

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 120224-U

Filed 7/18/12

NO. 4-12-0224

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In re: C.B., a Minor,)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
Petitioner-Appellee,)	Adams County
v.)	No. 10JA36
JOSEPH A. BIBBY,)	
Respondent-Appellant.)	Honorable
)	John C. Wooleyhan,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices POPE and McCULLOUGH concurred in the judgment.

ORDER

- ¶ 1 *Held:* The findings that respondent is an "unfit person" within the meaning of sections 1(D)(m)(ii) and (D)(m)(iii) of the Adoption Act (750 ILCS 50/1(D)(m)(ii), (D)(m)(iii) (West 2010)) and that it would be in the child's interest to terminate respondent's parental rights are not against the manifest weight of the evidence; therefore, the termination of his parental rights is affirmed.
- ¶ 2 Respondent, Joseph A. Bibby, appeals from an order terminating his parental rights to C.B., born on February 15, 2008. This order is based on the findings that respondent is an "unfit person" within the meaning of sections 1(D)(m)(ii) and (D)(m)(iii) of the Adoption Act (750 ILCS 50/1(D)(m)(ii), (D)(m)(iii) (West 2010)) and that it would be in C.B.'s interest to terminate respondent's parental rights. Because those findings are not against the manifest weight of the evidence, we affirm the trial court's judgment.

¶ 3

I. BACKGROUND

¶ 4

A. The Petition for Adjudication of Wardship

¶ 5

On June 23, 2010, the State filed a petition to adjudicate C.B. a ward of the court on the ground that she was "neglected" within the meaning of section 2-3(1)(b) of the Juvenile Court Act of 1987 (705 ILCS 405/2-3(1)(b) (West 2010) ("Those who are neglected include *** any minor under 18 years of age whose environment is injurious to his or her welfare."). According to the petition, a Quincy police officer discovered the neglect on June 22, 2010, in the course of a traffic stop. The driver of the pulled-over vehicle, Thomas Brown, was the paramour of C.B.'s mother, who, along with C.B., was a passenger in the vehicle. Inside the vehicle, the police officer found methamphetamine, precursors of methamphetamine, and materials for the manufacture of methamphetamine—all within C.B.'s reach. (Respondent says in his brief: "Though the [police] report is silent on the issue, it can be inferred that C.B. was present in her child restraint in the back seat of the vehicle.")

¶ 6

After the police arrested the mother (and, presumably, Brown, too) for the offenses of manufacturing methamphetamine and possessing materials for its manufacture, an investigator from the Illinois Department of Children and Family Services (DCFS), Christine Barr, interviewed the mother. In the interview, the mother told Barr she had been using methamphetamine three times a week for the past month or longer and that she most recently used it the week before her arrest.

¶ 7

The petition listed the mother's address as the Adams County jail in Quincy, Illinois, and respondent's address as the Missouri Department of Corrections in Moberly, Missouri.

¶ 8

B. Temporary Custody

¶ 9

On June 23, 2010, the same day the State filed its petition for an adjudication of

neglect, the trial court held a temporary-custody hearing, at which the mother appeared. The guardian *ad litem* for C.B., Betsy Bier, also appeared. Respondent (imprisoned in Missouri) did not appear.

¶ 10 In the hearing, the trial court awarded temporary custody of C.B. to DCFS, which in turn placed her in the foster home of Melissa and Jeremy Hansen, in Pike County, Illinois. The Hansens are unrelated to C.B.

¶ 11 C. Service Upon Respondent

¶ 12 On June 28, 2010, a summons was served upon respondent in the prison in Moberly, Missouri.

¶ 13 D. Respondent's "Motion for Teleconference"

¶ 14 On July 6, 2010, respondent filed a "Motion for Teleconference," in which he made two requests. First, he requested that if the trial court "need[ed] any additional testimony concerning this cause of action," the court would "make arrangements for this testimony to be had through teleconferencing" or, alternatively, that the court would continue the case until he was released from prison.

¶ 15 Second, respondent requested that, in the hearing on the petition for adjudication of wardship, the court appoint "a Guardian *a[d] litem*, regarding his Biological child."

¶ 16 The trial court already had appointed Bier as the guardian *ad litem* (on June 23, 2010). As for respondent's other request, the court declined to conduct the proceedings by teleconference. The court explained that it lacked "the technology *** to complete such an arrangement."

¶ 17 E. The Adjudicatory Hearing

¶ 18 On September 22, 2010, the trial court held an adjudicatory hearing, which

respondent did not attend. At the conclusion of the hearing, the court entered an order finding C.B. to be neglected on the basis of an admission that the mother had made in the hearing. Specifically, the factual basis of the court's finding of neglect consisted of the methamphetamine and other contraband found in the pulled-over car, within C.B.'s reach; the mother's admission to a caseworker that she had been using methamphetamine three times a week; and her guilty plea in a felony case arising from the traffic stop.

¶ 19 F. The Dispositional Hearing

¶ 20 On November 1, 2010, the trial court held a dispositional hearing, which both parents personally attended (respondent had been released from the Missouri prison and now lived in Iowa). The court entered a dispositional order making C.B. a ward of the court and keeping custody and guardianship with DCFS for the time being.

¶ 21 Respondent did not appeal from this dispositional order.

¶ 22 G. The State's Motion for Termination of Parental Rights

¶ 23 On September 30, 2011, the State filed a motion to terminate the parental rights of respondent and the mother to their daughter, C.B. (The mother is not a party to this appeal.) The motion alleged that respondent was an "unfit person" for two reasons: (1) he failed to make reasonable progress within nine months following the adjudication of neglect (see 750 ILCS 50/1(D)(m)(ii) (West 2010)), and (2) he failed to make reasonable progress during a nine-month period after the end of the initial nine-month period following the adjudication of neglect (see 750 ILCS 50/1(D)(m)(iii) (West 2010)).

¶ 24 H. The State's Designation of the Nine-Month Periods

¶ 25 On January 26, 2011, the State designated the initial nine-month period as September

23, 2010, through June 22, 2011, and the second nine-month period as June 23, 2011, through March 22, 2012.

¶ 26 I. The Unfitness Hearing

¶ 27 On January 27, 2012, the trial court held a hearing on the issue of whether the parents were "unfit persons." See 705 ILCS 405/2-29(2) (West 2010); 750 ILCS 50/1(D) (West 2010). Respondent did not attend the hearing because he was back in prison in Missouri.

¶ 28 The State called one witness, Jenna Miller, a DCFS caseworker. She testified to respondent's progress in the first service plan, for the period of June 22 to December 1, 2010; the second service plan, for the period of December 1, 2010, to June 8, 2011; and the third service plan, for the period of June 8 to December 12, 2011.

¶ 29 Miller rated respondent's overall progress in the first service plan as unsatisfactory because although he was satisfactory in his cooperation with DCFS and his completion of parenting classes, Miller had assigned him two other tasks, designed to address substance abuse and domestic violence, and he did not complete either of those tasks. She had prescribed services in the area of domestic violence because he had a history of domestic violence.

¶ 30 As for the second service plan, Miller rated respondent's overall progress as unsatisfactory not only because she still had received no documentation of services in the areas of substance abuse and domestic violence but also because he had gone back to prison and stopped communicating with her. Both parents had made unsatisfactory progress because Miller "didn't have any documentation at that time of services that either parent [was] doing, and they were both in prison and unable to demonstrate they could parent."

¶ 31 As for the third service plan, Miller rated respondent as unsatisfactory in his

cooperation with DCFS because she received little or no communication from him during those six months. The assistant State's Attorney asked her:

"Q. What was the nature of any contact that he had with you while he was incarcerated?

A. He sent me two letters asking how [C.B.] was doing and asking for visitation. He also sent cards and pictures for [C.B.].

Q. He never sent you any letters stating an intent to get engaged in services?

A. He told me that, in the letters he sent me, when he was getting ready to get out of Missouri DOC, he did send me confirmation of his outdate, which was supposed be in October [2011], and he said that he would be contacting me for visitation and to start up services again. However, he did not get out in October because he got in some more trouble in the prison that he was at.

Q. Okay. And is it your information that he remains lodged in the Missouri Department of Corrections at this time?

A. Yes."

¶ 32 Again, during the period of the third service plan, the goals in the areas of substance abuse and domestic violence remained unfulfilled—or at least Miller received no documentation that respondent had fulfilled those goals or that he even had started working on them. The overall progress of both parents was unsatisfactory "[b]ecause neither parent ha[d] been able to demonstrate that they [could] parent their child on a consistent basis outside of prison."

¶ 33 The trial court found, by clear and convincing evidence, that the State had proved a lack of reasonable progress on respondent's part during the initial nine-month period following the adjudication of neglect, namely, September 23, 2010, through June 22, 2011. (In its remarks from the bench, the court referred to "the period from September 23rd, 2010, through January 22nd, 2011," but the court obviously meant "June" instead of "January.") See 750 ILCS 50/1(D)(m)(ii) (West 2010). The court also found, by clear and convincing evidence, that respondent had failed to make reasonable progress during the second nine-month period, namely, June 23, 2011, through March 22, 2012. See 750 ILCS 50/1(D)(m)(iii) (West 2010).

¶ 34 J. The Best-Interest Hearing

¶ 35 Immediately after finding respondent to be an "unfit person," the trial court held a best-interest hearing, in which the State recalled Miller to the stand. Miller testified that C.B., who would be four years old the next month, had been living with the Hansens in Pike County since June 22, 2010, ever since she "came into care." Miller visited the Hansen residence at least once a month, and she had observed a close relationship between C.B. and the Hansens. C.B. called Melissa "Mommy" and Jeremy "Daddy." The extended family provided daycare for C.B. when she was not in preschool. There were games and activities in the Hansen household—and discipline when necessary. The Hansens made sure that C.B. received medical care, including the implantation of tubes in her ears. They had signed a commitment to adopt her.

¶ 36 Miller's testimony was the only evidence presented in the best-interest hearing. The trial court observed that, according to Miller's testimony, the Hansens' home was the only home C.B. had known for the past 18 months and that C.B. had grown close to the Hansens, who not only provided for her needs but intended to adopt her.

¶ 37 On the other hand—although the trial court acknowledged that the State had the burden of proof—the court had heard no evidence that C.B. was able to have unsupervised visits with either of her natural parents, both of whom were incarcerated. Nor had the court heard any evidence "with regard to what relationship, if any, currently exist[ed] between the minor and either of the natural parents."

¶ 38 So, on the basis of the evidence before it, the trial court found the State had proved, by a preponderance of the evidence, that termination of parental rights would be in C.B.'s best interest. Accordingly, the court terminated the parental rights of respondent and the mother to their daughter, C.B., and changed the goal to adoption.

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 A. The Denial of Respondent's "Motion for Teleconference"

¶ 42 Respondent argues that the trial court erred by denying his "Motion for Teleconference." We lack subject-matter jurisdiction to consider whether the court should have allowed respondent to participate by teleconference in the adjudicatory hearing on September 22, 2010, because he never appealed from the subsequent dispositional order of November 1, 2010, which made C.B. a ward of the court. See *In re Alexander R.*, 377 Ill. App. 3d 553, 555 (2007).

¶ 43 Respondent attended the dispositional hearing on November 1, 2011, and at the beginning of the hearing, he told the court he had been released from the Missouri Department of Corrections and that he now lived at 34 Hawkeye Village, Apartment 34, Keokuk, Iowa. His release from prison made the "Motion for Teleconference" moot. He never afterward renewed the motion.

¶ 44 B. Respondent's Lack of Representation

¶ 45 Respondent concedes that "[t]he denial of the Motion for Teleconference[,] in and of itself, may not have amounted to err[or]," but he contends that the denial of that motion was error when "coupled with the fact that the court had not ensured that [he] was represented by counsel, a statutorily defined right in a termination case." In this connection, he cites *In re Adoption of K.L.P.*, 198 Ill. 2d 448, 469 (2002), in which the supreme court held: "[W]here *** significant state action has resulted in the custody or guardianship of the minor child being placed with a person other than the parent, equal protection requires that the parent be provided with the assistance of counsel, if she is indigent, in a subsequent action to terminate her parental rights, whether that action is brought pursuant to the Juvenile Court Act [of 1987] or by the child's guardian or custodian pursuant to the Adoption Act." *K.L.P.* is distinguishable, however, in that the respondent in that case requested court-appointed counsel (*id.* at 451), whereas it does not appear that respondent in the present case ever made such a request. Section 1-5(1) of the Juvenile Court Act of 1987 (705 ILCS 405/1-5(1) (West 2010)) provides that "[a]t the request of any party financially unable to employ counsel, *** the court shall appoint the Public Defender or such other counsel as the case may require." (Emphasis added.) Courts have held that unless a parent requests court-appointed counsel, due process does not require the appointment of counsel in parental-termination proceedings. Patricia C. Kussman, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 92 A.L.R. 5th 379, 431 § 7[b] (2001).

¶ 46 C. Citation of Materials in the Record That Were Never Admitted in Evidence

¶ 47 We notice that both of the parties cite various reports in the record that never were entered in evidence in the unfitness hearing. We remind the parties that just because a document is in the common-law record, it does not necessarily follow that it is evidence. The rules of evidence

apply to an unfitness hearing, and "the trial court's decision as to whether a parent is unfit should be based only upon evidence properly admitted at the unfitness hearing." *In re J.G.*, 298 Ill. App. 3d 617, 629 (1998). By corollary, our review of a finding of parental unfitness should be based only on evidence properly admitted in the unfitness hearing.

¶ 48 It is true that a court may take judicial notice *sua sponte* (Ill. R. Evid. 201(c) (eff. Jan. 1, 2011)), but any fact of which the court takes judicial notice must be "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" (Ill. R. Evid. 201(b)). We do not mean to disparage any of the reports in the record, but they are not sources the accuracy of which is beyond reasonable question.

¶ 49 D. The Finding That Respondent Was an "Unfit Person"

¶ 50 Unless the parent consents to the termination of his or her parental rights (and, of course, respondent did not so consent in this case), the trial court may grant a petition or motion to terminate parental rights only if the court finds, by clear and convincing evidence, that the parent is an "unfit person" within the meaning of section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2010)). 705 ILCS 405/2-29(2) (West 2010). Section 1(D) contains several grounds for finding a parent to be an "unfit person." Two of those grounds, in sections 1(D)(m)(ii) and (D)(m)(iii) (750 ILCS 50/1(D)(m)(ii), (D)(m)(iii) (West 2010)), have to do with failing to make "reasonable progress." Sections 1(D)(m)(ii) and (D)(m)(iii) provide as follows:

"D. 'Unfit person' means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption. The grounds of unfitness are any

one or more of the following ***:

* * *

(m) Failure by a parent *** (ii) to make reasonable progress toward the return of the child to the parent within 9 months after an adjudication of neglected *** minor *** , or (iii) 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 *** minor ***. If a service plan has been established *** to correct the conditions that were the basis for the removal of the child from the parent and if those services were available, then, for purposes of this Act, 'failure to make reasonable progress toward the return of the child to the parent' includes (I) the parent's failure to substantially fulfill his or her obligations under the service plan and correct the conditions that brought the child into care within 9 months after the adjudication *** and (II) the parent's failure to substantially fulfill his or her obligations under the service plan and correct the conditions that brought the child into care during any 9-month period

after the end of the initial 9-month period following
the adjudication ***."

Thus, the statute defines a "failure to make reasonable progress" as a failure to "substantially" fulfill one's obligations in a service plan and a failure to correct the conditions that necessitated putting the child in someone else's care. *Id.* In addition, the supreme court has held that "failure to make reasonable progress" includes the failure to correct *any* condition that would prevent the court from returning custody of the child to the parent. *In re C.N.*, 196 Ill. 2d 181, 216 (2001).

¶ 51 Not every nonfulfillment of an obligation in a service plan amounts to a failure to make reasonable progress; the nonfulfillment must be "substantial" (important, essential, material, significantly great (Merriam-Webster's Collegiate Dictionary 1170 (10th ed. 2000)) as opposed to trivial or insignificant. 750 ILCS 50/1(D)(m) (West 2010). Respondent argues that the trial court's finding of a lack of reasonable progress on his part is against the manifest weight of the evidence, considering that "[t]he task of completing anger management classes and a substance abuse evaluation was rated unsatisfactory progress not due to any failure on the part of [respondent], rather Miller determined the need for services and did not have sufficient time to refer [him] for the services." The pages of the record that respondent cites, however, do not substantiate his representation that Miller failed to "refer" him for these services. See Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008) ("Statement of Facts, *** with appropriate reference to the pages of the record on appeal ***."). The record appears to contain no evidence that, during the successive six-month periods of the first, second, and third service plans, respondent ever mentioned to Miller a need for a referral.

¶ 52 The trial court could reasonably regard the nonfulfillment of the goals relating to

domestic violence and substance abuse as a substantial nonfulfillment of the service plans and, therefore, as a failure to make reasonable progress. See 750 ILCS 50/1(D)(m) (West 2010). Also, respondent's imprisonment was a condition that prevented the court from returning the child to him. See *C.N.*, 196 Ill. 2d at 216. Respondent has reinstated and reinforced that condition not only by returning to prison but by lengthening his confinement through misbehavior in prison. Consequently, we disagree that the court's findings that respondent is an "unfit person" within the meaning of sections 1(D)(m)(ii) and (D)(m)(iii) of the Adoption Act (750 ILCS 50/1(D)(m)(ii), (D)(m)(iii) (West 2010)) are against the manifest weight of the evidence. See *In re A.L.*, 409 Ill. App. 3d 492, 500 (2011) ("A reviewing court will not reverse a trial court's fitness finding unless it was contrary to the manifest weight of the evidence, meaning that the opposite conclusion is clearly evident from a review of the record.").

¶ 53 E. The Finding That It Was in C.B.'s Best Interest
 To Terminate Respondent's Parental Rights

¶ 54 Respondent contends that the State's evidence was insufficient to prove, by a preponderance of the evidence, that it was in C.B.'s best interest to terminate respondent's parental rights. See *In re D.T.*, 212 Ill. 2d 347, 367 (2004) (the child's best interest is to be proved by a preponderance of the evidence). We ask whether the trial court made a finding that was against the manifest weight of the evidence when it found that the State had proved, by a preponderance of the evidence, that termination of respondent's parental rights would be in C.B.'s best interest. See *In re Veronica J.*, 371 Ill. App. 3d 822, 831-32 (2007).

¶ 55 We conclude that the finding is not against the manifest weight of the evidence. It appears, from the evidence, that C.B. is safe with the Hansens and that they provide for all her needs,

including her needs for food, shelter, clothing, and medical care. See 705 ILCS 405/1-3(4.05)(a) (West 2010). C.B. is attached to them, addressing them as her mother and father. See 705 ILCS 405/1-3(4.05)(d)(i) (West 2010). At the time of the best-interest hearing, she had been living with them for the past year and seven months. See 705 ILCS 405/1-3(4.05)(d)(iii), (d)(v), (g) (West 2010). They want to adopt her. See 705 ILCS 405/1-3(d)(iv) (West 2010); *In re Tashika F.*, 333 Ill. App. 3d 165, 170-71 (2002).

¶ 56 Respondent was in no position to raise C.B.: he was in prison again, and the record does not appear to reveal when he would be released; that would depend on his behavior in prison, which evidently had not been good. It was far from certain that he would stay out of prison once he was released, let alone that he would substantially fulfill the service plans and provide C.B. a stable home. It was unclear that he had a relationship with C.B. The court could reasonably conclude that C.B. had a better, more secure future with the Hansens and that it was in C.B.'s best interest to terminate parental rights.

¶ 57

III. CONCLUSION

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

¶ 59 Affirmed.