

NOTICE

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2014 IL App (4th) 140196-U

NO. 4-14-0196

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

July 22, 2014
Carla Bender
4th District Appellate
Court, IL

In re: the Adoption of J.W., a Minor,)	Appeal from
SAMANTHA S. and DANIEL S.,)	Circuit Court of
Petitioners-Appellees,)	Sangamon County
v.)	No. 13AD73
RAMONE W.,)	
Respondent-Appellant.)	Honorable
)	John Schmidt,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred in terminating respondent's parental rights without determining whether termination was in the best interests of his child.
- ¶ 2 On February 7, 2014, the trial court terminated respondent Ramone W.'s parental rights to J.W. (born April 1, 2008). Ramone appeals, arguing the court's decision to terminate his parental rights for failing to maintain a reasonable degree of interest, concern, or responsibility for J.W. was against the manifest weight of the evidence. We affirm in part, vacate in part, and remand for further proceedings.

¶ 3 I. BACKGROUND

- ¶ 4 On September 4, 2013, petitioners, Samantha and Daniel S., filed a petition for adoption with regard to J.W. Samantha, J.W.'s biological mother, alleged she always had custody of J.W. Samantha married Daniel on June 8, 2013. Ramone is J.W.'s biological father.

The petition alleged Ramone was unfit because he had abandoned J.W. for a period exceeding three months immediately preceding the filing of the adoption petition and failed to maintain a reasonable degree of interest, concern, or responsibility as to J.W.'s welfare.

¶ 5 On November 7, 2013, the trial court appointed counsel to represent Ramone in the proceedings.

¶ 6 On January 15, 2014, Samantha and Daniel filed an amended petition for adoption. The amended petition added allegations Ramone was unfit based on his recurring drug charges for possession and his addiction to drugs. The amended petition also included an allegation he was unfit based on moral deficiency resulting in depravity based on a prior criminal conviction and pending criminal charges.

¶ 7 On February 7, 2014, Ramone filed an affirmative defense, contending the allegations contained in the adoption petition were due to circumstances beyond his control and to impediments created by Samantha having legal custody. The trial court held a fitness hearing for termination purposes the same day.

¶ 8 Samantha testified she is J.W.'s mother and Ramone is J.W.'s biological father. She and Ramone were dating when J.W. was born on April 1, 2008. Ramone was at the hospital for J.W.'s birth. She and Ramone dated on and off until May 2008. The relationship ended when Ramone was arrested for marijuana possession. Between May and December 2008, Ramone stayed in contact with J.W., visiting with her six times. Ramone did not visit with J.W. in 2009. In May 2010, he had one overnight visit with J.W. After that visit, Ramone did not contact Samantha about seeing J.W. Samantha testified Ramone never gave J.W. any birthday presents or Christmas cards. Ramone did give J.W. Christmas presents in 2008.

¶ 9 Samantha testified Ramone filed a petition for visitation in August 2010 in Tazewell County. She was not served until 2011. She and Ramone were required to attend and complete mediation. They did not complete mediation because Ramone was disruptive and uncooperative in the mediation room. The mediation was terminated by the mediator. They went back to court and a new judge was assigned to the case. Since 2011, Ramone had not pursued the petition for visitation or contacted her to see J.W.

¶ 10 In 2008, Samantha received a court order requiring Ramone to pay \$98 every two weeks in child support. From April 2011 until September 2013, Samantha received no child support from Ramone. He began to pay child support after being served with the adoption petition.

¶ 11 Samantha testified she did not know Ramone had a drug problem during their relationship prior to his initial arrest. Samantha admitted trying to prevent Ramone from seeing J.W. in 2008 and 2010 because of the drug charge and the people with whom Ramone was associating. Since 2010, Ramone had not attempted to contact her.

¶ 12 On cross-examination, Samantha testified she had probably three different addresses since she and Ramone lived together in Pekin and four or five different phone numbers since 2008. She stated she provided Ramone with the new addresses and with her new phone numbers "in the beginning." However, she did not give him her later phone numbers because she had no way of contacting him. She did not have his current address or phone number.

¶ 13 Ramone testified he had failed to pay child support "quite a lot." He believed the last occasion he spent time with J.W. was in 2010. This was around the time Samantha met her now husband, Daniel. When he saw J.W. in May 2010, he was not given J.W.'s telephone

number or actual address. Instead, he was only given a mailing address for a house where J.W. was not living. According to Ramone, he had to hire a private investigator to locate Samantha. He further testified Samantha had not provided him with a telephone number to contact her since May 2010.

¶ 14 Ramone testified he had purchased Christmas gifts for J.W. since 2010 but was unable to give them to her so she would know they were from him. On the occasions when he saw J.W., they went swimming, played baseball, and went to Chuck E. Cheese. After his last visit with J.W. in 2010, he tried to locate his daughter many times by driving to Pekin and talking to members of Samantha's family. No one would tell him where J.W. was. Although he filed a visitation petition in Tazewell County, he testified he did not pursue the petition because he "got caught up in work at the time." He also testified he became frustrated by the court process.

¶ 15 Sarah A., Ramone's fiancée, testified she and Ramone had been together for five years. She and Ramone attempted to have a relationship with J.W., but Samantha kept the child away from them. Sarah testified J.W. loved Ramone and was "a daddy's girl."

¶ 16 In rebuttal, Samantha testified Ramone had her telephone number in 2010 when Ramone saw J.W. She had the same telephone number until 2011. After Ramone's last visit with J.W. in 2010, Samantha received no calls from Ramone while she had the same phone number. She testified Ramone's phone number changed during this period so she had no way to get in touch with him.

¶ 17 The trial court found Samantha and Daniel failed to establish Ramone was unfit because of depravity or habitual drug addiction. However, the court found Samantha and Daniel

established by clear and convincing evidence Ramone abandoned J.W. in excess of three months prior to the filing of the adoption petition and failed to maintain a reasonable degree of interest, concern, or responsibility as to J.W.'s welfare. The court noted Ramone had no contact with J.W. since 2010. The court found Ramone had ample opportunity to contact Samantha to obtain visitation with J.W. Although Ramone made some efforts to establish visitation with the child, he did not pursue his petition for visitation in Tazewell County and the petition was dismissed for want of prosecution. The court found Samantha's testimony much more credible than Ramone's and Sarah's testimony.

¶ 18 According to the trial court:

"[T]he petitioner[s have] met their burden on 6A of the petition[, abandonment in excess of three months preceding filing of adoption petition and failure to maintain a reasonable degree of interest, concern, or responsibility as to J.W.'s welfare]. The respondent[s] *** parental rights to the child[, J.W.,] are terminated.

This matter will be continued to March the 7th, 2014[,] at 10:00 a.m. for the second stage hearing in this matter. This matter will be continued to March the 7th, 2014[,] at 10:00 a.m. for the best[-]interest hearing of the child."

¶ 19 At the March 7, 2014, best-interests hearing, the following exchange occurred between the trial court and Ramone at the beginning of the hearing:

"[TRIAL COURT]: [Ramone], I have previously terminated your rights. You're not a party to this hearing anymore.

[RAMONE]: I can't have a final word?

[TRIAL COURT]: No. You need to excuse yourself.

These are not open to the public.

[RAMONE]: In the letter it said I was allowed to be here.

That's the only reason why I came.

[TRIAL COURT]: I understand. That's not correct. These are closed proceedings now. I have terminated your rights. So unfortunately, you are not allowed to remain. Thank you, though.

[RAMONE]: All right. You have a blessed day.

[TRIAL COURT]: Thank you. You too."

After Ramone left the courtroom, the court asked counsel for Samantha and Daniel about the guardian *ad litem* (GAL). Counsel stated she spoke with the GAL about whether the GAL planned to be at the hearing. The GAL told counsel she did not plan on attending but gave counsel her cell phone number if the court had any questions. The court then heard testimony from Samantha and Daniel. After hearing their testimony, the court stated:

"This Court has listened to the evidence elicited in this case, the testimony of the petitioners in this case. I find their testimony to be compelling. I find it to be infinitely credible[,] and I find it to be in the best interest of the minor child to allow this adoption to go forward. I believe the evidence presented in this

case has done so by clear and convincing evidence. In fact, *** the Court finds based on all the evidence I've heard in this case from its initial filing to today's date, they have proven in the Court's mind by beyond a reasonable doubt, which is a step higher than you need. It's more than ample evidence here to prove it's in the best interest of this minor child to allow this adoption to go forward."

The court's written judgment order for adoption stated:

"[Ramone] abandoned and deserted his said child for a period in excess of three months immediately preceding the filing of this Petition, not having seen the child since July of 2010 and he has failed to maintain a reasonable degree of interest, concern, or responsibility as to the welfare of this child. The father is therefore an unfit person, his parental rights were terminated on February 7, 2014[,] after an evidentiary hearing, and his consent to this adoption is not necessary."

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 At issue in this case is the termination of Ramone's parental rights. "A parent's right to raise his or her biological child is a fundamental liberty interest [citation], and Illinois law favors natural parents having custody of their children." *In re Haley D.*, 2011 IL 110886, ¶ 90, 959 N.E.2d 1108. A proceeding to terminate a parent's rights is a drastic measure. *In re*

E.B., 231 Ill. 2d 459, 463, 899 N.E.2d 218, 221 (2008). A trial court's authority to involuntarily terminate a parent's rights is purely statutory. *Id.* A court's scope of authority is defined by the Adoption Act and the Juvenile Court Act of 1987, which contain strict procedural requirements. *Id.* at 463-64, 899 N.E.2d at 221. "Any action the trial court takes that is outside the statute's stricture is void." *Id.* at 464, 899 N.E.2d at 221.

¶ 23 "The termination of parental rights is a two-step process under which the best interests of the child is [*sic*] considered only after a court finds the parent unfit." *Id.* at 472, 899 N.E.2d at 226. Our supreme court has stated:

"When ruling on parental unfitness, a court is not to consider the child's 'best interests.' [Citation.] '[W]here the rights and interests of a parent are sought to be permanently severed, the best interests of the child can be considered only if the court finds by clear and convincing evidence that the parent is unfit or consents to the severance [citations].' [Citation.] Only evidence that bears on the issue of unfitness is to be considered, precluding evidence bearing on the child's 'best interests' [citation]. At this point, it is the parent's past conduct in the then-existing circumstances that is under scrutiny. [Citations.] The child's welfare and whether the child's eventual adoption by the petitioners would improve his future financial, social, and emotional atmosphere is not relevant in judging the fitness of the natural parent [citations]; nor are these factors relevant in

determining, as in this case, whether, in the past, the natural parent maintained a reasonable degree of concern, interest and responsibility as to the child's welfare. Only after a parent is found, by clear and convincing evidence, to be unfit does a circuit court ruling on an adoption petition proceed to consider the child's best interests and whether those interests would be served by the child's adoption by the petitioners, requiring termination of the natural parent's parental rights. [Citations.]" *In re Adoption of Syck*, 138 Ill. 2d 255, 276-77, 562 N.E.2d 174, 183-84 (1990).

In other words, as the First District has held, "When a petition for adoption alleges that a parent is unfit, abrogating the need for that parent's consent to the adoption [citation], our supreme court has held that, under circumstances such as those presented in this case, trial courts must undertake a two-step process in ruling on adoption petitions." *In re Adoption of C.A.P.*, 373 Ill. App. 3d 423, 426, 869 N.E.2d 214, 217-18 (2007). According to the First District:

"The first step is to determine whether the parent whose parental rights petitioners are seeking to terminate is unfit. [Citation.] At this stage, it is the parent's past conduct that is under scrutiny; evidence of whether allowing the adoption would be in the child's best interests is not to be considered. [Citation.] If the court determines that petitioners have met their burden of establishing by clear and convincing evidence the existence of one or more grounds for unfitness, it must then determine whether termination

of parental rights and allowance of the adoption petition would be in the child's best interests." *Id.* at 426, 869 N.E.2d at 218, (citing *Syck*, 138 Ill. 2d at 276-77, 869 N.E.2d at 183-84).

¶ 24 Ramone's appellate counsel only argues the trial court erred in finding Ramone unfit based on his failure to maintain a reasonable degree of interest, concern, or responsibility as to J.W.'s welfare. According to Ramone's brief, "the trial court terminated [his] parental rights solely on his failure to maintain a reasonable degree of interest, concern or responsibility for [J.W.'s] welfare, which is statutorily addressed by [section 1(D)(b) of the Adoption Act (750 ILCS 50/1(D)(b) (West 2012))]." In determining whether a parent failed to maintain a reasonable degree of interest, concern, or responsibility for a child's welfare, a court must consider the parent's conduct based on the circumstances existing when the conduct occurred. *Syck*, 138 Ill. 2d at 278, 562 N.E.2d at 185. According to defendant, the trial court failed to take into account all the factors set forth in section 1(D)(b) of the Adoption Act (750 ILCS 50/1(D)(b) (West 2012)). Defendant argues the court did not consider his lack of transportation, his relative poverty, or the actions or statements of others hindering or discouraging visitation. We disagree.

¶ 25 This court grants trial court decisions great deference in termination proceedings because the trial court is in a better position to see the witnesses and judge their credibility. *In re K.B.*, 314 Ill. App. 3d 739, 748, 732 N.E.2d 1198, 1206 (2000). This court will not overturn a finding of parental unfitness unless the finding is against the manifest weight of the evidence, meaning "the correctness of the opposite conclusion is clearly evident from a review of the evidence." *In re T.A.*, 359 Ill. App. 3d 953, 960, 835 N.E.2d 908, 913 (2005).

¶ 26 In this case, the record reflects the trial court considered the evidence presented by the parties. In considering the testimonial evidence, which only consisted of Samantha, Ramone, and Sarah, the court concluded Samantha's testimony was credible and found Ramone and Sarah's testimony did not meet the necessary level of credibility. As stated earlier, a court's credibility determinations are the reason why we give the trial court so much deference in termination proceedings. *K.B.*, 314 Ill. App. 3d at 748, 732 N.E.2d at 1206.

¶ 27 Respondent could have called other members of Samantha's family in an attempt to establish Samantha and her family hindered or discouraged his attempts to play a role in J.W.'s life. However, he failed to do so. The evidence before the court reflected Ramone had not visited with J.W. since 2010. Further, Ramone did not pay court-ordered child support between April 2011 and September 2013. He began to pay support only after receiving the adoption petition. Although Ramone filed a petition for visitation in August 2010, he stopped pursuing the petition in 2011. The petition was ultimately dismissed for lack of prosecution. The trial court's finding Ramone was unfit for failing to maintain a reasonable degree of interest, concern, or responsibility for J.W.'s welfare was not against the manifest weight of the evidence.

¶ 28 The trial court also found Ramone unfit because he had abandoned J.W. in the three months preceding the adoption petition. Ramone failed to address this finding in his brief to this court. Because we have found the trial court's finding of unfitness with regard to Ramone's failure to maintain a reasonable degree of interest, concern, or responsibility for J.W.'s welfare was not against the manifest weight of the evidence, Ramone's forfeiture, pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), of any argument concerning the court's abandonment finding is irrelevant and need not be addressed.

¶ 29 Although we hold the trial court's findings of unfitness were not against the manifest weight of the evidence, we must vacate the termination of Ramone's parental rights and the adoption order because the trial court terminated Ramone's parental rights prior to engaging in the required second step of the termination process. See *Syck*, 138 Ill. 2d at 276-77, 869 N.E.2d at 183-84; see also *C.A.P.*, 373 Ill. App. 3d at 426, 869 N.E.2d at 218. At the February 7, 2014, hearing, the court terminated Ramone's parental rights immediately after finding him unfit, without any consideration of whether J.W.'s best interests would be served by the termination. After terminating Ramone's parental rights, the court continued the matter for "a second stage hearing in this matter," which it also called a best-interests hearing.

¶ 30 At the beginning of the best-interests hearing on March 7, 2014, counsel for Samantha and Daniel told the trial court they were there for a best-interests hearing. The trial court then told Ramone his parental rights had already been terminated and he needed to excuse himself from the proceeding because it was not open to the public. Ramone stated he received a letter stating he could be there. The court responded the letter was not correct.

¶ 31 Although the cover sheet for the transcript of the proceeding lists appointed counsel's appearance, it is clear from the record Ramone's counsel in fact was not present for the hearing. The trial court only stated as present Samantha and Daniel, their attorney, and Ramone. No questions were asked other than by petitioners' counsel. Further, Ramone's appointed counsel filed a motion for payment of attorney fees on March 6, 2014, which noted his representation of Ramone ended on February 7, 2014. Not only was Ramone's appointed counsel not at the best-interests hearing, the record clearly reflects the GAL was not present at

the hearing. This is particularly troubling since the hearing was to decide the best interests of J.W. and the GAL was representing the minor's best interests.

¶ 32 Although Ramone's appointed appellate counsel did not raise the trial court's failure to make a best-interests determination before terminating his parental rights on appeal, this issue is too important for this court to simply ignore, especially considering Ramone appeared at the March 7 best-interests hearing and was told by the trial court he could not stay because his parental rights had already been terminated. As a result, we must vacate the orders granting the adoption and terminating Ramone's parental rights and remand this case for a hearing to determine whether terminating Ramone's parental rights and allowing the adoption are in J.W.'s best interests. On remand, the trial court shall appoint counsel for Ramone for purposes of this best-interests hearing and allow Ramone and his counsel to participate at the hearing. See *In re Adoption of L.T.M.*, 214 Ill. 2d 60, 77, 824 N.E.2d 221, 231-32 (2005) ("the state is required by the equal protection clause of the fourteenth amendment to provide appointed counsel to indigent parents who face the loss of parental rights in proceedings under the Adoption Act"). We make no determination of what is in J.W.'s best interests.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's finding Ramone was unfit, vacate the termination of Ramone's parental rights and the order allowing the adoption, and remand the case for a hearing to determine whether termination of Ramone's parental rights and the adoption are in J.W.'s best interests.

¶ 35 Affirmed in part and vacated in part; cause remanded with directions.