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IL App (3d) 100859-UB

Order filed August 30, 2011
Modified Upon Denial of Rehearing October 21, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

<i>In re</i> M.C.,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
a Minor,)	Peoria County, Illinois,
)	
(The People of the State of)	
Illinois,)	
)	Appeal No. 3--10--0859
Petitioner-Appellee,)	Circuit No. 08--JA--178
)	
v.)	
)	
C.P.,)	
)	Honorable Richard D. McCoy,
Respondent-Appellant).)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in allowing the minor child to remain in the custody of DCFS when it specifically found the father to be a fit parent and provided no written basis to support a conclusion that respondent is unable to care for the minor.

¶ 2 Respondent, C.P., appeals from a dispositional order entered by the circuit court of Peoria County making his minor son, M.C., a ward of the court and placing custody with the Illinois Department of Children and Family Services. (DCFS). Respondent claims the trial court's statement that it "cannot conclude father is prepared to take custody of child" is against the manifest weight of the evidence and its order constitutes an abuse of discretion.

¶ 3 **BACKGROUND**

¶ 4 The State filed a juvenile petition alleging neglect due to an injurious environment on behalf of the minor, M.C., on August 21, 2008. The minor's date of birth is August 18, 2008. At the date of the petition, the father of M.C. was unknown. The circuit court of Peoria County found M.C. neglected via dispositional order filed September 18, 2008. The September 18, 2008, dispositional order found M.C.'s mother unfit and added "no findings for potential fathers," indicating it was unclear at the time who fathered M.C.

¶ 5 The State filed a petition to terminate the mother's parental rights on June 2, 2010. The basis for the State's allegation included allegations that the minor's mother was previously found unfit in Tazewell County, there has been no subsequent finding of fitness, and the mother had not completed services that would result in the return home of the minor's sibling. Thereafter, the mother surrendered her parental rights; the parental rights to "fathers unknown" were terminated on September 2, 2010.

¶ 6 During the adjudication process, the respondent submitted to testing which revealed that he is the father of M.C. Thereafter, the trial court vacated the order terminating the parental rights of "fathers unknown" and allowed respondent to answer the juvenile petition.

¶ 7 Respondent completed the integrated assessment and social history requested by the State. He appeared on time and, was not under the influence of drugs or alcohol. The report from the caseworker indicates she believed he answered questions openly and honestly. He is employed at Wal-Mart, living with the mother of his eight-month-old child, E.P. He and the mother of E.P. intend to marry.

¶ 8 A summary of the assessment indicates respondent claimed to have no previous knowledge of M.C. prior to being contacted about these proceedings. He informed the State assigned caseworker that M.C.'s mother informed him of her pregnancy but also told him "she had obtained an abortion." The mother reiterated that claim to respondent in August of 2009 after M.C. was, unbeknown to respondent, approximately one year old. Respondent informed the caseworker that despite the history set forth above, "he still would like to engage in services and cooperate with the agency to gain custody of his daughter."

¶ 9 At the permanency hearing, the State voiced concern for the fact that the father had just entered the picture and had not proven his commitment to the child. The Guardian Ad Litem echoed the State's concerns.

¶ 10 Respondent testified that he saw the mother at Wal-Mart with two children, but she neither talked to him nor informed him that either of the children might be his. He denied pursuing custody of M.C. out of fear that his mother would be angry with him if he did not pursue custody. He stated he wanted to parent M.C. and was ready to take her home that day. He noted he and his fiancée were currently was parenting his other daughter, who was 11 months old at the time of the hearing.

¶ 11 Respondent further testified that he does not have a criminal history and that he has

almost always been employed. While he has held many jobs, he claimed to leave previous employment due to better employment opportunities. His fiancée works at Subway. He claimed he could obtain health insurance or a medical card for M.C.

¶ 12 The caseworker testified that she did not believe the father was using drugs or alcohol. She stated she wanted the father to go to individual counseling. She indicated that respondent was appropriate during visits.

¶ 13 Ultimately, the trial court found that it was reasonable to conclude the father relied upon the mother's representation that she had an abortion to explain respondent's lack of involvement in M.C.'s life. The court then found respondent to be a fit parent. However, the trial court found that "placement is necessary based on *In re Jacob K.*[, 341 Ill. App. 3d 425 (2003)]" and that it "cannot conclude the father is prepared to take custody of the child." Therefore, the trial court ordered M.C. be made a ward of the court and placed with DCFS. Respondent father appeals.

¶ 14 ANALYSIS

¶ 15 We will reverse a trial court's dispositional determination only if the findings of fact are against the manifest weight of the evidence, or if the trial court committed an abuse of discretion by selecting an inappropriate dispositional order. *In re K.L.S.-P.*, 381 Ill. App. 3d 194, 195 (2008).

¶ 16 As this court noted in *K.L.S.-P.*, once a trial court adjudicates a child to be neglected, the court shall hold a dispositional hearing. *Id.* at 195; 705 ILCS 405/2-21(2) (West 2008). Section 2-27 of the Juvenile Court Act of 1987 (the Act), states that if "the court determines *and puts in writing* the factual basis supporting the determination of whether the parents, guardian, or legal custodian of a minor adjudged a ward of the court are unfit or are unable, for some reason other

than financial circumstances alone, to care for, protect, train or discipline the minor or are unwilling to do so, and that the health, safety, and best interest of the minor will be jeopardized if the minor remains in the custody of his or her parents, guardian or custodian," it may place the minor outside the parental home. 705 ILCS 405/2-27(1) (West 2008). In that event, one of the options provided by the Act is for the court to commit the child to the care of DCFS. 705 ILCS 405/2-27(1)(d) (West 2008).

¶ 17 Respondent submits that reversal of the dispositional order is mandated given the clear language of section 2-27(1) of the Act coupled with the trial court's finding that he is a fit parent. The State submits that a notation by the trial court on the disposition order equates to a finding by the court that respondent was "akin to a finding that respondent is unable to have custody at this time." The State's hypothesis that the trial court seemingly found respondent unable to care for M.C. is unavailing. The State admits that the trial court made "no express finding that respondent was unable or unwilling to have custody." Moreover, a review of the disposition order itself shows a designated area where the trial court is to record whether a parent "is fit" or "is unfit or unable for some reason other than financial circumstances alone, to care for, protect, train, or discipline the minor(s), or is unwilling to do so." This form-order contains additional space for the trial court to record the basis for any finding of unfitness or the basis for a finding that the parent is unable to care for the child. As noted above, section 2-27 of the Act mandates that the trial court put such a basis in writing. 705 ILCS 405/2-27(1) (West 2008).

¶ 18 We are left with no choice but to hold that the trial court erred in awarding custody of M.C. to DCFS given: the trial court's finding that respondent is a fit parent; no express finding that respondent is unable or unwilling to care for M.C.; and the lack of a written basis to support

the inference that respondent is unable to care for M.C.

¶ 19 We understand that State's attempt to convince us that the notation made by the trial court, including its reference to *In re Jacob K*, on the disposition order equates to a finding that respondent is unable to care for M.C. First, we must note that the holding of *Jacob K*. seems inapplicable to the case at bar. The *Jacob K*. court addressed due process issues and found that "due process requires the trial court to advise respondent of the tasks that she was required to complete and the time frame within which she was required to complete them to avoid losing her parental rights when she had already corrected the conditions that led to the adjudication of neglect." *Jacob K.*, 341 Ill. App. 3d at 436.

¶ 20 Again, section 2-27(1) of the Act states that the trial court must not only make the factual determination that the parent is unable to care for the child but mandates that after doing so the court "puts in writing the factual basis supporting the determination ***." 705 ILCS 405/2-27(1) (West 2008). This court held in *In re Madison H.*, 347 Ill. App. 3d 1024 (2004) that the phrase "and puts in writing the factual basis" contained within section 2-27(1) is not permissive and a "trial court's failure to provide the required written factual bases in its dispositional order was reversible error." *Id.* at 1028.

¶ 21 Similarly, we find reversible error in placing custody of M.C. with DCFS after finding respondent a fit parent and without finding respondent unable to care for M.C. As noted above, a trial court abuses its discretion by entering an inappropriate dispositional order. *K.L.S.-P.*, 381 Ill. App. at 195. Without a finding of unfitness or a properly supported finding that respondent was unable or unwilling to care for M.C., "the trial court was not authorized to make the child a ward of the court, and to grant custody and guardianship of the minor to DCFS." *Id.* at 196; 705

ILCS 405/2-23(1)(a), 2-27(1) (West 2008).¹

¹While the statutory scheme compels us to reverse the trial court's order, the author (and only the author) nevertheless feels obligated to comment on the decision. Undoubtedly, as the trial court noted, respondent is a "Johnny Come Lately" to M.C.'s life. For whatever reason, respondent fathered a child, then took no part in her existence during the first 12 to 18 months of her life. It is undisputed that the original finding of neglect, due to an injurious environment, was appropriate. Certainly, a sufficient basis existed upon which the trial court could have found respondent an unfit parent. See 750 ILCS 50/1(D)(b), (g) (West 2008) ("The grounds for unfitness are ***: (b) Failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare. *** (g) Failure to protect the child from conditions within his environment injurious to the child's welfare.").

However, given respondent's cooperation with the caseworker, participation in the adjudication process and work toward obtaining custody of M.C., the trial court found him to be a fit parent. The fact that respondent may be legally fit to parent M.C. in no way changed the scenario presented to the trial court: that is, a minor approximately two years old at the time of the disposition hearing who has known only two parental figures, her foster parents, for her entire life, and a natural father who wants to literally walk out the doors of the courthouse with her, thereby immediately depriving her of the comfort of those parental figures. The solution adopted by the trial court, creating a plan whereby a five-month schedule of visits between respondent and M.C. would take place before he would be awarded custody of M.C., was not unreasonable and certainly in the best interests of M.C. However, it did not comply with statutory requirements and therefore must be reversed.

¶ 22 The statutory scheme and case law interpreting it dictate that a trial court cannot move on to best interest determinations until it finds the natural parents unfit, unwilling or unable to care for their minor child. See *In re M.R.*, 393 Ill. App. 3d 609, 616 (2009) ("It is clear from the Act and case law that termination proceedings involve a distinct two-step process, requiring a determination of parental fitness and then considerations of what is in the child's best interests. Before a court may consider a child's best interests it must find a parent unfit pursuant to grounds contained in the Adoption Act."); *K.L.S.-P.*, 381 Ill. App. 3d at 196, ("Having found the respondent to be fit, the trial court was not authorized to make the child a ward of the court, and to grant custody and guardianship of the minor to DCFS."); *In re Edward T.*, 343 Ill. App. 3d 778, 799 (2003) ("Generally, both parents must be adjudged unfit or unable to care for a child before placement with DCFS is authorized, as the child's biological parents have a 'superior right of custody' unless such a finding has been made.").

¶ 23 In its petition for rehearing, the State argues our holding conflicts with a previous decision from this court: *In re Y.A.*, 383 Ill. App. 3d 311 (2008). The State correctly notes that the *Y.A.* court upheld an order of the trial court placing the minor with DCFS even though the father was found fit. *Id.* at 316. As we noted in *Y.A.* however, the trial court found placement was necessary as the father "was not prepared for the child as he had not bought a crib or arranged for day care." *Id.* at 314. There is no similar finding in the case at bar that the father is unable to care for this child. Again, section 2-27 of the Act mandates that the trial court "determines and puts in writing the factual basis supporting the determination" that the parents "are unfit or are unable" to care for the minor. 705 ILCS 405/2-27(1)(West 2008). In *Y.A.*, the trial court made the necessary specific findings of fact as to why the fit father was unable to care

for the minor. As such, placement with DCFS was proper. Here, no such findings exist and, as such, we are left with no choice but to reverse the trial court's order placing the minor with DCFS.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and this cause remanded for further proceedings.

¶ 26 Reversed and remanded.