NOTICE
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2011 IL App (4th) 110510-U

Filed 10/27/11

NO. 4-11-0510

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: All. D. and Ala. D., Minors,	)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Petitioner-Appellee,	)	Champaign County
v.	)	No. 10JA75
COREY FRANZEN,	)	
Respondent-Appellant.	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* It is not clearly apparent that the respondent father rebutted the statutory presumption of depravity by presenting evidence that he had been trying to enroll in classes in prison; that he had been staying in contact with his caseworker and requesting visitation; and that he had maintained his union membership so that, upon his release from prison, he might obtain a job.

¶ 2 The trial court terminated the parental rights of respondent, Corey Franzen, to his twin daughters, All. D. and Ala. D. (born November 27, 2010), and respondent appeals. He contends that the court's findings are against the manifest weight of the evidence, specifically, the findings that (1) he is an "unfit person" within the meaning of sections 1(D)(i) and (D)(r) of the Adoption Act (750 ILCS 50/1(D)(i), (D)(r) (West 2010)) and (2) it is in the children's best interest to terminate his parental rights.

¶ 3 From our review of the record, however, and our consideration of respondent's arguments, it is not clearly apparent that the State failed to prove, by clear and convincing evidence, that respondent is an "unfit person" by reason of "depravity." 750 ILCS 50/1(D)(i) (West 2010). (Whether the State proved the alternative ground of unfitness, under section 1(D)(r) (750 ILCS 50/1(D)(r) (West 2010)), is inessential.) Nor is it clearly apparent that the State failed to prove, by a preponderance of the evidence, that it was in the children's best interest to terminate respondent's parental rights. Therefore, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Motion To Terminate Parental Rights

¶ 6 On February 11, 2011, the guardian *ad litem*, from the Court Appointed Special Advocates Association (CASA), filed a motion to terminate the parental rights of respondent and Dannelle Pasley to their children, Ala. and All., alleging it would be in the children's best interest to terminate parental rights. The motion requested the trial court to appoint a guardian of the children's persons and to authorize the guardian to consent to adoption.

¶ 7 The motion sought the termination of respondent's parental rights on the ground that he conformed to two of the definitions of an "unfit person" in section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2010)). Count I alleged he was an "unfit person" in that he was "depraved" (see 750 ILCS 50/1(D)(i) (West 2010)), and count II alleged he was an "unfit person" in that repeated incarceration had prevented him from fulfilling his parental responsibilities (see 750 ILCS 50/1(D)(r) (West 2010)).

¶ 8 B. Pasley's Surrender of Her Parental Rights

¶ 9 On May 4, 2011, Pasley signed final and irrevocable surrenders of her parental rights

to Ala. and All.

¶ 10 C. The Hearing Regarding Respondent's Fitness To Be a Parent

¶ 11 On May 4, 2011, the trial court held a hearing on CASA's motion to terminate respondent's parental rights. The first phase of the hearing addressed the issue of whether respondent was an "unfit person" as the motion alleged. The following evidence emerged in the hearing.

¶ 12 1. *Request for Admission*

¶ 13 The trial court took judicial notice that respondent had admitted the following facts pursuant to a request for admission:

> "1. You are the father of [Ala.] and [All].
>
> 2. You have been convicted of the following offenses in the following cases on the following dates.
>
> a. Burglary:
>
> i. Vermilion County case number 04-CF-568
>
> ii. March 30, 2005
>
> b. Burglary:
>
> i. Vermilion County case number 04-CF-574
>
> ii. March 3, 2005
>
> c. Unlawful Possession of a Controlled Substance

i. Vermilion County case number 06-CF-500

ii. December 19, 2006

d. Felony Theft:

i. Champaign County case number 10-CF-237

ii. September 27, 2010

e. Domestic Battery

i. Champaign County case number 02-CM-649

ii. September 25, 2002

3. You were incarcerated in the Champaign County Correctional Center on November 27, 2010.

4. You have been continuously incarcerated since November 27, 2010.

5. You are currently serving a sentence of 30 months in the Illinois Department of Corrections.

6. You moved in with [Pasley] in March, 2010.

7. You and [Pasley] used cocaine together throughout your relationship.

8. You have had no personal contact with the respondent minors herein, [Ala.] and [All.]

9[.] From the age of 25 to 31 years, you used cocaine weekly to every two weeks:

a. Later, you began smoking cocaine from every day to every other day;

b. You used methamphetamine for a period of three months;

c. your longest period of sobriety, while not incarcerated, has been six (6) months;

d. you participated in, but failed to complete, the Vermilion County Drug Court program;

e. you previously participated in substance abuse treatment while incarcerated in the Southwestern Correctional Center;

f. prior to November 10, 2010, you were using cocaine weekly;

g. you last used cocaine on October 10, 2010.

10. You have been incarcerated:

a. for seven (7) months in Vermilion County;

b. for two (2) months of periodic imprisonment (work release) in 2005

c. for four (4) months in 2006 before September 2;

d. for three and one-half (3-1/2) months beginning September 3, 2006;

e. from December 20, 2006 through January 16, 2007."

¶ 14 2. *Testimony of Tracey Hewitt*

¶ 15 A caseworker with the Illinois Department of Children and Family Services (DCFS), Tracey Hewitt, testified that the twins, Ala. and All., came into DCFS's care at the time of their birth because one of the twins tested positive for cocaine, as did the mother. The mother, Dannelle Pasley, admitted to investigators that she had used $600 to $700 worth of cocaine within a week's time. Pasley stated that after she was released from prison in early 2010, she began using cocaine again with respondent, who currently was serving a 30-month sentence of confinement.

¶ 16 In preparation for the home and background report, Hewitt interviewed respondent in the Champaign County jail. He told Hewitt he was in arrears in child support for two other children in the amount of approximately $30,000. He stated that from the age of 25 to 31, he used cocaine every one to two weeks. He also stated he began using cocaine every day or every other day. The longest period he abstained from cocaine was six months, and he last used cocaine on October 10, 2010.

¶ 17 3. *Respondent's Testimony*

¶ 18 Respondent testified he had been residing in the Illinois Department of Corrections since December 2010. He estimated he would be released on January 21, 2012, although good-conduct credit could advance that date. He had never seen Ala. and All.

¶ 19 From the age of 23 to 30, respondent regularly used cannabis (he was born January

30, 1975). From the age of 25 to 31, he used cocaine every week or every two weeks. When Hewitt interviewed him, he told her he also had used methamphetamine, but he testified he had lied to her in that regard, in an attempt to manipulate his correctional placement.

¶ 20 Respondent was on a waiting list for substance-abuse and anger-management classes, and he had written several letters, trying to get into those classes at the earliest opportunity. He had kept in contact with his caseworker, requesting visitation and informing her that he was on waiting lists for the classes. He felt a bond with his twin daughters.

¶ 21 Upon his release from prison, respondent would have prospects for employment, through his union, as an operating engineer. He promised to cooperate completely with DCFS in matters of parenting.

¶ 22 After hearing this evidence, the trial court found counts I and II of the motion to terminate parental rights to be proved by clear and convincing evidence.

¶ 23 D. The Hearing on the Children's Best Interests

¶ 24 The trial court then conducted a best-interest hearing. Ala. and All. had been placed in the home of a maternal cousin. They were six months old and had been in this home since they were two months old. They were happy and putting on weight. The best-interest report stated that the children "appear attached and bonded with their family members. The family is very much attached and bonded to the children and wants them to *** become a part of their family through adoption." The court found it would be in the children's best interest to terminate respondent's parental rights. Therefore, the court ordered that his parental rights to Ala. and All. were terminated.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 A. Unfitness To Be a Parent

¶ 28 Section 2-29(2) of the Juvenile Court Act of 1987 (705 ILCS 405/2-29(2) (West 2010)) provides in part as follows:

> "If a petition or motion alleges and the court finds that it is in the best interest of the minor that parental rights be terminated and the petition or motion requests that a guardian of the person be appointed and authorized to consent to the adoption of the minor, the court, with the consent of the parents, if living, or after finding, based upon clear and convincing evidence, that a parent is an unfit person as defined in Section 1 of the Adoption Act [(750 ILCS 50/1 (West 2010))], may terminate parental rights and empower the guardian of the person of the minor, in the order appointing him or her as such guardian, to appear in court where any proceedings for the adoption of the minor may at any time be pending and to consent to the adoption."

¶ 29 Thus, in response to the petition or motion, the trial court may terminate a parent's parental rights if the parent consents to the termination of his or her parental rights. Alternatively, if the parent does not so consent, the court may terminate the parent's parental rights only if the court finds, on the basis of clear and convincing evidence, that the parent is an "unfit person" within the meaning of section 1 of the Adoption Act (750 ILCS 50/1(D) (West 2010)) and only if the court further finds, on the basis of a preponderance of the evidence, that terminating parental rights would be in the child's best interest. *In re D.W.*, 214 Ill. 2d 289, 315-16 (2005).

¶ 30 On May 4, 2011, Pasley signed final and irrevocable surrenders of her parental rights

to Ala. and All. Respondent, however, did not consent to the termination of his parental rights. Therefore, his parental unfitness had to be proved by clear and convincing evidence. See 705 ILCS 405/2-29(2) (West 2010).

¶ 31 Section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2010)) contains several alternative definitions of an "unfit person." In its motion to terminate parental rights, CASA alleged that respondent conformed to two of these statutory definitions of an "unfit person." Count I of the motion alleged he was an "unfit person" in that he was "depraved" (see 750 ILCS 50/1(D)(i) (West 2010)), and count II alleged he was an "unfit person" in that repeated incarceration had prevented him from fulfilling his parental responsibilities (see 750 ILCS 50/1(D)(r) (West 2010)).

¶ 32 A person is "unfit to have a child" (750 ILCS 50/1(D) (West 2010)) if the person is "depraved" (750 ILCS 50/1(D)(i) (West 2010)). Criminal convictions can raise a presumption of depravity. Section 1(D)(i) of the Adoption Act (750 ILCS 50/1(D)(i) (West 2010)) provides in part: "There is a rebuttable presumption that a parent is depraved if the parent has been criminally convicted of at least 3 felonies under the laws of this State, or under federal law, or the criminal laws of any United States territory; and at least one of these convictions took place within 5 years of the filing of the petition or motion seeking termination of parental rights." According to a request for admission, respondent has been convicted of the following felonies: (1) burglary, in Vermilion County case No. 04-CF-574, on March 3, 2005; (2) burglary, in Vermilion County case No. 04-CF-568, on March 30, 2005; (3) unlawful possession of a controlled substance, in Vermilion County case No. 06-CF-500, on December 19, 2006; and (4) felony theft, in Champaign County case No. 10-CF-237, on September 27, 2010. These are at least three felony convictions, at least one of which took place within five years of the filing of the motion to terminate parental rights. Therefore,

as respondent admits in his brief, these convictions raise a rebuttable presumption of depravity. See 750 ILCS 50/1(D)(i) (West 2010).

¶ 33 All a presumption does is establish a *prima facie* case as to an issue, obliging the opposing party, on pain of judgment, to come forward with evidence meeting the presumption. *In re J.A.*, 316 Ill. App. 3d 553, 562 (2000). Once the opposing party comes forward with such evidence, the presumption vanishes, and the trier of fact decides the issue as if no presumption ever came into existence. *Id.*

¶ 34 The issue, for purposes of the present discussion, is whether respondent has "an inherent deficiency of moral sense and rectitude." (Internal quotation marks omitted.) *J.A.*, 316 Ill. App. 3d at 561. "[T]he acts constituting depravity *** must be of sufficient duration and of sufficient repetition to establish a deficiency in moral sense and either an inability or unwillingness to conform to accepted morality." (Internal quotation marks omitted.) *Id.*

¶ 35 When a trial court finds, by clear and convincing evidence, that a parent suffers from an inherent deficiency of moral sense, we ask whether the finding is against the manifest weight of the evidence. *J.A.*, 316 Ill. App. 3d at 561. This is a deferential standard of review. A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Id.*

¶ 36 Respondent contends that the trial court's finding of depravity is against the manifest weight of the evidence for the following reasons:

> "In rebuttal, Corey testified he expected to be released earlier than January 20, 2012, once credited with good time. He had been trying to accelerate his enrollment in substance abuse and anger management classes and was trying to stay in touch with his

> caseworker. He had maintained his union membership, so that, upon release, he would be readily employable as a heavy equipment operator, and he was resolved to cooperate with DCFS."

¶ 37 The appellate court has held, however, that taking classes in prison, though commendable, does not show rehabilitation. *In re A.M.*, 358 Ill. App. 3d 247, 254 (2005). This is because taking classes in prison shows, at most, an intent to lead a moral life upon release from prison and because as-yet unfulfilled resolutions do not evince moral character. The same observation applies to respondent's maintaining his union membership so that, upon release from prison, he can obtain employment as a heavy-equipment operator. This is a commendable resolution, but time has yet to reveal what ultimately comes of this resolution. Respondent plans to lead an upright life, but it is yet to be seen whether he has the ability and willingness to do so. Up to this point, respondent's actual performance has been to commit felonies and end up in prison when his children needed him to be a parent. So, it is not clearly apparent that respondent rebutted the presumption of depravity or that the State failed to prove, by clear and convincing evidence, that he was depraved. See *J.A.*, 316 Ill. App. 3d at 561.

¶ 38 Because respondent meets the statutory definition of an "unfit person" in that he is "depraved" (750 ILCS 50/1(D)(i) (West 2010)), we need not consider whether he meets the alternative definition of an "unfit person" in section 1(D)(r) of the Adoption Act (750 ILCS 50/1(D)(r) (West 2010)), as alleged in count II of the motion to terminate parental rights. See *J.A.*, 316 Ill. App. 3d at 564.

¶ 39 B. The Best Interest of the Children

¶ 40 The trial court found that terminating parental rights would be in the children's best

interest. Respondent says that this finding is against the manifest weight of the evidence for the following reasons:

> "Here, because of his incarceration, Corey has had no opportunity to form a relationship with the twins. That is significant, because by its terms, section 405/1-3(4.05) [(705 ILCS 405/1-3(4.05) (West 2010))] must be considered 'in the context of the child(ren)'s age and developmental needs.' Under the circumstances of the case, the factors [in section 1-3(4.05) of the Juvenile Court Act of 1987] do not, in any meaningful way, weigh more heavily in favor of termination of Corey's parental rights than they weigh in favor of their preservation."

¶ 41 The first sentence of the quoted passage is a *non sequitur*. If, because of his incarceration for criminal misconduct, respondent has been unable to form a relationship with the children, it is unclear how the children's age and developmental needs require the preservation of his parental rights, considering that others have been serving as the children's parents. As for the second sentence in the quoted passage, it is merely an assertion.

¶ 42 Consequently, we are unconvinced that the trial court made a finding that is against the manifest weight of the evidence when it found that terminating respondent's parental rights would be in the children's best interest. See *In re S.D.*, 2011 IL App (3d) 110184, ¶ 33, 2011WL 3503540 (Aug. 5, 2011).

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, we affirm the trial court's judgment.

¶ 45 Affirmed.