishes and long-term goals; the child's community ties, including church, school, and friends; the child's need for permanence, which includes the child's need for stability and continuity of relationships with parent figures and with

siblings and other relatives; the uniqueness of every family and child; the "risks attendant to entering and being in substitute care"; and the wishes of the persons available to care for the child. 705 ILCS 405/1-3(4.05) (West 2010). Other relevant factors in best-interests determinations include the nature and length of the child's relationship with their present caretaker and the effect that a change in placement would have upon their emotion and psychological well-being. *In re William H.*, 407 Ill. App. 3d at 871.

¶ 25 On appeal, Nikole does not argue that it would be in D'Maiah's best interests to live with her at the present time. Rather, she argues that her parental rights should be preserved even while D'Maiah remains in her current foster care placement. (D'Maiah's foster mother has indicated both a willingness to be a long-term placement for D'Maiah—which could occur if Nikole's parental rights were not terminated—and an interest in adopting D'Maiah.) Nikole highlights the evidence of D'Maiah's attachment to her and argues that the bond between her and D'Maiah will be severed if her parental rights are terminated. Nikole also contends that D'Maiah's foster mother has not worked to encourage D'Maiah's relationship with Nikole, and points out that, according to the caseworker, the foster mother has said plainly that she would not put forth any effort to make sure that D'Maiah is able to maintain her close relationship with her brother Emarian, who has a different placement. Nikole argues that if her own parental rights are terminated D'Maiah thus is likely to lose contact with all of her family members, whom D'Maiah has clearly expressed she cares for, and that this will negatively affect her sense of identity and emotional health.

¶ 26 The trial court's comments at the best-interests hearing indicate that it was aware of these concerns and did not discount them. However, the trial court ultimately found that it would be in D'Maiah's best interests for Nikole's parental rights to be terminated. In reaching this decision, the

trial court considered all of the listed factors and the evidence, which showed that D'Maiah was well-bonded with her foster mother, had close friends in her neighborhood, had high grades, attended church regularly, and was involved in extracurricular activities. The trial court also noted that, although D'Maiah also had a close bond with Nikole, Nikole was not in a position to care for D'Maiah and indeed had not visited or spoken with D'Maiah since she moved to Texas over 10 months earlier. Given the fact that D'Maiah had been with her foster mother for over four years, D'Maiah's need for permanency, and the unlikelihood that she could be returned to Nikole in the near future, the trial court found that the factors weighed in favor of terminating Nikole's parental rights. Based on our review of the record, we cannot say that this determination was against the manifest weight of the evidence.

¶ 27 CONCLUSION

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County terminating the parental rights of Nikole J. to D'Maiah J.

¶ 29 Affirmed.