

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).

2013 IL App (4th) 121126-U  
NO. 4-12-1126  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
May 2, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

|                                      |   |                  |
|--------------------------------------|---|------------------|
| In re: B.H., a Minor,                | ) | Appeal from      |
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Circuit Court of |
| Petitioner-Appellee,                 | ) | Sangamon County  |
| v.                                   | ) | No. 09JA112      |
| DAN HUDSON,                          | ) |                  |
| Respondent-Appellant.                | ) | Honorable        |
|                                      | ) | April Troemper,  |
|                                      | ) | Judge Presiding. |

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

**ORDER**

- ¶ 1 *Held:* The trial court did not make a finding that was against the manifest weight of the evidence in finding, by clear and convincing evidence, that the respondent father was an "unfit person" within the meaning of sections 1(D)(m)(i) and (D)(m)(ii) of the Adoption Act (750 ILCS 50/1(D)(m)(i), (D)(m)(ii) (West 2010)); nor did the court make a finding that was against the manifest weight of the evidence in finding, by a preponderance of the evidence, that it would be in B.H.'s best interest to terminate respondent's parental rights.
- ¶ 2 Respondent, Dan Hudson, is the father of B.H., born on April 1, 2009, and Yolanda Fraizer is B.H.'s mother. The State moved to terminate the parental rights of both parents. After evidentiary hearings, the trial court granted the motion in part and denied it in part. The court terminated the parental rights of respondent but declined to terminate the parental rights of Fraizer, finding that the State had failed to prove, on the basis of clear and convincing evidence, that she was an "unfit person" within the meaning of section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West

2010)).

¶ 3 Respondent appeals from the order terminating his parental rights. He challenges the two factual findings underlying that order: the finding that he was an "unfit person" under sections 1(D)(m)(i) and (D)(m)(ii) of the Adoption Act (750 ILCS 50/1(D)(m)(i), (D)(m)(ii) (West 2010)) and the finding that it was in the best interest of B.H. to terminate his parental rights.

¶ 4 The trial court did not make a finding that was against the manifest weight of the evidence when it found, by clear and convincing evidence, that respondent was an "unfit person" within the meaning of sections 1(D)(m)(i) and (D)(m)(ii). Nor did the court make a finding that was against the manifest weight of the evidence in finding, by a preponderance of the evidence, that it would be in B.H.'s best interest to terminate respondent's parental rights. Therefore, we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 A. The Adjudication and the Dispositional Order

¶ 7 On August 5, 2010, the trial court entered an adjudicatory order finding B.H. to be a "neglected minor" 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)) in that his parents' use of drugs caused him to be in an environment injurious to his welfare.

¶ 8 On September 23, 2010, the trial court entered a dispositional order making B.H. a ward of the court and awarding custody and guardianship of him to the guardianship administrator of the Illinois Department of Children and Family Services (DCFS).

¶ 9 Respondent appealed from the dispositional order, but on February 25, 2011, we affirmed it. *In re B.H.*, No. 4-10-0801 (Feb. 25, 2011) (unpublished order under Supreme Court

Rule 23).

¶ 10 B. The State's Petition To Terminate Parental Rights

¶ 11 On September 15, 2011, the State filed a petition to terminate parental rights of both parents. The petition alleged that respondent was an "unfit person" for three reasons: (1) he had "[f]aile[d] to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare" (750 ILCS 50/1(D)(b) (West 2010)); (2) he had "[f]ail[ed] \*\*\* to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the parent" (750 ILCS 50/1(D)(m)(i) (West 2010)); and (3) he had "[f]ail[ed] \*\*\* to make reasonable progress toward the return of the child to the parent within 9 months after an adjudication of neglected \*\*\* minor under Section 2-3 of the Juvenile Court Act of 1987" (750 ILCS 50/1(D)(m)(ii) (West 2010)).

¶ 12 C. The Evidentiary Hearing on the Issue of Parental Unfitness

¶ 13 On June 18, 2012, the trial court held an evidentiary hearing on the issue of whether the parents were "unfit persons" as the State alleged in its petition to terminate parental rights.

¶ 14 At the conclusion of the evidence, the State conceded that respondent had maintained a reasonable degree of interest, concern, or responsibility as to B.H.'s welfare. But the State stood by its remaining two allegations against him: the allegations that he had failed to make reasonable efforts and that he had failed to make reasonable progress.

¶ 15 With respect to respondent, the trial court announced the following factual findings from the bench:

"With regard to Mr. Hudson, Paragraph 9(a) in the petition, the State has conceded that he did maintain a reasonable degree of interest, concern, and responsibility as to the minor's welfare, and

therefore, that paragraph is dismissed.

With regard to failure to make reasonable efforts to correct the conditions and failure to make reasonable progress, the Court struggles with this one as well, but I am bound by the judicial finding of adjudication based on neglect based on the drug use that was alleged in the original petition. Also, the Appellate Court revisited that issue and also found there was sufficient evidence to find the minor adjudicated as neglected. Knowing that Mr. Hudson had a drug problem and needed to follow the recommendations, I find that he did not make reasonable efforts to correct those conditions and thus also did not make reasonable progress and find him unfit as to those provisions."

¶ 16 In addition to drug use, the State had presented evidence of other alleged parental shortcomings on the part of respondent, but because it was for the trial court to decide whether those purported shortcomings amounted to a failure to make reasonable efforts or a failure to make reasonable progress and because, in its remarks from the bench, the court mentioned only drug use as a failure to make reasonable efforts and a failure to make reasonable progress, we will recount only the evidence of drug use. (The written order declaring respondent to be an "unfit person" finds merely a failure to make reasonable efforts and a failure to make reasonable progress, without further detail.)

¶ 17 Taylor Sincavage, a caseworker for Catholic Charities, testified that two of the objectives in respondent's service plan were, first, for him to follow all the recommendations of the

Triangle Center, a drug rehabilitation organization to which Catholic Charities had referred him, and, second, for him to stop using illegal drugs. The Triangle Center disenrolled respondent from its program because he would not stop using cannabis. Sincavage explained that, typically, drug rehabilitation programs required clients to abstain from any further use of illegal drugs and that, the first time the client tested positively for drugs, the client received a warning and, the second time, the client was discharged from the program. In each of the nine months from August 5, 2010, to May 5, 2011, respondent was tested for drugs, and, every time, the test came back positive for cannabis. Sincavage warned him he had to stop using cannabis, but he replied he had been smoking it for a long time and that he did not want to stop. DCFS decided to decrease the frequency of visitation from once a week to once a month because both parents persisted in using drugs.

¶ 18 Respondent testified he had been addicted to cannabis since he was 14 years old (he now was 50, according to his attorney's closing argument), and he admitted he probably told Sincavage he was not ready to stop smoking it. By his understanding, the Triangle Center disenrolled him from its program not because of his continued use of cannabis *per se* but because of his refusal to undergo inpatient treatment as opposed to outpatient treatment. (Sincavage testified she had no knowledge that the Triangle Center ever recommended outpatient treatment for respondent, even though he had signed an authorization for her to receive information from the Triangle Center regarding his treatment.) Respondent explained that, at the time the Triangle Center wanted him to undergo inpatient treatment, he was taking care of his brother, who was confined to a wheelchair and had to be taken to dialysis, and if respondent had been admitted as an inpatient, he could not have continued taking care of his brother. When asked why he did not undergo inpatient treatment after his brother died in October 2010, respondent answered that he wanted to try to

overcome his drug addiction on his own.

¶ 19 Respondent told the trial court he now was ready to undergo inpatient treatment and to stop using cannabis if those measures were necessary for him to be reunited with B.H. He had been under the impression that his use of cannabis posed no threat to his parental rights. If he had known otherwise, he would have given up cannabis by now. According to him, a DCFS employee named Jeffrey Davis or, perhaps, David Jeffries (he was uncertain of the name) had assured him "they" would not "take [his] child because of a little marijuana."

¶ 20 The guardian *ad litem*, Michelle Blackburn, asked respondent:

"Q. Okay. So, if you thought that DCFS was okay with the marijuana usage, why did you think that they wanted you to do substance abuse counseling?"

A. I thought they just have everybody because that's what they do. They send everybody through some kind of drug program."

¶ 21 D. The Reason Why the Trial Court Declined To Find That Fraizer Was an "Unfit Person"

¶ 22 The evidence suggested that Fraizer, like respondent, had a drug problem. During each of the nine months following the adjudication of neglect, she, too, tested positively for drugs. Unlike respondent, however, she also had psychological problems. DCFS had offered her treatment only for her drug problem.

¶ 23 Her attorney and the guardian *ad litem* argued to the trial court that treating the drug problem alone was futile because the drug problem was connected to the psychological problems. They argued that, to give Fraizer a reasonable opportunity for success, she should be offered a dual

program addressing both the drug problem and the psychological problems. Fraizer was on the waiting list for such a dual program, but the waiting list was long, and consequently she had not yet been through the dual program.

¶ 24 The trial court agreed that Fraizer should receive an opportunity to benefit from the dual program. Therefore, at this time, the court declined to find Fraizer to be an unfit person. The court's written order reads: "The court does not find the mother unfit. The court orders the Center for Youth and Family Solutions to look into the dual program."

¶ 25 E. The Evidentiary Hearing on the Issue of Whether It Would Be in B.H.'s Best Interest To Terminate Respondent's Parental Rights

¶ 26 On November 29, 2012, the trial court held an evidentiary hearing on the question of whether it would be in B.H.'s best interest to terminate respondent's parental rights. (Of course, since the court had found Fraizer's unfitness to be unproved, terminating her parental rights was not under consideration.)

¶ 27 The State called B.H.'s caseworker, Kathryn Vincent, an employee of the Center for Youth and Family Solutions. She testified that B.H. was three years old and that since August 2009, he had lived with nonrelatives, Thomas and Susan Westcott. This was a "specialty placement" because B.H. had a lot of medical needs.

¶ 28 The Westcotts lived in a bi-level house, "beautifully furnished," on several acres of land in the country. The house had five bedrooms, three bathrooms, and a full garage. Along with B.H., the Westcotts had several children of their own living with them, adopted children and biological children, ranging in age from 7 years old to 17 years old. B.H. had his own bedroom. The Westcotts were providing for all his needs. He was attached to them.

¶ 29 On the other hand, respondent presented some evidence of a relationship between himself and B.H., although, naturally, weekly visitation—subsequently reduced to monthly visitation—could not have created as deep a relationship as living with the child and taking care of him for 24 hours a day for 3 years.

¶ 30 Respondent was at the hospital when B.H. was born, and from the start, he declared himself to be B.H.'s father. Even so, DCFS never considered giving him custody of B.H. after removing B.H. from Frazier in the hospital. (B.H. was in intensive care for four months after his birth.) Perhaps the reason was that a paternity test was not administered until six or seven months after B.H.'s birth. It is unclear why DCFS never considered placement with other relatives.

¶ 31 In any event, respondent insisted he was able to develop a relationship with his son during visitations. He testified he had been bringing him food and clothes. He showed the trial court photographs of himself and B.H. playing. Fraizer also testified to the relationship between B.H. and his father, admitting that she sometimes became jealous because B.H. preferred his father to her.

¶ 32 After hearing the evidence and the arguments, the trial court said:

"THE COURT: All right. As I think everyone has acknowledged, this is a very difficult case for everyone involved, and I think even more so for the Court, but the Court has to make the final decision, and some will be happy, and some will not be happy with that decision, and that's why I'm up here and get to make those decisions, so I am the one that will have to live with the decision I make.

And given that, the Court has reviewed some additional case

law, too, on this, because here, we clearly do have a parent that loves his child, and it's clear that he loves his child, and in his mind, he wasn't given a fair chance to develop that bond with his child. But we are past those stages, and now the Court must look solely at what is best for [B.H.] and look at it through [B.H.'s] eyes and [B.H.'s] future.

And again, there is support for the Court's decisions where the children have been placed in specialized care and foster parents' home a few days after birth and it was the only home they'd ever known, the foster home was a safe and appropriate place for the children, they had bonded well with their foster parents, foster parents had been involved in different activities and therapies, and foster parents had expressed an interest in adopting the children. That is *In Re M.S.*, 351 Ill. App. 3d 779. It's a First District case, 2004, and there have been no cases to cite it to the contrary. That's one of the cases I have looked at.

Given that, I do find that it is in [B.H.'s] best interests that the parental rights be terminated, and it's, as [(the assistant State's Attorney)] said, it's sad, painful, and it's painful for the Court to do that from Mr. Hudson's eyes, so.

MR. SRONCE [(Fraizer's attorney)]: Was there a finding that they proved that by preponderance of the evidence?

THE COURT: They have met their burden, yes."

¶ 33 This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 A. The Issue of Whether Respondent Was an "Unfit Person"

¶ 36 1. *Overview of the Law*

¶ 37 A trial court may terminate someone's parental rights only if the court finds, on the basis of clear and convincing evidence, that he or she is an "unfit person" on one of the grounds in section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2010)). 705 ILCS 405/2-29(2) (West 2010).

¶ 38 The trial court found respondent to be an "unfit person" on two of the grounds in section 1(D): (1) he had "[f]ail[ed] \*\*\* to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the parent" (750 ILCS 50/1(D)(m)(i) (West 2010)), and (2) he had "[f]ail[ed] \*\*\* to make reasonable progress toward the return of the child to the parent within 9 months after an adjudication of neglected \*\*\* minor under Section 2-3 of the Juvenile Court Act of 1987 [(705 ILCS 405/2-3 (West 2010))]" (750 ILCS 50/1(D)(m)(ii) (West 2010)).

¶ 39 The question on appeal is whether those findings are against the manifest weight of the evidence. *In re Tiffany M.*, 353 Ill. App. 3d 883, 890 (2004). This is a deferential standard of review, acknowledging that the trial court is in a better position than a reviewing court to assess the credibility of the witnesses and to weigh the evidence. *In re Anaya R.*, 2012 IL App (1st) 121101, ¶ 50. The trial court's findings of unfitness are against the manifest weight of the evidence only if the findings are unreasonable and arbitrary, or only if the record clearly requires the conclusion that the State did not prove, by clear and convincing evidence, respondent's failure to make reasonable efforts and failure to make reasonable progress. See *Tiffany M.*, 353 Ill. App. 3d at 890.

¶ 40

## 2. Failure To Make Reasonable Efforts

¶ 41 One of the statutory grounds of unfitness is "[a] [f]ailure by a parent \*\*\* to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the parent." 750 ILCS 50/1(D)(m)(i) (West 2010). Strictly speaking, Fraizer's alleged parental deficiencies, and her parental deficiencies alone, were the basis of DCFS's *removal* of the child. Evidently, Fraizer and respondent were unmarried, and until the paternity test several months later, it was uncorroborated that respondent was in fact B.H.'s father.

¶ 42 Nevertheless, we have interpreted section 1(D)(m) of the Adoption Act (750 ILCS 50/1(D)(m) (West 2010)) as requiring parents to "make the necessary effort or progress toward correcting the injurious conditions underlying the neglect finding." *In re D.J.*, 262 Ill. App. 3d 584, 590 (1994). The use of illegal drugs by both respondent and Fraizer underlies the neglect finding. Therefore, a failure by respondent to make reasonable efforts to abstain from further use of illegal drugs would make him an "unfit person" within the meaning of section 1(D)(m)(i). The reasonableness of a parents's efforts is "judged by a subjective standard based upon the amount of effort that is reasonable for a particular person." *In re Daphnie E.*, 368 Ill. App. 3d 1052, 1066-67 (2006).

¶ 43 Respondent told Sincavage that he did not *want* to stop using cannabis, and indeed he tested positively for the use of cannabis each month during the nine-month period of August 5, 2010, to May 5, 2011. It is true that, in the evidentiary hearing of June 18, 2012, respondent announced he now was ready to stop using cannabis. The relevant period, however, for assessing the reasonableness of a parent's efforts is the nine-month period following the adjudication of neglect (*In re D.F.*, 208 Ill. 2d 223, 239 (2003)), and June 2012 was beyond the nine-month period,

considering that the adjudication of neglect occurred on August 5, 2010. It appears that, during that nine-month period, respondent was not even willing to try abstaining from cannabis, judging from what he told Sincavage and judging from his consistently positive drug tests. Therefore, the trial court did not make a finding that was against the manifest weight of the evidence when it found respondent to be an "unfit person" within the meaning of section 1(D)(m)(i) of the Adoption Act (750 ILCS 50/1(D)(m)(i) (West 2010)), for lack of reasonable efforts.

¶ 44 *3. Failure To Make Reasonable Progress*

¶ 45 An alternative ground of unfitness is "[a] [f]ailure \*\*\* to make reasonable progress toward the return of the child to the parent within 9 months after an adjudication of neglected \*\*\* minor." 750 ILCS 50/1(D)(m)(ii) (West 2010). Again, it was on August 5, 2010, when the trial court adjudicated B.H. to be a neglected minor; therefore, the nine-month period, during which respondent was expected to make reasonable progress, was August 5, 2010, to May 5, 2011. See *id.*

¶ 46 "Reasonable progress" is an objective standard: it cares only about results, not about respondent's abilities or about how hard he tried. See *In re R.L.*, 352 Ill. App. 3d 985, 998 (2004); *In re D.D.*, 309 Ill. App. 3d 581, 589 (2000). To be objectively reasonable, the progress must be sufficient to justify a belief that the child could be returned to the parent in the near future. *In re Janine M.A.*, 342 Ill. App. 3d 1041, 1051 (2003). Reasonable progress is "measured by looking at the parent's compliance with the service plans and the court's directives in the light of the conditions that gave rise to the removal of the child and in light of other conditions that later become known and would prevent the court from returning custody of the child to the parent." *Id.*

¶ 47 The trial court found that, during the nine-month period of August 5, 2010, to May 5, 2011, respondent failed to make reasonable progress toward correcting his drug problem. Because

his drug problem amounted to a neglect of the child (*B.H.*, No. 4-10-0801, slip order at 4-5), a failure to correct his drug problem would prevent the court from returning the child to him. Arguably, respondent's refusal, during this nine-month period, to stop using cannabis constitutes a failure to make reasonable progress in correcting his drug problem.

¶ 48 Respondent blames DCFS for his lack of reasonable progress. He argues that, when the Triangle Center offered inpatient treatment, he could not avail himself of it because he had to take care of his ailing brother. Afterward, he says, he was offered only outpatient treatment, which he contends was inadequate to address his ingrained marijuana habit.

¶ 49 There are a couple of problems with this argument. First, it assumes that the Triangle Center deemed inpatient treatment to be necessary, and we have only respondent's word for that. The trial court did not have to believe him. Second, that respondent had another priority—legitimate as that priority was—really is not relevant to the objective standard of reasonable progress, which, again, measures only results. It might be relevant to the reasonableness of respondent's *efforts*: he might argue that he *tried* to follow all of the recommendations by Triangle Center but that he could not do so because he had to take care of his ailing brother (setting aside the fact that, really, respondent did not even want to stop using cannabis, according to what he told Sincavage). See 750 ILCS 50/1(D)(m)(i) (West 2010). But it would not be relevant to the reasonableness of his progress. 750 ILCS 50/1(D)(m)(ii) (West 2010). The requirement of reasonable progress is calculated to keep the child from being indefinitely in limbo. See *In re J.P.*, 261 Ill. App. 3d 165, 176 (1994). A stated purpose of the Juvenile Court Act of 1987 is to secure permanence, "at the earliest opportunity," for minors who have been removed from the custody of their parents. 705 ILCS 405/1-2(1) (West 2010). The Adoption Act is to be construed in conformity with that purpose. See 750 ILCS 50/2.1



