2017 IL App (4th) 170391-U

NO. 4-17-0391

FILED
October 13, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: L.H., a Minor	)	Appeal from
(The People of the State of Illinois,	)	Circuit Court of
Petitioner-Appellee,	)	Morgan County
v.	)	No. 15JA20
James Hazelman,	)	
Respondent-Appellant).	)	Honorable
	)	Jeffery E. Tobin,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's fitness determination was not against the manifest weight of the evidence and it did not commit reversible error by applying an improper legal standard.

¶ 2 In April 2017, the trial court terminated the parental rights of respondent, James Hazelman, to his child, L.H. (born August 12, 2013). Respondent appeals, arguing the court erred in finding him unfit. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The record shows respondent and Amy Ryan are the parents of L.H. In May 2015, L.H. came to the attention of the Illinois Department of Children and Family Services (DCFS) following a report that Ryan was abusing drugs and consuming alcohol while driving with L.H. In September 2015, the State filed a petition for adjudication of wardship, alleging L.H. was a

neglected minor, in that her environment was injurious to her welfare because of Ryan's substance-abuse issues. Throughout the underlying neglect proceedings, respondent was serving a prison sentence in Michigan for inflicting bodily injury while driving under the influence.

¶ 5 In December 2015, the trial court conducted an adjudicatory hearing and found L.H. was a neglected minor as alleged in the State's petition. In February 2016, the court entered an amended dispositional order, making L.H. a ward of the court and placing her custody and guardianship with DCFS.

¶ 6 In January 2017, the State filed a petition for termination of respondent's parental rights. (We note the State also sought to terminate Ryan's parental rights and its request was granted; however, Ryan is not a party to this appeal and we discuss the facts only as they relate to respondent and L.H.) In its petition, the State alleged respondent was unfit for failing to (1) make reasonable efforts to correct the conditions that were the basis for L.H.'s removal from the home during any nine-month period following the neglect adjudication (750 ILCS 50/1(D)(m)(i) (West 2016)), (2) make "substantial progress" toward L.H.'s return during any nine-month period following the neglect adjudication (750 ILCS 50/1(D)(m)(ii) (West 2016)), and (3) maintain a reasonable degree of interest, concern, or responsibility as to L.H.'s welfare (750 ILCS 50/1(D)(b) (West 2016)). The State focused its allegations on the nine-month period from April 6, 2016, to January 5, 2017. Further, it asserted that termination of respondent's parental rights was in L.H.'s best interest.

¶ 7 In April 2017, the trial court conducted fitness and best-interest hearings in the matter. At the fitness hearing, the State presented the testimony of Vicky Vinyard, L.H.'s DCFS caseworker. Vinyard testified she developed a service plan for respondent and provided him with a copy by mailing it to the correctional facility where he was imprisoned. Respondent's services

included obtaining stable housing and a legal means of income, and undergoing mental-health and substance-abuse assessments. Vinyard testified, between April 6, 2016, and January 5, 2017, respondent did not complete any of his recommended services due to his imprisonment and he received an unsatisfactory rating on his service plan. She stated respondent was not eligible for parole until 2020.

¶ 8 Vinyard testified she communicated with respondent once by letter and once by telephone. Initially, she wrote him a letter asking him to complete an integrated assessment so that she could develop his service plan. She stated respondent complied with her request and she was able to generate his service plan. Vinyard testified that she believed it was possible for respondent to complete mental-health and substance-abuse assessments while in prison. However, she did not know if she "addressed" with respondent what services he could complete while imprisoned.

¶ 9 On cross-examination, Vinyard testified she did not review the service plan requirements with respondent and did not verify that he received the service plan. The following colloquy occurred between Vinyard and respondent's counsel:

> "Q. Are you aware that [respondent] completed a substance abuse program while he was incarcerated?
>
> A. No, I was not aware of that.
>
> Q. Are you aware that he was enrolling in electrician training to be able to obtain a legal means of income when he is released?
>
> A. No.
>
> Q. Are you aware that he had signed up and started a parenting program—
>
> A. No.

Q. —while incarcerated?

A. No.

Q. Did you make any effort to follow up on whether [respondent] was able to engage in any of the services you had prescribed?

A. I did not.

Q. Did you make any effort to contact the prison where he was incarcerated to determine whether he would be able to engage in any of the services?

A. I did not."

On questioning by the guardian *ad litem*, Vinyard testified she spoke with respondent on the phone after sending him the service plan in July 2016. She asserted that, during their conversation, she and respondent "did talk about the services." However, Vinyard stated she did not ever advise respondent that he was not making satisfactory progress on his service plan.

¶ 10 Additionally, Vinyard testified respondent drew cards for L.H., which he sent to her. She forwarded the cards to L.H. and sent pictures of L.H. to respondent. Vinyard stated she also contacted respondent's mother on several occasions.

¶ 11 Aside from Vinyard's testimony, no other evidence was presented at the fitness hearing. Following the parties' arguments, the trial court determined respondent was unfit for failing "to make substantial progress" toward L.H.'s return within the relevant nine-month time frame. Although the State alleged two additional grounds for finding respondent unfit, the court determined the State had not met its burden of proof with respect to those allegations.

¶ 12 At the best-interest hearing, Vinyard testified L.H. had been in the same foster home since September 2015. Her foster family, which included two other children, had recently moved into a new house and L.H. had her own bedroom. Vinyard stated L.H. was "very much

engaged" with her foster family and was bonded with her foster parents. Additionally, she anticipated that L.H.'s foster family intended to adopt L.H. if parental rights were terminated. At the conclusion of the hearing, the court found termination of respondent's parental rights was in L.H.'s best interest.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, respondent challenges the trial court's finding that he was unfit. He contends the court's fitness determination was against the manifest weight of the evidence and that the court applied the wrong standard to determine his fitness.

¶ 16 Pursuant to the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/1-1 *et seq*. (West 2016)), a trial court may involuntarily terminate parental rights where it finds, by clear and convincing evidence, that a parent is unfit as defined in section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2016)) and that termination is in the child's best interest. *In re J.L.*, 236 Ill. 2d 329, 337, 924 N.E.2d 961, 966 (2010). "A parent's rights may be terminated if even a single alleged ground for unfitness is supported by clear and convincing evidence." *In re Gwynne P.*, 215 Ill. 2d 340, 349, 830 N.E.2d 508, 514 (2005). "A reviewing court will not reverse a trial court's fitness finding unless it was contrary to the manifest weight of the evidence, meaning that the opposite conclusion is clearly evident from a review of the record." *In re A.L.*, 409 Ill. App. 3d 492, 500, 949 N.E.2d 1123, 1129 (2011).

¶ 17 Under the Adoption Act, an unfit parent includes one who failed "to make reasonable progress toward the return of the child to the parent during any [nine]-month period following the [neglect] adjudication." 750 ILCS 50/1(D)(m)(ii) (West 2016).

"[T]he benchmark for measuring a parent's 'progress toward the return of the

> child' under section 1(D)(m) of the Adoption Act encompasses the parent's compliance with the service plans and the court's directives, in light of the condition which gave rise to the removal of the child, and in light of other conditions which later become known and which would prevent the court from returning custody of the child to the parent." *In re C.N.*, 196 Ill. 2d 181, 216-17, 752 N.E.2d 1030, 1050 (2001).

Additionally, this court has described reasonable progress as "an 'objective standard,' " which exists "when 'the progress being made by a parent to comply with directives given for the return of the child is sufficiently demonstrable and of such a quality that the court, in the *near future*, will be able to order the child returned to parental custody.' " (Emphasis in original.) *In re F.P.*, 2014 IL App (4th) 140360, ¶ 88, 19 N.E.3d 227 (quoting *In re L.L.S.*, 218 Ill. App. 3d 444, 461, 577 N.E.2d 1375, 1387 (1991)).

¶ 18 On appeal, respondent argues that a finding that he failed to make reasonable progress toward L.H.'s return to his care from April 6, 2016, to January 5, 2017, was against the manifest weight of the evidence. We disagree. Evidence presented at the fitness hearing showed respondent was in prison during the entire nine-month time period at issue. Vinyard testified she prepared and mailed a service plan to respondent, and talked "about the services" with him during a telephone conversation sometime after July 2016. According to Vinyard, respondent did not complete any of the recommended services and received an unsatisfactory rating on his service plan.

¶ 19 Respondent complains that Vinyard failed to inquire as to whether he had completed any of the required services and asserts she was unaware that he participated in various programs while in prison. The record shows that, while cross-examining Vinyard, respondent's

counsel inquired as to whether Vinyard was aware that respondent participated in substance-abuse, parenting, and job training programs while in prison. However, while counsel's questions raise the *suggestion* that respondent participated in such programs, they certainly did not constitute *evidence* that he had done so. There is simply nothing in the record to substantiate respondent's assertion on appeal that he, in fact, participated in the programs referenced by his counsel and, therefore, nothing to demonstrate that he complied in any way with his service plan.

¶ 20 Additionally, we note that the evidence does show respondent and Vinyard discussed the issue of services and that respondent knew how to contact Vinyard. In fact, respondent had sent Vinyard cards and letters to give to L.H. Thus, had respondent participated in services or programs while in prison, he certainly could have notified Vinyard of his activities.

¶ 21 On review, respondent further challenges the trial court's finding that he was unfit on the basis that Vinyard "was unable to testify that services were available to" respondent while he was in prison. He points out that section 1(D)(m)(ii) provides as follows:

> "If a service plan has been established *** to correct the conditions that were the basis for the removal of the child from the parent and *if those services were available*, then, for purposes of this Act, 'failure to make reasonable progress toward the return of the child to the parent' includes the parent's failure to substantially fulfill his or her obligations under the service plan and correct the conditions that brought the child into care during any [nine]-month period following the adjudication." (Emphasis added.) 750 ILCS 50/1(D)(m)(ii) (West 2016).

Based on this statutory language, respondent suggests that his failure to complete services cannot form the basis for a finding that he failed to make reasonable progress if he lacked access to services as a result of his imprisonment.

¶ 22 Again, we disagree with respondent's argument. Time that a parent spends in prison does not toll the nine-month period during which reasonable progress must be made. *In re J.L.*, 236 Ill. 2d 329, 341, 924 N.E.2d 961, 968 (2010). Further, "[t]hat *** personal circumstances prevented [a parent] from making reasonable progress is irrelevant to the 'objective standard.' " *F.P.*, 2014 IL App (4th) 140360, ¶ 89, 19 N.E.3d 227. It stands to reason that a parent's confinement in prison or jail is likely to inhibit his or her ability to comply with DCFS recommendations or engage in services that would otherwise be readily available if he or she were not confined. Here, even if we are to assume that respondent lacked the ability to engage in any services as a result of his imprisonment, such circumstances were personal to him and of his own making. To hold as he now suggests would require carving out exceptions to the nine-month "reasonable progress" period for time a parent spends in jail or prison; however, this is contrary to established case law and not something that section 1(D)(m) permits or requires.

¶ 23 On appeal respondent also argues the trial court erred by using an incorrect "standard" to determine that he was unfit. He points out that although a ground for unfitness under the Adoption Act is a parent's failure to make "reasonable progress," in this case, the State alleged in its petition, and the court found, that he failed to make "substantial progress" toward L.H.'s return home. Citing dictionary definitions of both reasonable and substantial, respondent contends that the difference between the words is clear and could lead to very different results when determining parental fitness.

¶ 24 The State responds by arguing respondent forfeited this claim of error by failing to raise an objection with the trial court. Additionally, it contends that while "plain errors affecting substantial rights may be noticed" (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)), no error occurred in this case and the plain-error rule cannot be applied to excuse respondent's forfeiture.

¶ 25 Here, we agree with the State that respondent has forfeited his claim of error by failing to first raise the issue with the trial court. *In re M.W.*, 232 Ill. 2d 408, 430, 905 N.E.2d 757, 773 (2009) (finding the failure raise an issue with the trial court during proceedings under the Juvenile Court Act resulted in forfeiture of the issue on appeal unless the respondent could demonstrate plain error). Although the State also raises the plain-error doctrine as a possible exception to respondent's forfeiture, respondent has elected not to file a reply brief and neither addressed the State's forfeiture argument nor any applicable exception to that doctrine. Moreover, even excusing respondent's forfeiture, we find any alleged error by the trial court was harmless. As discussed above, respondent was in prison during the entire relevant nine-month time period. Vinyard testified she mailed respondent's service plan to his correctional facility and spoke with him about his services on the phone. His services included obtaining housing and a legal means of income, and undergoing substance-abuse and mental-health assessments. The evidence presented indicates he failed to complete any of his recommended services or make any progress toward L.H.'s return to his care in the near future.

¶ 26 III. CONCLUSION

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

¶ 28 Affirmed.