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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> EMAIJAH B.,)	Appeal from the Circuit Court
)	of Winnebago County.
a Minor)	
)	No. 11-JA-288
)	
(The People of the State of Illinois,)	Honorable
Petitioner-Appellee, v. James P.,)	Mary Linn Green,
Respondent-Appellant).)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's failure to formally admonish the father pursuant to section 1-5 of the Juvenile Court Act did not require the reversal of the termination of his parental rights, as the father was not prejudiced: he had actual knowledge, from other sources, of some of the required information, and, given the strength of the State's evidence, his unawareness of other information was harmless.

¶ 2 On September 20, 2011, the State filed a three-count petition in the circuit court of Winnebago County, seeking an adjudication that Emaijah B. was a neglected minor. On November 18, 2011, Emaijah's mother, Denise B., stipulated to count I of the petition and, pursuant to an agreement with the State, the other two counts of the petition were dismissed. Consonant with Denise's stipulation, the trial court found that Emaijah was a neglected minor

and made her a ward of the court. The State subsequently filed a motion to terminate the parental rights of both Denise and Emiajah's father, James P. The trial court granted the motion on July 12, 2013, and James filed a timely notice of appeal. He argues that the order terminating his parental rights must be reversed because he was not properly admonished about the nature of the proceedings and the procedural rights afforded to him. We affirm.

¶ 3 Count I of the neglect petition alleged that Emajjah—who was five days old when the petition was filed—was a neglected minor in that “her siblings were removed from mothers [*sic*] care and mother has failed to cure the conditions which led to removal of [Emajjah's] siblings, thereby placing [Emajjah] at risk of harm.” The petition identified James as Emajjah's putative father and listed the Stateville Correctional Center as his place of residence. Denise appeared in court on the day the petition was filed. James did not. The trial court awarded temporary guardianship and custody to the guardianship administrator of the Department of Children and Family Services (DCFS), who was granted authority to place Emajjah with a responsible relative or in traditional foster care. The trial court also granted the State leave to publish notice of the petition. The published notice, which was addressed to James and “all whom it may concern,” stated, in pertinent part:

“THE COURT HAS AUTHORITY IN THIS PROCEEDING TO TAKE FROM YOU THE CUSTODY AND GUARDIANSHIP OF [EMAJAH], TO TERMINATE YOUR PARENTAL RIGHTS, AND TO APPOINT A GUARDIAN WITH POWER TO CONSENT TO ADOPTION. YOU MAY LOSE ALL PARENTAL RIGHTS TO YOUR CHILD.”

¶ 4 On September 28, 2011, the matter came before the court for a continued shelter care hearing. Again, James was not present. The trial court asked Kristin Kutay, a DCFS employee,

whether she had been in contact with James. She responded, “I faxed a letter to his counselor in Statesville [*sic*] and she said that she would give him the letter and the notice of shelter care. And I mailed that information to him as well, and that was done last week.” James first appeared in court on November 18, 2011, the date that Denise stipulated to count I of the petition and Emaijah was made a ward of the court. James appeared with counsel. At the outset, the trial court advised Denise that the State was seeking to terminate her parental rights to her three older children. James is not the father of those children. When the trial court turned its attention to the proceedings concerning Emaijah, the assistant State’s Attorney advised the court that, although counts II and III were to be dismissed, an agreement had been reached “that the parties would be ordered to do services based on all counts in the petition.” The assistant State’s Attorney added that guardianship and custody would be transferred to DCFS, which would have authority to place the child with a responsible relative or in traditional foster care, and that the parents would be ordered to remain drug and alcohol free, to submit to random drug testing, and to “cooperate with all services.” All of the attorneys present, including James’s attorney, acknowledged this agreement.

¶ 5 The first permanency hearing took place on May 15, 2012. Caseworker Imari Hanserd testified that Emaijah was living with her great aunt, Lisa B. Denise visited with Emaijah about three times a week for an hour or two. Denise was asked to complete a substance abuse assessment, participate in a substance abuse treatment program and parenting education, and submit to random drug screens. Denise completed the substance abuse assessment, but was discharged from a treatment program for nonattendance. She failed three random drug screens and failed to complete drug screens on at least six occasions. Because she had not established

that she had remained drug-free and alcohol-free for 90 days, she could not be referred to parenting education.

¶ 6 Hanserd further testified that James was an inmate at the Logan Correctional Center and that his projected release date was August 8, 2013. James had been asked to submit to paternity testing, but refused to do so, indicating that “he felt like Emaijah was his biological child.” James had recently received a service plan and had indicated that he would “try to get into some services.” According to Hanserd’s testimony, a “legal screen” would be conducted in three months “if things don’t improve.” Hanserd also testified that Lisa B. was willing to provide permanency.

¶ 7 The trial court found that neither Denise nor James had made reasonable efforts to achieve the goal of returning Emaijah home within 12 months. However, the trial court found that it was in Emaijah’s best interests to maintain that goal. The trial court ordered James to undergo paternity testing.

¶ 8 On August 7, 2012, a joint permanency review hearing took place for Emaijah and for her three older siblings. It was noted that the goal for Emaijah’s siblings was adoption by Denise’s grandmother. The trial court left that goal unchanged. With respect to Emaijah’s status, Hanserd testified that James had not yet submitted to paternity testing, but was expected to do so soon, and that the results would be available in about a month. James had written to Hanserd, indicating that he would try to “get into some services.” Drug screens had been requested for Denise on a monthly basis, but she had not submitted to screening since the last permanency review hearing. Denise’s visitation with Emaijah had been sporadic. The trial court found that James had not made reasonable progress toward the goal of returning Emaijah home

within 12 months. The trial court found that Denise had made neither reasonable efforts nor reasonable progress toward achieving that goal.

¶ 9 Another joint permanency review hearing for Emaijah and her siblings took place on February 4, 2013. At the outset, it was noted that petitions had been filed for the adoption of Emaijah's siblings. Caseworker Jacqueline Martin testified that Emaijah had been living with Lisa for nearly a year and had a very close bond with her. Lisa was committed to providing permanency for Emaijah. Martin also testified that paternity testing had been completed and that James's paternity had been established. James had expressed a willingness to complete services, but they were largely unavailable to him while he was incarcerated. He was on a waiting list for an anger management program. Since the prior permanency review hearing, James had visited with Emaijah twice. The first visit went well. However, at the second visit, Emaijah began crying after about 15 minutes and did not stop until the visit was over. Martin testified that Denise had passed a drug screen in August of the preceding year. Around that time, however, Martin lost contact with Denise. At the conclusion of the hearing, the trial court ruled, in pertinent part, as follows:

“As for Emaijah, taking into consideration all the evidence as presented, her time in care, the Court finds that it is in the best interests at this time to set her permanency goal as substitute care pending court determination on termination of parental rights.

As to the mother, the Court finds that she has not made reasonable efforts or reasonable progress. As for the father, for this review period, the Court does find that he has made reasonable efforts within the confines of what he is able to do *** but as for progress, the Court finds that he has not made reasonable progress for this review period.”

¶ 10 On April 18, 2013, the State filed its motion to terminate Denise’s and James’s parental rights. The motion alleged that James was an “unfit person” as defined in subsections (D)(b), (D)(i), (D)(m)(i), (D)(m)(ii), and D(m)(iii) of section 1 of the Adoption Act (750 ILCS 50/1(D)(b), (D)(i), (D)(m)(i), (D)(m)(ii), (D)(m)(iii) (West 2012)). Of particular relevance here, subsection (D)(i) provides that depravity is grounds for finding a parent to be an unfit person. 750 ILCS 50/1(D)(i) (West 2012). Further, “[t]here 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 any other 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.” *Id.* Subsection (D)(m) provides, in pertinent part, that a finding of unfitness may be based on:

“Failure by a parent (i) to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the parent, or (ii) to make reasonable progress toward the return of the child to the parent within 9 months after an adjudication of neglected or abused 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 or abused minor ***.” 750 ILCS 50/1(D)(m) (West 2012).

¶ 11 James and Denise both appeared in court on the day the motion to terminate their parental rights was filed. The trial court addressed James and Denise as follows:

“Okay. What I would like to say to the parents is a little bit about the process just so you have a better understanding. The document that you are looking at was just filed today, it’s a motion for termination of parental rights and power to consent to adoption.

Here's how the process works: Any termination of a parent's rights trial is a two-part process. The first part—or the first hearing we have evidence on what's called unfitness. All the evidence would go to show that the parents are unfit. The State has the burden to prove that by clear and convincing evidence. They have to prove at least one of those counts as to each of you.

If they can prove by clear and convincing evidence—now, that isn't proof beyond a reasonable doubt that they have to prove it, but it's still a pretty high burden. So the first hearing that we have, that's the evidence that we will hear. It has to do with your engagement in services, your visitation. It's all about what you might or might not have done.

*** Then at the end of that hearing, usually I have a stack of evidence about that high (indicating) that I have to go through, so we set a second date to come back, ***.
*** I will render my decision on whether or not the State has proven unfitness.

If the State has proven that you are each unfit in the first part of the hearing, that still does not terminate your rights as a parent. Then we *** go into what's called a best interest hearing, and at that hearing we listen to evidence about what is going to be in your child's best interest, is it going to be in your child's best interest to terminate your rights as a parent. And it's only after the State proves that second hearing [*sic*] that it would be in his [*sic*] best interest that the State would actually terminate your rights as a parent. So it's after two hearings and if the State proves their evidence in both hearings.”

¶ 12 The hearing on the State's motion commenced on May 31, 2013. During direct examination by the State, James testified that he was incarcerated at the Graham Correctional

Center for a 2011 conviction of aggravated fleeing a police officer and that, when he committed the offense, he was aware that Denise was pregnant with Emaijah. James further acknowledged that he had five additional felony convictions as follows: a 2011 conviction of domestic battery, a 2010 conviction of “attempt to deliver cannabis,” a 2007 conviction of possession of a controlled substance, a 2006 conviction of unlawful restraint, and a 2005 conviction of unlawful discharge of a firearm. James also acknowledged that he had visitation with Emaijah on only two occasions and that the second visit “didn’t go too well.” James testified that he regularly received service plans calling for him to attend parenting, substance abuse, and anger management programs. At the time of the hearing, James was enrolled in a parenting class, was on a waitlist for an anger management class, and had not participated in a substance abuse program. He indicated that, as a result of frequent court appearances, he was repeatedly waitlisted for substance abuse counseling.

¶ 13 On July 12, 2013, the trial court ruled that both Denise and James were unfit. The court found that the State had proved each of the several grounds on which the State had alleged that James was unfit. The court then heard evidence on whether termination of parental rights was in Emaijah’s best interests. The State presented evidence that Emaijah was in Lisa’s care; that Lisa expressed a desire to adopt Emaijah; that Lisa had provided a safe environment for Emaijah and provides for her needs; that Lisa enables Emaijah to have contact with members of her extended family; that Lisa is affectionate to Emaijah; and that Emaijah felt loved by Lisa and felt safe and secure in her care.

¶ 14 James testified that he would be released from the Department of Corrections on August 8, 2013, and that he planned to live with his mother, his brothers, and his nephews. He

expressed the desire to comply with his obligations under the service plan and to stay “connected” with Emaijah. Nevertheless, the trial court terminated his parental rights.

¶ 15 Section 1-5 of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/1-5 (West 2010)) provides, in pertinent part, as follows:

“(1) *** [T]he minor who is the subject of the proceeding and his parents, guardian, legal custodian or responsible relative who are parties respondent have the right to be present, to be heard, to present evidence material to the proceedings, to cross-examine witnesses, to examine pertinent court files and records and also, although proceedings under this Act are not intended to be adversary in character, the right to be represented by counsel. At the request of any party financially unable to employ counsel, with the exception of a foster parent permitted to intervene under this Section, the court shall appoint the Public Defender or such other counsel as the case may require. ***

No hearing on any petition or motion filed under this Act may be commenced unless the minor who is the subject of the proceeding is represented by counsel. *** Each adult respondent shall be furnished a written ‘Notice of Rights’ at or before the first hearing at which he or she appears.

* * *

(3) Parties respondent are entitled to notice in compliance with Sections 2-15 and 2-16, 3-17 and 3-18, 4-14 and 4-15 or 5-525 and 5-530, as appropriate. At the first appearance before the court by the minor, his parents, guardian, custodian or responsible relative, the court shall explain the nature of the proceedings and inform the parties of their rights under the first 2 paragraphs of this Section.

If the child is alleged to be abused, neglected or dependent, the court shall admonish the parents that if the court declares the child to be a ward of the court and awards custody or guardianship to the Department of Children and Family Services, the parents must cooperate with the Department of Children and Family Services, comply with the terms of the service plans, and correct the conditions that require the child to be in care, or risk termination of their parental rights.”

¶ 16 As James notes, it has been stated that “[i]n cases in which the State seeks an adjudication of neglect or a child otherwise in need of supervision, the parents, at the very minimum, must be informed that their child may become a ward of the State and that, upon such a determination, they may lose the custody of their child.” *In re Smith*, 77 Ill. App. 3d 1048, 1053 (1979). The *Smith* court added that “[i]n the absence of these basic admonitions, the other procedural rights, including the right to counsel, would have little meaning.” *Id.* In *Smith*, the mother chose to proceed without counsel in proceedings that culminated in permanent custody of her child being awarded to DCFS’s guardianship administrator. The *Smith* court noted that the mother—who had not been admonished that the proceedings might result in the permanent loss of custody of her child—had been led to believe that the loss of custody was only temporary. *Id.* at 1053-54. In reversing the permanent custody, the *Smith* court reasoned that “the mother, taken by surprise, could only plead that she loved her son and wanted him back home.” *Id.*

¶ 17 Here, the record establishes that, as in *Smith*, the trial court never formally admonished James of his rights in the neglect proceedings or that he risked losing his parental rights if Emaijah were declared a ward of the court. James stresses the trial court’s failure to inform him of the consequences of Denise’s stipulation that Emaijah was a neglected minor or that he needed to take positive steps to prevent the termination of his parental rights. It is clear,

however, that the absence of formal admonitions does not invariably require reversal of all orders adverse to a parent in neglect proceedings. *In re Moore*, 87 Ill. App. 3d 1117, 1120 (1980). This court has explained that “the *Smith* court was not concerned with admonishments merely for their own sake; *it reversed because the failure to admonish the respondent had a tangible effect on the outcome of the proceedings.*” (Emphasis added.) *In re Kenneth F.*, 332 Ill. App. 3d 674, 679 (2002). “In other words, the error [in *Smith*] was prejudicial.” *Id.*

¶ 18 A parent’s actual knowledge, derived from sources of information other than formal admonitions, of the nature of the proceedings and of his or her rights is an important consideration in determining whether the failure to comply with section 1-5(3)’s admonition requirement is prejudicial. *Id.* The State argues that there were several sources of information that were adequate to apprise James that he needed to take active steps to protect his parental rights.

¶ 19 The State notes that the published notice of the neglect petition explained that the trial court could terminate James’s parental rights. But notice by publication is merely a form of *constructive* notice and is not evidence of actual knowledge. See *In re Application of the County Collector*, 278 Ill. App. 3d 168, 173 (1996) (statute governing notice of right to redeem property sold for unpaid taxes is designed to afford actual notice; constructive notice by publication is authorized “as a last resort, if upon diligent inquiry and effort, owners and interested parties cannot be found and served”).

¶ 20 On the other hand, as the State notes, Kutay testified that she had faxed a letter and “notice of shelter care” to James’s counselor at the Stateville Correctional Center and mailed the information to James. The notice states, in pertinent part, as follows:

“YOUR FAILURE TO APPEAR at the hearing may result in placement of the child *** in foster care until a trial can be held. A trial may not be held for up to 90 days.

At the shelter care hearing, parents have the following rights:

1. To ask the court to appoint a lawyer if they cannot afford one.
2. To ask the court to continue the hearing to allow them time to prepare.
3. To present evidence concerning:
 - a. Whether or not the child *** [was] abused, neglected or dependent.
 - b. Whether or not there is ‘immediate and urgent necessity’ to remove the child from the home (including: their ability to care for the child, conditions in the home, alternative means of protecting the child other than removal).
 - c. The best interest of the child.
4. To cross-examine the State’s witnesses.”

This notice would have apprised James of what was at issue in the neglect proceedings and that custody of Emaijah was at stake.

¶ 21 As seen, however, a parent should also be admonished of the risk of termination of parental rights if he or she fails to “comply with the terms of the service plans, and correct the conditions that require the child to be in care.” 705 ILCS 405/1-5(3) (West 2010). The State contends that, at the hearing at which Denise stipulated that Emaijah was a neglected minor, James “was verbally admonished to cooperate with services.” The State evidently refers to a remark by the assistant State’s Attorney that, although the State was dismissing counts II and III of the petition, “the parties would be ordered to do services based on all counts in the petition.” We note, however, that the record reflects no admonition concerning the specific *consequences*

of failing to “cooperate with services.” It is true, as the State points out, that James was present in court during proceedings involving the termination of Denise’s parental rights to Emaijah’s older siblings and their placement for adoption. However, James was not the father of those children and was not a party to those proceedings. It is not reasonable to expect James to glean enough from those proceedings to understand the nature of the proceedings to which he was a party.

¶ 22 That said, we believe that any insufficiency in this regard was harmless beyond a reasonable doubt. Even if James had somehow been able to comply with the service plans, the trial court’s finding that James was depraved was a sufficient, independent basis for finding that James was an unfit person. “Depravity of a parent may be shown by a series of acts or a course of conduct that indicates a moral deficiency and an inability to conform to accepted morality.” *In re Dawn H.*, 281 Ill. App. 3d 746, 757 (1996). James’s criminal record created a rebuttable presumption of depravity. Even if James had been formally admonished about the need to comply with the service plan, it simply is not realistic, given James’s long history of criminal behavior, to think that he could have done anything to avoid the trial court’s finding of depravity. A trial court’s “failure to admonish [a parent] regarding the need to cooperate with DCFS and comply with her service plans d[oes] not excuse an extended course of conduct manifesting an inherent deficiency of moral sense and rectitude.” *In re J’America B.*, 346 Ill. App. 3d 1034, 1049 (2004). Moreover, the evidence was overwhelming that it was in Emaijah’s best interests to terminate James’s and Denise’s parental rights so that Lisa could adopt Emaijah. It is practically inconceivable that James could have done anything during his imprisonment that would have tipped the balance in his favor on this point.

¶ 23 James attempts to draw a parallel between this case and *In re Johnson*, 102 Ill. App. 3d 1005 (1981). In *Johnson*, the father of an allegedly neglected minor admitted the allegations of the State’s neglect petition. The *Johnson* court observed that “for the admission of a parent to be valid in the adjudicatory phase of a neglect proceeding, it must be apparent from the record that the parent making the admission understood the consequences of his admission—that a finding of neglect gives the court jurisdiction of the minor who then becomes subject to the dispositional powers of the court.” *Id.* at 1012-13. Because the record in *Johnson* was “completely devoid of any indication that [the father] understood the consequences of his admission” (*id.* at 1013), the court held that the admission was invalid. Here, however, James did not admit to the allegation of neglect. Accordingly, *Johnson* does not apply.

¶ 24 We also disagree with James’s argument that the failure to formally admonish him in accordance with section 1-5(3) of the Act deprived him of due process of law. Our supreme court addressed a similar argument in *In re Andrea F.*, 208 Ill. 2d 148, 165-66 (2003):

“In *Mathews v. Eldridge*, 424 U.S. 319 *** (1976), the Supreme Court identified three factors to be considered in determining what due process requires in proceedings implicating fundamental liberty interests: (1) the private interest implicated by the official action; (2) the risk of an erroneous deprivation of that interest through the proceedings used, and the probable value, if any, of additional or substitute safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute safeguards would entail. [Citation.] These same factors are considered in resolving what procedural safeguards are required by the due process clause of the Illinois constitution. [Citation.] Although the issue in *Mathews* was whether the due process clause of the fifth amendment required an evidentiary hearing

prior to the termination of a recipient's Social Security disability payments, both the Supreme Court and this court have applied the *Mathews* factors to cases involving the termination of parental rights. [Citations.]

Applying the *Mathews* factors to the facts of the present case, we conclude that [the father] was not denied due process by the trial court's failure to specifically admonish him that he risked termination of his parental rights if he failed to cooperate with DCFS or comply with the terms of the service plans. *** We find that the risk that [the father] was erroneously deprived of that interest as a result of the failure to give the admonishment in question is minimal because the record amply demonstrates that [the father] was aware of the need to cooperate with DCFS and that his parental rights could be terminated.

The record reveals that [the father] was admonished at his first appearance that his children could be declared wards of the court and removed from his custody. At the conclusion of the adjudicatory hearing, that [*sic*] trial court expressed its concern about 'termination proceedings.' Following the dispositional hearing, the court ordered [the father] to cooperate with DCFS and to participate in any and all counseling services DCFS recommended. At a hearing on February 25, 1997, [the father's] attorney argued that it would be unfair 'to terminate his rights' because he refused to admit in sex offender counseling that he had sexually abused his children. Thus, the record in the present case clearly demonstrates that T.F. was well aware of his need to cooperate with DCFS and that termination of his parental rights was a possibility."

¶ 25 Here, the risk of an erroneous deprivation was similarly low. A DCFS employee sent James a notice of shelter care that described the issues in the proceedings and described James's

procedural rights. Additionally, given the strength of the evidence of James's unfitness on grounds of depravity, and of Emaijah's best interests, it is not realistic to think that more forceful admonishments about complying with service plans could have enabled James to avoid the termination of his parental rights.

¶ 26 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 27 Affirmed.