2016 IL App (2d) 151075-U
No. 2-15-1075
Order filed March 17, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ROSE P., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	
	)	
	)	No. 12-JA-342
	)	
	)	Honorable
(The People of the State of Illinois, Petitioner-Appellee v. Cleatis D., Respondent-Appellant).	)	Mary Linn Green, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Hutchinson concurred in the judgment.
Justice Burke dissented in the judgment.

ORDER

¶ 1 *Held*: This court granted appointed appellate counsel's motion to withdraw pursuant to *Anders v. California* and affirmed the judgment of the trial court where the appeal presented no meritorious issues and was frivolous. The State proved by clear and convincing evidence that respondent was unfit, and the court's determination to terminate respondent's parental rights was not against the manifest weight of the evidence or an abuse of discretion.

¶ 2 Respondent, Cleatis D., the father of Rose P., appeals from the trial court's orders finding him to be an unfit parent and terminating his parental rights. Appointed appellate counsel filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), alleging that there are no meritorious issues on appeal. On December 28, 2015, the clerk of the appellate court notified

respondent that within 30 days he could file additional matters that he felt were meritorious or reasons why the motion to withdraw should not be allowed. Respondent failed to file anything. Accordingly, after examining the record and counsel's brief, we grant the motion to withdraw and affirm the judgment.

¶ 3 I. BACKGROUND

¶ 4 On October 19, 2012, the Department of Children and Family Services (DCFS) took Rose, age 14, into protective custody after a neighbor heard Rose yelling for 10 minutes for respondent to stop beating her. Rose said that respondent beat her with a belt. Respondent admitted the incident and stated that Rose was being "whipped" for allowing a man to enter their home.[1] Rose had numerous bleeding welts on her buttocks and smeared blood on her underwear. Respondent was charged with aggravated domestic battery and was taken into police custody.

¶ 5 On October 23, 2012, the court entered an order giving DCFS temporary custody and guardianship with discretion to place Rose with a responsible relative or in traditional foster care. Respondent was to have visitation at the discretion of DCFS, although there was an order in the criminal case prohibiting respondent from having contact with Rose. Rose was placed with her godmother. On January 30, 2013, the court adjudicated Rose a neglected minor and continued custody with DCFS. Thereafter, DCFS removed Rose from her godmother's home and placed her in traditional foster care.

¶ 6 Respondent remained incarcerated, unable to post bond. He did not fully engage in services while he was in the county jail because they were not available, although he completed a

[1] Throughout the proceedings, Rose's mother was absent and her whereabouts were unknown.

parenting class and was attending an anger management class. At the first permanency review on July 29, 2013, the court found that respondent had made reasonable efforts toward Rose's return home within 12 months.

¶ 7 On October 7, 2013, respondent was sentenced to the Illinois Department of Corrections for two years upon his conviction of domestic battery. However, by the time of the second permanency review on February 10, 2014, he had been paroled to Chicago, Illinois. His incarceration and the lack of available services after he was paroled prevented respondent from making progress toward Rose's return home. Nevertheless, the court found that respondent had made reasonable efforts toward that goal because of his willingness to work things out between himself and Rose. The court deferred a finding on reasonable progress.

¶ 8 The court held the final permanency review on August 11, 2014. Rose, now 16, testified that respondent repeatedly beat her with an extension cord out of anger, screamed at her, and belittled her. She testified that she did not want reunification with her father but wanted his parental rights terminated. Other evidence indicated that respondent had poor attendance at domestic violence counseling. The court found that respondent had made "some efforts" but no progress and changed the goal to substitute care pending court determination on termination of parental rights.

¶ 9 On April 24, 2015, the State filed an amended motion for termination of parental rights and consent to adoption. The petition alleged in count I that respondent failed to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare. Count II alleged that respondent failed to make reasonable progress toward the return of the child to him within nine months after the adjudication that Rose was a neglected or abused minor. Count III charged respondent with failing to make reasonable progress toward the return of the child to

him during any nine-month period after the end of the initial nine-month period following the adjudication of Rose as a neglected or abused minor. Count IV alleged that respondent failed to protect Rose from conditions in her environment that were injurious to her welfare.

¶ 10 Trial on the motion to terminate parental rights commenced on April 24, 2015. Colleen Weyers, a child welfare and adoption supervisor with Lutheran Social Services (LSSI), testified for the State. She was Rose's caseworker from October 2012 until the end of October 2013. She first became acquainted with respondent when he was incarcerated in the Winnebago County jail. Weyers testified that she encouraged respondent to have the no-contact order vacated so that he could have visitation with Rose, but respondent never addressed the issue with the criminal court. Weyers was aware of two letters that respondent wrote to Rose while he was incarcerated.

¶ 11 Weyers testified that she devised a service plan for respondent. According to Weyers, he engaged in no services while she was supervising the case. Weyers testified that even though those services were not available to respondent while he was incarcerated, he still needed to complete them. Weyers acknowledged that respondent availed himself of whatever services the jail provided. During the entire time that Weyers was Rose's caseworker, she was not able to take steps to return Rose to respondent's care because of his incarceration.

¶ 12 On cross-examination, Weyers testified that respondent desired visitation and asked why it was not allowed. She also testified that respondent never asked how Rose was doing. Weyers simply gave him information. Weyers testified that respondent attended a Bible class, GED classes, parenting classes, and anger management classes while he was in the county jail.

¶ 13 The State's next witness was Pamela Miley, an LSSI child welfare specialist, who was Rose's current caseworker. She testified that respondent maintained contact with her. From July

2014 to November 2014, Miley was unable to take steps to place Rose with respondent or to allow unsupervised visitation. Miley testified that LSSI made a critical decision in June 2014 not to allow home visits, because it was deemed unsafe for Rose. Respondent had become irate at the agency and was resistant even to providing his home address. Further, according to Miley, the agency did not know who else was living with respondent.

¶ 14 When Miley became Rose's caseworker in July 2014, no visitation was scheduled because Rose declined visitation. Then Rose's godmother falsely told Rose that respondent had committed suicide and it was Rose's fault. As a result, Rose was in an anxious, depressed state.

¶ 15 In December 2014, Miley monitored a telephone conversation between respondent and Rose. Respondent recited a long prayer. He then quizzed Rose, who was developmentally delayed and in special education, on math and black history questions. When Rose told respondent that she did not care about those subjects, he became upset with her. According to Miley, the telephone visit "didn't go well." After that, respondent and Rose both refused to have telephone contact. Although respondent indicated a willingness to correspond with Rose, he wrote her only one letter. Miley testified that respondent could not accept that Rose had a learning disability and constantly complained that, as to math, Rose "didn't get it."

¶ 16 On cross-examination, Miley explained that, other than sending one letter, respondent did not correspond with Rose or send her gifts. Miley was aware that in October 2014, Rose and respondent texted each other. According to Miley, Rose would become accusatory, which caused the relationship to "blow up." Miley testified that respondent was engaged in services such as domestic violence counseling and individual psychotherapy. Miley also testified that, while LSSI was focused on trying to facilitate some kind of visitation, respondent was focused on Rose's inability to do math problems.

¶ 17 The State presented no other witnesses. The court took judicial notice of the temporary custody orders, orders of adjudication and disposition, orders entered following permanency hearings, and the neglect petition. The State then rested.

¶ 18 Lois Jones-Myles testified for respondent. She was a supportive service specialist at the Safer Foundation in Chicago and an anger management facilitator. Respondent was a client of the Safer Foundation, which helps people with criminal records find employment. Through the Safer Foundation, respondent completed an anger management program in January 2015. According to Jones-Myles, respondent had perfect attendance at the meetings, completed homework, and made progress during the sessions.

¶ 19 Joseph Thomas, a licensed counselor and therapist, testified next. LSSI referred respondent to him for individual counseling. Thomas described respondent as cooperative. Thomas was present for two telephone calls between respondent and Rose. Thomas testified that respondent was a "little anxious" and "cautious" in speaking with her. Respondent questioned Rose about her education, and she seemed uncomfortable. Thomas characterized the conversations as "strained" and "kind of awkward." According to Thomas, respondent came to understand the depth of Rose's disability.

¶ 20 On cross-examination, Thomas agreed that respondent blamed the legal system and LSSI for his estrangement from Rose. Thomas diagnosed respondent with intermittent explosive disorder. Thomas had witnessed respondent become frustrated but not explode. According to Thomas, respondent used prayer to deal with his frustrations.

¶ 21 Respondent testified next. He was incarcerated in the Winnebago County jail for a year and then was transferred to the Illinois Department of Corrections for one week before he was paroled. While he was in the county jail, respondent attended domestic violence, anger

management, and parenting classes. After he was paroled, respondent attended domestic violence classes. Through his parenting classes he learned to deal with issues instead of jumping to the "solution." Regarding visitation, respondent was told that Rose never wanted to see him again. Respondent testified that an October 2014 telephone conversation with Rose lasted eight hours. According to respondent, after that phone call, he and Rose texted each other all day, every day for the next two months. Respondent testified that, as soon as he told LSSI about his communications with Rose, the communications stopped. Respondent also said that LSSI did not give Rose the many letters he wrote her.

¶ 22 The parties stipulated to the testimony of Linda Lindberg, the supervisor of programming for the Winnebago County jail. Her testimony would detail the days and hours that the various programs that respondent stated he attended were held at the jail. Respondent rested.

¶ 23 The court ruled that the State proved the allegations in counts II, III, and IV by clear and convincing evidence and made the following factual findings leading to its determination of unfitness. Respondent admitted that he whipped Rose with a leather belt 10 or 11 times. Rose was taken to the emergency room where she was found to be bleeding from welts on her buttocks. Respondent was charged with aggravated domestic battery and pleaded guilty to domestic battery. Respondent was incarcerated from October 19, 2012, to October 7, 2013. Respondent's service providers encouraged him to have the no-contact order with Rose lifted, but he did not do it. As to count II, the first nine months after adjudication, there was no progress. As to count III, October 30, 2013, to July 30, 2014, respondent made unsatisfactory progress. Between February 28, 2014, and November 30, 2014, respondent made unsatisfactory progress.

¶ 24 The court then proceeded to a best interest hearing. The court first took judicial notice of

the evidence adduced at the unfitness hearing. Then Rose testified in chambers. Rose was 17 years of age. She was a senior in high school and was engaged in a program for which she received college credit. Her goal was to obtain a master's degree in special education.

¶ 25 Rose testified that she was living with her foster parent, whom she called Nana, and a younger foster brother. Rose was close with Nana's extended family. Rose attended a "life group" at her church, and she also attended counseling for post-traumatic stress disorder stemming from incidents with her father.

¶ 26 Rose testified that she was frightened when she lived with respondent, because he used to hit her "a lot." Respondent had been hitting her since she was three years old. According to Rose, she had previously been involved with DCFS when her father hit her and she could not sit in a chair at school. Rose also described how her father had ignored a medical problem that caused her almost to go deaf, which resulted in a speech impediment.

¶ 27 Rose testified about her telephone conversation with respondent in March 2014. She testified that respondent kept questioning her about math. She started crying, because she was not good at math and respondent was not considering her feelings. Rose testified that she and respondent texted for about a week in the fall of 2014. She told respondent that she did not want to go home. Nevertheless, he told her to tell her lawyer and the judge that she did want to go home.

¶ 28 Rose stated that she was presently frightened of respondent and did not want to see him. She testified that being surrounded by her foster family made her feel safer. She also felt empowered by being a ward of the court and talking to the judge. Rose expressed her desire to be adopted by her foster mother.

¶ 29 Saundra Johnson-Gatlin, Rose's foster mother, was the next witness. She testified that

Rose had been with her for three years. Rose had a lot of challenges at school, including dyslexia. Rose also had a problem with bed-wetting. According to Johnson-Gatlin, Rose desired to be adopted.

¶ 30 Miley testified next. She opined that, because of Rose's need for stability and security, it would be in Rose's best interest to be adopted. In Miley's further opinion, it would be important to Rose to be in a family where she felt that she belonged.

¶ 31 Respondent testified that he always wanted contact with Rose and that he sent her cards and money. According to respondent, the phone conversation in which he quizzed Rose about math "got flipped around" by Rose's counselors. In reality, according to respondent, he was simply inquiring about Rose's grades. Respondent testified that he did everything to provide for Rose growing up. He felt that the State was pushing for adoption because Johnson-Gatlin was richer than he and had a better house. Respondent testified that he was well aware of Rose's special needs. He testified that Rose's only problem with him was that he worked too much. Respondent testified that when Rose evinced a desire to talk to him, LSSI took her phone away from her. Respondent believed that LSSI did not want him to see Rose because he was "big" and "because [he was] black."

¶ 32 Miley testified again and denied respondent's allegations that LSSI had influenced Rose to have no contact with him. In response to Miley's testimony, respondent testified briefly that he was glad that Rose was placed with Johnson-Gatlin. He also testified that he knew that he would always be the "bad guy" instead of the loving father.

¶ 33 The court found that the State had proved "at least by a preponderance of [the] evidence" that it was in Rose's best interest to terminate respondent's parental rights."[2] The court found

[2] The court also found that it was in Rose's best interest to terminate the mother's parental

that Rose had been with Johnson-Gatlin for over two years and had found safety, stability, and security with her. The court further found that Rose fit into the extended foster family and was attached to them. Additionally, the court found, Rose was clear in her desire to be adopted by her foster mother.

¶ 34 Respondent filed a timely appeal.

¶ 35 II. ANALYSIS

¶ 36 In accordance with *In re Alexa J.*, 345 Ill. App. 3d 985, 988 (2003), appellate counsel has identified three potential issues. The first potential issue is whether respondent's efforts would support a finding that he made reasonable progress toward the goal of the minor's return. The second potential issue is whether respondent was deprived of due process when, as a result of a single criminal conviction of domestic battery against the minor, he was found to be an unfit parent. The third potential issue is whether the court's decision to terminate respondent's parental rights was against the minor's best interest.

¶ 37 The Juvenile Court Act of 1987 (Act) (705 ILCS 405/1-1 *et seq.* (West 2014)) provides a two-step process for the involuntary termination of parental rights. *In re Deandre D.*, 405 Ill. App. 3d 945, 952 (2010). First, the State must prove that the parent is unfit by clear and convincing evidence. *Deandre D.*, 405 Ill. App. 3d at 952. Section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2014)) lists the grounds under which a parent can be found unfit. *In re Tiffany M.*, 353 Ill. App. 3d 883, 889 (2004). Second, if the court makes a finding of unfitness, the court then considers whether it is in the best interest of the minor to terminate parental rights. *Deandre D.*, 405 Ill. App. 3d at 952. The State has the burden of proving by a preponderance of the evidence that termination is in the minor's best interest. *Deandre D.*, 405 Ill. App. 3d at 953.

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rights.

The appellate court will reverse a finding of unfitness only where it is against the manifest weight of the evidence, that is, where the opposite conclusion is clearly evident. *Deandre D.*, 405 Ill. App. 3d at 952. The reviewing court will reverse a best-interest finding only where it is against the manifest weight of the evidence or where the trial court has abused its discretion. *Deandre D.*, 405 Ill. App. 3d at 953.

¶ 38 Section 1(D)(m) of the Adoption Act contains three separate grounds, any one of which can serve as a basis for a finding of unfitness. 750 ILCS 50/1(D)(m) (West 2014). Subsection (i) deals with a parent's failure to make "reasonable efforts" to correct conditions that were the basis for the minor's removal; subsection (ii) deals with a parent's failure to make "reasonable progress" toward the return of the minor within nine months after an adjudication of neglect; subsection (iii) deals with a parent's failure to make "reasonable progress" toward the return of the minor during "any nine month period" after the initial nine-month period following the adjudication of neglect. 750 ILCS 50/1(D)(m)(i)-(iii) (West 2014).

¶ 39 In addition, section 1(D)(b) of the Adoption Act provides that a parent's failure to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare is a ground for a finding of unfitness. 750 ILCS 50/1(D)(b) (West 2014). Section 1(D)(g) provides that the failure to protect the child from conditions within his environment injurious to the child's welfare is a separate basis for a finding of unfitness. 750 ILCS 50/1(D)(g) (West 2014).

¶ 40 Here, the State alleged in count I of the amended motion to terminate parental rights that respondent failed to maintain a reasonable degree of interest, concern, or responsibility as to Rose's welfare. Count II alleged that respondent failed to make reasonable progress toward Rose's return to him within nine months after she was adjudicated a neglected minor. Count III alleged that respondent failed to make reasonable progress toward Rose's return to him during

any nine-month period after the end of the initial nine-month period following her adjudication as a neglected minor. Count IV alleged that respondent failed to protect Rose from conditions in her environment that were injurious to her welfare. The court found that the State failed to prove the allegations in count I. The court found that the State proved the allegations in counts II, III, and IV by clear and convincing evidence. The court need find a parent unfit under only one of the grounds enumerated in section 1(D) of the Adoption Act to proceed to a best interest hearing. *Deandre D.*, 405 Ill. App. 3d at 953.

¶ 41 With respect to the first potential argument, appellate counsel concedes that the record supports the court's findings with respect to respondent's lack of progress based on the fact that he was incarcerated and was objectively unable to make progress toward the goal of Rose's return. Further, counsel concedes lack of progress based on respondent's failure to grasp the depth of Rose's developmental disability.

¶ 42 While respondent made some efforts toward reunification, such as writing one letter to Rose, texting her, engaging in telephone calls, and completing services offered by the county jail, as well as programs offered by the Safer Foundation, efforts are not the same thing as progress. The legislature provided in section 50/1(m)(i) that failure by a parent to make reasonable efforts to correct the conditions that were the basis for the child's removal serves as a basis for a finding of unfitness (750 ILCS 50/1(m)(i) (West 2014)), but the legislature also provided, in a separate section, that failure to make reasonable progress was another, independent, ground for finding unfitness. 750 ILCS 50/1(m)(ii) (West 2014). Significantly, the State here alleged that respondent failed to make reasonable progress under section 50/1(m)(ii). "Reasonable progress is an objective standard measured by a benchmark encompassing the parent's compliance with the service plan and the court's directives in light of the conditions causing the removal, as well

as other conditions that would prevent the court from returning the minor to [the] parent's custody." *In re J.H.*, 2014 IL App (3d) 140185, ¶ 22. Reasonable progress requires "measurable movement" toward reunification and occurs when the court can expect to order the child returned to the parent's custody in the near future. *J.H.*, 2014 IL App (3d) 140185, ¶ 22.

¶ 43 Under an objective standard, respondent in the instant case did not make reasonable progress as to count II, because he was incarcerated and unable to comply with the service plan during the timeframe alleged, the adjudication date of January 30, 2013, to October 30, 2013. As to count III, alleging timeframes of October 30, 2013, to July 30, 2014, and/or February 28, 2014, to November 30, 2014, respondent also failed to make reasonable progress. Upon being released from prison, respondent refused to sign consents for release of information to LSSI regarding his cooperation with the terms of his parole. He also refused to disclose whether he was living with anyone. Although respondent began the recommended domestic violence services in March 2014, he did not complete them within the targeted timeframe. He also had numerous absences and was habitually tardy. Respondent began individual therapy in May 2014, but he did not complete that service within the targeted timeframe, either. Respondent was diagnosed with intermittent explosive disorder, and he still had difficulty understanding Rose's developmental disabilities. Respondent began anger management classes at the Safer Foundation in December 2014 and completed them in January 2015. However, that program occurred outside of the alleged timeframe. Furthermore, Rose was adamant that she was fearful of respondent and did not want to live with him. Based on the above, we agree with appellate counsel, that no nonfrivolous argument that respondent made reasonable progress could be made.

¶ 44 Second, counsel posits that respondent could argue that he was deprived of due process when he was not admonished in his criminal case that a conviction of domestic battery would

automatically render him an unfit parent, thus depriving him of his ability to meaningfully contest the termination proceedings. Nothing in the record supports the assumption that respondent was not admonished in the criminal case, as we have no transcripts from the criminal proceeding. Even if respondent was not so admonished, the court did not make a determination that his conviction for domestic battery rendered him *per se* unfit. The record demonstrated that respondent hit or whipped Rose repeatedly since she was three years old. Consequently, we agree with counsel that the due process argument is meritless.

¶ 45 Counsel next posits that respondent could argue that by alleging in count IV that respondent failed to protect the minor from conditions in her environment injurious to her welfare, the charge was so vague as to include every possible condition imaginable, which the State failed to prove. The State's documentation and evidence centered on the beatings respondent administered, which were proved by clear and convincing evidence. Therefore, we agree with counsel that there is no merit to this argument.

¶ 46 With respect to the best interest finding, counsel concedes that the testimony was clear and unchallenged. Rose, who was then 17, came to a thoughtful and rational decision that she never again wanted to see respondent. The evidence showed that Rose was accepted by and was assimilated into her foster family, which provided for her physical, emotional, and educational needs. She felt liberated and safe by having been made a ward of the court. The evidence also demonstrated that respondent had little or no insight into Rose's needs or his own behavior. Nevertheless, counsel posits that respondent could make a policy argument that Rose should be raised by her natural father. In the context of a best interest determination, section 1-3(4.05) of the Act sets forth the factors to consider, including the physical safety and welfare of the child, where the child actually feels love, attachment, and a sense of being valued, and the child's

wishes and long-term goals. 705 ILCS 405/1-3(4.05) (West 2014). Thus, the legislature has declared the public policy, and, as counsel recognizes, courts will not overturn it. When the legislature has declared by law the public policy of this State, the judiciary will remain silent, and, if a change in public policy is desired, the legislature, not the courts, must address it. *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 56 (2011).

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we grant counsel's motion to withdraw and affirm the judgment of the circuit court of Winnebago County.

¶ 49 Affirmed.

¶ 50 JUSTICE BURKE, dissenting.

¶ 51 In an *Anders* situation, the question is not whether counsel is of the opinion that the appeal will be successful, but whether there are any nonfrivolous potential errors that may be raised on behalf of his or her client. See *In the Matter of Brazelton*, 237 Ill. App. 3d 269, 271 (1992). Based upon the record in the present case, there are nonfrivolous issues counsel can raise on behalf of respondent concerning the trial court's unfitness determination. As such, I would deny the *Anders* motion and order further briefing on that issue.

¶ 52 The incident that led to Rose being taken into protective custody was extremely serious. After DCFS became involved with respondent there is evidence that he complied with recommended services when they were available to him. While he was incarcerated, he participated in domestic violence, anger management, and parenting classes. Once he was paroled, respondent completed an anger management program with perfect attendance, and engaged in and cooperated with individual counseling. Respondent maintained contact with the caseworker and visited with Rose by telephone. There is evidence that he also corresponded

with Rose by letter and texting. In three permanency review hearings, the trial court never found that respondent failed to make reasonable efforts to comply with his service plan.

¶ 53 I certainly am cognizant of the fact that the State presented evidence concerning difficulty with telephone visitation and other evidence supporting its position on unfitness. Whether the State will ultimately prevail in this appeal is not at issue during this stage of the proceedings. In *Alexa J.*, we quoted from *Brazelton* where the Fourth District Appellate Court stated the following:

> " ' The attorney in an *Anders* situation is faced with an unusual difficulty. The attorney requesting the court's permission to withdraw bears the knowledge a successful motion to withdraw necessitates the court's determination that an appeal would be frivolous. An attorney is expected to zealously argue in favor of that which he is requesting of the court. The initial impulse of an attorney seeking to withdraw from a case is to emphatically maintain the correctness of the circuit court's determination and the frivolous nature of any appeal. However, this impulse to convince the court of the merits of the motion to withdraw must be tempered by the duty to the client.
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> Counsel's duty to the client mandates the attorney, to the extent possible, remain as an advocate of the client. The attorney may not act as an unbiased judge of the merits of the appeal. Rather he must set out *any* irregularities in the trial process or other potential error, which, although in his judgment not a basis for appellate relief, might *** be meritorious. [Citation.]' " (Emphasis in original.) *Alexa J.*, 345 Ill. App. 3d at 987 (quoting *Brazelton*, 237 Ill. App. 3d at 271).

¶ 54 Here, zealous representation of respondent could reasonably include an argument that the State failed to prove unfitness by clear and convincing evidence. Counsel could argue that

respondent did make reasonable progress by complying with the services as they were available to him. Also, an argument may be made that the State's reliance on one incident of excessive corporal punishment did not satisfy its burden on the injurious environment count. Such arguments may not have prevailed on appeal but they would not have been frivolous based on this record. Therefore, I would order counsel to brief the unfitness issue and any other issues that he believes are of arguable merit.