2011 IL App (1st) 110164-UB

FOURTH DIVISION
October 13, 2011

No. 1-11-0164

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE INTEREST OF:	)	Appeal from the
	)	Circuit Court of
JESSICA J. and DEMARCUS J.,	)	Cook County.
	)	
Minors/Respondents-Appellees/Cross-Appellants	)	
	)	
(The People of the State of Illinois,	)	Nos. 07 JA 01028
	)	07 JA 01029
Petitioner-Appellee,	)	
	)	
v.	)	
	)	
Eric J.,	)	The Honorable
	)	Marilyn Johnson,
Father/Respondent-Appellant/Cross-Appellee).	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Epstein and Justice Joseph Gordon concurred in the judgment.

ORDER

HELD: Following our limited remand to trial court to conduct new best interests hearing due to change in circumstances regarding minors' placement, trial court's new ruling that it was now not in best interests of minors to terminate biological father's

parental rights should be affirmed and our mandate should issue forthwith so our jurisdiction can be relinquished to trial court for a permanency planning hearing.

¶ 1 Respondent-appellant and cross-appellee Eric J. (respondent) originally appealed the trial court's determinations finding him to be unfit under section 1(D)(m) of the Illinois Adoption Act (Adoption Act) (750 ILCS 50/1(D)(m) (West 2008)), and ordering the termination of his parental rights over respondents-appellees and cross-appellants Jessica J. and Demarcus J. (minors or as named), his minor children. With its termination ruling, the trial court essentially recommended that the minors be freed for adoption by their current foster mother, Ms. Felicia M.C., with whom the children had been living for the last two years. In fact, Felicia M.C. had appeared at the minors' best interests hearing and had testified at length about the progress the minors had made in her care and her desire to adopt them. For their part, the minors, as well as petitioner-appellee the State of Illinois (petitioner), sought, in contradiction to respondent, our affirmance of both the trial court's orders.

¶ 2 However, towards the conclusion of the pendency of respondent's appeal, the minors' public guardian filed in our Court a report which informed us that a change in the minors' placement had occurred; to wit: the children were removed from their foster placement upon the discovery of a registered sex offender living in the foster home. Following the filing of this report, we issued an order in respondent's appeal affirming the trial court's finding of his unfitness under section 1(D)(m) of the Adoption Act, but remanding the case in a limited manner for a new hearing on the children's best interests due to the placement change.[1] See *In re Jessica*

[1]In addition, we also dismissed the minors' cross-appeal asking us to reverse the trial court's order denying their petition to find respondent unfit under section 1(D)(b) of the

J. and Demarcus J., No. 1-11-0164 (2011) (unpublished order under Supreme Court Rule 23). Further, in a separate order, we retained jurisdiction over the entire matter and asked the parties to return to our Court to file a status report and a supplemental record following the conclusion of the new best interests hearing.

¶ 3 Upon these orders, the trial court held the new best interests hearing on September 14, 2011. Following this, the minors returned to our Court with a supplemental record of that hearing, as well as a status report. In that report, the minors now ask us to affirm the trial court's findings at the new best interests hearing and its conclusion that respondent's parental rights *not* be terminated. Petitioner and respondent have not presented any further paperwork to this Court.

¶ 4 For the reasons that follow, we affirm the judgment of the trial court, relinquishing our jurisdiction over the matter and issuing our mandate in this cause forthwith.

¶ 5 BACKGROUND

¶ 6 A brief recitation of the facts is necessary here, as new legal proceedings are now involved in this case.

¶ 7 At the commencement of the new best interests hearing, the trial court heard opening statements from all the parties. Petitioner, which had originally sought the termination of respondent's parental rights to the minors during the initial best interests hearing, now stated that it was *not* in the minors' best interests for this to occur. Respondent agreed, as did the minors' public guardian.

Adoption Act. See *In re Jessica J. and Demarcus J.*, No. 1-11-0164 (2011) (unpublished order under Supreme Court Rule 23).

¶ 8 The minors' longtime caseworker, Vinice Jones, was the only witness to testify at this hearing. She stated that, in mid-summer 2011, Demarcus J. was detained by police and brought to the station.[2] Upon questioning, he informed them of his address–that of his foster home with Felicia M.C. When police ran a check on this address, they found that a registered sex offender, Livester G., was living at the home. The minors were immediately taken to a shelter.

¶ 9 Jones further testified that she met with Felicia M.C., who confirmed that Livester G. was indeed living at her residence. She told Jones that he was part of her life and that he would not be leaving her home. Upon meeting with her a second time, and after making clear that the situation would not change, Jones removed the minors from Felicia M.C.'s care and placed them in the home of Janet J., their paternal grandmother (respondent's mother).[3]

¶ 10 Finally, Jones testified that, at this point in time, it was not in the minors' best interests to terminate respondent's parental rights. While Janet J. expressed an interest in assuming guardianship over the minors, she has stated to Jones that she does not want to adopt them. Moreover, the minors have only been living with Janet J. for approximately seven weeks; she is

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[2]We note for the record that Demarcus J. was detained while he was with his younger half-brother, Terrell. Respondent is not Terrell's biological father. Rather, Demarcus J. (now 12 years old), Jessica J. (now 15 years old) and Terrell all share the same biological mother, who is deceased. Terrell's father is listed as "unknown," but from the record in both this and the prior appeal, it appears that all three children have been kept together throughout foster placement.

The original appeal involved strictly Demarcus J. and Jessica J.; any matter surrounding Terrell was purposefully severed. However, at the new best interests hearing, the trial court made clear that, from now on, its rulings would apply to all three children, as they were now a "package deal." No party has objected to this. Accordingly, we wish to make clear that our holding, too, applies to all three children.

[3]Janet J. appeared and testified at the original best interests hearing, on respondent's behalf, even though she was not a fixture in the minors' lives.

not a licensed foster parent, has not been with the minors for an extended period of time, and would require training on how to care for them. In addition, the minors have had to change schools, make new friends and stopped attending their church; they have not yet formed an attachment to Janet J. and continue to receive counseling for the trauma they experienced when removed from Felicia M.C.'s home. Most significantly, Jones noted that felony DUI charges are still pending against respondent, and there is a viable possibility that he will soon be jailed. Accordingly, Jones testified that, until a more suitable and permanent placement can be determined,[4] respondent's rights should not be terminated.

¶ 11 At the close of testimony, the trial court held that it was not in the minors' best interests to terminate respondent's parental rights. The court cited a number of factors for its decision, including the minors' ages, their past experiences, Felicia M.C.'s decision, their limited time with Janet J., and her wish not to adopt them. The court also noted that respondent "is at present not able to provide for" the minors' care. Based on all this, and because "adoption is realistically not on the horizon at this point," the court continued the case until November 4, 2011 for a permanency planning hearing.

¶ 12 ANALYSIS

¶ 13 As noted, in our holding regarding respondent's initial appeal, we retained jurisdiction over the instant matter. At that time, in addition to ordering the new best interests hearing, we ordered the parties to return to our Court and file a status report. The minors did, and they now

[4]For example, the supplemental record indicates that a paternal aunt of the minors appeared at the new best interests hearing.

request that we affirm the trial court's new best interests determination not to terminate respondent's rights at this time. Because we find that the relinquishment of our jurisdiction over this cause and the issuance of a mandate from our Court are necessary for a proper and thoughtful decision regarding the minors' permanency to finally be determined, we agree and affirm the trial court's order.

¶ 14 The law is well-settled that termination of parental rights cases are bifurcated proceedings; first, a dispositional hearing is conducted to determine whether a parent is fit, willing and able to care for the child and, if he is found to be unfit, unwilling or unable, an adjudicatory hearing is conducted to determine whether termination of the parent's rights is in the child's best interests. See *In re Jaron Z.*, 348 Ill. App. 3d 239, 253, 261 (2004). The instant case, at this point in time, focuses only on the second of these parts. That is, in our prior decision, we held that respondent was unfit pursuant to section 1(D)(m) of the Adoption Act, due to his failure to complete the required services toward reunification in a timely manner. That decision, again as of this point in time, stands.

¶ 15 Turning, then, to the adjudicatory phase, we note that the burden is upon petitioner to show that termination is proper based on a preponderance of the evidence. See *Jaron Z.*, 348 Ill. App. 3d at 261. The court's final decision in this regard lies within its sound discretion, especially when it considers the credibility of testimony presented at the best interests hearing, and that decision will not be overturned unless it is against the manifest weight of the evidence or the court has in some way abused its discretion. See *Jaron Z.*, 348 Ill. App. 3d at 261-62; *In re G.L.*, 329 Ill. App. 3d 18, 25 (2002).

¶ 16 In the instant cause, the status report makes clear that all the parties involved–respondent, petitioner, and the minors–agree that it is in the best interests of the minors *not* to terminate respondent's parental rights at this time. And, upon its own evaluation, the trial court came to the same conclusion. While this is clearly a shift in position from the prior appeal, particularly on the part of petitioner, the minors and the trial court, it cannot be helped in this case. The peculiar circumstances regarding what has occurred with the minors' placement are undeniable and, in a very real sense, unfortunate.

¶ 17 That said, we find, obviously, that petitioner has not met its burden to show that termination is proper based on a preponderance of the evidence; clearly, it asserts now that the opposite is true. And, we further find that the trial court's new decision is not against the manifest weight of the evidence, nor has the court abused its discretion in any way. To the contrary, and as it expressed at the hearing, adoption of the minors by any one is not feasible at this time. They were removed just weeks ago from a foster home where they had been living for two years and where, according to the testimony presented at the first best interests hearing, they had made a real connection with their foster mother and their surrounding community. However, that home has now become utterly unsuitable for them and, according to caseworker Jones, will not change. The minors were then removed to a shelter and, eventually, placed with their paternal grandmother, Janet J.

¶ 18 For lack of a better alternative, this is where they currently reside. However, while interested in guardianship, Janet J. has made clear that she does not want to adopt the minors. Nor is that an acceptable possibility right now: Janet J. has not yet formed an attachment to the

minors nor them to her, she is not a licensed foster parent or a certified adoptive parent, and she would require training on how to parent the minors. Moreover, it is not realistic that the minors be immediately returned to respondent. In addition to the finding of his unfitness (which we affirmed), he is currently facing felony DUI charges, with the real potential of going to jail. As the trial court found, he is simply, at present, unable to provide care for the minors. And, while the supplemental record from the new best interests hearing indicates that a paternal aunt has expressed some interest in the minors' placement, it is unclear, without more, whether she may be a viable, or willing, permanent caregiver for them.

¶ 19 These are only some the many issues that currently face the minors. One thing, however, is clear: without even a potential permanent placement, there is no reason, at this time, to terminate respondent's parental rights. It is simply not in their best interests under the current circumstances. Instead, what is in their best interests at this time is the holding of a permanency planning hearing, where these issues can be sorted out and a plan can be reached among the parties, with the trial court's intervention, as to where these minors should live.

¶ 20 Accordingly, we relinquish our jurisdiction over the matter and immediately issue our mandate to the trial court so that the permanency planning hearing proposed by that court for November 4, 2011, can be held forthwith and without any legal impediment. See, *e.g.*, *People v. Curoe*, 97 Ill. App. 3d 258, 272 (1981) (case reaches final disposition in reviewing court once mandate issues; appellate jurisdiction is then lifted). These minors need, and deserve, some semblance of stability in their lives, and that should begin as soon as possible.

¶ 21 CONCLUSION

¶ 22 For all the foregoing reasons, we affirm the judgment of the trial court, holding that it is not in the minors' best interests to terminate respondent's parental rights at this time. Our mandate in this cause is to issue immediately, thereby relinquishing our jurisdiction over the matter.

¶ 23 Affirmed; mandate to issue forthwith.