NOTICE
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2018 IL App (4th) 180061-U

NO. 4-18-0061

FILED
June 26, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re Z.L., D.L., and S.L., Minors	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Livingston County
Petitioner-Appellant,	)	No. 17JA18
v.	)	
Samantha Lair and Darryl Kelly,	)	Honorable
Respondents-Appellees).	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Holder White and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part and reversed in part, finding the trial court did not err in barring admission of an indicated report at the adjudicatory hearing but did err in placing custody of the minors with respondent mother. The court remanded with directions and for further proceedings.

¶ 2 In November 2017, the State filed a first amended petition for adjudication of wardship with respect to Z.L., D.L., and S.L., the minor children of respondent Samantha Lair. The petition also named respondent Darryl Kelly, who is the father of Z.L. and S.L. In January 2018, the trial court made the minors wards of the court, placed guardianship with the Department of Children and Family Services (DCFS), and placed custody of the minors with respondent mother.

¶ 3 On appeal, the State argues the trial court erred in (1) barring admission of an indicated report at the adjudicatory hearing and (2) making the minors wards of the court while

placing them in the custody of respondent mother. We affirm in part, reverse in part, and remand with directions and for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In May 2017, the State filed a petition for adjudication of wardship with respect to D.L., born in November 2016, and Z.L., born in May 2014, the minor children of respondent mother. Respondent father is the father of Z.L. The petition alleged the minors were neglected pursuant to section 2-3(1)(b) of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/2-3(1)(b) (West 2016)) because their environment was injurious to their welfare in that their parents (1) have a history of engaging in domestic violence (count I) and (2) engaged in domestic violence in the presence of D.L. (count II). The petition also alleged D.L. is an abused minor pursuant to section 2-3(2)(ii) of the Juvenile Court Act (705 ILCS 405/2-3(2)(ii) (West 2016)) (count III) in that his parent, immediate family member, person responsible for his welfare, individual in the home, or paramour of his parent, creates a substantial risk of physical injury, by other than accidental means, which would be likely to cause death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function, in that respondent father struck minor about the head.

¶ 6 Following a temporary custody hearing, the trial court found probable cause to believe the minors were abused or neglected and an immediate and urgent necessity existed to support the removal of the minors from the home. The court entered an order granting temporary custody to DCFS and permitting visitation at the discretion of DCFS.

¶ 7 In November 2017, the State filed a first amended petition for adjudication of wardship with respect to D.L., Z.L., and S.L, born in November 2017. S.L. is the child of both respondents. The petition realleged counts I, II, and III. The State also alleged the minors were

neglected pursuant to section 2-3(1)(b) of the Juvenile Court Act because their environment is injurious to their welfare in that their parents have a history of substance abuse preventing them from properly parenting (count IV). The trial court entered a temporary custody order finding probable cause to believe the minors were neglected.

¶ 8 At the adjudicatory hearing, Lee Boedigheimer, a DCFS child protective investigator, testified he began his investigation of the minors' case following a report of the risk of harm due to domestic violence in April 2017. After making numerous unsuccessful attempts to contact respondents, Boedigheimer met them outside their apartment in May 2017. At that time, respondent father was "not overly cooperative" and indicated his disagreement with the allegation of domestic violence, claiming there were "no marks on the child" and "he had gotten away with it before, [and] he'd get away with it again." Moreover, Boedigheimer testified respondent father stated if "he had hit the child, the child would have been in the hospital." He then told Boedigheimer to get away from his van and left.

¶ 9 Respondent mother told Boedigheimer she had initially said respondent father hit her. However, she stated the parties had an argument, and respondent father threw her purse at her while she was holding D.L. The purse hit her in the back of the neck and shoulder area and also struck D.L. Respondent mother stated there had been one reported claim of domestic violence and "a couple of unreported ones." Boedigheimer advised her to obtain an order of protection against respondent father, but she did not do so.

¶ 10 After having told respondent father he could not be around the children, Boedigheimer went to respondent mother's house and saw him inside his van on the back part of the property. He stated he was "just getting tools to work on his van."

¶ 11 Based on his investigation, Boedigheimer testified he completed an "indicated

packet," which the State marked as exhibit No. 1, and it contained his notes and his findings. Boedigheimer stated he created the indicated packet in the regular course of business for DCFS. The State asked to admit exhibit No. 1, but respondents objected on the basis of hearsay. The State argued an indicated report is admissible into evidence at the adjudicatory hearing pursuant to section 2-18(4)(b) of the Juvenile Court Act (705 ILCS 405/2-18(4)(b) (West 2016)). However, respondent father's counsel argued "an indicated report is different than that packet," which has "all sorts of material in it." The trial court took the matter under advisement.

¶ 12 Pontiac Police Department Detective Michael Henson testified he investigated a report of domestic violence that occurred on April 2, 2017. Eight days later, Henson made contact with respondents at their residence. Respondent mother stated respondent father had been at the residence since the incident "because he helps with the children."

¶ 13 Pontiac police officer Derek Schumm testified he responded to a call of a domestic dispute on April 2, 2017, and met with respondent mother. She stated the parties had an argument after she knocked over respondent father's bicycle. While she was carrying D.L., respondent father "came up behind her" and struck her and D.L. Respondent mother was struck in the back of her neck, and D.L. was struck "in the forehead area." Schumm observed "light marks" on both of them. Respondent mother gave a written statement in which she stated respondent father had been in a "bad mood" and, after she pushed over his bicycle, he became irate. He came inside and "punched" her in the back of her neck, hitting her son she held in her arms.

¶ 14 Pontiac police sergeant Robin Bohm testified he responded to a call on September 24, 2015, and observed respondents arguing. At the time, respondent mother was holding a small child. While waiting for other officers to respond, Bohm saw respondent father hit

respondent mother in the face with his open hand. Respondent father later claimed respondent mother had battered him. When Bohm asked whether he struck respondent mother, he responded "you know what you saw."

¶ 15 Pontiac police officer Allan Doran testified he responded to a domestic dispute on September 24, 2015. He found the residence "in disarray," with items broken and "alcohol poured on several items." He also observed respondent mother had a red and swollen left eye and "several bruises on her arm and neck." Respondent mother stated respondent father had hit her in the face and "choked [her] to the point where she was unable to breathe easily." Respondent mother stated she was holding Z.L. while respondent father was attacking her. She ran to the bathroom and retrieved a phone, which she had hidden in case more abuse occurred. After speaking with respondent mother, Doran smelled a "strong odor of cannabis" in the residence. Respondent mother denied having any cannabis on her person. She later provided Doran with a small plastic bag of suspected cannabis.

¶ 16 Respondent mother gave a written statement indicating respondent father walked in the house and hit her "upside the head twice and once in the mouth." He continued to hit her "on the side of the head" and ripped a gold chain off her neck. He also grabbed her arm and choked her. After leaving the bathroom to unlock the front door, she noticed he had dumped cooking oil and wine on the couch and broken a mirror off the wall. When he saw she had unlocked the front door, he hit her "upside the head again."

¶ 17 Respondent mother testified the incidents in September 2015 and April 2017 were the only two instances of physical violence between her and respondent father. At the time of the hearing, she was no longer in a relationship with him.

¶ 18 On cross-examination, respondent mother testified respondent father moved back

into the home with her after the April 2017 incident. He lived with her until police arrested him in October 2017. She did not obtain an order of protection against him when the minors were living with her, and she admitted leaving the children unsupervised in his care. Respondent mother did not engage in any domestic-violence counseling, and she did not ask respondent father to undergo counseling either. Respondent mother denied posting respondent father's bond so he could released from jail in October 2017. When confronted with the appearance bond in respondent father's case, she admitted signing the bond but denied paying any money. She also agreed her address on the bond was the same as respondent father's address.

¶ 19 At the close of the evidence, the trial court addressed exhibit No. 1, which the court described as "the entire investigation" regarding the April 2017 incident. After hearing argument, the court found exhibit No. 1 "should not come in in its entirety because it does contain a whole bunch of hearsay." The court also found the indicated report did not fall under the business record exception.

¶ 20 Following arguments, the trial court found the State failed to meet its burden of proof on count IV, noting the lack of evidence establishing a history of substance abuse in front of the children. The court, however, found the State met its burden of proof on counts I, II, and III. On count I, the court found the "history of domestic abuse is prohibiting the parents from properly parenting." Moreover, the condition of the house during the September 2015 incident, which "indicated somebody was on some kind of a rampage," was an inappropriate environment for the children. On count II, the court found "no doubt that the parents, whether it's mom or dad or both, exhibited conduct that *** endangered the children" and created an environment injurious to their welfare. On count III, the court noted the evidence of D.L. being struck in the head. The court found the minors were neglected.

¶ 21 The December 2017 dispositional report noted respondent mother had been indicated for substantial risk of physical injury in January 2015, after she had been arrested for driving under the influence, driving on a suspended license, and child endangerment (Z.L.). Respondent mother told an investigator she had smoked marijuana earlier in the day and failed one of the field sobriety tests. Respondent mother was also indicated for substantial risk of physical injury based on the April 2017 incident.

¶ 22 The report stated respondent mother lived separately from respondent father and was in the process of obtaining an order of protection against him. She had been active in services, including attending domestic-violence meetings, completing a substance-abuse assessment, and completing a parenting class. While respondent mother claimed she was living a substance-free life after using drugs in the first trimester of her pregnancy, the report found this was "clearly not an accurate representation of the facts," as two drug screens indicated she tested positive for marijuana when she was eight months pregnant. S.L. tested positive for marijuana at birth. Respondent mother failed to inform her caseworker of S.L.'s birth. Instead, she was in the process of leaving the hospital with S.L. when an investigator interceded after respondent mother had told the social worker she had no involvement with DCFS. It was recommended respondent mother attend group and individual counseling.

¶ 23 Respondent mother was arrested for retail theft in October 2017, claiming "some of her items did not ring up appropriately." The police report, however, stated she checked out items in the self-checkout lane but took additional unpaid items she hid in a second cart.

¶ 24 Respondent mother visited with her children on a weekly basis, and the report indicated she "has gone above and beyond in attempting to see her children." She took the train to Chicago to attend visitations and medical appointments.

¶ 25 The report noted the "duality of [respondent mother] is difficult to reconcile. She can be one of the most natural mothers, but yet her child is born drug-exposed." While she states her relationship with respondent father is over, "they are seen together by professionals in the community." While respondent mother "has been cooperative and has made a great deal of progress in completing her services, it appears she has failed to implement what she has learned in these services into her everyday life and has not demonstrated a change or correction to the issues" that necessitated DCFS involvement.

¶ 26 Police conducted a raid of respondent mother's home in October 2017. Although she had stated respondent father was no longer a part of her life and she only saw him casually in the community, the police report indicated he had lived with her for most of the year. At the time of the raid, respondent mother stated he was only present for that week "until he obtained his first check from his employment."

¶ 27 The report recommended the children remain in substitute care to allow respondent mother time to complete her substance-abuse treatment and to document a substance-free lifestyle. Moreover, the report hoped respondent mother would be "as self-sufficient as possible so that when her children are returned to her, she will have the necessary support systems in place."

¶ 28 The dispositional report noted respondent father had twice been indicated for substantial risk of physical injury based on the September 2015 and April 2017 incidents. He had been found "largely non-compliant with his services, as he had only completed two hours of services since the children came into care." He "continued to blame DCFS for the current placement situation of the children and has refused to hold himself accountable for any portion." His whereabouts were unknown, as he refused to provide an address to the caseworker.

Respondent father visited with the children each week until he was incarcerated.

¶ 29 In January 2018, the trial court conducted the dispositional hearing. Respondent father did not appear. The court admitted the indicated report (exhibit No. 2), which had been denied admission at the adjudicatory hearing (exhibit No. 1).

¶ 30 Pontiac Police Department Officer Jonathan Marion testified he participated in an October 2017 investigation involving respondents' apartment. Tests conducted of items collected from a garbage can at the curb revealed "approximately 13 jeweler baggies with cocaine residue." A search of the residence revealed "approximately three grams of cannabis, two smoking pipes[,] and approximately half a gram of cocaine and a Suboxone tab." Marion also located "a jeweler baggie on the bedroom dresser," and the bags were the same as those found in the garbage. Respondent mother stated she "occasionally smoke[] weed" and told the officers they would find cannabis and glass pipes inside the residence. Respondent mother also stated respondent father had been living with her since April 2017. Marion found a duffle bag containing respondent father's mail and other personal items located in the bedroom.

¶ 31 Nancy Cooley, a DCFS caseworker, testified it was in the minors' best interests for guardianship and custody to remain with DCFS because respondent mother has had a history of substance abuse and her involvement with respondent father. Cooley "repeatedly" told her as long as respondent father "is not involved in services that she was putting her kids' placement at risk." While respondent mother stated the relationship was over, Cooley received evidence to the contrary. Cooley also noted respondent tested positive for cannabis in December 2017.

¶ 32 On cross-examination, Cooley stated "the children are very excited" to see respondent mother at visits and she has displayed appropriate parenting techniques during those visits. D.L. and Z.L. live with their paternal grandmother, and S.L. resides in a traditional foster

care home. Cooley stated the plan was to have all three children reunited in a traditional foster care placement.

¶ 33 Respondent mother testified she is 32 years old and lives in Pontiac. After respondent father was released from jail, he did not stay with her. She last used marijuana on December 7, 2017, but she has been going to counseling to help remain substance-free. She has also been attending domestic-violence counseling. Respondent mother works evenings, but her boss was willing to let her work during the day while the minors were in preschool and day care. She has had weekly visits with the children and tries to make additional visits and medical appointments. On cross-examination, she admitted respondent father had been "in and out" of her residence when she told Cooley he was not living with her and lied because she was trying to "hide it." In regard to a hearing on an order of protection in November 2017, respondent mother admitted stating there was nothing that led her to believe respondent father would throw a purse at her or attempt to abuse her in the future.

¶ 34 The trial court noted the main issues centered on (1) the minors residing in a home free of domestic violence, (2) respondent mother learning better parenting techniques, and (3) respondent mother remaining substance free. While the court stated it was "very hard" to find respondent mother credible, the court found insufficient evidence to find respondent father was living with respondent mother. The court found respondent mother has "done everything" DCFS has asked of her and she "just needs to maintain consistency in living in a domestic[-]violence[-]free home." The court then noted "the biggest concern" is respondent's cannabis use and found it "alarming" that S.L. was born with cannabis in his system. However, the court stated "if we start taking kids out of the home of every person that is using cannabis, not that cannabis is okay, but my god, we're going to have three-fourths of the dang city in foster

care." Noting "we want our kids to be with their parents" and the Juvenile Court Act's purpose to secure for the minors the care and guidance "in his or her own home," the court could not say respondent mother was unfit at that time.

¶ 35 In its January 4, 2018, dispositional order, the trial court found respondent mother fit, able, and willing to care for, protect, train, and discipline the minors. The court found respondent father unfit. The court made the minors wards of the court and placed guardianship with DCFS and custody with respondent mother. The court also entered an order of protection and required respondent father to have no direct or indirect contact with respondent mother while the case is pending.

¶ 36 On January 30, 2018, the State filed a notice of appeal. On February 8, 2018, DCFS filed a motion to vacate the trial court's dispositional order, arguing the court could not grant guardianship to DCFS absent a finding that both parents were unfit, unable, or unwilling to care for the minors. As the court found respondent mother fit, DCFS asked that "both custody and guardianship should be vested in the biological mother as a matter of law."

¶ 37 II. ANALYSIS

¶ 38 A. Indicated Report

¶ 39 The State argues the trial court erred in barring admission of an indicated report (exhibit No. 1) at the adjudicatory hearing. We disagree.

¶ 40 The Abused and Neglected Child Reporting Act (Reporting Act) (325 ILCS 5/1 to 11.8 (West 2016)) provides for the reporting of suspected cases of abused or neglected children. 325 ILCS 5/4 (West 2016). DCFS is responsible for receiving and investigating those reports. 325 ILCS 5/2(a) (West 2016). Reports made pursuant to the Reporting Act shall include, if known, the following:

> "[T]he name and address of the child and his parents or other persons having his custody; the child's age; the nature of the child's condition including any evidence of previous injuries or disabilities; and any other information that the person filing the report believes might be helpful in establishing the cause of such abuse or neglect and the identity of the person believed to have caused such abuse or neglect." 325 ILCS 5/7 (West 2016).

¶ 41 Once a report is received, DCFS investigative staff conducts an initial investigation to determine whether reasonable cause exists to believe child abuse or neglect exists. 325 ILCS 5/7.4(b)(3) (West 2016). If reasonable cause is found, the formal investigation begins. *In re J.C.*, 2012 IL App (4th) 110861, ¶ 22, 966 N.E.2d 453. Once a DCFS investigation into a suspected case of abuse or neglect of a child is completed, the investigative staff shall make a final determination as to whether a child was abused or neglected, and allegations may be determined to be indicated, undetermined, or unfounded. 325 ILCS 5/7.12 (West 2016). " 'An indicated report' means a report made under this Act if an investigation determines that credible evidence of the alleged abuse or neglect exists." 325 ILCS 5/3 (West 2016); see also 89 Ill. Adm. Code 300.20 (2012).

¶ 42 Section 2-18(4)(b) of the Juvenile Court Act provides that any indicated report filed pursuant to the Reporting Act shall be admissible in evidence at the adjudicatory hearing. 705 ILCS 405/2-18(4)(b) (West 2016). The standard of proof and the rules of evidence applicable to civil proceedings are applied at an adjudicatory hearing. 705 ILCS 405/2-18(1) (West 2016). Generally, whether evidence is admissible is within the trial court's discretion, and its ruling will not be reversed absent an abuse of that discretion. *In re A.W.*, 231 Ill. 2d 241, 256,

897 N.E.2d 733, 742 (2008). However, what material physically constitutes an "indicated report" involves a matter of statutory construction that we review *de novo*. *J.C.*, 2012 IL App (4th) 110861, ¶ 19, 966 N.E.2d 453.

¶ 43 In the case *sub judice*, the State sought to admit exhibit No. 1, the indicated packet created and completed by Boedigheimer, into evidence at the adjudicatory hearing. Boedigheimer stated the packet included his notes of his investigation and his findings and was created in the regular course of business for DCFS. Counsel for both respondents objected on the basis of hearsay. Respondent father's counsel contended the packet contained "all sorts of material in it" and was different than an indicated report. Respondent mother's counsel believed an indicated report is "a one[-]or[-]two page document that says you are indicated."

¶ 44 The trial court found the State was seeking to admit "the entire investigation" into the April 2017 incident. Based on its reading of *J.C.*, the court concluded "the full investigation doesn't come in." The State disagreed, contending *J.C.* involved medical records that had been attached to the investigation. Respondent mother's counsel argued exhibit No. 1 was "not the indicated report; this is the investigative file." The court found "the entire file of DCFS should not be admitted."

¶ 45 In *J.C.*, 2012 IL App (4th) 110861, ¶ 7, 966 N.E.2d 453, the State sought to introduce two exhibits pertaining to DCFS investigations. Exhibit Nos. 1 and 2 contained over 200 and 100 pages respectively, and the first 43 pages of exhibit No. 1 and the first 48 pages of exhibit No. 2 were computer printouts from DCFS's computer system. *J.C.*, 2012 IL App (4th) 110861, ¶ 8, 966 N.E.2d 453. The printouts were "labeled 'Handoff Document' and comprised the 'entire investigation.' " *J.C.*, 2012 IL App (4th) 110861, ¶ 8, 966 N.E.2d 453. The remaining documents in the two exhibits included supporting material gathered from witnesses

and others involved in the case. *J.C.*, 2012 IL App (4th) 110861, ¶ 8, 966 N.E.2d 453. The trial court admitted the exhibits in their entirety, over the respondent's objection. *J.C.*, 2012 IL App (4th) 110861, ¶ 14, 966 N.E.2d 453.

¶ 46 On appeal, this court noted "[t]he term 'indicated report' has two components, referring both to the report of suspected child abuse or neglect and the ultimate finding by a DCFS investigator that the report is supported by credible evidence." *J.C.*, 2012 IL App (4th) 110861, ¶ 23, 966 N.E.2d 453. In looking at the two exhibits at issue, the court found they "contained far more information than was necessary to show evidence of 'indicated reports' involving respondent and her children and also more information than was relevant to the State's particular allegations against respondent." *J.C.*, 2012 IL App (4th) 110861, ¶ 23, 966 N.E.2d 453. "While the finding that a report of abuse or neglect is 'indicated' is necessarily based upon an investigation into the report, it does not follow that the entire record of the investigation is admissible under the hearsay exception contained in section 2-18(4)(b)." *J.C.*, 2012 IL App (4th) 110861, ¶ 23, 966 N.E.2d 453. Thus, the trial court erred in admitting the exhibits in their entirety on the basis they constituted indicated reports under the Juvenile Court Act. *J.C.*, 2012 IL App (4th) 110861, ¶ 24, 966 N.E.2d 453.

¶ 47 In that case, the State also argued the exhibits were admissible as business records under section 2-18(4)(a) of the Juvenile Court Act (705 ILCS 405/2-18(4)(a) (West 2010)). *J.C.*, 2012 IL App (4th) 110861, ¶ 25, 966 N.E.2d 453.

> " 'Any writing, record, photograph or x-ray of any hospital or public or private agency, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence[,] or event relating to a minor in an

> abuse, neglect[,] or dependency proceeding, shall be admissible in evidence as proof of that condition, act, transaction, occurrence[,] or event, if the court finds that the document was made in the regular course of the business of the hospital or agency and that it was in the regular course of such business to make it, at the time of the act, transaction, occurrence[,] or event, or within a reasonable time thereafter.' 705 ILCS 405/2-18(4)(a) (West 2010).
>
> For admission of evidence pursuant to section 2-18(4)(a), the proponent must establish a foundation by showing 'the writing was (1) made as a memorandum or record of the condition or event; (2) made in the ordinary course of business; and (3) made at the time of the event or within a reasonable time thereafter.' [Citation.] 'The author of the writing does not need to testify; anyone familiar with the business and its procedures may testify about how the writing was prepared.' [Citation.]" *J.C.*, 2012 IL App (4th) 110861, ¶¶ 25-26, 966 N.E.2d 453.

¶ 48 This court noted the exhibits contained documents used by the DCFS investigator in the regular course of performing her duties and they were prepared within a reasonable time after the investigations commenced. *J.C.*, 2012 IL App (4th) 110861, ¶ 27, 966 N.E.2d 453. However, we found it inappropriate to admit the exhibits in their entirety as business records, noting, in part, "each exhibit contained attachments that likely originated from sources other than DCFS and were merely compiled by the DCFS investigator during the investigatory process." *J.C.*, 2012 IL App (4th) 110861, ¶ 28, 966 N.E.2d 453.

¶ 49 In the case before us, had the State identified specific portions of the indicated report, the trial court could have made a determination on admissibility under both the Juvenile Court Act and rules of evidence. In *In re Aniylah B.*, 2016 IL App (1st) 153662, ¶¶ 24-34, 61 N.E.3d 216, the respondent objected to the admission of certain transcripts from previous hearings as well as a client service plan and report regarding another child. The court discussed both section 2-18, the statutory evidence provision of the Juvenile Court Act, as well as the rules of evidence applicable to civil cases. *Aniylah B.*, 2016 IL App (1st) 153662, ¶ 24, 61 N.E.3d 216. The court agreed with our analysis in *J.C.* and described a suggested procedure found in *In re J.G.*, 298 Ill. App. 3d 617, 699 N.E.2d 167 (1998), which the State could have used here. In *J.G.*, 298 Ill. App. 3d at 627, 699 N.E.2d at 174, the respondent argued for the first time on appeal it was error for the trial court to take judicial notice of the entire court file. This court found it to be error, however there was more than sufficient evidence to establish unfitness without it. *J.G.*, 298 Ill. App. 3d at 629, 699 N.E.2d at 176. We noted how the State could have made a proffer to the court of the portion of the file for which judicial notice was sought under section 2-18(4). *J.G.*, 298 Ill. App. 3d at 629, 699 N.E.2d at 175-76. As we explained:

> "Such a procedure would serve to focus the trial court's attention on only those matters that are admissible under the rules of evidence, as well as make it easier for the reviewing court to determine what the trial court actually relied on in making its decision of unfitness." *J.G.*, 298 Ill. App. 3d at 629, 699 N.E.2d at 175.

We stated a reason for the importance of such a procedure—because a trial court's decision regarding parental unfitness should be based only upon properly admitted evidence. *J.G.*, 298

Ill. App. 3d at 629, 699 N.E.2d at 175-76. By simply tendering the entire "indicated report," the State's lawyers essentially abdicated the responsibility for presentation of relevant, material, and admissible evidence to the trial court—a task more properly theirs. We find the trial court did not err in barring admission of an indicated report (exhibit No. 1) at the adjudicatory hearing.

¶ 50 B. Custody

¶ 51 The State contends the trial court's order making the children wards of the court, but placing them in the custody of respondent mother, was contrary to the manifest weight of the evidence. We agree.

¶ 52 We are required to give deference to the trial court's findings since it is in the best position to observe the conduct and demeanor of witnesses. *In re D.F.*, 201 Ill. 2d 476, 498-99, 777 N.E.2d 930, 943 (2002). We will not substitute our judgment for that of the trial court on matters of credibility, the weight to be given the evidence, or inferences to be drawn therefrom. *D.F.*, 201 Ill. 2d at 499, 777 N.E.2d at 943. However, the manifest weight of the evidence standard is not a rubber stamp and "does not require mindless acceptance in the reviewing court." *People v. Anderson*, 303 Ill. App. 3d 1050, 1057, 709 N.E.2d 661, 666 (1999). We have no desire to usurp the role of the trial judge as the fact-finder, and we recognize the trial judge is in the best position to determine credibility; however, credibility has its limits. We are still obligated to examine the factual findings of the trial court to see whether "the opposite conclusion is clearly evident." *People v. Lee*, 2016 IL App (2d) 150359, ¶ 10, 50 N.E.3d 37. In this case, based upon this record, we conclude it is.

¶ 53 The first issue to be decided at a dispositional hearing is whether making the children wards of the court is in their best interests. An explicit adjudication of wardship is required before the court can proceed to disposition. See *In re Interest of Fornizy*, 48 Ill. App.

3d 107, 109, 365 N.E.2d 512, 513 (1977). The court must conclude it is in the child's best interest that he or she be made a ward of the court before proceeding to determine the proper disposition. *In re C.L.*, 384 Ill. App. 3d 689, 693, 894 N.E.2d 949, 953 (2008). In fact, we have previously noted how this determination is jurisdictional and is a prerequisite to entry of a dispositional order. *In re Miller*, 49 Ill. App. 3d 772, 774, 364 N.E.2d 973, 974 (1977).

¶ 54 Our supreme court has noted that, although the best interest of the child is the overarching concern at a dispositional hearing, the Juvenile Court Act reflects the constitutional presumption that the child's interest will best be served in the custody of a fit parent. *In re M.M.*, 2016 IL 119932, ¶ 26, 72 N.E.3d 260 (citing *Troxel v. Granville*, 530 U.S. 57, 68 (2000)). The purpose of the Juvenile Court Act is

> "to secure for each minor *** such care and guidance, preferably in his or her own home, as will serve the safety and moral, emotional, mental, and physical welfare of the minor and the best interests of the community [and] to preserve and strengthen the minor's family ties whenever possible, removing him or her from the custody of his or her parents only when his or her safety or welfare or the protection of the public cannot be adequately safeguarded without removal[.]" 705 ILCS 405/1-2(1) (West 2016).

Thus, the " 'preferred result under the Juvenile Court Act is that a child remain in his or her home, in the custody of his or her parents,' " if those parents are fit to care for the child. *M.M.*, 2016 IL 119932, ¶ 23, 72 N.E.3d 260 (quoting *In re R.C.*, 195 Ill. 2d 291, 308, 745 N.E.2d 1233, 1244 (2001)).

¶ 55 In this case, before we can determine whether manifest error has occurred, we are required to examine the entire record to assess the evidence available to the trial court by the time of the January 4, 2018, dispositional hearing. As the court began its analysis of the evidence, it characterized the three primary concerns expressed by DCFS in the December 27, 2017, family service plan as: "One, that the children are in a home that's free from domestic violence; two, that Mother learn better parenting techniques; and three, that Mother remain substance free." We will look at each concern in turn.

¶ 56 1. *Domestic Violence*

¶ 57 The obvious concern of both the trial court and DCFS was whether, in light of the lengthy history of domestic violence between the parties, respondent mother's continued residence with the respondent father, who refused to participate in services or acknowledge the existence of a problem, placed the children at risk of further involvement with domestic-violence incidents.

¶ 58 The trial court referenced, among other things, the December 27, 2017, dispositional report and the previously mentioned family service plan, which were considered by the court along with the testimony of three live witnesses—Officer Marion, DCFS caseworker Cooley, and respondent mother. The dispositional report indicated the children came into care as a result of a hotline call to the DCFS Central Registry on April 12, 2017, regarding a domestic altercation at the residence of respondents, where both respondent mother and her five-month-old child had been hit by respondent father. By this time, the parties had, in the words of the client service plan, an "extensive history of domestic violence." In fact, at the conclusion of the dispositional hearing, the court entered an order of protection prohibiting respondent father, who had been essentially uninvolved in the case, from having any contact with either respondent

mother or the children. This was, in no small part, undoubtedly due to the evidence of repeated instances of domestic violence perpetrated on respondent mother by respondent father, with no follow through to pursue anything beyond an emergency order by respondent mother.

¶ 59 There had been previous DCFS involvement with both parents, which included prior incidents of domestic violence. In September 2015, the police witnessed respondent father striking respondent mother in the face when they arrived to respond to her domestic-violence call. At the time of the report, respondent mother showed the officers evidence of a bruise she said was caused by respondent father three days before when he also physically abused her. According to respondent mother, she had to hide in the bathroom with her child while a friend called the police for her. In fact, during the pendency of the case, she disclosed a practice of hiding a phone in the bathroom in order to be able to call the police—obviously in anticipation of expected incidents of domestic abuse. In addition, respondent mother admitted to the DCFS investigator after the April 2017 incident, there had been a number of previously unreported incidents of domestic violence by respondent father against her. However, at the adjudicatory hearing, she denied telling the DCFS investigator about them, instead contending: "I told him that we have had arguments and disagreements as every human has, but never a domestic issue that I haven't called the police on."

¶ 60 Based on the April 2017 incident, the State's Attorney's office filed the petition in this case, in part because respondent mother refused to pursue an order of protection. When questioned about her appearance for the hearing on the order of protection, she admitted she informed the judge she was only pursuing it because of DCFS, and when questioned about the incident, she was unable to say whether respondent father struck her. Instead, she told the judge she had no reason to believe he would be likely to engage in any form of domestic violence in

the future. As a result, no order was entered.

¶ 61 In Cooley's assessment, there was chronic domestic violence in the home, respondent father did not acknowledge it, and respondent mother was not being protective of the children. Other than attending one session with a counselor and one parenting class, respondent father has not participated in services, claiming, according to Cooley, "it was just DCFS wanting to break up families."

¶ 62 In her family service plan, Cooley listed the primary reason for the case opening was "to offer services to the parents for domestic violence," among other things, noting both parents were referred for substance-abuse assessments and classes as well as parenting classes. According to Cooley's report, "Mr. Kelly has continued to blame DCFS for the current placement situation of the children and has refused to hold himself accountable for any portion." In addition, Cooley noted, as of the date of her December 21, 2017, report, she had been unsuccessful in determining where respondent father lived since case opening, which would have been April 12, 2017.

¶ 63 This is probably because, by all indications, there was substantial evidence in the record respondent father continued to reside with respondent mother, including respondent mother's own testimony at the adjudicatory hearing on December 7, 2017. At that hearing, the following colloquy took place between the prosecutor and respondent mother:

> "Q. Now, following the incident, the most recent one that occurred in April of 2017, Mr. Kelly was released from jail and moved back into the home with you. Correct?
>
> A. Yes.
>
> Q. In fact, he was living with you up until his recent arrest

in October. Correct?

A. Yes."

Later in the hearing, respondent mother responded to the State's questioning as follows:

"Q. Now, after the children were taken into care, you stated at that time that your relationship with Mr. Kelly was over. Correct?

A. Right.

Q. During the most recent, Mr. Kelly's most recent arrest in October of 2017, you reported to the police officer that Mr. Kelly had been living in the home with you since April. Correct?

A. No, ma'am. I haven't even lived there since April.

Q. So you did not state to Officer Marion that Mr. Kelly, that you,—I'm sorry—that Mr. Kelly has been living at this address with you since April?

A. No. I haven't lived at this address since April myself.

Q. But has Mr. Kelly been living with you since April?

A. Um, yes.

Q. So, he never, you never actually left him when you indicated to the DCFS that your relationship was over?

A. Um, no. I mean, he was in and out; but, no."

¶ 64 As indicated previously, during the pendency of the case, while respondent mother and respondent father were being provided services, he was again arrested for an incident of domestic violence against her on October 19, 2017. During the adjudicatory hearing,

respondent mother denied posting his bond in order to secure his release even after being confronted by the State with the bond sheet from case No. 17-CF-310, which listed her name and address as the depositor. It was also noted the November 19, 2017, bond sheet listed the identical address for both respondents.

¶ 65 The evidence indicates, in a case where the children came into care for "chronic domestic violence," where respondent father refused to cooperate with services or acknowledge any domestic-violence issues, respondent mother has repeatedly refused to follow through with seeking an order of protection, lied about her continued relationship with her abuser, bonded him out of jail after the last incident against her, and continued to reside with him throughout the pendency of the case—while lying about that as well.

¶ 66 Respondent father admitted to officers and others he continued to reside with respondent mother during the life of the case. When police raided respondent mother's residence on October 19, 2017, six months after the children came into care, they found both respondents, along with cocaine and marijuana. She told the police he had continued to live with her for most of the year. She was also arrested for retail theft on the same date as the raid. Although reports revealed she purchased items at the self-checkout lane and then removed unpaid items she had hidden in a second cart, she said there were some items which did not ring up properly. This was a mere two weeks before respondent mother delivered a marijuana-positive baby prematurely, after attempting to prevent DCFS from learning of the delivery. Although she claimed she was substance-free after using drugs during the first trimester of her pregnancy, she tested positive for two drug screens performed when she was eight-months pregnant and admitted using marijuana within two weeks of her drug assessment in December 2017. It must be remembered when she obtained a drug assessment at the outset of the case, based, undoubtedly, upon her self-

reporting, she was not recommended for any services.

¶ 67 Respondent mother did not tell the DCFS caseworker when she delivered S.L., and she attempted to leave the hospital with the child after telling the hospital social worker she did not have a pending case with DCFS and after having been informed by her caseworker it was unlikely she could take the newborn home due to the recent drug raid at her house. When describing respondent mother's progress on domestic-violence issues in the December 27, 2017, family service plan, Cooley described respondent mother as follows: "It is hard to discern how sincere Samantha's intentions are" and "it is difficult to find Samantha credible at this point."

¶ 68 All of this transpired shortly before the dispositional hearing where the trial judge characterized respondent mother's testimony as follows: "I do agree that it's very hard to take Miss Lair's testimony or find much credibility in Miss Lair's testimony given her history." However, the judge then credited her testimony in which she denied respondent father was actually living with her when his van had been seen at the residence by both police officers and a DCFS investigator as recently as several days before the dispositional hearing, concluding: "So I'm just, I'm not satisfied that there's been any evidence that would indicate that Mom has, that Mr. Kelly is living with Miss Lair." In spite of repeated instances of lying about her living arrangements, drug usage, and incidents of domestic violence, merely denying respondent father was residing with her at the time of the dispositional hearing, in spite of substantial and credible circumstantial evidence otherwise, was apparently sufficient for the judge.

¶ 69 Respondent mother has, by all credible evidence, throughout the pendency of the case, refused to end a long-standing relationship with an uncooperative, abusive partner who was previously seen by police striking her. When asked about the incident by the responding officer, respondent father's response was "you know what you saw." He has hit her repeatedly and

choked her to the point where she said she was "unable to breathe easily," all while in the presence of the children. When confronted by the DCFS investigator about striking the five-month-old child on April 12, 2017, respondent father noted there were "no marks on the child" (a month later since they had dodged the investigator for almost a month) and "[he] had gotten away with it before[, and he'd] get away with it again." Yet respondent mother continued to live with him and expose the children to further episodes of domestic violence because "he helps with the children." He even acknowledged to police he continued to reside with her throughout the pendency of the case.

¶ 70 By the time of the dispositional hearing, respondent mother had lost all credibility with her caseworker, who described herself previously as "the strongest advocate with Miss Lair." Respondent mother obviously lied at her initial substance-abuse evaluation since it was recommended that "no further action was needed," and she had reassured DCFS she was not using drugs—that is until she admitted smoking marijuana during the first trimester of her pregnancy, tested positive for marijuana twice in the month before prematurely delivering a baby with marijuana in its system without ever notifying DCFS of the results, and admitted smoking marijuana several weeks before her second drug assessment on December 19, 2017, less than a month before the dispositional hearing. She even lied to DCFS about attending the second assessment, telling Cooley she had already done so, when, in fact, Cooley contacted the Institute for Human Resources and learned she had not. It is reasonable to surmise the police raid on her house where both marijuana and cocaine were found, along with respondent father who was not supposed to be there, contributed to her lack of credibility as well.

¶ 71 2. *Parenting Skills*

¶ 72 The trial court listed the second-most important issue to be "that the mother learn

better parenting skills." By the time of the dispositional hearing, everyone was in agreement respondent mother parented the children well during her visitations. However, one might question why she continued to receive visitations if she was neither clean for her drug drops, if any were even required, nor compliant with the recommendations of DCFS that she not continue living with father.

¶ 73 Logic might dictate the only objective way of assessing a parent's level of cooperation in a case such as this would be to require active participation with recommended services and drug drops before visitation—with a failure to provide a clean drop or failure to participate resulting in a denial of visitation. Every other method of assessing respondent mother's level of cooperation and performance is subjective, as it is solely the evaluation of a therapist or counselor based upon the parent's level of cooperation in classes or sessions. Other than two drug screens conducted by her physician prior to delivery, there is no indication drug drops were requested by the State or DCFS or required before her second assessment. Interestingly, respondent mother testified her last use of marijuana was December 7, 2017, the date of the adjudicatory hearing. Since the evaluation from her first drug assessment in August resulted in a recommendation for no further action, and since she never told her caseworker about the two positive screens at her doctor's office in October, it is possible no one considered regular, unscheduled drug screens or drug screens at least 24 hours prior to visitation to be necessary. The facts of this case, however, point out the efficacy of such a practice. Had she been getting screened all along, the newborn might not have been born with marijuana in its system.

¶ 74 We question how respondent mother could be considered to be exhibiting effective parenting skills after delivering a substance-exposed infant and refusing to protect her

children from witnessing or experiencing incidents of domestic violence in the home. However, apparently the fact she attended her parenting classes and did well during visitations was sufficient. The dispositional report noted how respondent mother had "gone above and beyond" to visit her children and how the worker had been impressed "with the affection that Ms. Lair and the children have towards each other."

¶ 75 Even the family service plan, where on November 14, 2017, she was evaluated "satisfactory" with regard to the parenting component, noted one of the desired outcomes of any permanency plan would be that she "will be able to maintain a home [free] from any form of conflict in order to ensure safety of her children." As can be seen from the evidence, this was one of those aspects of her parenting education she had not yet internalized and did not appear to be practicing successfully. By November 14, 2017, her home had been raided by the police, with quantities of marijuana and cocaine found, along with a number of jeweler's bags with cocaine residue, two smoking pipes, and a Suboxone tablet. She had been arrested the same day of the raid for retail theft. She had delivered a substance-exposed infant and tested positive twice in the month before delivery. She had bonded respondent father, who was arrested for battering her, out of jail and, by all appearances, was allowing him to continue to reside with her. None of these things would seem to qualify as "effective parenting." However, according to the trial court, "[w]ith regard to learning better parenting techniques, also that's been completed satisfactorily and needs to remain consistent. Miss Lair completed her parenting classes." These classes consisted of five sessions between August 30, 2017, and September 27, 2017. She successfully completed them approximately three weeks before the drugs and her abusive paramour were found in her home. We believe those things reflected on respondent mother's true ability to effectively parent her children.

¶ 76 3. *Substance Free*

¶ 77 The third most important component of the service plan noted by the trial judge was "that Mother remain substance free." This hardly needs further comment at this point other than to note the judge's comment after mentioning respondent mother's delivery of a child with cannabis in his system during the pendency of the case, when the judge explained her analysis in this fashion: "But if we start taking kids out of the home of every person that is using cannabis, not that cannabis is okay, but my god, we're going to have three-fourths of the dang city in foster care." The judge recognized the need for the use of cannabis to be, in some way, connected to the ability to care for children, but apparently did not believe continued drug usage and delivery of a substance-exposed infant was sufficient. We respectfully disagree.

¶ 78 The trial court did not believe there was sufficient evidence to find respondent mother used any of the cocaine found in her home by the police, and although she noted the risk its mere presence created for the children, concluded "[b]ut she's in a new house now." The more reasoned assessment of respondent mother's situation and potential for further drug usage or exposure to the children should have been based on her performance or lack thereof. The fact she is in a different house has nothing to do with her lifestyle choices, her lack of significant progress, and her continued relationship with respondent father.

¶ 79 4. *The Trial Court's Decision*

¶ 80 The trial court's decision to return the children to respondent mother was against the recommendation of the caseworker who identified herself as previously being respondent mother's "strongest advocate." What changed her opinion? Probably the substantial body of evidence of lies and manipulation by respondent mother as she progressed, or failed to progress, through services. When she did not follow through with recommendations, she always had an

excuse. She claimed she did not get the order of protection because the court would not grant it. However, it was ultimately learned she did not tell the court about the history of physical abuse and said she did not believe it was likely to happen again. When she did not follow through with getting her second assessment, she told Cooley she had. However, Cooley learned this was not true. When respondent mother told the social worker at the hospital she had no pending involvement with DCFS as she attempted to remove the substance-exposed newborn, that was found not to be true. She had already been told it was not likely she could take the child home, but she attempted to do so anyway. Although she told her caseworker she was no longer in a relationship with respondent father, she admitted to police in October they continued to live together since the incident in April. When she denied continued drug usage, that proved to be untrue as well.

¶ 81 Cooley had been the caseworker since case opening eight months prior to the dispositional hearing. When asked by the prosecutor to explain her opinion why it would be in the best interests of the children for custody to remain with DCFS, she said:

> "I think for two reasons. The first is she's had a history of substance abuse, which clearly she demonstrated in October by testing positive twice when she was eight months pregnant at the suggestion of her primary care provider. I think there is also concern on our behalf that the child had marijuana in the cord when born. And then the larger issue of course is her involvement with Darryl, Mr. Kelly. Whether that remains in effect or not, it's difficult to ascertain."

¶ 82 In the opinion of the person most directly involved with respondent mother, the

children, and respondent father from the outset of the case, it was in the best interests of the children that custody remain with DCFS. It goes without saying the trial court is in no way bound by the recommendation of the caseworker and has the absolute right to exercise its discretion as it sees fit. However, it is significant Cooley did not believe any one of the three key issues identified by the court at the outset of the hearing could be resolved in respondent mother's favor.

¶ 83 This became more evident as the State continued to question her at the dispositional hearing. Cooley testified she told respondent mother repeatedly throughout the life of the case how her continued relationship with respondent father would impact her ability to obtain the return of the children. However, since May, respondent mother told her repeatedly the relationship was over; a fact which, by the time of the dispositional hearing, was clearly known to be false.

¶ 84 During the trial court's ruling from the bench on January 4, 2018, it noted the language of section 1-2 of the Juvenile Court Act, indicating "the purpose of this Act is to secure for each minor subject here to such care and guidance preferably in his or her own home as will serve the safety and moral, emotional[,] mental[,] and physical welfare of the minors." The court then concluded it could not find any reason to declare respondent mother unfit. Although we have noted how the " 'preferred result under the Juvenile Court Act is that a child remain in his or her home, in the custody of his or her parents,' " if those parents are fit to care for the child (*M.M.*, 2016 IL 119932, ¶ 23, 72 N.E.3d 260 (quoting *R.C.*, 195 Ill. 2d at 308, 745 N.E.2d at 1244)), based on this record, we conclude such a decision was against the manifest weight of the evidence.

¶ 85 We are not unmindful of the fact our decision today affects the legal custody of

minors who have been returned to their mother some months ago. However, we are also aware DCFS may choose to seek continued placement with respondent mother if circumstances so warrant and the matter can be scheduled for hearing on an abbreviated timeline such as the one under which this court operates for cases of this nature.

¶ 86 III. CONCLUSION

¶ 87 For the reasons stated, we affirm in part and reverse in part the trial court's dispositional order, finding the court's decision returning the minors to respondent mother's custody was against the manifest weight of the evidence. We order custody be placed and guardianship remain with DCFS. We also remand for further proceedings.

¶ 88 Affirmed in part and reversed in part; cause remanded with directions and for further proceedings.