2016 IL App (4th) 160517-U

NOS. 4-16-0517, 4-16-0518 cons.

FILED
November 8, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
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| In re: A.C., a Minor, | ) | Appeal from |
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Circuit Court of |
| Petitioner-Appellee, | ) | Adams County |
| v. (No. 4-16-0517) | ) | No. 16J1 |
| TONI HALE, | ) | |
| Respondent-Appellant. | ) | |
| | ) | |
| In re: B.C., a Minor, | ) | No. 16J2 |
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| Petitioner-Appellee, | ) | |
| v. (No. 4-16-0518) | ) | Honorable |
| TONI HALE, | ) | John C. Wooleyhan, |
| Respondent-Appellant. | ) | Judge Presiding. |

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed the trial court's decision terminating respondent's parental rights.

¶ 2 In January 2016, the State filed petitions for adjudication of wardship with respect to A.C. and B.C., the minor children of respondent, Toni Hale. The State also sought to terminate respondent's parental rights. In May 2016, the State filed amended petitions for adjudication of wardship. In July 2016, the trial court made the minors wards of the court and placed custody and guardianship with the Department of Children and Family Services (DCFS). The court also found respondent unfit and determined it was in the minors' best interests that her parental rights be terminated.

¶ 3 On appeal, respondent argues the trial court erred in (1) denying her right to counsel at the shelter-care hearing, (2) denying her motion for substitution of judge, (3) finding her unfit, (4) finding in the minors' best interests to terminate her parental rights, and (5) failing to use the reasonable doubt standard. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2016, the State filed petitions for adjudication of wardship with respect to respondent's children, including A.C., born in February 2004 (case No. 16-J-1) and B.C., born in October 2002 (case No. 16-J-2). The petitions alleged the minors were dependent pursuant to section 2-4 of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/2-4 (West 2014)) because respondent had a history of criminal activity with multiple felony convictions, they had been living with a legal guardian for most of their lives, respondent had four other children not in her care due to involvement with the court system and DCFS, and respondent was currently incarcerated. The petitions also sought termination of respondent's parental rights.

¶ 6 At the shelter-care hearing, respondent stated she had not seen copies of the State's petitions and did not have an attorney present. The State then provided copies of the petitions. Respondent asked the trial court not to proceed until she had an attorney. The court stated the law required the hearing to take place within a certain amount of time. Respondent continued to object, stating she did not understand what was going on. The court proceeded with the hearing, and the State asked the court to take judicial notice of respondent's three felony cases. After continued outbursts, respondent left the courtroom. Following the testimony of two witnesses, the court entered a temporary custody order, finding probable cause for the filing of the petitions. The court also found it a matter of immediate and urgent necessity that the minors

be placed in shelter care and indicated reasonable efforts had been made but had not eliminated the necessity of the minors' removal from the home. The court placed temporary custody with the guardianship administrator of DCFS.

¶ 7 The trial court appointed counsel for respondent on March 22, 2016. On May 19, 2016, the State filed amended petitions for adjudication of wardship, alleging the minors were dependent. The State also sought to terminate respondent's parental rights, alleging she (1) failed to maintain a reasonable degree of interest, concern, or responsibility as to the minors' welfare (750 ILCS 50/1(D)(b) (West 2014)); (2) is depraved due to her three felony convictions (750 ILCS 50/1(D)(i) (West 2014)); and (3) has been repeatedly incarcerated as a result of criminal convictions and her repeated incarceration has prevented her from discharging her parental responsibilities (750 ILCS 50/1(D)(s) (West 2014)).

¶ 8 On May 31, 2016, respondent's counsel filed a motion for substitution of judge as of right pursuant to section 2-1001(a)(2) of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1001(a)(2) (West 2014)). The motion alleged no substantive ruling had been made by the trial court so as to preclude automatic substitution.

¶ 9 At the adjudicatory hearing, the trial court considered the motion for substitution of judge. The court noted the shelter-care hearing took place on January 25, 2016. At that time, the court stated it made certain findings based upon the State's evidence and found probable cause to believe the minors were neglected and/or abused. The court also found it was a matter of immediate and urgent necessity that the minors be placed in shelter care, that reasonable efforts had been made but had not eliminated the necessity of the minors' removal from the home, and that it would be contrary to the health, welfare, and safety of the minors to remain in the home. Given these findings, the court found the temporary custody order was a ruling on a

substantive issue that precluded respondent being entitled to a substitution of judge as a matter of right. The court denied the motion.

¶ 10 Thereafter, the State asked the trial court to take judicial notice of respondent's felony convictions for forgery (No. 07-CF-305), aggravated battery (No. 09-CF-392), and forgery (No. 13-CF-599). Jeri Niewohner, a child welfare specialist with DCFS, testified respondent was incarcerated at the initial temporary custody hearing in August 2015. Niewohner never considered returning the minors to respondent's home because she "has an extensive criminal history and she has an extensive indicated child abuse and neglect history with us."

¶ 11 Chris Powell, a child welfare specialist, testified he attended the shelter-care hearing on January 25, 2016. At that time, respondent resided in jail. At the hearing, Powell found respondent's demeanor to be "poor," as she was "aggressive," "acting out," and "uncooperative." Powell was unable to talk with her because of her uncooperative nature. He attempted to make contact with respondent on February 29, 2016, at the jail. He discussed the tasks of the service plan with her, but she was "displeased with the ratings" and "uncooperative." Powell met with respondent in the courthouse on March 22, 2016, but she was again uncooperative. Powell stated it was "difficult to engage her in an appropriate conversation," as she was cursing and making inappropriate statements. Powell testified respondent refused to participate in an integrated assessment. Respondent's service plan was rated unsatisfactory because she failed to provide documentation of any completed services, she was uncooperative, and there was a lack of satisfactory progress toward completing any services. Moreover, Powell noted respondent had been incarcerated through much of the case.

¶ 12 The trial court found the minors dependent based on respondent's significant criminal and juvenile history. Moreover, the court found placement with respondent was not

viable. The court also found respondent unfit by clear and convincing evidence, stating she failed to maintain a reasonable degree of interest, concern, or responsibility as to the minors' welfare, is depraved due to her felony convictions, and she has been repeatedly incarcerated during the majority of the case and has been unable to discharge any of her parental responsibilities.

¶ 13 In July 2016, the trial court conducted the best-interests hearing. Following arguments, the court found it in the minors' best interests that respondent's parental rights be terminated. The court stated evidence showed the minors are in placements that meet all of their needs and no evidence indicated what relationship, if any, existed between respondent and the minors. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 A. Right to Counsel

¶ 16 Respondent argues the trial court denied her right to counsel at the shelter-care hearing. We find this issue forfeited.

¶ 17 In her argument on this issue, which consists of less than 1-1/2 pages, respondent contends the trial court denied her right to counsel at the shelter-care hearing as provided in section 1-5(1) of the Juvenile Court Act, which provides that, "[a]t the request of any party financially unable to employ counsel ***, the court shall appoint the Public Defender or such other counsel as the case may require." 705 ILCS 405/1-5(1) (West 2014). Counsel "shall appear at all stages of the trial court proceeding, and such appointment shall continue through the permanency hearings and termination of parental rights proceedings." 705 ILCS 405/1-5(1) (West 2014). While respondent cites the relevant statute, she fails to support her claim of error with adequate argument. Respondent does not request any remedy or relief or provide any

authority demonstrating she is due any remedy or relief for any violation of section 1-5(1). Thus, we find the issue forfeited. See *In re Tinya W.*, 328 Ill. App. 3d 405, 410, 765 N.E.2d 1214, 1219 (2002); see also *Deutsche Bank National v. Burtley*, 371 Ill. App. 3d 1, 7, 861 N.E.2d 1075, 1081 (2006) (declining to address the appellant's claim of error because he failed to provide an argument for reversal with supporting authority).

¶ 18 B. Motion for Substitution of Judge

¶ 19 Respondent argues the trial court erred in denying her motion for substitution of judge as of right. We disagree.

¶ 20 In this case, respondent's counsel filed a motion for substitution of judge pursuant to section 2-1001(a)(2) of the Procedure Code on May 31, 2016. Section 2-1001(a)(2) provides, in part, as follows:

> "When a party timely exercises his or her right to a substitution without cause as provided in this paragraph (2).
>
> (i) Each party shall be entitled to one substitution of judge without cause as a matter of right.
>
> (ii) An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties." 735 ILCS 5/2-1001(a)(2) (West 2014).

In the motion, respondent noted the trial court entered a ruling at the shelter-care hearing on January 25, 2016. However, respondent contended the probable cause finding was not a substantive ruling that would preclude automatic substitution of judge, citing this court's opinion in *In re Austin D.*, 358 Ill. App. 3d 277, 831 N.E.2d 1215 (2005). In that case, this court found the trial court's ruling at the shelter-care hearing did not constitute a substantive ruling directly related to the merits of the case and the motion for substitution was improperly denied. *Austin D.*, 358 Ill. App. 3d at 286, 831 N.E.2d at 1221.

¶ 21 Here, and in response to counsel's argument, the trial court distinguished the facts set forth in *Austin D.* In the case before it, the court stated the temporary custody order made certain findings based upon evidence presented by the State. The court found probable cause existed to believe the minors were neglected and/or abused based on the evidence. Further, the court found it a matter of immediate and urgent necessity that the minors be placed in shelter care, that reasonable efforts had been made but had not eliminated the necessity for the minors' removal from the home, and that it would be contrary to the health, welfare, and safety of the minors to remain in the home. Thus, the court concluded the temporary custody order was a ruling on a substantive issue that precluded respondent's entitlement to a substitution of judge as of right.

¶ 22 We need not address whether this case is distinguishable from *Austin D.* or whether the facts support the trial court's conclusion that it had already ruled on a substantive issue when the motion for substitution was made. We note this court may affirm on any basis in the record. *In re Marriage of Murphy*, 338 Ill. App. 3d 1095, 1099, 792 N.E.2d 12, 15 (2003). When construing section 2-1001(a)(2) of the Procedure Code, our supreme court has stated that, "though not expressly included in the statute, this court has long recognized that courts may take

into consideration the circumstances surrounding a motion for substitution of judge and may deny the motion if it is apparent that the request has been made as a delay tactic." *Bowman v. Ottney*, 2015 IL 119000, ¶ 18, 48 N.E.3d 1080.

¶ 23 In this case, the petitions for adjudication of wardship and termination of parental rights were filed on January 25, 2016. The shelter-care hearing and the temporary custody order occurred the same day. The trial court appointed counsel for respondent on March 22, 2016, and continued the case to April 25, 2016. On April 25, the adjudicatory hearing was set for May 31, 2016. On May 19, 2016, the State filed the amended wardship petitions, and the cause was set for May 31, 2016. Respondent did not file her motion for substitution of judge until May 31, 2016, the day of the adjudicatory hearing. Here, no evidence explains the delay in filing the motion. Accordingly, we find the court properly denied the motion, as it is apparent it was made to delay the proceedings.

¶ 24 C. Unfitness Findings

¶ 25 Respondent argues the trial court's findings of unfitness were against the manifest weight of the evidence. We disagree.

¶ 26 In a proceeding to terminate a respondent's parental rights, the State must prove unfitness by clear and convincing evidence. *In re Donald A.G.*, 221 Ill. 2d 234, 244, 850 N.E.2d 172, 177 (2006). " 'A determination of parental unfitness involves factual findings and credibility assessments that the trial court is in the best position to make.' " *In re Richard H.*, 376 Ill. App. 3d 162, 165, 875 N.E.2d 1198, 1201 (2007) (quoting *In re Tiffany M.*, 353 Ill. App. 3d 883, 889-90, 819 N.E.2d 813, 819 (2004)). A reviewing court accords great deference to a trial court's finding of parental unfitness, and such a finding will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re A.F.*, 2012 IL App (2d) 111079,

¶ 40, 969 N.E.2d 877. "A decision regarding parental fitness is against the manifest weight of the evidence where the opposite conclusion is clearly the proper result." *In re D.D.*, 196 Ill. 2d 405, 417, 752 N.E.2d 1112, 1119 (2001).

¶ 27 In this case, the trial court found respondent unfit due to her failure to maintain a reasonable degree of interest, concern, or responsibility as to the minors' welfare, her depravity, and her repeated incarceration. Respondent makes no argument regarding these three allegations. Instead, respondent only argues the court should not have admitted evidence of her pending cases. However, notwithstanding respondent's argument, the other remaining evidence clearly shows her unfitness. The evidence indicated respondent had three felony convictions, including forgery (No. 07-CF-305), aggravated battery (No. 09-CF-392), and forgery (No. 13-CF-599). The latter conviction fell within five years of the 2016 filing of the petition seeking termination. 750 ILCS 50/1(D)(i) (West 2014). Respondent's convictions created a rebuttable presumption of her depravity, and she offered no evidence to rebut that presumption. Thus, the court's finding of unfitness on this ground was not against the manifest weight of the evidence. Because the grounds of unfitness are independent, we need not address the remaining grounds. See *In re H.D.*, 343 Ill. App. 3d 483, 493, 797 N.E.2d 1112, 1120 (2003) ("As the grounds for unfitness are independent, the trial court's judgment may be affirmed if the evidence supports the finding of unfitness on any one of the alleged statutory grounds.").

¶ 28 D. Best-Interests Findings

¶ 29 Respondent argues the trial court's determination that it was in the minors' best interests that her parental rights be terminated was against the manifest weight of the evidence. We disagree.

¶ 30 "Courts will not lightly terminate parental rights because of the fundamental

importance inherent in those rights." *In re Veronica J.*, 371 Ill. App. 3d 822, 831, 867 N.E.2d 1134, 1142 (2007) (citing *In re M.H.*, 196 Ill. 2d 356, 362-63, 751 N.E.2d 1134, 1140 (2001)). Once the trial court finds the parent unfit, "all considerations must yield to the best interest of the child." *In re I.B.*, 397 Ill. App. 3d 335, 340, 921 N.E.2d 797, 801 (2009). When considering whether termination of parental rights is in a child's best interests, the trial court must consider a number of factors within "the context of the child's age and developmental needs." 705 ILCS 405/1-3(4.05) (West 2014). These include the following:

> "(1) the child's physical safety and welfare; (2) the development of the child's identity; (3) the child's familial, cultural[,] and religious background and ties; (4) the child's sense of attachments, including love, security, familiarity, continuity of affection, and the least[-]disruptive placement alternative; (5) the child's wishes and long-term goals; (6) the child's community ties; (7) the child's need for permanence, including the need for stability and continuity of relationships with parent figures and siblings; (8) the uniqueness of every family and child; (9) the risks related to substitute care; and (10) the preferences of the person available to care for the child." *In re Daphnie E.*, 368 Ill. App. 3d 1052, 1072, 859 N.E.2d 123, 141 (2006).

See also 705 ILCS 405/1-3(4.05)(a) to (j) (West 2014).

¶ 31 A trial court's finding that termination of parental rights is in a child's best interests will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Anaya J.G.*, 403 Ill. App. 3d 875, 883, 932 N.E.2d 1192, 1199 (2010). A decision will be

found to be against the manifest weight of the evidence in cases "where the opposite conclusion is clearly evident or where the findings are unreasonable, arbitrary, and not based upon any of the evidence." *In re Tasha L.-I.*, 383 Ill. App. 3d 45, 52, 890 N.E.2d 573, 579 (2008).

¶ 32 At the best-interests hearing, the State relied on the caseworker's report, which stated respondent had been incarcerated for the majority of the case, had no visitation pursuant to court order, had not been involved in any documented services, and had not completed any tasks or recommendations. The guardian *ad litem* pointed out the report "makes it clear that [respondent] causes her children significant stress and it is in their best interest to terminate her parental rights."

¶ 33 The report indicated B.C.'s placement appeared "appropriate and stable" and her emotional, relational, and educational needs were being met. The report stated it would be appropriate for her to remain in the placement to achieve permanency. The report indicated A.C. resided in a children's home and had the correct services in place to help with his relationship issues. The report stated it would be in his best interests to continue with his treatment and work toward a more home-like placement. As to respondent, the report noted she had "very little involvement in this case and has shown almost no interest in her children." Moreover, she had not completed any services and had been violent, aggressive, and uncooperative. Given the minors' needs, along with respondent's troubled criminal history and lack of cooperation, it was clear she could not provide the permanency they need and deserve now in their young lives or in the near future. Considering the evidence and the best interests of the minors, most importantly their physical safety and welfare, we find the trial court's order terminating respondent's parental rights was not against the manifest weight of the evidence.

¶ 34 E. Indian Child Welfare Act of 1978

¶ 35 Respondent argues the trial court abused its discretion in terminating her parental rights by using the clear and convincing standard rather than the beyond a reasonable doubt standard of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. §§ 1901 to 1923 (2012)). We disagree.

¶ 36 This court has noted "the ICWA does not apply unless it is established that the minor is an 'Indian child.' " *H.D.*, 343 Ill. App. at 488, 797 N.E.2d at 1117. Moreover, "the ICWA 'does not apply merely because the children are "Indian," but applies only where there is proof that the children are members, or are eligible for membership, in an Indian tribe, as defined by the [ICWA].' " *H.D.*, 343 Ill. App. 3d at 489, 797 N.E.2d 1117 (quoting *In re Stiarwalt*, 190 Ill. App. 3d 547, 551, 546 N.E.2d 44, 48 (1989)).

¶ 37 In the case *sub judice*, no proof existed that the minors were Indian children. Nothing indicated they were members or were eligible for membership in an Indian tribe as defined by the ICWA. Instead, there was only respondent's unsubstantiated claim that she was part Native American. As respondent failed to present evidence to show the minors were Indian children or part of an Indian tribe, the ICWA does not apply. See *H.D.*, 343 Ill. App. 3d at 489, 797 N.E.2d at 1118.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment.

¶ 40 Affirmed.