2011 IL App (4th) 110512-U

Filed 11/3/11

NO. 4-11-0512

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: P.L. and L.L., Minors,	)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Petitioner-Appellee,	)	McLean County
v.	)	No. 08JA118
RICHARD LOGSDON,	)	
Respondent-Appellant.	)	Honorable
	)	Kevin P. Fitzgerald,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* Where the State failed to sufficiently prove that respondent father had failed to make reasonable progress toward the return of the children to his care within a nine-month period after the initial nine-month period following adjudication, the trial court erred in finding respondent an unfit parent and terminating his parental rights.

¶ 2 Respondent father, Richard Logsdon, appeals the trial court's order terminating his parental rights to his children, P.L., born April 21, 2004, and L.L., born September 14, 2008. He claims the court's findings that (1) he was an unfit parent and (2) termination was in the children's best interests were against the manifest weight of the evidence. We agree and reverse the court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In September 2008, the State filed a petition for the adjudication of L.L. and P.L., alleging they were neglected minors. L.L., only three days' old at the time, was born to Lona

Logsdon, respondent's wife. Lona had been determined to be an unfit parent in two prior juvenile cases (McLean County case Nos. 01-JA-8 and 06-JA-164) involving her older children. In 2001, she was convicted of murder in the death of her second oldest child. According to the petition, these prior judgments created a risk of harm to L.L. Likewise, P.L., a four-year-old child, was residing in an environment injurious to her welfare with her mother, Brienne Daniels. A week earlier, a trial court had determined that Daniels was an unfit parent to another child. This finding of unfitness created a risk of harm to P.L. Respondent was the father of both children. Upon each child's removal from his or her respective mother's care, each was placed with respondent.

¶ 5 The crux of this case centers on the following information that was included in the shelter-care report. In 1991, respondent, who was 15 years old at the time, was adjudicated a delinquent minor after being charged with six counts of aggravated criminal sexual assault for the anal penetration of his two female cousins, aged 6 and 4. He successfully served 24 months' probation. Though he pleaded guilty to the offenses, he has since denied that he committed the acts for which he was charged.

¶ 6 In October 2008, the trial court entered an order of adjudication upon both mothers' stipulations to a finding of neglect. In December 2008, the parties convened for a dispositional hearing; however, the State asked for a continuance to gather further information. In particular, the State requested more information regarding respondent's sexual-abuse evaluation and treatment provider in order to assess his risk of reoffending. Upon questioning by the court, respondent stated that approximately 20 years ago, he had received treatment at Catholic Social Services in Bloomington. Respondent's counsel informed the court that he had advised respondent not to sign a release "just because this did happen when he was 13 [*sic*] years old. He was successfully

discharged." Despite counsel's objection, the court ordered respondent to execute a release in favor of the Illinois Department of Children and Family Services (DCFS). According to his service plan, respondent was required to participate in a psychological evaluation and individual counseling.

¶ 7 In preparation for the dispositional hearing, DCFS prepared a dispositional report. Attached thereto was a copy of respondent's sex-offender evaluation conducted on February 26, 1991, by Phillip A. Foster, which recommended treatment. Because the children were placed with respondent, the prosecutor asked that the dispositional hearing be continued until she could verify that respondent successfully completed sex-offender treatment. In February 2009, at the dispositional hearing, the prosecutor noted that she had been unable to locate records of verification, but she did inform the trial court that respondent had been successfully discharged from his sentence of probation. In February 2009, the court entered a dispositional order finding both mothers unfit. Over the State's objection, the court found respondent fit, willing, and able to care for the minors. Custody of both children remained with respondent.

¶ 8 Also in February 2009, respondent participated in a psychological evaluation. Of concern to the psychologist, Dr. Linda Lanier, was respondent's inability to believe that L.L.'s mother, Lona, was capable of killing her child. Lona was convicted of murder related to the death of her second oldest child, then one month old, in 2001. Her conviction was reversed on appeal *(People v. Griffin*, 351 Ill. App. 3d 838, 856 (2004)), but she subsequently pleaded guilty to a lesser charge in May 2009. In Lanier's opinion, respondent "cannot be trusted to monitor and protect children in Lona's care." According to Lanier, should Lona be allowed to return to her home with respondent, it was reasonable to conclude that respondent would allow her to independently care for the children based on his belief that she was incapable of child abuse.

¶ 9 At a permanency hearing in July 2009, the trial court found respondent to be an unfit parent based on the following concerns: (1) the amount of time per day the children spent in day care; (2) respondent's inability to protect his children from harm in light of his revelation to Lanier that he did not believe Lona was capable of killing her child; and (3) taking P.L. off her prescribed medication against her doctor's recommendation and lying about it, stating that the doctor had approved. There was no stated concern about respondent's sex-offender history. The children were removed from respondent's home and placed together in a traditional foster home.

¶ 10 In February 2010, respondent participated in a sex-offender evaluation with Dr. Michael S. Shear. According to Shear, respondent minimized his mental-health issues and failed to timely return 23 assessment instruments given to him to be completed at home (14 related specifically to sex-offender issues and 9 related to mental-health issues). However, Shear determined that respondent's risk of reoffending was in "the low category."

¶ 11 In August 2010, P.L. and L.L. were separated after the foster family had requested P.L.'s removal from their home due to her behavioral issues. She was placed in a different traditional placement and L.L. remained in the home.

¶ 12 Due to respondent's failure to cooperate with sex-offender treatment, in September 2010, the State filed a petition to terminate his parental rights, alleging he was unfit for (1) failing to make reasonable efforts to correct the conditions that were the basis for the children's removal (750 ILCS 50/1(D)(m)(i) (West 2010)), (2) failing to make reasonable progress toward the return of the minors within the initial nine months after adjudication, namely October 28, 2008, through July 28, 2009 (750 ILCS 50/1(D)(m)(ii) (West 2010)), and (3) failing to make reasonable progress toward the return of the minors during any nine-month period after the initial nine-month period

following adjudication, specifically July 28, 2009, through April 28, 2010 (750 ILCS 50/1(D)(m)(iii) (West 2010)). The petition further alleged termination of respondent's parental rights would be in P.L.'s and L.L's best interests.

¶ 13 On November 27, 2010, Dr. Shear sent a letter to DCFS explaining that in August 2010, respondent had unexpectedly left sex-offender therapy and did not return until November 1, 2010. Respondent told Shear that he returned because he realized DCFS would require him to participate in order to have his children returned to his care. However, he then missed two sessions. He was told he would be required to submit to a polygraph examination, as he continued to deny that he committed a sex offense. As of the date of Shear's letter, respondent had not made the arrangements for the examination. Shear noted respondent "obviously did not show that he took the sex[-]offender treatment *** seriously. He seemed to have gotten essentially nothing from it."

¶ 14 In December 2010, Lona surrendered her parental rights to L.L. In February 2011, on the day scheduled for trial, the trial court granted respondent's request to substitute his attorney for Alan Novick, the attorney who had represented Lona.

¶ 15 In February 2011, the State filed an amended petition to terminate, adding an allegation that respondent was unfit for failing to make reasonable progress toward the return of the minors during any nine-month period after the initial nine-month period following adjudication, specifically April 28, 2010, through January 28, 2011 (750 ILCS 50/1(D)(m)(iii) (West 2010)).

¶ 16 A. Fitness Hearing

¶ 17 In April 2011, on the day of trial, P.L.'s mother surrendered her parental rights. Thus, the trial court conducted a hearing on the State's petitions as they related to respondent only. The prosecutor informed the court the State would proceed on the allegation contained in the amended

petition only, abandoning the allegations set forth in the original petition. The prosecutor asked the court to take judicial notice of specifically mentioned pleadings, docket entries, and orders. She read each of the requested documents by name and date into the record.

¶ 18 First to testify for the State was Sharyl Rushton, the DCFS caseworker assigned to this case during the relevant time period of April 28, 2010, through January 28, 2011. Rushton identified the tasks set forth in respondent's service plans and testified as to the progress he had made on each particular task. The first task identified in a July 2010 case plan was respondent's participation in counseling at Chestnut Behavioral Systems with Todd Smith. Respondent's progress was rated "satisfactory," as Smith had "completed" respondent with a recommendation to follow up with sex-offender treatment. Respondent's second task was to cooperate with DCFS. Respondent's progress on this task was rated overall "satisfactory" because he had regularly met with the caseworker. However, because respondent had not cooperated with sex-offender services, DCFS rated his progress on the task of satisfying his service plan obligations according to DCFS's recommendations as "unsatisfactory." The treatment provider, Dr. Shear, had requested that respondent complete inventories at home and return them within a week in February 2010. Respondent did not return them until April 2010.

¶ 19 The third identified task was parenting. Respondent's progress was "satisfactory" as he had completed the required parenting course and was adequately implementing the skills learned in visitation. The fourth task required respondent to participate in sex-offender treatment, which, because of his failure to timely return the information to Shear, respondent's progress was rated "unsatisfactory."

¶ 20 Rushton testified that respondent visited both children weekly in his home and the

visits went well. An issue arose regarding the air in respondent's home, as he regularly smoked inside. L.L. was diagnosed with RSV (respiratory syncytial virus), which was exacerbated by secondhand smoke. When respondent was advised of this issue, he immediately took steps to completely clean his home, including having his carpets professionally cleaned. He also stopped smoking inside the home.

¶ 21 Rushton next testified regarding respondent's service plan dated July 2010 through January 2011. Respondent's progress was "satisfactory" on all tasks except the fourth, his participation in sex-offender treatment. Respondent had indicated that he did not attend treatment because he could not afford it. After DCFS found funding for the treatment, respondent still did not attend. Shear had requested that respondent participate in a polygraph examination since he adamantly denied committing any sex offense. Shear asked that respondent take the examination by December 3, 2010, however, respondent did not take it until January 21, 2011.

¶ 22 On cross-examination, Rushton testified that she began as caseworker in July 2009. She recalled that DCFS contacted the circuit court of McLean County to obtain the records of respondent's sex-offender treatment as a juvenile. DCFS discovered that pursuant to an evaluation, respondent was ordered to participate in treatment at Catholic Charities. DCFS received the evaluation but "got little other information."

¶ 23 Rushton said respondent interacted well with his children and the visits were getting progressively better as a result of the services in which respondent was participating. In her opinion, respondent was a "nurturing parent." However, respondent's failure to complete the sex-offender treatment was a "very large safety issue" for DCFS. Rushton testified that respondent did not offer the test results from his polygraph examination but referred her to his attorney (his previous

counsel). His attorney indicated that he wanted to speak with respondent before revealing the results to Rushton. DCFS still has not been advised of the results. Rushton testified that she never saw "any official papers" indicating that respondent successfully completed sex-offender treatment 20 years ago. Rushton acknowledged that a parent would not be asked to reengage in domestic-violence or substance-abuse treatment if he or she had already completed the same and there had been no further incidents. However, in this case, respondent did not provide proof that he had successfully completed such treatment in the past.

¶ 24 Dr. Shear next testified for the State. He is a clinical psychologist with a general practice focusing on sex-offender treatment. He evaluated respondent on May 29, 2010. At the conclusion, Shear recommended sex-offender group treatment for respondent, meeting twice a week or for three hours per week. Respondent began in August 2010. He attended the first week, but he did only part of the second week. He told Shear he could "not tolerate being in that setting with those people." He stopped coming until November 2010. When he returned, he told Shear he realized he had to participate and successfully complete treatment in order to have his children returned. Shear asked him to submit to a polygraph due to the importance of accepting and admitting his status as a sex-offender. He attended for two weeks and quit again. The prosecutor asked Shear if he believed respondent "took this treatment seriously." Shear responded: "I, I didn't get evidence that he took it seriously. I mean, he did show up a few times. He did some things that were in line with what was expected. But for the most part, overall, compared to other people that are undergoing the same process, no."

¶ 25 On cross-examination, Shear clarified his belief that the children would not be safe with respondent because he "didn't have evidence to say otherwise. That's [what his] conservative

answer in good conscience would have to be, yes, they would be unsafe because [he does]n't know otherwise." Respondent's attorney asked Shear whether positive records regarding respondent's visits with the children, progress on his case plans, or permanency reports would have altered his opinion that the children were not safe with respondent. He said he probably would have viewed things "somewhat differently." Counsel asked Shear if he would have the same opinion if he had been made aware that DCFS placed the children with respondent at the shelter-care hearing. He said he would have the same opinion based on the fact that respondent had been criminally convicted. Shear indicated that he thought he had been advised that respondent had not successfully completed sex-offender treatment approximately 20 years ago, though he could not locate his notes on that issue. Shear said that even if respondent had successfully completed treatment in the past, his present-day denial requires that he participate in treatment so that the risk of him being around children could be assessed.

¶ 26 The State next called respondent to testify. He said he took a polygraph examination on January 21, 2011, because he was "told that [he] had to either take the polygraph or [he] was going to be dropped from classes." Although he knew he needed to produce the results before he could continue with treatment, he said he did not receive the results. He said his attorney received them. He substituted attorneys and had not spoken with his previous attorney since. He hinted that he knew the results and told his previous attorney he would think about what to do. He said he could not remember whether the test results indicated a level of deception. The State rested.

¶ 27 Respondent testified on his own behalf. He said that as of April 2010, he was employed at Fresh Market, a high-end grocery or gourmet store, earning $10.92 per hour in a full-time position. He said he worked diligently on his case plan with the hope of regaining custody of

his children. He said in January 2010, he changed his opinion and now one "hundred percent believe[s]" that Lana killed her son.

¶ 28 Respondent explained that he applied many of the things discussed with Todd Smith in counseling at Chestnut to his parenting styles and personal life in general. He said he has not had any experience with the criminal justice system, other than receiving a speeding ticket, since his juvenile adjudication in 1991. He said he successfully completed a year-long sex-offender treatment program at Catholic Social Services. He became frustrated with DCFS when his service plan required that he reengage in treatment. There were no treatment providers in Bloomington. He had to travel either 50 minutes east to Peoria or an hour west to participate in treatment. He had travel difficulties getting to either location. He was also frustrated with Shear because in November 2010, Shear told the entire group, in front of respondent, that respondent had stopped attending in August 2010 because members of the group made him sick. Respondent did not attend after that because (1) he had travel issues, (2) Shear revealed to the group what respondent had said, and (3) he felt he did not need further treatment. Respondent testified that he did not commit the acts for which he was charged in 1991.

¶ 29 At the close of respondent's case, respondent's attorney asked the court to take judicial notice of respondent's certificate of completion of probation in McLean County case No. 91-J-1. The court took judicial notice of the certificate of completion along with the dispositional report in that case, except the section reiterating what respondent had told the probation officer about the crime.

¶ 30 After considering the evidence and arguments of counsel, the trial court found the State had sufficiently proved respondent was unfit for failing to make reasonable progress related

to his sex-offender treatment between April 28, 2010, and January 28, 2011. The court specifically found respondent (1) delayed in taking the polygraph examination and (2) did not provide Shear with the results, knowing the results were necessary in order for Shear to implement a treatment plan.

¶ 31 B. Best-Interest Hearing

¶ 32 The trial court proceeded immediately to a best-interest hearing. The court took judicial notice of the entire file in this case, in respondent's juvenile case (McLean County case No. 91-J-1), and of the visitation records. Sharyl Rushton testified regarding the children's respective placements. She said L.L., who was then 2 1/2 years old, resided with Patricia and Eric Lambert. He had been in their home since October 2009. The Lamberts have a biological daughter, who is away at college, and one other foster child in the home. They adequately meet all of L.L.'s needs, including his respiratory issues, speech issues, and attendance at physical therapy. They are mutually bonded and are willing to adopt him. Rushton was asked if respondent's rights should be terminated to L.L. Rushton responded: "I mean, [respondent] loves his–both of his children, but he's not going to be able to provide for them in the near future based on his failure to comply with the sex[-]offender services."

¶ 33 Rushton testified that P.L., who was then seven years old, had resided in a traditional foster home since August 2010. The Lamberts asked that she be removed from their home because they had issues with her "disruptive and difficult" behaviors. According to Rushton, P.L. frequently made untruthful statements and was"pretty blatant" in her noncompliance with their directives. She is currently in first grade and doing "very well" in school. She suffers from attention deficit disorder (ADD) and was taking medication to help with the symptoms. She had an individualized education

program at school, which seemed to help with her behavior. She suffers from pseudostrabismus, an eye disorder which requires that she be seen by a specialist. She attends counseling and seems to be doing well. The foster parents are not willing to adopt P.L. but Rushton spoke of an adoptive placement available for her. DCFS did not want to move her into that home until it was necessary. In the adoptive placement, the family has a 15-year old biological son, a 12-year old biological daughter, a 12-year old adopted son, and a 9-year old adopted son. P.L. has not met the family. This home is in a different school district and a different community than where she currently resides.

¶ 34 In Rushton's opinion, it is in P.L.'s interest to terminate respondent's parental rights. Referring to both children, Rushton said they both need stability in that there had been "a lot of movement and ins and outs and changes and back and forths in their life with the adults, their parents' relationships. And without them being able to have some form of stability in the near future, I don't see them being able to move forward."

¶ 35 On cross-examination, Rushton was asked to describe the bond between respondent and the children. She said L.L. was bonded to respondent but "in a lesser degree" than to his foster parents, and P.L. was bonded to him "to some degree." Rushton said P.L. "vacillates" on that. She said DCFS tries to place siblings together "whenever possible." They tried to maintain P.L.'s placement with the Lamberts by offering counseling, to no avail. She said "clinical" was called in to assist. Rushton said P.L. would not need counseling once termination proceedings were over. P.L.'s behavior has improved. Rushton admitted that the potential for sibling placement had not been reviewed.

¶ 36 Respondent's counsel moved to continue the best-interest hearing until DCFS

complied with its regulation regarding reviewing sibling placement. The trial court denied respondent's motion and the hearing continued. The court did take judicial notice of section 301.70 of title 89 of the Administrative Code (89 Ill. Adm. § 301.70 (2011)) (DCFS's policy is to place siblings together if possible; if not, placement will be reviewed periodically to ensure compliance).

¶ 37 Rushton testified that the Lamberts "were pretty clear" that they did not think P.L. should be in their home, though she had not had a recent discussion with them regarding this issue. They had indicated they were willing to allow P.L. to visit L.L. should they adopt him.

¶ 38 Patricia Lambert, L.L.'s foster mother, testified that she and her husband did not want to "get rid of" P.L. On August 30, 2010, she wrote a letter to Rushton explaining her feelings about P.L. She and her husband felt it was unfair to P.L. to remain in the home, as P.L. was unhappy and the Lamberts were unhappy. She said she did not think it would be a good idea to have P.L. return to the home, but would be "more than willing" to have her visit with L.L. Her decision is based on L.L.'s best interest. L.L. would "cower back" when P.L. was screaming, throwing fits, and throwing things. Patricia did not want L.L. exposed to that type of behavior. Patricia said L.L. calls her and her husband "Mommy and Daddy," and their daughter "Sissy."

¶ 39 On cross-examination, Patricia said she "kept in constant contact" with a counselor at ABC and Rushton after her request to remove P.L. from her home. She said no one offered any special classes or techniques to deal with P.L.'s behaviors. She did not think P.L. and L.L. shared "a strong bond." In her opinion, P.L. had a difficult time bonding with anyone. She said when DCFS decided to remove L.L. from her home to keep the siblings together when P.L. was removed, Patricia appealed because L.L. had already formed a "very tight bond" with her family and she felt the family could help L.L. but not P.L. L.L. was allowed to stay.

¶ 40 Patricia said when L.L. came into her home, he was very withdrawn. He did not smile or laugh. He "basically just laid there." She described him now as "a very happy child." He has suffered developmental delays, but they were working on them. For example, L.L. participates in physical therapy to help him walk properly, as he tended to walk on his "tippy toes" and fell easily. He also participates in occupational therapy to help him work better with his hands. They practice cutting, pasting, and buttoning. He also participates in developmental therapy, which "picks up everything that the others don't cover." Finally, he participates in speech therapy. He also gets breathing treatments twice a day for ongoing respiratory issues. The State rested.

¶ 41 Derrick Jedlicka testified on behalf of respondent. He said he has been a friend of respondent's for 20 years. He has seen respondent and his children interact with each other. He said respondent plays with his children, cooks for them, shows them affection, nurtures them, and provides for them. In his opinion, the children are safe with him and he would leave his own children with respondent. Jedlicka said respondent's children are "absolutely" bonded to him. He said he also definitely sees a bond between P.L. and L.L., describing P.L. as "enamored" with L.L.

¶ 42 On cross-examination, Jedlicka agreed with the statement that "loving a child is enough to be a good parent." He also said it had been "a couple years now" since he had seen respondent with his children. He thought respondent lost custody of his children "because of the situation with his wife at the time." He reiterated that he trusted respondent around his children, who were aged 10 and 13.

¶ 43 Bradley Logsdon, respondent's uncle, also testified on respondent' behalf. He has seen respondent interact with his children and described him as "a really good dad." He said respondent plays with his children and helps them with various activities. He provides for all of

their needs. He is affectionate and nurturing. Logsdon said some things respondent has done he does not agree with "job wise," but he said "that's his business." When it comes to his children, respondent is "very responsible." Logsdon testified that he believes the reason the children were removed from respondent was due to "his relationship with his wife." Logsdon said respondent was a "great kid growing up." He knew respondent was involved in the juvenile court system. When asked to comment on respondent's involvement, Logsdon said: "What I know of it is this, I wouldn't trust the two that were involved," referring to the two female cousins. He continued: "I know very, very little of it. I knew there was some kind of misbehavior, I guess, sexually, but I–to me I highly doubted that ever happened, but that's what the case was, I guess."

¶ 44 Logsdon said that he knew a little about what respondent had to do to have his children returned to his care. He said he knew respondent "had to take some class he told [him] about that he wasn't comfortable with." Logsdon thought it was "some kind of sexual predator class" that made respondent "ill." On cross-examination, Logsdon admitted he would not feel comfortable leaving his child with an untreated sex offender.

¶ 45 Jennifer Slater, a family-habilitation specialist with Catholic Charities, testified that she has worked with respondent and his children as the supervisor of visitation. Her job was to make sure that the things respondent learned in parenting were implemented during visitation. Slater said that P.L. had "come a long way in being very accountable for her own actions." She said she had seen a change in P.L.'s behavior since she had been taking medication for her ADD. She said respondent did "very well" in implementing mealtime and family time. She said he provided nutritious meals for the children, he appropriately talks to the children, and engages them in conversation. Respondent works with L.L. having him repeat words correctly. Slater said L.L.'s

"linguistic skills have exploded recently." When L.L. uses a new word, respondent cheers and claps. P.L. plays along with respondent and L.L. gets excited and starts clapping. She said with this type of behavior, the new word is "positively reinforced."

¶ 46 Slater testified that L.L. and P.L. "definitely have a bond." They are always happy to see each other. Slater reiterated that respondent had completely cleaned his home when it was discovered that L.L. suffered from respiratory issues. She said she no longer detects the odor of smoke in respondent's home. She said respondent has sufficiently addressed various safety issues in his home with baby gates, door locks, *et cetera.* Slater said respondent "loves those children *** treats them very well." P.L. "shrieks" when she sees respondent at visitation and L.L. is "happy to see [him] from what [she] observe[s]." They exchange hugs and kisses at the beginning and at the end of the visits. Slater said there was a "stage in there where [P.L.] would cry a lot. She would really–she did not understand why she had to go anywhere. She wanted to stay with dad and dad had to explain to her very appropriately." She said respondent and the children color, read, and play together. In Slater's opinion, after supervising approximately 200 hours of visitation among respondent and the children, she believes the children are safe in respondent's care; he provides adequate food, clothing, and shelter; and they feel secure with him.

¶ 47 On cross-examination, Slater testified that she had not observed any major situations when the children return to their respective homes after visits. She said L.L. is "very happy" to see his foster parents and P.L. was "just fine." Slater said there was "no real affection or anything" at P.L.'s foster home but she seemed "content." She said both children refer to respondent as "Dad."

¶ 48 Next to testify for respondent was Donna J. Bell, the court-appointed special advocate (CASA). She was present when P.L. informed Rushton that the Lamberts did not like her as much

as they liked L.L. because she had accidents in her pants. Bell questioned the Lamberts, who denied feeling that way and were dumbfounded as to why P.L. would make such an assertion. However, Bell admitted that shortly thereafter, the Lamberts filed a notice to have P.L. removed from their home. Bell agreed with Slater and Rushton that visits among respondent and the children went "very well." She said P.L. is bonded to respondent. She thought L.L. was still too young for her to make that determination regarding his feelings. On cross-examination, Bell testified that, in her opinion, it was in the children's best interests to terminate respondent's parental rights in the interest of stability.

¶ 49 Finally, respondent testified on his own behalf. He was recently fired from Fresh Market for failing to wear the required safety shoes into the cooler, but he was able to secure unemployment benefits. With regard to his children, respondent said he was very much involved with them. He had made a behavior chart for P.L., where she would receive a sticker for good behavior. She was very excited about this chart and loved the stickers respondent had purchased. She was always proud to announce that she had been good, but not so eager to reveal when she was not. She would sometimes even hide the fact. Respondent said he often spoke with her about being honest and "to stay straight." He would explain the importance of being truthful, told her the story of the boy who cried wolf, and said that lying hurts people's feelings. P.L. told respondent she did not want to hurt anyone's feelings.

¶ 50 Respondent said he always had activities planned for their visits. They would often play outdoors and would always do things that each child enjoyed. Respondent said P.L. would frequently tell him that she misses him and her brother and questions when she can return home. He said P.L. loves for him to fix her hair in a ponytail. He said he tries his best to be nurturing to

his children. They all share a bond with each other. He explained that he wanted the children returned to his care and that he had family members who could help him if he needed assistance.

¶ 51 On cross-examination, the following exchange occurred:

"Q. [By assistant State's Attorney]: Sir, you understand that you need to engage in sex offender treatment?

A. I took classes for it when I was a juvenile.

Q. Okay. But you're aware that part of your service plan goals include that you need to engage in sex offender treatment?

A. That wasn't the reason why you guys took my kids away from me in the beginning.

* * *

Q. You understand that part of you service plan goals include that you need to engage in sex offender treatment?

A. Somewhat, yeah.

Q. That you need to successfully complete this treatment?

A. Little bit.

Q. That the reason is there's a risk for the children if you don't, a risk of harm, excuse me, if you don't?

A. Yeah.

Q. That if you don't engage in treatment, the children are not going to be returned back home?

A. Yeah.

Q. You heard testimony yesterday from Dr. Shear where he indicated that best-case scenario this treatment takes minimum a year, correct?

A. Yeah.

Q. And when he gave that example, he stated that that is based on a patient that is cooperating, correct?

A. Yeah.

Q. Not denying that anything occurred, correct?

A. Yeah.

Q. Do you think it's in the best interest of both [L.L.] and [P.L.] that they remain in foster care for a minimum of one year still before you're able to complete treatment?

A. I don't think it's in their best interest to be taken away from both parents permanently.

Q. Do you think it's in their best interest to have to wait at best, minimum, a year?

A. No."

¶ 52 On further cross-examination, the following exchange occurred:

"Q. [By guardian *ad litem*] If it's suggested or ordered by the court that you do the treatment as suggested by Dr. Shear and provide the polygraph results in order to get your children back in your care and you refuse to do those things, how do you suggest we get past

that impasse getting your children back to you?

A. See, I don't really understand, because they didn't get taken from my care for my juvenile history. I parented [P.L.] all the way up until she started school, and then they come in and took her from me.

Q. Do you basically want us just to ignore that portion of your service plan and not have you be required to address that issue?

A. I mean, it states in my juvenile record that in order to be satisfactorily released from probation I have to do the stuff with Catholic Social Services at the time. And it said that I was satisfactorily released.

Q. From probation?

A. Right. And I had to take the classes at Catholic Charities (Social Services back then)."

¶ 53 Respondent acknowledged that he had told the juvenile court services officer that he had, in fact, committed the crimes. But, he claims he did so because the officer pressured him into a confession and he was without a "good lawyer." Respondent also acknowledged that he had cooperated with DCFS in performing the other goals set forth in his service plan because he "care[d] about [his] kids." Following up, the guardian *ad litem* asked:

"Q. So why won't you work on this last task if you care about your kids?

A. Why would you admit to something when--okay, let's say

> you get charged with something as a kid and you say [']yeah I did it,[] whatever. Let's say it gets brought out when you're an adult again. Why would you go back and look at it and say, [']wow, I didn't do this[']? Why would you admit to it again? That's just stupidity."

¶ 54 After considering the evidence and recommendations of counsel, the trial court announced its ruling in open court. The court first noted that the decision to split the siblings was not ideal but was "appropriate" after determining it was in L.L.'s best interest to stay with the Lamberts. Next, the court discussed the "propriety of requiring [respondent] to first of all be assessed for sex-offender treatment and then to be required to complete the treatment which was recommended." The court noted the "seriousness of the offense" as opposed to other sexual cases. For example, the court noted that a misdemeanor sexual-abuse case or one that involves consensual sex and is criminal only due to the ages of the parties, are quite different than a case where the perpetrator sodomized young children. Thus, given the severity of respondent's offense, the requirement that he participate in an assessment and treatment was appropriate. When looking at the evidence of respondent's admissions to the investigators 20 years ago, the court found it was "certainly more likely true than not true that [respondent] committed the offenses against those two young children, albeit a long time ago." The court noted respondent orally admitted to police officers, his probation officer, and the sex-offender evaluator, that he committed the offense. And, he signed a confession, admitting the charges. Based on these facts, the court concluded that "sex-offender treatment would have to be completed."

¶ 55 The trial court then considered each of the best-interest statutory factors. The court

acknowledged that respondent was generally capable of providing the necessities for the children. The factor may weigh slightly in favor of termination based on respondent's "spotty employment." For the factors of identity and the child's background and ties, the court said those weighed in favor of termination for L.L. simply because of his age and the amount of time he had spent in foster care. For P.L., the factors weighed against termination because of her age and the fact she had not found a permanent home. For each child's sense of attachment and feeling loved, the factors weighed slightly in favor of termination for L.L. based on the bond he has with the Lamberts. Though, the court noted, L.L. feels loved with respondent as well. For P.L., the factor weighed against termination again based on the fact that she was not in a permanent home and because of respondent's relationship with her.

¶ 56 The factors related to the children's wishes and community ties were not significant due to their relatively young ages. The factor related to the preference of the persons available to care for the children favored termination for L.L. because of the Lamberts' desire to adopt him and because respondent was unavailable. For P.L., the factor weighed against termination because of her lack of permanency. In terms of permanency, the court stated:

> "This court always has considered permanence for the child to be the most important factor in this case, in these cases. That's ultimately what every child needs, what every child craves, what every child deserves.
>
> The situation with [respondent] is that he has not completed his sex-offender treatment. He has denied throughout the life of this case that he committed the offense. And I think it's pretty clear from

Dr. Shear's testimony that by persisting in that stance, that he will never complete sex-offender treatment. I mean, I can't conceive of a way that he can do it under the--what's been presented to the court. In that context, I don't see how he could ever provide permanency for either of these children.

So when the court looks at all the factors with respect to [L.L.], I think the court can and does find well beyond a preponderance of the evidence that it is in his best interest that [respondent]'s parental rights be terminated.

It is a much closer case for [P.L.] given where she is at. However, even though most of the factors in the court's mind are neutral or may slightly favor non-termination, to me the permanency issue trumps them all. If we can't find permanency for her with [respondent], and I just don't see how we can under the situation where he has denied treatment; treatment won't accept him if he's in denial. And with the court's finding, again, it's important to the court the significance and the type of sexual misconduct that we're talking about in terms of placing children back with someone. I could not make a finding of fitness, nor would I be able to make a finding of best interest of return of a child to someone who has committed that type of offense and has not completed sex abuse treatment. So the court finds by a preponderance of the evidence that it is in [P.L.]'s

best interest as well that [respondent]'s parental rights be terminated."

¶ 57 On May 2, 2011, the trial court entered a written order, finding the State had sufficiently proved that respondent was an unfit parent and that it was in the children's best interests to terminate his parental rights.

¶ 58 On May 20, 2011, respondent filed a motion to reconsider, claiming the trial court's decisions were against the manifest weight of the evidence. Respondent alleged his due-process and equal-protection rights were violated when DCFS required respondent to engage in sex-offender treatment (1) 20 years after the incidents, (2) after he had already successfully completed treatment at the time, and (3) without the commission of any further offenses. He also claimed it was not in the children's best interests to separate them and place them into different homes. On June 10, 2011, after a hearing on the matter, the court denied respondent's motion. This appeal followed.

¶ 59 II. ANALYSIS

¶ 60 Respondent claims the trial court's decisions finding him unfit and that termination of his parental rights would be in the children's best interests were against the manifest weight of the evidence. He claims the court violated his constitutional rights by requiring him to participate in sex-offender treatment.

¶ 61 The termination of parental rights is a serious matter and therefore the State must prove unfitness by clear and convincing evidence. *In re M.H.*, 196 Ill. 2d 356, 365 (2001). Because the interest of a parent in the control, custody, and care of his child is fundamental, the decision to terminate will not be made lightly. *M.H.*, 196 Ill. 2d at 365. Thus, we are mindful that this private fundamental interest in the control, custody, and care of a child, which is potentially affected by government action, is due the utmost protection. *In re Jacob K.*, 341 Ill. App. 3d 425, 434 (2003).

However, a reviewing court accords great deference to a trial court's finding of parental unfitness, and such a finding will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re T.A.*, 359 Ill. App. 3d 953, 960 (2005).

¶ 62 Here, the trial court found the State had sufficiently proved that respondent was unfit based on his failure to make reasonable progress toward the return of the children during any nine-month period following the first nine-month period after adjudication, namely April 28, 2010, to January 28, 2011. Reasonable progress toward the return of the children for purposes of showing a parent's fitness may be found if the trial court can objectively conclude that the parent's progress is sufficiently demonstrable and is of such quality that the child can be returned to the parent within the near future. *In re J.P.*, 261 Ill. App. 3d 165, 175 (1994). "The standard by which progress is to be measured is parental compliance with the court's directives, the service plan, or both." *In re E.M.*, 295 Ill. App. 3d 220, 226 (1998) (quoting *In re L.L.S.*, 218 Ill. App. 3d 444, 463-64 (1991).

¶ 63 In this case, the trial court found respondent had failed to participate in sex-offender treatment as required by his service plan, thus leading to the court's conclusion that respondent was an unfit parent because he failed to make reasonable progress toward reunification with his children during the relevant specified time frame. Because nothing in the record before us supports the requirement imposed by DCFS that respondent participate in sex-offender treatment, we reverse the court's finding of unfitness.

¶ 64 We begin our analysis by noting that respondent successfully completed the three other tasks set forth in his service plan, and there were no issues or concerns related to respondent's visits with his children. According to DCFS, the fact that respondent failed to participate in sex-offender treatment with Dr. Shear was a serious failure to complete his service plan and sufficient,

in and of itself, for the court to determine that progress toward reunification had not been achieved.

¶ 65 The uncontroverted evidence in the record shows that respondent successfully completed his sentence of probation some 20 years earlier. A condition imposed as part of his 1991 probation term was that respondent participate in a sex-offender evaluation and cooperate with all treatment recommendations. According to the record, respondent participated in treatment with Catholic Charities. DCFS does not dispute this fact. Instead, DCFS disputes that respondent successfully completed treatment because the juvenile court was unable to produce documents verifying completion. DCFS's inability to retrieve the records from the juvenile court system should not be held against respondent. Respondent would not have been successfully discharged from probation had he not successfully completed a condition of his probation. See 730 ILCS 5/5-6-3 (West 2010) (setting forth conditions of a sentence of probation).

¶ 66 DCFS relied on Dr. Shear's "recommendation" that respondent participate in group treatment even though Shear's evaluation indicated respondent was at a low risk of reoffending. Nothing in Shear's testimony convinces us that the children's safety depended on respondent receiving further treatment. To the contrary, Shear testified that had he been shown positive visitation records, he may have viewed the risk of the children's safety "somewhat differently." He also testified that he had to testify in good conscience that the children would be unsafe because he "didn't know otherwise." This testimony does not identify any known risk to the children sufficient to support a requirement that respondent again engage in treatment after having had completed treatment 20 years prior.

¶ 67 Treatment was not required when DCFS placed the children with respondent after the shelter-care hearing even though DCFS knew of respondent's juvenile record. The children

remained with him for 10 months without any indication there was an underlying issue regarding his status as a sex offender. The children were removed from respondent's care for reasons completely unrelated to the commission of the sex offenses. According to the record, respondent remedied, to DCFS's satisfaction, those issues that caused him to be unfit, as they were never raised again. Yet, because the juvenile court system could not produce verification that respondent successfully completed treatment, he risked termination of his parental rights if he did not reengage in treatment.

¶ 68 This case is not unlike that of *In re K.S.*, 365 Ill. App. 3d 566 (2006), where the respondent father had been accused of and criminally charged with sexual abuse of one of his children. The criminal charges against him were dismissed, but in the neglect proceedings, DCFS still required him to participate in sex-offender treatment. *K.S.*, 365 Ill. App. 3d at 569. The trial court, admitting that it did not know why the criminal charges were dismissed or whether the respondent had actually sexually abused one of his children, supported the requirement that the respondent participate in treatment. *K.S.*, 365 Ill. App. 3d at 569. The Second District reversed, noting that trial courts must base decisions on *evidence*, not assumptions. "The absence of evidence is not '[a]ll the more reason' to order a parent to submit to a sexual offender evaluation and possible counseling." *K.S.*, 365 Ill. App. 3d at 573. Without actual evidence supporting DCFS assumptions that the respondent had committed sexual abuse, the trial court erred in ordering the respondent participate in a sex-offender evaluation. *K.S.*, 365 Ill. App. 3d at 574.

¶ 69 Likewise, the State has failed to produce any evidence to support its assumption that the children are at a risk of harm because respondent cannot produce proof that he successfully completed sex-offender treatment 20 years ago when he was 15 years of age. Apparently,

respondent cannot now deny that he committed the sex offense, lest he be required to participate in further treatment, regardless of the success of his prior treatment. In sum, no evidence before the trial court showed that respondent was in need of further sex-offender treatment. We cannot support a finding, based on these facts, that the children's safety depends on respondent's further participation in sex-offender treatment.

¶ 70 "We are dealing here with the future and only possibilities and probabilities can be assessed. To expose respondent's children to a reasonable probability of abuse is something this court will not do. On the other hand, no child in any family is free from the *possibility* of future abuse and we cannot afford to sever the natural ties between parent and child and cause that loss to both of them on the mere possibility that the child may be abuse." (Emphasis in original.) *In re Baby Boy Butt*, 76 Ill. App. 3d 587, 594 (1979).

¶ 71 The State failed to demonstrate that the children's safety depended on the requirement that respondent undergo further sex-offender treatment. It is not respondent's burden to prove that his children are not at risk of harm. See *K.S.*, 365 Ill. App. 3d at 578. According to the record before us, once respondent satisfactorily remedied the issues which caused the children's removal from his care, *i.e.*, the disbelief his spouse had murdered a child, the State had no basis to proceed on the issues related to his status as a sex offender, as nothing new had surfaced to cause the State a legitimate concern.

¶ 72 We keep in mind the following well-established principles. The right of a parent to control the upbringing of his child is a fundamental constitutional right. *In re R.C.*, 195 Ill. 2d 291, 303 (2001). In fact, the United States Supreme Court has described the rights associated with parenting as the most " 'basic civil rights of man' " (*Stanley v. Illinois*, 405 U.S. 645, 651 (1972)

(quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942))) and "the oldest of the fundamental liberty interests" (*Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

¶ 73 "The liberty interest of parents in the care, custody and management of their child ' "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." ' " *In re D.W.*, 214 Ill. 2d 289, 311 (quoting *In re D.T.*, 212 Ill. 2d 347, 359 (2004), quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)). In this case, the State has a sufficient compelling interest in protecting respondent's children from being raised by an untreated sex offender, especially when the offense involved sodomizing minors. The question then becomes whether requiring respondent to participate in sex-offender treatment is narrowly tailored so as to use the least-restrictive means available? Given that respondent had previously completed treatment, we think not. The State required respondent to participate in treatment because neither DCFS nor Shear could evaluate the records of respondent's prior treatment in order to confirm success of the issues presented.

¶ 74 The manifest weight of the evidence before the trial court was that respondent had been successfully treated 20 years earlier and absolutely no incidents questioning the success of that treatment had surfaced. Respondent was, at one time, a fit parent. With no new knowledge or occurrences related to the sex-offender issue, the State cannot now reasonably argue that he is unfit.

¶ 75 We find the trial court's decision that respondent was an unfit parent was against the manifest weight of the evidence. Thus, we reverse the court's order finding respondent unfit and remand for further proceedings consistent with our decision. Given our decision, we need not discuss the court's best-interest determination.

¶ 76 III. CONCLUSION

¶ 77 For the reasons stated, we reverse the trial court's judgment.

¶ 78 Reversed and remanded with directions.