



to care for the minor, Z.H., because he failed to make reasonable progress toward the return of the minors within the initial nine-month period following the adjudication of abused minor (750 ILCS 50/1(D) (m) (ii) (West 2008)) and a specified nine-month period after the end of the initial nine-month period following the adjudication of neglect (750 ILCS 50/1(D) (m) (iii) (West 2008)). The trial court also found that it was in the minor's best interest to terminate the respondent's parental rights. The respondent appeals. We affirm.

#### ANALYSIS

Z.H. was born on April 14, 2008, to the respondent father (age 21) and her mother, A.D. (age 18). The respondent was charged with aggravated battery of Z.H. stemming from allegations that, on August 6, 2008, he grabbed Z.H. by the arm, causing a fracture to her clavicle.

On August 12, 2008, the State filed a juvenile petition alleging that Z.H. was neglected and abused in that her parents allowed physical injury upon her, as indicated by: (1) a report received by the Department of Children and Family Services (DCFS) on August 6, 2008, that bruises were observed on her forehead, and fingertip bruises were observed on her back; (2) history given by A.D. identified a torn frenulum (mucous membrane extending from the floor of the mouth to the underside of the tongue) and a healing broken clavicle; (3) the respondent's

history of bipolar disorder, anxiety, and attention deficit hyperactivity disorder, for which he was not taking medication; and (4) observations of the respondent handling Z.H. angrily and becoming frustrated with her. The court ordered that DCFS be granted temporary custody of Z.H., and she was placed with her maternal great-grandmother.

On September 10, 2008, the respondent went to jail for aggravated battery of Z.H. On September 16, 2008, A.D. stipulated to the facts in the petition, and the trial court adjudicated Z.H. abused and neglected.

On October 1, 2008, a dispositional report by Catholic Charities indicated that the respondent admitted to grabbing Z.H. too hard, causing bruising to her face and back, and pushing her pacifier in her mouth too hard, causing her mouth to bleed. He also admitted that he had untreated mental health issues and anger management issues. According to the report, the respondent indicated that he may have caused Z.H.'s broken clavicle by picking her up by the arm.

On October 15, 2008, DCFS filed an initial service plan with a permanency goal of return home within 12 months. DCFS recommended that the respondent: (1) participate in anger management counseling; (2) allow no further domestic violence within the home or in the presence of Z.H.; (3) cooperate with anger management recommendations; (4) demonstrate an

understanding of his role in domestic abuse and the steps needed to prevent further abuse; (5) participate in a mental health evaluation and mental health counseling; (6) cooperate with mental health recommendations, which may include counseling and medications; (7) develop an understanding of his mental illness and the impact it has on his parenting and relationships; (8) submit to random urinalyses; (9) maintain housing; (10) obtain and maintain a legal source of income; (11) provide and maintain safe electrical wiring and outlets; (12) complete a parenting class and apply learned skills; (13) use appropriate discipline, nurture the minor, encourage positive growth, and demonstrate an understanding of the minor's needs; and (14) sign necessary consents for release of information. The plan also required visits.

On October 17, 2008, at the dispositional hearing, the trial court acknowledged that the respondent was not in a position to do any service tasks while he was in custody. The trial court found the respondent to be dispositionally unfit based upon physical abuse. The court ordered that the respondent: (1) complete a parenting class; (2) obtain a substance abuse evaluation; (3) obtain a psychological or psychiatric evaluation and follow all recommendations, including taking medications if so prescribed; (4) obtain appropriate housing; and (5) complete domestic violence counseling.

On April 7, 2009, a permanency review order indicated that no visitation would take place with the respondent at the Rock Island jail. The court found that the respondent failed to make reasonable progress.

On October 13, 2009, at a permanency review hearing, the respondent's attorney argued that the respondent did not have an opportunity to meet the goals of the service plan because he was still incarcerated. She indicated that the respondent was innocent of the charges and requested that he be given the opportunity to meet the tasks if he was found not guilty. She also indicated that he had a pending request for his criminal case to proceed through the mental health court. The trial court indicated that the delay in the criminal matter was likely attributable to the respondent because otherwise he would have been released for a speedy trial violation.<sup>1</sup> The trial court

---

<sup>1</sup> The docket sheet of the criminal matter indicated: September 10, 2008, a first appearance; October 15, 2008, court finds *bona fide* doubt as to respondent's fitness; December 23, 2008, continuance for "good cause shown"; January 6, 2009, continuance by court for fitness report; January 20, 2009, court finds respondent fit and sets trial for April 6, 2009; March 19, 2009, matter continued on defendant's motion until May 18, 2009, for trial; May 1, 2009, matter continued on defendant's motion until July 13, 2009, for trial; July 10, 2009, court reconsiders

acknowledged that services were not available to the respondent in jail but stated that the respondent "ha[d] to take some of the responsibility for the fact that he has not put himself in a position to adjudicate the criminal case." The court found that the respondent failed to make reasonable progress and continued the matter for three months.

On January 19, 2010, at the permanency review hearing, the respondent's attorney requested that the court take judicial notice of the fact that the respondent's criminal trial was delayed due to a conflict of interest on the part of the State's Attorney's office. She indicated the conflict arose from the prosecutor's son being a potential witness because A.D. allegedly told him that the respondent took the blame for her actions and she had broken the minor's clavicle. The respondent's attorney indicated that she believed the respondent would be found innocent at trial. The trial court noted that even if the respondent did not break the minor's clavicle he had admitted to "roughing the child up" and treating her "too roughly." The trial court found that the respondent made no progress and

---

denial of insanity defense and allows evaluation; November 13, 2009, motion to reconsider insanity defense denied; November 30, 2009, defendant files motion to disqualify prosecutor; January 5, 2010, special prosecutor appointed; and January 11, 2010, appointment of special prosecutor vacated.

changed the permanency goal to substitute care pending termination of parental rights.

On February 4, 2010, the respondent pled guilty to aggravated battery of Z.H. On April 13, 2010, he was sentenced to three years of imprisonment. On May 13, 2010, he was released from incarceration for time served.

On April 20, 2010, the State filed a petition to terminate the respondent's parental rights, alleging that the respondent: (1) was deprived (count I); (2) failed to make reasonable progress toward the return home of the minor within nine months of the adjudication of abused minor, that period being October 17, 2008, to July 17, 2009 (count II); and (3) failed to make reasonable progress toward the return home of the minor during any nine-month period after the end of the initial nine-month period following the adjudication of abused minor, that period being July 17, 2009, to April 17, 2010 (count III). The petition also alleged that the respondent pled guilty to aggravated domestic battery of Z.H. and due to his incarceration since September of 2008, he was "unable to provide a home for the minor, attend or complete Parenting Class, Substance Abuse Evaluation or Domestic Violence Counseling."

On May 11, 2010, at the fitness hearing, the respondent testified that he had been diagnosed with bipolar disorder and complied with taking medication prescribed. He also testified

that parenting, anger management, and domestic violence classes were not offered in jail. The respondent lived with his aunt because Catholic Charities indicated his parents' visits with the minor would be terminated if he moved back into their home. Since his release from jail, the respondent attended parenting classes, completed anger management classes, and attended all visits with the minor. The respondent's father testified that anger management classes and medication have made a significant difference in the respondent's behavior.

On August 31, 2010, the trial court entered an order dismissing count I (depravity) and finding that the State proved counts II and III by clear and convincing evidence. The trial court found that the respondent was in jail during the entire nine-month periods alleged in the petition, the respondent was unable to complete mental health services, domestic violence counseling, parenting classes, and visitation, and the respondent was unable to provide housing and financial support for Z.H. The trial court based its ruling on the Illinois Supreme Court's decision in *In re J.L.*, 236 Ill. 2d 329 (2010), noting that "incarceration does not relieve [the respondent] of the responsibility to make progress on the service plan tasks."

On September 24, 2010, a best interest hearing took place. The evidence indicated that the minor had lived with her foster parents, her maternal great-grandparents, for two years and one

month. The minor's maternal great-grandparents were willing to adopt the minor, the community accepted her as part of their family, and the minor called them "papa" and "mee maw." If they adopted Z.H., they would allow visits with her mother but not weekend visits with her paternal grandparents because the minor returned "confused" and "just d[id]n't act normal."

Additionally, the evidence indicated the respondent completed a parenting class, attended all visits with the minor, and completed anger management counseling since being released from jail on May 13, 2010. He also submitted to a drug and alcohol assessment and did not need treatment. He had started looking for a job and had submitted applications to gas stations and Walmart. The caseworker testified that the respondent was making progress.

At the best interest hearing, the respondent testified that if he had expanded visits with the minor he would attend every visit. The respondent wanted to continue his life with the minor and be a good father. He testified that at visits, Z.H. hugged him and sometimes sat on his lap. The respondent testified that he pled guilty to the aggravated domestic battery charge because he was told that his parental rights would be terminated if he did not get out of jail.

The respondent's father testified the he and his wife would allow the respondent to move into their home if they would not

lose their visits with Z.H. The respondent's father also testified that when Z.H. saw him and his wife for visits she would smile, run to them, and hug and kiss them. The minor was comfortable in their home, and she called them "Mamaw" and "Papa." They had never missed a visit with the minor and had her for a week at a time on several occasions. They were willing to adopt her and would have taken custody of the minor at the outset of the case. The respondent's father believed it would be in the minor's best interest to grow up knowing her biological father and having a relationship with him.

In considering the minor's welfare and physical safety, the court found that it would not be in Z.H.'s best interest to be with the respondent in light of his conviction for battery of her. The court noted that if the respondent did not commit the crime he should not have pled guilty. The court found Z.H.'s foster parents provided for her physical safety and welfare, including food, shelter, and clothing. The court found that the minor's sense of attachment and sense of security could be with either the foster parents (maternal great-grandparents) or the paternal grandparents but not with respondent. The court also found that the minor would not have a sense of familiarity with the respondent because he had only seen her for three hours in 21 months. The court concluded that it was in the best interest of the minor to terminate the respondent's parental rights. The

respondent appealed.

#### ANALYSIS

On appeal, the respondent argues that: (1) the trial court's finding that he was an unfit parent was against the manifest weight of the evidence; and (2) the trial court's finding that it was in Z.H.'s best interest to terminate his parental rights was against the manifest weight of the evidence. We affirm.

The Juvenile Court Act of 1987 sets forth a two-step process when terminating a person's parental rights involuntarily. 705 ILCS 405/2--29(2) (West 2008). First, the court must find that a parent is unfit by clear and convincing evidence. Second, once a parent is found unfit, the court considers whether it would be in the best interest of the child to terminate the parental rights.

#### I. Respondent's Fitness

A trial court's finding of unfitness is afforded great deference and will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Gwynne P.*, 215 Ill. 2d 340 (2005). A decision is against the manifest weight of the evidence where the opposite conclusion is apparent. *Gwynne P.*, 215 Ill. 2d 340.

In this case, the respondent was found unfit pursuant to sections 1(D)(m)(ii) and 1(D)(m)(iii) of the Adoption Act, for failure to make reasonable progress toward the return of Z.H. within nine months after the adjudication of neglect or abused

minor (October 17, 2008, to July 17, 2009) and during any nine-month period after the end of the initial nine-month period following the adjudication of neglect or abused minor (July 17, 2009, to April 17, 2010). 750 ILCS 50/1(D) (m) (ii), 1(D) (m) (iii) (West 2008). Reasonable progress is measured by an objective standard, which focuses on the amount of progress a parent has made toward the return of the child. *In re Daphnie E.*, 368 Ill. App. 3d 1052 (2006). At minimum, reasonable progress requires measurable or demonstrable movement toward reunification. *Daphnie E.*, 368 Ill. App. 3d 1052. If a service plan had been established to correct conditions that were the basis for removal of the child and if those services were available, then failure to make reasonable progress includes the parent's failure to substantially fulfill obligations under the service plan. 750 ILCS 50/1(D) (m) (West 2008).

In interpreting the reasonable progress requirement, the Illinois Supreme Court has stated:

"There is no exception for time spent in prison.

Indeed, no mention is made of incarceration. The statute simply provides that a ground for a finding of unfitness is the '(f)ailure by a parent \*\*\* to make reasonable progress toward the return of the child to the parent during any 9-month period after the end of the initial 9-month period following the adjudication of neglected or abused minor \*\*\*

or dependent minor.' 750 ILCS 50/1(D)(m)(iii) (West 2008).

\*\*\*

\*\*\* [T]he legislature was well aware of the possibility that a parent subject to termination proceedings would be incarcerated. \*\*\*

However, the legislature included no exception for incarcerated parents in section 1(D)(m)(iii)." *J.L.*, 236 Ill. 2d at 340-41.

The Illinois Supreme Court stated that in making a reasonable progress determination, "courts are to consider evidence occurring only during the relevant nine-month period mandated in section 1(D)(m)" and held that time spent in prison does not toll the nine-month period during which reasonable progress must be made. *J.L.*, 236 Ill. 2d at 341.

Here, the respondent was incarcerated for the entire duration of the nine-month periods alleged in counts II and III and could not accomplish any of service plan tasks while he was in jail. We must follow our supreme court's interpretation of "reasonable progress" and conclude that the respondent's jail time did not toll the nine-month period, nor may we look to his actions outside the alleged nine-month period. During the periods alleged, the respondent did not make any demonstrable movement toward reunification. Therefore, the the trial court's determination that the respondent failed to make reasonable

progress was not against the manifest weight of the evidence.

We acknowledge that a scenario could be imagined wherein a potentially innocent parent who is incarcerated and awaiting trial could lose their parental rights under this section of the Act. However, in the words of our supreme court, we are required to "uphold[] the law as it stands" and "[w]hether this needs to be changed is a policy question more appropriately directed to the legislature." *J.L.*, 236 Ill. 2d at 343.

## II. Best Interest

Next, the respondent contends that it was not in the best interest of Z.H. to terminate his parental rights. Once the trial court has found a parent to be unfit, all considerations must yield to the best interest of the child. *In re D.T.*, 212 Ill. 2d 347 (2004). Accordingly, at the best interest hearing, the parent's interest in maintaining a parent-child relationship yields to the child's interest in a stable and loving home life. *D.T.*, 212 Ill. 2d 347. The State must prove by a preponderance of the evidence that termination is in the child's best interest. *D.T.*, 212 Ill. 2d 347.

In determining the best interest of a child, the trial court's decision requires consideration of statutory factors, although the trial court is not required to explicitly mention the statutory factors in its decision. 705 ILCS 405/1--3(4.05) (West 2008); *In re Janira T.*, 368 Ill. App. 3d 883 (2006). The

statutory factors include: (1) the child's physical safety and welfare; (2) the development of the child's identity; (3) the child's background and ties, including familial, cultural, and religious; (4) the child's sense of attachment, including love, security, familiarity, continuity of affection, and least disruptive placement alternative; (5) the child's wishes; (6) the child's community ties; (7) the child's need for permanence; (8) the uniqueness of every family and child; (9) the risks related to substitute care; and (10) the preferences of persons available to care for the child. 705 ILCS 405/1--3(4.05) (West 2008). On review, the trial court's determination will not be disturbed unless it is contrary to the manifest weight of the evidence. *In re Austin W.*, 214 Ill. 2d 31 (2005).

In this case, the trial court appropriately considered the statutory best interest factors. The evidence showed that the respondent was convicted of aggravated battery to Z.H., supporting the court's decision to weigh the factor of the minor's physical safety and welfare against him. The minor was bonded to both her maternal great-grandparents and her paternal grandparents, who were both willing to adopt her. The minor had lived with her maternal great-grandparents as a foster child for over two years. We cannot say that the trial court's finding that it was in Z.H.'s best interest to terminate the respondent's parental rights was against the manifest weight of the evidence.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

Affirmed.