2019 IL App (2d) 190306-U
No. 2-19-0306
Order filed August 13, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re D.H., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 16-JA-425
	)	
	)	Honorable
(The People of the State of Illinois, Petitioner-Appellee v. Miranda E., Respondent-Appellant).)	)	Francis M. Martinez, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The Appellate Court properly allowed the respondent to file a late notice of appeal; the trial court's ruling that the respondent was unfit was vacated and remanded with directions where the record was unclear whether the trial court found unfitness by a preponderance of the evidence instead of by clear and convincing evidence.

¶ 2 Respondent, Miranda E., appeals the trial court's orders finding her to be an unfit parent and terminating her parental rights. For the reasons that follow, we vacate and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 D.H. was born on November 29, 2016. He was removed from respondent, Miranda E., at

birth because her three older children had open cases with the Department of Children and Family Services (DCFS). D.H.'s siblings were taken into care due to respondent's involvement in an abusive relationship with Donald Washington.[1] Washington was subject to a no-contact order with respondent when D.H. was conceived. Initially, respondent denied that Washington was D.H.'s father, but a subsequent DNA analysis confirmed Washington's paternity.

¶ 5 On December 5, 2016, the State filed a neglect petition alleging that the minor's environment was injurious to his welfare in that (1) respondent failed to cure the conditions that led to the minor's removal and (2) respondent had a history of engaging in domestic violence, thereby placing D.H. at risk of harm. On May 1, 2017, the court adjudicated D.H. a neglected minor and granted DCFS guardianship and custody. DCFS placed D.H. in a traditional foster home with two of his siblings.

¶ 6 Between October 25, 2017, and September 5, 2018, the court held three permanency review hearings. At each of those hearings, DCFS's concern was that respondent was concealing her ongoing relationship with her abuser, Washington. Washington was seen leaving respondent's apartment, and caseworkers saw double place settings in the sink and men's clothing in respondent's closet. Respondent gave implausible explanations for those occurrences.

¶ 7 At the first permanency hearing on October 25, 2017, the court noted that respondent was beaten and admitted to the hospital on September 23. According to DCFS reports, respondent claimed that she was jumped and robbed in an alley. Yet, respondent's caseworker did not locate any alley in the place where respondent said the incident occurred. Nor could the caseworker find that a police report of the incident had been made. DCFS's records showed that the hospital called the police but that respondent left the hospital before the police arrived to speak with her.

[1] This court decided Washington's appeal in *In re D.H.*, 2019 IL App (2d) 190214-U.

The court expressed concern that respondent was either the victim of abuse or was putting herself in harm's way by not reporting bad things that had happened to her. The court reserved making any finding with respect to whether respondent had made reasonable efforts toward the goal of reunification.

¶ 8 The next permanency hearing was held on February 28, 2018. DCFS reported that respondent was completing services, but that she was not realizing any benefits from those services. Specifically, respondent's caseworker believed that respondent and Washington were still together, as respondent was using a phone that was registered to Washington. After DCFS confronted respondent, she began using a phone that was not registered to Washington. The court found that respondent's issues were "deep-seated" but that, under the circumstances, she was making reasonable efforts and reasonable progress. The goal remained reunification.

¶ 9 The court held the next permanency hearing on August 10, 2018. At that hearing, the State sought a goal change to substitute care pending termination of parental rights. However, because of the court's schedule, the hearing was continued to September 5, 2018. On September 5, DCFS reported that respondent interacted with D.H. when the parenting coach was observing, but she either napped or looked at her phone when the coach was not present. Cathy Costanza, the caseworker assigned to D.H., testified that respondent's apartment was clean and appropriate. According to Costanza, respondent lived there by herself. Respondent was employed at Dollar General. Costanza testified that respondent was doing well in counseling and that she was meeting her goals. Costanza was concerned that respondent was still in a relationship with Washington. She testified that respondent's car appeared to be similar, if not identical, to the car that Washington drove, and someone had seen her shopping with Washington. Costanza testified that she saw respondent and Washington walking on the street together to a bus stop twice after

court hearings. Costanza also referenced unexplained bruises for which respondent made excuses. According to Costanza, respondent needed to complete another course of domestic violence training, but respondent refused to attend for a second time. Because the court did not see reunification occurring in the near future, it changed the goal to substitute care pending termination of parental rights.

¶ 10 On September 7, 2018, the State filed a motion for termination of parental rights and power to consent to adoption. The motion alleged that respondent was unfit, as follows: (count I) she failed to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare (750 ILCS 50/1(D)(b) (West 2018)); and (count II) she failed to protect the child from conditions within his environment injurious to the child's welfare (750 ILCS 50/1(D)(g) (West 2018)). The motion further alleged that it was in the best interest of D.H. that respondent's parental rights be terminated.

¶ 11 The unfitness hearing was held on November 16, 2018. Costanza testified that respondent had completed services except for the second course of domestic violence counseling. Costanza testified that her main concern was respondent's ongoing relationship with Washington. Costanza clarified her earlier testimony regarding respondent's car by saying that pictures on the Internet showed that Washington was using it and claiming that it was his. According to Costanza, respondent had suffered injuries the previous April and May. Respondent claimed that she was injured at work, but when Costanza asked to see the accident reports, respondent could not produce them. Costanza testified that she was not assuming that Washington caused the injuries, but she was concerned because respondent could not verify that they were work related. Costanza testified that what concerned her most was that respondent and Washington were not honest about their relationship. Costanza was also concerned that respondent would nap or watch

movies instead of interacting with D.H. when the parenting coach was not present.

¶ 12 Duane Wilke was the State's second witness. He attended respondent's visits with D.H., and he noticed that she interacted with the minor when the parenting coach was present but not otherwise. According to Wilke, when D.H. was an infant, respondent would sit him in front of the television and have him watch the screen. Wilke testified that D.H. did not call respondent "Mother," and he did not go to her for anything. He observed no eye contact between respondent and D.H. Wilke testified that respondent watched television rather than talk to D.H. or play with him.

¶ 13 The court found that respondent's denial of her relationship with Washington constituted a failure to show interest and responsibility. In that vein, the court also found that respondent did not incorporate the services that she received. Specifically, the court found that there was "a great deal" of circumstantial evidence regarding the parties' ongoing relationship: "It appears more likely than not that [respondent and Washington] continued in a relationship, and the testimony concerning the shared automobile was convincing and certainly by a standard of a preponderance of the evidence." The court continued: "And then you layer onto that the unexplained injury, the purported injuries at work that were not corroborated." The court also found that D.H. was born into an environment "where the parents failed to correct the conditions that led to the removal" of respondent's three other children and, therefore, the evidence proved that the environment was injurious to D.H.'s welfare.

¶ 14 The court then addressed the evidence against Washington (not detailed in this Order) and stated: "As for [Washington], the State has met its burden by clear and convincing evidence, and I should have noted at the very beginning that the State recognized—or the court recognizes its burden or the burden as clear and convincing." The court then recited the evidence that was

adduced against Washington.

¶ 15 The court next proceeded to a best interest hearing. Costanza testified that D.H., three years old, had been in the same foster home with two of his biological siblings, ages four and five, since his birth. According to Costanza, the foster home was "safe and appropriate." She testified that D.H. had not received any services and had no special needs. She also testified that D.H. treated his foster parents as his own parents and went to them for all of his needs. Costanza testified that D.H. was "very connected" to his siblings. She described them as "typical boys," who had a "great bedroom" and who loved playing together. Costanza also described D.H.'s relationship with his foster mother's extended family as "very good." According to Costanza, D.H.'s foster grandmother provided daycare services for him, and his foster mother's nieces were like his "sisters." Costanza testified that D.H. had contact with both of his biological parents and an older brother who had been adopted before Costanza became involved with the family. Costanza testified that the foster parents wanted to adopt D.H. On cross-examination, Costanza testified that respondent's supervised visits with D.H. "went well."

¶ 16 The court found that it was in D.H.'s best interest to terminate parental rights, given that he was "integrated" into his foster home and would be traumatized if he were to be removed from the family that he viewed as his primary care givers. The court found that permanency was the primary consideration and that it would not be achieved by removing D.H. from his foster family. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Respondent argues that (1) the court applied the wrong burden of proof—preponderance of the evidence—in finding respondent unfit, (2) the court shifted the burden of proof to respondent, (3) the court erred in finding that respondent was unfit because of an environment

injurious to the minor's welfare when D.H. was removed at birth and never lived with respondent, and (4) respondent received ineffective assistance of counsel.

¶ 19 We first must resolve the issue of our jurisdiction. The notice of appeal was due to be filed on April 12, 2019. It was file-stamped by the circuit clerk on April 15, 2019. Appellate counsel (who was not trial counsel) moved in this court pursuant to Illinois Supreme Court Rule 303(d) (eff. July 1, 2017) "to treat the notice of appeal as timely filed," which in substance was a motion for leave to file a late notice of appeal. Appellate counsel attached trial counsel's affidavit stating that trial counsel filed the notice of appeal in the circuit clerk's office on April 12 but that the clerk stamped it with the wrong date. Appellate counsel's motion also stated that the State had no objection to the motion. Indeed, the State filed no objections. On May 13, 2019, this court granted the motion. Respondent then filed her opening brief. In lieu of filing a timely response brief, the State moved to dismiss this appeal for lack of jurisdiction, on the ground that the notice of appeal was filed on April 15. Citing the history, this court denied the motion to dismiss and reset the briefing schedule. In its response brief, the State again raises the jurisdiction issue, arguing that this court had no legal basis to treat the notice of appeal as timely filed and that, despite its earlier acquiescence, the State could not agree to confer jurisdiction on this court.

¶ 20 Contrary to the State's contention, Rule 303(d) provides that this court may grant leave to file a late notice of appeal "on motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time," where the motion is filed within 30 days after the expiration of the time for filing the notice of appeal. Ill. S. Ct. R. 303(d). Here, respondent's motion was filed within the 30-day period specified by Rule 303(d), and it made a showing of reasonable excuse for why the notice of appeal was stamped three days after it was due. The State did not provide

an opposing affidavit that contradicted trial counsel's averments. Therefore, we take trial counsel's affidavit as true. *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248 (1981). Accordingly, we reaffirm that this court properly allowed the late notice of appeal.

¶ 21 Before addressing respondent's arguments, we review the principles applicable to termination proceedings. The Juvenile Court Act of 1987 (Act) (705 ILCS 405/1-1 *et seq.* (West 2018)) provides a two-step process for the involuntary termination of parental rights. *In re Deandre D.*, 405 Ill. App. 3d 945, 952 (2010). First, the State must prove that the parent is unfit by clear and convincing evidence. *Deandre D.*, 405 Ill. App. 3d at 952. Section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2018)) lists the grounds under which a parent can be found unfit. *In re Tiffany M.*, 353 Ill. App. 3d 883, 889 (2004). Section 1(D)(b) of the Adoption Act provides that a parent's failure to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare is a ground for a finding of unfitness. 750 ILCS 50/1(D)(b) (West 2018). Section 1(D)(g) of the Adoption Act provides that a parent's failure to protect the child from conditions within his environment injurious to the child's welfare is also a ground for a finding of unfitness. 750 ILCS 50/1(D)(g) (West 2018). Second, if the court makes a finding of unfitness, the court then considers whether it is in the best interest of the minor to terminate parental rights. *Deandre D.*, 405 Ill. App. 3d at 953. The State has the burden of proving by a preponderance of the evidence that termination is in the minor's best interest. *Deandre D.*, 405 Ill. App. 3d at 953. The appellate court will reverse a finding of unfitness only where it is against the manifest weight of the evidence, that is, where the opposite conclusion is clearly evident. *Deandre D.*, 405 Ill. App. 3d at 952.

¶ 22 Here, the State alleged in count I of the motion to terminate parental rights that respondent failed to maintain a reasonable degree of interest, concern, or responsibility as to the

minor's welfare. Count II alleged that respondent failed to protect the child from conditions within his environment injurious to the child's welfare. Respondent argues that the court's finding of unfitness as to count II must be reversed under *In re C.W.*, 199 Ill. 2d 198, 212 (2000), where the court held that when a child has been removed from the home, "a parent cannot be found unfit based on a 'failure to protect' during the period the child is in foster care." Because D.H. was removed at birth and never lived with respondent, she argues that she cannot be found unfit for failure to protect. The State concedes this point. We accept the State's concession.

¶ 23 We next consider respondent's argument that the court found her unfit under count I by a preponderance of the evidence rather than by clear and convincing evidence. Because the termination of parental rights is a serious matter, the State must prove unfitness by clear and convincing evidence. *In re Richard H.*, 376 Ill. App. 3d 162, 164-65 (2007). We review whether the trial court applied the correct legal standard *de novo*. *In re P.J.*, 2018 IL App (3d) 170539, ¶ 13.

¶ 24 The issue that brought D.H. into care was respondent's abusive relationship with Washington. The State's theory was that the relationship was ongoing. In making its ruling, the court found it "more likely than not" that the parties continued in a relationship. Citing the evidence, the court found that it showed—"certainly by a standard of a preponderance of the evidence"—that Washington was using respondent's automobile. The court added: "[t]hen you layer onto that the unexplained injury, the purported injuries at work that were not corroborated." Only when addressing the evidence against Washington (which was different from that against respondent) did the court find that the State met its burden by clear and convincing evidence. The court further stated: "I should have noted at the very beginning that the State recognized—or

the court recognizes its burden or the burden as clear and convincing." The court then continued with its findings as to Washington.

¶ 25 The State argues that by stacking preponderance findings, the court came to an overall finding of unfitness by clear and convincing evidence. The State also argues that the court's typewritten order recited that the court found respondent unfit by clear and convincing evidence. That argument is unpersuasive, as the oral order controls where there is a conflict between a written order and an oral order. *In re Tr. O.*, 362 Ill. App. 3d 860, 868 (2005).

¶ 26 A finding of unfitness is a condition precedent to termination of parental rights. *P.J.*, 2018 IL App (3d) 170539, ¶ 15. "Fundamentally fair judicial procedures are critical for those parents facing the involuntary dissolution of their rights." *In re J.J.*, 201 Ill. 2d 236, 246 (2002). The standard of proof of clear and convincing evidence is "crucial" to protecting a parent's fundamental liberty interest concerning personal choice in family matters. *J.J.*, 201 Ill. 2d at 246. In *In re Enis*, 121 Ill. 2d 124, 133-34 (1988), our supreme court held that a new unfitness hearing must be held where a trial court judges the evidence by an improper standard of proof.

¶ 27 However, we believe that the record in the instant case is unclear as to whether the court used an improper standard of proof. When the court began its findings as to Washington, it noted that it should have stated "at the very beginning" that the proper standard was clear and convincing evidence. The court could have meant that it was backtracking to correct its misstatements in finding the evidence against respondent sufficient under a preponderance standard. That the court did not explicitly so state renders the record unclear. In *In re J.D.*, 314 Ill. App. 3d 1109, 1110 (2000), the court vacated an adjudication of unfitness and remanded with directions to review the evidence to determine the parents' unfitness where the record was unclear whether the trial court examined events outside the statutory time frame in determining

whether the parents made reasonable progress. Accordingly, we vacate the order adjudicating respondent unfit, and we remand to the circuit court with directions to review the evidence submitted against respondent to determine whether it proved her unfitness by clear and convincing evidence. Because we must remand, we do not reach respondent's remaining issues.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we vacate the judgment of the circuit court of Winnebago County and remand the cause with directions.

¶ 30 Vacated and remanded with directions.