2016 IL App (5th) 160231-U

NO. 5-16-0231

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re T.G., N.G., and E.G., Minors	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Richland County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	Nos. 12-JA-29, 12-JA-30, & 12-JA-31
	)	
Timothy G.,	)	Honorable
	)	Larry D. Dunn,
Respondent-Appellant).	)	Judge, presiding

JUSTICE STEWART delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not violate the respondent's due process rights by proceeding to a termination of parental rights hearing without his being physically present because he was able to participate in the hearing by telephone. The trial court's determination that the respondent was unfit on the grounds of depravity was not against the manifest weight of the evidence where the respondent had been convicted of at least three felonies and one of the convictions occurred within five years of the filing of the motions to terminate parental rights.

¶ 2 On November 8, 2012, the State filed petitions for the adjudication of wardship for E.G., T.G., and N.G. after their parents, Christina G. and Timothy G., were charged with

possession of methamphetamine, possession of methamphetamine manufacturing materials, use of property to manufacture methamphetamine, and child endangerment. Following a shelter care hearing that day, the children were placed in traditional foster care. On January 11, 2013, an order for adjudication of wardship and an order of disposition were entered placing the children in the custody/guardianship of the Department of Children and Family Services (DCFS). On January 31, 2014, Christina signed and tendered final and irrevocable consents to adoption by specified persons in a DCFS case as to each of the three children. The State filed motions to terminate parental rights and for appointment of a guardian with the power to consent to adoption. Following a fitness hearing, the respondent, Timothy G., was found unfit. Following a best interests hearing, the court determined that it was in the best interest of the children that the respondent's parental rights be terminated. The respondent filed a timely notice of appeal. We affirm.

¶ 3 BACKGROUND

¶ 4 This case involves three children: E.G. (born January 25, 2008), T.G. (born March 11, 2009), and N.G. (born October 25, 2012). Christina is the biological mother of all of the children. Clifford Parker is the biological father of E.G. However, the respondent, who began living with Christina when E.G. was approximately three months old, signed a voluntary acknowledgment of paternity on her birth certificate and considered himself her father. The respondent is the biological father of T.G. and N.G.

¶ 5 On November 4, 2012, the respondent and Christina were arrested in their home pursuant to a search warrant for allegedly manufacturing methamphetamine. Methamphetamine and methamphetamine manufacturing materials were found at the residence. The three minor children were present in the home at the time of the arrest and were removed and taken into protective custody. They were placed with their maternal grandmother but removed by DCFS within a few days due to environmental concerns.

¶ 6 On November 8, 2012, the State filed petitions for adjudication of wardship alleging abuse and/or neglect by the respondent and Christina. Following a hearing on the same date, a shelter care order was entered. The children were placed in traditional foster care.

¶ 7 At the adjudicatory hearing on January 11, 2013, the respondent stipulated to the allegations set forth in the petition. The court found that, due to the negligence of the respondent and Christina, the children were placed in an injurious environment with a substantial risk of physical injury. An order for the adjudication of wardship and an order of disposition were entered adjudging the children wards of the court and placing their custody and guardianship with DCFS.

¶ 8 The respondent pleaded guilty in federal court to conspiracy to manufacture methamphetamine, possession of pseudoephedrine knowing it would be used to manufacture a controlled substance, and possession with intent to distribute hydrocodone. In December 2013, he was sentenced to 180 months' incarceration followed by five years' supervision. His projected release date was November 29, 2025.

¶ 9 On April 29, 2013, E.G. and T.G. were placed with Gerald and Julie Doan. On May 8, 2013, N.G. was placed with the Doans. The children have remained in the Doans' home since that time.

¶ 10 On January 31, 2014, Christina signed and tendered a final and irrevocable consent to adoption by specified persons in a DCFS case as to all three children. The court accepted the consents and reserved any order terminating her parental rights.

¶ 11 When the children first went into the care of DCFS, the respondent was incarcerated in the Richland County jail, and the children visited him there. He was then transferred under federal hold to the Saline County jail, and the children were transported there for monthly visits. Once he was sentenced in federal court, he was transferred to a prison in New Hampshire. The children had no personal visits with him there. He requested a transfer to Illinois to be closer to his children. His request was granted, and he was transferred to the federal penitentiary in Pekin, Illinois. He was allowed monthly telephone visits with the children.

¶ 12 On February 11, 2015, Dr. Judy Osgood, a licensed clinical psychologist, performed a bonding assessment on the children and the Doans. In her report dated February 12, 2015, she wrote that the purpose of the evaluation was to determine the nature of the attachment between the children and the Doans and to address the impact of potential permanency with the Doans. Dr. Osgood reported that E.G. was at grade level in all subjects, that she had attended school consistently, and that she had participated in activities including tumbling and swimming lessons. Dr. Osgood reported that initially in his placement with DCFS, T.G. had demonstrated some developmental delays. Since

being placed with the Doans, he had demonstrated significant progress developmentally. He was reported to be at grade level in all subjects. N.G. had received early intervention services with delays reported in communication (expressive and receptive), motor development (fine and gross motor), as well as social/emotional delays. He had been receiving physical and speech therapy. He, too, had made significant progress since his placement with the Doans. Dr. Osgood felt that the children and the Doans were bonded to one another. She observed that all three children appeared to be thriving with the Doans in all developmental areas including their emotional, social, educational, and familial functioning. She found that the Doans were committed to the children's education and developmental needs; were committed to providing them with all recommended services; and had provided them with a safe, stable, secure, and supportive home and family environment. Dr. Osgood recommended maintaining the current foster home placement with the Doans.

¶ 13 No bonding assessment was performed on the respondent and the children. In the March 3, 2015, DCFS report filed on March 4, 2015, DCFS consulting psychologist Bernice Collins, Ph.D., indicated that it would be difficult if not impossible to complete a bonding assessment of a parent who is in federal or state custody because the specialized assessment requires the evaluator to observe the parent and children interacting in a natural setting.

¶ 14 On March 12, 2015, the State filed a motion to terminate parental rights and for appointment of a guardian with the power to consent to adoption for each of the children.

¶ 15 On April 13, 2016, the court heard the motions to terminate parental rights. The respondent was present by telephone from the federal penitentiary in Pekin, Illinois. Despite numerous attempts to bring him to court for the hearing, including a writ of *habeas corpus* compelling the production of the parent at the hearing, the warden of his penitentiary would not allow him to attend. Parker did not appear.

¶ 16 Shannon Griffith, a child welfare advanced specialist for DCFS and the children's caseworker since their case opened in November 2012, testified that, in addition to the respondent's current federal conviction, he had several prior state felony convictions including: a 1991 felony theft conviction, for which he was sentenced to probation; a 1995 Class 4 deceptive practice conviction, for which he was sentenced to probation; a 1996 felony misuse of a credit card conviction, for which he was sentenced to the Illinois Department of Corrections (DOC); and a 2002 felony forgery conviction, for which he was sentenced to the DOC. The respondent testified that, in Arkansas in 2007, he was charged with felony arson and that he pleaded to a five-year probation or divergent-style program. He admitted that in 2007 he was also charged with felony forgery in Arkansas and that the case was still pending.

¶ 17 Griffith testified that the children came into care because a search warrant was executed on the respondent's residence, where methamphetamine and methamphetamine manufacturing material were located. The children were present in the home when the search warrant was executed. The respondent denied making methamphetamine in the house.

¶ 18 Griffith testified that the children have monthly telephone contact with the respondent from the conference room at the DCFS office. Griffith stated that, during the monthly telephone calls between the respondent and the children, the respondent tried to engage the children but that they were not really interested. Griffith testified that T.G. and N.G. would run in and out of the conference room. She stated that she encouraged the children to speak to the respondent.

¶ 19 Griffith testified that it was the respondent's responsibility to obtain the services required by the service plan but that his incarceration, based on his own actions, inhibited his ability to do so. She testified that the respondent was an unfit parent because he had been incarcerated since the time the case opened, he had been unable to participate in the services outlined in the service plan, he had been unable to provide any suitable housing for the children, and he was not scheduled to be released from prison until 2025.

¶ 20 The respondent admitted that, at the present time, he did not have appropriate housing for the children. He stated that if he were released he "might be able to" provide housing. He stated that he had sent the children birthday cards.

¶ 21 A copy of the respondent's coursework at the federal penitentiary was admitted into evidence. It showed that he had completed classes in Microsoft outlook/publisher, resume maker ultimate, math and money, Microsoft word, parenting from a distance, career preparation ace, beginning drums, auto dealership start-up, writing to be understood, and rules of work. The court took judicial notice of testimony from prior hearings that the respondent had completed a 40-hour drug program and was currently enrolled in a GED class. The respondent testified that he was enrolled in self-esteem

classes and that he was on the waiting list for anger management. He stated that he was attempting to do everything DCFS had asked of him.

¶ 22 The respondent asserted that, if passed, the "sentencing reform of the corrections act" would reduce his sentence by 2%. He also stated that he may have his sentence reduced for "good time in" and that there were other bills pending to reduce his time based on the classes he was taking. He asserted that it was possible that he could be released in 2017.

¶ 23 The court found that Parker was E.G.'s biological father and that the respondent was her legal father. The court found that the respondent, Parker, and all other unknown fathers were unfit as defined in the Illinois Adoption Act (750 ILCS 50/1(D) (West 2014). Specifically, the court found the respondent unfit under sections 1(D)(b), 1(D)(g), 1(D)(i), and 1(D)(s).

¶ 24 The court found that the respondent had shown no responsibility for the care, protection, housing, feeding, and support of the children since his arrest in 2012. The court found the respondent unfit under section 1(D)(b) of the Adoption Act because he failed to maintain a reasonable degree of responsibility as to the children's welfare. 750 ILCS 50/1(D)(b) (West 2014).

¶ 25 The court found by clear and convincing evidence that the respondent failed to protect his children from conditions within his environment that created an environment that was injurious to the children's welfare under section 1(D)(g) of the Adoption Act. 750 ILCS 50/1(D)(g) (West 2014).

¶ 26 The court found that the respondent was depraved under section 1(D)(i) of the Adoption Act because he had been criminally convicted of at least three felonies under Illinois or federal law, and at least one of the convictions occurred within five years of the filing of the petition to terminate parental rights. 750 ILCS 50/1(D)(i) (West 2014). In its order, the trial court noted the respondent's convictions that Griffith had testified about as well as a 1998 felony forgery conviction for which he was sentenced to the DOC.

¶ 27 The court found that the respondent was depraved under section 1(D)(s) of the Adoption Act because he was incarcerated when the motion to terminate parental rights was filed, he had been repeatedly incarcerated as a result of criminal convictions, and his repeated incarcerations had prevented him from discharging his parental responsibilities for the children. 750 ILCS 50/1(D)(s) (West 2014). The court considered that most of the convictions occurred before the children were born. However, it found that the most serious offense was the current federal conviction, for which he was imprisoned until 2025. The court found that the respondent's depravity was the result of his actions, not those of the State or DCFS. The court held that the State had proven depravity by clear and convincing evidence and that the respondent had failed to sufficiently rebut it.

¶ 28 The court found that the State proved by clear and convincing evidence that it was in the children's best interests and welfare that all parental rights be terminated. The court terminated the parental rights of Christina, the respondent, Parker, and all unknown fathers. The court appointed the DCFS guardian administrator guardian of the children with power to consent to their adoption.

¶ 29 The respondent filed an appeal. We affirm.

¶ 30 ANALYSIS

¶ 31 The respondent argues that the trial court violated his due process rights by proceeding to a termination of parental rights hearing without his being physically present.

¶ 32 Proceedings to terminate parental rights are governed under the Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq*. (West 2014)) and the Adoption Act (750 ILCS 50/0.01 *et seq*. (West 2014)). "Generally, under the Juvenile Court Act, where a child is adjudicated abused, neglected or dependent, and the State seeks to free the child for adoption, unless the parent consents, the State must first establish that the parent is 'unfit' under one or more of the grounds set forth in the Adoption Act." *In re D.T.*, 212 Ill. 2d 347, 352 (2004). If the trial court determines that the parent is unfit, the court then determines whether it is in the best interests of the child that parental rights be terminated. 705 ILCS 405/2-29(2) (West 2014).

¶ 33 A parent has a fundamental right in the care, custody, and control of his children. *In re M.H.*, 196 Ill. 2d 356, 362-63 (2001). The court will not easily terminate those rights because of the liberty interests involved. *Id*. When the State seeks to terminate a parent's rights, it seeks not merely to infringe on that fundamental liberty interest but to end it. *Id*. Thus, procedures involved in terminating parental rights must meet the requirements of the due process clause. *Id*.

¶ 34 A parent has a right to be present at a hearing to terminate his parental rights. 705 ILCS 405/1-5(1) (West 2014). However, although a respondent has such a right, his

presence is not mandatory. *In re M.R.*, 316 Ill. App. 3d 399, 402 (2000). It is well established that lawful incarceration necessarily makes unavailable many rights and privileges of the ordinary citizen. *In re C.J.*, 272 Ill. App. 3d 461, 464 (1995).

¶ 35 In determining whether the procedures followed in parental rights termination proceedings satisfied the constitutional requirements of due process, the courts employ the three-part balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *In re M.R.*, 316 Ill. App. 3d at 402. The factors considered are: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 334-35. We will apply these criteria in determining whether the respondent was denied due process of law when he was denied the right to be physically present during the termination of parental rights hearing.

¶ 36 In applying the first criterion, we recognize that the respondent has a very important interest that will be affected by the termination proceeding: specifically, his interest in the care, custody, and control of E.G., T.G., and N.G.

¶ 37 In applying the second criterion, it is apparent that the procedures used by the trial court offered little risk of an erroneous deprivation of the respondent's interest in parenting his children. See *In re M.R.*, 316 Ill. App. 3d at 402-03 (although the respondent was not present at the termination hearing, due to her hospitalization for psychiatric care, her attorney represented her interest to the best degree possible by fully

cross-examining witnesses and arguing her case to the trial court). Efforts were made to secure the respondent's presence at the hearing, but the federal warden would not honor the state court writ of *habeas corpus* and refused to transport the respondent to court for the termination hearing. The respondent admits in his reply brief that "[i]t is undisputed the circuit court and [his] counsel did as much as they could to get the cooperation of the federal authorities."

¶ 38 The trial court made reasonable accommodations under the particular circumstances. Although the respondent was able to participate by telephone, he argues that he was not able to hear the proceedings. He informed the court when he was unable to hear, and the court rectified this by making sure that whatever was said was repeated. He never complained that he was still unable to hear. He was given the opportunity to consult privately with his attorney whenever he requested. He had the opportunity to listen to the witnesses and to testify. His counsel fully cross-examined the witnesses and argued his case. Although he was not physically present, he was able to be present via telephone at the hearing on the petition to terminate his parental rights.

¶ 39 The final *Mathews* factor, the governmental interest in seeking to adjudicate parental rights, weighs against additional delay in the adjudication of this case. "The government's function in seeking to terminate parental rights is an aspect of its role as *parens patriae*." *In re C.J.*, 272 Ill. App. 3d at 466. When the children whose interests are to be protected are very young, delay in adjudication imposes a particularly serious cost on governmental functioning. *Id.* E.G. is currently eight years old, T.G. is seven years old, and N.G. is four years old. They were taken into custody when they were 4

years old, 3 years old, and 10 days old, respectively. The children have an interest in having a loving, stable, and safe home environment. *In re D.T.*, 212 Ill. 2d at 363. The children have been in foster care most of their lives and need permanence, which would be further delayed if the matter was continued until the respondent could be physically present. The federal authorities made it clear they were not going to honor the state court's writ. Thus, a continuance would have been futile. We take judicial notice of the fact that the respondent received a reduction in his sentence but is not scheduled to be released from federal prison until February 5, 2024. See *In re Brandon A.*, 395 Ill. App. 3d 224, 239 (2009); https://www.bop.gov/iloc2/LocateInmate.jsp (last visited Oct. 17, 2016).

¶ 40 The *Mathews* balancing test does not support the respondent's claim of a violation of his due process rights. By allowing the respondent to participate in the termination hearing by telephone, the trial court took appropriate steps under the circumstances to safeguard his due process rights.

¶ 41 The respondent also argues that the trial court's finding of unfitness was against the manifest weight of the evidence. Because termination of parental rights constitutes a permanent and complete severance of the parent-child relationship, a higher evidentiary standard must be applied to reduce the risk that the parent's fundamental rights to his child will be improperly terminated. *In re Cornica J.*, 351 Ill. App. 3d 557, 566 (2004). Under the Juvenile Court Act, a parent's rights cannot be terminated without consent unless the court first determines, by clear and convincing evidence, that the parent is an unfit person as defined by section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West

2014)). *In re Gwynne P.*, 215 Ill. 2d 340, 354 (2005). The State bears the burden of proof. *Id.* Every matter concerning parental fitness is *sui generis*; therefore, each case must be decided on the particular facts and circumstances presented. *Id.* "Only one ground of unfitness needs to be proved by clear and convincing evidence in order to find a parent unfit." *In re R.L.*, 352 Ill. App. 3d 985, 998 (2004). We accord a trial court's finding of unfitness great deference and will not overturn it unless it is contrary to the manifest weight of the evidence and the record shows the opposite conclusion is clearly apparent. *Id.*

¶ 42 One of the grounds on which the trial court found the respondent unfit is depravity. 750 ILCS 50/1(D)(i) (West 2014). The respondent argues that the trial court's determination that the State proved by clear and convincing evidence that he was depraved was against the manifest weight of the evidence. Section 1(D)(i) states, in pertinent part, that "[t]here is a rebuttable presumption that a parent is depraved if the parent has been criminally convicted of at least 3 felonies under the laws of this State or any other state, or under federal law, or the criminal laws of any United States territory; and at least one of these convictions took place within 5 years of the filing of the petition or motion seeking termination of parental rights." 750 ILCS 50/1(D)(i) (West 2014).

¶ 43 This rebuttable presumption creates a *prima facie* case of unfitness and has the practical effect of requiring the party against whom it operated to come forward with evidence to meet the presumption. *In re J.A.*, 316 Ill. App. 3d 553, 562 (2000). Once evidence opposing the presumption is presented, the presumption ceases to operate, and

the issue is determined on the basis of the evidence adduced at trial as if no presumption ever existed. *Id.*

¶ 44 The Illinois Supreme Court has defined depravity as " 'an inherent deficiency of moral sense and rectitude.' " *In re A.M.*, 358 Ill. App. 3d 247, 253 (2005) (quoting *Stalder v. Stone*, 412 Ill. 488, 498 (1952)). Here, evidence was presented that the respondent had at least five felony convictions, including the one for which he was currently incarcerated and which occurred within five years of the filing of the petition to terminate his parental rights. Therefore, under section 1(D)(i), the State's evidence created a rebuttable presumption that the respondent was depraved. The court found that the respondent failed to sufficiently rebut the rebuttable presumption.

¶ 45 The respondent argues that the court did not take into consideration the fact that prior to his 2012 federal conviction, he had spent 10 years free of any criminal convictions. He further argues that the court did not take into consideration the nature of his prior convictions to see if they indicated an inherent deficiency of moral sense and rectitude.

¶ 46 "In determining depravity, the trier of fact is required to closely scrutinize the character and credibility of the parent." *In re J'America B.*, 346 Ill. App. 3d 1034, 1046 (2004). "Depravity of a parent may be shown by a course of conduct that indicates a moral deficiency and an inability to conform to accepted moral standards." *Id.* at 1047. The respondent argues that the nature of his convictions was monetary/fraud and that they do not show depravity because no one was physically hurt.

¶ 47 Although no one was physically hurt by the respondent's monetary/fraud crimes, they were not victimless crimes. Also, the respondent is currently incarcerated on federal conviction for conspiracy to manufacture methamphetamine. His three children were present in the house when the police executed the search warrant. The youngest one was 10 days old. Although the respondent denied making methamphetamine in the house, he was originally charged with possession of methamphetamine, possession of methamphetamine manufacturing materials, and use of property to manufacture methamphetamine. The respondent showed a deficient moral sense by exposing his very young children to methamphetamine.

¶ 48 The respondent further argues that the time between his 2012 conviction and his prior conviction indicates that he does not have an inherent deficiency of moral sense and rectitude. He argues that the fact that he had not been convicted of a felony for a 10-year period prior to his current 2012 conviction should be considered. This ignores the fact that the respondent testified that in 2007 he was charged, in Arkansas, with felony arson and pleaded to a five-year probation or divergent-style program and that he has a pending felony forgery charge. The respondent thus did not go for a 10-year period without committing a crime. He was convicted of felony forgery in 2002 and incarcerated in the DOC, charged in 2007 in Arkansas with felony arson and forgery, and arrested in November 2012 for the methamphetamine charge for which he is currently incarcerated in federal prison. He remained in jail or prison from the time of his November 2012 arrest. He has committed numerous felonies starting in 1991 and when not incarcerated has not gone a significant period of time without committing a crime. His course of

conduct indicates a moral deficiency and an inability to conform to accepted moral standards.

¶ 49 The respondent argues that while in prison he took classes under the belief that they would help him in his rehabilitation. Rehabilitation can only be shown by a parent who leaves prison and maintains a lifestyle suitable for parenting children safely. *In re Shanna W.*, 343 Ill. App. 3d 1155, 1167 (2003). The respondent's repeated incarcerations demonstrate that he cannot leave prison and maintain a lifestyle suitable for parenting children safely. He is currently incarcerated on a federal conviction for conspiracy to manufacture methamphetamine, possession of pseudoephedrine knowing it would be used to manufacture a controlled substance, and possession with intent to distribute hydrocodone. His actions showed a disregard for his children and resulted in his incarceration until 2024. N.G. was 10 days old when he was taken into custody. N.G. has never known him as a father figure. By the time he is released, E.G. will be 16 years old, T.G. will be just shy of 15 years old, and N.G. will be 11 years old. The respondent will have spent the major part of his children's youth incarcerated. He failed to show that he is capable of maintaining a lifestyle suitable for parenting his children safely.

¶ 50 The respondent failed to rebut the presumption that he was depraved because he had committed at least three felonies and one of the convictions occurred within five years of the filing of the motion to terminate his parental rights. For these reasons, we find that the trial court's finding of unfitness on the ground of depravity was not against the manifest weight of the evidence. Because only one ground of unfitness needs to be proved to find a parent unfit, we need not address the respondent's arguments that the

trial court's determination on other grounds of unfitness was against the manifest weight of the evidence.

¶ 51 CONCLUSION

¶ 52 For the reasons stated, we affirm the judgment of the circuit court of Richland County.

¶ 53 Affirmed.