FILED
September 21, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 170309-U

NOS. 4-17-0309

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: K.S., a Minor	)	Appeal from
	)	Circuit Court of
(The People of the State of Illinois,	)	Macon County
Petitioner-Appellee,	)	No. 16JA152
v.	)	
Cindy Miller,	)	Honorable
Respondent-Appellant).	)	Thomas E. Little,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) By finding the minor to be neglected, the trial court did not make a finding that was against the manifest weight of the evidence.

(2) Respondent is estopped from challenging the trial court's decision to make the minor a ward of the court.

(3) It was not an abuse of discretion to award guardianship and custody of the minor to the Illinois Department of Children and Family Services, with the power to place the minor.

¶ 2 The trial court adjudged K.S., born December 11, 2012, to be a neglected minor, made him a ward of the court, and awarded guardianship and custody of him to the Illinois Department of Children and Family Services (Department). Respondent, Cindy Miller, his mother, appeals both the adjudication and the disposition. (The child's father, Shawn Stolley, who is confined in Lawrence Correctional Center with a projected parole date of November 3, 2018, does not appeal.)

¶ 3 As for the adjudication, the trial court did not make a finding that was against the manifest weight of the evidence. The record contains evidence of neglect. As for the disposition, respondent's attorney conceded to the court that K.S. should be made a ward of the court. Consequently, respondent now is estopped from taking a contrary position. We are unconvinced that the rest of the disposition, awarding custody and guardianship to the Department, was an abuse of discretion. Therefore, we affirm the court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Adjudicatory Hearing

¶ 6 On January 19 and February 15, 2017, the trial court held an adjudicatory hearing. Evidence tended to show the following.

¶ 7 In a Facebook conversation with respondent, Ellie Pumphrey agreed to watch K.S. at her house overnight while respondent, who was wanted on a warrant, turned herself in to the police and bonded out. (According to a dispositional report, filed on February 24, 2017, the warrant was for criminal damage to state property.) Around 5 p.m. on Thursday, September 29, 2016, K.S.'s stepfather, Jack Miller, dropped K.S. off at Pumphrey's house. K.S. had the clothes he was wearing, some digital video disks, and a tube of medication—nothing more.

¶ 8 A couple of hours after Jack Miller dropped off K.S. at Pumphrey's house, respondent asked Pumphrey on Facebook if it would be all right if she came over, hugged and kissed K.S., and took a shower before she went to jail. Pumphrey replied that would be fine. When asked in the adjudicatory hearing why respondent did not shower at her own house, Pumphrey answered that respondent wanted to avoid Jack Miller—the record does not appear to reveal why. Respondent came over to Pumphrey's house and then, according to Pumphrey's

testimony, left sometime between 1 a.m. and about 8 a.m. on Friday, September 30, 2016—without taking K.S. with her.

¶ 9 Cynthia Williams testified that after 8 a.m., when she got off work, she gave respondent a ride from Pumphrey's house to her, Williams's, house. Having worked the night shift, Williams slept while respondent watched her children. Williams was unaware at the time that a warrant had been issued for respondent's arrest.

¶ 10 In the meantime, K.S. was still at Pumphrey's house. Pumphrey had agreed to watch K.S. for the night on the understanding that (1) respondent would pick up K.S. by the afternoon of the next day, Friday, September 30, 2016, and (2) Jack Miller, respondent's husband, would give Pumphrey some money for food. Friday afternoon arrived, and Pumphrey tried calling respondent six or seven times to find out when she would pick up K.S., but the calls kept going to voice mail. She tried calling Jack Miller, too, but he did not answer. Then she tried messaging respondent on Facebook. Upon receiving no response from her, she tried messaging respondent's father, but he did not respond either. (There appears to be some discrepancy in the evidence as to whether Pumphrey succeeded in reaching respondent by telephone after Thursday. Williams testified she heard respondent having a telephone conversation with Pumphrey sometime on Friday. Pumphrey, on the other hand, testified she never heard from or saw respondent or Jack Miller again after respondent left her house early Friday morning.)

¶ 11 Pumphrey testified she was a single mother barely getting by on cash assistance and food stamps and that she did not have enough food to feed both her own child and K.S. That was why she had asked for grocery money. She knew where respondent and Jack Miller lived, but it was impossible for Pumphrey to drive there, because she would have had to bring both her own 2 1/2-year-old and 3-year-old K.S., and she had only one car seat. So, she talked her

neighbor, Heather Penny, into going to the Millers' house. Penny drove there and managed to persuade Jack Miller to speak with her through a window of the house. He sent her back with some food and another change of clothing for K.S.

¶ 12 On Saturday, October 1, 2016, around 11 a.m., still not having heard from respondent, Pumphrey called the Department and then the Decatur police. A police officer arrived, and the Department took K.S. into protective custody. Afterward, respondent's father told Pumphrey she had done the right thing by calling the authorities (as she recounted in her testimony); he told her he already had two of respondent's children and that he could not possibly take care of a third.

¶ 13 Randy Clem testified he was the Decatur police officer who responded to Pumphrey's call. For at least 1 1/2 hours on October 1, 2016, he tried to locate respondent, without success. He tried telephoning her. He went to her house and spoke with Jack Miller, who said he had not seen her or spoken with her in four days. He went to places that respondent was said to frequent. He checked on the arrest warrant, and it was still active and had not yet been served on respondent. In other words, she had not yet turned herself in.

¶ 14 At the conclusion of its case, the State requested the trial court to take judicial notice that in *People v. Miller*, Macon County case No. 16-CF-856, Jack Miller was convicted of the aggravated battery of K.S. Respondent's attorney responded he had no objection to the proposed judicial notice. He requested the court to also note, however, that, in the docket entry for the sentencing hearing, the judge ordered Jack Miller to take parenting classes and cooperate with the Department but the judge did not forbid him to have contact with K.S.

¶ 15 After hearing arguments, the trial court "[found] *** the testimony of Ellie Pumphrey to be credible." The court found, by a preponderance of the evidence, that K.S. was a

neglected minor within the meaning of section 2-3(1)(a) of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/2-3(1)(a) (West 2016)), "at least insofar as the allegation that [respondent] le[ft] [K.S.] with other caregivers and [did] not retrieve the child as scheduled *** and that she [did] not provide adequate clothing for the child when she le[ft] the child with others." The corresponding adjudicatory order, filed on February 15, 2017, finds K.S. to be neglected within the meaning of section 2-3(1)(a) of the Act (705 ILCS 405/2-3(1)(a) (West 2016)) in that he was "left with [an] insufficient care plan," and the order further finds that respondent "inflicted" this neglect.

¶ 16 B. The Dispositional Hearing

¶ 17 On April 6, 2017, the trial court held a dispositional hearing. (The parties had waived the 30-day deadline in section 2-21(2) of the Act (705 ILCS 405/2-21(2) (West 2016)).) Evidence tended to show the following.

¶ 18 The service plan for respondent recommended she do six things: (1) undergo a substance-abuse assessment and follow any resulting recommendations, (2) undergo a mental-health assessment and follow any resulting recommendations, (3) undergo a domestic-violence assessment and follow any resulting recommendations, (4) receive instruction from a parenting coach, (5) attend visits with K.S., and (6) cooperate with Lutheran Child and Family Services (Lutheran). A caseworker at Lutheran, Nicole Moffett, testified that respondent was satisfactorily performing all those tasks except (3) and (4) and that Moffett did not know about (2) because respondent had not yet signed a consent at Heritage Behavioral Health Center (Heritage). For the parenting component of the services, Moffett had referred respondent to a program in Macon County called "igrow," which, in turn, had referred her to a program called "Early Beginnings." Moffett testified she had received a letter from Early Beginnings, which stated that when Early

Beginnings contacted respondent on March 15, 2017, she refused its services. Also, according to Moffett, respondent had gone to Dove, Inc. (Dove), for domestic-violence services, but she had declined those services as well.

¶ 19 Respondent testified she had declined domestic-violence services only because she was unaware those services were *required* as opposed to merely *offered* or *available*. When she went to Dove, the intake counselor asked her if there had been any domestic violence between herself and Jack Miller. She answered no, whereupon the intake counselor merely described to her the services that Dove offered—without recommending that respondent avail herself of any of those services. Also, respondent seemed surprised to learn, in the dispositional hearing, that she was regarded as having declined parenting services. She testified that the first time she became aware of that fact (or perception) was when she talked with Moffett immediately before the dispositional hearing.

¶ 20 As for Jack Miller, Moffett testified the recommended tasks in his service plan were to (1) undergo a substance-abuse assessment and follow any resulting recommendations, (2) undergo a mental-health assessment and follow any resulting recommendations, (3) participate in domestic-violence services, (4) continue with parenting classes, and (5) cooperate with Lutheran. Like respondent, Jack Miller had refused parenting services. He was compliant, however, with (1) and (2); he was in a dual program at Heritage. Also, at the beginning of February 2017, Lutheran referred him to its "AWARE" program for domestic violence, and he was scheduled to begin classes the day of the dispositional hearing. Therefore, he was compliant with (3); he just had not completed those services yet.

¶ 21 Stolley's attorney asked respondent:

"Q. Do you continue to reside with Jack Miller?

A. Yes.

Q. Is Jack Miller convicted in Macon County, Case Number 16-CF-856 of felony aggravated battery?

A. Yes.

Q. Was the victim of that crime your child, [K.S.]?

A. Yes.

Q. Do you have concerns about allowing your child to be in an environment where you're residing with an individual convicted of felony battery to that child?

A. Do I have any concerns?

Q. Yes.

A. No.

Q. So you don't think that that's a threat to your son—

A. No.

Q. —having the step-father who battered him around him?

A. No. He—he didn't hit him.

Q. But he plead[ed] guilty to it[,] and he was convicted of it.

A. Correct.

Q. Is there any no-contact provision between Jack Miller and [K.S.]?

A. No.

Q. And that doesn't cause you any concern either, I take it?

A. No."

¶ 22 Respondent's attorney asked her on redirect examination:

"Q. You said that Jack [Miller] never hit [K.S.]?

A. Correct.

Q. Do you know what the basis of the aggravated battery is then?

A. I just—seen the video. It was inside the Sprint store. Um, they walked into a Sprint—the Sprint store and he pushed on [K.S.'s] back. [K.S.] tripped over a rug.

Q. Okay. So it happened in a public place?

A. Yes. That's why it was aggravated battery."

¶ 23 After the close of evidence, the trial court heard arguments.

¶ 24 The State began by referring the trial court to page 3 of the shelter-care report, filed on October 4, 2016, which gave the following account of the aggravated battery:

"[A child protection investigator for the Department, Ali] Collins[,] indicated a report in June 2016[,] which stated Jack [Miller] was observed by several witnesses being physically and verbally abusive to his [three]-year-old step son, [K.S.,] at a [Sprint] [s]tore. Jack [Miller] was observed by several witnesses at a store telling [K.S.] he was going to 'Cut his fucking tongue out if he didn't stop being a pussy.' [K.S.] had to go to the bathroom[,] and Jack [Miller] told him to pee in the middle of the parking lot in broad daylight, and when [K.S.] wouldn't do this, Jack [Miller] had him walk in front of him back into the store, then Jack [Miller] hit [K.S.] so hard in his head, he knocked him down. [K.S.] started crying[,] and Jack [Miller] just walked on by him and continued calling him names like 'little bitch,' 'pussy,' and telling him to stop whining like a little girl. Jack [Miller] at the time, had [five] warrants out for his

arrest. Police ended up finding the child with his mom[,] who is aware that Jack [Miller was] with [K.S.] When police arrived at the residence, Jack [Miller] ran. Police reported that Jack [Miller] is a past [methamphetamine] addict."

¶ 25 The State noted that "really the most important services that are necessary here," parenting and domestic-violence counseling, were "the ones that [respondent had] declined." Also, even though respondent knew that Jack Miller, having been "indicated," was not supposed to be in any kind of supervisory role with K.S., he "has been often doing that." "Until we get some more of these services going online," the State argued, "that child won't be safe at that home."

¶ 26 Respondent's attorney next made an argument. He argued that, "contrary to what the State ha[d] just talked about," they "were not [t]here because of an aggravated battery to the child" and nor were they there "because Mr. Miller was apparently often the sole caretaker." Rather, they were there because, under the trial court's adjudicatory finding, K.S. had not been "receiving proper, necessary care." The court had found K.S. to be a neglected minor not for the reasons the State had just mentioned but instead because K.S. "was left at another caregiver's home for a period of time *** without a proper care plan in place and did not necessarily have all the food and clothes as should have attended with the child." The only services that appeared to be lacking were domestic-violence counseling and parenting instruction, and the first of those two services, respondent's attorney argued, was "not relevant to the reasons why the child [had been] brought into care" and "adjudicated *** neglected." As for parenting instruction, respondent testified she previously was unaware of having been "reported as refusing" such instruction. Respondent's attorney stated: "I will stipulate the wardship. Mother will stipulate to wardship," but he maintained that because six months had gone by and there had "been no

further issues related to anything that brought the child into care," it was safe and in the best interest of K.S. to "return [him] to his parents' home."

¶ 27 Stolley's attorney next made an argument. He pointed out that, in the adjudicatory hearing, the trial court took judicial notice of Jack Miller's conviction of the aggravated battery of K.S. Thus, he argued, the aggravated battery was within the scope of the adjudicatory proceedings. As K.S.'s father, Stolley did not believe it was in the best interest of K.S. to be returned home to respondent if Jack Miller also would be there, especially considering that Jack Miller committed the aggravated battery "not *** that long ago, in 2016."

¶ 28 The guardian *ad litem* next made an argument. He pointed out to the trial court the following language in section 2-22(1) of the Act (705 ILCS 405/2-22(1) (West 2016)):

> " 'At the dispositional hearing, the court shall determine whether it is in the best interests of the minor and the public that he be made a ward of the court, and, if he is to be made a ward of the court, the court shall determine the proper disposition best serving the health, safety and interests of the minor and the public. *** *All evidence helpful in determining these questions, including oral and written reports, may be admitted and may be relied upon to the extent of its probative value, even though not competent for the purposes of the adjudicatory hearing*.' " (Emphasis added.)

Thus, the guardian *ad litem* argued, just because "this came in because [respondent] left the child *** for too long of a period of time with [the] caregiver, it [did not] restrict the Court from hearing about the evidence that her husband may pose a threat." Because services were as of yet uncompleted and because respondent denied that Jack Miller had hit K.S. (even though, apparently, he had made forceful enough contact with K.S. to knock him to the floor and bring a

prosecution upon himself), the guardian *ad litem* argued it would be premature to return the child home. It was as of yet unclear that the Miller residence was a safe environment for K.S.

¶ 29 After hearing those arguments, the trial court found it would be in the best interest of K.S. to make him a ward of the court and to appoint the Department as his guardian, with the power to place him and to consent to his medical treatment.

¶ 30 In the dispositional order, which was filed on April 6, 2017, the trial court found that because of "mental health, domestic violence, substance abuse, [and] lack of supervision," respondent was unfit and unable to take care of K.S. and that placing K.S. with her would be contrary to his health, safety, and best interest. The court found Stolley to be unfit and unable to take care of K.S. because Stolley was incarcerated in the Illinois Department of Corrections and, in addition, he probably had "mental health issues." Therefore, in the dispositional order, the court adjudicated K.S. to be neglected, made him a ward of the court, and awarded custody and guardianship of him to the Department's guardianship administrator, with the right to place him. The court further ordered supervised visitation, to be monitored by the Department of its designee.

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 A. The Adjudicatory Finding That K.S. Is a Neglected Minor

¶ 34 The trial court found K.S. to be neglected within the meaning of section 2-3(1)(a) of the Act (705 ILCS 405/2-3(1)(a) (West 2016)) in that he was "left with [an] insufficient care plan." Section 2-3(1)(a) defines a neglected minor to include "any minor under 18 years of age who is not receiving the *** care necessary for his or her well-being, including adequate food, clothing[,] and shelter, or who is abandoned by his or her parent or parents or other person or

persons responsible for the minor's welfare." 705 ILCS 405/2-3(1)(a) (West 2016). This was the statutory provision the State cited in count I of its petition—the count the court found to be proved.

¶ 35 The burden was on the State to prove its allegation of neglect by a preponderance of the evidence. See *In re J.B.*, 2013 IL App (3d) 120137, ¶ 14. We do not decide whether the State carried that burden. Instead, we decide whether the trial court made a finding that was against the manifest weight of the evidence by finding the State had carried its burden. See *id.* A finding is against the manifest weight of the evidence only if "the opposite conclusion is clearly evident from the record" or only if the finding is "arbitrary, unreasonable, or not based on the evidence presented." *Id.*

¶ 36 Respondent argues that by finding K.S. to be neglected, the trial court made a finding that was against the manifest weight of the evidence. She gives essentially three reasons for that argument.

¶ 37 First, she notes that K.S. was left in Pumphrey's care for only two days. Even so, that was about 1 1/2 days too long, and leaving an overnight babysitter in the lurch for that long, without any communication or alternative arrangements, is a dereliction of parental duty. The agreement was that K.S. would stay with Pumphrey overnight and that respondent would pick him up the next morning. As it turned out, respondent did not pick up K.S. the next morning. Nor did she pick him up the morning after that. All the while, respondent failed or refused to return Pumphrey's telephone calls and Facebook messages—or so Pumphrey testified, and the trial court was entitled to believe her (see *id.* ¶ 16). Pumphrey, a single mother subsisting on welfare, had to scramble for more food and clothing for K.S. A reasonable trier of fact could regard such

behavior by respondent as a "failure to exercise the care that circumstances justly demand[ed]." (Internal quotation marks omitted.) *In re S.R.*, 349 Ill. App. 3d 1017, 1020 (2004).

¶ 38 Second, respondent argues there is no evidence that while K.S. was with Pumphrey, he lacked "the *** care necessary for his *** well-being." 705 ILCS 405/2-3(1)(a) (West 2016). A reasonable trier of fact could take the view, however, that care necessary for a child's well-being includes having a parent who personally attends to the child's well-being instead of foisting that task on unwilling third parties by leaving the child with them long after the agreed-upon pickup time. See *In re B.T.*, 204 Ill. App. 3d 277, 281 (1990) ("[In the cited cases,] [n]eglect based on lack of necessary care was proven, although the physical needs of the children were being met by others ***.").

¶ 39 Third, respondent argues she has participated in services, cooperated with Lutheran, and maintained housing and there have been no further instances of domestic violence. This argument, however, relies on behavior and circumstances that postdate the neglect that respondent inflicted upon K.S. by leaving him for two days at Pumphrey's house. Whatever happened after the neglect cannot erase the neglect. See *In re C.W.*, 199 Ill. 2d 198, 217 (2002).

¶ 40 In sum, then, we are unconvinced the trial court made a finding that was against the manifest weight of the evidence by finding K.S. to be a neglected minor. See *J.B.*, 2013 IL App (3d) 120137, ¶ 14. Accordingly, we defer to that finding. See *id.*

¶ 41 B. Making K.S. a Ward of the Court

¶ 42 Respondent argues: "Based on the total lack of evidence, the court's decision to make K.S. a ward of the court is against the manifest weight of the evidence, and the decision should be reversed." In the trial court, however, respondent's attorney stipulated that K.S. should be made a ward of the court. Consequently, on appeal, respondent is estopped from challenging

the decision to make K.S. a ward of the court. See *In re Stephen K.*, 373 Ill. App. 3d 7, 25 (2007).

¶ 43 C. Awarding Guardianship to the Department

¶ 44 Respondent argues that "[e]ven if the [trial] court had adequate evidence to grant wardship of K.S. to the court, the court's decision to grant guardianship to [the Department] was against the manifest weight of the evidence." Then, a couple of sentences afterward, respondent says that "[t]he decision [as to placement, legal custody, or guardianship] is made at the discretion of the court."

¶ 45 This discussion blurs together two different standards of review. Manifest weight of the evidence relates to factual findings, whereas abuse of discretion relates to the choice of a disposition. *In re April C.*, 326 Ill. App. 3d 245, 257 (2001); *In re T.B.*, 215 Ill. App. 3d 1059, 1061 (1991). In this context, respondent seems to be challenging the choice of a disposition, namely, the award of guardianship to the Department; therefore, the applicable standard of review is abuse of discretion. See *In re E.L.*, 353 Ill. App. 3d 894, 897 (2004); *T.B.*, 215 Ill. App. 3d at 1061. Given that "the overriding concern is the best interest of the child" (*E.L.*, 353 Ill. App. 3d at 897), did the trial court abuse its discretion by awarding guardianship to the Department?

¶ 46 A decision is an abuse of discretion only if it is arbitrary or only if it exceeds the bounds of reason. *Ruback v. Doss*, 347 Ill. App. 3d 808, 811-12 (2004). Thus, the question is whether it was arbitrary or rationally indefensible to decide that, for the time being, the Department, rather than respondent, should legally have the care of K.S. with the power to place him. The answer is no.

¶ 47 For two reasons, the trial court could have been unconvinced it would be safe to return K.S. home. First, in her testimony in the dispositional hearing, respondent appeared to minimize or downplay the threat that Jack Miller posed to K.S. Judging from the account in the shelter-care report, the verbal and physical abuse that Jack Miller inflicted upon three-year-old K.S. at the Sprint store was savage and appalling. It is difficult to understand how respondent could say afterward that she has no concern whatsoever about Jack Miller. He could pose a threat to K.S., psychologically and physically. Second, even though the suitability of Jack Miller as a parental figure is questionable, the record contains some evidence that respondent's parental responsibilities toward K.S. have been shuffled off onto him, just as her parental responsibilities toward her other children have been shuffled off onto relatives. The service plan dated December 16, 2016, notes: "Mr. Miller also claims that he provided most of the care to [K.S.] as he commented, 'The only thing I don't do is give him a bath. He wants mommy to do it; other than that he wants daddy to do it.' " We also note it was Jack Miller who took K.S. to Pumphrey's house—and he told Clem he had not seen respondent in four days.

¶ 48 Given these concerns, we are unable to say the trial court abused its discretion by awarding guardianship to the Department. We note that the Department has placed the child with his grandmother.

¶ 49 III. CONCLUSION

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

¶ 51 Affirmed.