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2018 IL App (3d) 170871-U

Order filed August 2, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

<i>In re</i> Z.B.,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
a Minor)	Peoria County, Illinois.
)	
(The People of the State of Illinois,)	
)	
Petitioner-Appellee,)	Appeal No. 3-17-0871
)	Circuit No. 10-JA-259
v.)	
)	
S.J.B.,)	The Honorable
)	Katherine Gorman Hubler,
Respondent-Appellant).)	Judge, presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err by sustaining an objection to questioning by respondent's attorney of a witness pertaining to irrelevant testimony. The trial court's determination of parental unfitness pursuant to section 1(D)(m)(ii) of the Adoption Act (750 ILCS 50/1(D)(m)(ii) (West 2016)) was not against the manifest weight of the evidence. Respondent's due process rights were not violated by the delay in the State filing the termination of parental rights petition three years after the permanency goal for the minor was changed to substitute care pending the court's determination of termination.

¶ 2 The State filed a petition to terminate the parental rights of respondent, S.J.B., as to his son, Z.B., with the State alleging that respondent failed to make reasonable progress toward the return of Z.B. within the nine-month period of October 7, 2015, until July 7, 2016, pursuant to section 1(D)(m)(ii) of the Adoption Act (750 ILCS 50/1(D)(m)(ii) (West 2016)). The trial court found that respondent was unfit as alleged in the petition and that it was in the best interest of Z.B. to terminate respondent's parental rights. On appeal, respondent argues: (1) the trial court abused its discretion by sustaining the State's objection to his attorney's questioning of a witness as irrelevant; (2) the trial court erred in finding that he failed to make reasonable progress toward the return home of Z.B. during the nine-month period of October 7, 2015, and July 7, 2016; and (3) the State's decision to wait three years after the permanency goal had been changed to substitute care pending the court's termination decision violated his due process rights. We affirm.

¶ 3 FACTS

¶ 4 Respondent is the biological father of Z.B. He was not married to or living with Z.B.'s mother during the pendency of this case.

¶ 5 On September 10, 2010, the State filed a juvenile petition alleging that Z.B. was neglected by reason of an injurious environment. The petition alleged that Z.B.'s mother ignored the severe dental conditions of Z.B.'s sibling—K.M.—leading K.M. to appear in the emergency room with a swollen face, fever, and pain and requiring K.M. to undergo treatment for an abscess and teeth removal, with K.M. having prior dental issues (cavities, an abscess, pain, and swelling) and without having any followup treatment until the emergency room visit on September 4, 2010; K.M.'s uncle had cut K.M. on the cheek with a knife, with the minors' mother taking no action and continuing to allow the uncle to babysit K.M.; the minors' mother accused K.M. of

lying about the incident and cussed out K.M. for being the reason she could not leave the hospital; the minors' uncle admitted to waving a knife in K.M.'s face and reported that the minors' mother was aware of his suicidal and substance abuse problems but the minors' mother still allowed him to babysit the minors; and the Department of Children and Family Services (DCFS) issued a service plan and safety plan for the family without taking protective custody of the minors, but the minors' mother violated the safety plan by fleeing to Indiana with the minors. The petition alleged that respondent (the minors' father) had a criminal history of convictions for possession of cannabis in 2004 and in 2005 and a conviction for the reckless discharge of a firearm in 2007.

¶ 6 On February 9, 2011, an adjudication hearing and a dispositional hearing took place. The trial court entered an adjudication order indicating that respondent and Z.B.'s mother stipulated to the allegations in the neglect petition (respondent stipulated to his three prior convictions, as alleged in the neglect petition). The trial court found that Z.B. was neglected. The matter immediately proceeded to a dispositional hearing, and both respondent and the minors' mother were found to be dispositionally unfit. According to the written dispositional order, respondent was ordered by the trial court to complete services, which included obtaining a drug assessment and complete any recommended treatment, complete four random drug tests per month, submit to a psychological examination and following any recommendations, obtain and maintain stable and suitable housing, and attend supervised visits with Z.B.

¶ 7 The initial permanency review order of July 18, 2011, and the subsequent permanency review order of December 28, 2011, indicated the trial court set the permanency goal as returning Z.B. home within one year and found the services required by the court and the service plan were appropriate. The permanency review order of July 18, 2011, indicated that respondent

had failed to make reasonable progress. The permanency review order of December 28, 2011, indicated that respondent failed to make reasonable efforts and at the next hearing, the caseworker was to provide the trial court with respondent's drug and alcohol evaluation of December 19, 2011, with a description of what referral information had been provided to the drug treatment facility. The order indicated that, contrary to instruction, the minors' mother allowed respondent to be around the minors at an unsupervised visit, she maintained a relationship with respondent, and respondent had been domestically violent to the minors' mother. On June 20, 2012, the permanency goal was changed to the "return home of Z.B. pending status" and respondent was found to have failed to make reasonable efforts, with the trial court noting that respondent and the minors' mother "used poor judgment regarding unauthorized contact with [the] children." On February 6, 2013, the permanency goal of return home pending a status hearing remained unchanged. On May 1, 2013, the permanency goal remained the same (return home pending status hearing); Z.B.'s mother and respondent were found to have failed to make reasonable efforts; respondent was to perform a drug test that day; respondent was admonished regarding contempt if he failed to perform the ordered drug test; respondent was ordered to do drug testing four times per month; respondent was to re-engage in counseling; and respondent was ordered to "return to drug treatment facility and accept treatment."

¶ 8 On August 14, 2013, the permanency goal was changed to substitute care pending the court's determination on termination of parental rights, with the trial court finding that the minors' mother and respondent failed to make reasonable efforts. On April 2, 2014, the permanency goal was changed back to return home pending status hearing as to Z.B.'s mother (with the goal for respondent remaining as substitute care pending the court's determination of

termination of parental rights). The trial court found that respondent failed to make reasonable efforts to achieve the service plan. On October 1, 2014, the permanency goal for Z.B.'s mother returned to substitute care pending the court's determination on termination of parental rights, with the trial court finding that both Z.B.'s mother and respondent failed to make reasonable efforts toward the service plan.

¶ 9 On April 6, 2015, respondent, who was represented by counsel, filed a *pro se* motion to dismiss. Subsequently, respondent was admonished by the trial court that his attorney must file any pleadings, and he was directed not to file any pleadings himself. On April 22, 2015, respondent's attorney was allowed to withdraw at respondent's request, with respondent indicating that he wanted to hire an attorney or represent himself. On June 10, 2015, respondent indicated he could not afford an attorney, and the trial court appointed him counsel. On August 26, 2015, the trial court deferred its efforts finding in regard to respondent at the request of his new counsel so that she could obtain medical information regarding respondent. The next permanency review hearing was scheduled for February 17, 2016, which was continued at the request of respondent's attorney so that she could file motions. On March 23, 2016, at the permanency review hearing, respondent was found to have failed to make reasonable efforts to achieve the service plan, with the trial court finding that he had multiple missed drug tests, tested positive for cannabis, and failed to complete a drug and alcohol evaluation.

¶ 10 On July 12, 2016, the State filed a petition to terminate the parental rights of respondent as to Z.B. The petition alleged that respondent was unfit in that he failed to make reasonable progress toward the return of Z.B. during any nine month period after the end of the initial nine-month period following the adjudication of neglect, pursuant to section 1(D)(m)(ii) of the Adoption Act (750 ILCS 50/1(D)(m)(ii) (West 2016)), with the said nine-month period being

October 7, 2015 to July 7, 2016. On May 10, 2017, a hearing on the State's motion to terminate the parental rights of Z.B.'s mother and respondent commenced. The State introduced certified records of the respondent from Fortes Labs regarding drug testing, records from the Human Service Center (behavioral health records), St. Francis Hospital (medical records), and Heartland Health (medical records). The State also requested the trial court take judicial notice of the pleadings and various orders within the file.

¶ 11 Respondent testified that prior to the relevant nine-month period, he had been diagnosed with sickle cell disease and migraine headaches. He also suffered from anxiety and panic attacks. Respondent suffered from memory loss and could not recall the answers to many questions asked of him. Respondent testified that during the relevant nine-month period, sickle cell disease was not a diagnosis for which medical marijuana could be prescribed. Respondent had been using cannabis for several years as a means of pain management and to control the symptoms of anxiety/post-traumatic stress disorder (PTSD). Respondent testified that he was not in good health during the relevant time period. He testified that he suffered from migraine headaches, night sweats, nightmares, and anxiety. Respondent was seeing Dr. Tammy Watkins (nurse practitioner with a doctorate degree) for his sickle cell disease at an infusion center, with whom he had a pain contract to receive pain medications so that he could not seek out pain management medications elsewhere. He was prescribed oxycontin and vicodin. Respondent had a care plan for Z.B. in the event Z.B. was returned home and respondent was not able to care for him, with respondent's mother, fiancée, cousins, aunts, and uncles able to care for Z.B., who all had passed background checks. Respondent testified that during the relevant time period, he was taking his prescribed pain medications, although his court-ordered drug testing during the relevant nine-month period did not show the presence of that medication.

Respondent indicated that he could not take his pain medication prior to a drug drop because he would be “spaced out” and there were side effects to the medications. Respondent did not feel that it was safe to drive when he was on the pain medication. During the relevant nine-month time period, respondent had a legal source of income in the form of social security disability due to his sickle cell anemia. He also had suitable housing for Z.B. and had completed the services ordered by the court, with only having to perform required drug drops and a new drug and alcohol assessment. During the relevant nine-month time period, respondent was unable to obtain a medical marijuana card because his conditions were not approved conditions at that time. Respondent testified that he used marijuana as needed for pain, approximately 15 to 20 times per month.

¶ 12 Felicia Jackson testified that she was the caseworker assigned to this case. Prior to the relevant nine-month period of October 7, 2015, to July 7, 2016, respondent had completed individual counseling. During a child and family team meeting on December 22, 2015, respondent indicated he was in the process of applying for a medical marijuana card due to his sickle cell disease but could not complete the process because he could not pay the application fee. On January 3, 2016, during another child and family team meeting, respondent indicated that he could not obtain a medical marijuana card because he did not have the \$175 application fee. Jackson requested that respondent undergo a new drug and alcohol assessment. Respondent indicated he was prescribed pain medication and was not interested in seeking out another pain management source because prescription medications did not make him feel well and interfered with his body and erections. Jackson was not aware that respondent seeking pain medication from another source would void his current pain medication contract. Respondent did not complete a drug and alcohol assessment during the relevant nine-month period. From March 29

to July 7, 2016, respondent completed drug tests that were positive for cannabis but no other illicit substances. During the relevant nine-month period, there was no indication that respondent was under the influence of drugs or alcohol during his visits with Z.B.

¶ 13 Respondent entered into evidence the deposition of nurse practitioner Dr. Tamara Wilkins, who had a doctorate in nursing. Wilkins was not a medical doctor. During the relevant nine-month period Wilkins was employed as a nurse practitioner at an infusion clinic that treated patients with various conditions, including sickle cell disease. Wilkins testified that patients with sickle cell disease are generally African American (like respondent) with misshapen red blood cells, with the most common first warning sign of the disease being pain. If treated early enough, a patient can be given an infusion to aid with blood flow, which can reduce pain and avoid hospitalization. Patients with sickle cell disease can also sometime develop damage to their bones, blood vessels, and organs, leading to necrosis (cell death in tissue or organs) that is irreversible and causes debilitating pain and immobility. Wilkins testified that respondent suffered from necrosis in the hips and shoulders. Wilkins testified that respondent had an oral “pain contract” that meant that he could not obtain pain medications elsewhere or the provider would stop seeing him. Wilkins testified that despite taking his prescribed pain medications, respondent would still suffer from day-to-day pain. Wilkins acknowledged that respondent told her that he sometimes used cannabis to manage his pain. She also acknowledged that sickle cell anemia was not a qualifying condition for the medical cannabis program. Wilkins did not see respondent ever display signs of being high or overmedicating.

¶ 14 Anita Burnett testified that she was a nurse and worked at a local dispensary for medical marijuana in Peoria, Illinois. Burnett testified that sickle cell disease was not currently a qualifying condition to receive medical marijuana in Illinois and was not during the relevant

nine-month period. During the relevant time period, severe, chronic, or intractable pain was also not a qualifying condition in Illinois for the medical marijuana program. Through Burnett's testimony, respondent's attorney attempted to establish that: (1) there are various strains of cannabis with medicinal properties that have no psychoactive properties; (2) respondent attempted to obtain a medical marijuana card during the relevant nine-month period but he did not have an approved condition to receive the card; and (3) respondent's marijuana use did not equate to him being impaired or unable to care for his child. The State objected to the relevancy of such testimony, arguing that any use of cannabis was illegal. In response to the State's objection, respondent's attorney argued that not every illegal act impacts a parent's ability to effectively care for his or her child.

¶ 15 Specifically, respondent's attorney asked Burnett, "[a]re there different strains or forms of cannabis which have either more or less or no psychoactive effects?" The State objected and, in response to the objection, respondent's counsel argued that the restriction of respondent's cannabis use must relate to his parenting and she was attempting to establish whether all forms of cannabis would "make someone high." The State responded that respondent had no legal way to obtain cannabis in Illinois during the relevant nine-month period so any evidence regarding various strains of cannabis was irrelevant. The trial court sustained the State's objection to the question on the basis of relevancy. Respondent's attorney indicated, "Okay. I'll move on." No further testimony was obtained from Burnett.

¶ 16 On June 21, 2017, the trial court found that during the relevant nine-month period, respondent failed to appear for 16 of the 18 drug tests ordered and the two drug tests he performed were positive for cannabis. The trial court noted that it had considered respondent's voluminous medical records, his medical condition, and the effect his medical condition may

have had on his ability to engage in services. The trial court found that respondent was capable of engaging in services but he chose not to do so in a meaningful way. The trial court concluded that respondent failed to reasonably progress during the nine-month period and that the State proved the allegations in the termination petition by clear and convincing evidence.

¶ 17 Respondent's attorney filed a motion for the trial court to reconsider its ruling, arguing, *inter alia*, that respondent's use of cannabis to self-medicate for his pain was not sufficient to show by clear and convincing evidence that he failed to make reasonable progress. The trial court denied the motion.

¶ 18 On November 15, 2017, a best interest hearing took place. Respondent's attorney argued that after the permanency goal changed to termination on August 14, 2013, respondent was only allowed one hour of visitation per month and the State waited almost three years to file the termination petition, which set respondent up to fail on the best interest factors due to his limited visitation schedule with Z.B. of one hour per month. The trial court found that it was in Z.B.'s best interest to terminate respondent's parental rights.

¶ 19 Respondent appealed.

¶ 20 ANALYSIS

¶ 21 On appeal, respondent argues: (1) the trial court abused its discretion by sustaining the State's objection to his questioning of Burnett regarding the properties of various strains of cannabis and regarding inferences that could be made from the presence of cannabis on respondent's drug screens; (2) the trial court's finding that respondent failed to make reasonable progress toward the return home of Z.B. during the nine-month period of October 7, 2015, and July 7, 2016, was against the manifest weight of the evidence; and (3) the State's decision to wait three years after the permanency goal had been changed to substitute care pending the court's

termination decision violated respondent's due process rights by ensuring the best interest factors would favor the foster parent.

¶ 22 I. Objection to Burnett's Testimony

¶ 23 On appeal, respondent contends the trial court erred in sustaining the State's objection to his attorney's questioning of Burnett about whether various strains of cannabis may have little or no psychoactive effects on the user and regarding inferences that could be made from the presence of cannabis on respondent's drug screens. The State argues that the trial court did not abuse its discretion in sustaining the State's objection. Generally, a trial court's decision regarding the relevance and admissibility of evidence is within the trial court's discretion and the trial court's decision will not be disturbed on appeal absent an abuse of discretion. *In re Zariyah A.*, 2017 IL App (1st) 170971, ¶ 98.

¶ 24 Evidence is relevant for trial purposes if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See Ill. R. Evid. 401 (eff. Jan. 1, 2011). In this case, the issue was whether respondent made reasonable progress toward the return home of Z.B. during the relevant nine-month period of October 7, 2015, to July 7, 2016. See 750 ILCS 50/1(D)(m)(ii) (West 2016). The 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 court directives, in light of the condition which gave rise to the removal of the child, and in light of other conditions which later became known and which would prevent the court from returning custody of the child to the parent. *In re C.N.*, 196 Ill. 2d 181, 208 (2001). During the pendency of this case, respondent's self-medicating with cannabis became known to the court and service providers, and defendant was directed to undergo another drug evaluation.

During the applicable nine-month period, respondent missed multiple court-ordered drug tests, tested positive for cannabis use, and failed to perform the requested drug and alcohol evaluation. Which illegal strain of cannabis respondent used during the nine-month period would not have made the determination of whether respondent made reasonable progress more or less probable than without such evidence and, therefore, was irrelevant. Accordingly, the trial court did not abuse its discretion by sustaining the State's objection to his attorney's questioning of Burnett about various strains of cannabis.

¶ 25 No questions were posed to Burnett regarding inferences that could be made from the presence of cannabis on respondent's drug screen and, thus, no objection or offer of proof was made regarding the issue. We, therefore, will not address this issue on appeal.

¶ 26 II. Finding of Unfitness

¶ 27 Respondent argues that the trial court's finding that he failed to make reasonable progress toward the return home of Z.B. during the nine-month period of October 7, 2015, and July 7, 2016, was against the manifest weight of the evidence. The termination of parental rights constitutes a permanent and complete severance of the parent-child relationship and, as such, the State must prove parental unfitness by clear and convincing evidence. 705 ILCS 405/2-29(4) (West 2016); *C.N.*, 196 Ill. 2d at 208. The trial court's decision should not be reversed on appeal unless the finding was against the manifest weight of the evidence. *C.N.*, 196 Ill. 2d at 208. Only if the record shows that it is clearly apparent that the trial court should have reached the opposite conclusion will the trial court's decision be deemed to be against the manifest weight of the evidence. *Id.* The trial court is to consider evidence occurring only during the relevant nine-month period to determine whether a parent has made reasonable progress toward the return of the minor. *In re J.L.*, 236 Ill. 2d 329, 341 (2010).

¶ 28 In this case, the trial court found respondent was unfit pursuant to section 1(D)(m)(ii) of the Adoption Act because he failed to make reasonable progress during the nine-month period of October 7, 2015, and July 7, 2016. See 750 ILCS 50/1(D)(m)(ii) (West 2016) (providing that a ground of unfitness is the parents' failure “to make reasonable progress toward the return of the child to the parent during any 9-month period following the adjudication of neglected or abused minor under Section 2-3 of the Juvenile Court Act of 1987 or dependent minor under Section 2-4 of that Act”). Our supreme court has interpreted section 1(D)(m)(ii) as requiring a parent make demonstrable movement toward the goal of reunification. *C.N.*, 196 Ill. 2d at 211. The benchmark for measuring a parent's reasonable progress under section 1(D)(m)(ii) of the Adoption Act includes compliance with service plans and court directives in light of the condition that gave rise to the removal of the child and other conditions which later become known that would prevent the court from returning custody of the child to the parent. *Id.* at 216-17. Reasonable progress exists when the trial court can conclude that the progress being made by a parent to comply with the directives given for the return of the minor is sufficiently demonstrable and of such quality that the court would be able to order the child returned to the parent’s custody in the near future. *In re J.H.*, 2014 IL App (3d) 140185, ¶ 22.

¶ 29 Service plans are an integral part of the statutory scheme, and compliance with the service plans is intimately tied to a parent's progress toward the return of the child. *C.N.*, 196 Ill. 2d at 216. The failure to make reasonable progress includes the failure to substantially fulfill the terms of the service plans. *Id.* at 216-217. Section 1(D)(m)(ii) of the Adoption Act specifically provides:

“If a service plan has been established as required under Section 8.2 of the Abused and Neglected Child Reporting Act 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 9-month period following the adjudication [of neglect].” 750 ILCS 50/1(D)(m)(ii) (West 2016).

¶ 30 Section 8.2 of the Abused and Neglected Child Reporting Act sets forth requirements for drafting service plans and provides:

“No service plan shall compel any child or parent to engage in any activity or refrain from any activity which is not reasonably related to remedying a condition or conditions that gave rise or which could give rise to any finding of child abuse or neglect.” 325 ILCS 5/8.2 (West 2016).

¶ 31 Relevant to the determination of respondent’s reasonable progress in this case, the removal of Z.B., as alleged in the neglect petition and as stipulated to by respondent, included respondent’s criminal convictions for illegally possessing cannabis. The record indicates that respondent preferred to continue to self-medicate with cannabis 15-20 times per month, despite being on a pain contract with his medical care providers under which he had been prescribed pain medications. During the applicable nine-month period, the frequency of respondent’s marijuana use, his failure to complete the majority of court-ordered drug tests, and his failure to obtain an additional drug and alcohol evaluation perpetuated the court’s inability to resolve the ongoing concern as to whether respondent had a substance abuse problem and prevented the trial court from properly assessing that concern. In short, respondent failed to substantially fulfill his obligations under the service plan and, as a result, the trial court could not conclude that

respondent's progress in complying with the service plan directives was sufficiently demonstrable and of such quality to allow the trial court to order Z.B. to be returned home in the near future.

¶ 32 Respondent cites to *In re Zariyah A.*, 2017 IL App (1st) 170971, for the proposition that the State had a burden to provide some nexus between respondent's marijuana use and his ability to safely parent Z.B. In *Zariyah A.*, only the trial court's adjudication order, with the trial court's finding that each of the eight minors was neglected due to an injurious environment, was at issue on appeal. *Id.* ¶ 2. On appeal in *Zariyah A.*, the mother argued that it was error for the trial court to allow the State to present evidence of her unwillingness to engage in or complete intact family services prior to the State filing the neglect petition because such evidence was irrelevant to the court's determination of whether the minors were neglected or abused. *Id.* ¶ 96. The appellate court agreed that a parent's refusal to participate in referred intact family services is not automatically relevant to a finding of abuse or neglect, but rejected the mother's argument that her refusal to participate in intact services could never be relevant at an adjudicatory hearing. *Id.* ¶¶ 99-100. The *Zariyah A.* court held that for such evidence of the refusal to engage in intact family services to be relevant at an adjudicatory hearing, the services refused must be services that the evidence demonstrates have some connection to the problems in the home. See *id.* ¶¶ 101-02 (finding that because no admissible evidence established the mother suffered from a specific mental health disorder requiring treatment the State's evidence of her refusal to participate in mental health services was not relevant at the adjudication hearing). The *Zariyah A.* court found that evidence of the mother's refusal to receive substance abuse treatment was relevant because the mother had admitted to using marijuana while she was pregnant with one of the minors, but the court noted, however, that the State "failed to present any evidence regarding

the frequency of [the marijuana] use or establishing the children witnessed or were otherwise affected by [the parents'] marijuana use.” *Id.* ¶ 102.

¶ 33 On appeal in this case, respondent claims that the comment by the *Zariyah A.* court that the State “failed to present any evidence regarding the frequency of that [the marijuana] use or establishing the children witnessed or were otherwise affected by [the parents'] marijuana use” suggested the State has a burden to provide some nexus between the respondent’s marijuana use and his ability to safely parent Z.B. We agree with the State that respondent has taken this one sentence from the *Zariyah A.* decision out of context. The *Zariyah A.* case was an appeal from the trial court’s order adjudicating the minors neglected due to an injurious environment and within the context of the issue of whether evidence of a parent’s refusal to participate in intact services prior to the start of any court proceedings was relevant to the trial court’s subsequent determination that a minor was abused or neglected.

¶ 34 We acknowledge that “[a]ny tasks the court requires of the parents, guardian, or legal custodian or child prior to returning the child home, must be reasonably related to remedying a condition or conditions that gave rise to or which could give rise to any finding of child abuse or neglect.” See 705 ILCS 405/2-28(2) (West 2016). However, respondent did not appeal the dispositional order, which encompassed the trial court’s finding that Z.B. was neglected (*i.e.*, the conditions that brought Z.B. into care) and encompassed the court-ordered tasks entered as part of the dispositional order. See *Zariyah A.*, 2017 IL App (1st) 170971, ¶ 65 (citing *In re Barion S.*, 2012 IL App (1st) 113026, ¶ 36 (the dispositional order is a final and appealable order and the proper vehicle to appeal a finding of abuse or neglect)); 705 ILCS 405/2-23 (West 2016) (if the court finds services in a plan will not reasonably accomplish the permanency goal, the court shall enter such a finding in writing, based on evidence taken, and enter an order for a new service

plan to be created and served on all parties within 45 days). Additionally, it does not appear that respondent has taken issue with any specific permanency review finding made by the trial court in this case. See 705 ILCS 405/2-28(2) (West 2016) (the trial court is required to make findings at the permanency review hearing as to whether the services in the service plan require anything that is not reasonably related to remedying a condition or conditions that gave rise or which could give rise to any finding of child abuse or neglect). Rather, respondent argues on appeal that the trial court erred in finding that he was unfit under section 1(D)(m)(ii) of the Adoption Act, which specifically provides that a parent is unfit if that parent fails to make reasonable progress during any 9-month period following the adjudication of neglect, with section 1(D)(m)(ii) defining the failure to make reasonable progress as including 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. See 750 ILCS 50/1(D)(m)(ii) (West 2016).

¶ 35 Here, respondent failed to complete his obligations under the service plan during the relevant nine-month period, namely drug drops and a drug assessment, which would have aided the trial court in assessing whether respondent could safely parent Z.B. Accordingly, the trial court's finding that respondent was unfit pursuant to section 1(D)(m)(ii) of the Adoption Act was not against the manifest weight of the evidence.

¶ 36 III. Due Process

¶ 37 Respondent argues that the State's decision to wait to file a termination of parental rights petition until three years after the permanency goal was changed to substitute care pending the trial court's termination decision violated respondent's due process rights by ensuring the best interest factors would favor Z.B.'s foster parent. Respondent claims that as a result of the permanency goal change his visitation with Z.B. was decreased to one hour per month, so that

the State's three-year delay in filing the termination petition ensured the best interest factors would be found in favor of the foster parent, making the best interest hearing a futile gesture.

¶ 38 “One of the fundamental rights protected under the fourteenth amendment is the right of parents to make decisions concerning the care, custody, and control of their children without unwarranted state intrusion.” *In re D.T.*, 2017 IL App (3d) 170120, ¶ 23 (quoting *Wickham v. Byrne*, 199 Ill. 2d 309, 316 (2002)). The State's interference, however, with a parent's fundamental right to rear his or her child is justified in limited instances in order to protect the health, safety, and welfare of children. *D.T.*, 2017 IL App (3d) 170120, ¶ 23. The due process clause of the United States Constitution provides heightened protection against governmental interference with the fundamental rights of parents. *Id.* Due process in the context of interference with parental rights is achieved by compliance with the provisions of the Juvenile Court Act and fundamental fairness. *Id.* We review issues of constitutional law, such as the due process violation claimed in this case, *de novo*. See *In re D.W.*, 214 Ill. 2d 289, 309 (2005).

¶ 39 In support of his contention that his due process rights were violated, respondent relies on this court's decision in *In re O.S.*, 364 Ill. App. 3d 628 (2006). In *O.S.*, the mother argued that certain decisions made by the trial court, DCFS, and the caseworkers regarding her visitation with O.S. during the four years preceding the best interest hearing “predetermined” the outcome of the case. *Id.* at 633. The mother in *O.S.* had lost custody of *O.S.* as a result of her drug use and two-years of incarceration. *Id.* at 634-36. From the time of her incarceration through the termination of her parental rights, the State, the court, and the involved agencies created a fiction that respondent was not O.S.'s mother for purposes of visitation, which the appellate court held had actively impeded the development of any parental bonding between the mother and O.S. *Id.* at 636. The appellate court noted that at a best interest hearing, the trial court is to assess the

relative degree to which the child has bonded to his foster parents and his biological parent, taking into consideration the natural harm to the relationship caused by the parent's derelictions. *Id.* at 637 (citing 750 ILCS 5/602 (West 2016) (listing the best interest factors)). The appellate court stated that any harm to the parent's relationship with the child must be assessed without any artificial or coercive intervention of others into the bonding process and when the actions of the involved child welfare agencies, enforced by the courts, prior to the best interest hearing make the best interest hearing a “futile gesture” there has been a violation of due process that taints the constitutionality of the termination proceedings. *Id.* at 637-38. The appellate court concluded that the agency, by its actions, virtually ensured that the mother’s reunification with O.S. would fail by forcing O.S. to view her not as his mother but as a less intimate, more remote relative, causing her parental rights to be terminated, in significant part, because O.S. related to her as an aunt rather than as his mother. *Id.* at 639. The appellate court, therefore, held that terminating the mother’s parental rights under those circumstances would be a deprivation of the mother’s constitutional right to the custody of her son without the proper due process of law and would undermine the perceived integrity of the judicial system. *Id.* at 640.

¶ 40 First, we find *O.S.* distinguishable. In this case, nothing in the record suggests that the trial court, DCFS, caseworkers, or the State “actively impeded” respondent's bonding with Z.B. or that the actions of the trial court, DCFS, caseworkers, or the State somehow contributed to the deterioration of the bond between respondent and Z.B. Rather, respondent’s dereliction in relation to his obligations under the service plan and his failure to complete court-ordered tasks led to the permanency goal change of substitute care pending the court’s determination of parental rights on August 14, 2013, which resulted in the reduction of his visitation time with Z.B.

¶ 41 Additionally, after the permanency goal was changed to substitute care pending the court's determination of parental rights on August 14, 2013, the permanency goal was changed back to return home pending status hearing as to Z.B.'s mother on April 2, 2014, making the State's initial delay in bringing the termination petition reasonable because it was not clear whether termination proceedings would proceed against Z.B.'s mother as well as against respondent. On October 1, 2014, the permanency goal returned to substitute care for Z.B. pending the court's determination of termination of parental rights as to both respondent and Z.B.'s mother but, thereafter, proceedings were delayed when respondent requested to proceed with private counsel in April 2015. On June 10, 2015, respondent requested for counsel to be appointed because he could not afford a private attorney. On August 26, 2015, trial court deferred its efforts finding in regard to respondent at the request of his new counsel, who then requested a continuance at the next permanency review hearing on February 17, 2016, so that she could file motions on respondent's behalf. On March 23, 2016, respondent was found to have failed to make reasonable efforts to achieve the service plan and, on July 12, 2016, the State filed a petition to terminate his parental rights. Therefore, the record directly contradicts respondent's claim of an unreasonable delay on the part of the State in bringing the termination petition. Furthermore, the delay allowed respondent an additional three years to address his suspected substance abuse issues and make reasonable efforts toward fulfilling his obligations under the service plan, but respondent failed to do so.

¶ 42 In sum, there is no indication that the actions of the trial court, the State, DCFS, or caseworkers somehow predetermined the outcome of the best interest hearing so as to make the best interest hearing a futile gesture. Consequently, respondent's claim that his due process

rights were violated by the State's decision to wait three years to file the termination petition is entirely without merit.

¶ 43

CONCLUSION

¶ 44

The judgment of the circuit court of Peoria County is affirmed.

¶ 45

Affirmed.