2015 IL App (5th) 140604-U

NO. 5-14-0604

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re K.C., S.Y., and J.Y., Minors	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Marion County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 11-JA-43 cons. with Nos. 11-JA-44
	)	and 11-JA-45
Lori Y. and Jason Y.,	)	
	)	Honorable Wm. Robin Todd,
Respondents-Appellants).	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Order terminating parental rights reversed and *nunc pro tunc* order finding the respondents unfit as parents reversed and cause remanded with instructions for the circuit court to conduct a new fitness hearing and, if necessary, a best-interest hearing and to make determinations based on the standards of clear and convincing evidence and a preponderance of the evidence, respectively.

¶ 2 The respondents, Lori Y. and Jason Y., each appeal the August 28, 2014, *nunc pro tunc* order of the circuit court of Marion County that found them unfit as parents and the March 14, 2014, order that terminated their parental rights. For the following reasons, we reverse the orders and remand with instructions for the circuit court to conduct a new

fitness hearing, to render a fitness decision based on clear and convincing evidence, and to conduct a new best-interest hearing, if necessary, using a preponderance of the evidence standard to render a decision as to whether the respondents' parental rights should be terminated.

¶ 3 FACTS

¶ 4 At the outset, we note that this is an expedited appeal, pursuant to Illinois Supreme Court Rule 311(a) (eff. Feb. 26, 2010). The deadline for the filing of this disposition was May 9, 2015. However, the deadline was not met for good cause. Both respondents filed motions for extension of time to file their appellant's briefs. The motions were granted, thereby resulting in delayed schedules for briefing and oral argument, which was not heard until May 7, 2015. Accordingly, the disposition was filed as soon as possible after oral argument.

¶ 5 We now turn to the facts. On November 30, 2011, adjudicatory orders were entered, finding the respondents' children were neglected by being in an environment injurious to their welfare, pursuant to section 2-3(1)(b) of the Juvenile Court Act of 1987 (705 ILCS 405/2-3(1)(b) (West 2010)). Both respondents stipulated to the adjudications. Dispositional orders were entered on January 4, 2012, granting custody and guardianship of the children to the Department of Children and Family Services. On April 16, 2013, motions were filed for a termination of parental rights and for appointment of a guardian with power to consent to adoption. Permanency orders were entered the following day, establishing permanency goals for substitute care pending determination of the termination of parental rights.

¶ 6 A fitness hearing was conducted on July 24, 2013. During closing arguments, the State made reference to the court file and respondent Lori Y.'s counsel objected to the circuit court taking judicial notice of the file after the close of evidence. The circuit court requested authority from the parties regarding the propriety of taking judicial notice of its own file without one of the parties requesting the same. The circuit court took the matter under advisement and, on October 1, 2013, entered an order finding the respondents unfit and finding it in the best interest of the children to terminate the respondents' parental rights.[1] In the order, the circuit court stated that it had taken "judicial notice of all pleadings, previous orders and reports filed in this cause, as testified to, or referred to by the parties."

¶ 7 On December 17, 2013, the circuit court, by docket entry, declared the following: "The court finds based upon the presentation by counsel that the order of termination entered by this court on 10/01/2013 is void for failure to conduct a best interest hearing."[2] On February 14, 2014, a best-interest hearing was conducted. On March 14, 2014, the

[1]The termination order was entered without the circuit court first conducting a best-interest hearing.

[2]The October 1, 2013, order was declared void in its entirety. There was no qualifying language that the order was void in part, only to the extent of the termination of the respondents' parental rights. Nor did the circuit court indicate that it was preserving the finding of unfitness in the October 1, 2013, order.

circuit court entered another order terminating the respondents' parental rights.[3] In that order, the circuit court stated that it had "taken judicial notice of all pleadings, previous orders and reports filed in these causes *** as testified to, or referred to by the parties, the recommendation of the parties and the arguments of counsel, the report of the Guardian ad litem." More than five months later, on August 28, 2014, the circuit court entered a finding of unfitness *nunc pro tunc*. In the order, the circuit court referenced the July 24, 2013, hearing,[4] upon which its findings were based. The circuit court again stated that it had taken "judicial notice of all pleadings, previous orders and reports filed in this cause as testified to or referred to by the parties." The respondents filed timely notices of appeal.

¶ 8 ANALYSIS

¶ 9 This case demonstrates the importance of proper procedure and application of the appropriate evidentiary standards in cases involving the termination of parental rights. It is well established that the right of a parent to the custody, care, and control of his or her child "is fundamental and will not be terminated lightly." *In re M.H.*, 196 Ill. 2d 356, 365 (2001). "Under the [Adoption] Act, the involuntary termination of parental rights is a

[3]The order was entered without a valid finding of unfitness in the record, as the October 1, 2013, order–that had previously found the respondents unfit–was now void, having been declared so in the December 17, 2013, docket entry.

[4]The *nunc pro tunc* order references the date of the fitness hearing as July 24, 2014, an apparent error as the hearing was actually conducted on July 24, 2013.

two-step process." *In re Andrea D.*, 342 Ill. App. 3d 233, 246 (2003). "*First*, there must be showing, based on clear and convincing evidence, that the parent is 'unfit,' as that term is defined in section 1(D) of the Adoption Act [citation]." (Emphasis added.) *Id*. "*If* the court makes this finding, it must *then* consider whether it is in the best interests of the child that parental rights be terminated." (Emphasis added.) *Id*. The best-interest hearing is to be conducted under a preponderance of the evidence standard. See *In re D.T.*, 212 Ill. 2d 347, 367 (2004).

¶ 10 The procedural history of this case is problematic in several respects. First, the orders were entered in improper sequence. The circuit court initially made a finding of unfitness in its October 1, 2013, order. However, the order was later declared void because in the same order, in addition to finding the respondents unfit, the circuit court found it in the children's best interest to terminate the respondents' parental rights without first conducting a best-interest hearing. Accordingly, the order was vacated by the circuit court in its entirety via a docket entry on December 17, 2013, that declared the October 1, 2013, order to be void.

¶ 11 The circuit court then conducted a best-interest hearing on February 14, 2014, and entered an order on March 14, 2014, terminating the respondents' parental rights. This occurred without a valid finding of unfitness on the record because the earlier order that had found the respondents unfit was now void. See *In re Andrea D.*, 342 Ill. App. 3d at 246 (finding of unfitness must be established by clear and convincing evidence before proceeding to a best-interest hearing). Over five months later, on August 28, 2014, the circuit court entered a finding of unfitness *nunc pro tunc*. This finding of unfitness

should have been established prior to the circuit court making any determinations regarding the children's best interests. See *id.*

¶ 12 We again emphasize that termination of parental rights is not taken lightly, given the fundamental rights parents have in the upbringing of their children. See *In re M.H.*, 196 Ill. 2d at 365. This reaffirms the importance of the proceedings being conducted in the proper order, as well as the findings that are made being based on evidence properly adduced at those proceedings, using the appropriate evidentiary standards at each stage of the proceedings. Accordingly, on remand, the circuit court should conduct a new fitness hearing and render its decision based on clear and convincing evidence. See *In re Andrea D.*, 342 Ill. App. 3d at 246. If necessary, a best-interest hearing should then be held and a decision rendered regarding the termination of parental rights, based on a preponderance of the evidence.

¶ 13 Besides the orders being entered out of sequence, we note that because the circuit court stated in the orders that it had taken "judicial notice of all pleadings, previous orders and reports filed in this cause, as testified to, or referred to by the parties," it is unclear upon which evidence the court based its decisions. As the appellate court established in the case of *In re J.G.*, 298 Ill. App. 3d 617, 629 (1998), "wholesale judicial notice of everything that took place prior to the unfitness hearing is unnecessary and inappropriate." Moreover, the rules of evidence apply to fitness hearings. See *id.* "If the State wishes the trial court to take judicial notice of portions of the court file in a particular unfitness proceeding, the State can make a proffer to the court of the material requested to be noticed." *Id.* "Defense counsel should then be allowed an opportunity to

object to the State's request." *Id.* "Such a procedure would serve to focus the trial court's attention on only those matters that are admissible under the rules of evidence, as well as make it easier for a reviewing court to determine what the trial court actually relied on in making its decision of unfitness." *Id.* "Above all, the trial court's decision as to whether a parent is unfit should be based only upon evidence properly admitted at the unfitness hearing." *Id.*

¶ 14 Regarding judicial notice *sua sponte*–which is what occurred in the case at bar–the Illinois Supreme Court stated in *People v. Speight* that it had previously considered Rule 201 of the Federal Rules of Evidence, which provides that " '[a] court may take judicial notice, whether requested or not' [citation], 'at any stage of the proceeding [citation]' " (153 Ill. 2d 365, 382 (1992) (quoting Fed. R. Evid. 201(c), (f))), "and decided not to adopt it as a rule of evidence in Illinois." *Id.* As this court observed in *People v. Barham*, 337 Ill. App. 3d 1121, 1129 (2003), "[i]n rare instances, a trial judge may take judicial notice, *sua sponte*, of facts, as long as the judge makes clear during the course of the trial and *not after the evidence is closed what facts and sources are included* in the *sua sponte* notice." (Emphasis added.) The *Barham* court further noted that "[i]t is well established that concepts of fair play require that all parties to an action be given a fair opportunity to confront and to rebut any evidence which might be damaging to their position." *Id.* Moreover, "[a] party has the same right to rebut evidence admitted by *sua sponte* judicial notice as it does to rebut evidence introduced by the opposing party." *Id.*

¶ 15 Applying these principles to the case at bar, the above-described procedures were not followed. The State did not make a request for the circuit court to take judicial notice

of any portion of the file, nor were respondents' counsel given the opportunity to object to or to rebut any such evidence. See *In re J.G.*, 298 Ill. App. 3d at 629. Rather, the circuit court took judicial notice of the file *sua sponte*–after the close of evidence–at the July 24, 2013, hearing and ultimately stated in its orders of October 1, 2013, and August 28, 2014, that in reaching its decision it had taken "judicial notice of all pleadings, previous orders and reports filed in this cause, as testified to, or referred to by the parties." Similarly, the circuit court's March 14, 2014, order terminating the respondents' parental rights states that the court had "taken judicial notice of all pleadings, previous orders and reports filed in these causes *** as testified to, or referred to by the parties, the recommendation of the parties and the arguments of counsel, the report of the Guardian ad litem." The *sua sponte* notice did not make clear during the course of the trial what facts and sources were included in the notice as required. See *Barham*, 337 Ill. App. 3d at 1129. Moreover, because the *sua sponte* notice was given after the close of evidence, no opportunity was available for the parties to confront and rebut any evidence that might damage their position. See *id.* Accordingly, on remand, if any judicial notice is taken, it should be done consistent with the above-stated principles.

¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, we reverse the August 28, 2014, *nunc pro tunc* order of the circuit court of Marion County that found the respondents unfit and the March 14, 2014, order that terminated their parental rights, and remand with instructions for the circuit court to conduct a new fitness hearing and to render a fitness decision based on the clear and convincing evidence standard and, if necessary, to conduct a new best-interest

hearing and to render a decision on the termination of parental rights, based on a preponderance of the evidence standard.

¶ 18 Reversed and remanded with instructions.