2014 IL App (3d) 140107-U

Order filed June 30, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

In re Kr.K., Kd.K., and Kt.K.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Minors	)	Tazewell County, Illinois.
	)	
(The People of the State of Illinois,	)	
	)	Appeal Nos. 3-14-0107
Petitioner-Appellee,	)	3-14-0108
	)	3-14-0109
v.	)	Circuit Nos. 11-JA-118
	)	11-JA-119
S.K.,	)	11-JA-120
	)	
Respondent-Appellant).	)	Honorable Albert Purham, Jr.
	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Lytton concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held*: The trial court's finding that the respondent was depraved and therefore unfit pursuant to 750 ILCS 50/1(D)(i) was not against the manifest weight of the evidence.

¶ 2 The trial court found that the State had proved by clear and convincing evidence that the respondent father, S.K., was a depraved person pursuant to section 1(D)(i) of the Adoption Act

(the Act) (750 ILCS 50/1(D)(i) (West 2012)). Respondent's parental rights were terminated; he appeals the finding of unfitness. We affirm.

¶ 3 BACKGROUND

¶ 4 On November 10, 2011, the State filed shelter care petitions, alleging Kr.K. (D.O.B. September 5, 2003), Kd.K. (D.O.B. August 4, 2008) and Kt.K. (D.O.B. November 17, 2010) were neglected due to an environment injurious to their welfare. 705 ILCS 405/2-3(1)(b) (West 2010). The trial court conducted a hearing and granted the State's petition, placing the children with the Department of Children and Family Services (DCFS).

¶ 5 On July 13, 2012, the trial court entered an adjudicatory order, finding the State proved by a preponderance of the evidence that the minors were abused or neglected due to an environment injurious to their welfare (705 ILCS 405/2-3(1)(b) (West 2010)) based on the respondent's "extensive criminal history." That same date, the trial court entered a dispositional order finding the respondent unable to care for the minors due to his incarceration. The dispositional order adjudicated the minors neglected and directed DCFS to implement an appropriate permanency goal for the minors. The trial court also ordered respondent to perform tasks upon his release from custody. These tasks included executing all authorizations for releases of information requested by DCFS, cooperating fully with DCFS, obtaining and completing drug and alcohol treatment, and maintaining stable housing.

¶ 6 On July 15, 2013, the State filed a "Petition for Termination of Parental Rights," alleging one basis to terminate the respondent's parental rights on the grounds that respondent was depraved pursuant to section 50/1(D)(i) of the Act (750 ILCS 50/1(D)(i) (West 2012)). The sole basis for termination set forth in the State's petition alleged that respondent had at least three felony convictions, with at least one of those convictions occurring within five years of the date

of the petition to terminate parental rights. According to the petition, respondent was convicted of felony residential burglary in Henry County case No. 96-CF-262, convicted of two counts of felony aggravated battery in Tazewell County case No. 03-CF-861, and convicted in federal case No. 12-10009 for being a felon in possession of a firearm. Respondent filed an answer on October 11, 2013, acknowledging his convictions, but denying he was depraved under section 50/1(D)(i).

¶ 7 On December 13, 2013, the matter proceeded to a fitness hearing. The State requested, and the court agreed, to take judicial notice of respondent's four previous felony convictions. First, the State offered a certified copy of respondent's Class 1 felony conviction in Henry County case No. 96-CF-262 for residential burglary. The information alleged that respondent committed residential burglary on November 2, 1996, when he entered the dwelling of "Cliff and/or Jean Fulkerson" with the intent to commit the offense of theft. The certified "Judgment Order and Recommendation for Impact Incarceration" documents the trial court recommended the 20-year-old for the Illinois Department of Correction's "Impact Incarceration Program" after imposing a six year sentence.

¶ 8 The State also offered a certified copy of respondent's next two felony convictions in Tazewell County case No. 03-CF-861 for aggravated battery. The indictments alleged respondent committed aggravated battery when he struck the victims in the face with his fist while in a tavern. The court sentenced respondent to serve concurrent terms of 7 ½ years' incarceration on each count. Finally, the State also introduced a certified copy of respondent's felony conviction in federal case No. 12-10009 for being a felon in possession of a firearm. The judgment reveals respondent pled guilty and was sentenced to a term of 63 months' incarceration on October 9, 2012. The State then rested.

¶ 9 Darcy Kramer, a counselor at the Federal Bureau of Prisons, testified on behalf of respondent. Kramer stated respondent completed the "challenge program" and handed out books and assisted in the library. Kramer also confirmed respondent recently completed the parenting course, an anger management course, and currently taught an anger management class.

¶ 10 Respondent introduced a group exhibit showing certificates he received for completing 17 programs during his incarceration in federal prison in Terre Haute, Indiana. By telephone from federal prison, respondent informed the court he could be released in December 2015, but would be required to live in a halfway house for an additional six to nine months. Respondent explained he was taking classes to obtain his General Equivalency Diploma and he recently completed a six-week parenting class. Based on his completion of the parenting class, respondent became eligible for a transfer to the federal prison located in Pekin, Illinois. Respondent testified he completed a nine-month "challenge program" and he began teaching the anger management course at the prison two weeks prior to the unfitness hearing.

¶ 11 Respondent stated he felt remorseful for his prior actions and the impact his actions had on his children. The respondent also stated he had remorse that he "did it, that [he] put [himself] in this position." In addition, respondent stated the tools he learned during his incarceration taught him he can "do the right thing always." Respondent testified he had the ability to conform his actions to accepted societal standards and he had a willingness to make a better life for himself and his children upon his release.

¶ 12 During his testimony by telephone, respondent explained some of the details surrounding his felony convictions. He testified that his incarceration for Tazewell County case No. 03-CF-861 ended in November 2007. Respondent explained he served three years and three months on his 7½ year sentence because of day-for-day credit and credit for "good time." Between 2007

and 2011, respondent worked for Subway, Bob Evans, performed "tree work" and worked other "odd jobs" for cash. In addition, respondent stated he was "with" the children's mother until his arrest in Henry County case No. 96-CF-262 in October 2011. Respondent informed the court he was released from jail in December 2011 after serving a 60-day sentence for failing to pay restitution in that case. Respondent explained he used the money he earned to pay for the children's schooling, bills, clothes, and other expenses between 2007 and 2011. Respondent also stated he provided emotional support for the children and acted as a "full-time dad." Respondent stated he and the children's mother used drugs while the children were present in the house, but in another room. Respondent testified things were going well for the family until August 2011, when respondent was unable to secure employment. Respondent testified the children were placed in foster care in November 2011 because he remained incarcerated for failing to pay restitution, and the children's mother continued to use drugs.

¶ 13 According to respondent, Kr.K. visited him at Peoria County jail three times between January 2012 and October 2012. Respondent stated that Kd.K. remained in the waiting area at the jail while Kr.K. visited him. According to respondent, he did not see Kd.K. or Kt.K. after his incarceration in January 2012. Respondent told the court he knew the children's favorite colors and he loved his children "very much." Respondent testified he did not know how his children were doing in school or daycare. Respondent explained he sent two letters to the children during his incarceration, but did not send any additional letters or cards for birthdays or holidays because he did not receive a response from his first letters. Respondent also stated he was aware that Kd.K. had been having issues in her foster home, including nightmares and wetting the bed, but respondent did not inquire about the status of those issues during his incarceration.

¶ 14 According to respondent, his conviction in federal case No. 12-10009 occurred after he drank whiskey and took a "whole bunch of Xanax." Respondent explained he did not remember committing the crime, but he understood he and his friends were driving around when police stopped the vehicle. Someone in the vehicle handed respondent a gun, resulting in his arrest and subsequent conviction for being a felon in possession of a firearm. Respondent admitted he knew it was wrong to get high and drunk while his children were in foster care.

¶ 15 In addition to his own testimony, respondent presented the testimony of Lori Newman, the DCFS caseworker assigned to the children's case. Newman testified she worked with respondent's family from May 2011 to November 2011, and again from October 2012 to the date of her testimony. In 2011, Newman received one letter from respondent to all of the children around November. After respondent's release from jail in December 2011, he stopped by the DCFS office and spoke with Newman who encouraged respondent to engage in services. Newman met with respondent in October 2012 at the Tazewell County jail and informed him he needed to demonstrate his desire to correct his parenting issues and to write letters to the children during his incarceration. Newman stated that respondent did not support his children after his arrest in January 2012. Newman testified she received two letters from respondent, one addressed to her and one addressed to Kr.K., between January and April 2013, during respondent's incarceration in federal prison.

¶ 16 After hearing arguments, the trial court observed the State's July 15, 2013, petition alleging respondent was unfit due to depravity based on section 50/1(D)(i) of the Act. Commenting that "residential burglary is a quite serious offense," the court noted respondent received impact incarceration due to his age and that respondent must have successfully completed the impact incarceration program. The court stated that respondent was sentenced to

7½ years' incarceration for aggravated battery in Tazewell County case No. 03-CF-861 because there were two separate victims. In addition, the court commented that respondent was placed in a maximum security prison for 63 months due to his federal offense, and according to respondent he was "so blacked out" he did not know how the gun came into his possession.

¶ 17 Based on the circumstances surrounding those four convictions, the court concluded that respondent was "deficient in moral character." The court discounted respondent's participation in classes during his federal incarceration as respondent's effort to gain time off his federal sentence rather than an effort to improve his outlook on life. The court noted respondent did not express any remorse for the victims of his crimes and determined the State proved respondent to be depraved by clear and convincing evidence.

¶ 18 The matter proceeded to a best interest hearing on January 16, 2014. After the hearing, the court reviewed the factors set forth in section 405 of the Act and found, "all the factors favor termination of [respondent's] parental rights and I hereby terminate [respondent's] parental rights." On January 23, 2014, the trial court entered a "Dispositional Order Terminating Parental Rights" of respondent. Respondent timely appealed.

¶ 19 ANALYSIS

¶ 20 I. Unfitness

¶ 21 The respondent first contends that the trial court committed reversible error by finding him unfit. Specifically, while respondent concedes that the State produced sufficient evidence at trial to invoke the presumption of his depravity, he argues that the evidence presented overcame that presumption.

> "A parent's rights may be terminated only upon proof, by clear and convincing evidence, that the parent is unfit. [Citation.] This

> determination must be made prior to a consideration of the child's best interest. [Citation.] The State must establish the existence of at least one statutory ground of unfitness, as defined in section 1(D) of the Adoption Act (750 ILCS 50/1 (West 1998)). [Citation.] A court's determination of parental unfitness will not be disturbed on review unless it is against the manifest weight of the evidence. [Citation.] A decision is against the manifest weight of the evidence where the opposite conclusion is clearly the proper result. [Citation.]" *In re E.C.*, 337 Ill. App. 3d 391, 398 (2003).

¶ 22 Section 1(D) of the Act (750 ILCS 50/1(D) (West 2012)) provides that an " '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." At issue in this case is section (D)(i), which provides that "[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 *** 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." 750 ILCS 50/1(D)(i) (West 2012).

¶ 23 Our supreme court has defined "depravity" as "an inherent deficiency of moral sense and rectitude." (Internal quotation marks omitted.) *Stalder v. Stone*, 412 Ill. 488, 498 (1952). Within the context of a petition to terminate parental rights, depravity must be shown to exist at the time of the petition, and "the 'acts constituting depravity *** must be of sufficient duration and of sufficient repetition to establish a 'deficiency' in moral sense and either an inability or an unwillingness to conform to accepted morality.' " *In re J.A.*, 316 Ill. App. 3d 553, 561 (2000).

¶ 24 In this case, the State established a *prima facie* case of depravity by providing the trial court with certified copies of respondent's four prior felony convictions and demonstrating one of those convictions occurred in the five years preceding the State's petition. The respondent's actions also display sufficient repetition, demonstrating either his inability or unwillingness to conform to accepted morality. The State thus met its burden and proved by clear and convincing evidence the rebuttable statutory presumption that respondent is depraved under section 50/1(D)(i).

¶ 25 We agree with respondent that a rebuttable presumption is one that he can overcome. Indeed, it has been held that "[w]here the presumption of depravity is rebuttable, the parent is still able to present evidence showing that, despite his convictions, he is not depraved." (Internal quotation marks omitted.) *In re A.M.*, 358 Ill. App. 3d 247, 253 (2005) (quoting *J.A.*, 316 Ill. App. 3d 553, 562 (2000)). However, we find that respondent's evidence did not rebut the presumption.

¶ 26 Notwithstanding any rebuttable presumptions, it is important to note that the three children have birthdates of September 5, 2003; August 4, 2008; and November 17, 2010. In November of 2011, the State filed its shelter petitions, alleging the three children were neglected due to an environment injurious to their welfare. On December 29, 2003, three months after the birth of his first child, respondent was charged with aggravated battery in Tazewell County that led to his incarceration for over three years. He was released from custody on or about November of 2007. Knowing that his children were in shelter care, respondent was arrested on January 12, 2012, on charges of being a felon in possession of a handgun. He was convicted of that charge. In this matter, he testified that he was so drunk and high that he did not remember getting into the car and did not know how he got the gun. Even if that testimony were taken as

true, it supports rather than rebuts the notion that respondent suffers from "an inherent deficiency of moral sense and rectitude." *Stalder*, 412 Ill. at 498.

¶ 27 Respondent submits that he enrolled, attended, completed and earned certificates for multiple courses in self-improvement/rehabilitation prior to the filing of the State's petition and since being incarcerated at the federal facility. This, he argues, is evidence of his moral rectitude and willingness to conform to societal standards. The respondent also asserts that at the fitness hearing, he acknowledged the wrongfulness of his acts. He expressed remorse for the people he hurt and for putting his children in this situation. Finally, respondent points out that he did continue his course work and completed classes after the filing of the State's petition, including teaching the anger management course at the prison.

¶ 28 However, it is not respondent's conduct while incarcerated that is at issue, it is his conduct while not incarcerated. While respondent correctly points out that cases involving adjudications of neglect and wardship are considered *sui generis* and each case must be decided upon its own unique set of facts (see *In re S.S.*, 313 Ill. App. 3d 121, 126 (2000)), we find *In re A.M.*, 358 Ill. App. 3d 247 (2005), instructive. As in this case, the respondent-father had convictions for three felonies (and two misdemeanors), and also offered evidence that he was a model prisoner and successfully completed a number of courses offered in prison in an effort to improve himself and rebut the presumption of depravity. Yet, this court held that the State's evidence was clear and convincing and that the father had failed to prove that he was no longer depraved, affirming the trial court's finding that the father was unfit based upon grounds of depravity. *Id*. at 254. The court stated:

> "As evidence that the respondent was not depraved, he offered the completion of his GED in 1995. However, he committed two

misdemeanors and two felonies after obtaining his GED. While commendable, the completion of the respondent's GED did not show that he was no longer depraved.

After the respondent's last felony conviction in 2003, he obtained certificates for (1) the 'Education to Careers Seminar,' (2) perfect attendance in the seminar, and (3) 'Commercial Custodial Services.' However, completion of classes in prison, while also commendable, does not show rehabilitation. [Citation.]

The respondent had enrolled in parenting and drug abuse classes. He also had been approved for work release. Again, these efforts are commendable. However, because the respondent had not yet begun any of these programs, these facts could not be considered as proof that he was no longer depraved." *Id*. at 254.

¶ 29 We believe it is readily apparent that if the actions of the father in *A.M.* were not enough to rebut the presumption that he was depraved, the respondent's actions in this case similarly fall short of rebutting the presumption.

¶ 30 Finally, respondent suggests that his criminal record is not so egregious as to fit within the definition of depravity. He downplays the seriousness of his crimes, arguing that they occurred over a span of 17 years, that he was only 20 years old at the time of the first felony conviction, and that two of the convictions stemmed from respondent's struggle with alcohol abuse. We find these arguments and respondent's evidence unconvincing.

¶ 31 Despite noting that adjudication and wardship cases are *sui generis*, respondent points this court to three cases where his "depraved character" pales in comparison to the respondents in those cases. Admittedly, respondent here does not have a conviction for involuntarily manslaughter, aggravated criminal sexual assault (see *In re J'America B.*, 346 Ill. App. 3d 1034 (2000)), or voluntary manslaughter (see *In re Dawn H.*, 281 Ill. App. 3d 746 (1996)). The statute does not provide varying degrees of depravity based on what he was convicted of and when. If respondent has at least three felony convictions, one of which occurred within five years of the State's petition seeking termination of parental rights, the rebuttable presumption has been created. The fact that the crimes spanned over 17 years does little to rebut the presumption; quite the opposite.

¶ 32 We find the 2012 arrest extremely significant. Respondent's children were already in shelter care as the result of a neglect petition. Any reasonable person who wanted his children back would figure it was time to straighten up. Respondent, however, was arrested in Peoria and charged as a felon in possession of a firearm. Respondent pled guilty to the offense. However, he now posits that, somehow, possessing the gun while both drunk and high on drugs mitigates the offense. This argument alone (in essence: "it wasn't my fault I had the gun, I was too drunk and high to know what I was doing.") suggests a depraved mind.

¶ 33 Accordingly, we find that the evidence offered by respondent failed to rebut the presumption of depravity; the trial court's finding of unfitness was not against the manifest weight of the evidence.

¶ 34 II. Best Interests

¶ 35 On appeal, respondent does not argue that the trial court's finding that it was in the minors' best interests to terminate his parental rights was against the manifest weight of the evidence. In fact, respondent conceded that based upon the evidence presented at the best interest hearing many of the best interest factors favored termination. See 705 ILCS 1-3(4.05) (West 2012). Respondent argues only that if the finding of unfitness is reversed, then the termination order must also be reversed.

¶ 36 For the reasons outlined above, we affirm the trial court's finding of unfitness, and similarly affirm the trial court's termination of respondent's parental rights.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court of Tazewell County is affirmed.

¶ 39 Affirmed.

¶ 40 JUSTICE WRIGHT, dissenting.

¶ 41 In *In re A.M.*, 358 Ill. App. 3d 247 (2005), this court held a parent need only present "some" evidence to defeat the rebuttable presumption created by multiple felony convictions. In *In re A.M.*, this court relied heavily on the language set forth by the court in *In re J.A.*, 316 Ill. App. 3d 553 (2000). Since the holding in *In re J.A.* was both persuasive and particularly concise, I find it worth is reciting once again. In that case, the court stated:

> A rebuttable presumption creates "a *prima facie* case as to the particular issue in question and thus has the practical effect of requiring the party against whom it operates to come forward with evidence to meet the presumption. [Citation.] However, once evidence opposing the presumption comes into the

> case, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed. [Citation.] The burden of proof does not shift but remains with the party who initially had the benefit of the presumption. [Citation.] The only effect of the rebuttable presumption is to create the necessity of evidence to meet the *prima facie* case created thereby, and which, if no proof to the contrary is offered, will prevail. [Citation.] *In re J.A.*, 316 Ill. App. 3d 553, 562-63 (2000).

¶ 42 I agree with the majority that the State established a *prima facie* case of depravity by providing the trial court with certified copies of father's four prior felony convictions and demonstrating one of those convictions occurred in the five years preceding the State's petition. Unlike the majority, I believe father offered "some" or slight evidence to rebut the presumption under the Act. Father's testimony revealed he remained conviction-free for several years while he supported his children financially and emotionally and maintained employment from 2007 to 2011. The father in *In re A.M.* did not offer any proof he financially or emotionally supported his children at times when he was not incarcerated. The father in that case had five convictions in a short eight year period, with three of the convictions related to theft of property and two convictions related to illegal drugs. This repetitive pattern of the same or similar criminal offense is not present in the case at bar.

¶ 43 Further, unlike the father in *In re A.M.*, this father presented two independent witnesses to the court. One neutral witness, a DCFS counselor, established father corresponded, albeit sporadically, with his children while in prison. The other witness, a correctional employee, testified father not only completed, but was also teaching, an anger management course to other inmates in the prison.

¶ 44 According to existing case law, I conclude father's slight evidence, in the form of his testimony and the testimony of two additional witnesses, extinguished the presumption of depravity and reset the evidentiary scales to a neutral position. At this point in the termination proceedings, the evidentiary scales were evenly balanced, in favor of neither party.

¶ 45 This court has recognized the acts constituting depravity "must be of sufficient duration and of sufficient *repetition* to establish a 'deficiency' in moral sense and either an inability or an unwillingness to conform to accepted morality." (Emphasis added.) *In re J.A.*, 316 Ill. App. 3d at 561 (citing *In re Adoption of Kleba*, 37 Ill. App. 3d 163, 166 (1976)). Here, I can discern no obvious pattern to father's past criminality.

¶ 46 The four felony convictions, occurring on three separate dates, do not share a common thread. The record reveals father's first felony conviction was a crime against property committed in 1996, and was followed by many years without criminal misconduct. Seven years later, in 2003, father battered two men in a tavern, but was not alleged to have inflicted serious harm on either person. Father admitted the 2012 gun offense was alcohol and drug related. However, the residential burglary was not linked to any drug or alcohol addiction based on the evidence admitted by the State in this case. The charging instruments regarding the aggravated batteries do not suggest father was intoxicated at the time of those offenses or support a view that the victims were seriously harmed by father's rage.

¶ 47 Unlike the trial court, I see no indication father was either unable or unwilling to conform to accepted morality for a significant period of time. To the contrary, father lived his life with sporadic and isolated offenses of criminal stupidity separated by years without felony convictions.

¶ 48 The circumstances involved in the decision of *In re Travarius O.*, 343 Ill. App. 3d 844 (2003), relied upon by the State, does not support the State's request to affirm the trial court in the case at bar. In *In re Travarius O.*, the father refused to testify and offered no evidence, and therefore, the presumption of depravity applied. Unlike the parent in *In re Travarius O.*, father in this case both testified and offered independent witnesses to refute the presumption of depravity. Thus, *In re Travarius O.*, is distinguishable from the case at bar.

¶ 49 Consequently, I respectfully disagree with the majority and conclude the trial court's ruling that father was unfit on the basis of depravity, arising out of a rebutted presumption, was against the manifest weight of the evidence. This is not to say the State may not seek termination of father's parental rights on other grounds set forth in a subsequent petition to terminate parental rights.