2017 IL App (1st) 162021-U

FOURTH DIVISION
February 9, 2017

No. 1-16-2021

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re M.C., G.C., and R.S., Minors,	)	
	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	Nos. 12 JA 69
v.	)	12 JA 699
	)	13 JA 1139
Katherine C.,	)	
	)	Honorable
Respondent-Appellant).	)	Devlin Schoop,
	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

ORDER

Held: The trial court's determination that respondent was unfit and that it was in the minors' best interests to terminate parental rights was not against the manifest weight of the evidence. The Americans with Disabilities Act cannot serve as a defense in termination proceedings and, in any case, the mother was provided with reasonable accommodations in services.

¶ 1 Respondent, Katherine C., appeals the trial court's June 23, 2016, decision that it was in the best interests of her three minor children, M.C., G.C., and R.S., to terminate her parental

rights. Respondent has epilepsy and related cognitive and memory impairment due to brain damage associated with past seizures. The trial court found respondent unfit pursuant to subsection 50/1(D)(m) and (p) of the Illinois Adoption Act (750 ILCS 50/1(D)(m), (p) (West 2012)), concluding that she failed to make reasonable progress toward return of the children and her cognitive impairment made it impossible for her to safely parent her children. The minors' fathers are not parties to this appeal.

¶ 2 On appeal, respondent argues that (1) the trial court's finding of unfitness was against the manifest weight of the evidence, (2) the trial court's best interests determination was against the manifest weight of the evidence, and (3) the finding of unfitness should be reversed because the State did not make reasonable accommodations in providing reunification services to respondent in light of her specific disability, in violation of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12132). For the following reasons, we affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 M.C. was born on June 25, 2011. The State filed a petition for adjudication of wardship for M.C. on January 18, 2012, alleging that the then-six-month-old M.C. was hospitalized due to dehydration and non-organic failure to thrive because respondent and the biological father, A.C., failed to properly feed M.C.[1] The allegations indicated that respondent's seizure disorder required her to sleep eight hours a night and A.C. had a psychiatric history. The trial court adjudicated M.C. a ward of the court based on lack of care, injurious environment, and substantial risk of physical injury, and placed him under Department of Children and Family Services (DCFS) guardianship on December 28, 2012.

[1] A.C., who is also the father of G.C., had his parental rights terminated on June 20, 2016.

¶ 5 G.C. was born on June 1, 2012. The State filed a petition for adjudication of wardship for G.C. on July 9, 2012, alleging that she was abused due to a substantial risk of physical injury and neglect due to an injurious environment. The petition alleged the circumstances of M.C.'s involvement in DCFS, the outstanding services which respondent needed to complete, and G.C.'s complex medical conditions. G.C. has epilepsy and Long QT Syndrome (LQTS), a congenital heart condition that respondent also has. The trial court adjudicated G.C. a ward of the court on July 26, 2013.

¶ 6 R.S. was born on November 26, 2013. The State filed a petition for adjudication of wardship on December 9, 2013, alleging injurious environment, substantial risk of physical injury, and lack of care due to physical or mental disability. The State alleged the findings for M.C. and G.C., concerns about respondent's ability to parent due to her own medical conditions and cognitive delays, and R.S.'s special medical needs. R.S. was diagnosed with LQTS and has a chromosomal malformation. The putative father, E.S., was a registered sex offender and was incarcerated for sex offenses.[2] The trial court adjudicated R.S. a ward of the court on September 8, 2014.

¶ 7 The initial goal at the beginning of DCFS involvement in 2012 was return home. In February of 2015, the trial court entered a goal of substitute care pending a determination on termination of parental rights.

¶ 8 The State filed a petition to terminate parental rights on June 2, 2015, based on three grounds: (1) failure to maintain a reasonable degree of interest, concern, or responsibility as to the children's welfare (750 ILCS 50/1(D)(b) (West 2012)); (2) failure to make reasonable efforts and progress toward return of the children during any nine-month period following adjudication

[2] E.S. subsequently executed a consent for adoption.

(750 ILCS 50/1(D)(m) (West 2012)); and (3) inability to discharge parental responsibilities because of mental impairment where such inability will extend beyond a reasonable time (750 ILCS 50/1(D)(p) (West 2012)).

¶ 9 A. Unfitness Hearing

¶ 10 The unfitness hearing began on April 26, 2016. The State introduced into evidence numerous documents, including information regarding respondent's and the children's medical histories, service plans for March 2012 through June 2015, and a 2012 parenting capacity evaluation by the Cook County Juvenile Court Clinic (CCJCC). The evaluation noted respondent's inflexible thinking, little insight into why M.C. was diagnosed with failure to thrive, her limited motor abilities which made it difficult to carry the children, her limited support network, and her difficulty managing both M.C. and G.C. at the same time. The evaluation recommended parent coaching using a "hands on" method, links to services for those with disabilities, social support, individual counseling, and compliance with her own medical care.

¶ 11 Jamie Moler was the caseworker through Jewish Child and Family Services (JCFS) assigned to respondent's case. She received the case in January 2013, but started shadowing the case in 2012. Respondent needed to undergo a psychological evaluation, parent coaching, parenting classes, and participate in visitation. Respondent had a psychological assessment conducted in 2012, a parenting capacity assessment in 2012, and a subsequent evaluation by Hephzibah Children's Association in 2015. It was recommended that respondent receive individual therapy, parent coaching, and having the children's developmental and medical needs explained to respondent.

¶ 12 Moler testified that respondent participated in services and made reasonable efforts to comply with the service plans. However, respondent failed to show reasonable progress. Her lack

of progress in therapy and parent coaching made it difficult to increase visitation or move toward unsupervised visitation as she was unlikely to parent safely. Respondent initially had three supervised visits per week. Respondent had a very difficult time managing G.C. and M.C. (before R.S. was born) and needed a lot of prompting and assistance with childproofing, changing diapers, and feeding the appropriate foods. Respondent once attempted to give G.C. spoiled milk, and on another occasion tried to give G.C. foods she could not have because of risks of aspiration. Respondent failed to retain information Moler shared with her and she would engage in the same behavior at the next visit. Moler testified that respondent was never able to retain instructions over the almost four years Moler was involved.

¶ 13 The visits were shortened from three hours to two hours because of her lack of progress and because it was difficult for the children to be there for three hours when respondent was unable to care for them. Even with the reduced visitation, the same behaviors and issues persisted. Visitation was further reduced to two visits of two hours in duration because of her failure to progress in any of her services and her continued need for intervention and assistance during visitations. Moler testified that respondent would forget to give the children their medication and once confused medications for two of the children. Moler testified that she set reminders and timers on respondent's phone and prompted her regarding feedings, diaper changes, and medications, but this did not help. She did not believe that respondent understood which medications were for which child. Moler showed respondent how to use G.C.'s nebulizer multiple times, approximately twice a month for two years, but respondent was never able to use it without assistance.

¶ 14 The visits were reduced to once per week for two hours in August 2014. Moler testified that it was still difficult for respondent to manage despite the reduced hours. Moler testified that

R.S. cried frequently and respondent had trouble soothing her and would become flustered, and the other children would become upset and "dis-regulated." The visitation was reduced to twice per month from February 2015 through December 2015, and it was currently offered once per month. Moler never recommended unsupervised visitation as respondent was unable to care for all three children on her own. Unsupervised visits would have posed a risk of harm to the children.

¶ 15 Moler was also concerned by respondent's inaccurate understanding of the children's developmental needs. Moler explained that she attempted to put R.S. on her stomach for "tummy time" when R.S. was too young developmentally. She tried to pick up G.C. by her legs like a "wheel barrel" and have her walk on her hands despite G.C.'s low muscle tone and inability to walk yet. Moler tried to explain the children's needs and diagnosis but she retained "[v]ery little" of this information. Respondent has never been able to articulate the children's developmental delays, medical issues, or when they need their medication.

¶ 16 Moler testified that respondent's neurologist recommended that respondent "not hold or carry her children for long periods of time or for a long length. And that she not be alone when she bathed them or changed their diaper. And if she did have to transport them, that she transport them from room to room in a stroller." Her doctors recommended she have a support system and someone with her at night to feed R.S. because respondent had a high risk of seizures if she did not sleep eight hours a night. Although respondent at one point lived with T.S., the sister of R.S.'s father, Moler indicated she was not an appropriate support person because T.S. had allowed R.S.'s father, a convicted sex offender, to watch her children. Respondent could not comprehend how her involvement with him would impact her or her children.

¶ 17 Moler testified that the CCJCC evaluation recommended a consult with Equipment for Equality Resources (an organization dedicated to advancing civil rights of individuals with disabilities), but this was not done. She testified that JCFS continued to evaluate the effectiveness of the services provided throughout the case. Moler testified that JCFS believed respondent has a cognitive disability and JCFS offered some accommodations regarding the disability. Moler testified that as the case went on and more complications arose, JCFS added another caseworker. Respondent attended an epilepsy support group. Moler agreed that respondent has a strong desire to reunite with her children, maintained an interest in their health and well-being, and did her best to reunify with them.

¶ 18 Natalie Ross, a registered nurse with JCFS, was assigned as the family caseworker from October 2012 to December 2014. M.C. was diagnosed with inorganic failure to thrive and multiple respiratory issues, for which he took medications and followed a feeding plan. G.C.'s health issues—LQTS, epilepsy, and breathing issues—require daily medications for her heart, usage of an inhaler and nebulizer, and following a strict diet due to swallowing issues. The heart medications must be given regularly or she is at risk for cardiac arrhythmias. R.S. also had LQTS and she takes multiple medications, occasionally requires a feeding tube to assist with swallowing issues, and follows a specific diet. The children have multiple specialty medical providers involved in their care and require multiple doctor appointments. Respondent attended approximately 75% of the doctor appointments that Ross attended and she was responsive "at times" to the providers, but Ross or the foster parent would often have to interject.

¶ 19 Respondent was never able to accurately characterize the developmental concerns of the children and often overestimated their abilities. Ross spoke to respondent about her concerns, but respondent did not change this behavior. Respondent struggled to change the children's diapers

or dress and undress them. Ross believed unsupervised visitation would have posed a risk of harm to the children as respondent would not be able to manage the numerous doctor appointments and medications. Ross was also concerned about respondent's ability to administer emergency equipment such as heart monitors and defibrillators.

¶ 20 Becky Feiler was respondent's individual clinical therapist and parent coach through JCFS. Feiler has experience working with people who have traumatic brain injuries and developmental disabilities. Respondent had weekly therapy sessions with the goal of learning adaptations for her limitations and skills to support her in parenting. Feiler testified that respondent blamed DCFS involvement on M.C.'s father because he did not feed M.C. at night and her seizure disorder required her to get eight hours of sleep.

¶ 21 At the time of treatment with Feiler, respondent was "still committed" to the father of R.S., despite his imprisonment and conviction for a sex offense. Feiler counseled respondent, who was living with T.S., about finding more appropriate, supportive housing, but she "wasn't receptive at all to that" and respondent never sought it out. Feiler testified that respondent has a "rigidity to her thinking" and it was "her way or its this all or none thinking. *** I could make recommendations such as supportive housing. That wouldn't even be considered. She was going to do it on her own." Feiler never referred respondent to a housing advocate, but she "did encourage her and helped her apply for Section 8 housing," but respondent was not admitted.

¶ 22 Feiler also counseled respondent on financial planning. Respondent took out a $14,000 loan for massage therapy school, but did not pass the prerequisites for admission. Feiler suggested different options that would allow respondent to support her children, but respondent instead pursued another massage therapy school and took out another loan. Feiler also wanted to ensure respondent had a relationship with the foster parents so that she could essentially co-

parent, but progress on this objective was "minimal.” Individual therapy continued until February 2015. Respondent did not meet the therapy goals.

¶ 23 Feiler provided respondent with weekly parent coaching sessions. Feiler attempted to teach respondent techniques to work with the children, but she was unable to retain them. One of her "biggest deficits" was her difficulty multi-tasking and managing all children at once. Feiler discussed how to soothe M.C. when he exhibited "rocking" behaviors when distressed, but respondent stated that she did not want to take away this coping mechanism. Feiler testified that when she tried to redirect respondent, respondent would roll her eyes. Feiler was more involved because respondent had difficulty managing the children while R.S. was "crying hysterically." Feiler believed unsupervised visits would have posed a risk of harm to the children. Respondent did not make substantial progress in the parent coaching. Parent coaching ended in November 2014, but coaching for R.S. ended early because respondent could not soothe her. Feiler was aware that a November 2014 parenting capacity assessment recommended that the parenting coach should write down the specific recommendations so respondent had them during visits, but this was not done.

¶ 24 Hailey Zaldivar was R.S.'s JCFS caseworker from December 2013 to July 2015. R.S. was hospitalized from birth for a long period of time. R.S. receives speech therapy and developmental therapy, sees a neurologist and cardiologist, and must carry an AED at all times because of her heart condition. Initially, respondent had supervised visitation with R.S. three times per week. Zaldivar testified that in June 2014, the frequency of visits was reduced, but the length was increased. This was done to accommodate R.S.'s heart condition, as she would scream and cry in the car during the hour-long drive and this was not safe for her heart condition.

¶ 25 Respondent was consistent with her visitations, showed her children affection, and consistently attended meetings and court dates. However, Zaldivar testified that respondent did not make progress in her ability to handle and administer care for R.S. Zaldivar observed that respondent was "very unsteady" and once almost dropped R.S. while holding her. There were "a string of incidents" from December 2013 to February 2014 where respondent had to be repeatedly instructed on how to correctly hold the bottle to feed R.S. During a single feeding, Zaldivar or a nurse had to redirect respondent three to four times. Zaldivar once took over a feeding because respondent was unable to follow instructions. Zaldivar testified that respondent sometimes rolled her eyes and sighed or stated, "I know how to feed a baby." R.S. needed a feeding tube on occasion due to swallowing issues and aspirating formula into her lungs. Respondent never became trained in using the tube. Respondent had difficulty understanding R.S.'s abilities when she began eating purees and table food. The foster mother showed respondent the doctor's instructions for feeding, but respondent was unable to maintain correct feeding habits for R.S. throughout the entire time Zaldivar was assigned to the case.

¶ 26 Zaldivar testified that respondent often had to be frequently prompted to give R.S. medicine at the appropriate times. Respondent struggled to give the proper dosages and needed help with fine motor skills in transferring the medication and in administering it to R.S. while holding her. Similarly, respondent needed prompting to change R.S.'s diaper and often required assistance. She had difficulty soothing R.S. and "often would state that [R.S.] was inconsolable or hard to handle. She wouldn't talk about it in terms of her abilities." Respondent also was never able to accurately articulate R.S.'s developmental stages, despite Zaldivar's attempts to explain them.

¶ 27 Zaldivar testified that during the monthly visits when all three children were present, respondent's "abilities diminished" and she "needed much more prompting. She needed a lot of assistance in keeping the children safe." Zaldivar never recommended unsupervised visitation because she believed that R.S.'s safety would be jeopardized.

¶ 28 The State admitted into evidence a February 2015 Hephzibah Parenting Assessment team report conducted by Dr. Poonam Jha, Dr. Martin Blackman, and social worker Shelby Vorella. Dr. Jha, a board certified general and child adolescent psychiatrist, performed the psychiatric evaluation of respondent. She reviewed DCFS records, social assessments, therapy records, and medical records, and she interviewed respondent in November 2014. Dr. Jha testified that respondent related that her mother abandoned the family when she was two years old and she was raised by her father until he died when she was 13 or 14 years old, and she entered the foster care system. She has epilepsy and LQTS. Her father did not believe in traditional medicine, so she experienced multiple seizures during her childhood and did not receive treatment until she was a young adult. Dr. Jha opined that recurrent seizures "can have a significant impact on brain development and brain functioning, including memory, focus, attention, decision making, executive functioning." Executive functioning refers to the ability to plan, make decisions, and control impulses. Respondent reported being in a prolonged coma for two or three weeks following a seizure when she was 17 or 18 years old, which resulted in "significant regression of her motor and cognitive skills" and required extensive rehabilitation. Dr. Jha testified that this contributed to her impaired executive functioning.

¶ 29 Respondent did not feel like the mental health services mandated by DCFS were necessary. She told Dr. Jha that the assessment of her first child was "unfair" because it was

M.C.'s father's job to feed him. She also indicated she would continue contact with R.S.'s father despite his incarceration for sexual abuse.

¶ 30 Dr. Jha administered the Montreal Cognitive Assessment screening exam and her score indicated "significant impairment." Dr. Jha testified that her "cognitive abilities, specifically her memory and ***new information learning, limited her ability to care for these highly specialized needs kids. They're very fragile and required a lot of attention." This included "making doctor appointments, giving medications correctly, [and] ensuring their safety." Although she loved her children, respondent exhibited "limited understanding of her limitations and her ability" to care for them. She was unable to articulate a realistic plan for caring for the children on her own. She was living in temporary housing and did not have significant financial stability or a support system.

¶ 31 Dr. Jha diagnosed cognitive disorder secondary to epilepsy, unspecified depressive disorder, epilepsy, LQTS, status post-pacemaker, and defibrillator placement and history of numerous head injuries due to seizure activity. Dr. Jha concluded that respondent was unable to parent independently "due to her medical needs, history of medical instability and brain injury and lack of progress in services." She believed that allowing unsupervised time with the minors would pose a risk of harm to them. She testified that there were no treatments or medical advances which would reverse respondent's cognitive impairments, and that she did not believe respondent would be able to reverse the conditions causing her inability to parent.

¶ 32 Dr. Blackman, a clinical psychologist, performed the psychological evaluation of respondent for the Hephzibah assessment. He noted respondent's history of untreated epilepsy and seizures which caused cognitive delays related to executive functioning. One of his assessments showed a risk of being unable to empathize with a child's feelings. Respondent had

an average IQ, but had difficulty recognizing facial expressions or reading emotions. She reported feeling sad "much of the time," but did not have other aspects of depression.

¶ 33 Dr. Blackman observed a parent-child interaction and testified that respondent was slow to take a pencil away from G.C. while she was walking with it and one staff member intervened. Respondent had difficulty attempting to console R.S. when she cried and respondent missed R.S.'s feeding time by one hour. R.S. needed a nebulizer administered at various times and respondent was unable to implement this task, despite the fact that respondent had been instructed on the nebulizer numerous times. Dr. Blackman testified that the assessment team concluded that, to a reasonable degree of psychological certainty, respondent did not have the ability to independently discharge her parental responsibilities, and that this would extend beyond a reasonable period of time for the children.

¶ 34 Respondent admitted into evidence documents showing her current enrollment at DePaul University and a sample of visitation notes from the agency file regarding several of her visits.

¶ 35 The trial court issued a 21-page opinion on June 20, 2016, in which it found respondent unfit under grounds (m) and (p), but not under ground (b). The trial court found all the witnesses were credible and presented consistent testimony, which it reviewed at length. The trial court held that whether the ADA applied to termination proceedings was an evolving area of law. The trial court did not decide this issue because, even assuming the ADA applied, it found that respondent was provided with reasonable accommodations. The trial court found that respondent was unwilling to receive housing assistance based on Feiler's testimony that respondent was not interested in meaningfully addressing the need to find alternate housing with assistance. Although respondent argued that she should have received additional time to make progress, the trial court found that, even from the latest adjudication date for R.S., respondent had two and a

half years to demonstrate progress toward reunification, but failed to do so, and that this was a reasonable amount of time given the needs of the children and respondent's progress. The trial court held that the State met its burden under ground (p) as respondent was mentally unable to discharge her normal parental responsibilities and her inability to do so would extend beyond a reasonable period of time. The trial court found the evidence "overwhelming and uncontroverted" that she had a cognitive impairment, memory loss, and impaired executive functioning, and that this made it nearly impossible for her to independently attend to the complex medical needs of the children. The trial court found Drs. Jha and Blackman based their opinions on sound methodology, facts, and observations. It found no reasonable expectation that more time would result in a different outcome where she failed to progress to unsupervised visits with any of her children after four years of DCFS involvement. For the same reasons, the trial court also found respondent unfit under ground (m) for failing to make reasonable progress toward return of her children.

¶ 36 B. Best Interests Hearing

¶ 37 The best interests hearing was held on June 23, 2016. K.D., foster mother of M.C., testified that M.C. had lived with her, her husband, and their two biological sons for two and a half years. He progressed quickly and his developmental delays had diminished, he attended therapy, played sports, and called his foster parents “mom” and “dad” and thought of his foster brothers as “normal brothers.”

¶ 38 H.K., the foster mother of G.C., testified that G.C. has lived with her, her husband, and ten-year-old son since November 2013 and is strongly bonded. G.C. takes 13 medications, which she and her husband administer, and has numerous medical appointments and other therapy sessions.

¶ 39 D.B., foster mother of R.S., testified that R.S. had lived with her since she was two months old and R.S. was two and a half years old at the time of the hearing. She testified that R.S. takes medication and regularly sees a cardiologist and neurologist, receives speech and occupational therapy, occasionally needs a feeding tube, and has a heart machine to alert if she has an unstable heartbeat. D.B. is trained to use her medical devices.

¶ 40 All of the foster parents indicated a willingness to continue the visits with respondent and with biological siblings. Moler testified that M.C.'s foster parents were strong advocates for his needs and he had a strong bond with them, and G.C. has bonded with her foster family. Tracey Walsh was R.S.'s caseworker with JCFS beginning in December 2015 and testified about R.S.'s special needs and the strong bond with her foster family. Walsh and Moler believed it was in the children's best interests to terminate respondent's parental rights.

¶ 41 Respondent offered into evidence a February 2016 parent coaching report which stated that she was playful with M.C. and attuned to him; a letter from her neurologist that indicated that the benefits of contact between respondent and the children outweighed the relatively low risk of injury; a Hephzibah parenting assessment indicating she had reasonable expectations of M.C. and encouraged his psychological growth; and a report stating that she has strong emotional bonds with her children.

¶ 42 The trial court ruled that the evidence proved the children were in safe and appropriate placements, had bonded with their foster families, and felt a sense of security with them. It found that the children had a long term need for permanency, had complex medical issues, needed continuity of care on a safe an consistent basis, and they had been with their foster placements for most of their lives. It found it was in the children's best interests to terminate respondent's parental rights.

¶ 43 II. ANALYSIS

¶ 44 A. Finding of Unfitness

¶ 45 On appeal, respondent first contends that the trial court's determination that she was "unfit" as defined in Section 1(D)(m) and (p) of the Adoption Act was against the manifest weight of the evidence.

¶ 46 The Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq.* (West 2012)) sets forth a two-step process for the involuntary termination of parental rights. *In re M.I.*, 2016 IL120232, ¶ 20 (citing 705 ILCS 405/2-29(2) (West 2014)). First, the State must prove by clear and convincing evidence that the parent is "unfit" as defined by section 1(D) of the Adoption Act. *Id.*; 705 ILCS 405/2-29(2) (West 2012). If the parent is found unfit, the circuit court must then determine whether it is in the child's best interest to terminate parental rights. *Id.*; 705 ILCS 405/2-29(2) (West 2012).

¶ 47 Because the circuit court is in a superior position to observe and evaluate the parties and witnesses, we will not reverse a finding of unfitness unless it is against the manifest weight of the evidence. *In re M.I.*, 2016 IL120232, ¶ 21. " 'A court's decision regarding a parent's fitness is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent.' " *Id.* (quoting *In re Gwynne P.*, 215 Ill. 2d 340, 354 (2005)). Each parental unfitness case is evaluated *sui generis*, based on its individual facts. *In re C.E.,* 406 Ill. App. 3d 97, 108 (2010).

¶ 48 i. Ground (m) – Reasonable Progress

¶ 49 Subsection (m) provides that a parent is unfit if he fails "to make reasonable progress toward the return of the child" in the nine months following adjudication or during any nine-month period thereafter. 750 ILCS 50/1(D)(m)(ii), (iii) (West 2012). Failure to make reasonable

progress may include failure to "substantially fulfill *** her obligations under the service plan and correct the conditions that brought the child into care ***." 750 ILCS 50/1(D)(m) (West 2012).

¶ 50 Respondent argues that the trial court's finding of unfitness under section (m) was against the manifest weight of the evidence because DCFS failed to provide reasonable accommodations and services in light of her mental impairment. She relies on *In re M.I.*, 2015 IL App (3d) 150403, ¶ 14. However, our supreme court reversed this Third District case after the parties filed briefs in the present case. *In re M.I.*, 2016 IL 120232. The Third District overturned the termination of the father's rights under subsections (b) (reasonable degree of interest) and (m) (reasonable progress) because the trial court equated the father's failure to complete assigned services, which were beyond the father's diminished intellectual capacity, with a refusal to comply, and he was not provided with a service plan or appropriate accommodations. *In re M.I.*, 2015 IL App (3d) 150403, ¶¶ 16-19. In reversing the Third District, the Illinois Supreme Court found that the plain language of subsection (b) did not contain an implied state of mind requirement or create an exception for "faultless" failure. *In re M.I.,* 2016 IL 120232, ¶ 26. "A parent's circumstances, such as an intellectual disability, do not necessarily or automatically redeem a parent's failure to demonstrate reasonable interest, concern, or responsibility. Nor do such circumstances fix a different standard of reasonableness. Rather, the question is whether a parent's then-existing circumstances provide a valid excuse." *Id.* ¶ 29. The father's intellectual disability and poverty did not excuse his failure to attend visitations or refusal to comply with drug screening. *Id.* ¶¶ 34-36.

¶ 51 Although the supreme court in *M.I.* only interpreted and based its ruling on subsection (b), the plain language of subsection (m) is similar to the language in subsection (b) in that it

contains no state of mind requirement: "(m) Failure by a parent *** (ii) to make reasonable progress toward the return of the child to the parent ***." 750 ILCS 50/1(D)(m)(ii) (West 2014). In light of our supreme court's reversal of *In re M.I.*, we are not persuaded by respondent's reliance on the Third District's decision or its analysis of subsection (m).

¶ 52 Our court has determined that reasonable progress "is judged by an objective standard" and requires, at a minimum, "measurable or demonstrable movement toward the goal of reunification." *In re D.E.*, 368 Ill. App. 3d 1052, 1067 (2006). The benchmark of reasonable progress "encompasses the parent's compliance with the service plans and the court's directives, in light of the condition which gave rise to the removal of the child, and in light of other conditions which later become known and which would prevent the court from returning custody of the child to the parent." *In re C.N.*, 196 Ill. 2d 181, 216-17 (2001). See *In Interest of Edmonds*, 85 Ill. App. 3d 229, 233 (1980) (finding that regardless of mother's limited mental abilities, the weight of the evidence showed that she failed to make reasonable progress in over four years of services); *In re S.K.B.,* 2015 IL App (1st) 151249, ¶¶ 32-35 (affirming finding of unfitness where mother complied with therapy and taking medication, developed some coping strategies, and expanded her support network, but had significant psychiatric history, continued to exhibit signs of mental illness, and was never capable of unsupervised visitations).

¶ 53 We find that the trial court's determination that respondent failed to make reasonable progress was not against the manifest weight of the evidence. The testimony from the various DCFS and JCFS witnesses and doctors uniformly demonstrated that, despite parenting classes, individual therapy, and individual parent coaching over approximately four years of DCFS involvement, respondent failed to make measurable progress toward reunification. Despite repeated coaching, instruction, demonstration, and intervention, respondent was unable to

implement parenting techniques, remember the children's feeding schedules, or use proper feeding techniques. She struggled to change diapers and often required assistance and prompting to do so. She was unable to soothe R.S. and believed it was because she was "inconsolable," instead of realizing it related to respondent's own lack of ability to soothe her. She consistently failed to understand the children's appropriate developmental stages, despite repeated attempts by staff to educate her. She similarly was unable to handle the children's complex medical needs, she was unable to independently administer their medication on a timely basis, unable to use the medical instruments necessary for their care, and unable to correctly administer the appropriate type and dose of medication. Her struggles with managing the children, feeding them, and administering their medical care were only exacerbated when all three children were present. Despite four years of DCFS involvement, respondent never progressed to unsupervised visitations with any of the children. She was also unable to create a support network to assist her in caring for the children and failed to find suitable housing.

¶ 54 The trial court considered the dynamics of respondent's circumstances, including her mental abilities. Respondent was provided with individual parent coaching, offered housing assistance and received assistance with applying for Section 8 housing. She had two caseworkers assigned to her complicated case. Her individual therapist had experience dealing with traumatic brain injuries, she attended an epilepsy support group, and she saw a neurologist. She was unwilling to receive the additional housing assistance offered and she did not make progress despite being given additional time. Given this record, the trial court's decision that respondent failed to make "measurable or demonstrable movement toward the goal of reunification" (*In re D.E.*, 368 Ill. App. 3d at 1067) was not against the manifest weight of the evidence.

¶ 55 Respondent asserts that she complied with all mandated services and made substantial efforts toward reunification. However, the trial court found that respondent failed to make reasonable *progress* under subsection (m)(ii), which is distinct from a finding under subsection (m)(i), failure to make "reasonable *efforts*" to correct the conditions which led to removal of the child. See 750 ILCS 50/1(D)(m)(i), (ii) (West 2014). Even when a parent participates in all required services, she may fail to make reasonable progress under subsection (m)(ii). See, *e.g.*, *In re C.E.*, 406 Ill. App. 3d 97 (2010).

¶ 56 ii. Ground (p) – Inability to Discharge Parental Responsibilities

¶ 57 Pursuant to subsection (p), the State must show an "[i]nability to discharge parental responsibilities supported by competent evidence from a psychiatrist, licensed clinical social worker, or clinical psychologist of mental impairment, mental illness or an intellectual disability *** or developmental disability *** and there is sufficient justification to believe that the inability to discharge parental responsibilities shall extend beyond a reasonable time period." 750 ILCS 50/1(D)(p) (West 2012); *In re S.R.*, 2014 IL App (3d) 140565, ¶ 23.

¶ 58 The trial court's finding of unfitness under subsection (p) was not against the manifest weight of the evidence. Overwhelming evidence demonstrated that respondent's epilepsy-related cognitive impairment, memory impairment, and impaired executive functioning and decision-making ability made it impossible for her to independently manage the complex medical needs of the three children. Drs. Jha and Blackman testified concerning respondent's medical history and impaired cognitive abilities that limited her ability to provide the highly specialized care the children required, including making doctor appointments, correctly and timely administering medications, and ensuring their safety. Although respondent criticizes Dr. Jha's use of the Montreal Cognitive Assessment test, Dr. Jha explained that this was merely used as a screening

test, not a diagnostic test, to highlight areas of concern. Dr. Blackman's observation of the parent-child interaction confirmed his concerns, as respondent was unable to properly feed R.S. or administer her nebulizer or protect G.C. from dangerous behavior. Both doctors opined that respondent was unable to independently discharge her parental responsibilities, there was no treatment available to reverse her cognitive impairments, and they would extend beyond a reasonable period of time for the children.

¶ 59 Their testimony was supported by the testimony of the caseworkers and respondent's clinical therapist and parent coach, who detailed the children's significant, life-long, and complicated medical issues and the specialized medical and developmental treatment they required on a daily and ongoing basis. Despite repeated attempts to teach respondent proper schedules and techniques for feeding and administering medicine to the children, respondent was unable to retain this information or accomplish these crucial tasks. She was unable to learn how to successfully use the medical equipment her children required. She was unable to understand appropriate developmental activities and stages and struggled to perform basic tasks such as diapering and consoling the children. Although it was clear that respondent loved her children, the State proved by clear and convincing evidence that respondent was unable to discharge her parental responsibilities due to her impairment and this inability will extend beyond a reasonable period of time.

¶ 60 We are not persuaded by respondent's citation of *In re Cornica J.*, 351 Ill. App. 3d 557 (2004). There, the State's case rested largely on the testimony of one expert, and other witnesses contradicted the State's evidence. *Id.* at 566-67, 70. Here, by contrast, the State's case was supported by the testimony of two experts who evaluated respondent and the detailed records in

her case, Dr. Blackman observed a parent-child interaction, and the doctors' testimony was supported by the testimony of Moler, Feiler, Zaldivar, and Ross.

¶ 61 B. Best Interests Determination

¶ 62 Respondent next challenges the trial court's decision that it was in the minors' best interests to terminate her parental rights.

¶ 63 The State bears the burden of proving that termination of parental rights is in a child's best interests. *In re D.T.*, 212 Ill. 2d 347, 363-66 (2004). The trial court must consider, "in the context of a child's age and developmental needs," the following factors set forth the Juvenile Court Act:

> "(1) the child's physical safety and welfare; (2) the development of the child's identity; (3) the child's background and ties, including familial, cultural, and religious; (4) the child's sense of attachments, including love, security, familiarity, and continuity of affection, and the least-disruptive placement alternative; (5) the child's wishes; (6) the child's community ties; (7) the child's need for permanence, including the need for stability and continuity of relationships with parental figures and siblings; (8) the uniqueness of every family and child; (9) the risks related to substitute care; and (10) the preferences of the persons available to care for the child." *In re Jay H.,* 395 Ill. App. 3d 1063, 1071 (2009).

¶ 64 We will not reverse a trial court's best-interest finding unless it is against the manifest weight of the evidence; that is, the facts clearly show that the court should have reached an opposite conclusion. *In re Jay H.*, 395 Ill. App. 3d at 1071.

¶ 65 Respondent contends that she made reasonable efforts to comply with all services, she continually visited her children, and loves them and has a bond with them. She relies on *In re M.F.,* 326 Ill. App. 3d 1110 (2002), in asserting that a finding of unfitness does not necessarily mean it is in a child's best interest that parental rights be terminated. In that case, the appellate court upheld the determination that the mother was unfit due to a mental disability which prevented her from carrying out her parental responsibilities. *Id.* at 1115. The court reversed the decision to terminate the mother's parental rights as to her older child, however, because she consistently visited the child for several years, the minor expressed an interest in continuing to visit the mother, the mother loved the minor and worked to foster their relationship, and the minor would not gain more stability by terminating the mother's rights because she resided with the father, who had full custody and guardianship. *Id.* at 1117-18. The court held that no benefits were to be gained by termination, and it would deprive the minor of an already established relationship with her mother. *Id.* at 1118.

¶ 66 In contrast, none of the children here were in the custody and guardianship of their natural fathers, and, therefore, terminating respondent's parental rights would have an effect on the permanency of their placements. Although the record is clear that respondent loves and is attached to the children and visits them consistently, the older child in *In re M.F.* had a long-established bond with the mother, whereas the children here were all removed from respondent's care at very young ages, have been living with their foster families for most of their lives, and the children have bonded with their respective foster families. The evidence showed that all three children were thriving in their foster homes, had fully integrated into the families, the foster parents were able to adequately attend to their developmental and medical needs, and their foster parents want to adopt them.

¶ 67 Although the bond between a child and his natural parent is one consideration in a best interests finding, it is but one of many factors a trial court must take into account. *In re Jay H.,* 395 Ill. App. 3d at 1071. See 705 ILCS 405/1-3(4.05) (West 2012). Balancing the many considerations is "a difficult and delicate task, requiring a nuanced analysis of the statutory factors." *In re D.T.,* 212 Ill. 2d at 354-55. This court has affirmed decisions terminating parental rights where, notwithstanding such a bond, the child was thriving with the foster family and the child's need for permanency and stability took precedence. *In re Tajannah O.*, 2014 IL App (1st) 133119, ¶¶ 22-35. Moreover, the foster families were committed to maintaining a relationship with respondent. See, *e.g.*, *In re Shauntae P.*, 2012 IL App (1st) 112280, ¶¶ 108-09 (affirming termination of parental rights despite bond with mother where children had been with foster families for most of their lives and needed permanency and foster parents encouraged contact with mother and extended biological family). In ruling, the trial court here emphasized the children's long-term need for permanency and, given their complex medical needs, their need for consistent and safe care. This decision is not against the manifest weight of the evidence. *In re Jay H.*, 395 Ill. App. 3d at 1071.

¶ 68 C. Americans with Disabilities Act

¶ 69 In her final claim on appeal, respondent argues that the unfitness determination should be reversed because she was not provided reasonable accommodations in the provision of reunification services, in violation of the ADA and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 749(b)(1)(A), (B)).

¶ 70 “[T]he interpretation and application of a statute is a matter of law *** subject to *de novo* review.” *Rudy v. People*, 2013 IL App (1st) 113449, ¶ 11 (citing *Unzicker v. Kraft Food*

Ingredients Corp., 203 Ill. 2d 64, 74 (2002)). See *In re A.H.*, 207 Ill. 2d 590, 593 (2003) (Issues of law are reviewed *de novo* on appeal.)

¶ 71 Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 provides that qualified disabled persons shall not "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *** solely by reason of her or his disability." 29 U.S.C. 794(a).[3]

¶ 72 The State and public guardian contend respondent forfeited this claim, asserting that, to avoid forfeiture, an ADA claim must be raised well before a termination hearing.[4]

¶ 73 Generally, an issue is procedurally defaulted when a respondent "fail[s] to raise this issue in the trial court." *In re Tamera W.*, 2012 IL App (2d) 111131, ¶ 29 (citing *In re M.W.,* 232 Ill. 2d 408, 430 (2009) (stating that forfeiture principles requiring an objection at trial to preserve an error applies to proceedings under the Juvenile Court Act). See *In re Jeanette L.*, 2017 IL App (1st) 161944, ¶ 16 (the respondent, in appealing the termination of her parental rights, forfeited her claim that the services provided did not reasonably accommodate her disability under the ADA because she did not raise this claim at any point during the proceedings below).

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[3] A "public entity" is defined as "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1) (2000)(A), (B). According to the Code of Federal Regulations, a title IV-E agency is required to make “reasonable efforts” to maintain the family unit or effectuate the safe reunification of a child, and directs that in determining reasonable efforts, “the child's health and safety must be the paramount concern.” 45 C.F.R. § 1356.21(b). The Illinois Administrative Code sets forth a grievance procedure pursuant to the ADA which states that “[i]n general, the ADA requires that each program, service and activity offered by the Department of Children and Family Services, when viewed in its entirety, be readily accessible to and usable by qualified individuals with disabilities.” 4 Ill. Adm. Code § 425.10(b) (Adopted at 36 Ill. Reg. 12303, eff. July 20, 2012).

[4] See *In re Terry*, 240 Mich. App. 14, 25-26 (2000) (holding that a parent must timely claim an ADA violation when a service plan is adopted or soon thereafter so that the agency can make accommodations).

¶ 74 Here, although it does not appear that respondent raised an ADA claim with DCFS earlier in the case before termination proceedings commenced, she did, in fact, present her ADA argument at her unfitness hearing. Moreover, "[t]he termination of parental rights affects a fundamental liberty interest." *In re Tamera W.*, 2012 IL App (2d) 111131, ¶ 30. Our forfeiture rule "is a limitation on the parties, not the reviewing court, and we will relax the forfeiture rule to address a plain error affecting the fundamental fairness of a proceeding, maintain a uniform body of precedent, and reach a just result." *Id.*

¶ 75 The public guardian argues that the ADA cannot serve as a defense in termination proceedings. Even if it is applicable, the issue of whether individualized services were offered to respondent is irrelevant under subsection (p), because that subsection does not require the State to provide reunification services, and this court can affirm solely on the basis of subsection (p). Regarding subsection (m), the public guardian asserts that respondent was provided with specific individualized services in compliance with the ADA. The State echoes these arguments.

¶ 76 Recently, after the parties filed briefs in the present case, this court held that the ADA cannot serve as a defense in termination of parental rights proceedings. *In re Jeanette L.*, 2017 IL App (1st) 161944, ¶ 17. In *Jeanette*, the mother, who had cognitive and developmental delays, was found unfit based on subsections (b) and (m), but not (p). *Id.* ¶ 11. The mother argued on appeal that the services provided were not reasonably accommodated to her developmental disability in violation of the ADA. *Id.* ¶ 15. This court held that, although the mother forfeited the claim by failing to raise it below, the ADA claim was nevertheless meritless because termination of parental rights proceedings were not "services, programs, or activities" subject to ADA requirements. *Id.* ¶ 17 (citing *In re S.R.*, 2014 IL App (3d) 140565, ¶ 28; *In re Adoption of Gregory*, 434 Mass. 117 (2001); *In re B.S.*, 166 Vt. 345 (1997)). In addition, the court held that

under subsection (p), "a parent's developmental disabilities *per se* are not sufficient grounds to terminate parental rights; rather, developmental disability is a ground for parental unfitness only where 'there is sufficient justification to believe that the inability to discharge parental responsibilities shall extend beyond a reasonable time period.' " *Id.* (quoting 750 ILCS 50/1(D)(p) (West 2012)). This court further determined that "overwhelming evidence supporting the trial court's findings" under subsections (b) and (m). *Id.* This court also concluded that, assuming the ADA applied, the State "*did* offer accommodations that took [the mother's] developmental disabilities into account" in that she was referred for individual therapy to address her developmental delays. *Id.* ¶ 19.

¶ 77 In light of this precedent, we reject respondent's ADA claim. *In re Jeanette L.*, 2017 IL App (1st) 161944, ¶ 17. Respondent's citation to cases from foreign jurisdictions is unavailing considering *In re Jeanette L.* See also *In re S.R.*, 2014 IL App (3d) 140565, ¶ 28 (finding that the ADA does not apply to termination of parental rights proceedings because they are not "services, programs or activities," and termination proceedings do not discriminate against disabled persons because mental disability "is not, by itself, a ground for terminating parental rights").

¶ 78 With regard to subsection (p), as this court held in *In re Jeanette L.*, "a parent's developmental disabilities *per se* are not sufficient grounds to terminate parental rights; rather, a developmental disability is a ground for parental unfitness only where 'there is sufficient justification to believe that the inability to discharge parental responsibilities shall extend beyond a reasonable time period.' " *In re Jeanette L.*, 2017 IL App (1st) 161944, ¶ 17 (quoting 750 ILCS 50/1(D)(p) (West 2012)). Even if the ADA applied to termination proceedings, there is no specific discrimination against those with mental disabilities under subsection (p) as this cannot serve as a basis for termination of rights standing alone.

¶ 79 As in *In re Jeanette L.*, and for the reasons previously discussed, there was overwhelming evidence to support the trial court's conclusion that respondent was unfit under ground (m) (reasonable progress). Even if we were to assume that the ADA applies, DCFS reasonably accommodated respondent's disabilities. DCFS provided numerous services designed to improve her parenting skills and learn to manage the children's complex medical needs in light of her cognitive impairment. She was assigned a particular therapist and parent coach who had experience working with people who had suffered brain injuries or had developmental disabilities, and continued therapy was offered even after the goal changed. Two caseworkers were assigned to handle the amount of services needed by respondent and the children. Moler evaluated the effectiveness of respondent's services over time and testified that respondent was offered accommodations for her cognitive disability. Respondent saw a neurologist and participated in an epilepsy support group. DCFS attempted to offer housing assistance to respondent, but she refused the assistance. Although visitation time and frequency were reduced over time, it does not follow that respondent would have done better with *more* visitation, given that she was unable to manage the visitations with the children that she did receive.

¶ 80 Respondent's reliance on *In re M.I.*, 2015 IL App (3d) 150403, is unavailing. The Third District in *In re M.I.* specifically stated that it was not relying on the ADA in reversing the termination of parental rights because Illinois law already requires a parent's progress to be "measured in light of the circumstances that lead to the neglect." *In re M.I.*, 2015 IL App (3d) 150403, ¶ 16. The supreme court similarly did not rely on the ADA in overturning the Third District's decision to reverse the termination of parental rights. *In re M.I.*, 2016 IL 120232, ¶ 47.

¶ 81 III. CONCLUSION

¶ 82 The trial court's finding of unfitness and its best interest determination were not against the manifest weight of the evidence. The ADA cannot serve as a defense to the termination proceedings against respondent, and even if the ADA applied, DCFS provided reasonable accommodations in light of her mental disabilities. We affirm the trial court's termination of respondent's parental rights.

¶ 83 Affirmed.