

NOTICE

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FILED

July 13, 2016
Carla Bender
4th District Appellate
Court, IL

2016 IL App (4th) 160174-U

NOS. 4-16-0174, 4-16-0176, 4-16-0177, 4-16-0179 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: H.T., a Minor,)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
Petitioner-Appellee,)	Macon County
v. (No. 4-16-0174))	No. 15JA42
JESSICA TOBERMAN,)	
Respondent-Appellant.)	
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In re: H.T., a Minor,)	No. 15JA42
THE PEOPLE OF THE STATE OF ILLINOIS,)	
Petitioner-Appellee,)	
v. (No. 4-16-0176))	
DALE TOBERMAN,)	
Respondent-Appellant.)	
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In re: M.H., a Minor,)	No. 15JA43
THE PEOPLE OF THE STATE OF ILLINOIS,)	
Petitioner-Appellee,)	
v. (No. 4-16-0177))	
JESSICA TOBERMAN,)	
Respondent-Appellant.)	
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In re: S.H., a Minor,)	No. 15JA44
THE PEOPLE OF THE STATE OF ILLINOIS,)	
Petitioner-Appellee,)	
v. (No. 4-16-0179))	Honorable
JESSICA TOBERMAN,)	Thomas E. Little,
Respondent-Appellant.)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.

Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's judgment, which made the minors wards of the court and appointed the Illinois Department of Children and Family

Services as their guardian.

¶ 2 In March 2015, the State filed petitions for adjudication of wardship regarding H.T. (born June 23, 2014), M.H. (born September 20, 2012), and S.H. (born December 27, 2010). The petitions alleged that the children were abused and neglected because nine-month-old H.T. sustained a broken femur for which neither parent provided a plausible explanation. Following two hearings in December 2015 and January 2016, the trial court entered a written order finding that (1) H.T. was abused and neglected and (2) M.H. and S.H. were neglected. Following a February 2016 dispositional hearing, the court entered dispositional orders finding that it was in each minor's best interest to be made a ward of the court and appointing the Illinois Department of Children and Family Services (DCFS) as guardian.

¶ 3 Respondents, Jessica and Dale Toberman, appeal, arguing that the trial court's adjudicatory and dispositional findings were against the manifest weight of the evidence. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Petitions for Wardship

¶ 6 In March 2015, the State filed wardship petitions alleging the abuse and neglect of H.T. and her half-sisters, M.H. and S.H. The petitions alleged that nine-month-old H.T. was brought to the hospital with a broken femur. Further examination showed previous fractures to her tibia and wrist. Neither respondent could provide an explanation for H.T.'s injuries. The State alleged that all three minors were neglected pursuant to section 2-3(1)(b) of the Juvenile Court Act of 1987 (705 ILCS 405/2-3(1)(b) (West 2014)) due to an injurious environment. In addition, the State alleged that H.T. was abused pursuant to (1) section 2-3(2)(i) of the Act (705 ILCS 405/2-3(2)(i) (West 2014)) due to the infliction of physical injury by other than accidental

means, and (2) section 2-3(2)(ii) of the Act (705 ILCS 5/2-3(2)(ii) (West 2014)) due to the creation of a substantial risk of physical injury by other than accidental means.

¶ 7 B. The March 2015 Shelter-Care Hearing

¶ 8 After a March 2015 shelter-care hearing, the trial court entered an order finding that an immediate and urgent necessity required the children's placement in shelter care. Thereafter, the court granted DCFS temporary custody of H.T., M.H., and S.H.

¶ 9 C. The December 2015 Adjudicatory Hearing

¶ 10 In December 2015 and January 2016, the trial court conducted two hearings on the petitions for wardship, at which the following pertinent evidence was presented.

¶ 11 1. *Dr. Channing Petrak*

¶ 12 Physician Channing Petrak testified that she was the medical director of the Pediatric Resource Center at the University of Illinois College of Medicine in Peoria. She was board-certified in general pediatrics and child-abuse pediatrics and had practiced in the "neglect-abuse specialty area" since 2003. The State tendered Petrak as an expert (without specifying a specific area of expertise), and the court found that Petrak was "qualified to render opinions in this case."

¶ 13 Petrak testified that in April 2015, she evaluated H.T. As part of that evaluation, she reviewed H.T.'s complete medical history, which included a skeletal survey and laboratory testing results conducted earlier at a Decatur, Illinois, hospital. In addition, Petrak conducted an independent skeletal survey on H.T. When Petrak evaluated H.T., she had already been treated for a broken femur and was wearing a cast. Petrak testified that H.T. had fractures to her femur, tibia, and wrist. Petrak noted that H.T.'s tibia and wrist fractures were metaphyseal fractures caused by a "shearing mechanism," such as a quick jerk or yank on her limbs or a shaking that would cause her limbs to flail. Petrak explained that a fracture caused by a shearing mechanism

is usually not accidental and therefore indicates a "high specificity for abuse." Petrak contrasted a shearing-mechanism fracture to a fracture caused by a bending of the bone, which she testified can happen accidentally.

¶ 14 Petrak testified further that H.T.'s femur fracture was a spiral fracture caused by a twisting motion. She explained that a femur fracture requires some velocity or force. Petrak noted that a child could accidentally suffer the type of femur fracture H.T. sustained by running and then twisting while falling. Petrak testified, however, that a parent removing a child from a crib while the child's leg was stuck would not generate the necessary torque to fracture a femur.

¶ 15 Petrak testified that, in her opinion, H.T. did not suffer from rickets. Petrak explained that radiological imaging and laboratory tests performed on a patient usually will indicate the presence of rickets. In this case, neither the radiological imaging of H.T.'s bones nor the laboratory tests displayed any signs of rickets.

¶ 16 In Petrak's opinion, the fractures to H.T.'s femur, tibia, and wrist were caused by physical abuse.

¶ 17 *2. Jennifer Inness*

¶ 18 DCFS child-protection specialist Jennifer Inness testified that she spoke with respondents in March 2015, after H.T. presented with a fractured femur. According to Inness' testimony, Jessica told Inness that when she returned home one day, Dale told her that H.T.'s leg had become stuck between the slats of her crib and that H.T. was favoring the leg. Inness further testified that Jessica had an open case with DCFS and was required to attend counseling, parenting classes, and couples counseling with Dale. However, Jessica was not meeting those obligations.

¶ 19 Inness testified further that Dale gave different accounts of what happened to H.T.

Initially, Dale explained to Inness that he went to check on H.T. in the middle of the night and noticed that her leg was stuck in the slats of her crib. Dale claimed that he extricated H.T.'s leg and that the next day, H.T. was favoring the leg. Later, Dale gave Inness a differing explanation, claiming that H.T. was lying on the floor when one of the other children fell on her. Inness testified that Dale also gave a third explanation, but Inness did not describe that explanation. Neither respondent gave Inness an explanation for the fractures to H.T.'s tibia and wrist. Inness testified that Dale said that he was not attending counseling because he was too busy.

¶ 20 *3. Dr. David Ayoub*

¶ 21 Dr. David Ayoub testified that he was a physician working as a radiologist at Clinical Radiologists in Springfield, Illinois. He was board-certified in diagnostic radiology and had practiced in that area for approximately 25 years. Ayoub explained that he had done extensive research into metabolic bone disease in infants. The trial court admitted Ayoub as an expert in diagnostic radiology.

¶ 22 Ayoub explained that rickets is a condition that interferes with the bone-hardening process in children. Rickets has many potential contributing factors, including vitamin D and calcium deficiencies. Babies born prematurely are at a higher risk to develop rickets. According to Ayoub's evaluation of H.T.'s skeletal surveys, H.T. had previously suffered from rickets and was now recovering but continued to have poor bone quality. Ayoub claimed that H.T. also suffered from low vitamin D, which was further evidence of bone problems. In Ayoub's opinion, H.T. suffered from a "metabolic bone disease."

¶ 23 Ayoub did not personally examine H.T., but he reviewed her medical records, including two skeletal surveys. According to Ayoub, the records showed that H.T. suffered a spiral fracture in her right femur. Ayoub explained that spiral fractures of the femur are commonly

caused by accident, although they require some twisting force. Ayoub testified further that the spiral fracture to H.T.'s femur was "non-displaced," meaning that it resulted from a low amount of force. Ayoub also stated that the nature of the fracture indicated that H.T.'s femur was abnormal and not strong. According to Ayoub, H.T.'s femur fracture could have resulted from H.T.'s leg becoming stuck in the slats of her crib or from someone changing her diaper. Ayoub testified that the fracture was not caused by someone pulling on H.T.'s leg or by shaking her.

¶ 24 Ayoub testified further that a person suffering from a metabolic bone disease is more likely to have multiple fractures. As to H.T.'s metaphyseal fractures to her tibia and wrist, Ayoub explained that those fractures were not specific for abuse and could be caused by any force. According to Ayoub, H.T.'s skeletal survey showed no sign of a shearing fracture. In Ayoub's opinion, H.T.'s fractures were not the result of "excessive force."

¶ 25 Ayoub testified further that, in medical schools today, the teaching of rickets is "really off the radar." Ayoub stated further that the knowledge of rickets among medical professionals has "gone away." Ayoub cited those trends to explain how he reached such a different conclusion from Petrak in this case. In Ayoub's opinion, recent medical literature was "rampant" in describing signs of metabolic bone diseases as child abuse, which led to a bias among prosecutors to charge child abuse where none had occurred.

¶ 26 D. The Trial Court's Adjudicatory Order

¶ 27 In January 2016, the trial court entered a written order containing the following findings. The court found that H.T. was neglected pursuant to section 2-3(1)(b) (705 ILCS 405/2-3(1)(b) (West 2014)); and abused pursuant to sections 2-3(2)(i) and 2-3(2)(ii) of the Act (705 ILCS 405/2-3(2)(i), 2-3(2)(ii) (West 2014)). In addition, the court found that both M.H. and S.H. were neglected pursuant to section 2-3(1)(b) of the Act. The court's order also included

several findings of fact in support of its ultimate conclusions on the issue of abuse and neglect.

¶ 28 E. The February 2016 Dispositional Hearing

¶ 29 In February 2016, the trial court conducted a dispositional hearing, where the following evidence was presented.

¶ 30 DCFS caseworker Kim Taylor recommended that all three children (H.T., M.H., and S.H.) be made wards of the court and placed under the guardianship of DCFS. Taylor testified that respondents required additional services before they would be prepared to regain custody. Taylor estimated that three to four more months of services were necessary. According to Taylor, it was difficult to evaluate whether respondents had resolved the safety issues in their home because both refused to accept that H.T.'s injuries resulted from anything other than rickets. Since H.T. was removed from respondents' custody, she had not suffered any more bone fractures.

¶ 31 Mental-health counselor Tamika Hall testified that she was Jessica's counselor and that Jessica was regularly attending counseling. She testified further that Jessica had successfully completed an eight-week anger-management program. Jessica still had four remaining "goals" to accomplish through counseling.

¶ 32 Visitation specialist Crystal Madrigal testified that she was supervising the visits between respondents and the three children. Madrigal testified that the visits were going well.

¶ 33 F. The Trial Court's Dispositional Order

¶ 34 The same day as the dispositional hearing, the trial court entered a dispositional order making all three minors wards of the court and placing them in the custody of DCFS.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 Respondents argue that the findings in the trial court's adjudicatory and dispositional orders were against the manifest weight of the evidence. We disagree.

¶ 38 A. The Trial Court's Adjudicatory Orders

¶ 39 Respondents argue that the trial court's determinations that H.T. was abused and neglected and that M.H. and S.H. were neglected were against the manifest weight of the evidence.

¶ 40 1. *Applicable Statute and Standard of Review*

¶ 41 In any proceeding under the Act, the paramount consideration is the best interest of the child. *In re Arthur H.*, 212 Ill. 2d 441, 464, 819 N.E.2d 734, 747 (2004). A trial court's finding that a minor has been abused or neglected under section 2-3 of the Act will not be reversed unless it is against the manifest weight of the evidence. *Id.* "[T]he trier of fact is in the best position to weigh the credibility of experts, leaving us reluctant to second-guess the findings of the trial court in a battle of experts." (Internal quotation marks omitted.) *In re R.G.*, 2012 IL App (1st) 120193, ¶ 39, 977 N.E.2d 869.

¶ 42 2. *The Trial Court's Findings of Abuse and Neglect in This Case*

¶ 43 Respondents argue that Ayoub's testimony that H.T.'s injuries happened accidentally because H.T. suffered from rickets was "impressive" and provided "a very plausible explanation for H.T.'s injuries." Respondents claim that because the trial court was faced with "credible conflicting theories" as to the source of H.T.'s injuries, it was against the manifest weight of the evidence for the court to accept Petrak's theory that H.T.'s injury resulted from abuse instead of an accident. Therefore, respondents continue, the court's findings of abuse and neglect were against the manifest weight of the evidence.

¶ 44 Respondents misunderstand the trial court's function as fact finder as well as the

standard of review on appeal. The trial court is in the best position to weigh the credibility of experts. *Id.* In this case, the court heard the conflicting expert testimony of both Petrak and Ayoub. The court then determined that Petrak's theory was more credible. The court had the authority to make that determination. On appeal, we will not second-guess the findings of the trial court in a "battle of experts." *Id.*

¶ 45 Relying on Petrak's testimony, the trial court made its findings of abuse and neglect, which we conclude were not against the manifest weight of the evidence. Based on Petrak's testimony that H.T.'s injuries were not accidental and were the result of abuse, the trial court found that H.T. was abused. That finding was not against the manifest weight of the evidence because, at the very least, respondents allowed physical injury to be inflicted upon H.T. by other than accidental means. Similarly, after the court found that H.T.'s injuries were not accidental, its finding that all three minors were neglected because their environment was injurious to their welfare was not against the manifest weight of the evidence.

¶ 46 B. The Trial Court's Dispositional Order

¶ 47 Respondents argue that the trial court's findings that it was in the minors' best interest to be made wards of the court and that DCFS should be appointed as their guardian were against the manifest weight of the evidence.

¶ 48 1. *Statutory Language and Standard of Review*

¶ 49 Section 2-22(1) of the Act, which governs dispositional hearings, states as follows:

"At the dispositional hearing, the court shall determine whether it is in the best interests of the minor and the public that he be made a ward of the court, and, if he is to be made a ward of the

court, the court shall determine the proper disposition best serving the health, safety and interests of the minor and the public." 705 ILCS 405/2-22(1) (West 2014).

¶ 50 Under section 2-27(1) of the Act, the trial court may appoint DCFS as guardian of the minor if it determines that the parents are unfit or unable, for reasons other than financial circumstances alone, "to care for, protect, train[,] or discipline the minor or are unwilling to do so, and the health, safety, and best interest of the minor will be jeopardized if the minor remains in the custody of *** her parents." 705 ILCS 405/2-27(1) (West 2014). The court's decision will be reversed only if the findings of fact are against the manifest weight of the evidence or if the court committed an abuse of discretion by selecting an inappropriate dispositional order. In re J.W., 386 Ill.App.3d 847, 856, 898 N.E.2d 803, 811 (2008).

¶ 51 *2. The Trial Court's Dispositional Order in This Case*

¶ 52 The trial court found that respondents were participating in their required services but had not yet completed those services. As a result, the court found that it was still unclear whether it was safe to return the children to respondents' care. The court determined that it was in the children's best interest to be made wards of the court and to be placed in the guardianship of DCFS.

¶ 53 Respondents argue that the trial court's decision was against the manifest weight of the evidence because respondents were participating in services and their visits with their children were going well. Further, respondents maintain that they did not abuse their children and that placing them with DCFS is not in their best interest because it would not strengthen family ties. We disagree.

¶ 54 Whether respondents admit causing H.T.'s injuries is irrelevant. The trial court

found that H.T.'s injuries were not accidental and that the children's safety was therefore at risk if respondents were to maintain guardianship of the children. The court, therefore, found that it was in the children's best interest to be made wards of the court and to be placed in the guardianship of DCFS. In reaching that decision, the court considered that respondents were engaging in services, and it stated that they should be "commended" for doing so. However, the court found that until respondents had successfully *completed* services, placing the children in the guardianship of DCFS was necessary to maintain their safety and, therefore, in their best interest. We conclude that the trial court's determination was not against the manifest weight of the evidence.

¶ 55

III. CONCLUSION

¶ 56

For the reasons stated, we affirm the trial court's decisions finding the minors abused and neglected, making them wards of the court, and placing them in the guardianship of DCFS.

¶ 57

Affirmed.