

NOTICE

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2015 IL App (4th) 150402-U

NO. 4-15-0402

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: G.L., a Minor,)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
Petitioner-Appellee,)	Champaign County
v.)	No. 15JA12
CLIFFORD LUSTER,)	
Respondent-Appellant.)	Honorable
)	John R. Kennedy,
)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The State failed to present sufficient evidence to meet its burden of establishing G.L. was neglected.

¶ 2 On April 13, 2015, the trial court found G.L. (born January 31, 2015) to be a neglected minor pursuant to section 2-3(1)(b) of the Juvenile Court Act of 1987 (Juvenile Act) (705 ILCS 405/2-3(1)(b) (West 2014)). On May 11, 2015, the court found respondent, Clifford Luster, to be dispositionally unfit. We reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 On February 3, 2015, the State filed a petition for an adjudication of neglect with regard to G.L., alleging the infant was neglected because his environment was injurious to his welfare because (1) his mother, Kayla Smith, had failed to correct the conditions which resulted

in a prior adjudication of parental unfitness with regard to G.L.'s half-sibling, S.L.; and (2) respondent exposed G.L. to substance abuse.

¶ 5 The shelter-care report filed on February 3, 2015, stated Smith gave birth to G.L. on January 31, 2015. Smith's older child, S.L., was already in foster care after Smith experienced postpartum depression following S.L.'s birth. Smith was still having supervised visits with S.L. throughout this case. According to the report, the court-appointed special advocate was concerned because Smith was not taking her psychotropic medication during her pregnancy with G.L., which increased her risk for postpartum depression. However, the report also noted Smith's caseworkers stated Smith was doing well in services. In fact, the caseworker was in favor of allowing G.L. to go home from the hospital with Smith. Smith was cooperating with play-therapy services and counseling and her drug drops had been clean. Regardless, the report still recommended the court give temporary custody of G.L. to the Department of Children and Family Services (DCFS). Smith and respondent stipulated to a temporary custody order.

¶ 6 The adjudicatory hearing in this case began on March 23, 2015. Officer Justin Age, a University of Illinois police officer, stopped respondent on October 28, 2014, for allegedly stealing a bicycle. (This was approximately three months *before* G.L. was born.) Officer Age testified he smelled alcohol on respondent. This was shortly after 2 a.m. Officer Kaleb Schroeder, with the University of Illinois, testified he, too, was involved in the stop. While searching respondent, Officer Schroeder found a black grinder, commonly used to grind marijuana. The grinder contained residue consistent with marijuana. He did not field test the substance. Although respondent was arrested, the State dropped the charges.

¶ 7 Timothy Calvin, a case manager at Cunningham Children's Home (CCH), dealt with Smith on S.L.'s case from January 15, 2014, until November 1, 2014. Smith had been

referred for psychiatric care and therapy and a substance-abuse assessment. Smith tested positive for tetrahydrocannabinol (THC) in March 2014. She completed a substance-abuse assessment and no treatment was recommended. In June 2014, Smith tested positive for THC again. She then completed another substance-abuse assessment and again no treatment was recommended. Calvin testified Smith had been under psychiatric care.

¶ 8 In May 2014, Smith informed Calvin she was seven weeks pregnant. Calvin testified Smith's doctor discontinued her psychiatric medication because of her pregnancy. Smith told Calvin she and her doctor planned for Smith to begin taking the medication again after her child was born. Calvin found this to be an appropriate plan. Smith was attending individual therapy with Carrie Winkler at CCH and was making progress with her therapy. In addition, Smith was in play therapy with S.L. to help establish a bond.

¶ 9 Calvin instructed Smith to continue with her therapy while she was pregnant. Calvin recommended, but did not require, respondent complete a substance-abuse assessment. Calvin did not require the assessment because a 2011 marijuana-possession charge involved only a misdemeanor amount. Respondent never provided an assessment to Calvin. Calvin also told respondent he would need stable housing to be a placement option for his child if the child was removed from Smith. Calvin stated Smith was making progress in her visits with S.L. both while she was on psychotropic medication and after she stopped taking it because of her pregnancy with G.L.

¶ 10 Courtney Oker, a caseworker for CCH, testified she became the case manager in S.L.'s case in December 2014. Smith continued to engage in individual therapy. Smith had no substance-abuse incidents while Oker was working on the case, which included up to the date of the adjudicatory hearing. Oker had no contact with respondent until G.L. came into care. Oker

determined respondent had been living with Smith since July 2014. Smith had not made Oker aware of this. Oker testified she had spoken with Amanda Shepard, the therapist who did "therapy" with Smith and S.L., and included a report from Shepard and Carrie Winkler with her March 18, 2015, report to the court. According to Oker, neither Shepard nor Winkler expressed any concern Smith's mental health would impact her ability to parent.

¶ 11 The State introduced a prior judgment showing respondent was convicted of misdemeanor unlawful possession of cannabis in 2011. Respondent pleaded guilty at his first appearance and was fined \$100. The trial court also took judicial notice of the prior orders entered in the case involving S.L.

¶ 12 The adjudicatory hearing resumed on April 13, 2015. Tricia Peoples, a DCFS investigator, testified DCFS received a hotline call on January 31, 2015, concerning G.L. During her investigation, she learned Smith had another open case with DCFS and learned why the other child came into care. Smith told Peoples she had started taking Celexa, an antidepressant, the day after G.L. was born. Smith had not been taking that medication during her pregnancy, which concerned Peoples. Peoples also met with respondent. Respondent denied drug- or alcohol-abuse issues. Respondent indicated a friend had given him a hydrocodone pill, which respondent took because of pain from an ankle or foot injury. Peoples testified respondent told her he often stays at Smith's home and they were "together."

¶ 13 Peoples testified Smith did not report any signs of depression when Peoples met with her on February 2, which was two days after Smith began retaking Celexa. Peoples stated she did not personally know how long a person has to take Celexa before it will begin to benefit the person. However, the benefit was not instantaneous.

¶ 14 Smith testified she did not take Celexa during the first two trimesters of her pregnancy with G.L. She started back on Celexa about a month before G.L. was born.

According to her psychiatrist, this would reduce her chance of postpartum depression, which had been an issue after she gave birth to S.L. Smith testified she had not experienced any postpartum depression after giving birth to G.L. She stated she was currently in training at Meijer for a part-time job and all of her drug drops had been negative. Further, she stated she had never seen respondent use drugs.

¶ 15 Respondent testified he was G.L.'s father and lived with Smith. He worked part-time at Fluid Events. Respondent stated he had stopped smoking marijuana around the beginning of January 2015, about a month before G.L. was born, and his drug drops since then had been negative. He admitted to taking one hydrocodone pill on February 1, 2015, for pain in his ankle. He got this pill from a friend. Respondent testified he now understood it was not appropriate to take someone else's prescription medication. He stated he did not take any other illegal drugs but acknowledged drinking alcohol on occasion.

¶ 16 The trial court ruled from the bench, finding the State proved G.L. was neglected. The trial court's written order found G.L. was neglected because his environment was injurious to his welfare. The court included handwritten findings upon which it based its determination the minor was neglected. However, a good portion of these handwritten findings are not legible, and they were not recited when the court ruled from the bench. According to the State's brief, the court relied on several factual findings, which the State lists as follows:

"(1) respondent father resides together with Kayla Smith, G.L.'s mother; (2) Smith was found unfit to exercise custody and guardianship over another child in case No. 14-JA-1; (3) Smith

requires medication for depression and previously expressed thoughts of harming the other child; (4) Smith stopped taking her medications during the majority of her pregnancy with G.L.; (5) Smith made therapy progress but failed to correct the conditions that resulted in the finding of unfitness; (6) respondent father had a previous criminal history related to marijuana possession; (7) respondent father was arrested in October 2014 with marijuana and paraphernalia in his possession; and (8) respondent father tested positive for an opiate that he obtained from a friend."

¶ 17 A dispositional hearing was held on May 11, 2015. After hearing arguments from the parties, the trial court found it in G.L.'s best interests to make G.L. a ward of the court. The court found both respondent and Smith unfit and unable to care for, protect, train, and discipline G.L. and it would be against G.L.'s best interests to be placed in either parent's custody. The court placed custody and guardianship of G.L. with DCFS.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Respondent argues the State's evidence failed to establish G.L. was neglected by either respondent or Smith. Further, according to respondent, the trial court abused its discretion in not allowing respondent to have custody of G.L.

¶ 21 We first address the trial court's neglect finding. Both counts of the State's petition alleged G.L. was neglected pursuant to section 2-3(1)(b) of the Juvenile Act (705 ILCS 405/2-3(1)(b) (West 2014)), which states, "Those who are neglected include *** any minor

under 18 years of age whose environment is injurious to his or her welfare[.]” 705 ILCS 405/2-3(1)(b) (West 2014). Our supreme court has stated:

“Generally, ‘neglect’ is defined as the ‘failure to exercise the care that circumstances justly demand.’” [Citations.]

However, this does not mean that the term ‘neglect’ is limited to a narrow definition; to the contrary, ‘neglect,’ by necessity, has a fluid meaning. As this court has previously explained,

“‘[Neglect] embraces willful as well as unintentional disregard of duty. It is not a term of fixed and measured meaning. It takes its content always from specific circumstances, and its meaning varies as the context of surrounding circumstances changes.’” [Citations.]

Similarly, the term ‘injurious environment’ has been recognized by our courts as an amorphous concept that cannot be defined with particularity. [Citations.] In general, however, the term ‘injurious environment’ has been interpreted to include ‘the breach of a parent’s duty to ensure a “safe and nurturing shelter” for his or her children.’ [Citation.]

Accordingly, cases involving allegations of neglect and adjudication of wardship are *sui generis*, and must be decided on the basis of their unique circumstances. [Citations.] This analytical principle underscores the ‘fact-driven nature of neglect

and injurious environment rulings.' [Citation.]" *In re Arthur H.*,
212 Ill. 2d 441, 463, 819 N.E.2d 734, 746-47 (2004)

¶ 22 We will not reverse a trial court's neglect finding unless the decision is against the manifest weight of the evidence, which essentially means the opposite result is clearly evident. *Id.* at 464, 819 N.E.2d at 747. However, the State must prove the allegations of neglect by a preponderance of the evidence. *Id.* at 463-64, 819 N.E.2d at 747. "In other words, the State must establish that the allegations of neglect are more probably true than not." *Id.* at 464, 819 N.E.2d at 747. The State's petition must be dismissed if the State fails to prove the allegations of neglect, abuse, or dependence by a preponderance of the evidence. *Id.*

¶ 23 A trial court's focus during an adjudicatory hearing is whether the child has been neglected. *Id.* at 465, 819 N.E.2d at 748. "The legislature made no mention in [section 1-3(1) of the Juvenile Act (705 ILCS 405/1-3(1) (West 2000)]] that during the adjudicatory stage of the proceedings the circuit court is also to determine who may be responsible for the child's neglect, and to assess the proportion of blame with respect to such individuals." *Id.*

¶ 24 In this case, the State alleged G.L. was neglected because of the actions of both Smith and respondent. Further, the trial court found G.L. was neglected because of the actions of both parents. Even though Smith is not a party to this appeal, the relevant question before us is whether the State established G.L. was neglected, regardless of whether G.L. was neglected by his mother or respondent.

¶ 25 We first address the trial court's finding regarding respondent. According to the State, the court relied on several findings of fact with regard to respondent, including his criminal history for marijuana possession (a 2011 misdemeanor), an arrest in October 2014 while in possession of marijuana residue and paraphernalia, and taking a hydrocodone pill which was

not prescribed to him. We reject the notion respondent's minimal history of petty drug offenses or the one-time use of someone else's prescription painkiller, especially when these "bad acts" were not done around a child, is sufficient to establish by a preponderance of the evidence G.L. would be in an environment injurious to his welfare if he lived with respondent.

¶ 26 G.L. was born on January 31, 2015. Respondent's misdemeanor conviction for possession of marijuana in 2011 was more than 3½ years prior to G.L.'s birth. The bicycle incident occurred more than three months prior to G.L.'s birth. The residue in the grinder was not even field tested. The petition alleged G.L. was neglected because residing with respondent exposed the minor to substance abuse. Other than the initial drug test, respondent had tested negative for illegal substances. The State failed to prove this allegation by a preponderance of the evidence.

¶ 27 However, the State's allegations of neglect concerned the actions of both respondent and Smith. If the State presented sufficient evidence to establish G.L. was neglected because of his mother's actions, we would affirm the trial court's neglect adjudication. However, the State also failed to meet its burden of proof with regard to that allegation.

¶ 28 The State's case was essentially based on the theory of anticipatory neglect. In other words, Smith would neglect G.L. because of her actions with regard to S.L. Our supreme court has stated:

"Although our appellate court has recognized the theory of anticipatory neglect for some time [citation], our courts have also held that there is no *per se* rule that the neglect of one child conclusively establishes the neglect of another child in the same household. [Citations.] Rather, 'such neglect should be measured

not only by the circumstances surrounding the sibling, but also by the care and condition of the child in question.' [Citations.]

Although section 2-18(3) of the [Juvenile] Act (705 ILCS 405/2-18(3) (West 2000)) provides that the proof of neglect of one minor 'shall be admissible evidence' on the issue of the neglect of any other minor for whom the parent is responsible [citation], we emphasize that the mere admissibility of evidence does not constitute conclusive proof of the neglect of another minor. Each case concerning the adjudication of minors, including those cases pursued under a theory of anticipatory neglect based upon the neglect of a child's sibling, must be reviewed according to its own facts. [Citations.]" (Emphasis added.) Id. at 468-69, 819 N.E.2d at 749-50.

The State's case with regard to Smith was essentially comprised of the following facts. She suffered from postpartum depression after S.L. was born; S.L. was adjudicated neglected; she had not regained custody of S.L.; and she stopped taking her antidepressant during the first two trimesters of her pregnancy with G.L.

¶ 29 While this evidence is admissible, it does not automatically establish G.L. would be in an injurious environment living with Smith. Postpartum depression is a serious condition, and a child residing with a parent with postpartum depression may very well be in an injurious environment. We do not fault the trial court for its concern, considering the potential ramifications of postpartum depression. However, the State did not introduce any evidence establishing Smith was suffering from postpartum depression after G.L.'s birth or the likelihood

Smith might again suffer from postpartum depression. The State bears the burden of establishing neglect. In this case, they failed to do so. As a result, the trial court erred in adjudicating G.L. neglected.

¶ 30 We note the record in this case paints a positive picture of Smith. She cooperated with her treatment. Although she did not take her psychotropic medication during most of her pregnancy with G.L., this was pursuant to her doctor's orders. Further, she started back on her medicine at the end of her pregnancy to reduce her chances of another episode of postpartum depression.

¶ 31 Further, at a November 2014 hearing in S.L.'s case, the caseworkers recommended Smith be allowed unsupervised visits with S.L. In addition, the CCH caseworker recommended Smith be permitted to take G.L. home from the hospital. The record also shows Smith did not try to conceal her depression after S.L.'s birth. Instead, she sought help. Finally, the record reflects Smith did not appear to be struggling to manage the symptoms of her mental health.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated above, we reverse the trial court's adjudication of G.L. as neglected and remand this case for the trial court to dismiss the State's petition for an adjudication of neglect.

¶ 34 Reversed; cause remanded with directions.