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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re DARIUS K. and DARYL K.,)	Appeal from the Circuit Court
)	of Lake County.
Petitioners-Appellees,)	
)	
v.)	Nos. 10-JA-127, 128
)	
DARRYL KNIGHTEN,)	Honorable
)	Sara P. Lessman,
Respondent-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: The State did not deprive the incarcerated respondent of his due process rights where it failed to provide him visitation with petitioners. Trial court's ruling that it is in petitioners' best interest that respondent's parental rights be terminated affirmed where petitioners have been living in the same foster home since birth, have thrived there, and the foster parents are willing to provide petitioners with a permanent home.

¶ 1 On July 11, 2011, the trial court found respondent, Darryl Knighten, an unfit parent to his children, petitioners Darius and Daryl K. Further, the court found that it is in petitioners' best interest for respondent's parental rights to be terminated. Respondent appeals. For the following reasons, we affirm.

¶ 2

I. BACKGROUND

¶ 3 Petitioners, twin brothers, were born in December 2007. They were born methadone exposed and were immediately taken into the Department of Children and Family Services' (DCFS') care.¹ When petitioners were born, respondent was incarcerated and awaiting sentencing on a residential burglary conviction.² In January 2008, shortly after petitioners were born, respondent formally admitted paternity. Also in January 2008, respondent was sentenced to 15 years' imprisonment on the residential burglary conviction; his projected parole date is in June 2014.

¶ 4 On September 16, 2010, the State petitioned to terminate respondent's parental rights, alleging that respondent is an unfit parent pursuant to several subsections of section 1(D) of the Adoption Act (Act) (750 ILCS 50/1(D) (West 2008)), including subsection (b) (failure to maintain a reasonable degree of interest, concern, or responsibility for the children's welfare), subsection (r) (incarceration that prevents the discharge of parental duties for a period exceeding two years after the filing of the petition to terminate rights, accompanied by little to no previous contact and/or support for the child), and subsection (s) (repeated incarceration that prevents the parent from discharging parental responsibilities). 750 ILCS 50/1(D)(b),(r),(s) (West 2008). A significant portion of the fitness hearing focused on respondent's efforts to establish visitation and to otherwise communicate with his sons, as well as his completion of parenting and counseling services as recommended in various service plans. Respondent routinely inquired about petitioners, requested photographs and updates about them, and communicated with his caseworker regarding petitioners'

¹ Petitioners' mother admitted to using illegal drugs while pregnant and, in January 2011, signed irrevocable consents to both minors' adoptions.

² Respondent had previously, from 1985 to 1995, served a term of imprisonment for robbery.

placement in foster care. It was uncontested that respondent repeatedly sought visitation with petitioners, to no avail. According to respondent's caseworker, when petitioners were infants, they could not visit respondent because children under three years of age are not allowed to visit the penitentiary (a fact defense counsel acknowledged in her closing argument). When the boys turned age three, visitation was deemed inappropriate because the petition for termination of parental rights was pending, a trip to the penitentiary required an 8- to 10- hour drive (round-trip), the young children were not particularly verbal or successfully potty-trained, and their visitation time with respondent would have lasted no longer than four hours. Consequently, it was undisputed that respondent has never had direct contact with petitioners.

¶ 5 Ultimately, the trial court determined that the State did *not* prove its allegations, pursuant to subsection (b), that respondent failed to maintain a reasonable degree of interest or concern for the children, finding that respondent had made reasonable efforts under the circumstances. Instead, the court found that the State proved by clear and convincing evidence respondent's unfitness pursuant to subsections (r) and (s) of the Act.³ As to subsection (r), the court found that respondent: (1) was

³ Those sections specifically provide as follows:

“(r) The child is in the temporary custody or guardianship of the [DCFS], the parent is incarcerated as a result of criminal conviction at the time the petition or motion for termination of parental rights is filed, prior to incarceration the parent had little or no contact with the child or provided little or no support for the child, and the parent's incarceration will prevent the parent from discharging his or her parental responsibilities for the child for a period in excess of 2 years after the filing of the petition or motion for termination of parental rights.

incarcerated in September 2010 when the petition for termination was filed; (2) will be incarcerated until 2014 and, therefore, for a period exceeding two years after the filing of the petition to terminate; and (3) respondent has not had contact with or provided support for petitioners. As to subsection (s), the court similarly found that respondent: (1) was incarcerated when the petition for termination was filed; (2) has been repeatedly incarcerated as a result of criminal convictions; and (3) as a result of his past and continued incarceration, has been unable, and will continue to be unable, to discharge parental responsibilities over petitioners.

¶6 After finding respondent unfit, the court immediately conducted a best-interests hearing. The court heard testimony from Lauren Barry, the caseworker assigned to petitioners' case. Barry personally observed petitioners in their foster home—a single-family home in which petitioners reside with a foster mother and father, a foster grandparent, and two foster siblings. Petitioners have resided in the same home since birth. Petitioners share a bedroom that is well-furnished and contains toys and a closet full of clothes. The foster family provides petitioners with adequate food, as well as support for petitioners' special (they have IEP's requiring therapy) and other medical needs. Petitioners are “very comfortable” and affectionate with the foster mother, come to her for assistance when upset, engage her and the foster grandmother in play, and refer to the foster parents as Mom and Dad. Barry did not observe petitioners with the foster siblings, but was told that they get along

(s) The child is in the temporary custody or guardianship of the [DCFS], the parent is incarcerated at the time the petition or motion for termination of parental rights is filed, the parent has been repeatedly incarcerated as a result of criminal convictions, and the parent's repeated incarceration has prevented the parent from discharging his or her parental responsibilities for the child.” 750 ILCS 50/1(D)(r),(s) (West 2008).

well. Similarly, because he works outside of the home, she did not observe on her visits petitioners' relationships with their foster father, but it has been reported to her that their relationship is good and that there are no concerns. The family engages in group activities, such as going to the library, to parks, and camping, and it was planning a family trip to Walt Disney World. According to the foster mother, petitioners are considered part of the family and both foster parents are willing to provide the minors permanency through adoption. Barry believed that both foster parents had signed a permanency commitment form.

¶ 7 The court found that the foregoing evidence reflected that it is in petitioners' best interest that respondent's parental rights be terminated and that DCFS be able to consent to their adoption. The court emphasized that petitioners were in need of permanency, and "that permanency is available to them with a family that is all that they have known. [Respondent] is not available *** to provide any type of support, financial, [or] emotional for these minors until the earliest time of June 2014. These minors have been in the system since birth and need to have permanency." The court denied respondent's motion to reconsider.

¶ 8 II. ANALYSIS

¶ 9 As there appears in the briefs slight confusion over the issues, we note first what respondent does *not* argue before this court. Specifically, respondent does not argue that the trial court erred in finding him unfit pursuant to sections 1(D)(r) and 1(D)(s) of the Act. Indeed, the record is clear that the trial court's findings that respondent is an unfit parent as defined by those sections is not contrary to the manifest weight of the evidence. See *In re Gwynne P.*, 215 Ill. 2d 340, 354 (2005) (trial court's finding that unfitness was established by clear and convincing evidence will not be disturbed on review unless against the manifest weight of the evidence). Rather, respondent's two arguments

on appeal are that: (1) his due process rights were violated because, where he was not permitted to visit with petitioners, he had no chance to bond with them and, therefore, the court's best-interest finding was a foregone conclusion; and (2) the court erred in finding termination of parental rights in petitioners' best interest. For the following reasons, we reject respondent's arguments.

¶ 10 A. Due Process

¶ 11 Relying on *In re O.S.*, 364 Ill. App. 3d 628 (2006), respondent argues first that the trial court, in finding that it is in petitioners' best interest that his rights be terminated, failed to consider that the State, by not facilitating visitation between him and petitioners, thwarted any possibility of a bond developing between them. Respondent argues that, by repeatedly denying his requests for visitation with petitioners, the State virtually ensured that reunification would fail because he never had a sufficient opportunity to be reunited with petitioners. Respondent argues that terminating his constitutional right to custody of his sons, where the State disregarded his every attempt to develop a relationship with them, constitutes a due process violation.

¶ 12 Respondent is correct that parents have a constitutional right to the custody of their children. *Wickham v. Byrne*, 199 Ill. 2d 309, 316 (2002). That right, however, is not absolute; the State may interfere with fundamental parental childrearing rights to protect the health, safety, and welfare of a child. *Id.* If, to protect the child, the State deprives a parent of his or her right to custody, the deprivation must comply with principles of due process. *Id.* Due process is achieved by compliance with the Act, the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/1-1 *et seq.* (West 2008)), and fundamental fairness. *In re O.S.*, 364 Ill. App. 3d at 638; see also *In re Gwynne*, 215 Ill. 2d at 353 (noting that a court has no power to terminate a parent's rights involuntarily *except* as

authorized by statute, *i.e.*, the Adoption Act and Juvenile Court Act). We conclude that this case is significantly distinguishable from *In re O.S.* and that there was no due process violation.

¶ 13 In *In re O.S.*, the respondent-mother was incarcerated for two years and was not allowed to have any visits with her son, O.S. After the respondent was released from prison, visitation with O.S. resumed, but the court, apparently to protect O.S. from the psychological effects of learning that his foster parents were not his biological parents, ordered the respondent, O.S.'s foster parents, and O.S.'s sisters to inform O.S. that the woman he was visiting was a woman *other* than his mother. At the best-interest hearing, the court found that O.S. was more attached to his foster parents than to the respondent. On appeal, the court considered the goals of the Juvenile Court Act and noted that all proceedings thereunder must strike a careful balance between protecting the child and assisting parents in their efforts at remediation and reunification. *In re O.S.*, 364 Ill. App. 3d at 635. Although the bond between the parent and child must be considered when assessing best interests, "it seems that any harm to the parent's relationship with the child must be assessed absent artificial or coercive intervention of others into the bonding process." *Id.* at 637. The appellate court concluded that, where the trial court's and State's actions led the respondent to believe that she was progressing toward reunification when, in fact, the arrangement was ensuring that she would fail the best-interest test, "the actions make the best interest hearing a futile gesture, [and] there has been a violation of due process tainting the constitutionality of the termination of [the] respondent's parental rights." *Id.* at 638. Further, the court was troubled by the active deception allowed and facilitated by the court (*id.*), concluding that, although the intent of the deception was not to harm the mother but, rather, to protect the child, the deception perpetrated on O.S. nevertheless fit the definition of fraud. *Id.* at 640.

¶ 14 Here, unlike in *In re O.S.*, there is no evidence that the State or the trial court engaged in deceptive or fraudulent actions. Nor does the evidence suggest that the State did not arrange visitation between respondent and petitioners to interfere with their ability to bond or simply because to do so would be inconvenient; we would not condone such actions. Rather, the evidence reflected that the correctional facility in which respondent was placed does not allow visits by infants and toddlers under age three. Further, after petitioners turned age three, the decision not to arrange visitation was based on several reasonable factors; namely, the distance to the penitentiary, petitioners' developmental delays, the limited time petitioners would be permitted to visit respondent, and the fact that the petition to terminate respondent's rights was pending. We note that there was only a six-month period between the date when petitioners turned three years old (December 2010) and could have visited the penitentiary and when the court terminated respondent's parental rights (July 2011). Therefore, we cannot say that the trial court's determination that the evidence reflected simple compliance with established policy and a subsequent reasonable assessment of the practicality and feasibility of visitation under the existing circumstances, was contrary to the manifest weight of the evidence.

¶ 15 We further note that the absence of visitation between petitioners and respondent did not render the best-interest finding a foregone conclusion because, as discussed further below, the trial court's ruling on the best-interest issue focused on petitioners' need for permanence, not the absence of a bond between respondent and petitioners. Thus, where the State's actions complied with the Juvenile Court Act and Adoption Act and did not violate principles of fundamental fairness (*In re O.S.*, 364 Ill. App. 3d at 638; *In re Gwynne*, 215 Ill. 2d at 353), we reject respondent's due process argument.

¶ 16

B. Best-Interest Finding

¶ 17 Respondent next argues that the court erred in its best-interest finding. He argues that the court failed to properly consider that petitioners' young age leaves significant time for him, upon his release, to develop a relationship with them, that he could be present to guide them as they grow and seek their biological identity, and that family ties should be preserved.

¶ 18 "Once a finding of unfitness has been made, all considerations must yield to the best interest of the child." *In re O.S.*, 364 Ill. App. 3d at 633. At this stage, the State must prove by a preponderance of the evidence that termination is in the child's best interest. *In re D.T.*, 212 Ill. 2d 347, 366 (2004). In making a best-interest determination, the trial court must consider the factors set forth in section 1-3(4.05) of the Juvenile Court Act (705 ILCS 405/1-3(4.05) (West 2008)), including the child's physical safety and welfare; need for permanence, stability and continuity; sense of attachments, love, security, and familiarity; and his or her background and ties, including familial, cultural, and religious. *In re Janira T.*, 368 Ill. App. 3d 883, 894 (2006). Again, the court's determination that termination is in child's best interest will not be disturbed on review unless it is against the manifest weight of the evidence. *Id.*

¶ 19 Here, the evidence reflects that, even if respondent had through visitation developed a bond or relationship with petitioners, the court's best-interest finding is not contrary to the manifest weight of the evidence. Petitioners were born into the foster care system and have spent the entirety of their lives with the same foster family. Respondent has been incarcerated for the entirety of petitioners' lives; he has never parented. The foster family meets petitioners' financial, educational, and medical needs, including special services for their developmental delays. Respondent, because of his incarceration, has never provided for petitioners' needs, nor can he for at least two more years.

Contrary to respondent's suggestion, the court did not fail to consider the importance of familial bonds, the petitioners' sense of identity, and petitioners' background and ties—all factors respondent contends he could support and encourage if permitted to parent upon his release from prison. Respondent made these arguments to the court at trial and in his motion to reconsider. However, the court rejected those arguments in favor of finding that petitioners' needs for permanency, stability, continuity, security, and familiarity outweighed any other factors. The court noted that petitioners have spent their entire lives in foster care, have known only one family, and will continue to have their needs met by that family, not respondent, for at least two more years. It considered that petitioners were born into this system and determined that they need permanency.

¶ 20 We feel obligated to note that it is clear from the record, and indeed the trial court found, that respondent has maintained a reasonable degree of interest and concern for sons that he has never met. Those efforts, both to comply with recommended services and to receive visits from his sons, are laudable and must be recognized. See *e.g.*, *In re Gwynne*, 215 Ill. 2d at 361. However, it is simply not known whether respondent will ever be able to provide for petitioners' needs. While nothing in life is certain, respondent's recidivism and criminal convictions unquestionably place him at a disadvantage in resuming, at a minimum, a financially stable life upon his release. See, *e.g.*, *In re Gwynne*, 215 Ill. 2d at 361-62. When contrasted with petitioners' current placement in a home that provides for their needs, we cannot find error with the court's determination that, here, the need for permanency effectively trumped respondent's *potential* to *eventually* parent. In sum, the court did not err in finding that it is in petitioners' best interest that respondent's rights be terminated.

¶ 21

III. CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 23 Affirmed.

