FOURTH DIVISION
Rule 23 Order filed July 23, 2015
Modified upon denial of rehearing August 20, 2015

No. 1-15-0532

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re K.S. and L.S.,	)	Appeal from the
	)	Circuit Court of
Minors-Respondents-Appellees,	)	Cook County.
	)	
	)	Nos. 10 JA 716
	)	13 JA 13
(People of the State of Illinois, Petitioner-Appellee v.	)	
Bernice T., Respondent-Appellant).	)	Honorable
	)	Maxwell Griffin, Jr.,
	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's finding of unfitness affirmed where respondent did not challenge one of bases for unfitness as to her daughter and, as to her son, respondent did not rebut presumption of depravity created by murder conviction. Respondent's counsel did not render ineffective assistance by failing to present evidence that was cumulative of other evidence at unfitness hearing. Trial court finding that children's best interests were served by termination and adoption was not against manifest weight of evidence. Respondent was not deprived of her right to counsel when best-interest hearing began shortly before her attorney arrived, and her attorney had opportunity to question each of State's witnesses and present respondent's case.

¶ 2 Respondent Bernice T. appeals the trial court's termination of her parental rights with respect to her daughter K.S. and son L.S. She contends that the court's findings that she was unfit based on her depravity and her failure to make reasonable progress toward the return of her

children, as well as its findings that the children's best interests would be served by the termination of her parental rights, were against the manifest weight of the evidence. She also argues that her attorney provided her with ineffective assistance in failing to prevent evidence in her favor, and that the trial court deprived her of her right to counsel when it permitted the State to conduct a direct examination of a witness when neither she nor her attorney was present.

¶ 3 Bernice does not challenge the trial court's finding that she was unfit with respect to K.S. That is, she challenges one of the two bases for unfitness with regard to K.S. but not the second one, and the second one is enough by itself, as a matter of law, for a finding of unfitness. Thus, we have no basis on which to disturb the trial court's finding of unfitness as to K.S.

¶ 4 We also affirm the trial court's finding of unfitness as to L.S. Bernice did not present clear and convincing evidence to overcome the presumption that she was depraved, a presumption which arose based on Bernice's conviction for the 1996 murder of her newborn son. While the evidence showed that Bernice had complied with many of the necessary services and had not committed any new crimes, these facts alone did not show that she had rehabilitated by clear and convincing evidence. To the contrary, she exhibited some of the same psychological issues with which she grappled at the time of her first child's death.

¶ 5 With respect to her argument that her attorney provided ineffective assistance at the unfitness hearing, we find that Bernice has failed to show prejudice. That is, she cannot show that the evidence her attorney failed to present would have likely changed the results of the unfitness hearing.

¶ 6 Further, we affirm the trial court's finding that it was in the children's best interests for Bernice's parental rights to be terminated. K.S. and L.S. lived together with their foster mother, Cheryl S., from the time that they were infants. They had a loving, stable home with Cheryl,

identified Cheryl as their mother, and had good relationships with Cheryl and her family. No evidence suggested that the children's interests would be better served with Bernice than with the person whom the children identified as their mother.

¶ 7 Finally, we reject Bernice's argument that she was denied her right to counsel when the trial court began the best-interests hearing shortly before her attorney arrived. Her attorney had an opportunity to question the State's witnesses and present Bernice's case.

¶ 8 I. BACKGROUND

¶ 9 In 2003, Bernice pled guilty to the 1996 first-degree murder of her newborn son. We do not know a great deal about this crime because there was no trial. The record shows that Bernice, who had not told anyone about her pregnancy, gave birth to her son in a bathroom and left him in a garbage can. According to Bernice, she thought the child was stillborn when she left his body in the garbage, but other evidence showed that Bernice had admitted that she did not want the child. Her son's body was never recovered. Bernice was sentenced to 20 years' incarceration and released in 2009, due in part to the substantial time she spent in custody before pleading guilty.

¶ 10 On August 9, 2010, while she was still on parole for the murder, Bernice gave birth to K.S., the first of the two children involved in this appeal. At the State's request, the trial court adjudicated K.S. a ward of the court in November 2010. K.S. was placed into a foster home. The trial court set a goal for K.S. to return to Bernice's custody within one year.

¶ 11 On November 6, 2012, while still working to regain custody of K.S., Bernice gave birth to L.S. The court adjudicated L.S. a ward of the court on May 14, 2013, and L.S. was placed in the same foster home as his older sister, K.S.

¶ 12 In February and July 2014, the State filed petitions seeking to terminate Bernice's parental rights to K.S. and L.S., respectively, on the basis that Bernice was "unfit to have a child." 750 ILCS 50/1(D) (West 2014).

¶ 13 A proceeding to terminate a party's parental rights under the Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq.* (West 2014)) occurs in two stages. First, the State must establish that the parent is "unfit to have a child" under one or more of the grounds in the Adoption Act. *In re D.T.*, 212 Ill. 2d 347, 352 (2004); see 750 ILCS 50/1(D) (West 2014) (setting out bases for finding of unfitness). At the unfitness hearing, the State bears the burden of proving, by clear and convincing evidence, that the parent is unfit to have a child. See *In re D.W.*, 214 Ill. 2d 289, 315 (2005); *In re D.T.*, 212 Ill. 2d at 366. The reason for this heightened burden of proof is rooted in the notion that "the right of parents to control the upbringing of their children is a fundamental constitutional right." *D.W.*, 214 Ill. 2d at 310.

¶ 14 If the trial court finds the parent to be unfit, the proceedings advance to the second stage, where the court determines whether it is in the best interests of the minor for the parent's rights to be terminated. *D.T.*, 212 Ill. 2d at 352. At the best-interests hearing, the burden of proof is the lower preponderance-of-the-evidence standard. *D.W.*, 214 Ill. 2d at 315; *D.T.*, 212 Ill. 2d at 361. A lower standard is appropriate because, once the State proves parental unfitness, the focus shifts to the child, and the interests of parent and child diverge. *D.W.*, 214 Ill. 2d at 315.

¶ 15 In this case, the court conducted the unfitness hearing on October 14 and 24, 2014, and the best-interests hearing on January 28, 2015. The results of each hearing are challenged on appeal, and thus we will consider them separately.

¶ 16 A. Unfitness Hearing

¶ 17 1. *Live Testimony*

¶ 18 The unfitness hearing combined the State's claims against Bernice regarding each of Bernice's children, her daughter K.S. and her younger son L.S. The State raised the same two grounds of unfitness with respect to each child. First, it alleged that Bernice "behaved in a depraved manner" under section 50/1(D)(i) (750 ILCS 50/1(D)(i) (West 2014)) of the Adoption Act. Second, it alleged that Bernice had failed to make reasonable progress toward the return of her children under section 50/1(D)(m)(ii) (750 ILCS 50/1(d)(m)(ii) (West 2014)).

¶ 19 Regarding the first ground—depravity—the State began with a presumption in its favor. Bernice's 2003 conviction for the first-degree murder of her child "create[s] a presumption that [Bernice] is depraved[,] which can only be overcome by clear and convincing evidence." 750 ILCS 50/1(D)(i) (West 2014). Given the uncontested evidence of her 2003 conviction for the murder of her newborn child, the burden of production thus shifted to Bernice at the unfitness hearing to overcome this presumption of depravity by clear and convincing evidence.

¶ 20 To demonstrate the second ground for unfitness, that Bernice failed "to make reasonable progress toward the return of" her children, the State was required to prove that Bernice "fail[ed] to substantially fulfill *** her obligations under the service plan and correct the conditions that brought the child[ren] into care during any 9-month period following" the adjudication of the children as wards of the State. 750 ILCS 50/1(D)(m) (West 2014). Because there are two children involved in this litigation, who were born at different times and adjudicated wards at different times, the nine-month periods alleged by the State are different for each of the children, and they also overlap among one another in the case of the younger child, L.S.[1]

[1] For the older child, K.S., who was made a ward of the court on November 4, 2010, the relevant nine-month periods during which the State claimed that Bernice failed to make reasonable progress toward the return of her daughter were November 5, 2010 through August 5, 2011; August 6, 2011 through May 6, 2012; May 7, 2012 through February 7, 2013; February 8, 2013 through November 8, 2013; November 9, 2013 through August 9, 2014; and January 14

¶ 21 At the unfitness hearing, the State presented three witnesses. First, Ebony Horn, a caseworker with Universal Family Connections, was assigned to K.S. and L.S.'s case in October 2012. Horn, who had reviewed the agency's file on the case, testified that Bernice first became involved with the Department of Children and Family Services (DCFS) in 2010. Bernice was assigned to complete individual therapy, a parenting assessment, a psychological evaluation, anger management, and a domestic violence assessment.

¶ 22 According to the reports Horn reviewed, Bernice had not made progress in her individual therapy from 2010 until October 2012. The reports also said that Bernice could not complete her parenting coaching because she did not have a home where Bernice could be observed with K.S.; Bernice was living with "numerous people" and two "big dogs." Bernice successfully completed the parenting classes, psychological evaluation, parenting assessment, and domestic violence assessment. Horn was not aware of the results of the assessments, but she did not see any recommendations based on those assessments.

¶ 23 Horn testified that she referred Bernice to a housing advocacy agency to help her find "appropriate housing." Bernice did not "follow through with" the necessary steps to secure housing through the agency. Horn testified that she repeatedly told Bernice the importance of getting a home and that Bernice's lack of housing was "one of the biggest issues" in her case. On cross-examination, Horn agreed that Bernice was required to have a certain level of income in order to qualify for the housing program. But Horn said that the housing agency's main reason

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through October 14, 2014 (the date of unfitness hearing). The younger child, L.S., was born on November 6, 2012 and was not made a ward of the court until May 14, 2013. For L.S., the relevant, overlapping 9-month periods during which the State claimed that Bernice failed to make reasonable progress toward the return of her son were May 15, 2013 through February 15, 2014 and January 14, 2014 through October 14, 2014 (the date of the unfitness hearing).

for Bernice failing to obtain housing through the program was that she did not disclose that her children were involved with DCFS services. Horn also noted that another caseworker had referred Bernice to a housing agency in either 2010 or 2011.

¶ 24 Horn said that Bernice did not inform DCFS that she was pregnant before she gave birth to L.S. in November 2012. Horn believed that it was important for Bernice to tell her that she was pregnant so that Horn could make sure that Bernice was "going to prenatals" and "maybe finding housing." Horn was particularly concerned about Bernice concealing her pregnancy because she likewise concealed her 1996 pregnancy, which ended with her throwing her newborn child in the garbage. According to Horn, Bernice said she did not tell anyone about her pregnancy with L.S. in 2012 because she "didn't want the baby to be taken."

¶ 25 Horn said that the goal for K.S. changed—from returning to Bernice's home to the termination of Bernice's parental rights—in September 2013. The goal had been changed because Bernice had not progressed in her parenting coaching, her individual therapy, or in obtaining "appropriate" housing.

¶ 26 Horn testified that Bernice got an apartment in February 2014. While the carpet in Bernice's apartment was dirty, Horn believed that the apartment otherwise would have been an appropriate place for the children to live. At that point, Bernice began to undergo parenting coaching for L.S. Horn said that Bernice attended eight or nine coaching sessions until May 2014. L.S.'s goal changed to the termination of Bernice's parental rights in June 2014 because of Bernice's lack of progress in parenting coaching and individual therapy.

¶ 27 Horn testified that Bernice had consistently attended her supervised visits with K.S. and L.S., which occurred two to three times per week. Horn had observed these visits and had no concerns when watching Bernice and the children interact. She never felt that K.S. or L.S. faced

a risk of harm when with Bernice. Horn said that Bernice was never permitted to have unsupervised visits because "the parenting coach did not see fit for her to have" them.

¶ 28 Surat Bisiriyu, a clinician with Universal Family Connections, was assigned to act as Bernice's individual therapist beginning in January 2011. Bernice was scheduled to meet with Bisiriyu once a week. Bisiriyu's initial goals for Bernice were to focus on the past trauma in Bernice's life, particularly the fact that she had been placed in foster homes as a child, to adjust to her recent release from prison, and to address why her daughter K.S. had been placed into foster care. Bisiriyu testified that Bernice regularly attended therapy sessions until May 2011. During the time that Bernice regularly attended therapy, Bisiriyu noticed that Bernice was "coping well," had attempted to pass a general educational development (GED) test, and was "using her resources in the community better than she was before." Bernice expressed hope for the future and had personal goals.

¶ 29 In May 2011, Bernice "suddenly *** stopped coming" to her sessions with Bisiriyu. When Bisiriyu tried to get Bernice to come back to therapy, Bernice said she felt "overwhelmed." Bernice attended only one session in June 2011 and one session in July 2011. Bernice began to attend sessions more regularly between August and October 2011, but, according to Bisiriyu, Bernice "would not disclose anything" during those sessions. From October 2011 to December 2011, Bernice did not meet with Bisiriyu. During the time that Bernice was not attending therapy regularly, Bisiriyu noticed that Bernice was withdrawn. Bisiriyu also said that Bernice did not look "well"; she was not "managing" her physical appearance. In total, Bernice missed nearly half of her therapy sessions.

¶ 30 Their last session was on December 22, 2011. Bernice told Bisiriyu that "she was struggling with some issues," as she had moved out of the group home where she had been

staying and moved in with the children's father. Bernice told Bisiriyu that she no longer wanted to attend therapy with Bisiriyu because she had found counseling elsewhere. In her final session, Bernice told Bisiriyu that she had not accomplished anything that she set out to do in therapy.

¶ 31 Linda Vasquez, another clinician with Universal Family Connections, worked as Bernice's parenting coach from April 2014 through May 2014. Vasquez had been a licensed clinical social worker for 35 years. She had obtained a master's degree in social work from Jane Addams College of Social Work. Vasquez conducted a total of six coaching sessions with Bernice and L.S., each lasting between an hour and 90 minutes. Vasquez said that Bernice was appropriate with L.S., dressed him, fed him, read to him, and played with him.

¶ 32 Vasquez said that there were two incidents that "made [her] wonder" about whether Bernice could take care of the children if their safety was threatened. In the first incident, Vasquez and another worker were conducting a coaching session in Bernice's home. They smelled natural gas, although the stove was not on. Vasquez told Bernice, who said that she had not noticed the odor. Vasquez presumed that Bernice called the gas company to fix the problem because, at the next session, the smell was gone.

¶ 33 In the second incident, Bernice kept L.S. in his playpen during the coaching session because the floor "was very, very dirty," and Bernice did not want to let L.S. sit on the floor. Vasquez suggested that Bernice put a clean blanket on the floor so that they could complete their exercises. Vasquez said that Bernice "was unable to figure out how to interact with the child outside of the playpen" until Vasquez suggested using the blanket. In a subsequent session, Bernice used the blanket on the floor without Vasquez's prompting.

¶ 34 Vasquez testified that she reviewed Bernice's file after these incidents. Vasquez said that, after reviewing the file, "it was [her] assessment that [Bernice] has a diagnosis of fetal alcohol

spectrum disorder." Vasquez further opined that Bernice exhibited a "fake-good profile," which she defined as "someone who's overly concerned with showing the[ ] positive side of [herself]." Vasquez said that someone with a "fake-good profile" could be deceitful. Vasquez based her assessment that Bernice had such a profile on the fact that she had kept her pregnancies secret from others. According to Vazquez, these two "assessments" hindered Bernice's "ability to anticipate how to protect the children and anticipate how to get help if the children needed help."

¶ 35 Vasquez said that her master's degree made her "qualified to make diagnoses." She said that people with fetal alcohol syndrome exhibit a "lack of remorse or lack of showing remorse, affect, deficit in social skills or some type of deficit in social interactions, impulsivity." She also noted that people with fetal alcohol syndrome have "physical problems," such as Bernice's "heart problems," and a lower intelligence quotient (IQ). Vasquez claimed that Bernice's file showed all of these symptoms.

¶ 36 Vasquez acknowledged that none of the documents in Bernice's file diagnosed her with fetal alcohol syndrome. Bernice did not tell Vasquez that her mother had consumed alcohol while pregnant. Vasquez performed no tests on Bernice before making her diagnoses. She recognized that, ordinarily, a brain scan is performed to diagnose fetal alcohol syndrome.

¶ 37 Vasquez believed that Bernice "would not be able to protect the children adequately from any dangerous situations." Vasquez also said that Bernice was "not always truthful or factual" when seeking help for the children. But she did concede that Bernice displayed "some nurturing tendencies." Vasquez also believed that, even without the diagnosis of fetal alcohol syndrome, Bernice had cognitive limitations.

¶ 38 2. *Documentary Evidence*

¶ 39 Both the State and Bernice introduced numerous documents as evidence at the unfitness hearing. The parties stipulated to the foundation for the admission of these documents, and no party objected to their admission.

¶ 40 The State introduced a copy of Bernice's initial psychological evaluation, which was conducted on December 20, 2010, by a psychologist named Paul Linden. According to Dr. Linden, Bernice spoke fluently and "expressed her ideas fully." She recalled personal information without delay, her concentration was consistent, and her communication was coherent. Linden wrote, "No blunting of affect or emotional lability was detected during the interview." He also observed that "her affect was not constricted in range," and that she appeared calm.

¶ 41 Linden performed the Wechsler Adult Intelligence Scale-IV test on Bernice. She scored an 81, which placed her in the "low average range of intellectual ability." While Bernice had "average ability on tasks that required rapid processing speed," she scored lower on "tasks that required Verbal Comprehension and Perceptual Reasoning." In a different series of tests, she displayed a limited vocabulary and a word-reading score that placed her at the "4.6 grade level." But she scored at an eighth-grade level for sentence comprehension and spelling, and an eleventh-grade level for arithmetic. Linden said that these scores showed that Bernice might have "mild problems reading instructions, but no problems writing notes, or doing the everyday arithmetic needed to budget money."

¶ 42 Linden also conducted a "Parent Attitude Test," a multiple-choice test that asked Bernice to choose the best response to common behaviors of children. Bernice's responses "indicated that she ha[d] a poor understanding of behavior modifications principles and how these techniques can be used to correct children's misbehavior." While she "did endorse the use of threats of

punishment" in one answer, she did not "endorse the use of physical punishment in any of the presented scenarios."

¶ 43 Finally, Linden conducted personality tests on Bernice. These tests showed that Bernice was not "suffering from any severe disturbance in her thought processes or emotional functioning," and that she had "adequate psychological resources to manage the routine demands of life." But Linden also noted that Bernice used "suppression and denial to a significant extent in order to maintain a façade of calmness," and that she was quick to give up on tasks when presented with obstacles. Bernice also had "difficulties bonding with others, including her daughter."

¶ 44 The State also introduced several court reports reflecting Bernice's participation in therapy after she stopped seeing Bisiriyu. A March 19, 2012 report said that Bernice wanted to start therapy with a different therapist, and Bernice thought "it [would] be better to start everything new." The report said that Bernice "consistently communicate[d]" with her caseworker and that she had completed her anger management classes. A December 11, 2012 court report said that Bernice was "involved in weekly individual therapy with therapist Joseph Thomas." According to the court report, Thomas said that Bernice was "very consistent with attending sessions and *** made some progress."

¶ 45 The State also presented a "Multidisciplinary Parenting Competency Evaluation" from January 2013, which had been completed by Parenting Assessment Team (PAT) consisting of a psychiatrist, a licensed clinical social worker, a social work intern, and a psychologist. The evaluation indicated that Bernice had no problems attending therapy with Thomas. She said that she enjoyed therapy with him, and Thomas reported that Bernice had been "very committed to her therapy" and was working toward addressing the death of her son. Thomas also said that

Bernice "can be distrustful of others," but that she had been "committed and diligent" to process those feelings. The PAT concluded that Bernice displayed "an important strength" in continuing to attend therapy with Thomas.

¶ 46 The evaluation also indicated that Bernice had "elevated scores on the Lie scale" of a child-abuse test that were "consistent with a 'faking good profile.' " The PAT wrote that "[s]uch a score is consistent with an attempt to present oneself in a positive manner." But the PAT ultimately concluded that Bernice did not meet the criteria for "a diagnosable mental illness," and that no mental illness appeared to impact her parenting. Specifically, the evaluation stated that Bernice did not present "symptoms related to a cognitive delay," and that her cognition did not "appear to impact her ability to attend appointments, interact with others, attend to K.S., or talk reflectively and meaningfully about her life and parenting concerns." The evaluation also noted that Bernice had "a number of substantial parenting strengths," including her "consistent and appropriate engagement" in visiting K.S., "understanding of K.S.'s age-appropriate behaviors," and "positive attributions about K.S.'s needs and safety."

¶ 47 While the PAT said that Bernice's decision to keep her pregnancy with L.S. secret was problematic, they also noted that she was forthright with hospital staff regarding DCFS's involvement with K.S. According to the PAT, this was "a positive sign of progress in disclosing information" because Bernice could have lied in an attempt to avoid DCFS involvement with L.S.

¶ 48 Bernice introduced several documents in support of her case. Bernice presented several certificates showing that she had completed parenting classes and anger management classes. Bernice introduced the records from her anger management classes from 2009 to 2013, which

generally showed that she was compliant with her treatment plan and that she demonstrated a good ability to adhere to recommendations.

¶ 49 Bernice also introduced a parenting capacity assessment authored by psychologist Michelle Iyamah on October 8, 2011. Iyamah said that Bernice "had no difficulty performing tasks" and "was pleasant and calm," but also that she had a "propensity to present in an overly favorable manner." With respect to Bernice's intelligence, Iyamah said that her score on the Wechsler Adult Intelligence Scale-IV showed that Bernice would "have little difficulty making decisions regarding commonly encountered life problems, which bodes well for adequate parenting." Iyamah also noted that Bernice scored below average in her "Health and Safety" skills, which Iyamah defined has "taking precautions, first aid knowledge, etc." But she also noted that Bernice's "adaptive skills will serve her needs for daily functioning and basic parenting." Overall, Iyamah stated that Bernice's prognosis for regaining custody of K.S. was "fairly good."

¶ 50 Finally, Bernice introduced five reports from her therapist Joseph Thomas, who treated Bernice after she stopped seeing Bisiriyu. In Thomas's September 6, 2012 report, he said that Bernice "demonstrated an ability to reflect on her past life and discuss her decision making as it pertained to her child as well as herself." He described Bernice as "surprisingly open and candid in all discussions." He said she remained somewhat "guarded," but also that she was "engaged in the therapeutic process" and was willing to explore her past decisions "once she establishes some semblance of trust."

¶ 51 Thomas's January 7, 2013 report said that, since his last report, Bernice had given birth to L.S. Thomas did not know that Bernice was pregnant. Despite her concealment of the pregnancy, Thomas noted that Bernice "remain[ed] steadfast in her desire to regain custody of K.S." Thomas

added that, while Bernice was "very guarded and tend[ed] to distrust others, making this process slow at best," she also "faithfully made her sessions and seem[ed] connected to the process, albeit with reservations."

¶ 52 Thomas's third report, dated April 1, 2013, said that he and Bernice discussed "a systematic way in which she can approach procuring housing." Thomas stressed Bernice's compliance "with all of the court mandates, which includes securing housing." He maintained that she was "cooperative and an active participant in her therapy."

¶ 53 Thomas's fourth report, dated September 10, 2013, said that, due to his own medical issues, he could not meet with Bernice from May until mid-July. Due to "scheduling conflicts," Thomas could only see Bernice once from May until the date of the report. Thomas expressed "concern that [Bernice] had failed to secure housing in the prescribed time frame."

¶ 54 The final report from Thomas, dated February 25, 2014, said that Bernice had found an apartment in October 2013. Thomas noted that "[i]n the past few months," Bernice "made some gains in her treatment." While she still maintained some of her past defense mechanisms, "some elements of this wall ha[d] eroded and she [was] willing to share glimpses of vulnerability." Thomas said that she was "making gains but at her own pace."

¶ 55 The record also contains a report from Thomas dated June 1, 2014, which Bernice's attorney did not present at the unfitness hearing. In that report, Thomas observed that Bernice seemed "resigned that she may lose her parental rights to K.S.," as the State's petition to terminate her rights to K.S. had already been filed. Bernice had made progress "in her willingness to discuss her struggles with trust and how that relates to her difficulty with dealing with DCFS and the court systems." Thomas described Bernice's understanding that she may lose custody of K.S. as a "huge shift." Thomas also said that Bernice had been consistently making

her appointments and participating in therapy, that her "overall coping skills seem[ed] to be developing," and that she was "clearly motivated to work on change, which is a shift from her initial position of resistance."

¶ 56 3. *Trial Court's Findings and Ruling*

¶ 57 The court found that Bernice was unfit as to both K.S. and L.S., and in each case it found that both grounds of unfitness were proven. The court found that Bernice was depraved under section 1(D)(i) and that she failed to make reasonable progress toward the return of her children pursuant to section 1(D)(m). With respect to its finding of depravity, the trial court found that, by virtue of Bernice's murder conviction, the State had established a presumption that she was depraved under section 1(D)(i), thus shifting the burden to Bernice to establish that she was not depraved by clear and convincing evidence. The trial court found that "[t]he exhibits tendered to the Court by the mother did not *** present clear or convincing evidence to rebut the presumption of depravity." With respect to its second basis for unfitness—the reasonable-progress finding—the court clarified that Bernice did not make reasonable progress during the following periods: November 5, 2010 to August 5, 2011; August 6, 2011 to May 6, 2012; May 7, 2012 to February 7, 2013; February 8, 2013 to November 8, 2013; November 9, 2013 to August 9, 2014; and January 14, 2014 to October 14, 2014.

¶ 58 The trial court's finding of unfitness paved the way for the second stage in the parental termination, the best-interests hearing. At this hearing, as we have noted above, the State bore the burden of proving by a preponderance of the evidence that it was in the best interests of K.S. and L.S. to terminate Bernice's parental rights. *D.W.*, 214 Ill. 2d at 315; *D.T.*, 212 Ill. 2d at 361.

¶ 59 B. Best-Interests Hearing

¶ 60 At the beginning of the hearing on K.S.'s and L.S.'s best interests, the trial court asked the parties to identify themselves for the record. After they did so, the following exchange occurred:

> "MS. VERMA [Assistant State's Attorney]: We need Miss Doyle.
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> THE COURT: We have a PD.
>
> MS. VERMA: Miss Doyle for the natural mother.
>
> ***
>
> THE COURT: Anybody know where she is?
>
> ***
>
> PD.
>
> Is the natural mother here?
>
> MS. VERMA: I did not see her outside when I called the case, Judge."

After one of the attorneys checked in a different room and did not see Bernice or her lawyer, the court asked, "Parties ready to proceed?" The parties that were present said that they were.

¶ 61 Two witnesses testified at the hearing: Horn and Cheryl S., the children's foster parent. Horn testified that K.S. and L.S. had been placed in Cheryl's home in 2010 and 2012, respectively. K.S. was four years old, she did not need any services from DCFS, and she was developing normally. L.S. was two and was receiving speech and developmental therapy.

¶ 62 Horn testified that she last visited K.S. and L.S. in Cheryl's home two weeks before the hearing, that the home was safe and appropriate, and that she saw no signs of abuse, neglect, or a risk of harm to the minors. Horn never received a negative report from Cheryl's home. Horn said that K.S. and L.S. were "doing really well in [the] foster home." Both K.S. and L.S. called Cheryl, " ' mom.' " She testified that the children had appropriate contact with Cheryl. Cheryl took them to parks and "the Ice Capades." Cheryl also held birthday parties for the children, and the three of them ate dinner together.

¶ 63 Horn testified that Cheryl's adopted daughter, who was eight or nine years old, also lived with K.S. and L.S. The three children all got along, and K.S. and L.S. also got along with Cheryl's extended family.

¶ 64 Horn recommended terminating Bernice's parental rights, saying that it was in K.S. and L.S.'s best interests to do so because of their bond with Cheryl. Horn noted that they were "aware of" Bernice, but she believed that it was "most beneficial for them to remain with the foster mother."

¶ 65 Horn testified that Cheryl permitted Bernice to have access to the children. She invited Bernice to attend a trip to the zoo and let Bernice plan birthday parties for K.S. and L.S.

¶ 66 After the State and the assistant public guardian questioned Horn, Bernice and her attorney arrived in the courtroom. Bernice's attorney apologized "for being late." The court then let Bernice's attorney question Horn.

¶ 67 On cross-examination, Horn testified that Bernice visited with K.S. and L.S., that those visits were appropriate, and that the children were bonded to her. Horn never observed any unusual incidents during Bernice's visits. Horn believed that it was in the children's best interests to continue to have a relationship with Bernice.

¶ 68 Following counsel's cross-examination of Horn, the court passed the case to allow Cheryl to arrive. It is unclear how long the parties waited for her to arrive.

¶ 69 Cheryl testified that both K.S. and L.S. had been placed with her since they were born. Cheryl said that she loved them both and wanted to adopt them. She testified that she and the children played games, watched movies, and went bowling together. Cheryl also had "grown children" and an adoptive daughter, each of who treated K.S. and L.S. like their siblings.

¶ 70 Cheryl was 49 years old at the time of the hearing. Cheryl had started a catering company that permitted her to work from home. Cheryl said her backup plan for K.S. and L.S., if something were to happen to her, would be for them to be raised by her aunt, her mother, or her daughters.

¶ 71 Cheryl testified that she "love[d] Bernice," and that she wanted Bernice to be involved in K.S. and L.S.'s lives. She had observed the children with Bernice and thought their visits were appropriate. Cheryl also believed that it was in the children's best interests to continue a relationship with Bernice.

¶ 72 The court found that it was in both K.S. and L.S.'s best interests to terminate Bernice's parental rights and to be adopted by Cheryl. The court noted that K.S. and L.S. had "resided in the foster home for most of their lives, [were] stable there, [were] loved there, [and] ha[d] been offered the only stability and permanency that they'[d] known in their lives in *** [Cheryl's] home." The court also noted that the fact that Cheryl had a relationship with Bernice was "simply a bonus for these children." Bernice appeals.

¶ 73 II. ANALYSIS

¶ 74 Bernice raises four issues on appeal. First, she claims that the trial court erred in finding her unfit because she rebutted the presumption of depravity created by her conviction, and the State failed to prove by clear and convincing evidence that she failed to make reasonable progress toward the return of L.S. Second, she argues that her attorney rendered ineffective assistance at the unfitness hearing by failing to present Thomas's June 1, 2014 report, which showed that Bernice had made significant progress in therapy. Third, she argues that the State failed to prove that it was in the children's best interests for her parental rights to be terminated.

Fourth, she contends that the trial court erred in beginning the best-interests hearing while she and her attorney were absent. We address each of Bernice's claims in turn.

¶ 75 A. Unfitness Determinations

¶ 76 As we have noted previously, a finding of unfitness must be supported by clear and convincing evidence. 705 ILCS 405/2-29(2) (West 2014); *In re J.L.*, 236 Ill. 2d 329, 337 (2010). We must defer to the trial court's finding of unfitness, because that finding involves factual findings and credibility assessments that the trial court is better-equipped to make. *In re Richard H.*, 376 Ill. App. 3d 162, 165 (2007). Thus, we will not reverse a finding of unfitness unless it is against the manifest weight of the evidence. *Id.* A decision is against the manifest weight of the evidence if the facts clearly demonstrate that the court should have reached the opposite result. *In re N.B.*, 191 Ill. 2d 338, 346 (2000). When reviewing the sufficiency of the evidence in a termination-of-parental-rights case, each case must be decided based on the particular facts and circumstances presented. *In re G.L.*, 329 Ill. App. 3d 18, 26 (2002). Because the grounds for unfitness are independent of one another, we will affirm the trial court's judgment if the evidence supports any of the grounds of unfitness found by the trial court. *Richard H.*, 376 Ill. App. 3d at 165; *In re Addison R.*, 2013 IL App (2d) 121318, ¶ 35 (single ground of unfitness is sufficient to support finding of unfitness).

¶ 77 The trial court found Bernice to be unfit, with regard to both K.S. and L.S., under two provisions of the Adoption Act: section 1(D)(i), which provides that a parent who is "depraved" is unfit, and section 1(D)(m), which provides that a parent is unfit if he or she fails to make reasonable progress toward the return of a child during any nine-month period after the first nine months following the child's being adjudicated abused or neglected. 750 ILCS 50/1(D)(i), (m)

(West 2014). We will first consider the finding of unfitness with regard to K.S., and then proceed to the finding regarding L.S.

¶ 78 1. Finding of Unfitness as to K.S.

¶ 79 Bernice does not challenge the trial court's finding that she failed to make reasonable progress toward her daughter K.S.'s return. Nowhere in her brief does she argue that the trial court's reasonable-progress finding as to K.S. was erroneous, nor does she specify how the evidence showed that she had, in fact, made reasonable progress during the nine-month periods alleged by the State. Thus, Bernice has forfeited her challenge to that finding, and we do not need to address it. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *In re J.B.*, 2014 IL App (1st) 140773, ¶ 62 (points not argued on appeal are forfeited).

¶ 80 Regardless of Bernice's forfeiture, the State presented sufficient evidence that Bernice failed to make reasonable progress toward regaining custody of K.S. DCFS set goals for Bernice to find appropriate housing for K.S., to complete parenting coaching, and to participate in individual therapy. Bernice did not find appropriate housing from the beginning of her case in 2010 until early 2014. During that time, she did not work with the housing agency to which Horn had referred her. Because she lacked appropriate housing during that time, Bernice also could not complete her parenting coaching. And from May 2011 until early 2013, Bernice was either not regularly attending her individual therapy sessions with Bisiriyu or not attending therapy at all. The State was only required to show that, during *any* nine-month period after K.S. was adjudicated a ward of the court, Bernice did not make reasonable progress toward K.S.'s return. 750 ILCS 50/1(D)(m) (West 2014). In light of the evidence showing that Bernice struggled to complete a majority of the necessary services until 2014—more than three years after K.S. was adjudicated a ward of the court—we would find that the trial court's finding of a lack of

reasonable progress toward K.S.'s return was not against the manifest weight of the evidence, even had Bernice not forfeited the issue.

¶ 81 Because we uphold the trial court's finding of unfitness due to lack of reasonable progress, it is not necessary to consider the issue of depravity with respect to K.S. A finding of reasonable progress, alone, is sufficient reason to find her unfit with respect to K.S. *Richard H.*, 376 Ill. App. 3d at 165; *Addison R.*, 2013 IL App (2d) 121318, ¶ 35. We thus affirm the finding of unfitness as to K.S.

¶ 82 2. Finding of Unfitness as to L.S.

¶ 83 With respect to L.S., however, Bernice does challenge the trial court's reasonable-progress finding. She argues that the trial court erred in finding that she failed to make reasonable progress toward L.S.'s return during the two nine-month periods alleged by the State: May 13, 2013 through February 15, 2014, and January 14, 2014 through October 14, 2014. But it is not necessary for us to reach this argument, because the State may prove its case based on either ground of unfitness (*Richard H.*, 376 Ill. App. 3d at 165; *Addison R.*, 2013 IL App (2d) 121318, ¶ 35), and we find that the State proved its case based on depravity.

¶ 84 Under section 1(D)(i), a parent is presumed depraved if he or she has been convicted of one of seven enumerated crimes, including the first-degree murder of any child. 750 ILCS 50/1(D)(1)(i)(2) (West 2014). That presumption may be rebutted only by clear and convincing evidence that the parent is not depraved. *Id.* It is undisputed that Bernice pleaded guilty to the 1996 murder of her newborn son. Thus, Bernice was required to overcome the presumption of depravity with clear and convincing evidence.

¶ 85 "Depravity," as it is used in the Adoption Act, means " 'an inherent deficiency of moral sense and rectitude.' " *In re A.M.*, 358 Ill. App. 3d 247, 253 (2005) (quoting *Stalder v. Stone*, 412

Ill. 488, 498 (1952)). Depravity is assessed at the time the State files its petition to terminate parental rights, and the acts allegedly proving the parent's depravity must be of sufficient duration and repetition to show either an inability or unwillingness to conform to accepted morality. *A.M.*, 358 Ill. App. 3d at 253.

¶ 86 The evidence presented at the hearing showed that, following her murder of her newborn child in 1996, Bernice spent the next 13 years in custody, until she was released in 2009. The record shows no evidence of crimes or misconduct during that time. That is certainly a point in her favor, but we can only credit that fact so much. The absence of criminal behavior while in prison lacks great evidentiary value because prison is a "controlled environment" (*Addison R.*, 2013 IL App (2d) 121318, ¶ 30) and the " 'opportunity to commit further criminal acts [is] severely restricted.' " *Id*. (quoting *In re Adoption of Kleba*, 37 Ill. App. 3d 163, 166 (1976)).

¶ 87 The key to rebutting a presumption of depravity is a parent's ability to show that he or she has been rehabilitated. See, *e.g.*, *Shanna W.*, 343 Ill. App. 3d at 1167 (parent could not rebut presumption of depravity because she "ha[d] shown no evidence that she [was] rehabilitated"). A parent's rehabilitation can be shown where the parent leaves prison and maintains a lifestyle "suitable for parenting children safely." *Id.* at 1167. Consequently, evidence that a parent, after being released from prison, leads a law-abiding life and complies with DCFS services may constitute clear and convincing evidence of a lack of depravity. See, *e.g.*, *In re Gwynne P.*, 346 Ill. App. 3d 584, 599 (2004) (mother convicted of drug offenses and theft had rebutted presumption of depravity where she maintained sobriety, completed drug treatment program, had been employed continuously for seven months, completed parenting classes, and attended all visits with her child); *In re J.A.*, 316 Ill. App. 3d 553, 563 (2000) (affirming trial court's finding that father had rebutted depravity presumption where father prepared room in his home in case

he regained custody of child, provided financial and emotional support for child, visited child more frequently than required by DCFS, and was in "constant contact" with child).

¶ 88 But participation in some services or some efforts at rehabilitation does not necessarily overcome the presumption of depravity in all cases. See, *e.g.*, *A.M.*, 358 Ill. App. 3d at 245 (evidence that father obtained his GED, completed career training classes, enrolled in parenting and drug-abuse classes, and had been approved for work release from prison insufficient to overcome presumption of depravity); *Addison R.*, 2013 IL App (2d) 121318, ¶ 30 (evidence that mother had completed substance-abuse and psychiatric programs and had enrolled in college courses while in prison, "while commendable, [was] insufficient evidence of rehabilitation or lack of depravity"); *Shanna W.*, 343 Ill. App. 3d at 1167 ("Receiving a few certificates for completing basic services in prison, while commendable, is not a difficult task and does not show rehabilitation.").

¶ 89 Bernice led a law-abiding life following her release from prison in 2009. She had committed no new crimes and had no problems completing her parole. And at the time the State filed its petition to terminate Bernice's parental rights, she was complying with the services DCFS required. She attended individual therapy regularly, participated in parenting coaching, and obtained appropriate housing.

¶ 90 But at other times, Bernice struggled or refused to participate in her services. For much of the time she was involved with DCFS, she did not engage in therapy, did not attempt to find housing where her children could live, and did not complete her parenting coaching. Although the trial court was required to assess Bernice's depravity at the time the State's petition was filed in 2014, these facts tended to show that Bernice had not yet rehabilitated to the extent that she would be a suitable parent.

¶ 91 Moreover, Bernice continued to act in a secretive, guarded manner, behavior that she exhibited before the death of her son in 1996. Linden's psychological evaluation from 2010 said that Bernice "use[d] suppression and denial to a significant extent in order to maintain a façade of calmness." Iyamah's 2011 report noted that Bernice "tended to deny even commonplace problems" and "tend[ed] to present in an overly favorable manner." The PAT, which evaluated Bernice in 2013, noted Bernice's "longstanding history of distrusting others and keeping information secret when she [was] concerned about the response from others and when the information is very emotionally overwhelming for her." The PAT added that Bernice "displayed these tendencies most overtly in her decision to withhold information about her second pregnancy from [K.S.'s] foster mother, *** her therapist, her caseworker, and the PAT." The PAT concluded that Bernice's "tendency toward repression and secrecy present[ed] an impediment for her to rely upon others and appropriately respond to overwhelming circumstances, particularly those that trigger her past trauma." Thomas's reports, which he completed close to the time the State filed its petition to terminate Bernice's rights, showed that Bernice "prefer[red] to avoid discussions as a superficial defense mechanism." She was "very guarded" and "tend[ed] to distrust others," making her progress in therapy "slow at best." Thomas noted that the fact that Bernice kept her pregnancy with L.S. a secret "brought into question [her] ability to be forthright with her resource providers." She felt "conflicted in trusting others" and "distrust[ed] the system." The record further shows that, at various times, Bernice was not forthcoming with DCFS workers about her continuing relationship with the father of K.S. and L.S., a father who admitted to being a frequent, daily user of cannabis.

¶ 92 From this evidence, the trial court could conclude that Bernice had not fully addressed the fact that she had murdered her own child in 1996. And the court could conclude that Bernice

continued to be secretive and withholding—traits that she showed when she kept her pregnancy a secret in 1996 and which resulted in the murder of her newborn son. As Bernice continued to exhibit the psychological tendencies she had at the time of the murder—secrecy, guardedness, and an unwillingness to face her problems—the trial court's depravity finding was not against the manifest weight of the evidence.

¶ 93 We also note that Bernice presented no clear evidence regarding her character at the time of the hearing. She put on no live testimony, no witnesses to testify that she was a different person in 2014 than the person who murdered her child in 1996 and was incarcerated until 2009. Nor was there any mitigating or exonerating evidence put forth at the hearing to explain the circumstances behind her murder of her newborn in 1996. Nor, for that matter, was there any explanation from Bernice or anyone else to explain her concealment of her pregnancy with L.S., which was eerily reminiscent of the behavior she exhibited before murdering her newborn in 1996 (though the case worker testified that Bernice claimed that she was afraid DCFS would take L.S. away).

¶ 94 If anything, the live testimony the court did hear—the State's evidence—showed that Bernice failed to open up and reveal herself to DCFS workers and continued to project a false impression to them. While the documents that she presented generally showed that she had made some effort to comply with DCFS services, that she had committed no further acts of violence, and that she cared for her children, it is simply not enough for us to conclude that the trial court's finding—that Bernice had not overcome the presumption of depravity—was against the manifest weight of the evidence. We cannot say that the opposite conclusion was clearly evident.

¶ 95 By our holding, we do not mean to condemn Bernice, who seemed to be making at least some effort to comply with the service plans, and who has not committed a crime or act of

violence since the murder she committed in 1996. Nor do we mean to imply that someone convicted of even the most heinous of crimes, as here, is incapable of rehabilitation and should always be declared unfit. That is not the law, nor should it be. But in this case, the trial court heard testimony suggesting that Bernice continued to behave inconsistently and somewhat disturbingly at various times following her release from prison, and we cannot say that its finding of depravity was against the manifest weight of the evidence.[2]

¶ 96 B. Ineffective Assistance of Counsel

¶ 97 Bernice next contends that her attorney was ineffective for failing to present three pieces of evidence during the unfitness portion of the hearing: (1) Cheryl's testimony that "it was in the children's best interest[s] to have a continued relationship with their mother"; (2) Bernice's "educational achievement certificates"; and (3) Thomas's June 1, 2014 report documenting Bernice's progress in therapy. The State contends that Bernice was only entitled to the "reasonable" assistance of counsel, rather than the effective assistance of counsel, because her right to counsel was statutory, not constitutional. The State and public guardian also contend that Bernice was not prejudiced by any alleged deficiency in counsel's performance.

¶ 98 As an initial matter, we reject the State's contention that a parent is entitled only to a "reasonable" level of assistance—a lesser standard than effective assistance—during a

[2] Earlier, we provided the entire summary of Linda Vasquez's testimony for the sake of a complete record. But our conclusions with regard to the finding of depravity in this case are not reliant in any way on Vasquez's diagnosis of Bernice with fetal alcohol spectrum disorder. We agree with Bernice that this diagnosis was highly questionable at best. Vasquez diagnosed Bernice as having fetal alcohol syndrome despite the fact that she never learned of any evidence that Bernice's mother drank while pregnant, she never saw the results of any brain scans to suggest that Bernice had fetal alcohol syndrome, and she based her diagnosis entirely on two incidents that occurred in the limited time that Vasquez worked with Bernice. Even if Vasquez had seen such evidence, none of the other professionals who reported on Bernice—including a psychiatrist and a psychologist who authored a 2013 assessment report on Bernice—reached a similar conclusion. We see no indication that the trial court placed undue weight, or any weight at all, on Vasquez's testimony on this topic, and we place none.

proceeding to terminate parental rights. The Juvenile Court Act of 1987 affords parents a right to counsel in a proceeding to terminate their rights. 705 ILCS 405/1-5(1) (West 2014). This court has consistently held that parents are entitled to the effective assistance of counsel during such proceedings and that the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), should guide our analysis of whether a parent has received effective assistance. *In re C.C.*, 368 Ill. App. 3d 744, 747-48 (2006); *In re M.F.*, 326 Ill. App. 3d 1110, 1119 (2002); *In re D.M.*, 258 Ill. App. 3d 669, 673-74 (1994); *In re R.G.*, 165 Ill. App. 3d 112, 127-28 (1988).

¶ 99 The State's only reason for applying the reasonable-assistance standard is that courts apply that standard when assessing the performance of counsel in postconviction proceedings, and termination proceedings, like postconviction proceedings, provide for a statutory, rather than constitutional right to counsel. But postconviction proceedings are not analogous to termination-of-parental-rights hearings. The statutes providing for a right to counsel in postconviction proceedings only require counsel to provide limited duties. See 725 ILCS 5/122-4 (West 2014); Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *People v. Owens*, 139 Ill. 2d 351, 358-59 (1990) (postconviction counsel must consult with petitioner by mail or in person, examine record of trial proceedings, and amend petition to adequately present petitioner's constitutional claims). There are no limited duties spelled in section 1-5's guarantee of counsel, evincing no similar intent to impose a lesser standard on counsel at a termination hearing. See 705 ILCS 5/1-5(1) (West 2014) (providing parent with "right to be represented by counsel"). Moreover, postconviction petitioners seeking to collaterally attack their convictions have already had the benefit of counsel during their trials and direct appeals, as well as the guarantee of the effective assistance of counsel at those stages. Thus, there is less need to provide the same guarantees for counsel's performance during postconviction proceedings. See *Pennsylvania v. Finley*, 481 U.S. 551, 555

(1987); *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). In termination cases, however, parents do not get the benefit of a previous trial and direct appeal with a constitutionally guaranteed right to the effective assistance of counsel. Thus, we see no reason to supplant our settled standard with the "reasonable" assistance of counsel standard from postconviction proceedings.

¶ 100 We now turn to the merits of Bernice's claim. To establish her claim of ineffective assistance of counsel, Bernice must show that her attorney's performance was deficient and that her attorney's deficient performance prejudiced her. *Strickland*, 466 U.S. at 687. Prejudice occurs when, absent the attorney's error, there is a reasonable probability that the outcome of the proceeding would have been different. *Id.* at 694.

¶ 101 In this case, Bernice cannot show that her attorney was ineffective for failing to introduce the three pieces of evidence Bernice cites. First, Bernice contends that her attorney should have called Cheryl to testify during the unfitness hearing because, at the best-interests hearing, Cheryl testified as to Bernice's positive relationship with K.S. and L.S. While that may have impacted the trial court's depravity finding, Cheryl could offer no opinion as to whether Bernice made reasonable progress toward the children's return, as Cheryl could not provide insight into whether Bernice was complying with the services required by DCFS. As Bernice could have been found unfit either due to depravity or a failure to make reasonable progress (*Richard H.*, 376 Ill. App. 3d at 165), and Bernice does not challenge the lack of progress finding with respect to K.S., Cheryl's testimony would not have likely changed the finding of unfitness as to K.S. The failure to present her testimony at the unfitness hearing did not prejudice Bernice.

¶ 102 Moreover, Cheryl's testimony would have had limited impact on the depravity finding with respect to L.S. because it would have been cumulative of other evidence at the hearing. All Cheryl could have contributed would be testimony that Bernice visited the children and was

appropriate with them, which were facts that Horn testified to at the unfitness hearing. In fact, all of the evidence at the unfitness hearing showed that Bernice had been appropriate with the children at every visit she had with them. Adding Cheryl's testimony would be cumulative and would not have likely changed the outcome of the hearing. See *People v. Pulliam*, 206 Ill. 2d 218, 239 (2002); *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 79 (defendant not prejudiced when evidence that counsel allegedly should have presented was cumulative).

¶ 103 Second, Bernice claims that counsel should have introduced certificates showing that Bernice had completed adult-education classes in order to counter the State's claim that she was depraved. We disagree that there was a reasonable probability that the introduction of these certificates would have had any impact on the outcome of the hearing for two reasons. First, Bernice received these certificates in 2009 and 2010, long before the State filed its petition to terminate her parental rights in 2014. As depravity must be assessed at the time the State files its petition (*A.M.*, 358 Ill. App. 3d at 253), these years-old certificates would have little ability to change the trial court's finding. Second, even if these certificates, showing that Bernice had completed adult-education classes, had been introduced, they would do nothing to counter the evidence that Bernice continued to exhibit the secrecy and guardedness that supported the presumption of depravity created by her murder conviction. Rather, they would simply show that Bernice had been attempting to better herself, which would be cumulative of the evidence showing that Bernice had begun to comply with DCFS services and regularly attend therapy in 2014. Thus, Bernice cannot show that counsel's failure to introduce her educational certificates prejudiced her.

¶ 104 Third, Bernice claims that her attorney should have introduced Thomas's June 1, 2014 report. According to Bernice, this report would have bolstered her case that she was not depraved

and that she was making reasonable progress toward the return of K.S. But the timing of the report does not support Bernice's claim. The State alleged that Bernice failed to make reasonable progress toward K.S.'s return during several nine-month periods. Thomas's report would have only shown Bernice's reasonable progress during the last of those periods. Because the trial court could have found Bernice unfit based on her failure to make reasonable progress during *any* of those nine-month periods (750 ILCS 50/1(D)(m)(iii) (West 2014))—most of which were before June 2014—Thomas's final report was unlikely to change the outcome of the hearing with respect to K.S.

¶ 105 Nor is there a reasonable likelihood, with regard to either K.S. or L.S., that Thomas's final report would have resulted in a different finding with regard to depravity. While Thomas's last report noted that Bernice had made progress in her therapy, so did his five other reports, which counsel presented at the unfitness hearing. And the final report simply noted that she had "made some adjustments" to her psychological approach and that her "overall coping skills seem to be developing." Thus, Thomas's praise of Bernice was measured. His report was not so conclusive or positive that it would create a reasonable probability that the unfitness hearing would turn out differently had it been presented. Bernice has not shown that her attorney was ineffective for failing to present this evidence on her behalf.

¶ 106 C. Best Interests Determinations

¶ 107 Bernice next contends that the trial court erred in determining that it was in K.S.'s best interests to terminate Bernice's parental rights where Cheryl, K.S.'s foster mother, and Horn "testified that it was in the children's best interest to have a continuing relationship with Bernice in view of the loving nature of their bond." The public guardian and the State respond that the

evidence at the best-interests hearing showed that K.S. would benefit from the "increased stability and security" offered by Cheryl's home.

¶ 108 At a best-interests hearing, the parent's interest in maintaining the parent-child relationship must yield to the child's interest in a stable, loving home life. *D.T.*, 212 Ill. 2d at 364. In determining a child's best interests, the trial court must apply the 10 factors in section 1-3(4.05) of the Juvenile Court Act of 1987: (1) the physical safety and welfare of the minor, including food, shelter, health, and clothing; (2) the development of the minor's identity; (3) the minor's background and ties, including familial, cultural, and religious; (4) the minor's sense of attachments; (5) the minor's wishes and long-term goals; (6) the minor's community ties, including church, school, and friends; (7) the minor's need for permanence, including his or her relationships with parent figures, siblings, and other relatives; (8) the uniqueness of every family and child; (9) the risks attendant to the minor entering and being in substitute care; and (10) the preferences of the persons available to care for the minor. 705 ILCS 405/1-3(4.05) (West 2014). The State bears the burden of proving that termination of parental rights and adoption is in the child's best interests by a preponderance of the evidence. *D.T.*, 212 Ill. 2d at 366.

¶ 109 A trial court's best-interests finding will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re B'yata I.*, 2014 IL App (2d) 13055-B, ¶ 41. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Id.*

¶ 110 1. The Physical Safety and Welfare of the Minors

¶ 111 The evidence at the best interest hearing showed that Cheryl had cared for K.S. since 2010 and L.S. since 2014. K.S. and L.S. were both babies when they entered Cheryl's care. Horn testified that Cheryl met the minors' needs with respect to their food, shelter, health, and clothing. She did not express any concern regarding the minors' physical safety or welfare in the

time they had been in Cheryl's care. Cheryl was self-employed at the time of the best interest hearing, giving her the ability to continue to provide the children with food, shelter, health care, and clothing.

¶ 112 By contrast, Bernice was not employed at the time of the best-interest hearing. Her only income was from disability benefits. She had secured housing that was appropriate for the children, but was also very dirty. While Bernice herself never posed any threat to the children's welfare or safety, she appeared less able to provide for the children than Cheryl, who had been acting as the children's mother nearly since the time they were born.

¶ 113 2. The Development of the Minors' Identity

¶ 114 The minors had only ever known Cheryl's home as their own. The development of their identity was likely best served by keeping them with the only parent they had known in their lives.

¶ 115 3. The Minors' Background and Familial, Cultural, and Religious Ties

¶ 116 Little evidence was presented regarding K.S. and L.S.'s background as they were both still very young at the time of the best-interests hearing. But they had spent a majority of their young lives in Cheryl's care, being raised as her children. Thus, their limited background was inextricably tied to Cheryl's home. They had spent comparatively little time with Bernice, and had only done so in the presence of a DCFS employee or Cheryl herself.

¶ 117 4. The Minors' Attachments

¶ 118 When evaluating this factor, the court must consider five additional factors: (i) where the minor feels love, attachment, and a sense of being valued; (ii) the minor's sense of security; (iii) the minor's sense of familiarity; (iv) the continuity of affection for the child; and (v) the least disruptive placement alternative. 705 ILCS 405/1-3(4.05)(d) (West 2014).

¶ 119 The evidence showed K.S. and L.S. were bonded to both Cheryl and Bernice. But the evidence showed that they were likely more attached to Cheryl. They had lived with Cheryl for most of their lives and referred to her as "mom." Cheryl took care of the day-to-day duties of a parent for both K.S. and L.S. Bernice, by contrast, only had supervised visits with the children a few times a week. They would also feel attached to Cheryl's daughter, who acted as K.S. and L.S.'s sister for most of their lives. According to Horn, the children felt secure in Cheryl's home, as she capably provided for them.

¶ 120 The minors' sense of familiarity weighed in favor of adoption, as well. Both K.S. and L.S. had lived with Cheryl since they were babies. The evidence at the best-interest hearing supported a finding that the minors would find Cheryl's care to be the most familiar.

¶ 121 Perhaps most important was the fact that keeping the children in Cheryl's care would be the least disruptive alternative. They both knew Cheryl as their mother since they were infants. They lived with each other and Cheryl's other daughter as siblings. Cheryl's extended family treated K.S. and L.S. like family.

¶ 122 We also note that Cheryl testified that, if she were to adopt K.S. and L.S., she would continue to permit them to see Bernice. In fact, Cheryl went so far as to say that she "love[d]" Bernice and felt that it was important for Bernice to remain in the children's lives. This testimony bolsters the conclusion that the minors' senses of attachment would not be negatively impacted by termination and adoption.

¶ 123 5. The Minors' Wishes and Long-Term Goals

¶ 124 This factor does not apply to this case. Both K.S. and L.S. were so young that they could not articulate what their desired goals were.

¶ 125 6. The Minors' Community Ties

¶ 126 The State presented little evidence regarding the minors' community ties. Neither child was old enough to attend school at the time, and there was no evidence regarding their friendships in the community. But Cheryl did take the children on outings in the area and the children interacted with Cheryl's extended family. In all, this factor weighed slightly in favor of termination and adoption.

¶ 127 7. The Minors' Need for Permanence

¶ 128 With respect to this factor, the court must consider "the child's need for stability and continuity of relationships with parent figures and with siblings and other relatives." 705 ILCS 405/1-3(4.05)(g) (West 2014).

¶ 129 Here, Cheryl had served as the minors' parent figure since they were infants. The minors had each lived with her since they were very young. Horn testified that K.S. and L.S. shared a close bond with Cheryl. Cheryl also testified that her other daughter acted like a sibling toward K.S. and L.S. The evidence showed that permitting Cheryl to adopt the minors would provide them with stability in their relationships, as they would live together in the location that they had for a majority of their lives.

¶ 130 8. The Uniqueness of the Family and Minors

¶ 131 While no unique characteristics of the family stand out in this case, Cheryl testified that she would still permit Bernice to have contact with the children. This unique arrangement would afford the children the opportunity both to have a stable, loving home with Cheryl and to keep some relationship with their biological mother. Thus, this factor does not weigh against termination and adoption.

¶ 132 9. The Risks Attendant to Entering and Being in Substitute Care

¶ 133 There were few risks in keeping the children in Cheryl's care. Cheryl and Bernice were of a similar age and Cheryl was in better health than Bernice, as Bernice suffered from a heart condition. Moreover, Cheryl specified several family members who could take care of the children if something were to happen to her. Bernice did not have any.

¶ 134 10. The Preferences of the Persons Available to Care for the Minors

¶ 135 Cheryl testified that she was willing to adopt and care for both children, without any reservations. Bernice also preferred to retain her parental rights. This factor was thus neutral.

¶ 136 11. Summary

¶ 137 In sum, most of the factors weighed in favor of terminating Bernice's parental rights and permitting Cheryl to adopt the children. They had grown up in Cheryl's care, and Cheryl had capably provided for the children's needs. The mere fact that Horn and Cheryl thought it would be in the children's best interests to have a relationship with Bernice does not override the majority of the evidence showing that Cheryl would be the best available caretaker for the children. The trial court’s finding on the children’s best interests was not against the manifest weight of the evidence.

¶ 138 D. Right to Counsel

¶ 139 Finally, Bernice claims that she was deprived of her right to counsel when the trial court conducted a portion of the best-interests hearing when her attorney was absent. The State and public guardian contend that Bernice forfeited this issue by not objecting below and that she suffered no prejudice from her attorney's absence.

¶ 140 Bernice acknowledges that she did not object to the continuation of the proceedings once her attorney arrived. But she contends that this error was plain error that requires reversal regardless of her forfeiture. See *In re Darius G.*, 406 Ill. App. 3d 727, 732 (2010) (finding plain

error where attorney at termination proceedings suffered from conflict of interest). When conducting a plain-error analysis, our first step is to determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 141 The due process clause does not require the State to appoint counsel in every termination-of-parental-rights case. *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 26-27 (1981); *In re K.L.P.*, 198 Ill. 2d 448, 461 (2002). But the denial of appointed counsel may deprive a parent of his or her rights to due process in a specific case, depending on the balance of the parent's interests, the State's interests, and the risk of an erroneous decision. *Lassiter*, 452 U.S. at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *K.L.P.*, 198 Ill. 2d at 460.

¶ 142 We disagree that Bernice was deprived of due process. In *In re D.L.*, 226 Ill. App. 3d 177, 185-86 (1992), we held that a father was not denied his due-process rights when the trial court began a hearing on the State's petition for temporary custody of his son even though the father's attorney was not present. In reaching that conclusion, we highlighted the fact that proceedings under the Juvenile Court Act are " 'not intended to be adversary in character' "; rather, the child's best interests are the primary concern. *Id.* at 185 (quoting *In re E.L.*, 152 Ill. App. 3d 25, 33 (1987)). We also stressed that the father and his attorney had received notice of the hearing and that the father had an opportunity to be heard at the hearing. *D.L.*, 226 Ill. App. 3d at 185-86. Finally, we noted that the trial court waited 2 ½ hours for the father's attorney to arrive before starting the hearing. *Id.* at 185.

¶ 143 *D.L.* is similar to this case. Like the hearing at issue in *D.L.*, the best-interests hearing in this case was a non-adversarial proceeding. And Bernice had the benefit of counsel for a majority of the hearing, along with the opportunity to question both of the State's witnesses and present

her own evidence. Although the record does not show that the trial court waited an extended period of time for Bernice and her attorney to arrive, it is also unclear how late Bernice and her attorney were for the hearing.

¶ 144 Bernice has not shown that counsel's absence prejudiced her in any way. She points to no testimony elicited during counsel's absence that was objectionable or improper. During counsel's cross-examination of Horn, counsel did not ask any questions outside the scope of the State's direct examination or otherwise perform deficiently based on the fact that she did not hear Horn's direct examination. Even if Bernice's attorney had been present, it is unclear how her performance at the best-interests hearing would have been any different.

¶ 145 Bernice cites *In re J.P.*, 316 Ill. App. 3d 652 (2000), in support of her claim that she was denied her right to counsel. But in *J.P.*, the mother did not have adequate notice of the best-interests hearing, and the trial court granted the mother's attorney's request to withdraw even though the mother was not aware of the request. *Id.* at 660-62. Here, Bernice had notice of the best-interests hearing and her attorney did not withdraw without telling her. To the contrary, her attorney arrived shortly after the hearing began and capably represented Bernice throughout the remainder of the hearing. Thus, *J.P.* is distinguishable.

¶ 146 Bernice also contends that her attorney's absence was reversible regardless of the prejudice she suffered, noting that "courts have held that the absence of counsel during part, although not all, of a critical stage of a proceeding is *** *per se* reversible." But Bernice cites only *criminal* cases in support of this notion. As we noted above, Bernice did not enjoy the same right to counsel as a criminal defendant, who must be represented at all critical stages absent waiver of the right to counsel. See *People v. Burton*, 184 Ill. 2d 1, 22 (1998) (criminal defendant has right to counsel at all critical stages). Because due process does not even demand that

counsel be appointed in every termination-of-parental-rights case (see *Lassiter*, 452 U.S. at 26-27; *K.L.P.*, 198 Ill. 2d at 461; *People v. Lackey*, 79 Ill. 2d 466, 468 (1980)), Bernice cannot claim that a rule of *per se* reversibility is required under the due process clause whenever a portion of a best-interest hearing is conducted without counsel being present for a small portion of it.

¶ 147 Nor has Bernice shown that any violation of the statutory right to counsel in section 1-5(1) of the Juvenile Court Act requires automatic reversal. Bernice has cited no Illinois authority in support of this argument, and we have not found any. Instead, Bernice cites *In re J.M.O.*, 459 S.W.3d 90 (Tex. Ct. App. 2014), where the court held that trial counsel's failure to appear at a hearing on the termination of a father's parental rights constituted ineffective assistance under the statutory right to counsel provided to parents under Texas law. *Id.* at 93-94. The court, relying on *United States v. Cronic*, 466 U.S. 648 (1984), presumed that the attorney's absence prejudiced the father because the attorney "wholly fail[ed] to appear at trial." *Id.* at 94.

¶ 148 *J.M.O.* does not support Bernice's proposition. The court in *J.M.O.* did not hold that any attorney's delayed arrival at a hearing should be presumed prejudicial. To the contrary, the court only presumed prejudice because the father's attorney did not appear *at all*. That is a far cry from this case, where Bernice's attorney not only attended a majority of the best-interests hearing, but fully cross-examined each of the State's witness and argued on Bernice's behalf. Moreover, unlike Texas courts, this court has refused to extend the presumption of prejudice in *Cronic* to termination-of-parental-rights cases. *In re C.C.*, 368 Ill. App. 3d 744, 748 (2006). Instead, we have continued to require a parent to show prejudice in any case where the parent's attorney is allegedly deficient. See, *e.g.*, *id.* at 748-49. As we explained above, Bernice suffered no prejudice from her attorney's late arrival. Thus, we do not find *J.M.O.* to be persuasive and

decline to presume that Bernice was prejudice based on her attorney's absence from a portion of the best-interests hearing.

¶ 149 III. CONCLUSION

¶ 150 For the reasons stated, we affirm the trial court's termination of Bernice's parental rights. Bernice did not present clear and convincing evidence that she was no longer depraved and she did not receive ineffective assistance of counsel at her unfitness hearing. The trial court did not err in concluding that K.S. and L.S.'s best interests would be served by terminating Bernice's parental rights, and Bernice was not deprived of her due-process right to counsel at the best-interests hearing.

¶ 151 Affirmed.