2015 IL App (2d) 150056-U
No. 2-15-0056
Order filed April 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re NOAH G., a Minor,	)	Appeal from the Circuit Court
	)	of Stephenson County.
	)	
	)	No. 2011-JA-25
	)	
(People of the State of Illinois,	)	Honorable
Petitioner-Appellee, v. Michael	)	James M. Hauser,
Brown, Respondent-Appellant).	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's finding of unfitness based on a failure to make reasonable progress toward the goal of return home during the nine-month period(s) immediately preceding the fitness hearing.

¶ On December 2, 2014, the trial court found respondent, Michael Brown, an unfit parent as to Noah G. (born November 2, 2011) based on a failure to make reasonable efforts and a failure to make reasonable progress during the nine-month period(s) immediately preceding the

fitness hearing. 750 ILCS 50/1(D)(m)(i), (ii) (West 2014).[1] On January 6, 2015, following a best interest hearing, the court terminated respondent's parental rights. Respondent appeals, arguing that, due to the flawed language in the petition to terminate and in the written order finding unfitness, he did not receive a fair hearing and the trial court did not use the correct fitness standard. We disagree, because the supreme court has already rejected respondent's fairness argument, and because the trial court's oral pronouncement, which controls over the written order, shows that the trial court utilized the correct fitness standard. We focus our analysis on the ground of reasonable progress. Affirmed.

¶ 2 I. BACKGROUND

¶ 3 On November 2, 2011, Andrea G. gave birth to Noah, her fourth of five children that would be removed from her care. Noah was born with traces of THC (marijuana) in his system, and paternity was uncertain. On November 9, 2011, Noah was made a ward of the court and, at less than one week old, he was placed with his foster parents, who now seek to adopt him.

¶ 4 On February 7, 2012, the trial court entered an adjudication of neglect. Respondent had not yet acknowledged paternity, and he was not yet named on any court documents. On July 16, 2012, respondent contacted Lutheran Social Services and told them that he might be Noah's father. He gave service providers his contact information, and he informed them that he lived in Beloit, Wisconsin. On September 4, 2012, the court ordered respondent to take a paternity test. On November 20, 2012, the results came back positive, and respondent signed an acknowledgment of paternity.

[1] This section has been amended many times in recent years. Throughout this order, we cite the version relevant at the time of the proceedings, as promulgated in Public Act 98-756 (Pub. Act 98-756, § 750 (eff. July 16, 2014)).

¶ 5 On December 11, 2012, the trial court, Judge Theresa Ursin presiding, entered its first permanency review order as pertains to respondent. It expressly ruled that it would make "no finding at this time as to [respondent's] substantial progress," presumably because respondent had just become a named party three weeks earlier.

¶ 6 On February 5, 2013, the trial court conducted another permanency review hearing. The service reports that had been prepared by Lutheran Social Services and the Department of Children and Family Services (DCFS) for the hearing stated that respondent now claimed to live in Rockford. The reporting worker did not believe respondent, thinking that he lived in Beloit, with his fiancé and her two children. Respondent told the worker that he would like to be registered for services in Beloit, and he would like transportation to Freeport to visit Noah. Transportation services were ultimately granted. Also, respondent began to participate in parenting classes. In its order, the court found that respondent *had* made "substantial progress" toward the goal of return home.

¶ 7 On July 9, 2013, the trial court conducted the next permanency review hearing. The service reports revealed more information about respondent's past. Respondent was serving a three-year probation term for possession of drugs. Through this probation, he successfully completed TASC. He also cooperated with scheduled drug testing. Respondent reported having bipolar disorder and ADHD, and he stated that his physician is monitoring his medications and treatment. However, he provided no verification. Therefore, as to this instant family case, service providers referred respondent to a psychologist to monitor medications and treatment. Respondent missed visits with Noah. He struggled to attend for various reasons, including failing to call to confirm, being sick, or transportation issues. When respondent attended, he appeared to have difficulties engaging Noah in play. On the positive side, however, respondent

completed one parenting class and started another. He also completed an anger management class through Kingdom Builders Ministry. The court found that respondent *had* made "substantial progress" toward the goal of return home.

¶ 8 On August 31, 2013, in what would become a turning point in this case, respondent had an altercation with his new wife. Allegedly, he acted violently, hitting and choking her. The State of Wisconsin criminally charged him with battery and disorderly conduct. He pleaded not guilty, and the criminal case remained pending throughout the balance of this family case.

¶ 9 On January 7, 2014, the trial court conducted the next scheduled permanency review hearing. The service reports that had been prepared for the hearing stated that Andrea, the mother, had expressed interest in allowing the foster parents to adopt Noah. She understood that she had not provided for Noah and that Noah had grown to love his foster parents. Respondent, in turn, had gained employment at a factory in Wisconsin. However, he continued to have trouble attending visitation and applying what he learned in parenting class. He had trouble with simple tasks like changing diapers. Service providers had received reports from relatives that respondent continued to struggle with anger management issues, and, so, they referred respondent to additional anger management services. The court found that respondent had *not* made "substantial progress" for this period, but it maintained the goal of return home.

¶ 10 On May 27 and June 10, 2014, the trial court, Judge James Hauser presiding, conducted the next permanency review hearing. The service reports stated that Andrea signed a specified consent for the adoption of Noah by his longstanding foster parents. Lutheran Social Services worker Crystal Imboden-McRae testified that she referred respondent to a domestic violence counselor as early as October 2013. However, respondent did not act on that referral. He did not see why his dispute with his wife had anything to do with the custody of his son. Respondent did

not go to domestic violence counseling until April 2014, six months later, when he was ordered to do so by the Wisconsin criminal courts. The Wisconsin counselor informed Imboden-McRae that, although respondent had completed a portion of the program, he continued to see himself as a victim and did not take responsibility for his actions. He reported: "[respondent] has admitted that he has become angry and thrown things, broken items, and screamed at his wife, but he downplays these actions and blames his wife for provoking things."

¶ 11 Imboden-McRae also testified that respondent did not act upon the psychological referral that she provided for him five months earlier. Respondent told her that he did, but, when Imboden-McRae called the provider to confirm, the provider told her that he only went to an intake appointment and did not follow through with further treatment. (Respondent signed a release whereby providers were free to discuss his medical treatment.)

¶ 12 Imboden-McRae stated that respondent was not ready to be alone with Noah. He had trouble applying what he had learned in parenting classes. He needed to be reminded to chop up food in small pieces. However, these care-giving issues were not Imboden-McRae's biggest concern. Rather, she supported a retraction of the return-home goal due to respondent's anger problems and his refusal to comply with counseling referrals.

¶ 13 Respondent testified that he had completed two parenting classes. These classes taught him to teach, listen, and be responsible. He also successfully completed his three-year probation term for drug possession. He explained that he did not take the anger management classes because he was on a waiting list. He disagreed that he did not follow through on the psychological referrals, stating, contrary to the information provided to Imboden-McRae, that, after meeting with the physician on one occasion, the physician gave him a six-month supply of medication for bipolar disorder, ADHD, and depression.

¶ 14 After hearing the evidence, the trial court determined that respondent again had made no "substantial progress." The court changed the goal from return home to substitute care pending a termination ruling.

¶ 15 As a result of the stated goal change, on August 13, 2014, the State petitioned to terminate parental rights. In it, it alleged one count of unfitness:

> "He has failed to make reasonable efforts to correct the conditions that were the basis for the removal of the child from him or to make reasonable progress toward the return of the child to him *within nine (9) months after an adjudication of neglect[]* or abused minor under Section 2-3 of the Illinois Juvenile Court Act of 1987." (Emphasis added.)

As is relevant to this appeal, both parties now agree that the petition's language is problematic. Respondent did not become involved in this case until nearly nine months *after* the adjudication of neglect, and, even then, the trial court initially ruled favorably as to his progress. Rather, respondent's cooperation lessened as the case proceeded. Therefore, the initial nine-month period cited in the petition is not the correct assessment period.

¶ 16 On December 2, 2014, the trial court conducted the fitness hearing. It accepted the records from all prior proceedings. Respondent did not attend the hearing. His attorney reported that respondent called him to state that he could not attend the hearing due to a work obligation. In addition to accepting the evidence adduced at the prior proceedings, which was largely repeated at the termination proceedings, the court heard Lutheran Social Services provider Tina Green testify that she worked with respondent from September 2012 to August 2013. During that time, respondent attended only 30% of his scheduled weekly hour-long visits. Green acknowledged that respondent had transportation issues. However, at least in the beginning,

service providers drove respondent to the appointments. He did not always call to confirm the appointment. Later, respondent's wife was supposed to transport him, and the service providers gave him gas cards.

¶ 17 Imboden-McRae then testified that, during her time with respondent, from August 2013 to July 2014, respondent attended approximately 50% of his scheduled visits. She viewed respondent's wife's reluctance to help as an impediment to attendance. As the case went on, respondent failed to keep her updated as to his address. In May or June, 2013, she arrived at his listed address for a visit, and those in the home told her that he no longer lived there. As stated in the previous permanency hearing, he never followed up with orders to meet consistently with the psychologist. Additionally, in July 2014, the Wisconsin system dropped him from domestic violence counseling due to lack of attendance.

¶ 18 Lutheran Social Service worker Mary Seehaver testified that she was assigned to respondent's case from July 2014 to the present. She had minimal contact with respondent. She tried to communicate with respondent through letters. She thrice physically went to respondent's various listed addresses, but he was not present. She had not seen respondent since an October 2014 status hearing at the courthouse.

¶ 19 In closing, the State argued that, even overlooking respondent's initial noninvolvement due to lack of paternity confirmation and even giving respondent credit for his initial cooperation in parenting classes, respondent failed to cooperate with services during the "just under two[-]year" period immediately preceding the termination hearing (*i.e.*, at least August 2013 to December 2014).

¶ 20 In response, respondent's attorney recapped respondent's positive involvement early on, such as completion of the parenting classes and completion of his probation term. He was

"perplexed" by Green's testimony as to poor attendance, as (that degree of) poor attendance was not contemporaneously reported during the earlier stages of the case. He did concede, however, that "had this case beg[u]n when it did [*i.e.*, when respondent first acknowledged paternity], and this hearing [had been] held nine months after that, maybe [respondent] would have a better argument than we do today."

¶ 21 The trial court agreed, orally pronouncing:

> "[I]t doesn't seem like the evidence is really in conflict. *This gentlemen made some progress* but failed in the majority of the tasks he was asked to perform. [Looking at the evidence most favorable to respondent], I believe that the State has still carried the burden in proving that [respondent] has not corrected the conditions or the basis for the removal—or make reasonable progress toward the return of the child to him within *a* nine-month period, since this case has been in existence. So I do find that he is an unfit parent." (Emphases added.)

In its very next sentence, the court stated: "I assume you'll have a written order to that effect?"

¶ 22 In the written order, it appears that the State simply cut and pasted the grounds for unfitness from its problematic petition to terminate:

> "He has failed to make reasonable efforts to correct the conditions that were the basis for removal of the child from him or to make reasonable progress toward the return of the child to him *within nine (9) months after an adjudication of neglect* or abused minor under Section 2-3 of the Illinois Juvenile Court Act of 1987." (Emphasis added.)

¶ 23 At the best-interest hearing, the trial court determined that it was in Noah's best interest to terminate respondent's parental rights. Noah's foster mother, with whom he has lived his entire life, testified that she would adopt Noah. Though she understood that she was not legally

obligated to do so, she planned to allow respondent and Andrea to remain in Noah's life through letters and pictures. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, respondent raises multiple arguments. However, in each of these arguments, he essentially complains that both the petition and the written order contained problematic language that did not correctly reflect the procedural history of the case. Again, both the petition and the written order named the nine-month period immediately following the adjudication of neglect. However, respondent did not become involved in this case until the close of that period. During the next nine-month period, from October 8, 2012, to July 8, 2013, the trial court found respondent to have made "substantial progress." It was not until the *third* nine-month period, from July 9, 2013, to April 9, 2014, that respondent's compliance dropped. Respondent contends that, because the initial nine-month period cited in the petition and written order was not the correct assessment period: (1) his hearing was unfair, because the evidence was not presented in a manner that expressly broke down nine-month period by nine-month period; and (2) the trial court did not utilize the proper fitness standard.

¶ 26 We agree with respondent that the initial nine-month period cited in the petition and the written order was not the correct assessment period, and we in no way condone this mistake. The State must carefully review its pleadings and drafted orders to ensure that they comply with the procedural history of the case. However, in this case, we are confident that the State's errors did not cause respondent to receive an unfair hearing or cause the trial court to utilize an improper standard.

¶ 27 A. Fairness of the Hearing

¶ 28 In evaluating whether the flawed petition caused respondent to receive an unfair fitness hearing, we look to *In re S.L.*, 2014 IL 115424, where the supreme court considered a similar issue. In *In re S.L.*, the State alleged in its pleading that the mother did not make reasonable progress during *any* of the nine month periods at issue. It did not provide the mother with separate notice, as required by statute, as to which of the four nine-month period or periods were the subject of the termination proceeding. *Id.* ¶ 18 (citing 750 ILCS 50/1(D)(m)(iii) (West 2010)). Nevertheless, the mother did not object, and, at the hearing, the State proceeded as though each of the nine-month periods were relevant. It called the service workers to the stand, asking questions about the mother's compliance. Likewise, when the mother testified, her counsel elicited testimony on points that encompassed all of the nine-month periods. *Id.* ¶ 10.

¶ 29 On appeal, the *S.L.* mother argued that the finding of unfitness must be reversed, because the State failed to notify her as to which of the nine-month period(s) provided the basis for the termination. She contended that, although she failed to object at trial, the defect in the pleadings amounted to a failure to plead a cause of action, and that defect cannot be forfeited. The supreme court disagreed. The defect in the pleadings did *not* amount to a failure to state a cause of action. *Id.* ¶ 22. The specific nine-month period is not an element of the cause of action. Rather, it simply provides notice to a given respondent so that he or she can prepare a defense. *Id.* The court ruled that the mother forfeited her challenge to the pleadings, because she failed to raise the issue in the trial court, when the problem could have been remedied. *Id.* ¶ 27.

¶ 30 Moreover, the court noted that the mother had not been prejudiced by the State's defective pleading. *Id.* ¶ 26. Although the State did not specify in a separate notice pleading, or at the hearing, which periods formed the basis for its allegations of unfitness, "it [was] apparent from the record that the parties proceeded as though all four nine-month periods were relevant."

Id. ¶ 24. The case workers testified as to events that spanned all four time periods (although the evidence was not broken down time period by time period). *Id*. ¶ 25. Likewise, the mother defended against all four time periods. *Id*.

¶ 31 Here, the pleading at issue was arguably more flawed than the one in *In re S.L*. Not only did the State fail to notify respondent as to the relevant 9-month period, but it named the one period that was obviously incorrect. However, respondent failed to object at trial when the error could have been remedied. Because the error was not so egregious that it resulted in a failure to state a cause of action, respondent procedurally defaulted on any challenge to the pleadings or notice of the 9-month period. We note that respondent appears to concede that he defaulted on any challenge to the pleadings.

¶ 32 Moreover, as in *In re S.L*., the error in the pleadings did not result in prejudice to respondent. The State proceeded through all relevant time periods, and respondent was given the opportunity to defend against all relevant time periods.

¶ 33 Respondent complains that the State did not segment the evidence by time period, but this does not matter. The evidence in *In re S.L*. was not broken down time period by time period, and the supreme court did not find that problematic. *Id*. ¶ 25. Respondent's complaint that some of the evidence covered periods *exceeding* nine months is not compelling. Clearly, if a respondent failed to comply with directives for over nine months, he failed to comply for a minimum of nine months. In any case, as in the facts of *S.L*. and the nature of its proceedings, service plans are fluid and may span across several evaluation periods. For example, a given counseling program may span across the end of one nine-month period and the beginning of another. It would be unrealistic to expect each and every thread of respondent's service plan and compliance therewith to fit neatly within one nine-month frame or another. Rather, the court

must do its best to evaluate the events of a given nine-month period in the context of the entire case.

¶ 34 B. Proper Fitness Standard

¶ 35 In evaluating whether the trial court utilized the proper fitness standard, we look to the court's oral pronouncement. Where, as here, the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls. *In re William H.*, 407 Ill. App. 3d 858, 866 (2011); see also *In re J.A.M.*, 2014 IL App (2d) 140493-U, ¶ 34 (the flawed written order happened to be drafted by the attorney, which helped to explain the inconsistency between the court's oral pronouncement and the written order).

¶ 36 In contrast with the written order, the trial court's oral pronouncement fits with the procedural history of the case. Here, the court orally pronounced:

> "[I]t doesn't seem like the evidence is really in conflict. *This gentlemen made some progress* but failed in the majority of the tasks he was asked to perform. [Looking at the evidence most favorable to respondent], I believe that the State has still carried the burden in proving that [respondent] has not corrected the conditions or the basis for the removal—or make reasonable progress toward the return of the child to him within *a* nine-month period, since this case has been in existence." (Emphases added.)

Viewing this pronouncement in the context of the evidence and the argument that immediately proceeded it, we take the court's ruling to mean that respondent initially made progress. Then, in a *later* nine-month period, which occurred at some time "since this case has been in existence," respondent failed to make reasonable progress toward the return of the child. In the context of this case, the later nine-month period to which the court must be referring is the third nine-month period (beginning in July 2013 and continuing into the first portion of the fourth nine-month

period). This assessment of the trial court's statement also makes sense as a response to the parties' closing arguments. Again, in its closing, the State noted that, even overlooking respondent's initial noninvolvement due to lack of paternity confirmation and even giving respondent credit for his initial cooperation in parenting classes, respondent failed to cooperate with services during the "just under two[-]year" period immediately preceding the termination hearing (*i.e.*, at least August 2013 to December 2014). Likewise, respondent's attorney conceded that "had this case beg[u]n when it did [*i.e.*, when respondent first acknowledged paternity], and this hearing [had been] held nine months after that, maybe [respondent] would have a better argument than we do today." Therefore, the court's oral pronouncement correctly acknowledged both respondent's initial progress and his subsequent lack of compliance.

¶ 37 Looking to the oral pronouncement in this case, we are confident that the trial court utilized the correct legal standard in finding respondent unfit. "Although section 1(D) of the Adoption Act sets forth numerous grounds under which a parent may be deemed "unfit," any *one* ground, properly proven, is sufficient to enter a finding of unfitness." *In re C.W.*, 199 Ill. 2d 198, 210 (2002) (emphasis added, discussing 750 ILCS 50/1(D) (now West 2014)). Although the State charged respondent with failure to make reasonable efforts *and* failure to make reasonable progress, we focus our analysis on the single ground of reasonable progress.

¶ 38 Section 50/1(D)(m)(ii) of the Adoption Act states that a parent may be found unfit where he or she fails "to make reasonable progress toward the return of the child to the parent during any 9-month period following the adjudication of neglect[] ***." 750 ILCS 50/1(D)(m)(ii) (West 2014). Reasonable progress is judged by an objective standard based upon the amount of progress made as compared to the conditions existing at the time custody was taken from the parent. *In re Daphne E.*, 368 Ill. App. 3d 1052, 1067 (2006). Reasonable progress exists when

the court finds that it will be able to return the child to the parent's custody in the near future. *Id*. At a minimum, however, reasonable progress requires measurable or demonstrable movement toward the goal of reunification. *Id*. In determining whether there has been measureable movement, the court considers the condition that gave rise to the removal, as well as later discovered conditions that would prevent return, and, with those conditions in mind, looks to the parent's compliance with service plans and court directives. *Id*. We will reverse a trial court's finding of unfitness based on a failure to make reasonable progress only where it is against the manifest weight of the evidence. *Id*. at 1064.

¶ 39 Here, the evidence showed that, as the case went on, respondent regressed rather than progressed toward the return home of his child. Respondent did not follow through on orders to receive domestic violence counseling and psychological treatment. He did not provide accurate contact information to service providers, and he had a low attendance rate for visits. He never progressed to unsupervised visitation. There was simply no indication that respondent would be ready to accept a child into his care in the near future.

¶ 40 For these reasons, the evidence certainly supports the trial court's finding that respondent failed to make reasonable progress toward the return home of his child in the 9-months-plus immediately preceding the fitness hearing. Because any one ground is sufficient to enter a finding of unfitness, we do not repeat our analysis as to respondent's reasonable efforts. Additionally, given our ruling, we do not entertain the State's assertion that respondent should have been more proactive in ascertaining paternity and, therefore, failed to make reasonable progress during the initial nine-month period as well. On that point, at least, we agree with respondent that the initial nine-month period was not the reason the State sought, nor the reason the trial court found, unfitness.

¶ 41 After reading through the entire record, it is obvious that the trial court found respondent unfit based on his lack of reasonable progress during the later nine-month periods of this case. We see no need to order a correction to the trial court's written order where this appellate order clarifies that the trial court's oral pronouncement controls. We affirm the trial court's finding of unfitness based on respondent's failure to make reasonable progress toward the return home of his child during the later nine-month periods of this case.

¶ 42 III. CONCLUSION

¶ 43 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 44 Affirmed.