

2014 IL App (2d) 140012-U
Nos. 2-14-0012, 2-14-0013
Order filed May 1, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re C.B. and K.N., Minors,) Appeal from the Circuit Court
) of Winnebago County.
)
) Nos. 11-JA-297
) 11-JA-298
)
(The People of the State of Illinois,) Honorable
Petitioner-Appellee, v. Kayla A.L.,) Mary Linn Green,
Respondent-Appellant.) Judge, Presiding.

In re K.N., a Minor,) Appeal from the Circuit Court
) of Winnebago County.
)
) No. 11-JA-298
)
(The People of the State of Illinois,) Honorable
Petitioner-Appellee, v. Bryan N.,) Mary Linn Green,
Respondent-Appellant.) Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* Where there were no potentially meritorious issues on appeal from the judgment terminating respondents' parental rights, appellate counsels' motions to withdraw from representation would be granted.

¶ 2 On January 3, 2014, the trial court entered orders (1) terminating the parental rights of respondents, Kayla A.L., and Bryan N. in their biological child, K.N.; and (2) terminating the parental rights of Kayla A.L. in her biological child, C.B. Respondents filed separate appeals challenging the findings that they were unfit parents and that termination of their parental rights was in the best interests of K.N. and C.B. Appellate counsel was appointed for respondents, but now counsel in each case has moved to withdraw from representation, pursuant to the mechanism set forth in *Anders v. California*, 386 U.S. 738 (1967), and *In re Alexa J.*, 345 Ill. App. 3d 985 (2003). We have consolidated the appeals for decision on the motions. As required by *Anders*, counsel in each appeal has filed a memorandum with the motion to withdraw. The memorandum provides a statement of facts, then identifies potential issues for appeal and explains why none has arguable merit. See *Anders*, 386 U.S. at 744 (appellate counsel must accompany his request to withdraw with a brief “referring to anything in the record that might arguably support the appeal”). Each respondent had 30 days to respond to the motion. Kayla filed a response; Bryan did not. For the reasons that follow, we grant both motions to withdraw.

¶ 3 I. BACKGROUND

¶ 4 The facts common to both appeals are as follows. In September 2011, Kayla resided with Bryan at his home in South Beloit. Also residing in the home were three children: K.N., born June 21, 2007, C.B., born June 17, 2010, and J.B., born August 5, 2011. The biological parents of K.N. are Kayla and Bryan. The biological parents of C.B. are Kayla and Craig B., who were also the parents of J.B., who died on September 22, 2011.

¶ 5 On the morning of September 22, 2011, Kayla found seven-week old J.B. unresponsive in his crib. Emergency personnel were summoned, and J.B. was pronounced dead at the scene. J.B. weighed 7.5 pounds at birth. At the autopsy performed on September 23, 2011, he weighed

4.95 pounds and had “no subcutaneous and visceral fat.” Police photos taken on September 22 and introduced at the consolidated fitness hearing show a severely emaciated infant with visible bones and loose skin. Dr. Mark Peters, who performed the autopsy, concluded that J.B. died of “malnutrition without evidence of natural disease.” Peters, testifying at the fitness hearing, explained that one of the causes he eliminated was congenital adrenal hyperplasia (CAH), which can precipitate an electrolyte imbalance resulting in death. Peters noted that J.B.’s abnormal levels of the hormone 17-OHP would have been indicative of CAH had J.B.’s adrenal glands not been of normal size.

¶ 6 On September 26, 2011, the State filed neglect petitions with respect to K.N. and C.B. The petitions alleged that the two children were neglected because of an injurious environment created by Kayla’s and Bryan’s failure to seek medical attention for J.B. The same day the petitions were filed, Kayla and Bryan waived their rights to a temporary shelter care hearing. The State has filed homicide charges against Kayla for the death of J.B. She is currently awaiting trial on those charges.

¶ 7 The State, seeking an expedited termination of parental rights, filed termination petitions against Kayla and Bryan on October 4, 2012, while the neglect petitions were still pending. Counts I and III of the petitions alleged that Kayla and Bryan (1) substantially neglected J.B., a child residing within the household, resulting in his death; and (2) failed to protect K.N. and C.B. from conditions in their environment injurious to their welfare. Count II of the petitions alleged that Kayla and Bryan were depraved.

¶ 8 The neglect and termination petitions were adjudicated together. On September 12, 2013, the court adjudicated K.N. and C.B. neglected and found both Kayla and Bryan to be unfit parents. Specifically, the court found counts I (substantial neglect), II (depravity), and III

(failure to protect) proved against Kayla, but only counts I (substantial neglect) and III (failure to protect) proved against Bryan. A best-interests hearing was held in November 2013. On January 3, 2014, the trial court found that termination of Kayla's and Bryan's parental rights was in the bests interests of K.N. and C.B.

¶ 9 Section 2-29 of the Juvenile Court Act of 1987 (705 ILCS 405/2-29 (West 2012)) sets forth a bifurcated procedure for termination of parental rights. Under this procedure, the State must make a threshold showing of parental unfitness followed by a showing that the best interests of the child are served by severing parental rights. *In re J.L.*, 236 Ill. 2d 329, 337-38 (2010); *In re Katrina R.*, 364 Ill. App. 3d 834, 841 (2006).

¶ 10 II. POTENTIAL ISSUES ON APPEAL

¶ 11 A. Fitness – General Principles

¶ 12 We consider first any potential appellate issues regarding unfitness. Parental unfitness is determined with reference to section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2012)). Counts I, II, and III of the termination petitions charged unfitness consisting of, respectively: (I) “[s]ubstantial neglect, if continuous or repeated, of any child [here, J.B.] residing in the household which resulted in the death of that child” (750 ILCS 50/1(D)(d-1) (West 2012)); (II) depravity (750 ILCS 50/1(D)(i) (West 2012)); and (III) “[f]ailure to protect the child[ren] (here, K.N. and C.B.) from conditions within [their] environment injurious to [their] welfare” (750 ILCS 50/1(D)(g) (West 2012)). The State must prove unfitness by clear and convincing evidence. *Katrina R.*, 364 Ill. App. 3d at 842.

¶ 13 1. Kayla – Fitness

¶ 14 Counsel for Kayla identifies a potential argument that the trial court considered several irrelevant facts at the fitness hearing, specifically, (1) that Kayla was indicated for medical

neglect of her biological son, L.L., who was born on January 21, 2009, and passed away on June 9, 2009; and (2) that there were dogs in Bryan's house on the day J.B. died who appeared to be well-fed (in contrast to J.B.). Another potential argument that counsel identifies is that the trial court accorded insufficient weight to the fact that there was evidence in Bryan's house (cans of powered baby formula and used bottles of mixed formula) that J.B. was being fed. Counsel acknowledges that this evidence was consistent with Kayla's claim in her police interview that she was feeding J.B. at close, regular intervals and that he was taking two to four ounces of formula each time. Counsel denies that either of these two contentions would have any arguable merit.

¶ 15 We agree. Kayla stated in her police interview that, about two to three weeks before his death, J.B. began to vomit during feedings. She then reduced the amount of each feeding from four ounces of formula to two. Kayla last fed J.B. about two hours before she found him unresponsive. There was feces in J.B.'s diaper when he died and, as Dr. Peters acknowledged, there was no evidence of dehydration.

¶ 16 Kayla further told the police that, after she reduced his portion of formula, J.B. no longer vomited during feedings, but now she noticed that he was losing weight and that his bones were showing more. Kayla acknowledged that she should have notified a doctor about J.B.'s appearance. Kayla initially told police that she was unable to do so because the service on her cell phone was shut off and she did not have access to a vehicle. Upon further questioning, she admitted that, for several days before J.B.'s death, her cell phone was working and that a vehicle was available to her. Kayla also admitted she had managed to arrange dental care for herself and been to the dentist's office twice in the two weeks prior to J.B.'s death. Kayla ultimately admitted that she had not sought medical attention for J.B. because she kept forgetting. Kayla

had not taken J.B. to the doctor since he was born. At one point, Kayla had a routine check-up scheduled but overslept and failed to reschedule.

¶ 17 We agree with counsel that there would be no potential merit in arguing that the evidence of Kayla's regular feeding of J.B. indicated there was no neglect. The photos of J.B. are shocking; his appearance should have prompted his mother to seek immediate medical attention for him. " 'Neglect * * * is the failure to exercise the care that the circumstances justly demand. It embraces wilful as well as unintentional disregard of duty.' " *In re D.F.*, 201 Ill. 2d 476, 499 (2002) (quoting *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 624 (1952)). Neglect includes the failure to obtain medical assistance for the child. See 750 ILCS 50/1(Q) (West 2012)).

¶ 18 There would also be no merit in contending that Kayla's prior indication for medical neglect was irrelevant. In June 2009, L.L. was temporarily staying with Bryan and his then-girlfriend because Kayla had no electricity at the place where she was residing. On June 9, 2009, L.L. was found unresponsive in his bed. The conclusion of the medical examiner (as paraphrased in the testimony of a caseworker) was "unknown etiology, possibly asphyxiation due to positioning [in bed][,] or just unknown etiology ***." An investigation by the Department of Child and Family Services determined that Kayla had failed to inform Bryan that L.L. was prescribed medicine for a breathing disorder. Kayla was indicated for medical neglect, but not for neglect resulting in death. This evidence of Kayla's previous inattention to medical issues involving a child was, we hold, of unquestionable relevance to the particular allegation of neglect in the case at hand.

¶ 19 As Bryan was apparently the primary caregiver for the dogs, we address below the potential relevancy issue regarding the dogs' condition.

¶ 20 In her response to the motion to withdraw, Kayla herself identifies several potential issues. First, she claims that “noting in the record indicates that the judge reviewed [her] videotaped statement [to the police].” This is inaccurate. The court declared on the record on April 26, 2013, that it had reviewed the recorded statement.

¶ 21 Second, Kayla contends that the trial court should have allowed her trial counsel additional time to present expert opinion challenging the autopsy findings. The trial court allowed several continuances of the fitness hearing for trial counsel to have J.B.’s blood tested. The court finally set a firm discovery deadline, but counsel did not ask for an extension.

¶ 22 Upon review of the record, we ourselves find no issues of arguable merit on the issue of Kayla’s fitness. The State clearly proved unfitness under section 1(D)(d-1) of the Adoption Act, as the neglect of J.B. was substantial and resulted in his death. There being no arguable challenge to that ground, we need not consider whether there are available challenges to the court’s additional findings that Kayla is depraved and that she exposed K.N. and C.B. to an injurious environment. See *In re Brandon A.*, 395 Ill. App. 3d 224, 241 (2009) (once the reviewing court finds sufficient evidence to support one ground of unfitness, the court need not examine other potential grounds).

¶ 23 2. Bryan - Fitness

¶ 24 As for the issue of Bryan’s unfitness, his counsel raises several potential contentions, insisting none has merit. He identifies the following: (1) Bryan was not responsible for J.B.’s welfare; (2) J.B. did not die of substantial neglect; and (3) K.N. was by all accounts healthy. We agree with counsel that none of these are viable. For reasons already stated, there is no colorable basis for contesting that J.B. died of substantial neglect. As for whether Bryan could be considered an agent of that neglect, we note that only acts or omissions “by a parent or other

person responsible for the child's welfare” constitute “neglect” for purposes of an unfitness finding. See 750 ILCS 50/1(Q) (West 2012). The evidence showed that J.B.’s crib was immediately next to the bed that Bryan shared with Kayla. Bryan claimed that his only involvement in the care of J.B. was occasionally making bottles for him. Bryan “didn’t feel comfortable” doing anything else for J.B. Bryan was, however, involved in the care of K.N. and C.B. Bryan claimed he worked extensive hours and never saw J.B. being bathed or having his diaper changed. Bryan noticed nothing about J.B. to indicate he needed medical attention, but did observe that J.B. was sleeping more in the two to three days before his death. Bryan testified that he “occasionally” placed his hand on J.B.’s chest in the morning to see if he was still breathing. Bryan acknowledged that he might have told police that he did this to J.B. every morning.

¶ 25 The record permits no colorable challenge to the legal conclusion that Bryan was a “person responsible for [J.B.’s] welfare.” (750 ILCS 50/1(Q) (West 2012)). The trial court evidently concluded, with ample justification, that Bryan could not disclaim a duty to seek medical help for an infant residing in his house who was in such obviously critical condition. The court’s findings imply that it disbelieved Bryan’s claim to have observed nothing in J.B. to suggest he needed medical attention. This credibility judgment is well supported by the record, which shows that J.B.’s crib was not only in Bryan’s room but also immediately adjacent to the bed he shared with Kayla. The trial court also cited Bryan’s admission that he would occasionally check to see if J.B. was still breathing. The court may well have concluded, justifiably, that Bryan thereby revealed a suspicion that J.B. was in poor health, or at least should have realized from this contact with J.B. that he was literally wasting away.

¶ 26 We note that the court also cited the fact that Bryan displayed such compassion for stray dogs that he took them into his home and nursed them back to health. Apparently, the court found it ironic that Bryan would show such care for animals while an infant in the house was visibly malnourished. Whether the trial court actually accorded legal relevance to Bryan’s treatment of the dogs is unclear from the record. Certainly, Bryan’s substantial, fatal neglect of J.B. stands as a sufficient ground of unfitness regardless of how he treated other humans or animals in the house. Accordingly, there is also no merit to the final potential issue identified by Bryan’s counsel, which is that the trial court gave insufficient regard to the fact that K.N. was found in good health.

¶ 27 B. Best Interests - General Principles

¶ 28 Next we determine whether there are any potentially meritorious issues regarding the trial court’s best-interests determination. At the fitness stage, “the parent’s past conduct is under scrutiny.” *In re D.M.*, 336 Ill. App. 3d 766, 771-72 (2002). In contrast, at the best-interests stage the court “focuses upon the children’s welfare and whether termination would improve the child’s future financial, social and emotional atmosphere.” *Id.* at 772. “The issue is no longer whether parental rights *can* be terminated; the issue is whether, in light of the child’s needs, parental rights *should* be terminated.” (Emphasis in original.) *In re D.T.*, 212 Ill. 2d 347, 364 (2004). “Accordingly, at a best-interests hearing, the parent’s interest in maintaining the parent-child relationship must yield to the child’s interest in a stable, loving home life.” *Id.* The trial court “cannot rely solely on fitness findings to terminate parental rights.” *D.M.*, 336 Ill. App. 3d at 772. The statutory factors governing the best-interests inquiry include: (1) the child’s physical safety and welfare; (2) the development of the child’s identity; (3) the child’s familial, cultural, and religious background and ties; (4) the child’s sense of attachment, including love, security,

familiarity, continuity of relationships with parent figures, and considering the least disruptive placement alternative for the child; (5) the child's wishes and goals; (6) community ties; (7) the child's need for permanence; (8) the uniqueness of every family and every child; (9) the risks related to substitute care; and (10) the preferences of the person(s) available to care for the child.

705 ILCS 405/1-3(4.05) (West 2012). The standard proof at the best-interests phase is preponderance of the evidence. *D.T.*, 212 Ill. 2d at 366. The manifest-weight standard applies on appeal. *D.M.*, 336 Ill. App. 3d at 773.

¶ 29

1. Best Interests - Kayla

¶ 30 Kayla's counsel identifies no potential issues for review as to best interests, but Kayla herself does.

¶ 31 First, she argues that the trial court erred in the manner in which it denied her trial counsel's attempt to introduce, at the best-interests phase, a letter from Kayla's expert witness in her ongoing criminal case. Kayla's trial counsel recognized that the letter would not "affect prior rulings," but claimed it was relevant at the best-interests stage. The trial court barred the letter as untimely. The court also declined to allow the letter into the record as an offer of proof. Trial counsel was able, however, to describe the letter on the record, noting that it set forth an opinion that J.B.'s cause of death could not be determined with any degree of medical certainty.

¶ 32 Kayla argues that the trial court erred by denying admission of the letter and, further, by denying trial counsel an offer of proof. While counsel was not allowed to introduce the letter as an offer of proof, counsel apparently was permitted to describe the letter on the record. Counsel, however, did not describe the letter with enough detail for us to determine whether there was any error in its exclusion from evidence. Without knowing the content of the letter, we also cannot determine whether Kayla's trial counsel was ineffective for failing to submit a more thorough

offer of proof. We note that Kayla has available to her postjudgment processes under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), through which she may adduce what the letter would have stated. We caution, however, that any petition under section 2-1401 for relief from a final judgment entered pursuant to the Adoption Act must be filed within one year of that judgment. See 750 ILCS 50/20b (West 2012).

¶ 33 Kayla also argues that the trial court did not place enough weight on her successes with her required services. Kayla notes particularly that she requested (though was denied) increased visitation with K.N. and C.B. Kayla also contends that the court improperly relied on her caseworker's testimony that she was not participating fully in counseling because, on the advice of counsel in her criminal case, she declined to discuss J.B.'s death. In this manner, Kayla submits, the court failed to recognize her right not to make potentially incriminating statements.

¶ 34 In rendering its decision, however, the trial court did not cite Kayla's level of progress in services, but mentioned only that K.N. and C.B. had "two siblings who previously died" under Kayla's care, that K.N. and C.B. had been in foster care for two years and needed permanency, and that the foster parents were providing a loving, stable, and safe home for the children.

¶ 35 There is abundant evidence supporting the trial court's best-interests determination apart from the concerns Kayla mentions. Her caseworker testified that Kayla was making progress in all services except counseling. Reports from her therapist for September and October 2013 (the best-interest hearing was in November 2013) indicate that Kayla had made no progress toward "address[ing] and resolv[ing] the issues that led her children to be in care." The therapist did cite Kayla's refusal to speak about J.B.'s death, but also noted Kayla's struggles with parenting. Specifically, Kayla was displaying "a somewhat childlike and narcissistic approach to child rearing," would "personalize [K.N.'s] behavior relative to her own needs," and would "attribute

intentions on his part that are not age-appropriate.” Obviously, given the enormity of Kayla’s past lapses, it was imperative that she display parental aptitude beyond question. The therapist’s report clearly does not allay concerns for the safety of K.N. and C.B.

¶ 36 Finally, Kayla suggests that the trial court should have held its decision on best interests in abeyance until her criminal matter is concluded, because she might be acquitted. It does not appear, however, that Kayla’s trial counsel ever made such a request. Moreover, given the higher standard of proof for a criminal conviction, an acquittal would not entail that the decision to terminate parental rights was erroneous.

¶ 37 We note that there was unchallenged testimony that K.N. and C.B. are in loving and stable foster homes. According to Kayla’s caseworker, K.N. has a stronger bond with his foster parents than with Kayla. Neither set of foster parents testified at the best-interests phase, but K.N.’s foster parents submitted a letter claiming that K.N. has expressed that he wishes to stay with them “forever.”

¶ 38 Our own review of the record discloses no potentially meritorious issues on the best-interests finding with respect to Kayla.

¶ 39 **2. Best Interests - Bryan**

¶ 40 Bryan’s counsel identifies no issues of potential merit regarding the best-interests finding against him. We ourselves have found no such issues. Bryan’s caseworker testified that he has attended the majority of his scheduled visits with the children. His counselor, however, reported that while Bryan was making progress in learning to address K.N.’s needs (he has an attention disorder), his overall progress in counseling was poor. Bryan’s recent attendance at counseling was sporadic. In June 2013, Bryan was indicated for abuse of G.N., another of his children, after G.N. was found with bruises and reported that Bryan had hit him. In October 2013, Bryan was

arrested for possession of drugs and drug paraphernalia after police responded to a domestic disturbance at his home. As noted, K.N. and C.B. are in loving and stable foster homes, and K.N.'s foster parents have reported that K.N. desires to reside with them permanently. We hold that there are no grounds of arguable merit for challenging the best-interests finding with respect to Bryan.

¶ 41

III. CONCLUSION

¶ 42 For the foregoing reasons, we grant the motions of appellate counsel to withdraw from representation for respondents in their respective appeals. Accordingly, we affirm the judgments of the circuit court of Winnebago County.

¶ 43 Affirmed.