FOURTH DIVISION
AUGUST 8, 2013

No. 1-13-0847

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re GIANNA B.,	)	
	)	
Minor-Respondent-Appellee,	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County.
	)	
Petitioner-Appellee,	)	
v.	)	No. 12JA236
	)	
Johnny B.,	)	
	)	Honorable
Father-Respondent-Appellant).	)	Maureen F. Delehanty,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ 1 *HELD*: Disposition order entered by the court in a juvenile case finding that the minor's father was unable and unwilling to care for his daughter upheld where the father's challenge to the order was moot and where the court's findings were not against the manifest weight of the evidence.

¶ 2 Following an adjudication hearing under the Juvenile Court Act of 1987 ("Act" or

"Juvenile Court Act") (705 ILCS 405/1-1 *et seq*. (West 2010)), the circuit court found that Gianna B.[1] was a neglected and abused minor. In the disposition hearing that followed, the trial court concluded that her father, respondent Johnny B., was both unable and unwilling to properly care for his daughter, adjudicated Gianna a ward of the court and placed her under the guardianship of the Illinois Department of Child and Family Services (DCFS). On appeal, Johnny contests the court's disposition finding that he was unwilling to care for his daughter, arguing that the finding is against the manifest weight of the evidence. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Gianna B. was born on February 28, 2012. Johnny B. is her natural father[2] and her natural mother is Alicia M.[3] On March 6, 2012, the State filed a petition for adjudication of

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[1] We note that the minor's name is spelled two different ways in the circuit court documents contained in the record on appeal: Giannia and Gianna. Because each of the parties in this appeal identify the minor as Gianna in their briefs, we will use this spelling throughout this disposition.

[2] At the time that DCFS initiated proceedings on Gianna's behalf, Johnny expressed doubt as to whether he was her biological father. As a result, the court ordered Johnny to take a paternity test. On May 21, 2012, after receiving results of the DNA test, which conclusively established Johnny's paternity of Gianna, the court entered an order identifying Johnny as Gianna's natural father.

[3] Although Alicia was represented by counsel during the lower court proceedings, she has

wardship. In the petition, the State alleged that Gianna was "neglected" as that term is defined in the Act (705 ILCS 405/2-3 (West 2008)). Specifically, the State alleged that Gianna was being subjected to an environment that was injurious to her welfare (705 ILCS 405/2-3(1)(b) (West 2008)). The State further alleged that Gianna was also an "abused" minor as that term is defined by the Act because she was at "substantial risk" for physical injury (705 ILCS 405/2-3(2)(ii) (West 2008)). In support of the allegations of neglect and abuse, the State alleged as follows:

> "Mother has two prior indicated reports for substantial risk of injury/environment injurious to health and welfare by neglect. Mother has had two previous intact cases with DCFS. This minor's putative father has one prior indicated report for substantial risk of physical injury/environment injurious to health and welfare by abuse. Mother has one other minor who is in DCFS care. At the time of this minor's birth, mother tested positive for illegal substances. Mother admits to using illegal substances while pregnant with this minor. At the time of this minor's birth mother smelled like a 'chemical solvent.' Mother admitted to abusing poisonous chemicals while pregnant with this minor. Mother and putative father currently reside together. Mother has an order of protection against putative father. On or about January 24, 2012, this minor's [two] siblings died in a house fire. Mother admitted that she was home and asleep at the time of the fire. Mother has previously been diagnosed with Bi-polar Disorder however she denies any current mental health issues. Mother has a history of domestic violence with putative father and was abusing poisonous chemicals. Putative father admits to using illegal substances and

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not appealed the court's adjudication and disposition orders.

states he might not be the father. Paternity has not been established."

¶ 5 The State also filed a motion for temporary custody, requesting the court to enter an order appointing D. Jean Ortega-Piron, a Guardianship Administrator with DCFS, as the temporary guardian of Gianna. The State's request was immediately granted and the cause subsequently proceeded to an adjudication hearing.

¶ 6 Adjudication Hearing[4]

¶ 7 The State, proceeding under a theory of anticipated neglect, presented the court with a series of stipulations. The stipulations included information about Alicia's marijuana use and her long history of ingesting poisonous chemicals, including mothballs during her pregnancy with Gianna, which resulted in notable physical and neurological difficulties. In addition, the court heard details about the fire that resulted in the deaths of two of Gianna's siblings and the couple's long history of domestic violence. In pertinent part, the court was informed that Johnny had been convicted of domestic battery and had been incarcerated for violating an order of protection during the course of his tumultuous relationship with Alicia.

¶ 8 After reviewing the exhibits and stipulated evidence, the court found that Gianna was a neglected and abused minor. The court noted that Gianna was born approximately one month after the fire that resulted in the deaths of two of her siblings, and stated:

"So, clearly this child was born into an environment which was injurious to her

[4] Because Johnny does not dispute the court's adjudication findings, we will not detail all of the evidence and exhibits presented to the court during the adjudication hearing; rather, we will merely provide a brief synopsis of the State's evidence.

welfare. Mother was in denial about her pica disorder. There is an undealt with domestic violence. Mother testing positive for cannabis at the time of this child's birth. Clearly, this was an environment injurious to this vulnerable infant's welfare.

So, I find the State has met its burden on that ground.

And, on the last ground of abuse/substantial risk of physical injury, my findings, factual findings, are virtually the same. Mother had severe physical problems more than likely brought on by the mothball ingestion, her use of cannabis during the pregnancy, and ongoing domestic violence issues all created a substantial risk to this vulnerable infant. She was [at substantial risk of physical injury] prebirth and after her birth.

So, I find the State has met its burden on this count as well."

¶ 9 Disposition Hearing

¶ 10 At the disposition hearing that followed, Ethelyn Brown, a caseworker with DCFS, testified that Gianna was placed in a traditional non-relative foster home in April 2012. Brown has visited the foster home and has found the placement to be safe and appropriate. She has never observed signs of abuse, neglect or corporal punishment. Brown further testified that Gianna has received regular medical care throughout her placement. Although Gianna appears to have some developmental delays, Brown testified that the delays are not significant enough to warrant services at this time. Brown explained that Gianna's development will be reevaluated in the future to determine whether she will require additional resources.

¶ 11 Brown further testified that her agency also assessed Alicia and Johnny for services. She confirmed that Alicia participated in a parenting capacity assessment and had undergone a

psychological evaluation. Brown, however, indicated that she had not received reports detailing the results of those assessments as of the date of the disposition hearing. Although Alicia completed the aforementioned diagnostic services, Brown testified that she was not as cooperative in completing the other recommended services. Specifically, Alicia refused to participate in a drug abuse assessment or receive any treatment for substance abuse. In addition, although Alicia had initially attended individual therapy sessions for approximately one month, she had not taken part in any additional sessions since December 2012. Alicia never explained to Brown why she stopped attended therapy. Finally, Brown indicated that parenting classes and domestic violence services had also been recommended for Alicia, but explained that she had not made any referrals for those services because Alicia had not completed her drug treatment and therapy services.

¶ 12 Brown further testified that domestic violence services, parenting classes, and a psychiatric evaluations have been recommended for Johnny. However, because Johnny has been incarcerated in Cook County jail, he has not been able to participate in those services. Brown explained that substance abuse counseling is the only program available to Johnny during his incarceration. Brown spoke to her liaison with the prison and was told that it was Johnny's responsibility to enroll himself in counseling. Brown advised Johnny that he needed to initiate services through the prison system. To her knowledge, Johnny has not done so. She has not received any documentation regarding Johnny's involvement in any services during his prison term. Brown confirmed that Johnny has been able to have bi-monthly supervised visitation with his daughter at the prison. Although Brown has not observed the visits herself, she has been told

that the visits "go very well. [Gianna] giggles and goos at him. And, he giggles and goos back at her." She acknowledged that Johnny is entitled to weekly visitation, but explained that this has not been possible due to scheduling issues with Cook County jail.

¶ 13 Ultimately, Brown recommended that it was in Gianna's best interest to be made a ward of the court. She explained that currently "neither parent is able to care for [her]. [Johnny] is incarcerated and [Alicia] is–needs assistance with services, and someone needs to take care of this child, and neither one of them are [sic] available at this time."

¶ 14 Johnny confirmed he has been in prison since April 2012 and testified that he has had approximately 15 supervised visits with Gianna during that time. He was unsure of his release date. He further testified that he is being held in Division 11 at the jail and that substance abuse treatment is not currently available to him. Johnny explained that such treatment is available to inmates in Division 14 and that he would need to request to be transferred in order to be eligible for substance abuse treatment during his incarceration. He acknowledged that he has not requested a transfer and explained that he would rather complete the treatment when he is released from jail. Johnny, however, did indicate he would be willing to start treatment in prison if it was required to get his daughter back in his custody. Johnny ultimately confirmed that he wanted to be reunited with Gianna and expressed his dissatisfaction that his daughter had been placed in a non-relative foster home because he had recommended that his aunt care for his daughter during his incarceration.

¶ 15 At the conclusion of live testimony, the parties made closing arguments. During its argument, the State indicated it was "seeking findings of unable and unwilling as to" both Alicia

and Johnny." In support of its argument that Johnny be found both unable and unwilling to care for Gianna, the State addressed the court as follows:

> "Your Honor, the testimony was that of the services that [Johnny] has been recommended, the only service that is available to him while he is incarcerated is substance abuse treatment. And, by his own testimony today, he is not willing to engage in that treatment until he is released. It's the one service right now that the agency is requesting of him.
>
> Although he has not canceled any visits, he doesn't have to take any action to allow visits to occur. Gianna is obviously brought to him. Gianna is again under one year old and she is essentially brought to the jail for fifteen visits now in which the case aid holds her up physically to the glass partition so she can have the visitation with her father. The amount of interaction or bonding with that is obviously questionable. However, given the fact that the one action that is being required of [Johnny] right now is for him to get the substance abuse treatment, something that he can do while he's incarcerated, and at least have a head start on for when he's released, and he's not doing it. And, he stated today, Your Honor, he's not willing to do it.
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> The testimony by him was that he at least believes that he could transfer to the different division if he requested to be transferred so that he could engage in that service. He has not done so."

¶ 16 In response, Johnny's court-appointed counsel urged the court to make a finding that Johnny was merely unable to care for his daughter. Counsel maintained that a finding that

Johnny was unwilling to care for Gianna was inappropriate, arguing:

> "Your Honor, father takes advantage of all of the visits he's been offered. He's never cancelled any. He wants to continue to visit with his child and he's concerned about the visits that the agency hasn't been able to yet facilitate. He's interested in making up the time loss with his daughter as much as possible.
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> He is concerned about his child's placement. A big concern for him is the fact that the family placement does not seem to be a primary [concern] with the agency, and he also has, you know, he's willing to offer other family placement options. Father is willing to participate in any services that the agency recommends, even if they are not in his preferred time, timeline, or in the circumstances he wishes right now.
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> Currently he's in Cook County Jail. He's only offered substance abuse treatment, and he's in a division where that's not currently offered. He's willing to take part in any services the jail can provide him with."

¶ 17 After reviewing the evidence and hearing the arguments of the parties, the court adjudged Gianna a ward of the court, finding that both of her parents were unable and unwilling to provide her with proper care. In doing so, the court rejected Johnny's argument that he merely be found unable to care for his daughter due to his incarceration, reasoning:

> "The testimony from [Johnny] was that he's been in Cook County Jail since April 2012. So he's removed himself from being out and able to do services through his own actions. The one service that is available to him is that of substance abuse treatment. He testified that a transfer to the other division would be the course that he would take in

order to obtain that service. Yet he doesn't want to do that.

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He's decided that he wants to do the services when he's released. That's the only thing that's asked of him, the one thing that he's not done.

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So, I make findings that [Johnny] is unable and unwilling."

¶ 18 During the court's oral ruling, Johnny vocalized his dissatisfaction with its disposition finding. He was advised of his appeal rights and a timely notice of appeal was filed on his behalf.

¶ 19 II. ANALYSIS

¶ 20 On appeal, respondent does not challenge the court's adjudication findings of abuse and neglect; rather, his sole challenge to the lower court proceedings is the court's dispositional finding that he was "unwilling" to care for his daughter. Because Johnny was incarcerated during the disposition hearing, he does not dispute that he was "unable" to properly care for Gianna; however, he argues that the court's finding that he was also "unwilling" to care for his daughter was against the manifest weight of the evidence.

¶ 21 In response, the State and public guardian both contend that respondent's argument is moot. They observe that the Juvenile Court Act provides that a court may commit a child to DCFS for care and services if the court finds that the child's parents are unwilling *or* unable to provide the child with proper care. Because Johnny conceded that he was unable to care for Gianna due to his incarceration at the time of the disposition hearing and only challenges the

court's finding that he was unwilling to provide Gianna with proper care, the State and public guardian maintain his challenge is necessarily moot since Johnny's inability was sufficient, in itself, to justify Gianna being adjudged a ward of the court. On the merits, both parties contend that the court's finding of unwillingness was not against the manifest weight of the evidence.

¶ 22 Pursuant to the Juvenile Court Act, once a minor is adjudicated abused or neglected, the cause proceeds to a disposition hearing to determine whether "it is consistent with the health, safety and best interests of the minor and the public that [s]he be made a ward of the court." 705 ILCS 405/2-21(2) (West 2010); *In re Arthur H.*, 212 Ill. 2d 441, 464 (2004). Like every other proceeding under the Juvenile Court Act, the paramount consideration is the best interest of the child. *In re Arthur H.*, 212 Ill. 2d at 464. On review, a trial court's determination will only be disturbed if its findings of fact are against the manifest weight of the evidence or if it abused its discretion by selecting an inappropriate disposition order. *In re Stephen K.*, 373 Ill. App. 3d 7, 25 (2007); *In re April C.*, 326 Ill. App. 3d 245, 258 (2001). A finding is against the manifest weight of the evidence only where a review of the record clearly demonstrates that the opposite conclusion is proper. *In re April C.*, 326 Ill. App. 3d at 257. Because the trial court is in a superior position to weigh the evidence and assess the credibility and demeanor of the witnesses, a reviewing court will not reverse a trial court's disposition findings simply because it may have reached a different conclusion. *In re Stephen K.*, 373 Ill. App. 3d at 25; *In re April C.*, 326 Ill. App. 3d at 257.

¶ 23 We first address the mootness argument advanced by the State and public guardian. "It is axiomatic that the existence of an actual controversy is an essential prerequisite to appellate

jurisdiction, and courts of review will generally not decide abstract, hypothetical or moot questions." *Adams v. Bath and Body Works, Inc.*, 358 Ill. App. 3d 387, 399 (2005). An appeal is considered "moot" when it does not involve an actual controversy and a decision of a reviewing court can have no practical affect on the parties. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 522-23 (2001); *In re Lakita B.*, 297 Ill. App. 3d 985, 992 (1998).

¶ 24 To determine whether respondent's appeal is moot, we turn to section 2-27 of the Act, which governs disposition hearings and findings. 705 ILCS 405/2-27 (West 2010). In pertinent part, this provision of the Act provides as follows:

> "If the court determines and puts in writing the factual basis supporting the determination of whether the parents *** of a minor adjudged a ward of the court are unfit *or* are unable, for some reason other than financial circumstances alone, to care for, protect, train or discipline the minor *or* are unwilling to do so, and that it is in the best interest of the minor to take [her] from the custody of [her] parents, *** the court may at this hearing and at any later point:
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> ***
>
> (d) Commit [her] to the Department of Children and Family Services for care and service." (Emphasis added.) 705 ILCS 405/2-27(d) (West 2010).

¶ 25 This court was first called upon to interpret section 2-27 of the Act and address the issue of mootness in *In re Lakita B.*, 297 Ill. App. 3d 985 (1998). In that case, the circuit court found that the minor's mother was both unable and unfit to care for her child. On appeal, the respondent did not challenge the court's finding that she was unable to care for her child and

simply contested that court's finding of unfitness. This court, however, found respondent's challenge moot, explaining:

> "Based on a plain reading of section 2-27, we believe that, although the Act does not specifically define 'unable,' 'unwilling,' or 'unfit,' the terms nonetheless have separate meanings. By wording the terms in the disjunctive, the legislature intended that custody of a minor can be taken away from a natural parent if that parent is adjudged to be *either* unfit *or* unable *or* unwilling. Because respondent here concedes that the trial court properly found her unable pursuant to section 2-27, this factor alone as a basis for the trial court's judgment is sufficient to support the trial court's judgment and, therefore, the issue of the trial court's additional finding that respondent was unfit, is moot." *In re Lakita B.*, 297 Ill. App. 3d at 992-93.

¶ 26 We have continued to adhere to this interpretation of section 2-27 of the Act in more recent cases. See, *e.g*, *In re M.B.*, 332 Ill. App. 3d 996, 1004 (2002) (holding that the respondent's challenge to the court's disposition finding that she was unfit was moot because she did not challenge the court's finding that she was unable to care for her child since the court's finding of inability, alone, was sufficient to support the court's disposition order); *In re J.B.*, 332 Ill. App. 3d 316, 332 (2002) (same).

¶ 27 Here, relying on past precedent, we necessarily find Johnny's challenge to the court's disposition finding of unwillingness to be moot. He conceded at the disposition hearing that he was unable to care for Gianna due to his incarceration. This finding of inability, alone, is sufficient to support the trial court's order placing Gianna in the care of DCFS. Accordingly, the

propriety of the trial court's additional finding that Johnny was also unwilling to care for his daughter is moot. *In re M.B.*, 332 Ill. App. 3d at 1004; *In re J.B.*, 332 Ill. App. 3d at 332; *In re Lakita B.*, 297 Ill. App. 3d at 992-93.

¶ 28 Assuming *arguendo* that the issue of Johnny's unwillingness to properly care for his daughter is not moot, we are nonetheless unable to conclude that the trial court's finding is against the manifest weight of the evidence. At the disposition hearing, DCFS caseworker Ethelyn Brown testified that she had recommended a number of services for Johnny, but explained that substance abuse counseling was the only service available to Johnny during his incarceration. Brown further testified that she informed Johnny that it was his responsibility to enroll himself in counseling at the jail. Johnny confirmed that substance abuse counseling was available to him, but explained that he would need to transfer to a different division of the jail to obtain those services. He acknowledged that he had not made any efforts to seek a transfer or obtain those services as of the time of the disposition hearing, explaining that he preferred to complete all of his services after his incarceration. Johnny, however, did state that he would make the effort in the immediate future if it was necessary to retain custody of his daughter.

¶ 29 Ultimately, based on Johnny's failure to attempt to obtain a transfer and enroll in substance abuse counseling, the trial court found that he demonstrated an unwillingness to care for his daughter. We are unable to agree with Johnny that this finding is against the manifest weight of the evidence. Although Johnny suggests on appeal that he may not have been eligible for a transfer that would allow him access to substance abuse counseling during his incarceration, we find that his failure to make any inquiries at all prior to the disposition hearing supports the

trial court's unwillingness determination.

¶ 30 III. CONCLUSION

¶ 31 Accordingly, the judgment of the circuit court is affirmed.

¶ 32 Affirmed.