2016 IL App (3d) 150731-U

Order filed February 2, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

In the Interest of K.L.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Minor.	)	Peoria County, Illinois.
	)	
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
	)	Appeal No. 3-15-0731
Petitioner-Appellee,	)	Circuit No. 10 JA 340
	)	
v.	)	
	)	
KELLY L.,	)	
	)	The Honorable
Respondent-Appellant).	)	Albert L. Purham,
	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decision that respondent-appellant is unfit and that it was in the best interest of the minor to terminate his parental rights was not against the manifest weight of the evidence.

¶ 2 FACTS

¶ 3 This case involves the termination of respondent-appellant, Kelly L.'s, parental rights of his minor, K.L.

¶ 4 K.L. was born on November 15, 2010. He was taken into protective custody on November 22 and the State filed a petition for neglect on November 23 alleging two counts. Count I stated that the minor was neglected because his meconium had tested positive for cocaine, a controlled substance, on November 16. Count II stated that the minor was neglected due to an injurious environment. It not only restated the minor's positive test for cocaine but also noted allegations regarding the mother's history of substance abuse, failed completion of a drug treatment program, mental illness, and her inability to provide any contact information for Kelly. The State later filed an amended petition that included the aforementioned information in both counts and added Kelly's criminal history as part of count II. The minor was adjudicated neglected on January 31, 2011, and a dispositional order was also entered requiring performance of tasks by the mother and forbidding Kelly to have any contact with the minor until he participated in an integrated assessment. K.L. has been in his current placement with his foster mother, his maternal aunt, since November 18, 2014.

¶ 5 On April 15, 2015, the Department of Children and Family Services (DCFS) filed a petition for the termination of parental rights of both parents. The petition alleged that Kelly was an unfit parent due to his criminal history of felonies as defined in section 50/1 (D)(i) of the Illinois Adoption Act (Adoption Act). (750 ILCS 50/1 (D)(i) (West 2014)). It noted Kelly had been convicted of eight felonies and four misdemeanors. Kelly was at the time incarcerated for his last felony conviction with an anticipated release date of April 2018.

¶ 6 At the adjudication hearing held August 19, 2015, the State provided certified copies of all but two of Kelly's convictions alleged in the termination petition. The convictions in 2010

and 2011 included a misdemeanor conviction for possession of cannabis in April 2010, a DUI conviction in March 2010, a DUI conviction in January 2011, a felony conviction for possession of an illegal substance and bribery in August 2011. He was indicted in September 2011 for escape/failure to report for his sentence pursuant to the two 2011 felony convictions and sentenced in February 2012 to an additional five consecutive years' imprisonment.

¶ 7 The State also had Shelia DeVall, a DCFS caseworker, testify. DeVall stated that she did not recall whether she or her predecessor had ever spoken with or met/seen Kelly before her seeing him at recent court hearings regarding the termination proceedings. She also did not recall whether she or her predecessor had asked Kelly if he had completed the integrated assessment.

¶ 8 Kelly testified on his own behalf. He did not contest any of the proffered allegations of or certificated copies showing his convictions. He acknowledged he was incarcerated in February 2012 for delivery of a controlled substance, bribery, and failure to report.

¶ 9 He initially stated during direct examination that he had resided in Chicago, Illinois, all of his life and specifically lived there in 2010. He asserted that the Peoria area telephone number listed on the neglect petition was not his and that he did not recall ever being served by publication or ever seeing the neglect petition or its subsequent adjudication and dispositional orders. However, he later conceded on cross-examination that he did reside in Peoria until after he graduated from the Peoria Center in 2004.

¶ 10 Kelly further stated that he was not aware or involved in the matter regarding the minor's placement into the care of the DCFS. He noted that he thought he first became aware of the proceedings at the beginning of 2015 while serving his sentence term at the Pinkneyville Correctional Facility (Pinkneyville). However, he later stated he found out prior to being incarcerated in February 2012 in either 2011 or 2012 that the minor was with DCFS. Kelly

testified that he would see his son when he would come to Peoria and sent his mother money about once a month for his support. He acknowledged that he never saw the minor with the mother as he was usually with the mother's sister. He stated he did not know why at first. After learning of DCFS's involvement, he explained, however, that he did not contact DCFS because the mother told him everything would be okay.

¶ 11 Kelly further testified that on May 13, 2015, he was moved from Pinkneyville, a level two facility, to his current housing facility, the Illinois River Department of Corrections (River), a level three facility. He stated that this was due to his not having any disciplinary issues and that his current sentence was set to expire in April 2018, without good time.

¶ 12 Kelly stated that prior to his relocation he had taken advantage of several programs offered at Pinkneyville to better his life. He had completed a parenting class and was involved in alcoholics anonymous and narcotics anonymous (AA/NA). He stated he was unable to complete the AA/NA programs, however, due to his transfer to River. While at River, he was working in the kitchen and dietary being paid 15 cents a day. He stated that he was on the waiting list for an automotive class, a culinary arts class, and the NA class. He noted that he had been reading the Bible and attempting to stay positive, doing what he could to be a better person.

¶ 13 After closing arguments from all parties involved, the trial court found, *inter alia*, that the State had proven by clear and convincing evidence that Kelly was unfit. The best interest hearing was then set for September 30, 2015.

¶ 14 At the best interest hearing, the trial court considered the best interest report provided by Family Core and testimony from Kelly. The report stated "[t]he child has no bond with Kelly as he had never had a visit with him." It also noted that the foster mother was willing to provide a permanent home for the minor and that he "has a stable home with his aunt." Family Core found

that “[i]t would be detrimental to disrupt [the minor's] placement with her and to place the child with either parent and that the child has a stable and loving home with the aunt and deserves to have permanency.”

¶ 15 Kelly stated that he had seen the best interest report but did not agree with its recommendation for his rights to be terminated. He felt that the minor needed his father in his life. He had previously visited with the minor prior to incarceration frequently and had given the mother money for him. He felt that he could be an upstanding parent, could get his life together, and that he was frustrated because the case had been pending since 2010 and yet DCFS and Family Core had never contacted him. He stated that nobody had ever asked him to do an integrated assessment and that he would be willing to do that because River is close to the minor. He also noted he has visits from two of his other children there. On cross examination, however, Kelly could not readily state the age or birthdates of all of his claimed seven children including the minor in this case. Though he argued that he did not know the minor's date of birth because he had not received the DCFS paperwork, he acknowledged and the record shows he was there at the minor's birth because he signed off on the paperwork as the father. Nevertheless, Kelly asked the court to give him a chance "to do what he is supposed to do." He stated that he felt guardianship for now was in the minor's best interest and he would get his fitness at a later time.

¶ 16 After evidence was heard and closing arguments, the court found that it was in the best interest of the minor for Kelly’s parental rights to be terminated with a permanency goal of adoption of the minor.

¶ 17 This appeal promptly followed.

¶ 18 ANALYSIS

¶ 19 A trial court's finding that a parent is unfit will not be reversed on appeal unless it is contrary to the manifest weight of the evidence. *In re D.D.*, 196 Ill. 2d 405, 417 (2001). Such a finding is contrary if the opposite result is clearly evident. *Id*. Nevertheless, each case is decided based on the merits of the facts and circumstances presented. *Id*. at 422.

¶ 20 In this case, the trial court determined that the State had proven by clear and convincing evidence that Kelly is unfit on the ground of depravity pursuant to section 50/1(D)(i) of the Adoption Act. 750 ILCS 50/1 (D)(i) (West 2014). Clear and convincing evidence is stated to be something less than proof beyond a reasonable doubt. *In re D.T.*, 212 Ill. 2d 347, 362 (2004).

¶ 21 Depravity had been defined as inherent deficiencies of moral sense and rectitude. *In the Interest of A.L.*, 301 Ill. App. 3d 198, 202 (1998). Historically, Illinois courts had found that "a parent's history of criminal convictions, standing alone, was not sufficient evidence of depravity." *In re T.S., III*, 312 Ill. App. 3d 875, 878 (2000). However, our legislature has since amended the Adoption Act providing a rebuttable presumption that the parent is depraved:

> "if the parent has been convicted of at least 3 felonies under the laws of this State or any other state, or under federal law, or the criminal laws of any United States territory; and at least one of these convictions took place within 5 years of the filing of the petition or motion seeking termination of parental rights." 750 ILCS 50/1(D)(i) (West 2014).

¶ 22 A parent is able to rebut this presumption by presenting evidence showing that, despite these convictions, he is not depraved. *In re A.M.*, 358 Ill. App. 3d 247, 253 (2005). The amount of evidence necessary to assure a rebuttal is not set by any rubric. However, as assessed by the trial court, if a strong presumption arises, the weight of the evidence brought in to rebut the presumption must be just as great. *Id*. If sufficient evidence is presented, the burden to show depravity then shifts back to the State. That burden is to prove, by clear and convincing

evidence, that (1) respondent's acts constituting depravity are of sufficient duration and repetition to establish deficiency in moral sense and (2) either an inability or an unwillingness to conform to accepted morality. *In re J.A.*, 316 Ill. App. 3d 553 (2000).

¶ 23 Here, the State submitted into evidence certified copies of all but two of Kelly's convictions. The convictions included more than the statutorily required three felony convictions to show a parent is depraved. Moreover, the record shows that Kelly was still incarcerated for the added charge of escape due to his failure to report to prison following his felony convictions in August 2011 of delivery of a controlled substance and bribery in relationship to the controlled substance charge. This is the same *modus operandi* Kelly exhibited with his earlier felony convictions in 2006 where he was convicted of escape/failure to report for his sentences for convictions of delivery of a controlled substance and obstructing justice. Although Kelly successfully completed a parenting program during his most recent imprisonment and is currently on the waiting list for several other programs to better himself for his impending release, those efforts are not sufficient to show that he has been rehabilitated and thus rebut the presumption of depravity. See *In re A.M.*, 358 Ill. App. 3d at 254.

¶ 24 Additionally, Kelly's criminal past involves crimes of dishonesty. He showcased his lack of rehabilitation by again being dishonest at the fitness hearing. He stated that he was not aware of the DCFS proceedings until he received notice of the petition for termination of parental rights in early 2015, but then affirmed that he was made aware of the DCFS's involvement prior to his incarceration in February 2012.

¶ 25 Kelly, moreover, failed to rebut the presumption with his assertion that he plans to be a better person for the minor because, in general, the minor needs his father. He makes this declaration in the same breath as he discusses his six other children – two, at least, teenagers.

These other children also needed him as a father yet he continued to commit various felonious crimes with convictions and incarcerations dating from 2001 to the present. Thus we find that the trial court's finding of unfitness was not against the manifest weight of the evidence.

¶ 26 We now move to the trial court's determination that Kelly's parental rights should be terminated. A trial court makes this determination using a preponderance of the evidence standard. *In re D.T.*, 212 Ill. 2d 347, 365 (2004). On review, we assess whether that determination to terminate parental rights is against the manifest weight of the evidence. *In re D.S.*, 2011 IL App (3d) 110184, ¶ 33.

¶ 27 Kelly argues here on appeal that the trial court's finding was against the manifest weight of the evidence. He asserts that the evidence produced at the best interest hearing was insufficient to find that it was in the best interest of the minor to terminate his parental rights because the Juvenile Court Act works to maintain family ties whenever possible and the record does not show that he was given the opportunity to showcase his relationship with the minor. We find that the court's finding was not against the manifest weight of the evidence.

¶ 28 It is well settled that once a parent has been found to be unfit the focus shifts to what would be in the best interest of the child. *In re D.T.*, 212 Ill. 2d at 364. The issue is no longer whether parental rights can be terminated, but rather, "in light of the child's needs, should the parental rights be terminated." (emphasis omitted) *Id*. Accordingly, a parent's interest in maintaining the parent/child relationship must give way to the child's interest in a stable, loving home life. *Id*.

¶ 29 As an initial matter, we note our awareness of our state's *parens patriae* interest that generally favors the preservation of the family. *Id.* at 366. However, "'once a court has found by clear and convincing evidence that a parent is unfit, the state's interest in protecting the child is

sufficiently compelling to allow the termination of parental rights.'" *Id*. (quoting *In re R.C.*, 195 Ill.2d 291, 308 (2001)). Thus, Kelly's initial argument is not persuasive.

¶ 30 Kelly, however, primarily asserts that his parental rights should not have been terminated because the minor was never given the opportunity to reunite with him. He argues that though the focus of the best interest hearing is on what would be in the best interest of the minor, the court failed to recognize that he was not provided with an opportunity to show he had been in the minor's life and that he could be a good father. He notes that his frequent visits prior to his incarceration were never explored by DCFS nor did the caseworkers attempt to bring the minor to see him in prison and note their interactions.

¶ 31 We note again that at the best interest hearing the needs of the child are the focus and his stability takes precedence. See *In the Interest of A.H.*, 215 Ill. App. 3d 522, 530 (1991) (noting that courts must not allow a child to live indefinitely with the lack of permanence inherent in a foster home). The minor has been in the care of DCFS his entire life after cocaine was found in his system at birth. He has been with his current foster mother, his aunt, since November 2014. The best interest report noted the minor's positive physical and psychological development and the strong bond the minor has established with the aunt. The minor has a flourishing relationship with his siblings and extended family. The report noted that his aunt has provided him with a safe and stable home and is willing to adopt the minor.

¶ 32 Kelly does not profess to have had custody of the minor for any duration of time. Specifically, he noted only seeing the minor when he came to Peoria and giving the minor's mother money when she asked. His testimony at the best interest hearing seemed to indicate that he was okay with the minor being with and thus being raised by the aunt. His past relationship

with the minor is very different from his new attitude of wanting the chance to "do what he is supposed to do."

¶ 33 At the hearing, Kelly acknowledged that he knew of DCFS's involvement in the minor's life before his incarceration, which was over three years prior to DCFS's petition for termination of parental rights. Regardless of what the mother may have told him, as the father, Kelly made no attempt to learn the status of his son or the case with DCFS. Further, though he argues that Family Core or DCFS could have brought the minor to visit with him while he was incarcerated to assess their relationship, the record is devoid of any indication that Kelly requested anyone to bring the minor to visit with him at any time while he was incarcerated or that the minor in fact did visit with him.

¶ 34 Kelly further argues that, more than four years after he was ordered to do so, he is willing to take whatever assessment is required and to show his fitness after he is released from prison in another two years. The minor at that time would be seven years old. Such great duration is not in accord with our state's desire for stability in the minor's life. Additionally, it is uncertain that Kelly will regain fitness after release considering his long criminal history despite the parental needs of his six other children.

¶ 35 Therefore, though Kelly has made some life improvements including the class he completed and his signing up for trade courses, the trial court’s finding was not against the manifest weight of the evidence. Kelly’s parental rights should be terminated as his personal advancements are insufficient to counter the overwhelming evidence of instability with respect to the needs of the minor.

¶ 36 CONCLUSION

¶ 37 The judgment of the trial court of Peoria County is affirmed.

¶ 38 Affirmed.