2015 IL App (2d) 150308-U
No. 2-15-0308
Order filed September 15, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re KEJUAN M., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	
	)	
	)	No. 14-JA-68
	)	
(The People of the State of Illinois, Petitioner-Appellee, v. Timothy W., Respondent-Appellant.)	)	Honorable
	)	Francis Martinez
	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

ORDER

Held: In a guardianship and custody proceeding under the Juvenile Court Act the trial court's finding that respondent was currently unable to care for his son was not against the manifest weight of the evidence when the evidence presented at the dispositional hearing overwhelmingly established that respondent failed to maintain contact with DCFS' contracting agency or maintain contact with his son throughout a majority of the proceedings. Therefore, the court's decision to place guardianship and custody of the child with DCFS was not an abuse of discretion.

¶ 1 Respondent Timothy Wainwright appeals from the order of the trial court granting guardianship and custody of his son, Kejuan, to the Department of Children and Family Services (DCFS). On appeal, respondent argues that the trial court's finding that he was unable to care

for Kejuan was against the manifest weight of the evidence and its decision to place Kejuan with DCFS was an abuse of discretion. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 The record reflects that on December 19, 2013, DCFS received a report that Kejuan's mother, Katrina M., and her paramour, Michael Dean, engaged in a verbal argument which allegedly led to Dean slapping Katrina several times in the face and choking her until she could not breathe. Kejuan's eight-month-old sister was in a bassinette in the room when the altercation occurred. Dean was arrested for domestic battery and taken into custody. The police had previously received reports of domestic violence between Katrina and Dean in March, April, July, August and September 2013. On February 13, 2014, a DCFS investigator made an unannounced visit to the home and found that Dean had moved back into the residence. DCFS then turned the matter over to the State's Attorney's office because of concerns with Katrina's ability to adequately parent Kejuan and his siblings.

¶ 4 On February 18, 2014, the State filed a one count neglect petition alleging that seven-year-old Kejuan was a neglected minor. Specifically, the State alleged Katrina and Dean had engaged in domestic violence in Kejuan's presence, thereby placing him at risk of harm in violation of section 2-3(1) of the Juvenile Court Act of 1987 (Act). 705 ILCS 405/2-3(1) (West 2014). That day the trial court granted temporary custody of Kejuan to DCFS. Kejuan and his siblings were initially placed with his sister's paternal grandmother, but they were all later moved together to the home of their maternal aunt.

¶ 5 On February 27, 2014, a shelter care hearing was held. The hearing proceeded on the single issue of whether there was an urgent and immediate necessity to keep Kejuan in the temporary custody of DCFS.

¶ 6 At the hearing, Alyshia Kinas, a child protection specialist from DCFS, testified for the State. Kinas said that DCFS had concerns with sending Kejuan home with respondent. Specifically, respondent had an extensive criminal history. He was currently on parole and had only been released from prison a few months before in October 2013 after serving two years in prison. She did not know the exact number of respondent's convictions, but she knew that he had been arrested over 20 times and that he had convictions for burglary and weapons offenses. Respondent had also been previously involved with the Gangster Disciples. Kinas said her other concern was that although respondent told her he had been regularly seeing his son, at the time of the hearing she did not know enough about their relationship, especially because Katrina told Kinas that respondent had not been having any contact with Kejuan.

¶ 7 On cross-examination by the guardian *ad litem* (GAL) Kinas said that Kejuan had never resided with respondent and it was her understanding that there had never been an order of visitation set up for him to visit Kejuan. Respondent was married but she did not know how long he had been married. On cross-examination by respondent's counsel Kinas testified that she had visited respondent's home. It was a two-level home and respondent and his wife had their own bedroom. Three children resided in the home. It was clean, the smoke detectors appeared to be working and she did not see any visible safety hazards.

¶ 8 The trial court heard the parties' arguments and then ruled that the temporary orders that had already been put in place would continue, except that it would give DCFS the discretion to place Kejuan with respondent assuming he cooperated with DCFS and satisfied the concerns that both it and DCFS had about him.

¶ 9 A report to the court dated April 23, 2014, from Children's Home + Aid Society of Illinois (CHASI)[1] indicated that respondent completed an Integrated Assessment on March 11, 2014. As a result of the assessment respondent was recommended for the following services: monthly contact with CHASI, individual counseling, family counseling when clinically appropriate and home visits. At the time of the April report respondent had maintained contact with the CHASI worker and stated that he would participate in services. With regard to Kejuan's current situation, CHASI caseworker Meliza Lester reported that Kejuan was doing well in foster care with a relative but that he would prefer to live with his father instead of his current placement.

¶ 10 A June 26, 2014, report from Lester indicated that respondent visited with Kejuan on Sundays at the foster parent's home for 3 hours. Although he requested unsupervised, overnight weekend visits with Kejuan Lester did not approve visits the because respondent had not started counseling as required by CHASI due to his work schedule, which was reportedly from 7 a.m. to 7 p.m. Monday through Friday. Lester also noted that respondent had a wife, two sons, and a step-daughter that lived with him in his home.

¶ 11 A report to the court dated July 14, 2014 from CHASI caseworker Carissa Whaley indicated that respondent had not been maintaining contact with the agency. Whaley reported that she sent respondent a certified letter on July 9, 2014, and told him that she needed to discuss information about Kejuan with him. Whaley asked respondent to get into contact with her, to provide her with a working contact number, and to stay in consistent contact with the agency. Respondent did not contact Whaley or the agency.

[1] CHASI is an agency that contracts with DCFS to provide care management services.

¶ 12 On July 28, 2014, the trial court entered an order of adjudication finding Kejuan neglected as to count one in the State's neglect petition. The case was scheduled for a dispositional hearing on September 10, 2014. The hearing was continued several times until March 25, 2015.

¶ 13 In the interim, Whaley filed another report on August 27, 2014. Again, the caseworker noted that respondent had not been in contact with the agency. Whaley sent another certified letter to respondent on August 5, 2014, asking him to get in contact with the agency. Whaley again reiterated that she had information about Kejuan that needed to be discussed. As of the date of the report respondent had not contacted CHASI.

¶ 14 Whaley filed another report on October 7, 2014. In it, the caseworker reported that respondent contacted her on September 19, 2014, and told her that someone had been tampering with his mail so he had not received CHASI's letters. Respondent gave the caseworker his address and an updated phone number where he could be reached. Respondent told Whaley that he could not visit with Kejuan during the week due to his work schedule. After respondent contacted CHASI she put in a request for visits to begin between respondent and Kejuan. However, after September 19, 2014, Whaley did not hear from respondent again. At the time the report was filed respondent was not currently engaged in any services.

¶ 15 In an addendum to the October 7, 2014, report Whaley noted that visitation between respondent and Kejuan began on October 28, 2014, and visits were set up on a weekly basis for one hour per week. Respondent did not cancel or show up to his visit with Kejuan on November 11 or November 18, 2014. Whaley had concerns regarding respondent's inconsistency in visiting Kejuan and its impact on the child.

¶ 16 DCFS conducted an administrative case review in February 2015 and rated respondent's progress as unsatisfactory for his failure to maintain consistent contact with the agency.

¶ 17 On March 25, 2015, the dispositional hearing took place. The State indicated that it was standing on DCFS's permanency report. In the report, DCFS noted that respondent started having consistent contact with CHASI in December 2014 and he had maintained that contact to the present. However, respondent had minimal contact with Kejuan or CHASI during a majority of the review period from August to December 2014. Attempts had been made to engage respondent, but he did not appear willing to participate in this case. Although visits had been set up on October 28, 2014, in November 2014 no visits were held because respondent had not confirmed the visitations. He did not show up for one visit in December and he cancelled a visit during the month of February. During visitations respondent and Kejuan interacted appropriately with each other.

¶ 18 In the report DCFS also indicated that respondent did not complete signing consent forms to engage in counseling until February 13, 2015. At that time, CHASI completed the counseling referral for respondent. DCFS noted that due to respondent's minimal communication with CHASI family counseling had not been deemed appropriate.

¶ 19 Respondent called Meghan Jamison, a CHASI caseworker, to testify. Jamison said that she had taken over this case in January 2015. Respondent had been asked to engage in individual, family and possibly couples' counseling, and he currently was in individual counseling. Visitations went well at respondent's home and Kejuan was able to interact with the rest of the family during those times. Respondent interacted well with Kejuan, for example, he helped him with his homework. When asked if there was any evidence that she knew of to suggest that respondent was unfit, unwilling or unable to care for Kejuan, Jamison replied, "no."

However, she said respondent was not very involved with the case at the beginning and he had just recently started to get involved with the case. A "minor" reason Jamison might think respondent was unfit, unwilling or unable to parent Kejuan was that since he had just started counseling she was unable to see a counseling report to see how that was progressing. When asked what about his late engagement in services made him unfit, unwilling or unable to care for Kejuan, Jamison responded, "[j]ust because he did not have a relationship with Kejuan at the beginning, and so it's starting to build that relationship back up with Kejuan and his family." When pressed by respondent's counsel again to clarify respondent's fitness, willingness and ability to care for Kejuan as of the date of the dispositional hearing, Jamison said that respondent was fit, willing, and able to parent the child.

¶ 20 On cross-examination by the State Jamison said that respondent had only been in counseling a few weeks because it took a couple weeks to set up sessions after a referral had been made and a referral is only made after the consent forms are signed. Jamison noted that old consents signed by respondent had been in their file, but since they were expiring soon she wanted to have respondent re-sign consents, which he did in February 2015. Respondent currently had one hour of supervised visitation with Kejuan per week. CHASI currently recommended that guardianship and custody of Kejuan remain with DCFS because it wanted to see how the services were going and how things were going to progress between respondent and Kejuan because respondent had only been involved in services for a very short time.

¶ 21 On cross-examination by the GAL, Jamison said it was DCFS's intention to keep the children together because they had been together for their entire lives. Removing Kejuan from his siblings would be detrimental to him. For example, Kejuan's older brother had been working with him to help him lose weight and it had been successful. Also, Kejuan had been having

some behavioral issues and leaving his siblings right now would make those behavioral issues much worse.

¶ 22 Jamison testified that before coming into DCFS care Kejuan had been having occasional overnight visitations with respondent. As far as Jamison knew those visits went well. There was no reason to prevent those overnight visits from occurring again, and Katrina told Jamison that if Kejuan were returned to her she would be willing to allow respondent to see Kejuan on a regular basis. It was DCFS's intention to place Kejuan and his siblings with Katrina sometime that month.

¶ 23 Respondent testified that he had been employed at Chrysler on an "on call" basis for the last six or seven months. He had been working consistently the last couple of weeks. He did not remember missing a visit with Kejuan in November 2014, and any visits that he missed were because he had to work. When he missed those visits he called to notify CHASI. He missed a visit in December 2014 because he had a 12-hour work shift and he wanted to get as much overtime as he could. He was married and had two other children living with him. After CHASI referred him for counseling in February 2015 it took two or three weeks before he had an assessment with the counseling agency. At the time of the dispositional hearing he had only had one counseling session.

¶ 24 Respondent testified that his wife, Tonya Wainwright, was a school bus driver and that she worked 40 hours per week. For the past four weeks he had worked between 20 and 40 hours per week. He could not think of a reason why Kejuan could not live with him right now. He wanted Kejuan to live with him and he could provide financially for Kejuan. If Kejuan needed any services he would be able to arrange for transportation for him. When he and Kejuan are

together he helps Kejuan with his homework. They also play games and cook together. If Kejuan lived with him he would have his own bedroom with his own bed and dresser.

¶ 25 On cross-examination by the State respondent admitted that he pled guilty to burglary in 2011 and he was sentenced to four years in prison. When questioned about the answer he gave on direct examination that he called CHASI every time he missed a visit, respondent said that he could not definitively say that he called CHASI because most of the time he was at work, however, he tried to call every time. He may not have called CHASI every time. He did not recall missing every visit with Kejuan in November.

¶ 26 On cross-examination by the GAL, respondent noted that the two children who live with him are 7 and 13 years old and he and his wife Tonya were their biological parents. He married Tonya in 2008. He had 11 children in total. Before this case began he did not have custody of Kejuan and he did not seek custody of him. Prior to his 2011 burglary conviction he had a number of other criminal charges and some of them were felonies.

¶ 27 The trial court then asked respondent whether he ever had any trouble exercising visitation with Kejuan before this case began. Respondent said that he never had any problems with visitation and that Katrina was a good mother. When asked about visitation with Kejuan while in prison, respondent said that he did not see Kejuan for the two years that he was in prison, but he talked to him over the telephone when his mother watched him.

¶ 28 Tonya Wainwright testified that she was a school bus driver and she also worked part-time at a gas station. If Kejuan were to be placed with respondent she would be able to take care of him and there would be nothing preventing Kejuan from having a normal placement in their home. On cross-examination by the State, Tonya said she only had one visit with Kejuan because when he visits their house she is working.

¶ 29 The State argued it was clear that respondent's involvement in this case was minimal up until the past few months. He was not maintaining consistent contact with CHASI and he did not have any visits at all for the entire month of November 2014. Even when he decided to re-engage with CHASI he still missed one visit in December 2014. Because of his inconsistency CHASI could not refer him for counseling until February 2015, and he had only one counseling session so far. The other services that he was supposed to complete have not started since Kejuan had just begun individual counseling. The State argued that although respondent may believe that he wanted Kejuan in his care, his actions did not demonstrate that desire. It was good that respondent had lately become involved, but the court should not place Kejuan with respondent based upon two months of consistent contact and one counseling session. That was simply not enough evidence that respondent was a fit parent at that time. The State asked the court to grant guardianship and custody to DCFS. The State argued that it was in Kejuan's best interest to be placed with DCFS because Kejuan was currently placed with his siblings and he was doing well there, and that CHASI was looking at placing all of the siblings with Katrina very soon. The State concluded by arguing that it did not think it was in Kejuan's best interest to be placed in respondent's care.

¶ 30 Respondent's counsel argued that the State appeared to be shifting the burden to respondent to show that he was not unfit, unwilling or unable to parent Kejuan. Instead, counsel contended, the burden rests with the State to prove the opposite. Counsel acknowledged that the parties were in court for the best interest of Kejuan, but in order for guardianship and custody to be placed with anyone other than the natural parent, there had to be a finding of unfitness, unwillingness and inability to parent. A finding on one of those grounds would have to be made before the court should look to other factors that would weigh in favor of Kejuan remaining with

his siblings "and all the other ancillary issues that come along with placement." Finally, counsel then argued that respondent was a fit, willing and able parent to care for Kejuan.

¶ 31 Counsel for Kejuan's mother argued that the court should find respondent unable to care for Kejuan because it was in the child's best interest to be placed with his mother. The GAL argued that the Act did not require a finding of unfitness, unwillingness or inability on the part of a parent before a child could be placed in DCFS care. The only determination the court needed to make was what was in Kejuan's best interest, and it was in the child's best interest for him to remain in his current placement.

¶ 32 In response, the State said that it did not intend to shift the burden to respondent and it was aware that it was the State's burden to prove that respondent was unfit, unwilling or unable to parent Kejuan, and it was in the best interests of Kejuan, regarding custody, to remain in the custody of DCFS. Finally, the State argued that it had put on evidence that respondent was both unwilling and unable to parent Kejuan and that he had not done enough in this case to demonstrate otherwise.

¶ 33 After hearing the parties' arguments the trial court stated on the record that it did not take respondent's criminal history into account in making its decision. The court stated that it was impressed with respondent, that he had a good job, was married to a good person, and he had a family that he was taking care of, along with his wife. It referred to respondent as a good citizen, and it found that respondent had been rehabilitated.

¶ 34 The court also said that it must act in the best interest of the child and that the determination of what went into the child's best interest drove the decision as to fitness, willingness, and ability, and not the other way around. It said that respondent was not unfit or unwilling to care for Kejuan, and it specifically found respondent to be willing to care for him.

However, it said that the principal considerations in Kejuan's life were his mother and his siblings and that it would not be in Kejuan's best interest to separate the children by granting respondent guardianship. In that sense, the court found respondent unable to provide the most secure setting for Kejuan mentally, physically, and in all other respects. Accordingly, it awarded guardianship and custody of Kejuan to DCFS. However, the court did not provide a written factual basis for its findings.

¶ 35 Respondent filed a timely notice of appeal. On this court's own motion, we retained jurisdiction of this appeal and remanded this cause for the trial court to provide a written factual basis for its ruling that respondent was unable to care for Kejuan as required in section 27(1) of the Act. 705 ILCS 405/2-27(1) (West Supp 2015). We also allowed the parties to supplement their briefs on appeal to address the trial court's written findings.

¶ 36 The trial court provided its written factual findings and they were supplemented into the record on appeal. Specifically, in its order the trial court found:

> "The court previously found [respondent] unfit or unwilling or unable to properly protect or parent the respondent minor. With respect to that ruling the court finds as follows:
>
> 1. [Respondent] previously failed to maintain regular contact with the agency, Children's Home + Aid, causing a delay in counseling services;
>
> 2. [Respondent] did not maintain regular contact with the minor;
>
> 3. [Respondent] has not commenced regular family counseling having not completed individual counseling."

¶ 37 We initially note that this appeal was accelerated under Supreme Court Rule 311(a) (eff. Feb. 26, 2010). Pursuant to that rule, the appellate court must, except for good cause shown,

issue its decision in an accelerated case within 150 days of the filing of the notice of appeal. Ill. S. Ct. R. 311(a)(5) (eff. Feb. 26, 2010). Here, respondent filed his notice of appeal on March 27, 2015, and this case was due to be filed on August 24, 2015. However, our limited remand to the trial court for it to provide written findings as required under the Act, and to allow the parties to supplement their briefs and respond to those findings, caused almost a two month delay in these proceedings. We find these reasons to constitute good cause for this decision to be issued after the time frame mandated in Supreme Court Rule 311(a) (eff.Feb.26, 2010).

¶ 38 II. ANALYSIS

¶ 39 On appeal, respondent argues that the trial court's finding that he was unable to care for Kejuan was against the manifest weight of the evidence and its decision to place custody with DCFS was an abuse of discretion. In support of his argument, respondent points out that at the dispositional hearing CHASI caseworker Jamison testified that he was fit, willing and able to care for Kejuan, he had regular overnight visitations with him before this case began, he parented Kejuan appropriately during visits, and he had a suitable home and sufficient income to care for Kejuan.

¶ 40 Respondent also claims that there is an inconsistency between the trial court's oral and written findings and that the court's express written findings do not support a finding that he was unable to parent Kejuan. Finally, respondent argues that to the extent that this court finds that the trial court's oral findings support its written findings, the trial court erred because it "put the cart before the horse" when it made its determination that it was in Kejuan's best interest to place guardianship and custody with DCFS before first determining whether he was unfit, unable or unwilling to parent Kejuan.

¶ 41 Proceedings to determine guardianship and custody of a neglected minor are governed by the Act. 705 ILCS 405/1-1 *et seq*. (West 2014). Under the Act, "'to deprive a parent of custodial rights to children who have been adjudged wards of the court, a court must find that the parent is unfit or unable to care for, protect, train or discipline the children or is unwilling to do so.'" *In re Star R.*, 2014 IL App (1st) 140920, ¶ 29 (quoting *In re J.J.*, 327 Ill. App. 3d 70, 77 (2001)). However, the trial court's primary concern is the best interest of the child, and to that end, the court is vested with wide discretion. *Id*. (citing *In re Stilley*, 66 Ill.2d 515, 520 (1977)). "[A] child's best interest is superior to all other factors, including the interests of the biological parents." *In re Stilley*, 66 Ill. 2d at 520.

¶ 42 At a dispositional hearing, the State has the burden of proving that the parent is unfit, unable or unwilling to parent the child. *In re Steven K.* 373 Ill. App. 3d 7, 25 (2007). The trial court's judgment after a dispositional hearing will be reversed if its findings of fact are against the manifest weight of the evidence or if it committed an abuse of discretion by selecting an inappropriate dispositional order. *Id*. A finding is against the manifest weight of the evidence where a review of the record clearly demonstrates that the result opposite reached by the trial court would have been the proper outcome. *Id*.

¶ 43 In reviewing whether any error occurred below we must first address respondent's contention that the trial court erred because it "put the cart before the horse" when it made its determination that it was in Kejuan's best interest to place guardianship and custody with DCFS before first determining whether he was unfit, unable or unwilling to parent Kejuan. As our First District has recently held, "[if] the best interests standard can be attained only by placing the child in the custody of someone other than the natural parent, *it is unnecessary for the court to find the natural parent unfit to care for the child.*" (Emphasis in original) *In re Star R.*, 2014 IL

App (1st) 140920, ¶ 29 (quoting *In re Stilley*, 66 Ill. 2d at 520). Therefore, we reject respondent's contention that the trial court could not engage in a best interest determination until it had first found respondent unfit, unable to unwilling to parent Kejuan. Illinois law is clear that the trial court could have found that it was in Kejuan's best interest for a third party to have guardianship and custody of him without finding respondent unable to currently parent Kejuan. Nevertheless, it did find respondent unable to parent Kejuan, both orally and in writing.

¶ 44 We now turn to respondent's argument that the trial court's finding that he was unable to parent Kejuan was against the manifest weight of the evidence.

¶ 45 We agree with respondent that several factors suggesting an ability to parent Kejuan weighed in his favor here, including his stable home life and income, the fact that he had visitations with Kejuan before this case began, and that CHASI caseworker Jamison testified that he parented Kejuan appropriately during visits. Unfortunately, however, the overwhelming majority of the evidence introduced at the dispositional hearing indicated that respondent was not currently able to parent Kejuan.

¶ 46 The CHASI reports made it very clear that respondent maintained extremely inconsistent contact with this case throughout these proceedings and only began to adhere to the services he agreed to perform back in April 2014 (maintain monthly contact with CHASI, engage in individual counseling, family counseling when appropriate, and home visits) a few months before the dispositional hearing. As late as November 2014 CHASI reported that respondent failed to cancel or show up at any of his scheduled visitations during that entire month. Although respondent initially testified that he called CHASI every time he missed a visit, on cross-examination respondent said that he could not definitively say that he called CHASI because most of the time he was at work, however, he tried to call every time. That statement

alone is strong evidence that respondent was currently unable to parent Kejuan. Even though respondent may have had to work at the time of his scheduled visitation with Kejuan, he did not appear to grasp the importance of letting CHASI know that he could not visit with Kejuan. Even more important, he did not seem to understand or appreciate the impact that his failure to show up for a visit may have had on Kejuan. As CHASI caseworker Whaley noted in one of her reports, she was concerned about respondent's inconsistency in visiting Kejuan and its impact on the child.

¶ 47 We are likewise not persuaded by respondent's claim that the trial court's oral and written findings were inconsistent. In its oral findings the trial court said that respondent was fit and willing to parent Kejuan. However, it also said that it found respondent unable to parent Kejuan because it did not find him responsible under the circumstances to provide the most secure setting for the child mentally, physically, or in any other respect. The written findings that the trial court provided on limited remand, although more specific, are consistent with its oral findings. Those written finding explain *why* the court believed that respondent was not currently able to provide the most secure setting for Kejuan, *i.e.*, that he failed to maintain regular contact with CHASI, which caused a delay in counseling services, he failed to maintain regular contact with Kejuan, and that he had not started family counseling because he had not completed individual counseling. To the extent that some of the court's oral findings referred to traditional "best interest factors" (*i.e.*, whether it was best for Kejuan to live with his siblings), as we have noted, the trial court may consider the best interest of the minor in a guardianship and custody proceeding because the court's primary concern is the best interest of the child. *In re Star R.*, 2014 IL App (1st) 140920, ¶ 29. Additionally, the trial court's written findings provided a specific factual basis as to why it found respondent to be currently unable to parent Kejuan.

¶ 48 Since it is abundantly clear that an opposite result was not called for here, we find that the trial court's finding that respondent was currently unable to parent Kejuan was not against the manifest weight of the evidence and the trial court did not abuse its discretion in granting guardianship and custody of Kejuan to DCFS.

¶ 49 III. CONCLUSION

¶ 50 In sum, the trial court's finding that respondent was not currently able to parent Kejuan was not against the manifest weight of the evidence when respondent failed to maintain contact with CHASI, or his son Kejuan, for a majority of these proceedings. Therefore, the trial court did not abuse its discretion in granting guardianship and custody of Kejuan to DCFS.

¶ 51 For the following reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 52 Affirmed.