Order filed January 16, 2018. Modified upon denial of rehearing February 15, 2018.

2018 IL App (5th) 170294-U

NO. 5-17-0294

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re A.T. & M.T., Minors	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Christian County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	Nos. 14-JA-22 & 14-JA-24
	)	
S.T.T.,	)	Honorable
	)	Allan F. Lolie,
Respondent-Appellant).	)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* The omission of a service plan did not prevent the circuit court from terminating the respondent's parental rights based solely on the ground of depravity.

¶ 2 In September 2014, the State filed petitions for adjudication of wardship with respect to the respondent's, S.T.T.'s, minor children, A.T. and M.T. In March 2015, the circuit court adjudicated the minor children wards of the court and ordered that temporary custody and guardianship be placed with the Illinois Department of Children and Family Services (DCFS). In October 2015, the State filed a petition to terminate the respondent's

parental rights. In February 2017, the court found the respondent unfit based on depravity. Later, at the second-stage hearing, the court determined that it was in the minors' best interests to terminate the respondent's parental rights. The minors' mother, B.H., surrendered her parental rights and is not a party to this appeal.

¶ 3 On appeal, the respondent argues that the circuit court's order terminating his parental rights must be vacated where (1) he was not provided a service plan and (2) the original adjudication of wardship was defective. We affirm.

¶ 4 BACKGROUND

¶ 5 This appeal requires an accelerated disposition pursuant to Illinois Supreme Court Rule 311(a)(5) (eff. Feb. 26, 2010) because it involves a matter affecting the best interests of a child. Illinois Supreme Court Rule 311(a)(5) (eff. Feb. 26, 2010) requires that the appellate court issue its decision within 150 days of the filing of the notice of appeal, except when good cause for delay is shown. The respondent filed his notice of appeal on July 31, 2017. Accordingly, this decision was due on December 28, 2017. However, the briefing schedule was delayed as a result of the consolidation of the appeal in No. 5-17-0293 with this appeal. Consequently, we find good cause for issuing this decision after the 150-day deadline.

¶ 6 On September 30, 2014, the State filed two petitions for adjudication of wardship and for temporary custody of the respondent's minor children, A.T., a three-year-old child, and M.T., a one-year-old child. The State alleged that A.T. and M.T. were neglected minors, pursuant to section 2-3(1)(b) of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/2-3(1)(b) (West 2012)), citing three separate incidents where the minors

were found away from their home while the children were in the sole care of B.H. Specifically, A.T. was found unattended several blocks from home in December 2013; M.T. was found unattended in a roadway two blocks from home on September 8, 2014; and A.T. was found unattended "near the fairgrounds" in Pana, Illinois, on September 27, 2014. At the time of the alleged incidents, the respondent was serving a seven-year prison sentence.

¶ 7 The circuit court held a temporary custody hearing on the State's petitions. The court ordered both minors to be placed in temporary custody with DCFS after finding that probable cause existed to support the allegations of neglect. The respondent was not present at this hearing due to his incarceration. However, the respondent was present and represented by counsel at the pretrial hearing held on October 29, 2014, where he informed the court that he would be released on parole in approximately 3½ years.

¶ 8 On February 25, 2015, the State filed amended petitions for wardship containing the allegations of neglect, as well as an additional count alleging dependency. See 705 ILCS 405/2-4(1)(b) (West 2012). The State alleged in the dependency count that the minors were without proper care and adequate supervision because B.H. suffered from depression and an anxiety disorder called agoraphobia. After B.H. stipulated to the allegations contained in the dependency count, the circuit court entered adjudication orders finding the minors dependent. The respondent's counsel appeared at the adjudicatory hearing on the respondent's behalf but made no objection to the entry of the adjudication orders because the petition for wardship did not contain allegations against

the respondent. The court ordered DCFS to prepare a dispositional report and set the matter for a dispositional hearing.

¶ 9 On March 25, 2015, the circuit court held the dispositional hearing. A dispositional report prepared by Tara Herbord (Herbord), a DCFS caseworker, was entered into evidence. The report described the services that had been provided to B.H. and indicated that the respondent had not been provided a service plan. Herbord reasoned that a service plan was not needed because the respondent was incarcerated and that it was not in the minors' best interests to visit the respondent in prison. In accordance with her report, Herbord testified that it was in the minors' best interests to be made wards of the court, remain in the temporary custody of DCFS, and have an initial permanency goal of return home to B.H.'s care within five months. The parties agreed and stipulated to the entry of the dispositional orders. Although the court was aware that the respondent was serving a long-term prison sentence, the court failed to make a finding on the preprinted dispositional order that the respondent was "unfit, unable, or unwilling for some reason other than financial circumstances alone to care for *** [or] supervise *** the minor[s]." The respondent notified the court that he was pursuing an administrative appeal to contest DCFS's decision to deny him visitation with the children.

¶ 10 On October 15, 2015, the State filed a petition to terminate the respondent's parental rights alleging three separate grounds of unfitness under the Adoption Act. See 750 ILCS 50/1(D)(i), (D)(r), (D)(s) (West 2016). On November 24, 2015, the State filed a motion to establish a permanency goal of substitute care pending termination of the respondent's parental rights.

¶ 11 On March 2, 2016, B.H. signed a final and irrevocable surrender of her parental rights to the children. On May 10, 2016, the permanency hearing was held and the circuit court changed the permanency goal to "substitute care pending determination of the petition to terminate [the respondent's] parental rights." On June 9, 2016, the respondent filed a request for interlocutory appeal; however, this appeal was later deemed untimely and stricken for lack of jurisdiction. *In re M.T. & A.T.*, No. 5-16-0243 (2016) (unpublished order).

¶ 12 On February 2, 2017, the circuit court held a hearing on the fitness stage of the State's petition to terminate the respondent's parental rights. The State withdrew two of the alleged grounds of parental unfitness and proceeded only on the ground of depravity. The State introduced, without objection, certified copies of the respondent's three prior felony convictions, which included convictions for unlawful violation of an order of protection (720 ILCS 5/12-3.4 (West 2012)), unlawful possession of methamphetamine precursor (720 ILCS 646/60 (West 2006)), and aggravated domestic battery (720 ILCS 5/12-3.3 (West 2010)). The certified copy of the respondent's prior conviction for aggravated domestic battery revealed that he had been found guilty and sentenced to seven years' imprisonment within five years of the filing of the petition to terminate.

¶ 13 After the State rested, the respondent testified to the following. At the time of the hearing, he had been in prison for four years and eight months. During that time, he had successfully participated in a 12-week fatherhood initiative program consisting of parenting-related classes. He had also completed other classes to assist him with life coping skills in order "to start taking responsibilities for [his] actions and to give [him]

the tools to not turn to drugs, alcohol or violence to try to cope [with] or handle life's problems." On cross-examination, the respondent admitted that he had 20 conduct violations including a conduct violation for threatening to stab a course instructor with a pencil. His last conduct violation occurred approximately one year earlier for "disobeying a direct order, insolence and threats and intimidation."

¶ 14 The circuit court, relying on *In re Shanna W.*, 343 Ill. App. 3d 1155 (2003), determined that the respondent's completion of "some classes in DOC" was insufficient to rebut the presumption of depravity. The court explained that due to the respondent's long-term incarceration, he would be unable to show his ability to maintain a lifestyle suitable for parenting children. Referencing similarities to the respondent-mother in *In re Shanna W.*, the court stated the following:

> "[H]ad [the respondent] been out of DOC, been working with DCFS, going to tailored sessions to meet his client service plan goals and shown a period of—a relatively decent period of leading a law abiding lifestyle of working toward the goal of return home, then I could find that was rebutted and we would act like the presumption never began or never was present."

Subsequently, the court found by clear and convincing evidence that the respondent was unfit and had failed to rebut the presumption of depravity.

¶ 15 On July 21, 2017, the court held the second-stage best interest hearing and found by a preponderance of the evidence that it was in the best interest of the children to terminate the respondent's parental rights. The respondent appealed.

¶ 16 ANALYSIS

¶ 17 The respondent contends that the circuit court's order terminating his parental rights must be vacated because DCFS failed to provide him with a service plan. The

respondent specifically urges that "his parental rights could not be terminated" because DCFS was required to provide him with a service plan, and this failure "precludes a finding" that he was an unfit parent. We disagree.

¶ 18 Before we address the respondent's claims, we consider the appropriate standard of review. Generally, the standard of review regarding the entry of an order terminating parental rights is whether the decision was against the manifest weight of the evidence. *In re C.N.*, 196 Ill. 2d 181, 208 (2001). However, in the instant case, the respondent does not contest the sufficiency of the evidence but presents purely legal issues involving the court's authority, and our review, therefore, is *de novo. In re S.B.*, 305 Ill. App. 3d 813, 816-17 (1999).

¶ 19 The respondent first contends that his parental rights could not be terminated where he was not provided a service plan. Thus, he argues, this omission precludes the circuit court from finding him unfit. Section 6a(a) of the Children and Family Services Act states that DCFS "shall develop a case plan designed to stabilize the family situation and prevent placement of a child outside the home ***." 20 ILCS 505/6a(a) (West 2016). Additionally, section 6a(a) states the following:

> "If the parent is incarcerated, the case plan must address the tasks that must be completed by the parent and how the parent will participate in the administrative case review and permanency planning hearings and, wherever possible, must include treatment that reflects the resources available at the facility where the parent is confined. The case plan must provide for visitation opportunities, unless visitation is not in the best interests of the child." *Id.*

The Illinois Administrative Code states that the purpose of the service plan, in part, is to identify what actions the family, the caseworker, caregiver, and others will take to meet the needs of the child and achieve permanency. 89 Ill. Adm. Code 315.130(a)(2) (2012).

¶ 20 Although Herbord testified that she did not provide the respondent with a service plan due to his incarceration, we note that the aforementioned provisions provide guidance in the event a parent is incarcerated. As a result, we conclude that withholding a service plan because of a parent's incarceration runs contrary to the above provisions. Thus, we agree with the respondent that he should have been provided a service plan in the present case. We reject, however, the respondent's assertion that this omission precludes the circuit court from finding him unfit.

¶ 21 The first step for the involuntary termination of parental rights requires that the court find by clear and convincing evidence that a parent is an unfit person as defined in the Adoption Act. 750 ILCS 50/1 *et seq*. (West 2016). The Adoption Act defines an "unfit person" as "any person whom the court shall find to be unfit to have a child ***." *Id.* § 1(D). Although the Adoption Act sets forth numerous grounds under which a parent may be deemed "unfit," a parent's rights may be terminated if even a single alleged ground for unfitness is supported by clear and convincing evidence. *In re M.I.*, 2016 IL 120232, ¶ 43 (citing *In re Gwynne P.*, 215 Ill. 2d 340, 349 (2005)).

¶ 22 "Depravity" is one of the grounds set forth in the Adoption Act (750 ILCS 50/1(D)(i) (West 2016)), and, in the instant case, the sole ground alleged by the State. Depravity has been defined as "an inherent deficiency of moral sense and rectitude."

(Internal quotation marks omitted.) *In re Abdullah*, 85 Ill. 2d 300, 305 (1981). Section 1(D)(i) of the Adoption Act states in pertinent part:

> "There is a rebuttable presumption that a parent is depraved if the parent has been criminally convicted of at least 3 felonies under the laws of this State or any other state, or under federal law, or the criminal laws of any United States territory; and at least one of these convictions took place within 5 years of the filing of the petition or motion seeking termination of parental rights." 750 ILCS 50/1(D)(i) (West 2016).

This rebuttable presumption creates a *prima facie* case of unfitness and has the practical effect of requiring the parent to come forward with clear and convincing evidence to overcome the presumption. *In re J.A.*, 316 Ill. App. 3d 553, 562 (2000). Once the parent produces evidence opposing the presumption, "the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed." *Id.*

¶ 23 Here, it is undisputed that the respondent falls within the ambit of the statutory presumption of depravity, which required him to present clear and convincing evidence to overcome the presumption. As previously noted, the respondent does not contest the sufficiency of the State's evidence of depravity, nor does the respondent argue that he presented sufficient evidence to rebut the presumption of depravity. Thus, our discussion is limited to the respondent's assertion that the omission of a service plan precluded the circuit court from finding him unfit on the basis of depravity.

¶ 24 The respondent relies upon *In re Keyon R.* to support his argument that "a service plan is required so that a parent can make progress toward a return home goal," and that the circuit court was precluded from finding him unfit based on the omission of a service

plan. 2017 IL App (2d) 160657, ¶ 28. While the respondent avers that a service plan is required so a parent can make progress, our readin*g* of *Keyon R.* indicates that the court did not hold that a service plan *is required*. Rather, paragraph 28 states in pertinent part:

> "*[I]f* DCFS established a service plan to correct the conditions that were the basis for the child's removal from the parent, and if those services were available, then failure to make reasonable progress includes the parent's failure to substantially fulfill his or her obligations under the service plan." (Emphasis added.) *Id.*

Because the respondent fails to cite legal authority to support his contention that a service plan is a prerequisite to the termination of parental rights, we reject this argument.

¶ 25 Additionally, in *Keyon R.*, the respondent-parent was found unfit pursuant to section 1(D)(m)(ii) of the Adoption Act. 750 ILCS 50/1(D)(m)(ii) (West 2014). Section 1(D)(m)(ii) pertains to a parent's failure to make reasonable progress toward the return of the child, which "includes the parent's failure to substantially fulfill his or her obligations under the service plan ***." *Id.*. Although the lower court specifically found that the respondent-parent had failed to make satisfactory progress in fulfilling service plan requirements, the appellate court noted that the respondent-parent had never been assessed for services and had never been given a service plan. *Keyon R.*, 2017 IL App (2d) 160657, ¶ 30. The court observed that it would be illogical to terminate the respondent-parent's parental rights on the basis that he failed to comply with nonexistent services that were intentionally withheld by DCFS. *Id.* Thus, the *Keyon R.* court reversed the order terminating the respondent-parent's parental rights and held that the State had failed to prove that the respondent-parent was unfit. *Id.* ¶ 34.

¶ 26 We find the facts of *Keyon R.* readily distinguishable from the instant case. We note that the lower court's finding of unfitness in *Keyon R.* was based upon the respondent-parent's failure to make reasonable progress, which was directly related to the respondent-parent's noncompliance with service plan requirements. Here, however, the circuit court found the respondent unfit on the ground of depravity pursuant to section 1(D)(i) of the Adoption Act, which does not require a court's consideration of a parent's compliance with a service plan. Instead, a finding of depravity is based upon a court's determination that a parent meets the statutory presumption or that a parent suffers from "an inherent deficiency of moral sense and rectitude." (Internal quotation marks omitted.) *Abdullah*, 85 Ill. 2d at 305. Thus, in finding the respondent unfit on the ground of depravity, the court was not required to consider the respondent's compliance, or noncompliance, with a service plan, as was the case in *Keyon R.*

¶ 27 Accordingly, the omission of a service plan did not prevent the respondent from challenging the State's allegation of depravity at the parental fitness hearing. The record shows that the respondent was afforded an opportunity to present evidence to rebut the presumption at the parental fitness hearing. In fact, the respondent testified that he had completed several parenting and life-skills courses in prison. We note, however, that the respondent's ability to overcome the statutory presumption of depravity was stifled by his own conduct, as opposed to the omission of a service plan. In particular, the State presented evidence regarding the respondent's prison conduct that demonstrated his failure to rectify his depraved behavior.

¶ 28 Next, the respondent contends that the circuit court's original adjudication of wardship was defective where the court failed to find that he was unfit, unable, or unwilling to care for the minors in writing at the dispositional hearing. The respondent argues that this defect rendered the adjudicatory order and all subsequent orders "void," including the order terminating his parental rights.

¶ 29 Here, the unfitness finding was not based upon the respondent's noncompliance with the circuit court's earlier dispositional order, which required the parents' compliance with a service plan to correct the conditions that caused the children to come into care. As such, the respondent's argument regarding the defect in the original adjudication of wardship has no bearing on the termination of the respondent's parental rights. See *In re T.A.*, 359 Ill. App. 3d 953, 958 (2005) ("when the trial court's unfitness finding is *not* based on an assessment of the parent's compliance with the dispositional order in the neglect proceedings ***—even a flaw that renders void an order entered therein—has no bearing on the subsequent termination case" (emphasis in original)). Therefore, we reject the respondent's assertion that the termination order was void where the court's unfitness finding was not based upon his compliance with the dispositional order.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the order of the circuit court of Christian County is hereby affirmed.

¶ 32 Affirmed.