2018 IL App (3d) 180112-U

Order filed July 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

In re D.W.,	)	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. 3-18-0112
	)	Circuit No. 16-JA-46
v.	)	
	)	
Nickey W.,	)	
	)	The Honorable
Respondent-Appellant).	)	Katherine S. Gorman Hubler,
	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it found the respondent-father unfit or when it found that it was in the best interest of the minor to terminate the respondent-father's parental rights.

¶ 2 The circuit court entered orders finding the respondent-father, Nickey W., unfit and terminating his parental rights to the minor, D.W. On appeal, the respondent challenges both of the court's orders. We affirm.

¶ 3 FACTS

¶ 4 On February 18, 2016, a juvenile petition was filed alleging that the minor (born May 14, 2014) was neglected by reason of an injurious environment. Specifically, the petition alleged that the minor had a severe swallowing dysfunction and reactive airway disease such that he needed to be fed in a certain manner,[1] but the mother had not abided by the feeding rules on several occasions. In paragraph C, the petition also alleged that on September 19, 2015, while both the respondent and the mother were intoxicated, he held her against a wall and when a male intervened, the respondent punched the male in the face.

¶ 5 On July 11, 2016, the circuit court held a hearing on the petition, at the conclusion of which it found the minor to be neglected based on partial stipulation. The court also found that the allegation contained in paragraph C of the petition did not contribute to the minor's injurious environment.

¶ 6 On August 8, 2016, the circuit court held a dispositional hearing, at the conclusion of which it made the minor a ward of the court, found the mother unfit, found the respondent fit, and placed the minor with the respondent. The court also ordered, *inter alia*, the respondent to complete the following tasks[2]: (1) execute all authorizations for releases of information requested by the Department of Children and Family Services (DCFS) or its designees; (2) cooperate fully with DCFS and its designees; (3) perform random drug drops at DCFS's discretion; (4) obtain and maintain stable housing conducive to the safe and healthy rearing of the minor; (5) provide the caseworker with any change in address, phone number, or household

[1] Specifically, the minor was supposed to be fed honey-thickened liquids in an open cup or through a gastronomy tube. If this was not done, his lungs would aspirate the liquid.

[2] The authority to order a fit parent to complete specific tasks—including a parent who did not contribute to the minor's injurious environment—appears to come from section 2-23(3) of the Juvenile Court Act of 1987 (705 ILCS 405/2-23(3) (West 2016)), which authorizes the circuit court to "enter any other orders necessary to fulfill the service plan, including, but not limited to, (i) orders requiring parties to cooperate with services[.]"

members within three days; and (6) provide DCFS with information on anyone having a relationship that would affect the minor. The court further prohibited the respondent from supervising visits with the mother and ordered him to attend to the minor's medical needs.

¶ 7 On November 7, 2016, the State filed an emergency motion for temporary change of guardianship, alleging that the respondent tested positive for cocaine on October 28, 2016; and on that same date, he allowed the mother to enter the residence when the minor was present. The motion was granted, the minor was placed with DCFS. The case was also set for a hearing on the State's additional motion to find the respondent unfit. On November 28, 2016, the respondent stipulated to the factual basis for the State's motion, and the circuit court entered an order finding him to be an unfit parent and granting guardianship of the minor to DCFS.

¶ 8 A permanency review hearing was held on January 9, 2017. A report compiled for that hearing indicated that the respondent had completed only one random drug drop since November 2016, and that drop tested positive for opiates. Regarding visitation, the report indicated that the visits were conducted with both parents, but they had a tendency to belittle each other during visits.

¶ 9 The respondent was evaluated on his progress toward his service plan tasks on April 25, 2017. He was given a satisfactory mark on cooperating with DCFS and its assigns and on obtaining a mental health assessment. He was given an unsatisfactory mark on completing random drug drops. The caseworker noted that the respondent failed to appear for drops on the following dates in 2016: November 11, 17, and 22; and December 6, 19, and 30. He completed drops on November 18 and December 21; both of those samples tested positive for opiates. In 2017, he completed drops on the following dates (results in parentheses): January 13 (negative), January 26 (positive for opiates), February 9 (positive for cocaine and opiates), February 13

(positive for cocaine), and March 2 (positive for cocaine). He failed to appear for drops on March 20, April 6, and April 17. He also had not completed a substance abuse assessment by the date of the evaluation. Further, the caseworker noted that regarding the February 9, 2017, test, at the visit he attended prior to that date, the minor's mother had given the respondent a cupcake and that he believed she laced the cupcake.

¶ 10 The respondent's therapist compiled a counseling report on May 26, 2017. The therapist reported that the respondent had excellent attendance over the prior three-plus months and had been cooperative with participation. The respondent had acknowledged his cocaine use had led to the minor's removal from his care and claimed that he was no longer using. However, the therapist noted that the respondent continued to test positive for cocaine; accordingly, the respondent had not made "valid progress" on his substance abuse issue. The therapist also reported that the respondent had "shown progress in being able to identify unhealthy vs. healthy patterns in his relationships and appear[ed] to be following healthier boundaries in his life." The respondent had a new romantic relationship with which the therapist found no concerns and had been working on establishing healthy boundaries in his co-parenting relationship with the minor's mother.

¶ 11 A permanency review hearing report was filed with the circuit court in early June 2017, which indicated that the respondent had completed a substance abuse assessment on May 16, 2017; but the evaluator did not recommend any follow-up services "due to lack of diagnostic criteria to justify substance abuse services, at this time." In addition, the report stated that the respondent had tested positive for cocaine and opiates on May 8, 2017. The results of his drop from May 30, 2017, had not yet been received. Regarding visitation, the report stated that the respondent had attended all visits except for one in late May 2017; the respondent explained that

he had a flat tire. The report also stated that the respondent would typically pull out his phone and watch videos with the minor during visits, but that the respondent had been observed to be sleeping during the visits while the videos were playing. DCFS visitation report records confirmed that the respondent fell asleep during visits in 2017 on March 17; April 7, 21, and 28; and May 19.

¶ 12 On August 17, 2017, the State filed a petition seeking the termination of the respondent's parental rights. Specifically, the petition alleged that the respondent failed to make reasonable progress toward the return of the minor to his care during the nine-month period between September 19, 2016, and June 19, 2017.

¶ 13 On December 11, 2017, the circuit court held a hearing on the State's termination petition. The respondent testified that during the relevant nine-month period, he completed mental health, substance abuse, and domestic violence assessments. He also attended every weekly visit with the minor except for one, which he missed due to a flat tire. He had seen a therapist and learned about "[m]aking a little bit better life choices and relationship choices." Regarding drug testing, the respondent testified that he had the testing site switched because he believed the original site was tampering with his samples to produce positive results. He denied that he tested positive for cocaine after the site switch, stating that "[t]he first one came back negative for everything." At the close of the hearing, the court found the respondent to be an unfit parent.

¶ 14 Also in December 2017, the caseworker prepared a report for the court covering the previous six months. The report stated, *inter alia*, that the minor had been with his maternal grandparents since February 20, 2017. The minor was happy, and the foster parents were willing

to provide permanency for him. He was attending school and had his medical needs met by the foster parents, who had completed training for properly feeding the minor.

¶ 15 On January 22, 2018, the circuit court held a best interest hearing. The caseworker testified in accord with her December 2017 report, noting, *inter alia*, that the minor told her that he wanted to be with "mommy and daddy and sissy," which meant his foster family. She also stated that the minor still had a bond with the respondent, but it was not as strong as the bond he had with his foster father. She also acknowledged that the frequency of the minor asking about the respondent had decreased over the past few months. At the close of the hearing, the court found that it was in the minor's best interest to terminate the respondent's parental rights.

¶ 16 The respondent appealed.

¶ 17 ANALYSIS

¶ 18 The respondent's first argument on appeal is that the circuit court erred when it found him to be an unfit parent.

¶ 19 Initially, the respondent claims that under section 1(D)(m), the relevant nine-month period starts with the removal of the child from the parent. Thus, because he had custody of the minor for the first two months of the nine-month period alleged in the termination petition, the respondent alleges that there was no statutory basis for the unfitness finding because he was only given seven months to recover custody of the minor.

¶ 20 First, we note that the respondent has predicated his argument on the reasonable *efforts* provision, rather than the reasonable *progress* provision, which was the pleaded basis for termination in this case. Even if the respondent argued under the proper provision, his argument would be without merit. Section 1(D)(m) provides that a parent may be found unfit if he or she fails "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*[.]" (Emphasis added.) 750 ILCS 50/1(D)(m) (West 2016). The statute is clear that the relevant nine-month period for making reasonable progress may begin at any time after the minor has been adjudicated neglected or abused, not after removal. See *In re K.P.*, 305 Ill. App. 3d 175, 179 (1999) (holding, under a prior version of the statute, that the operative event is the date of adjudication, not removal); see also *In re Cheyenne S.*, 351 Ill. App. 3d 1042, 1049-50 (2004) (holding that a parent need not even lose custody and/or guardianship of a minor for the statutory nine-month period to begin to run because the statute's operative event is the date of adjudication). Moreover, the respondent had been ordered to complete certain tasks with the entry of the dispositional order on August 8, 2016. Thus, he was in fact required to work toward completion of those tasks during the two months that he had custody of the minor. For these reasons, we reject the respondent's argument.

¶ 21 The respondent also argues, alternatively, that he showed improvement in identifying healthy versus unhealthy relationship patterns, which addressed one of the two issues in the emergency petition to remove the minor from his care. However, again, the respondent has predicated his argument on reasonable *efforts*: "Respondent argues *** that he did make reasonable efforts to correct the conditions which were the basis for the removal of the child from his care."

¶ 22 Reasonable efforts and reasonable progress are two very different standards under the Act. Reasonable efforts are measured subjectively and are "based upon the amount of effort that is reasonable for a particular person." *In re Daphnie E.*, 368 Ill. App. 3d 1052, 1067 (2006). Reasonable progress is measured objectively and "focus[es] on the amount of progress toward the goal of reunification that can be reasonably expected under the circumstances." *In re A.A.*,

324 Ill. App. 3d 227, 236 (2001). As the statute emphasizes, the failure to make reasonable progress "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." 750 ILCS 50/1(D)(m) (West 2016). "Reasonable progress exists when the trial court can conclude that it will be able to order the child returned to parental custody in the near future." *Daphnie E.*, 368 Ill. App. 3d at 1067.

¶ 23 We will not disturb a circuit court's unfitness determination unless it is against the manifest weight of the evidence. *In re Adoption of Syck*, 138 Ill. 2d 255, 274 (1990).

¶ 24 In this case, which involves whether the respondent made reasonable progress, the minor was removed from the mother's care for reasons that were not attributable to the respondent, including medical neglect. DCFS' involvement was meant at least in part to ensure the minor was properly cared for by the respondent, who was given custody of the minor. However, the minor was removed from the respondent's care in November 2016 after it was discovered that he had tested positive for cocaine on October 28, 2016, and that he had allowed the mother to enter his residence when the minor was present. It is true that in the therapist's report of May 2017, it was stated that the respondent had made progress on addressing his issues with forming and maintaining healthy relationships, including the co-parenting relationship he had with the minor's mother. However, the record is clear that the respondent had made no progress on his substance abuse issue. When he did complete random drug drops, he tested positive on almost every one—for cocaine, opiates, or both. Indeed, the record indicates that the respondent was also less than forthright about his issue, as he had blamed positive tests on the minor's mother and the testing center, and he had also told his therapist he was no longer using cocaine, despite the fact that he kept testing positive for it. His lack of progress with his substance abuse issue

was enough for the circuit court to find that the minor could not be returned to his care in the near future. See *id.* Under these circumstances, we hold that the circuit court did not err when it found the respondent to be an unfit parent.

¶ 25 The respondent's second argument on appeal is that the circuit court erred when it found it was in the minor's best interest to terminate his parental rights.

¶ 26 Once a parent has been found unfit, all considerations yield to the best interest of the minor. *In re D.T.*, 212 Ill. 2d 347, 364 (2004). When determining what is in the minor's best interest, the circuit court must consider the following factors in light of the minor's age and developmental needs:

> "(a) the physical safety and welfare of the child, including food, shelter, health, and clothing;
>
> (b) the development of the child's identity;
>
> (c) the child's background and ties, including familial, cultural, and religious;
>
> (d) the child's sense of attachments, including:
>
> (i) where the child actually feels love, attachment, and a sense of being valued (as opposed to where adults believe the child should feel such love, attachment, and a sense of being valued);
>
> (ii) the child's sense of security;
>
> (iii) the child's sense of familiarity;
>
> (iv) continuity of affection for the child;

(v) the least disruptive placement alternative for the child;

(e) the child's wishes and long-term goals;

(f) the child's community ties, including church, school, and friends;

(g) the child's need for permanence which includes the child's need for stability and continuity of relationships with parent figures and with siblings and other relatives;

(h) the uniqueness of every family and child;

(i) the risks attendant to entering and being in substitute care; and

(j) the preferences of the persons available to care for the child." 705 ILCS 405/1-3(4.05) (West 2016).

The circuit court is not required to make explicit findings on, or reference to, each factor. *In re Custody of G.L.*, 2017 IL App (1st) 163171, ¶ 43. We will not disturb a circuit court's best interest determination unless it is against the manifest weight of the evidence. *In re Dal. D.*, 2017 IL App (4th) 160893, ¶ 53.

¶ 27 Here, the respondent argues that the circuit court failed to sufficiently consider several of the statutory factors. First, he claims that the minor was not asked his preferences. However, even if a three-year-old could formulate a meaningful expression of his preference for caregiver, we note that contrary to the respondent's argument, the minor did in fact express a preference for his foster family to the caseworker.

¶ 28 Second, the respondent claims that it was unknown whether the foster parents supported the termination of his parental rights. However, he cites no authority to indicate that a foster parent's opinion on whether parental rights should be terminated is relevant under section 1-3(4.05). Furthermore, the evidence indicated here that the foster parents were willing to provide permanence for the minor if necessary.

¶ 29 Third, the respondent claims that there was no indication in the record that the minor's physical safety or welfare was endangered by the respondent maintaining his parental rights. He argues that allowing him to have guardianship rights would not place the minor at risk. However, this was not a case involving a petition for change in guardianship. See 705 ILCS 405/2-28(4)(a) (West 2016). Moreover, the evidence indicated that the minor was thriving in his foster placement, where his needs—including his special medical needs—were being met.

¶ 30 The respondent also claims that guardianship would not only meet the minor's need for permanence, but also serve as the least disruptive permanency goal. Again, this is not a change-of-guardianship case. Further, the respondent makes no attempt to explain *why* permanence would be furthered by allowing him to continue to see the minor. In fact, again, the evidence indicated that the minor was thriving in his foster placement and that disrupting this placement would not be in the minor's best interest.

¶ 31 Under these circumstances, we hold that the circuit court did not err when it found it was in the minor's best interest to terminate the respondent's parental rights.

¶ 32 CONCLUSION

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

¶ 34 Affirmed.