2013 IL App (4th) 121015-U

NOS. 4-12-1015, 4-12-1016, 4-12-1017

FILED
March 27, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: J.L., a Minor,	)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Petitioner-Appellee,	)	Vermilion County
v. (No. 4-12-1015)	)	No. 10JA52
CALVIN E. FOREMAN,	)	
Respondent-Appellant.	)	
----------	)	
In re: D.L., a Minor,	)	No. 10JA53
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Petitioner-Appellee,	)	
v. (No. 4-12-1016)	)	
CALVIN E. FOREMAN,	)	
Respondent-Appellant.	)	
----------	)	
In re: Z.L., a Minor	)	No. 10JA54
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Petitioner-Appellee,	)	
v. (No. 4-12-1017)	)	Honorable
CALVIN FOREMAN,	)	Craig H. DeArmond,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding (1) Illinois Supreme Court Rule 901(d) (eff. Feb. 26, 2010) is directory rather than mandatory, (2) the trial court's finding of unfitness was not against the manifest weight of the evidence, and (3) the trial court's best-interest finding was not against the manifest weight of the evidence.

¶ 2 On October 12, 2011, the State filed petitions to terminate the parental rights of

respondent, Calvin Foreman, as to his children, J.L. (born December 12, 2008), D.L. (born September 20, 2005), and Z.L. (born December 14, 2009). Following a fitness hearing, which concluded in February 2012, the trial court, on July 16, 2012, entered a written order finding respondent unfit. After a best interest hearing on October 26, 2012, the court terminated respondent's parental rights. Respondent filed a timely notice of appeal.

¶ 3 Respondent appeals, asserting (1) the trial court's violation of Illinois Supreme Court Rule 901(d) (eff. Feb. 26, 2010) requires reversal and remand, (2) the court's finding of unfitness was against the manifest weight of the evidence, and (3) the court's best-interest finding was against the manifest weight of the evidence. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Circumstances Preceding the State's Petition To Terminate Respondent's Parental Rights

¶ 6 On March 31, 2010, the State filed petitions for adjudication of wardship regarding the interests of J.L. (born December 12, 2008), D.L. (born September 20, 2005), and Z.L. (born December 14, 2009), naming respondent as the father. The petitions alleged the children were neglected in that their environment was injurious to their welfare due to the mother's drug abuse. The petition for Z.L. also contained an allegation he was born with a controlled substance in his system. On July 8, 2010, the mother admitted the petitions and respondent stipulated to the petition as to each child. After a dispositional hearing on August 26, 2010, the trial court granted custody and guardianship of the children to the Department of Children and Family Services (DCFS). At that time, the mother maintained physical custody of the children.

¶ 7 DCFS filed a dispositional report on August 20, 2010, which contained the following directives to respondent: (1) obtain a substance abuse evaluation and comply with recommended treatment, (2) submit to drug screens, and (3) cooperate with DCFS. DCFS based its recommendation for a substance abuse assessment on respondent's alleged criminal history and recent arrest on drug-related charges.

¶ 8 In February 2011, DCFS removed the children from their mother's home after she admitted drug use. A client service plan, filed February 18, 2011, rated respondent's progress unsatisfactory due to his failure to (1) cooperate with drug screens, (2) obtain a substance abuse assessment, and (3) maintain contact with DCFS. The next client service plan, filed May 20, 2011, also rated respondent's progress unsatisfactory due to his failure to complete a substance abuse assessment.

¶ 9 On August 31, 2011, DCFS filed another client service plan, which rated respondent's progress unsatisfactory. The caseworker noted that respondent finally completed his drug treatment assessment. DCFS referred him to parenting classes, from which he was later dropped for his failure to attend. At that point, respondent had not visited with his children since May 18, 2011.

¶ 10 On October 12, 2011, the State filed a petition to terminate respondent's parental rights, alleging he failed "to maintain a reasonable degree of interest, concern or responsibility" for the children's welfare and failed to make reasonable progress toward the return home of the children. 750 ILCS 50/1(D)(b), (m)(ii) (West 2010).

¶ 11 B. Fitness Hearing

¶ 12 The fitness hearing spanned three nonconsecutive days, December 14, 2011, January 18, 2012, and February 17, 2012. The State called DCFS caseworker Rebecca Woodard, respondent's caseworker from January 2010 through February 2011. She testified that, throughout her tenure on the case, the children remained at home with their mother as an intact family. The initial goal for respondent was cooperation with DCFS. After she learned respondent was arrested in May 2010 for a drug-related offense, Woodard updated respondent's goals to include a substance abuse assessment with any recommended treatment and drug drops. She stated that she also based her recommendation on respondent's criminal history, though she acknowledged respondent disputed some of that history. After a review of respondent's goals in February 2011, Woodard found his progress to be unsatisfactory.

¶ 13 Woodard testified that, in September 2010, while respondent resided with the children's mother, Woodard referred respondent for a substance abuse assessment, which he failed to attend. She again referred him for an assessment in October 2010, which he failed to attend. Woodard additionally stated respondent could have attended treatment either in Danville, which was near his residence, or Urbana, which was closer to his job. She testified she made no further attempts to refer respondent for a substance abuse assessment after October 2010 because he left the residence he shared with the children's mother, leaving no forwarding address. After October 2010, Woodard stated she had no contact with respondent through February 2011. She also noted that, during the time period she was the worker on his case, respondent did not participate in drug drops.

¶ 14 On February 24, 2011, DCFS took physical custody of the children due to the

mother's admitted drug use. The case was then reassigned to Doug Schroer, respondent's caseworker from March 1, 2011, through April 27, 2011. Schroer testified he referred respondent for a substance abuse assessment, but respondent did not obtain the assessment. Respondent submitted two drug drops in March 2011, both of which yielded negative results. During this time period, respondent visited the children twice and asked the caseworker about them frequently. Schroer further testified he directed respondent to complete counseling services due to new reports of abuse. In addition, he indicated respondent was unemployed and looking for work in March and April 2011.

¶ 15 On December 14, 2011, the State called Stephanie Ramirez, respondent's caseworker since April 27, 2011. She testified respondent had participated in three visits since April 2011, the last being October 12, 2011. On those dates, he completed drug screens which yielded negative results. She indicated respondent missed some visits due to cancelling or failing to appear, but DCFS also denied several visits due to his failure to cooperate with services. Ramirez noted respondent was not denied visits for failing to pay his co-pay until November 8, 2011, the date he completed treatment.

¶ 16 Ramirez further testified that she spoke with respondent weekly, but he did not ask her about the well-being of the children or their performance in school. She referred respondent to counseling on two occasions, once in August 2011, then in November 2011. Respondent had attended one counseling session prior to the court proceedings in December 2011. Additionally, she referred respondent to parenting classes in July 2011, which he failed to attend. He was scheduled to begin the next round of parenting classes in January 2012. Finally, Ramirez stated she referred respondent for a substance abuse assessment in May and July 2011,

and he obtained the assessment in August 2011. Respondent chose the facility, knowing that particular facility required a co-pay.

¶ 17 Ramirez testified respondent was employed throughout her tenure as his caseworker, working 40 hours per week plus overtime. His normal hours were from 6:30 in the morning until 1:30 in the afternoon, Indiana time. According to Ramirez, other than one week when respondent indicated he needed to pay his rent, at no time did respondent report he was unable to pay the co-pay.

¶ 18 Delores Jones, a substance abuse treatment provider, also testified at the fitness hearing regarding respondent's progress in treatment. She stated his first contact with her office was in July 2011, and he submitted to an assessment in August 2011. He completed treatment on November 8, 2011, though he did not have a certificate of completion because he still needed to pay the co-pay of $100. Throughout treatment, respondent's drug drops all yielded negative results.

¶ 19 The children's mother also testified at the fitness hearing. She stated she did not know respondent to use drugs. Throughout the relationship, respondent visited the children regularly, even once he was no longer in a relationship with their mother. She further stated respondent worked third shift from August to December 2010, paid child support, and provided other financial support as needed.

¶ 20 Respondent testified he was aware the case opened due to substance abuse by the children's mother, though he denied personal knowledge of her drug use. Respondent asserted he kept the caseworker apprised of his address throughout the pendency of the case. He acknowledged Woodard referred him for substance abuse assessments at Prairie Center in 2010,

but he could not attend due to his out-of-town work schedule. To his knowledge, Prairie Center only offered treatment during the day, while he was working. He waited for someone to contact him about scheduling treatment around his working hours, but no one did. Respondent said he was not aware he could attend treatment closer to his job. He denied past or present substance abuse.

¶ 21 Additionally, respondent testified he changed jobs in 2011 and began working in Indiana, with regular shift hours of 6 in the morning through 2 in the afternoon. In addition to any mandatory overtime work, he also volunteered to work overtime three to four times per week. Without overtime, he would bring home approximately $150/week after child support garnishment. Respondent testified he was referred for a substance abuse assessment in May 2011 at New Directions, a facility which required a co-pay for services but would schedule treatment around his work hours. He failed to attend that assessment due to work obligations. When he was referred to New Directions again in July 2011, he attended the assessment and completed treatment as directed.

¶ 22 Respondent acknowledged he had not finished paying the $100 co-pay for his assessment as of February 2012 and that he could not afford to do so because his employer had cut overtime hours. He said that his drug drops prior to visits were always negative.

¶ 23 Further, respondent testified he missed some of the scheduled visits with his children due to mandatory overtime work. He also acknowledged his directive to attend counseling sessions, but he stated the counselor told him after one session that he did not need to return. His parenting classes were delayed as well because he was not permitted to attend the same classes as the respondent mother. Respondent stated he always kept in contact with the

caseworkers, calling them a couple of times each week, but they never responded to his calls.

¶ 24 After hearing the evidence, the trial court asked the parties to submit written closing arguments within 17 days. All parties submitted their written arguments by March 6, 2012.

¶ 25 The trial court issued its written order finding respondent unfit on July 16, 2012. In makings its decision, the court cited the following facts. First, the court found the evidence supported respondent's ability to pay the co-pay on the substance abuse assessment, particularly because respondent chose to attend treatment at a facility which required a co-pay, even though his regular work schedule would have accommodated treatment at a facility that required no co-pay. The court specifically noted respondent delayed treatment from July 2010 until "well after" April 8, 2011. The court also found respondent failed to maintain contact with DCFS as required. In addition, during the pendency of the case, DCFS received an indicated report of abuse against two respondent's children. Further, respondent failed to attend parenting classes as required. Finally, he "did nothing to increase his opportunities to visit with his children." Based on these facts, the court found the respondent failed "to maintain a reasonable degree of interest, concern or responsibility" for the minors' welfare and failed to make reasonable progress toward the return home of the children. 750 ILCS 50/1(D)(b), (m)(ii) (West 2010).

¶ 26 C. Best Interest Hearing

¶ 27 The trial court scheduled the best interest hearing for August 17, 2012. On that date, respondent's attorney asked to reschedule the hearing due to respondent's absence. Respondent's attorney represented to the court respondent had started a new job and would be terminated if he missed work for the court appearance. The court rescheduled the hearing for

respondent, but the hearing commenced with regard to the children's mother. At the conclusion of the hearing on August 17, 2012, the court found it to be in the best interests of the minors to terminate the mother's parental rights.

¶ 28 The trial court scheduled the best interest hearing for respondent on October 26, 2012. Respondent again failed to appear for the hearing, and the court denied his attorney's request for a continuance.

¶ 29 The State called caseworker Trisha Lengfelder, who was assigned to the case in September 2012, taking over for Ramirez. Lengfelder testified the children were currently residing with their maternal grandmother, with whom they were "extremely bonded." She described the children as doing "very well" in their current environment. The maternal grandmother expressed interest in adopting the children and DCFS considered her an appropriate adoptive placement.

¶ 30 Additionally, Lengfelder testified the children were not bonded to respondent and that they never saw him. Respondent was not participating in services and had not been doing so for quite some time. All of the children indicated a desire to remain with their maternal grandmother. Lengfelder finally testified that she felt it would be in the best interests of the children to terminate respondent's parental rights.

¶ 31 After hearing arguments, the trial court found it was in the best interests of the children to terminate respondent's parental rights. In support of its finding, the court noted "there are few times when you can point to one thing that could be most telling about a person's real attitude about being a parent. *** For $100 [respondent] would be in a position to see his children, maintain a relationship, show the social workers and everyone involved how much he

wanted to parent these children." The court went on to state that DCFS and court orders did not prevent respondent from seeing his children, his behavior prevented him from seeing his children. Additionally important in rendering a decision, the court found, was the fact that respondent had not seen his children in over a year. "It was clear that he failed to maintain any reasonable degree of interest in the children" by failing to express interest in the children when he spoke with caseworkers. The court found respondent's payment of child support an insufficient reason to maintain respondent's parental rights.

¶ 32 Following the trial court's termination of respondent's parental rights, respondent filed a timely notice of appeal.

¶ 33 II. ANALYSIS

¶ 34 On appeal, respondent asserts (1) the trial court's violation of Illinois Supreme Court Rule 901(d) (eff. Feb. 26, 2010) requires reversal and remand, (2) the court's finding of unfitness was against the manifest weight of the evidence, and (3) the court's best-interest finding was against the manifest weight of the evidence. We address respondent's arguments in turn.

¶ 35 A. Respondent's Claim That the Trial Court Failed To Comply With Illinois Supreme Court Rule 901(d)

¶ 36 Respondent contends we should reverse and remand this case because the trial court failed to comply with Illinois Supreme Court Rule 901(d). The rule reads as follows:

> "In any child custody proceeding taken under advisement by the trial court, the trial judge shall render its decision as soon as possible but not later than 60 days after the completion of the trial or hearing." Ill. S. Ct. R. 901(d) (eff. Feb. 26, 2010).

¶ 37 The trial court failed to issue its finding of unfitness within 60 days, which is a violation of Rule 901(d). However, the question before this court is whether the trial court's failure to act within the time constraints of Rule 901(d) requires us to reverse and remand the case for new termination proceedings. We conclude failure to comply with Rule 901(d) does not require reversal because we find the rule to be directory rather than mandatory.

¶ 38 Issues of statutory construction, including whether statutory language is directory or mandatory, are subject to *de novo* review. *People v. Robinson,* 217 Ill. 2d 43, 54, 838 N.E.2d 930, 936 (2005). Courts resolve the issue of whether the rule is directory or mandatory by looking at the legislative intent, which is best evidenced by the statutory language. *Robinson,* 217 Ill. 2d at 54, 838 N.E.2d at 936. "[S]tatutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with the provision." *People v. Delvillar,* 235 Ill. 2d 507, 514, 922 N.E.2d 330, 335 (2009) (citing *Pullen v. Mulligan*, 138 Ill. 2d 21, 46, 561 N.E.2d 585, 595-96 (1990)). "In the absence of such intent the statute is directory and no particular consequence flows from noncompliance." *Delvillar,* 235 Ill. 2d at 515, 922 N.E.2d at 335.

¶ 39 If the provision contains language issuing a procedural command to a government official, the reviewing court will presume that the intent of the statute is directory, not mandatory. *Delvillar*, 235 Ill. 2d at 517, 922 N.E.2d at 336, see also *Robinson,* 217 Ill. 2d at 58, 838 N.E.2d at 938-39. This presumption will only be overcome if one of the following conditions is met: (1) "there is negative language prohibiting further action in the case of noncompliance" or (2) "when the right the provision is designed to protect would generally be injured under a directory reading." *Delvillar*, 235 Ill. 2d at 517, 922 N.E.2d at 336.

¶ 40 The language in Rule 901(d) unquestionably issues a procedural command to the trial judge, so we begin with the presumption that the intent of the statute is directory rather than mandatory. In turning to the conditions which must be met to overcome this presumption, we first conclude that the plain language of Rule 901(d) contains no negative language to prohibit the trial court from taking further action in the case of noncompliance. Additionally, we conclude a directory reading would not generally injure the right the provision is designed to protect.

¶ 41 Respondent asks us to interpret Rule 901(d) as mandatory and requests that we reverse and remand this case for new termination proceedings. This would result in an even more significant and unnecessary delay in reaching permanency for the minor children, which is contrary to the purpose of the Juvenile Court Act of 1987. 705 ILCS 405/1-2 (West 2010). That could not have been the result the legislature intended. A directory reading, on the other hand, does not cause as much injury to the protected right as would a mandatory reading. Although the trial court's noncompliance with Rule 901(d) delayed permanency by a couple of months, to follow respondent's recommendation would delay permanency by more than a year. We decline to follow that rationale. We therefore conclude that the language contained in Rule 901(d) is directory, not mandatory.

¶ 42 To provide permanency in an expeditious manner, the courts must comply with the directive in Rule 901(d), and we are confident the trial court will adhere to this rule in future proceedings.

¶ 43 B. Whether the Finding of Unfitness Was Against the Manifest Weight of the Evidence

¶ 44 Respondent next argues that the trial court's finding of unfitness was against the manifest weight of the evidence and asks us to reverse the court's ruling. We disagree and decline to do so.

¶ 45 The trial court found respondent to be an unfit parent based on two statutory provisions. First, the court found respondent failed "to maintain a reasonable degree of interest, concern or responsibility" for the minors' welfare. 750 ILCS 50/1(D)(b) (West 2010). Second, the court found respondent failed to make reasonable progress toward the return of the children within nine months, from July 8, 2010 to April 8, 2011, after the adjudication of neglect, abuse, or dependency. 750 ILCS 50/1(D)(m)(ii) (West 2010).

¶ 46 The State has the burden of proving parental unfitness by clear and convincing evidence. *In re Jordan V.,* 347 Ill. App. 3d 1057, 1067, 808 N.E.2d 596, 604 (2004). A reviewing court will not overturn the trial court's finding of unfitness unless it is against the manifest weight of the evidence. *Jordan V.,* 347 Ill. App. 3d at 1067, 808 N.E.2d at 604. The trial court is given great deference due to "its superior opportunity to observe the witnesses and evaluate their credibility." *Jordan V.,* 347 Ill. App. 3d at 1067, 808 N.E.2d at 604.

¶ 47 The trial court can consider whether a parent has completed objectives of the service plan as evidence of the parent's concern, interest, and responsibility. *In re Jaron Z.,* 348 Ill. App. 3d 239, 259, 810 N.E.2d 108, 125 (2004). Courts should also consider the "parent's efforts to visit and maintain contact with the child, as well as other indicia of interest, such as inquiries into the child's welfare." *In re Daphnie E.*, 368 Ill. App. 3d 1052, 1064, 859 N.E.2d

123, 135 (2006).

¶ 48 Respondent argues his failure to complete the substance abuse treatment requirement of his service plan was beyond his control because (1) his difficult work schedule left him no opportunity to attend treatment and (2) the treatment facility would not release his certificate of completion until he paid a $100 co-pay. We disagree and find the trial court could reasonably conclude respondent's personal choices led to his failure to complete the conditions of his service plan.

¶ 49 Beginning in September 2010, DCFS made numerous referrals for respondent to obtain his substance abuse assessment, and he did not comply until August 2011. A caseworker eventually imposed a requirement that he cooperate with services before being permitted to visit his children. Despite knowing this information, respondent did not obtain a substance abuse assessment for nearly one year. He attributed his delays to a difficult work schedule. However, by respondent's own testimony, his normal working day ended by midafternoon throughout the pendency of this case. Respondent goes on to assert that he volunteered to work overtime three to four days a week in order to pay child support and other bills, which he offers as an excuse for not obtaining an assessment or attending treatment. These choices reflect respondent's general attitude throughout proceedings to put his needs ahead of his children's needs, and further demonstrate his lack of concern and interest in the children.

¶ 50 Respondent noted he eventually complied with the service plan by attending treatment, but that he could not prove completion of the program until he paid a $100 co-pay. This, too, is a problem of respondent's own making. DCFS offered respondent treatment at a facility that required no co-pay; he chose to attend treatment at a facility that required a co-pay.

Given his own testimony that he was employed throughout the case and consistently working overtime, we agree with the trial court's assessment that respondent clearly had an ability to pay and chose not to do so. Moreover, respondent's failure to pay the co-pay represents only a portion of his noncompliance and did not affect his visitation until November 2011, shortly before the termination process began.

¶ 51 Throughout the nine-month period from July 2010 through April 2011, respondent actively chose not to meet the conditions of the service plan, which ultimately resulted in a period of several months without visitation due to his lack of compliance. Despite respondent's lack of regular visitation, he did maintain contact with DCFS, but a caseworker testified respondent never inquired about the health or welfare of the children. Further, respondent chose not to follow through with additional services later recommended by DCFS, such as parenting classes and counseling. Respondent's failure to cooperate with DCFS, accompanied by his significant delay in obtaining a substance abuse assessment and lack of interest in the children, is not indicative of one who is showing a reasonable degree of interest, concern, or responsibility for the child's welfare. Therefore, we conclude that the trial court's finding of unfitness was not against the manifest weight of the evidence.

¶ 52 C. Whether the Best-Interest Finding Was Against the Manifest Weight of the Evidence

¶ 53 Once the trial court determines a parent to be unfit, the next stage is to determine whether it is in the best interests of the minor to terminate parental rights. *Jaron Z.,* 348 Ill. App. 3d at 261, 810 N.E.2d at 126. The State must prove by a preponderance of the evidence that termination is in the best interests of the minor. *Jaron Z.,* 348 Ill. App. 3d at 261, 810 N.E.2d at

126. The court's finding will not be overturned unless it is against the manifest weight of the evidence. *Jaron Z.,* 348 Ill. App. 3d at 261-62, 810 N.E.2d at 126-27.

¶ 54 The trial court must consider the following factors, in the context of the child's age and developmental needs, in determining whether to terminate parental rights:

> "(a) the physical safety and welfare of the child, including food, shelter, health, and clothing; (b) the development of the child's identity; (c) the child's background and ties, including familial, cultural, and religious; (d) the child's sense of attachments ***; (e) the child's wishes and long-term goals; (f) the child's community ties, including church, school, and friends; (g) 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; (h) the uniqueness of every family and child; (i) the risks attendant to entering and being in substitute care; and (j) the preferences of the persons available to care for the child." 705 ILCS 405/1-3(4.05) (West 2010).

¶ 55 Respondent contends the trial court's decision to terminate his parental rights was against the manifest weight of the evidence because he eventually completed the service plan as required by DCFS. We note, however, that respondent did not complete all of the services recommended by DCFS because he failed to engage in parenting classes and never completed individual counseling. Regardless, the best interest stage is about the best interests of the child, not the parent. 705 ILCS 405/1-3 (West 2010).

¶ 56 Once removed from their mother's home in February 2011, the children were in the care of their maternal grandmother and expressed a desire to remain with her. Moreover, the children had bonded with their maternal grandmother. The caseworker testified the grandmother provided the children with permanency in a safe, loving environment and that she was a likely adoptive placement.

¶ 57 On the other hand, the children were indifferent to respondent, who had not seen his children for a full year prior to the best interest hearing. While we agree some of that delay can be attributed the trial court's failure to render, within 60 days, a decision regarding respondent's fitness, we also note respondent never filed any motions with the trial court in the interim requesting visitation with the children. Instead, the caseworker testified respondent never asked her about the children or attempted to engage in other recommended services through DCFS. We also observe that respondent failed to appear for the best interest hearing on two occasions, which is indicative of his lack of interest in his children.

¶ 58 As the trial court noted in rendering its decision, "for $100 [respondent] would be in a position to see his children, maintain a relationship, show the social workers and everyone involved how much he wanted to parent these children." The court went on to state that DCFS and court orders did not prevent respondent from seeing his children, his own behavior prevented him from seeing his children. We agree with the court's reasoning.

¶ 59 We therefore conclude the trial court's decision to terminate respondent's parental rights in the best interests of the children was not against the manifest weight of the evidence.

¶ 60 III. CONCLUSION

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

¶ 62 Affirmed.