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2017 IL App (3d) 160517-U

Order filed February 1, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

<i>In re</i> A.D.,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
a Minor)	Peoria County, Illinois.
)	
(The People of the State of Illinois,)	
)	
Petitioner-Appellee,)	Appeal No. 3-16-0517
)	Circuit No. 11-JA-171
v.)	
)	
Andre D.,)	
)	The Honorable
Respondent-Appellant).)	Kirk D. Schoenbein,
)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Holdridge and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's denial of respondent's motion for a directed finding and grant of the petition for termination of parental rights pursuant to section 1(D)(m)(ii), (D)(i) of the Adoption Act (750 ILCS 50/1(D)(m)(ii), (D)(i) (West 2014)) was not against the manifest weight of the evidence.

¶ 2 The State filed a petition for termination of parental rights against respondent alleging (1) respondent failed to make reasonable progress toward the return of A.D. pursuant to section 1(D)(m)(ii) of the Adoption Act (750 ILCS 50/1(D)(m)(ii) (West 2014)), and (2) respondent was a deprived person pursuant to section 1(D)(i) of the Adoption Act (750 ILCS 50/1(D)(i) (West 2014)). As a result, the trial court terminated respondent's parental rights. We affirm.

¶ 3 FACTS

¶ 4 Respondent Andre D. brings a claim before this court challenging the State's petition for termination of parental rights of A.D., who was born on July 26, 2011. In August 2011, the State filed a juvenile petition claiming A.D. was neglected due to an injurious environment. *In re A.D.*, 2012 IL App (3d) 120085-U, ¶ 1. The trial court found respondent unfit as a parent and A.D. was adjudicated a neglected minor. *Id.* ¶ 11. Also, a service plan order was entered requiring respondent to (1) execute all authorizations for releases of information requested by the Department of Children and Family Services (DCFS); (2) cooperate fully and completely with DCFS or its designees; (3) obtain and complete a drug and alcohol assessment arranged by DCFS or its designee and provide proof of successful completion; (4) participate in and complete counseling and provide proof of successful completion; (5) participate in and complete a domestic violence course specified by DCFS or its designee and provide proof of successful completion; (6) obtain and maintain stable housing for the minor; (7) provide to the assigned caseworker any change in address or phone number; (8) provide the assigned caseworker information regarding any individual requested by DCFS or its designee; and (9) schedule supervised visits with A.D. at times and places set by DCFS or its designee.

¶ 5 In July 2015, the State filed a petition for termination of parental rights alleging (1) respondent failed to make reasonable progress toward the return of A.D. as stated in count II and (2) respondent was a depraved person as stated in count III.

¶ 6 An adjudicatory hearing was held on the petition for termination of parental rights. At the hearing, the trial court took judicial notice of the respondent's service plan.

¶ 7 The State presented respondent as an adverse witness who testified to his full name, its spelling, his date of birth, and that he was incarcerated at the Bureau of Prisons because he had a federal case pending in Peoria County. Certified copies of respondent's prior convictions were admitted into evidence.

¶ 8 James Budds, a child welfare specialist with Lutheran Social Services, testified that he was the caseworker on this case from September 2014 to November 2015. Between October 2, 2014, and July 2, 2015, respondent did not notify Budds that he was in prison and Budds had no knowledge of respondent's participation and completion in a drug and alcohol assessment and a domestic violence program. Also, respondent did not have any visits with A.D.

¶ 9 On cross-examination, Budds testified he discovered respondent was incarcerated in Big Sandy Federal Penitentiary at a permanency hearing in June 2015 and may have reviewed a June 2014 order that listed respondent as a federal prisoner in Peoria County Jail but made no attempts to contact respondent in jail. Budds stated he authored a December 2014 report that stated a diligent search listed respondent's address as the Peoria County Courthouse and that respondent did not participate in any services during the reporting period. Budds testified that he was assigned the case after the previous caseworker resigned. The previous caseworker did not indicate to Budds that respondent was in federal custody at the Peoria County Jail. Once Budds

discovered respondent was in federal prison, Budds sent a letter to respondent requesting him to contact Budds.

¶ 10 In response to the trial court's inquiries, Budds stated that he conducted a search for respondent's address through DCFS and the Illinois Department of Corrections but did not conduct a search through the Federal Bureau of Prisons.

¶ 11 In February 2016, respondent filed a motion for directed finding as to count II of the petition for termination of parental rights, which the trial court denied. The trial court acknowledged Budds' failure to discover respondent was in federal custody but found the State made a *prima facie* case that respondent failed to make reasonable progress.

¶ 12 Respondent presented his case and testified that he had been in custody at the Peoria County Jail from February 26, 2013, to October 2, 2014, at FCI Big Sandy from October 2, 2014, to December 2015, and currently at FCI Pekin. Respondent completed a drug education program, and participated in a "stop the violence" program that dealt with anger management, a GED Program, and a parenting class at FCI Big Sandy. Respondent planned to take college courses after he obtained his GED and believed he was rehabilitated and capable of obeying the law. Respondent expected to be released from custody in 2018 or 2019.

¶ 13 On cross-examination, respondent testified that he had been to prison twice and was previously sentenced to the Illinois Department of Corrections because he violated his probation.

¶ 14 The trial court determined that the State had proven counts II and III of the petition. As to Count II, the court held that respondent failed to make reasonable progress toward the return of A.D. because respondent failed to communicate with DCFS in compliance with his service plan. Moreover, respondent did not provide sufficient evidence that he participated and completed the

courses he took in prison and did not provide sufficient evidence on the objective of each course to ensure compliance with his service plan.

¶ 15 As to count III, the court held that, although respondent rebutted the presumption of depravity, respondent demonstrated his unwillingness to conform to the accepted morality because he committed his most recent offense while this case was pending, he had two probation violations, and his offenses became more severe over time.

¶ 16 In June 2016, a best interest hearing on the petition for termination of parental rights was held and the trial court found the termination of respondent's parental rights to be in the best interest of A.D. Respondent appealed.

¶ 17 ANALYSIS

¶ 18 Section 1(D)(m)(ii)

¶ 19 Respondent argues that the trial court erred when it denied his motion for directed finding pursuant to section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2014)) as to count II of the petition because the State did not provide sufficient evidence to show that respondent was not making reasonable progress toward the return of A.D.

¶ 20 A trial court's review of a motion for directed finding pursuant to section 2-1110 involves a two-step analysis: (1) the court must determine if the plaintiff presented "some evidence on every element essential to the cause of action" and (2) if evidence is presented, the court must "consider and weigh the totality of the evidence presented, including evidence favorable to the defendant," and determine whether sufficient evidence establishes plaintiff's *prima facie* case. *Vician v. Vician*, 2016 IL App (2d) 160022, ¶ 35 (citing *527 S. Clinton, LLC v. Westloop Equities, LLC*, 403 Ill. App. 3d 42, 52 (2010)). If the trial court finds a *prima facie* case was presented, the court will deny defendant's motion. *Id.* "Generally, evidence examined under the

second prong must prove the plaintiff's case by a preponderance of the evidence.” *Id.* The appellate court will not reverse the trial court’s ruling unless it is contrary to the manifest weight of the evidence. *Id.* (citing *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 276 (2003)).

¶ 21 Section 1(D)(m)(ii) states:

“D. ‘Unfit person’ means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption. The grounds of unfitness are any one or more of the following ***

* * *

(m) Failure by a parent *** (ii) to make reasonable progress toward the return of the child to the parent during any 9-month period following the adjudication of neglected or abused minor under Section 2-3 of the Juvenile Court Act of 1987 or dependant minor under Section 2-4 of that Act. If a service plan has been established as required under Section 8.2 of the Abused and Neglected Child Reporting Act to correct the conditions that were the basis for the removal of the child from the parent and if those services were available, then, for purposes of this Act, ‘failure to make reasonable progress toward the return of the child to the parent’ includes the parent’s failure to substantially fulfill his or her obligations under the service plan and correct the conditions that brought the child into care during any 9-month period

following the adjudication under Section 2-3 or 2-4 of the Juvenile Court Act of 1987.” 750 ILCS 50/1(D)(m)(ii) (West 2014).

¶ 22 In light of the child’s best interest, reasonable progress requires demonstrable action toward the goal of the return of the child. *In re A.S.*, 2014 IL App (3d) 140060, ¶ 17. “[T]he benchmark for measuring a parent's progress toward the return of the child under section 1(D)(m) of the Adoption Act 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.” (Internal quotation marks omitted.) *Id.* (quoting *In re C.N.*, 196 Ill. 2d 181, 216-17 (2001)). Evidence of reasonable progress is present when “the trial court can conclude that it will be able to order the child returned to parental custody in the near future.” *Id.* Courts must only consider evidence occurring during the nine-month period stated in section 1(D)(m) of the Adoption Act. *Id.* ¶ 35; see 750 ILCS 50/1(D)(m) (West 2014).

¶ 23 Here, the State admitted into evidence respondent’s service plan, which listed various obligations assigned to respondent to remedy the conditions that lead to the adjudication of A.D. The service plan listed, among other things, that respondent complete a domestic violence course, a drug and alcohol assessment, and counseling and that respondent provide the caseworker any change in address or telephone number. Budds testified that he was never notified of respondent’s status in prison until the end of the nine-month period. Further, Budds stated that he did not have knowledge that respondent was participating in courses. The service plan also obligates respondent to maintain stable housing for A.D. and schedule visitation. Budds testified that respondent did not visit with A.D. during the nine-month period. Moreover, respondent was unable to provide A.D. with a stable home because he is incarcerated. For these

reasons, the State presented sufficient evidence to establish a *prima facie* case that respondent did not make reasonable progress toward the return of A.D.

¶ 24 Next, we determine whether the trial court's finding was against the manifest weight of the evidence. As previously discussed, the trial court ordered respondent to comply with the obligations listed in his service plan and respondent failed to comply with various requirements. Specifically, respondent did not provide sufficient evidence to prove he completed the courses in compliance with his service plan because respondent was required to provide DCFS with proof of completion. Also, respondent's service plan stated he was required to take courses arranged and specified by DCFS, and he failed to provide sufficient evidence on the objectives of his courses. Furthermore, respondent made no effort to inform DCFS of his transfer to three different prison facilities or schedule visits with A.D. Respondent argues that Budds is at fault for his failure to discover respondent was in federal prison. However, respondent fails to acknowledge that he was given a service plan that stated his obligation to contact DCFS. Also, we note that respondent's imprisonment is not an excuse for noncompliance with his service plan. See *In re J.L.*, 236 Ill. 2d 329, 341 (2010) (holding that the nine-month period stated in the statute was not tolled when a parent was in custody). Based on this information, we find the trial court's denial of respondent's motion for directed finding is not against the manifest weight of the evidence.

¶ 25 We note that this issue resolves the appeal because the State has provided a basis sufficient to establish the termination of respondent's parental rights. See *In re C.W.*, 199 Ill. 2d 198, 217 (2002) (termination of parental rights is sufficient on any one ground alleged in the petition). However, we will review respondent's claim as to count III of the petition.

¶ 26

Section 1(D)(i)

¶ 27 Respondent claims that the trial court’s ruling as to count III was against the manifest weight of the evidence because the State failed to prove respondent’s inability or unwillingness to conform to accepted morality in accordance with section 1(D)(i) of the Adoption Act. 750 ILCS 50/1(D)(i) (West 2014).

¶ 28 In the trial court, the State must prove its basis for a parent's unfitness by clear and convincing evidence. *In re A.M.*, 358 Ill. App. 3d 247, 252 (2005). Reviewing courts must give great deference to a trial court's finding of unfitness and must not reverse such a finding unless it is against the manifest weight of the evidence. *Id.*

¶ 29 Section 1(D)(i) states:

“D. ‘Unfit person’ means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption. The grounds of unfitness are any one or more of the following ***

* * *

(i) ***

There is a rebuttable presumption that a parent is deprived 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[.] 750 ILCS 50/1(D)(i) (West 2014).

¶ 30 If the respondent presented evidence sufficient to rebut the presumption, the State has the burden of proving respondent is still deprived by clear and convincing evidence. *In re A.M.*, 358 Ill. App. 3d at 254. To establish depravity, respondent’s actions “must be of sufficient duration

and of sufficient repetition to establish a deficiency in moral sense and either an inability or unwillingness to conform to accepted morality.” (Internal quotation marks omitted.) *Id.* at 253.

¶ 31 In this case, there was a rebuttable presumption that respondent was a depraved person because he was convicted of three felonies: two convictions for unlawful possession of controlled substance and one conviction for possession with intent to distribute and possession of a firearm in furtherance of a direct trafficking crime.

¶ 32 Respondent presented evidence to rebut the presumption when he testified that he completed a drug education course and parenting course and participated in a “stop the violence” program and GED program.

¶ 33 Yet, the trial court held respondent was still depraved because he was unwilling to conform to accepted morality. Specifically, the evidence shows defendant was given two chances at rehabilitation when sentenced to probation in 2002 and 2007; however, respondent violated both probations and was sentenced to prison on each offense. Furthermore, the evidence shows respondent committed his most recent federal offense while A.D.’s wardship was pending and the severity of respondent’s convictions increased over the years. For these reasons, the trial court believed defendant showed a lack of progress toward rehabilitation. We determine the State presented clear and convincing evidence that respondent was still depraved after the presumption was rebutted. Thus, we hold the trial court’s decision to terminate respondent’s parental rights was not against the manifest weight of the evidence.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Peoria County is affirmed.

¶ 36 Affirmed.