

2014 IL App (2d) 14-519-U
No. 2-14-0519
Order filed October 15, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re LIZETH M., a Minor) Appeal from the Circuit Court
) of Winnebago County.
)
) No. 08-JA-92
)
(The People of the State of Illinois, Petitioner-) Honorable
Appellee, v. Javier M., Respondent-) Mary Linn Green,
Appellant, Karla M., Respondent.)) Judge, Presiding.

In re ULYSSES M., a Minor) Appeal from the Circuit Court
) of Winnebago County.
)
) No. 08-JA-93
)
(The People of the State of Illinois, Petitioner-) Honorable
Appellee, v. Javier M., Respondent-) Mary Linn Green,
Appellant, Karla M., Respondent.)) Judge, Presiding.

In re JAVIER M., a Minor) Appeal from the Circuit Court
) of Winnebago County.
)
) No. 09-JA-196
)
(The People of the State of Illinois, Petitioner-) Honorable
Appellee, v. Javier M., Respondent-) Mary Linn Green,
Appellant, Karla M., Respondent.)) Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), was granted, and the trial court's judgment terminating respondent's parental rights was affirmed, where a careful examination of the record revealed no issue of arguable merit to support an appeal from the judgment.

¶ 2 The trial court found respondent, Javier M., to be an unfit parent and ruled that it was in the best interests of his minor children, Ulysses M., born January 27, 2006, Lizeth M., born May 25, 2007, and Javier M., born May 11, 2009, to terminate his parental rights. Respondent timely appealed, and the trial court appointed counsel. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), counsel moves to withdraw. In his motion, counsel states that he read the record, found no issue of arguable merit, and advised respondent of his opinion. Counsel has supplied a memorandum of law in support of his motion. This court advised respondent that he had 30 days to respond to the motion, and he has not responded. For the following reasons, we grant counsel's motion to withdraw and affirm the judgment.

¶ 3 I. BACKGROUND

¶ 4 Rather than provide a detailed recitation of the facts here, we briefly outline the procedural background and address the relevant facts in the discussion section below.

¶ 5 On May 20, 2008, the State filed neglect petitions with respect to Ulysses and Lizeth, and on May 15, 2009, the State filed a neglect petition with respect to Javier. The children's mother, Karla M., stipulated that Ulysses and Lizeth were neglected pursuant to section 2-3(1)(c) of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/2-3(1)(c) (West 2008)), in that they were born with cocaine in their urine, blood, or meconium. Both the mother and respondent stipulated that Javier was neglected pursuant to section 2-3(1)(b) of the Act (705 ILCS 405/2-3(1)(b) (West

2008)), in that his environment was injurious to his welfare. The court adjudicated the children neglected, made them wards of the court, and placed guardianship and custody with the Department of Children and Family Services (DCFS).

¶ 6 On February 14, 2014, the State filed petitions for termination of parental rights with respect to all three children. The mother signed specific consents to adoption, while respondent elected to contest the petitions. Following an unfitness hearing on April 11, 2014, the court found that the State had proven by clear and convincing evidence that respondent was an unfit parent pursuant to section 1(D)(b) of the Adoption Act (750 ILCS 50/1(D)(b) (West 2012)), in that he failed to maintain a reasonable degree of interest, concern, or responsibility as to the children's welfare. Following a best interests hearing, the court found that it was in the children's best interests that respondent's parental rights be terminated. The court terminated respondent's parental rights and granted DCFS the power to consent to adoption. Respondent timely filed a notice of appeal, and appellate counsel was appointed.

¶ 7

II. ANALYSIS

¶ 8 In his *Anders* motion, counsel maintains that there is no issue of arguable merit with respect to either the unfitness finding or the best interests finding. He also contends that, although there was a procedural defect in the initial adjudication proceedings, respondent forfeited the issue by failing to raise it in the trial court. After carefully reviewing the record, we agree that there is no issue of arguable merit to support an appeal.

¶ 9 Termination of parental rights under the Act is a two-step process. *In re Julian K.*, 2012 IL App (1st) 112841, ¶ 1. The State first must establish by clear and convincing evidence one ground of parental unfitness from those listed in section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2012)). 705 ILCS 405/2-29(2) (West 2012); *In re B.B.*, 386 Ill. App. 3d 686, 698

(2008). If the trial court finds a parent unfit, the court must conduct a second hearing to determine, by a preponderance of the evidence, whether it is in the best interest of the minors to terminate parental rights. *B.B.*, 386 Ill. App. 3d at 698. A reviewing court will not disturb a trial court's decision at a termination hearing unless it is against the manifest weight of the evidence. *Julian K.*, 2012 IL App (1st) 112841, ¶ 65. A trial court's decision is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent or the decision is unreasonable, arbitrary, and not based on evidence. *B.B.*, 386 Ill. App. 3d at 697-98.

¶ 10 The court found that respondent was an unfit parent due to his “[f]ailure to maintain a reasonable degree of interest, concern or responsibility as to the child’s welfare.” 750 ILCS 50/1(D)(b) (West 2012)). Because the language of section 1(D)(b) of the Adoption Act is disjunctive, any one of the three elements—*i.e.*, interest, concern, or responsibility—may by itself form the basis for a finding of unfitness. *In re B’Yata I.*, 2014 IL App (2d) 130558-B, ¶ 31. In determining whether a parent has exhibited reasonable interest, concern, or responsibility, a court must examine the parent’s conduct in the context of the circumstances in which it occurred. *In re Adoption of Syck*, 138 Ill. 2d 255, 278 (1990). Relevant circumstances include difficulty in obtaining transportation, a parent’s poverty, or the actions or statements of others that hinder or discourage visitation. *Syck*, 138 Ill. 2d at 278-79. Completion of service plan objectives is also relevant. *In re Daphnie E.*, 368 Ill. App. 3d 1052, 1065 (2006). A parent is not fit merely because he or she has demonstrated some interest or affection toward a child; rather, the interest, concern, or responsibility exhibited must be objectively reasonable. *In re Jaron Z.*, 348 Ill. App. 3d 239, 259 (2004). The focus is on the parent’s efforts, not on the parent’s success. *Daphnie E.*, 368 Ill. App. 3d at 1064. For example, if personal visits with a child are impractical, other

methods of communication, including letters, telephone calls, and gifts, may evidence a reasonable degree of interest, concern, or responsibility. *Syck*, 138 Ill. 2d at 279.

¶ 11 In concluding that respondent failed to maintain a reasonable degree of interest, concern, or responsibility as to the children's welfare, the trial court found that, after DCFS took custody of the children in June 2008, respondent "in essence" did not have visitation with the children for four years. The court further found that respondent did not know what grade Lizeth had reached in school, did not know which school Ulysses attended, and had attended only three doctor's appointments since the children had been in DCFS custody. The court also found that, during the time the children were in DCFS custody, respondent failed to complete any service plan objectives, tested positive for marijuana, was convicted of aggravated battery, and had an order of protection entered against him.

¶ 12 We agree with counsel that there is no issue of arguable merit with respect to the court's unfitness finding. At the unfitness hearing, respondent testified that DCFS took custody of Ulysses and Lizeth in June 2008. Although respondent attended visitations in September 2008, he stopped attending shortly thereafter and did not visit the children again until October 2009, five months after Javier was born and taken into DCFS custody. By the end of October 2009, respondent had again stopped visiting the children, and he did not resume visitation until October 2012. He then stopped visiting the children in December 2012 because he incorrectly believed the order of protection entered against him prohibited him from seeing the children. He resumed visitation from January through April 2013, after which he did not visit the children until August 2013.

¶ 13 When asked why he went such long periods without contacting the children, respondent testified that it was because of his job, which required him to travel out of state. He testified that,

from September 2008 to October 2009, he was working in Illinois “not that far” from Rockford. Respondent did not remember where he was from October 2009 to 2011, but he was not in Rockford. At another point during his testimony, he recalled that he was in Mexico for approximately seven months during 2010 because his brother died. In addition, he was in Oklahoma from July through November or December 2011 and in Atlanta, Georgia, from February through May 2012. In April 2013, he had to go to Raleigh, North Carolina, for work. Based on this testimony, the trial court’s finding that respondent “in essence” went four years without visiting the children was not against the manifest weight of the evidence.

¶ 14 Furthermore, although respondent’s travels for work and his trip to Mexico were circumstances that made personal visits with the children impractical at times, respondent did not otherwise exhibit a reasonable degree of interest, concern, or responsibility with respect to the children. Respondent testified that he was out of the country for seven months in 2010, but there was no evidence that he visited the children during the remaining five months of the year. Similarly, from September 2008 to September 2009, respondent was working in Illinois “not that far” from Rockford, but he did not visit with the children. It also appears that respondent was in Rockford for significant portions of 2011 and 2012 without visiting the children. This is far different than the facts of *Syck*, in which, although circumstances prevented the mother from seeing her child, she sent numerous letters, cards, and gifts and repeatedly attempted telephone contact. *Syck*, 138 Ill. 2d at 280. Other than his sporadic visits with the children, the only evidence of respondent’s interest, concern, or responsibility concerning the children was his testimony that he attended one of Ulysses’ doctor’s appointments and two of Lizeth’s appointments. He also testified that he attended two parent-teacher conferences for Lizeth and two or three for Ulysses.

¶ 15 Respondent also testified that his caseworker on one or two occasions took a month or more to return a telephone call, but this evidences respondent's lack of interest and concern as much as it evidences the caseworker's lack of diligence. Respondent testified that he would simply leave a voice mail and then take no other action until the caseworker returned his call. According to the service plans, which were admitted into evidence at the unfitness hearing, it was the caseworker who usually experienced difficulty contacting respondent. The service plan dated October 18, 2010, indicates that respondent's whereabouts had been unknown since October 2009. The service plan dated April 19, 2011, indicates that contact was made with respondent in November 2010 but that he disappeared again in February 2011 and had not been located since then. The caseworker then reported no contact with respondent until April 2012. The November 1, 2012, service plan indicates that respondent was approved to visit the children in July 2012 but that the caseworker's calls and letters to respondent went unreturned. Visitation did not begin again until October 2012.

¶ 16 Regarding compliance with the service plans, respondent's testimony and the service plans themselves indicated that, although respondent initiated a number of services, he failed to complete any and exhibited no effort in overcoming even small obstacles. When asked why he did not finish parenting classes, respondent testified that he had "a problem" with the DCFS driver. The service plans reflect that the caseworker attempted to engage respondent in services a number of times but that her efforts failed when she lost contact with him.

¶ 17 In sum, we agree with counsel that there is no issue of arguable merit with respect to the trial court's finding that respondent was an unfit parent because he failed to demonstrate an objectively reasonable level of interest, concern, or responsibility as to his children under the circumstances. We turn to the trial court's best interests finding.

¶ 18 Once a parent is found unfit, the focus shifts to the child, and the parent's interest in maintaining the parent-child relationship must yield to the child's interest in a stable, loving home life. *In re D.T.*, 212 Ill. 2d 347, 364 (2004). The Act sets forth the factors to be considered whenever a best interest determination is required: "(a) the physical safety and welfare of the child, including, food, shelter, health, and clothing"; "(b) the development of the child's identity"; "(c) the child's background and ties, including familial, cultural, and religious"; "(d) the child's sense of attachments"; "(e) the child's wishes and long-term goals"; "(f) the child's community ties, including church, school, and friends"; "(g) the child's need for permanence which includes the child's need for stability and continuity of relationships with parent figures and with siblings and other relatives"; "(h) the uniqueness of every family and child"; "(i) the risks attendant to entering and being in substitute care"; and "(j) the preferences of the persons available to care for the child." 705 ILCS 405/1-3(4.05) (West 2012). Also relevant in a best interest hearing are the nature and length of the minor's relationship with his or her present caretaker and the effect that a change in placement would have upon the minor's emotional and psychological well-being. *In re William H.*, 407 Ill. App. 3d 858, 871 (2011).

¶ 19 Here, at the best interests hearing, the State asked the court to take judicial notice of the evidence from the unfitness hearing and the *in camera* testimony on July 17, 2013, of Ulysses, Lizeth, Javier, and Carlos M., another child of Karla's who had a different father but who was in foster care with the other three children. The State also asked the court to take judicial notice of the caseworker's March 27, 2014, court report and two letters that Carlos sent to the judge asking to be adopted by his foster parents; however, the report and letters are not in the record.

¶ 20 The evidence admitted at the unfitness hearing included the service plans, which revealed that Ulysses, Lizeth, and Javier had lived together with the same foster parents since August

2012 and were doing well there. Lizeth and Ulysses were enrolled in school, Javier was enrolled in preschool, and none of the children had any major behavioral problems. The children all received regular medical care and were developmentally on target. The children lived with Carlos and another half-sibling, who was younger than Javier.

¶ 21 The transcripts of the children's *in camera* testimony revealed that, although Lizeth and Ulysses expressed a desire to live with their biological mother, none of the children mentioned respondent. Ulysses testified that he was eight years old and that he liked his "real mom" and wanted to stay with her. He also said that his foster parents took good care of him and were nice to him. When asked if he remembered ever living with his "real mom," Ulysses said, "not really." Lizeth testified that she wanted to live with her "visit mom," apparently meaning her biological mother, because she loved her. The examination of Lizeth ended before she testified about her foster family. Javier testified that he was four years old and that he called his foster parents "papa" and "mom." He said that he liked living with his foster parents, that they were nice to him, and that he wanted to stay living with them.

¶ 22 After the court took judicial notice of the requested evidence, the State rested. Respondent then testified as follows. Sometime in 2009 and in 2012, he provided clothes to the children, including pants, t-shirts, and coats. He also brought food when he visited the children. The last time he saw Ulysses and Lizeth, they called respondent "dad." Ulysses and Lizeth both knew members of respondent's family, including his older brother and the brother's wife, who had acted as foster parents to the children at one time. Respondent's sister purchased Christmas presents for the children every year.

¶ 23 After respondent rested, the children's foster father read a statement. He said that he and his wife had "seen a tremendous settling and adapting of the children" to their foster family and

home. He indicated that the children had thrived in school and in their personal relationships and that they wanted permanency and closure. He said that Ulysses, Lizeth, and Javier had integrated well with the family's other three children, and were loved by them. They all acted as brothers and sisters. The foster father believed that closure and permanency through adoption was in the children's best interests.

¶ 24 Based on a careful review of the record, we agree with counsel that there is no issue of arguable merit with respect to the trial court's best interests finding. Essentially, the evidence at the unfitness hearing revealed an absentee father. Although respondent testified at the best interests hearing that he had provided the children food and clothes during his sporadic visits, the evidence as a whole overwhelmingly established that the foster parents were better able to provide for the children's physical safety and welfare. To the extent that the evidence revealed the children's senses of attachment and preferences, it suggested that they were bonded to their biological mother and desired to live with her. The evidence did not reveal close bonds or any desire to live with respondent. The children were placed together with a single foster family who was willing to adopt them and their two half-siblings, and they had integrated well with the family's other children. Their educational and medical needs were met. Based on this evidence, the court's best interests finding was not against the manifest weight of the evidence.

¶ 25 Counsel raises one additional potential issue in his *Anders* motion, which he maintains lacks arguable merit because respondent forfeited it by not raising it below. Counsel contends that respondent was not named in the original neglect petitions with respect to Lizeth and Ulysses and that the trial court never admonished respondent in accordance with section 1-5(3) of the Act (705 ILCS 405/1-5(3) (West 2008)). According to counsel, respondent forfeited the

issue by failing to raise it below, so the issue can be addressed on appeal only if this court chooses to overlook the forfeiture.

¶ 26 Section 1-5(3) of the Act provides in pertinent that, “[a]t 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.” 705 ILCS 405/1-5(3) (West 2008). In addition, at the first appearance before the court, if a minor is alleged to be neglected, “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 [DCFS], the parents must cooperate with [DCFS], 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.” 705 ILCS 405/1-5(3) (West 2008). In addition, upon declaring a child to be a ward of the court, “the court shall inform the parties of their right to appeal therefrom as well as from any other final judgment of the court.” 705 ILCS 405/1-5(3) (West 2008).

¶ 27 At the September 11, 2008, hearing, which was the first hearing respondent attended, respondent identified himself at the commencement of the hearing as “Javier M***.”¹ At that point, it was still unknown to DCFS or to the court who the children’s father was, and DCFS had published notice of the neglect proceedings to “All Whom It May Concern” in accordance with section 2-16 of the Act (705 ILCS 405/2-16 (West 2008)). Nothing in the transcript indicates that anyone informed the court that respondent was the children’s father, and respondent made no other statements on the record. The court accepted the mother’s stipulation to the neglect

¹ Counsel asserts that respondent “identified himself as the father of the children through an interpreter.” While the court reporter designates respondent as the father in the transcript, nothing in the transcript indicates that anyone informed the court of that fact.

petitions and adjudicated Ulysses and Lizeth neglected minors. The court admonished the mother pursuant to section 1-5(3) of the Act.

¶ 28 At the next hearing, which was the March 9, 2009, permanency review, respondent identified himself as the children's father, and the court appointed counsel to represent him and ordered paternity testing. The court did not admonish respondent in accordance with section 1-5(3) of the Act. However, the caseworker's testimony at the hearing revealed that DCFS had created a service plan for respondent in September 2008 and that he had commenced some services at that time.

¶ 29 On May 15, 2009, a shelter care hearing was held with respect to Javier, who had been born four days earlier. Counsel for respondent indicated that respondent was in Mexico and had been notified of the hearing. The mother waived the shelter care hearing and the court placed temporary custody and guardianship of Javier with DCFS.

¶ 30 At the next hearing on May 29, 2009, respondent appeared with his counsel. The court indicated that this was the first hearing respondent had attended, and the court admonished him in accordance with section 1-5(3) of the Act.

¶ 31 Even assuming *arguendo* that the court erred by not admonishing respondent until the May 29, 2009, hearing, we conclude that the issue has no arguable merit on appeal. Ordinarily, the procedure for challenging defects in neglect proceedings is to file a notice of appeal within 30 days of entry of the dispositional order, and the failure to do so results in forfeiture of the issues. *In re Leona W.*, 228 Ill. 2d 439, 456-57 (2008); *In re M.J.*, 314 Ill. App. 3d 649, 655 (2000). Here, the dispositional order with respect to Ulysses and Lizeth was entered on September 11, 2008, and respondent did not appeal from that order. However, at that point, respondent was not represented by counsel, had not been identified to the court as the children's

father, and had not been admonished pursuant to section 1-5(3) of his right to appeal the dispositional order. As appellate counsel contends, it would be a harsh result to conclude that respondent forfeited the issue under these circumstances.

¶ 32 Even overlooking the potential forfeiture, however, the issue lacks arguable merit. A court's failure to admonish a parent in accordance with section 1-5(3) of the Act is subject to a harmless error analysis. *In re Kenneth F.*, 332 Ill. App. 3d 674, 679 (2002). A harmless error must be harmless beyond a reasonable doubt, and may include an error that did not contribute to the outcome of the case. *Kenneth F.*, 332 Ill. App. 3d at 680.

¶ 33 Because the trial court admonished defendant at the May 29, 2009, hearing, respondent became aware at the latest on that date of the nature of the proceedings and of the possibility that his parental rights might be terminated. Yet, following the May 29 hearing, respondent continued to fail to comply with the service plans or to make reasonable efforts to visit with the children, which suggests that the admonishment had no effect on respondent's conduct. Furthermore, the record overwhelmingly establishes that respondent was aware of the need to comply with the DCFS service plans, as he began participating in a number of services over the years. Respondent's inability to complete the services that he began and his failure to exhibit a reasonable degree of interest, concern, or responsibility with respect to his children cannot be attributed to the lack of admonishments in September 2008. See *In re J'America B.*, 346 Ill. App. 3d 1034, 1049 (2004) (holding, in a case involving an unfitness finding based on the respondent's depravity, that "[t]he trial court's failure to admonish the respondent [in accordance with section 1-5(3) of the Act] *** did not excuse an extended course of conduct manifesting an inherent deficiency of moral sense and rectitude.") In short, the court's error in failing to

admonish respondent at the September 11, 2008, hearing was harmless beyond a reasonable doubt, because it clearly did not contribute to the outcome of the case.

¶ 34 Even construing the argument as a violation of respondent's due process rights, it lacks arguable merit. In *In re Andrea F.*, 208 Ill. 2d 148 (2003), which was decided under a prior version of section 1-5(3), the supreme court rejected the respondent father's argument that he was denied due process by the trial court's failure to admonish him that he risked termination of his parental rights if he failed to cooperate with DCFS or to comply with the terms of the service plans. *Andrea F.*, 208 Ill. 2d at 165-66. The court reasoned that any error in failing to give the admonishment was minimal because the record "amply" demonstrated that the respondent was aware of the need to cooperate with DCFS and that his parental rights could be terminated. *Andrea F.*, 208 Ill. 2d at 166. The same is true here. Not only was respondent admonished on May 29, 2009, but also the record establishes that he was aware of the nature of the proceedings and of the need to comply with the service plans.

¶ 35

III. CONCLUSION

¶ 36 After examining the record, counsel's motion to withdraw, and the memorandum of law, we hold that this appeal presents no issue of arguable merit. Thus, we grant counsel's motion to withdraw and affirm the judgment of the circuit court of Winnebago County.

¶ 37 Affirmed.