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2012 IL App (4th) 120369-U

Filed 8/2/12

NO. 4-12-0369

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: X.S., a Minor,)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
Petitioner-Appellee,)	McLean County
v.)	No. 11JA90
JACOB PHILLIPS,)	
Respondent-Appellant.)	Honorable
)	Kevin P. Fitzgerald,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's dispositional order entered in neglect proceedings, withholding a fitness determination for respondent father, yet finding him unable to care for the minor child at that time because (1) he had not established a relationship with the child, (2) he lived in the State of Washington, and (3) had yet to complete required tasks, was not against the manifest weight of the evidence.

¶ 2 Respondent, Jacob Phillips, appeals from the trial court's dispositional order, making his son, X.S., a ward of the court and appointing the Illinois Department of Children and Family Services (DCFS) as guardian. Phillips claims the trial court erred in taking a "wait-and-see" approach when entering the dispositional order, rather than determining respondent was fit, willing, and able to care for the child. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 30, 2011, the State filed a petition for adjudication of neglect on behalf

of the minor X.S., born May 21, 2004, and his two siblings, who are not subjects of this appeal. The State alleged X.S. was a neglected minor pursuant to sections 2-3(1)(a) and 2-3(1)(b) of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/2-3(1)(a), (1)(b) (West 2010)) because his mother, Nicole S., who is not a party to this appeal, was not providing him with the proper care (count I) and his environment was injurious to his welfare (count II). X.S. and his two younger siblings, who have a different father, were living with Nicole in her car. The petition contained no allegations against respondent or the siblings' father.

¶ 5 The day before the State filed the petition, on August 29, 2011, Nicole took the children to the DCFS office in Bloomington and willingly surrendered them into protective custody. The children were placed together in relative foster placement in Forrest, Illinois. Respondent has always resided in the northwest United States, now residing in the State of Washington. After the minor's birth, respondent submitted to a paternity test, which, in May 2005, confirmed he was X.S.'s biological father.

¶ 6 On December 5, 2011, the trial court conducted an adjudicatory hearing. Respondent was present in person with counsel. Nicole stipulated to a finding of neglect based on the allegations set forth in count I; that X.S. was not receiving the proper or necessary care for his well-being, including adequate food, clothing and shelter. The State dismissed count II. The court entered a written adjudicatory order, finding X.S. and his siblings were neglected minors and awarding DCFS custody and guardianship.

¶ 7 On January 23, 2012, The Baby Fold prepared a dispositional report in anticipation of the upcoming dispositional hearing. According to the report, respondent's criminal history included "a few minor traffic violations" and an arrest for domestic violence. Apparently, respondent

had grabbed his ex-wife's arm during an argument. He successfully completed the required domestic-violence treatment and provided the caseworkers with verification of the completion. The report further indicated (1) respondent was not currently involved in a romantic relationship, (2) he was employed full time as a union construction worker, (3) he reported a normal childhood and maintained a good relationship with his parents, (4) he was honorably discharged from the military as a Marine, (5) he drinks alcohol only socially, and (6) he denied doing drugs. He did report he had been drinking during the domestic-violence incident. As a result, the caseworker requested he participate in an alcohol assessment.

¶ 8 The report further indicated respondent met X.S. for the first time on December 6, 2011, and has since talked to him on the telephone every Sunday. The report continued:

"[Respondent] has also shown consistent interest in his son since the case opened. He has not been present in his son's life prior to this. He reports that he has paid child support and made attempts to establish a relationship with his son when he was born. However, he reports shared custody was very difficult as communication between himself and [Nicole] has not been easy and with attorney fees becoming excessive, he could no longer afford to fight for custody. He reports that [Nicole] moved to Illinois after she found out she was pregnant and continued as an over[-]the[-]road[-] truck driver making communication that much more difficult. [Respondent] has been taken [*sic*] the initiative to identify services in the Washington area that meet DCFS standards for services and is

attempting [to] make progress. Additional issues need to be addressed through interstate communication with the State of Washington to assess his home more concretely. It will take some time to do this, as well as build the relationship with his son."

¶ 9 On January 26, 2012, the trial court conducted a dispositional hearing. First, respondent's counsel informed the court that respondent had begun his parenting class in Washington. He then corrected the errors in the above statement, pointing out to the court that (1) Nicole moved to Illinois before she knew she was pregnant and (2) she was not employed as a truck driver at that time. The State presented no evidence.

¶ 10 Respondent testified on his own behalf, stating he has lived in Battle Ground, Washington for eight years. He graduated from high school in 1995 and entered the Marine Corp in 1997. He was discharged in 2001 and has worked as a union construction worker since that time. He met Nicole in Vancouver, Washington in 2003 and they began dating. When they began arguing frequently, they decided to terminate the relationship and Nicole moved back to Illinois. She telephoned him from Illinois and advised she was pregnant. Respondent filed a paternity lawsuit in Washington to determine whether he was the father. It took approximately one year to confirm that he was, in fact, X.S.'s father.

¶ 11 Respondent testified that, prior to X.S.'s birth, in January 2004, Nicole sent him an e-mail suggesting he accept full custody of their son upon birth. Respondent said he contacted her by telephone and told her he "gladly would accept custody of [X.S.]" Apparently, Nicole changed her mind, and one month later, in February 2004, she advised respondent he would have nothing to do with X.S. Between January and February 2004, respondent flew to Illinois to attend a prenatal

doctor's visit and ultrasound.

¶ 12 Respondent had not been in touch with Nicole and did not know of her whereabouts until he was contacted by The Baby Fold at the beginning of these proceedings. As of the date of the hearing, respondent had visited with X.S. three times, the first being on December 6, 2011, and spoke with him on the telephone four times, beginning in November 2011. He said the first visit, supervised by the caseworker, went well. He said they "just kind of hung out and got to know each other." Their second visit, which lasted over 10 hours, was supervised by X.S.'s foster mother. Respondent said he was allowed to put X.S. to bed and read him a story. Respondent said they "had an excellent time." The third visit occurred the day before the hearing and lasted approximately 3 1/2 hours. They ate lunch and went to a museum in Pontiac, Illinois, looking at art, old cars, and military memorabilia.

¶ 13 Respondent acknowledged the child support order from the State of Washington, ordering him to pay \$466 per month plus \$250 toward an arrearage. He said his employment is seasonal but steady. He owns a three bedroom home, one bedroom of which would be X.S.'s. Respondent said the school is less than 10 blocks from his home. Respondent's brother and sister-in-law, his parents, his aunt and uncle, and cousins live nearby. Respondent said he spoke with the father of X.S.'s siblings and they agreed it was important for the siblings to maintain a relationship with each other even if they lived a distance apart. Respondent said he was willing and able, with no reservations, to take custody of his son. He and the caseworker were in the process of obtaining a home study on his residence.

¶ 14 After considering the evidence and counsels' recommendations, the trial court made X.S. a ward of the court with guardianship to DCFS. The court found as follows:

"This is unusual in that both of the fathers have known that they were the fathers really from almost birth, [respondent] having initiated proceedings out in Washington to establish that fact, and then I think somewhat carelessly not really following up with it after paternity was established.

I've always defined fitness of a parent as ability to provide minimum parenting standards to a child at any particular time. I think there is argument that the fathers are fit. I think there is an argument with that standard that they are unfit, because they haven't developed a relationship with these children yet. There's really no bond. And whether or not at this moment in time they could be returned to these gentlemen and have them provide minimum parenting to kids who are really strangers to them—I mean, I understand that since these proceedings have occurred, [respondent] and Mr. Mountjoy for that matter have both engaged in visitation and in establishing relationships, but they're still at that initial stage. [Respondent] I think has done everything he can given the geography, but the fact is three visits and four phone calls for a seven-and-a-half-year-old child doesn't establish a relationship. You've begun to do that, sir, and I think that's a positive thing.

I think all three parents are unable. I'm going to reserve

findings of fitness for [respondent] and Mr. Mountjoy I guess. I mean, I—not only the lack of a previous relationship, but *** [respondent] has to have the home study done, get through the parenting class. I think you can make an argument that [he is] unfit on that basis. I'm just going to reserve the finding of fitness for [him], because [he does] have some services that are necessary. *** But I think [he is] unable at this point for all of the reasons previously articulated.

* * *

As I said, I think [respondent] presented very well today. He appears to be a very stable person, and I think he needs to be involved in his son's life. And if mom's able to achieve a return home, that's one thing. Mom needs to understand it's important for these boys to have involvement by their fathers in their lives. ***

If mom's unable to achieve that, I would certainly consider always the best interest of the children and that may very well be placement with the fathers if mom's unable to achieve a reunification of all three together. But that's where at this point I feel the best interest of the children is.

So the court's going to set the goal as return home within 12 months."

¶ 15

The trial court discussed visitation and decided a return date prior to the beginning

of summer may be appropriate to determine summer visitation for respondent. The court stated it "would certainly allow unsupervised visitation with [respondent] at the discretion of the agency and not let the absence of a fitness *** finding *** impact on the available visitation for [respondent]."

¶ 16 On January 26, 2012, the court entered a written dispositional order, reserving a finding on the issue of respondent's fitness, but making X.S. a ward of the court and granting DCFS guardianship.

¶ 17 On February 27, 2012, respondent filed a motion to reconsider the trial court's finding that he was unable to care for X.S. At a March 21, 2012, hearing, the court denied respondent's motion, reaffirming its prior holding that the lack of an established relationship between X.S. and respondent justified a finding that it was in the child's best-interest to determine that respondent was unable to parent X.S. at that time. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Respondent claims the trial court's dispositional order making X.S. a ward of the court and finding respondent unable to parent X.S. was against the manifest weight of the evidence. Relying on *In re Ryan B.*, 367 Ill. App. 3d 517 (2006), and *In re Ta. A.*, 384 Ill. App. 3d 303 (2008), factually similar cases wherein the Third District vacated the dispositional orders granting DCFS guardianship, respondent claims the court here erred in taking a "wait[-]and[-]see[-]what[-]the[-]mother[-]will[-]do" stance before allowing him, who has a superior right over DCFS, to parent his son. Further, he contends the court completely ignored the statutory factors in making a best-interest determination. See 705 ILCS 405/1-3(4.05) (West 2010).

¶ 20 Though *Ryan B.* is factually similar to the case *sub judice*, the analysis in that case does not apply here. There, the respondent father was not the subject of the State's neglect petition,

as all allegations focused on the mother's behavior. The respondent had never met his minor child before the neglect proceedings. *Ryan B.*, 367 Ill. App. 3d at 518. He testified he was willing and able to parent the minor however, as the State argued, he had not sufficiently established a relationship with the child. *Ryan B.*, 367 Ill. App. 3d at 519. The trial court found the respondent unwilling based on the lack of a relationship between the father and son. The court further found that because the mother was unfit, DCFS had the right to place the minor. *Ryan B.*, 367 Ill. App. 3d at 519.

¶ 21 The reviewing court held the trial court's finding that the father was unwilling to care for his son was against the manifest weight of the evidence. *Ryan B.*, 367 Ill. App. 3d at 521. To the contrary, "the evidence demonstrated that respondent stood ready, willing[,] and able to care for his son and to provide parental guidance to him if [the mother] was found unfit to do so." *Ryan B.*, 367 Ill. App. 3d at 520. The court further found the trial court's order making the child a ward of the court and granting DCFS guardianship and placement authority was an abuse of discretion, where the trial court did not consider the respondent father's superior right to custody of his child, only whether the mother's home was an injurious environment for the child. *Ryan B.*, 367 Ill. App. 3d at 521.

¶ 22 Here, the trial court did not find respondent was "unwilling" to parent X.S. but rather, he was "unable" to parent him. Indeed, the evidence at the dispositional hearing demonstrated respondent's sincere willingness to parent X.S. Further, the court did consider respondent's superior right to custody, but as the *Ryan B.* court noted, a trial court may place a child with a third party instead of with a parent, even a fit parent, if there is good cause to do so. *Ryan B.*, 367 Ill. App. 3d at 521.

¶ 23 Likewise, the court's analysis in *Ta. A.* does not support respondent's appeal. In that case, the respondent father had an active relationship with his daughter for the first three years of her life, prior to the mother moving out of state. When she returned, three years later, the respondent father had his daughter full time for "a couple of months." *Ta. A.*, 384 Ill. App. 3d at 305. The couple's two other children had not established a relationship with the respondent father. *Ta. A.*, 384 Ill. App. 3d at 305-06. The respondent was regularly visiting with the children and had expressed a desire to parent them. The trial court found the father fit and did not find him unable or unwilling, but nevertheless granted DCFS guardianship. *Ta. A.*, 384 Ill. App. 3d at 306. The reviewing court found the trial court abused its discretion in doing so without articulating a reason, based on its fitness finding. *Ta. A.*, 384 Ill. App. 3d at 307. The court held that granting DCFS guardianship with the right to place was error in that the trial court had apparently failed to consider the father's superior right to custody. *Ta. A.*, 384 Ill. App. 3d at 308.

¶ 24 Unlike either case, the trial court here found respondent unable to care for X.S. when it entered the order. It did so, explaining that (1) the relationship between father and son was too new, (2) the geographical distance was a concern, (3) X.S.'s siblings remained in Illinois, and (4) respondent had tasks yet to complete. Though the court commended respondent on his efforts, his willingness to cooperate, and his anticipated ability to parent X.S., at the time the order was entered, it found it was in X.S.'s best interest to maintain his placement with his siblings and allow DCFS to have guardianship.

¶ 25 We find the trial court did an exceptional job in thoroughly explaining its findings and we commend the court for doing so. Based on this record, we conclude the court's judgment was supported by the manifest weight of the evidence. Although respondent maintains a superior right

to parent X.S. over a third party, his right is not absolute, as it must yield to a determination of what is in the best interest of the child at the time. See *In re S.J.*, 364 Ill. App. 3d 432, 442 (2006). Here, given the totality of the then current circumstances, the court made the proper determination in X.S.'s best interest.

¶ 26

III. CONCLUSION

¶ 27

For the foregoing reasons, we affirm the trial court's judgment.

¶ 28

Affirmed.