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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE INTEREST OF D.F., Minor,)	
Minor-Respondent-Appellee,)	Appeal from the
)	Court Circuit of
(THE PEOPLE OF THE STATE OF ILLINOIS,)	Cook County.
)	
Petitioner,)	
)	13 JA 00168
v.)	
)	
TONI D.,)	The Honorable
)	Demetrios Kottaras,
Mother-Respondent-Appellant).)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* When a court finds that a minor has been abused or neglected because he was subjected to an injurious environment or a substantial risk of physical harm, the court must base that finding on evidence about the child's actual environment, and not on what the child's environment would have been if he had been placed somewhere other than his actual environment.

¶ 2 The State petitioned for adjudication of wardship for D.F. The trial court entered an adjudicatory order and a disposition order based on its finding that D.F. had been subjected to an injurious environment with a substantial risk of physical harm. D.F.'s mother, Toni D., appeals, contesting the factual findings supporting the adjudication order. Because we find no evidence that D.F. was ever subjected to an injurious environment or a substantial risk of

physical harm, we reverse the adjudication order, vacate the disposition order, and remand for further proceedings.

¶ 3

BACKGROUND

¶ 4

Toni D. gave birth to D.F. on March 13, 2010, after 24 weeks of gestation. Tests showed no narcotics, opiates, or other illicit drugs in D.F.'s blood at birth. With the help of a hospital that could provide special care for premature neonates, D.F. survived. The hospital discharged D.F. on May 17, 2010.

¶ 5

Toni already had three of her children living with her when she gave birth to D.F. The eldest, who was then about 10 years old, had special needs. Toni asked her aunt, K.D., to help her by taking care of D.F. in K.D.'s home. K.D. served as D.F.'s primary caregiver until February 2013.

¶ 6

Due to D.F.'s developmental delays, in October 2010, the State found D.F. eligible for services through the Early Intervention program. Diane Shelby, a developmental therapist, started working with D.F. in K.D.'s home in January 2011.

¶ 7

In April or May 2011, Toni sought to regain custody of D.F. A court named K.D. as legal guardian for D.F., and K.D. refused to return D.F. to Toni's custody. Toni and K.D. turned to the courts for resolution of their custody dispute. A caseworker for the State's Office of Adoption and Child Advocacy interviewed both Toni and K.D. in 2012. K.D. said she took custody of D.F., at Toni's request, in June 2010, a few weeks after he left the hospital. Toni said K.D. started taking care of D.F. in August 2010. Toni and K.D. made very derisive allegations about each other, each accusing the other of seeking custody of D.F. for financial gain. The caseworker, in her written report to the court, said, "My impression is

that Toni and [K.D.] both are still using drugs." The caseworker found Toni's home unsuitable for D.F., but found K.D.'s home acceptable. The caseworker added,

"while it was apparent [K.D.] loves [D.F.] and seems concerned about his welfare, I am not confident she no longer uses drugs.

At this time, I question the suitability of both Toni *** and [K.D.] as providers of care to [D.F.]. I strongly suggest [the Department of Children and Family Services (DCFS)] immediately become involved with this case. I do not think [D.F.] should be moved to Toni's care, nor do I think he should remain in [K.D.'s] care, without some type of supervision from [DCFS]." (Emphasis in original.)

¶ 8 On February 6, 2013, DCFS opened a case file regarding D.F. The first DCFS caseworker reported that K.D. took care of D.F. since May 2010. DCFS nominally took D.F. into protective custody on February 13, 2013, but DCFS left D.F. in the home K.D. shared with a man who named himself as D.F.'s godfather. The State filed a petition for adjudication of wardship on February 15, 2013. In the petition, the State alleged that D.F. had substantial developmental special needs, that Toni's residence was "inadequate and unsuitable for [D.F.]," and that at the time of the petition, Toni used illegal substances. In an order dated February 15, 2013, the court granted DCFS temporary custody of D.F. DCFS took D.F. away from K.D. and placed him in a foster home.

¶ 9 Toni identified R.F. as D.F.'s father, but a paternity test ruled R.F. out. Toni did not suggest any other possible father for D.F. The State served D.F.'s unknown father with notice by publication of the proceedings regarding custody of D.F.

¶ 10 The first DCFS caseworker reported that Toni was "working toward reunification with her child," and that she was "currently involved in reunification services and visiting with the minor." By court order, a DCFS caseworker supervised all visits between Toni and D.F.

¶ 11 Toni had another child after D.F., so by February 2013, her home had grown to four children. She needed income and a safer place to raise her children. In October 2013, Toni moved with her four children to Iowa, where she found work. She continued to pursue reunification with D.F.

¶ 12 The trial court heard evidence on the petition for adjudication of wardship on February 20, 2014. Karla Belin, a DCFS investigator, testified that she met D.F. in K.D.'s home on February 13, 2013, and watched him for about 30 minutes. She found D.F. "extremely hyperactive, very difficult to engage." Later, at a hospital, doctors could not perform a physical on D.F. because D.F. "would not allow any touching."

¶ 13 Belin testified that she interviewed Toni on February 15, 2013. D.F. was not present for the interview, and Belin never saw Toni interact with D.F. Belin testified that Toni told her she smoked marijuana almost daily, and she had in the past used crack and ecstasy. Belin "had some very serious concerns about [Toni's] ability to care for [D.F.], because of his level of care that would be required and the fact that she already had a child with special needs." Toni said she might need some assistance with raising D.F., but she wanted him back with her family. Belin said that D.F. had been exposed to harmful substances before birth, but she apparently based the assertion on Toni's admission that she smoked marijuana the day before D.F.'s premature birth. The State presented no evidence to refute the hospital's tests showing no illicit substances, not even marijuana, in D.F.'s bloodstream at birth.

¶ 14 Belin testified that when she visited Toni, "they were having a card party in one of the bedrooms off to the side, and *** cigarette smoke was just emanating." But Belin noted that Toni had sufficient food and "the basic requirements" for the children. Belin saw no evidence any of the children in Toni's custody suffered any abuse. Belin did not take any of Toni's other children into custody, and DCFS never sought custody of Toni's other children. Belin concluded that if Toni had taken custody of D.F., "D.F. would have been put at risk of harm," because of the "level of care that was required for maintaining him." Belin "was very concerned that with mom having the amount of children that she had that she would not be able to manage [D.F.] effectively." Belin also testified about K.D. and her conclusion that K.D. could not adequately take care of D.F.

¶ 15 Toni sought to rebut Belin's testimony about the conditions in K.D.'s home and K.D.'s provision of inadequate care for D.F. The State objected to the testimony as irrelevant. The trial court sustained the objection, finding the conditions in K.D.'s home and K.D.'s care for D.F. irrelevant because the court had already terminated K.D.'s guardianship over D.F. and placed D.F. in a foster home.

¶ 16 The State presented evidence that Toni tested positive for cocaine in January 2012 and for marijuana in March 2012. Toni presented a caseworker report, in which the caseworker said that Toni explained that during the custody dispute, K.D. tricked her into smoking a cigarette laced with cocaine. Toni did not dispute the evidence that she used marijuana before the March 2012 test, but she pointed out that she tested negative for all drugs, including marijuana, consistently thereafter. Toni admitted to the caseworker that she rarely visited D.F. when K.D. had custody of him. The caseworker reported that Toni said K.D. did not permit her to visit.

¶ 17 Toni continued to submit to drug testing after she moved to Iowa. She sought other family services in Iowa, but the lack of sufficient child care to cover her work and services caused her to stop seeking the services and stop the drug testing.

¶ 18 In closing argument, the State brought up Belin's testimony about K.D., but the court sustained an objection to the argument as irrelevant. The court held:

"[D.F. was] born with a number of developmental special needs. Although there was not testimony linking intrauterine and the special needs, I would note that mother, in fact, admitted that she was using [marijuana] as recently as the day before delivery of this minor.

Once the guardianship was, in fact, established, it should be noted that there was a substantial gap in mother visiting with the minor. *** [T]he guardianship was *** vacated.

At approximately that time, there was an assessment of both the guardian as well as the mother. Mother's home, in fact, was assessed. Mother, in fact, was assessed at that point and it was determined that mother was still, in fact, using [marijuana]. The home of the mother was found to be not suitable for placement of the minor at that time. ***

The State is proceeding under a theory of anticipatory neglect and the Court is not determining at this point what the future would hold in terms of the minor and the mother, but we're looking at the situation at the time of the Court having taken temporary custody [in February 2013]. *** [I]t was an admission of use of illegal substances *** at the time ***.

I find at the time, *** that the State has, in fact, proven its allegation as to both neglect environment injurious and abuse substantial risk of injury as alleged in its petition."

¶ 19 In the written adjudication order, the court held that D.F. had been subjected to an injurious environment and placed at a substantial risk of physical harm, in violation of sections 405/2-3(1)(b) and 2-3(2)(ii) of the Juvenile Court Act (Act) (705 ILCS 405/2-3(1)(b), 2-3(2)(ii) (West 2012)).

¶ 20 At the dispositional hearing, a DCFS worker admitted that no one from DCFS went to Toni's home in Iowa, and no one from DCFS knew anything about conditions there. The State presented no evidence that Toni used any drugs, not even marijuana, after she moved to Iowa. The DCFS caseworker admitted that parents with low incomes have great difficulty finding reasonably safe housing. The caseworker said D.F.'s foster family provided a safe and nurturing environment for D.F.

¶ 21 The court ruled:

"There are parts of the city that are safe, there are parts that are not. Mother could have sought a place in Cook County, mother could have sought a place in a collar county, mother could have gone down state.

She chose, for whatever reason, and I don't know, to go to Iowa, with the explanation that she was doing that for the safety of her 12-year-old. ***

What I'm concerned about is the fact that there has not been contact with the minor in a very long time. And that even in a placement here, when mother was still here, there still was not a good amount of contact.

* * *

*** I find [Toni] unable. But because of her move, because of her lack of involvement in services and because of her, what appears to be, lack of interest in the minor, I'm also going to find her unwilling.

* * *

*** I find that mother has not made progress at this point."

In the written disposition order, the court said it found Toni "unable for some reason other than financial circumstances alone to care for, protect, train, or discipline the minor; and/or *** unwilling to care for, protect, train, or discipline the minor." The court placed D.F. under the guardianship of DCFS with the right to place D.F. Toni now appeals.

¶ 22

ANALYSIS

¶ 23

In this appeal, Toni principally challenges the findings, at the adjudication stage, that "the minor is *** abused or neglected *** in that conduct toward the minor violates *** [Act section] 405/2-3(1)(b) injurious environment *** [and section] 405/2-3(2)(ii) substantial risk/physical injury." We will overturn the trial court's findings of fact only if they are against the manifest weight of the evidence. *In re Faith B.*, 216 Ill. 2d 1, 13-14 (2005).

¶ 24

In determining whether conduct towards a minor violates the Act for purposes of an adjudication of wardship, courts must focus "exclusively upon the status of the child, and g[i]ve no consideration to an evaluation of the acts and/or omissions of the child's parents, or any other individual responsible for the welfare of the child, in arriving at a determination of neglect." *In re Arthur H., Jr.*, 212 Ill. 2d 441 (2004). As the *Arthur H.* court said, " parents

are not adjudicated neglectful at the adjudicatory stage of the proceedings under the Act; rather, minors are adjudicated neglected.' " *Arthur H., Jr.*, 212 Ill. 2d at 467, quoting *In re Arthur H., Jr.*, 338 Ill. App, 3d 1027, 1042 (2003) (Kapala, J., dissenting). An injurious environment, within the meaning of the Act, "is an amorphous concept that cannot be defined with particularity, but has been interpreted to include the breach of a parent's duty to ensure a safe and nurturing shelter for her children." *In re Kenneth D.*, 364 Ill. App. 3d 797, 801 (2006).

¶ 25 The trial court clarified that it treated the case as one of anticipatory neglect. "Under the theory of 'anticipatory neglect,' the State seeks to protect not only children who are the direct victims of neglect or abuse, but also those who have a probability to be subject to neglect or abuse because they reside, or in the future may reside, with an individual who has been found to have neglected or abused another child. [Citation.] Although the neglect of one child does not conclusively show the neglect of another child, the neglect of one minor is admissible as evidence of the neglect of another minor under a respondent's care." *Kenneth D.*, 364 Ill. App. 3d at 801. We have reviewed the record and find that the State's evidence did not show and the trial court did not find that Toni neglected or abused any of the children in her care. Thus, the theory of anticipatory neglect, as previously developed by the courts, does not apply. The State admits that "anticipatory neglect was not applicable here," and the State does not try to justify the court's ruling on the basis of the court's finding of anticipatory neglect.

¶ 26 The trial court apparently developed a unique theory of anticipatory neglect, relying on Belin's testimony that she believed D.F. "would be at risk if he were allowed to remain with [Toni]" at the time that Belin visited Toni's home. Belin also said that she "was very

concerned that with mom having the amount of children that she had that she would not be able to manage [D.F.] effectively." The trial court correctly recognized that the testimony had no bearing on D.F.'s actual environment, because Toni had not had custody of D.F. for several years at the time of Belin's home visit. The court instead relied on Belin's testimony as grounds to conclude that placing D.F. in Toni's home environment in February 2013 would have subjected him to a substantial risk of harm.

¶ 27 We cannot reconcile the trial court's expansive interpretation of anticipatory neglect with our supreme court's admonishment in *Arthur H.* that courts must focus not on the actions of parents and guardians, but rather on whether the child is subjected to an injurious environment or at a substantial risk of physical harm. Since Toni has not had custody of D.F. for several years, and no evidence showed that her infrequent visits with D.F. occurred in her home, and no evidence showed that D.F. had actually been subjected to the environment of Toni's home since 2010. No evidence showed that during Toni's visits with D.F., D.F. was subjected to an injurious environment. Thus, the condition of Toni's home after 2010 and Toni's ability to care for D.F. have no bearing on the only issue for the trial court to decide at the adjudication stage: whether D.F. had been subjected to an injurious environment or a substantial risk of physical harm.

¶ 28 The trial court excluded as irrelevant the evidence concerning the conditions in K.D.'s home and whether during K.D.'s guardianship D.F. was subjected to an injurious environment or a substantial risk of physical harm. Since DCFS removed D.F. from K.D.'s custody, a foster family has taken care of him. DCFS's caseworker testified that the foster family provided a safe and nurturing environment for D.F. The parties presented no contrary evidence. Thus, no evidence regarding D.F.'s environment after 2010 supports the trial

court's finding that D.F. was subjected to an injurious environment or a substantial risk of physical harm.

¶ 29 The State argues that the evidence shows that Toni subjected D.F. to an injurious environment or a substantial risk of physical harm in the time between his release from the hospital on May 17, 2010, and his transfer to K.D.'s custody. The evidence in the record does not establish the date of the transfer of custody. During the custody dispute with K.D., Toni said the transfer occurred in August 2010, while K.D. remembered the transfer as taking place in June 2010. The first caseworker to work with D.F. reported that K.D. took custody of D.F. in May 2010, no more than two weeks after the hospital released him. No evidence suggested that the hospital subjected D.F. to an injurious environment or a substantial risk of physical harm.

¶ 30 The State presented no witnesses to testify about the condition of Toni's home between May 2010 and August 2010. The State contends that four pieces of evidence support the trial court's finding of an injurious environment or a substantial risk of physical harm: (1) in the hospital, Toni admitted that she used marijuana the day before D.F.'s premature birth; (2) Toni tested positive for cocaine in January 2012 and for marijuana in March 2012; (3) Toni did not visit D.F. for months at a time while K.D. had custody of D.F.; and (4) late in 2010, after Toni transferred custody of D.F. to K.D., Diane Shelby, a developmental therapist, called Toni several times and went to Toni's home several times seeking to reach Toni and D.F., but she did not meet Toni until March 2011 and she did not start working with D.F. until January 2011. None of the evidence shows that Toni subjected D.F. to an injurious environment, or that she placed him at a substantial risk of physical harm, during the brief time that she retained custody of D.F. in 2010. None of the evidence on which the State

relies even relates to the brief period in 2010 after the hospital released D.F. and before Toni herself recognized that she could not provide D.F. all the care he needed, and she sought help from a relative who had time to care for D.F.

¶ 31 The State's evidence does not support a finding that after D.F. left the hospital and before K.D. took custody of him, D.F. was subjected to a substantial risk of physical harm. See *Arthur H.*, 212 Ill. 2d at 475-76; *In re Edricka C.*, 276 Ill. App. 3d at 28-29. Therefore, the trial court's finding that D.F. was subjected to an injurious environment is against the manifest weight of the evidence. See *Arthur H.*, 212 Ill. 2d at 475-76; *In re Edricka C.*, 276 Ill. App. 3d 18, 28-29 (1995). Accordingly, we must reverse the trial court's findings and its adjudication order.

¶ 32 Our Supreme court has made it clear that "[i]f the State fails to prove the allegations of abuse, neglect or dependence by a preponderance of the evidence, the court must dismiss the petition. [Citations.] A finding of abuse, neglect or dependence is jurisdictional." *Arthur H.*, 212 Ill. 2d at 464. Without a valid finding of neglect or abuse, the trial court had no basis for its disposition order, and therefore we vacate the disposition order.

¶ 33 CONCLUSION

¶ 34 In this case, no evidence that the court considered relevant supports the court's finding that D.F. has ever been subjected to an injurious environment or a substantial risk of physical harm. The doctrine of anticipatory harm does not permit the court to adjudicate a minor as abused or neglected because the minor would have been in an injurious environment if he had been somewhere other than his actual environment. Therefore, we reverse the trial court's order adjudicating D.F. a neglected or abused minor, and we vacate the disposition order, and we remand for further proceedings in accord with this order.

No. 1-14-1361

¶ 35 Reversed and remanded.