2017 IL App (4th) 170595-U

NO. 4-17-0595

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

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re N.B., a Minor	)	Appeal from
	)	Circuit Court of
(The People of the State of Illinois,	)	McLean County
Petitioner-Appellee,	)	No. 16JA37
v.	)	
Mario Burley,	)	Honorable
Respondent-Appellant).	)	Kevin P. Fitzgerald,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in terminating respondent's parental rights.

¶ 2 On July 17, 2017, the trial court terminated respondent father Mario Burley's parental rights to N.B. Burley appeals, arguing the court's findings of unfitness were against the manifest weight of the evidence and the termination of his parental rights was not in N.B.'s best interests. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 26, 2016, the State filed a petition for adjudication of wardship. The petition included allegations N.B. (born November 17, 2015) was living in an environment injurious to his welfare because his mother, Christyana Williams, who is not a party to this appeal, had unresolved domestic-violence and anger-management issues and had left N.B. alone in a bathtub full of water. The petition also alleged Burley had unresolved domestic-violence

issues. That same day, the trial court entered a temporary custody order, noting both parents had unresolved domestic-violence issues. The court placed temporary custody of the child with the guardianship administrator for the Department of Children and Family Services (DCFS).

¶ 5 On June 29, 2016, DCFS established a service plan for the parents. According to the plan, Burley needed to participate in (1) a domestic-violence assessment and any treatment recommended, (2) substance-abuse assessment and any recommended treatment, (3) any and all recommended counseling services to address his issues, and (4) parenting education. He also needed to maintain a legal source of income and acquire stable housing. Burley acknowledged he had been arrested three times for domestic battery to Williams. He had been convicted of assault and obstructing the peace. Burley was in custody awaiting trial for domestic battery and probation violation charges.

¶ 6 Williams reported she had a history of domestic violence with Burley. According to a DCFS report, she stated Burley had intimidated, hit, pushed, and kicked her. He had also broken her cell phone, pulled her hair, and given her a black eye. She did not fight back when she was pregnant, but, after giving birth, she started fighting back. She obtained an emergency order of protection against Burley in July 2015 after he hit her in the nose. Since then, Burley had been arrested twice for domestic violence.

¶ 7 On July 5, 2016, the trial court entered an adjudicatory order, finding N.B.'s environment was injurious to his welfare. The court noted its finding was based on Williams's unresolved anger-management issues and Burley's unresolved domestic-violence issues. On August 9, 2016, the court entered a dispositional order, finding both parents unfit for dispositional purposes. The court noted Burley was incarcerated in the Illinois Department of Corrections (IDOC) and unable to complete any recommended services while he was

incarcerated. The court set a permanency goal of return home within 12 months.

¶ 8 On January 3, 2017, a permanency report prepared by Kelsey Cushing, a child welfare specialist at The Baby Fold, was filed with the trial court. The permanency goal at the time was return home within 12 months. The report recommended the court continue the goal. The report noted Burley was incarcerated at the Danville Correctional Center. Burley reported he was participating in parenting classes and working toward his general equivolancy diploma (GED). His expected parole date was November 28, 2017.

¶ 9 On January 10, 2017, the trial court entered a permanency order, finding neither parent had made reasonable and substantial progress or reasonable efforts toward returning the child.

¶ 10 On April 11, 2017, the State filed a petition to terminate the parents' parental rights to N.B. As for Burley, the petition alleged he was unfit because he (1) failed to make reasonable progress toward N.B.'s return during the nine-month period between July 5, 2016, and April 5, 2017 (750 ILCS 50/1(D)(m)(ii) (West 2016)) and (2) had been repeatedly incarcerated as a result of his criminal convictions which prevented him from discharging his parental responsibilities for N.B. (750 ILCS 50/1(D)(s) (West 2016)).

¶ 11 On April 12, 2017, the trial court entered a permanency order again finding neither parent made reasonable and substantial progress or reasonable efforts toward N.B.'s return home. The court changed the permanency goal to substitute care pending court determination on the State's petition for termination of parental rights.

¶ 12 On July 17, 2017, the trial court held a hearing on the State's petition to terminate parental rights. At the beginning of the hearing, Williams informed the court she wished to irrevocably and permanently surrender her parental rights as to N.B. Williams signed a final and

irrevocable surrender of her parental rights as to N.B. for purposes of N.B.'s adoption.

¶ 13 The trial court took judicial notice of petitioner's exhibit No. 1, which included certain pleadings, orders, and docket entries. The court also admitted into evidence certified copies of Burley's (1) July 11, 2016, conviction for domestic battery (exhibit 2), (2) February 10, 2016, conviction for domestic battery (exhibit 3), and (3) August 20, 2015, conviction for domestic battery (exhibit 4). Williams was the victim of the abuse in each of these cases.

¶ 14 Kelsey Cushing testified she was a child welfare specialist at The Baby Fold. She was assigned N.B.'s case on October 21, 2016. She was the second caseworker after Ashley Fogarty. Cushing testified N.B. first came into care in May 2016 because of domestic violence in the home. She first communicated with Burley, who was incarcerated at the Danville Correctional Center, via letter in October 2016. She attached his service plan to the letter. Burley responded, stating he missed N.B. and was trying to become a better person. He did not have any questions with regard to the service plan. His progress was evaluated for the first time in December 2016. Overall, his progress was rated as unsatisfactory. With regard to individual counseling, he was rated unsatisfactory because he was not participating in any kind of mental health or individual counseling services. Although he was incarcerated, individual counseling was available to him. She did not know why he was not engaging in individual counseling. His domestic-violence treatment was also unsatisfactory. He was not able to participate in the domestic-violence program at the prison because the waiting list was extensive and he was not going to be incarcerated long enough to be admitted into the program. He was also rated unsatisfactory as to housing, income, and substance-abuse treatment. He had completed a parenting class and was rated satisfactory with regard to his parenting goal.

¶ 15 His progress was next evaluated in June 2017. Again, his overall progress was

rated unsatisfactory. While he participated in a substance-abuse class, he was rated unsatisfactory because the class was not a formal treatment program. The treatment program had a waiting list, and he would not be incarcerated long enough to get into the program. He was still rated satisfactory for parenting. He again was rated unsatisfactory with regard to his individual counseling and domestic-violence goals. Cushing was not able to confirm Burley was on the waiting list for the domestic-violence program at the prison. He was still rated unsatisfactory with regard to income and housing. Burley was set to be released on parole in August 2017. Upon his release, Burley would be required to complete a substance-abuse assessment and a domestic-violence assessment and follow any recommendations from those assessments. He would also need to achieve stable and legal income, stable and safe housing, and individual counseling.

¶ 16 Cushing testified The Baby Fold used Chestnut Health Systems for domestic-violence services. It typically took one month for someone to get in for an evaluation. Standard domestic-violence treatment usually takes six months. She also testified Burley did not have any visits with N.B. at the prison because he did not want N.B. to visit him there. Under certain conditions, she believed N.B. could have had safe visits with Burley at the prison between July 5, 2016, and April 5, 2017.

¶ 17 She did not believe Burley had made sufficient progress toward N.B.'s return for her to recommend he be found fit at anytime between July 5, 2016, and April 4, 2017.

¶ 18 On cross-examination, Cushing testified visits between N.B. and Burley would have required a three-hour roundtrip plus the time to get in and out of the prison for N.B. The child was eight months old at the time. Neither Cushing nor Burley thought these visits would be in N.B.'s best interest.

¶ 19 On July 17, 2017, the trial court found the State had established by clear and convincing evidence Burley was unfit because he (1) failed to make reasonable progress toward N.B.'s return during the nine-month period between July 5, 2016, and April 5, 2017, and (2) was incarcerated when the termination petition was filed, the child was in the temporary custody or guardianship of DCFS, and his repeated incarceration had prevented him from discharging his parental responsibilities to N.B.

¶ 20 After the trial court found Burley unfit, the case proceeded to a best-interest hearing. Darrien Vance testified via telephone. Vance was N.B.'s first foster parent beginning in May 2016. Williams is his niece. N.B. was in his care until February 2017 when Vance's family moved to Georgia for a job opportunity. N.B. lived with him, his girlfriend, her nine-year-old son, and their six-year-old daughter. No family could care for N.B. when Vance moved so N.B. was placed into foster care. Vance testified he had a strong bond with N.B. He visited with N.B. the week before the hearing. N.B. had not seen him since February, except for three video conversations, but N.B. ran straight to Vance when he saw him. Vance had remained in contact with N.B.'s current foster parent.

¶ 21 Vance testified it was not his initial intention to adopt N.B. He hoped one of the parents would be able to get the child back. However, after seeing how the situation was proceeding, he did not want N.B. to leave the family. He planned on moving back to the Bloomington area by August 31 to facilitate N.B.'s adoption. He planned to live at his girlfriend's mother's house for a few months but could get housing situated quicker if necessary. It was his intention to adopt N.B. if respondent-parents' rights were terminated. He stated Williams could come and see N.B. whenever she pleased. As for Burley, Vance would not want to supervise any visits between Burley and N.B., but he thought Burley should be part of N.B.'s

life. Vance did not want to be around Burley because he physically abused Vance's niece and conceived N.B. in Vance's house when Burley was not supposed to be there.

¶ 22 Vance did security work and had a stable employment history. He had a firm offer to work at the McLean County jail when he moved back to Bloomington. His girlfriend was a medical assistant at a dermatology office in Bloomington. Vance stated N.B. loved the other children in Vance's family and they were bonded, especially Vance's son and N.B.

¶ 23 On cross-examination, Vance testified he moved to Georgia for new opportunities and to get away from situations in Illinois. He had no criminal issues in Illinois. While N.B. was not the initial reason for his family to come back to Illinois, he stated they would have come back for him.

¶ 24 Katie White testified she was N.B.'s current foster parent and had been since February 2017. She was not related to N.B. She was a high school teacher. It was always her understanding N.B. would be returning to his uncle, Darrien Vance. N.B. adjusted well to White's home. When Vance came to visit N.B., the child immediately went to Vance and wanted to be picked up. N.B. was excited to see Vance. White believed a long-term placement with Vance would be best for N.B. for a combination of reasons, including familiarity and N.B.'s bond with Vance and Vance's children. White was not willing to adopt N.B. She did not believe returning N.B. to Burley would be in N.B.'s best interests because N.B. did not know or have a relationship with Burley. Vance told her he wanted to adopt N.B. On cross-examination, White testified she had never seen N.B. with Burley.

¶ 25 Kelsey Cushing, N.B.'s caseworker, testified she believed Burley's parental rights should be terminated because he had not made significant progress in the services that were required and had not seen N.B. much since N.B.'s birth. She testified Darrien Vance wanted to

adopt N.B. and a bond existed between Vance and N.B. She believed Vance could provide for N.B.'s long-term needs. Vance and N.B. were affectionate with each other. Cushing was confident Vance could be a stable placement and believed this was the best long-term placement for N.B. Under a best-case scenario, it would be six months to a year after Burley's release from prison before he could be found fit to have N.B. returned to his care. According to Cushing, termination of Burley's parental rights was in N.B.'s best interests primarily because of N.B.'s young age and his need for permanence. N.B. did not have a relationship with his father.

¶ 26 The trial court took judicial notice of the entire court file.

¶ 27 Ardelia Mayes testified she is Burley's mother and N.B.'s grandmother. When N.B. was born, she and Burley were able to see the baby every day at her house until the child was taken into care. N.B. would be at her house from about 11 a.m. until about 10 p.m. every day. She testified her son would change, feed, and bathe N.B. and was diligent in taking care of the baby. N.B. was Burley's first child. He did well taking care of N.B. and was protective of the child. Mayes believed her son and N.B. had established a bond during that eight-month period. She did not believe termination was in N.B.'s best interests. Mayes acknowledged defendant twice had been incarcerated after N.B.'s birth before his current incarceration. He served 20 days in January 2016 and 40 days starting in February 2016.

¶ 28 Burley did not testify at the hearing. However, he did present an exhibit showing he had been appropriate in prison and received good-time credit.

¶ 29 After hearing the evidence presented, the trial court found the State had proved by a preponderance of the evidence termination of Burley's parental rights was in N.B.'s best interests.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 Burley appeals the termination of his parental rights. "The termination of parental rights is a two-step process under which the best interests of the child is considered only after a court finds the parent unfit." *In re E.B.*, 231 Ill. 2d 459, 472, 899 N.E.2d 218, 226 (2008). Burley argues the trial court erred in finding him unfit and in finding it was in N.B.'s best interest to terminate Burley's parental rights.

¶ 33 A. Unfitness Finding

¶ 34 Before a trial court can terminate parental rights, the State must prove by clear and convincing evidence (*In re M.H.*, 196 Ill. 2d 356, 365, 751 N.E.2d 1134, 1141 (2001)) the parent is unfit as defined by the Adoption Act (750 ILCS 50/0.01 to 24 (West 2014)). *In re B.B.*, 386 Ill. App. 3d 686, 698, 899 N.E.2d 469, 480 (2008). A reviewing court will reverse a trial court's finding of unfitness only if it is against the manifest weight of the evidence. *In re D.F.*, 201 Ill. 2d 476, 498, 777 N.E.2d 930, 942 (2002). A decision is against the manifest weight of the evidence where the opposite result is clearly evident or where the determination is unreasonably arbitrary and not based on the evidence presented. *D.F.*, 201 Ill. 2d at 498, 777 N.E.2d at 942-43. An individual's parental rights can be terminated "if even a single alleged ground for unfitness is supported by clear and convincing evidence." *In re Gwynne P.*, 215 Ill. 2d 340, 349, 830 N.E.2d 508, 514 (2005).

¶ 35 The trial court found defendant had not made reasonable progress toward N.B.'s return during the nine-month period between July 5, 2016, and April 5, 2017. Reasonable progress may be found when "the progress being made by a parent to comply with directives given for the return of the child is sufficiently demonstrable and of such quality that the court, in the *near future*, will be able to order the child returned to parental custody." (Emphasis in

original.) *In re L.L.S.*, 218 Ill. App. 3d 444, 461, 577 N.E.2d 1375, 1387 (1991). This is an objective standard. *L.L.S.*, 218 Ill. App. 3d at 461, 577 N.E.2d at 1387.

¶ 36 Burley notes he passed an Illinois Constitution test, successfully completed a substance-abuse class, completed the InsideOut Dad parenting class, and earned good-conduct credit while in prison. However, Burley made no progress with regard to his domestic-violence issues, which was a primary issue in this case. As of the hearing on the State's petition to terminate Burley's parental rights, his domestic-violence issues were unresolved, and he had made no progress toward resolving the issues. Defendant also did not engage in individual counseling.

¶ 37 Defendant argues he was not able to make reasonable progress toward N.B.'s return because he was in prison and was unable to get into some of the programs he needed. This was true of the domestic-violence program. However, the Adoption Act does not exempt an incarcerated parent from having to make reasonable progress toward his child's return. Further, time spent in custody is included in the nine-month periods upon which a parent's progress is judged. *In re J.L.*, 236 Ill. 2d 329, 339-45, 924 N.E.2d 961, 967-70 (2010).

¶ 38 As stated earlier, based on the facts in this case, Burley's issues with domestic violence were the most important issues he needed to resolve before N.B. could be returned to his care. However, the evidence shows Burley made no progress with regard to this issue during the nine-month period in question. As a result, the trial court's decision to find him unfit for termination purposes based on his failure to make reasonable progress for the period between July 2016 and April 2017 was not against the manifest weight of the evidence.

¶ 39 Because we find the trial court did not err in finding Burley unfit based on his failure to make reasonable progress, we need not address the court's other unfitness finding.

¶ 40 B. Best Interest Determination

¶ 41 Once a parent has been found unfit in a termination proceeding, "the parent's rights must yield to the best interests of the child." *In re M.F.*, 326 Ill. App. 3d 1110, 1115, 762 N.E.2d 701, 706 (2002). The State has the burden of proving termination is in the best interest of the child by a preponderance of the evidence. *In re D.T.*, 212 Ill. 2d 347, 366, 818 N.E.2d 1214, 1228 (2004).

¶ 42 "A trial court's finding termination is in the children's best interests will not be reversed unless it is contrary to the manifest weight of the evidence." *M.F.*, 326 Ill. App. 3d at 1115-16, 762 N.E.2d at 706. Under this standard, a reviewing court gives the trial court deference because it is in a better position to observe the parties' and witnesses' conduct and demeanor. *In re M.H.*, 196 Ill. 2d 356, 361, 751 N.E.2d 1134, 1139 (2001). We will not substitute our judgment for that of the trial court regarding witness credibility, the weight to be given witness testimony, or inferences to be drawn from the evidence presented. *People v. Deleon*, 227 Ill. 2d 322, 332, 882 N.E.2d 999, 1005 (2008).

¶ 43 When considering whether termination of parental rights is in a child's best interest, the trial court must consider a number of factors within "the context of the child's age and developmental needs." 705 ILCS 405/1-3(4.05) (West 2016). These include the following:

> "(1) the child's physical safety and welfare; (2) the development of the child's identity; (3) the child's familial, cultural[,] and religious background and ties; (4) the child's sense of attachments, including love, security, familiarity, continuity of affection, and the least[-]disruptive placement alternative; (5) the child's wishes and long-term goals; (6) the child's community ties; (7) the child's need for permanence, including the need for stability and continuity of relationships with

> parent figures and siblings; (8) the uniqueness of every family and child; (9) the risks related to substitute care; and (10) the preferences of the person available to care for the child." *In re Daphnie E.*, 368 Ill. App. 3d 1052, 1072, 859 N.E.2d 123, 141 (2006).

Burley argues the trial court erred in finding it was in D.B.'s best interest to terminate Burley's parental rights. We disagree.

¶ 44 Part of defendant's argument focused on the trial court mentioning, in the context of the best-interest factor relating to persons available to care for the child, Williams's statement when surrendering her parental rights that she wanted Vance to adopt N.B. According to Burley:

> "At the time of the surrender the mother who allegedly wanted this child to be adopted by Mr. Vance was not a person available for the child because she had an unfitness finding. Unfit parents are, by definition, not available to care for a child. Moments after the surrender was taken she was no longer the parent of the child."

Based on the transcript of the best-interests hearing, the court placed little emphasis on this factor. The court only stated this factor "at least slightly favors termination." The court's main focus was on permanency, stating:

> "Mr. Burley is going to get out of the Department of Corrections here in the near future, but he's going to have to get through domestic[-]violence treatment, which is at least six months, and then demonstrate for a significant period of time that a crime-free lifestyle and one free of domestic violence is a pretty significant history for a man this young to have these incidences of domestic violence, and pretty serious incidences of domestic violence. I would have to see at least a year

> of that. So in the best case scenario we're probably closer to a year and a half is the best case. I think that [N.B.] deserves permanency now."

We agree with the trial court, especially considering N.B. had not had any contact with Burley while he was incarcerated.

¶ 45 Contrary to Burley's arguments, the evidence in this case supports the trial court's best-interest finding. In addition to permanence, the trial court also found the child's sense of attachment, including where he feels love, a sense of security, familiarity, and continuity of affection all favored termination. The State put on sufficient evidence to establish Vance would be able to provide for N.B.'s physical and emotional welfare. In addition, the trial court noted it "was taken by the level of bond between Mr. Vance and [N.B.]."

¶ 46 Burley argues the evidence shows Vance could not provide physical safety, a sense of attachment, security, familiarity, or continuity of affection considering "he abandoned the child for a job opportunity and just months later decided he changed his mind." Vance did not abandon N.B. He remained in contact with the child. Further, from the record, it appears the plan was always for Vance to adopt N.B.

¶ 47 Defendant also argues moving the child to live with Vance could not be the least-disruptive placement because N.B. would be disrupted from the current foster parent. Burley contends changing the placement from the current foster parent to Vance would not help with permanency. However, this argument ignores the evidence in this case. N.B.'s current foster parent testified she would not adopt N.B. If N.B. was going to be adopted, he would have to be moved from her home. Moving N.B. back to Vance and his family would be the least-disruptive alternative, considering N.B. had a relationship and was bonded with Vance and Vance was willing to adopt N.B. Further, Vance was a blood relative of N.B. and stated he would allow

N.B. to maintain ties with his biological parents.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the trial court's decision to terminate Burley's parental rights to N.B.

¶ 50 Affirmed.