No. 3--09--1047

Order filed March 2, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

S.M.P.,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Petitioner-Appellant,	)	Henry County, Illinois,
	)	
v.	)	No. 09--AD--09
	)	
D.R.G.,	)	Honorable
	)	Charles H. Stengel,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court. Justices Lytton and McDade concurred in the judgment.

ORDER

Held: The trial court's finding that the petitioner failed to prove that the respondent father was an unfit parent is upheld.

The petitioner, S.M.P., filed a petition for the adoption of D.G. (age 13), C.G. (age 12), and T.G. (age 10). The trial court denied the petition. On appeal, the petitioner argues that the trial court erred in finding that she failed to prove that the respondent father, D.R.G., was an unfit parent. We affirm.

FACTS

The petitioner is the minors' maternal aunt. On June 16, 2009, the minors' mother signed a consent for the petitioner to adopt the minors. In her adoption petition, the petitioner alleged that the respondent's consent to the adoption was unnecessary because he was an unfit parent under the Adoption Act (Act) (750 ILCS 50/1 *et seq.* (West 2008)) in that he: (1) abandoned the minors because for over four years he did not provide child support or have any contact, visits, telephone calls, or correspondence with the minors; (2) failed to maintain a reasonable degree of interest, concern or responsibility as to the minors; (3) deserted the minors for more than three months immediately preceding the commencement of this proceeding; (4) evidenced his intent to forego his parental rights; and (5) was depraved in that he had been convicted of three felonies, at least one of which occurred within five years of the filing of the petition.

At the fitness hearing, the evidence showed that, in the late 1990s, the minors' mother and the respondent were in a relationship and lived together. On April 30, 1997, the couple had a daughter, D.G. On April 21, 1998, they had twins, a daughter named C.G. and a son. On May 14, 1998, their son died. A few months later the couple broke up.

Prior to their breakup, the respondent and the minors' mother equally shared in child rearing and household duties.

After the breakup, the couple's daughters lived with their mother. Although the respondent and the minors' mother no longer had an ongoing relationship, they had a son, T.G., who was born on March 3, 2000. The respondent was present for his birth.

The minors' mother testified that at the time of T.G.'s birth the respondent was not very involved in the minors' lives other than keeping them on a couple of occasions. The respondent testified that after the breakup, a temporary visitation order was in place and he had visits with the minors twice per week and every other weekend.[1]

In 2000, the respondent established a relationship with another woman, whom he married. Between 2000 and 2007, the respondent was convicted four times for felony domestic battery of his wife. He went to jail in 2000 (two months), prison in 2003 (5 months), jail in 2006, and prison from July 2007 until October 2009 (26 months) for those convictions.

According to the minors' mother, the respondent did not see the minors from 2002 until 2005. The minors' mother testified that the last contact he had with the minors was in 2002, when he became intoxicated and shoved T.G. After that incident, the minors' mother did not allow the respondent to see the minors.

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[1] The record does not indicate the reason the temporary visitation order was implemented or the reason visits ceased.

The minors' mother also testified that she had received a total of three child support checks from the respondent.

The petitioner testified that in 2005 she requested that the minors' mother allow the minors to live with her at their maternal grandparents' home. The petitioner thought that obtaining temporary custody of the minors was in their best interest in light of a pending Department of Children and Family Services investigation against their mother. The investigation resulted from the minors' mother allowing her boyfriend to return to her home after he had been in jail for beating the minors. In March 2005, the minors moved in with the petitioner at their maternal grandparents' home. In 2005, for unrelated reasons, the paternal grandparents moved to a home within one block of the maternal grandparents' home. In August 2008, the petitioner and the minors moved into their own residence 1½ blocks away.

On November 24, 2009, at the time of the fitness hearing, the minors had been living with the petitioner for 4½ years. The petitioner testified that during that time, the respondent did not communicate with her or the minors and did not pay any child support. The petitioner testified that after she took custody of the minors, on the first occasion the paternal grandparents took the minors for a visit, she reiterated the rule of the minors' mother that the respondent was not allowed to have contact with the minors. She gave the instruction because that was what the

minors' mother told her to do. After that first visit, the subject of the respondent having contact with the minors was never brought up again. The petitioner testified that she would not have allowed the respondent to be alone with the minors.

The respondent testified that he had maintained regular contact with the minors until their mother banned him from seeing them. He did not recall shoving T.G. as alleged by the minors' mother. The last time he had contact with the minors was on Christmas in 2004. He saw them from a distance occasionally at their school when he escorted his father to pick up the respondent's eldest son.[2]

According to the respondent's testimony, he was informed by his parents and sisters that he was no longer allowed to have any contact with the minors. At that time, the respondent and the minors' mother "didn't hardly speak to each other." At some point in 2005, the respondent stopped visiting the minors pursuant to "the[ir] mother['s] and then the[ir] aunt's rules." He did not confront the minors' mother or the petitioner because he had lived with the minors' mother and knew that "once she made up her mind, it wasn't going to be changed" and that it "would be even stricter upheld with [the petitioner]." Also, he did not

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[2] The respondent's eldest son was from a relationship prior to his relationship with the minors' mother and was adopted by the respondent's parents.

want to jeopardize his family's ability to maintain contact with the minors.

In 2006, the respondent hired an attorney to compel visitation, but he did not have money to continue the process. Also, the process was interrupted because he went to jail for domestic battery of his wife. He attempted to seek out free legal services but was informed that he could not receive help if both parties were not in agreement.

The respondent testified that from August 2006 until May 2007, his wages were garnished for child support every week. He explained that the payments stopped in May 2007 because he went on medical leave and then was incarcerated in July 2007. The respondent acknowledged that he owed the petitioner $15,000 in back child support, but explained that the records did not reflect payments made to the minors' mother instead of the petitioner.

The respondent testified that he did not write letters, communicate or send gifts to the minors while he was incarcerated because he anticipated that his communications would not be accepted. He also thought that if there were confrontations over the minors, legal recourse would be taken against him in the form of restraining orders and harassment charges. The respondent admitted to having difficulties with alcohol and testified that he was enrolled in substance abuse and anger management programs. The respondent testified that he loved the minors and wished to

"restart[]" a relationship with them. The respondent said that he was not requesting that the minors live with him, but he wished to see them everyday or at least once per week.

The minors' paternal grandmother testified that at some point between 2002 and 2005, she was told by the minors' mother that she and her family could visit with the minors as long as the respondent was not involved. The respondent's family followed that rule because they did not want to be prevented from seeing the minors. The respondent's family felt that it would be best if someone in their family was able to see the minors and then be able to inform the respondent as to their well-being. The respondent's mother testified that the petitioner also did not allow the respondent to see the minors. According to the testimony of the respondent's mother, the respondent had bought gifts for the minors for several Christmases and stored them in her garage. She did not give the minors the gifts because she did not want to "make matters worse." The respondent's mother testified that the respondent had asked her about the minors' well-being, and she had given him photographs of them.

The respondent's mother testified that the respondent's family last visited with minors in spring of 2008 because they lost contact with them after the petitioner moved in August 2008. After the petitioner moved, the respondent's mother requested that the minors' mother or maternal grandmother give the

petitioner her contact information so she could visit with the minors for Christmas. The petitioner never contacted her.

The trial court found that the respondent had "no intent" to abandon, desert, or fail to maintain a reasonable degree of interest in his children and that there was no evidence that he intended to forgo his parental rights. The court found that the respondent's reasons for failing to see the minors were "rather reasonable." The trial court also found that the respondent presented enough evidence to rebut the presumption of depravity. The trial court ruled that the petitioner did not meet her burden of proving that the respondent was an unfit parent and denied her petition for adoption.

ANALYSIS

On appeal, we must decide whether the trial court's finding that the petitioner failed to present clear and convincing evidence of the respondent's unfitness was against the manifest weight of the evidence. We hold that it was not.

Under the Act, it is unnecessary to obtain a parent's consent to the adoption of his or her child if the parent is found by the court to be an unfit person by clear and convincing evidence. 750 ILCS 50/8(1) (West 2008). The burden of presenting clear and convincing evidence of a parent's unfitness is upon those who have petitioned for adoption. *In re Adoption of Syck,* 138 Ill. 2d 255 (1990). A trial court's finding of unfitness will not be reversed on appeal unless it is against the

manifest weight of the evidence, meaning that the correctness of the opposite conclusion is clearly evident from a review of the evidence. *In re D.F.*, 201 Ill. 2d 476 (2002). The trial court's findings should always be afforded great deference on review because the trial court has the best opportunity to view and evaluate the parties and their testimony. *In re Daphnie E.*, 368 Ill. App. 3d 1052 (2006).

In this case, the trial court's finding that the petitioner failed to prove that the respondent was unfit by clear and convincing evidence was not against the manifest weight of the evidence.

I. Abandonment

Pursuant to the Act, abandonment of a child is a ground for finding a parent to be unfit. 750 ILCS 50/1(D)(a) (West 2008). Abandonment is conduct on the part of a parent that evinces a purpose to forgo all parental responsibilities and relinquish all parental claims to the child. *In re Adoption of C.A.P.*, 373 Ill. App. 3d 423 (2007). In determining whether a parent has abandoned their child, the intent of the parent is the determining factor. *C.A.P.*, 373 Ill. App. 3d 423.

Here, the evidence does not indicate that the respondent had intended to abandon the minors. He was involved in their daily lives until the breakup of his relationship with their mother. After the breakup, the respondent maintained regular visitation with the minors until he was banned from seeing them by their

mother and, subsequently, by the petitioner. In 2006, the respondent sought legal assistance but could not financially afford to continue the process to compel visitation. The respondent inquired into the minors' well-being through his parents, who eventually lost contact with minors after the petitioner moved in 2008 and would not acknowledge their requests for visits with the minors. Based on the evidence presented, the trial court's finding that the respondent did not intend to abandon the minors was not against the manifest weight of the evidence.

II. Failure to Maintain Interest, Concern or Responsibility

Under section 1(D)(b) of the Act, a parent will be found unfit for failing to maintain a reasonable degree of interest, concern or responsibility as to their child's welfare. 750 ILCS 50/1(D)(b) (West 2008). The issue is whether a parent's efforts to maintain a reasonable degree of concern, interest, and responsibility as to the child's welfare was reasonable under the circumstances. *In re Adoption of L.T.M.,* 214 Ill. 2d 60 (2005). Circumstances that warrant consideration include difficulty in obtaining transportation to the child's residence, the parent's poverty, the actions and statements of others that hinder or discourage visitation, and whether the failure to visit the child was motivated by a need to cope with other aspects of his or her life or by a true indifference to or lack of concern for the child. *Syck,* 138 Ill. 2d 255.

In this case, the minors' mother and the petitioner prohibited contact between the respondent and the minors. The respondent testified that he paid child support and bought the minors gifts. He also testified that his failure to visit and communicate with the minors was due to the statements of their mother and the petitioner, not due to indifference or a lack of concern for the minors. We note, as did the trial court, the relevance of the paternal grandparents' relationship with the minors, in that it was the respondent's sole means of obtaining information regarding the minors' welfare. The respondent explained that he wanted to avoid conflict with the minors' mother and the petitioner so that his family would be able to continue seeing the minors. Therefore, there is support in the record for the trial court's finding that the respondent's efforts were reasonable under the circumstances.

III. Desertion

A parent is unfit if he or she deserts his or her child "for more than 3 months next preceding the commencement of the Adoption proceeding." 750 ILCS 50/1(D)(c) (West 2008). Desertion requires conduct by a parent indicating the intent to permanently terminate custody of a child but not relinquish all parental duties and rights. *In re R.B.W.*, 192 Ill. App. 3d 477 (1989).

Based upon the record before this court, we cannot say that the petitioner presented clear and convincing evidence that the

respondent deserted the minors. The respondent's lack of custody of the minors in the three months preceding the adoption proceedings was due to his incarceration and his continued impression that the petitioner would not allow him to see the minors. We acknowledge that the respondent testified that he was "not asking to have [the minors] live with [him]," which arguably indicates his intent to forgo custody while maintaining other parental duties and rights. However, under these circumstances, this isolated statement, without further clarification, does not establish an intent to permanently terminate custody of the minors by clear and convincing evidence.

IV. Intent to Forgo Parental Rights

Section 1(D)(n) of the Act provides that a parent may be found unfit if he or she evidences an intent to forgo his or her parental rights, as manifested by a failure for a period of 12 months to do the following: (i) visit the child; (ii) communicate with the child or agency, although able to do so; or (iii) maintain contact with or plan for the future of the child. 750 ILCS 50/1(D)(n) (West 2008). Section 1(D)(n) also provides:

> "In the absence of evidence to the contrary, the ability to visit, communicate, maintain contact, pay expenses and plan for the future shall be presumed. The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting that intent, shall not preclude a determination that the parent

has intended to forgo his or her parental rights." 750 ILCS 50/1(D)(n) (West 2008).

At the fitness hearing, the respondent explained that he did not visit or communicate with the minors because their mother and the petitioner prohibited him from doing so. The respondent testified that he did not challenge denial of contact with the minors out of fear of retaliation by way of order of protection or harassment charges, or his family also being prevented from seeing the minors. The trial court found that the respondent's explanation was "rather reasonable." We defer to the trial court's findings and will not reweigh evidence or reassess the respondent's credibility on appeal. *In re D.L.*, 326 Ill. App. 3d 262 (2001).

V. Depravity

Finally, the record also supports the trial court's finding that the respondent presented enough evidence to rebut the presumption of depravity. Under the Act, in certain situations a presumption of a parent's depravity arises, which can be overcome only by clear and convincing evidence. 750 ILCS 50/1(D)(i) (West 2008). Section 1(D)(i) provides:

> "[t]here is a rebuttable presumption that a parent is depraved if the parent has been criminally convicted of at least 3 felonies under the laws of this State *** and at least one of these convictions took place within 5 years of

the filing of the petition or motion seeking termination of parental rights." 750 ILCS 50/1(D)(i) (West 2008). However, because the presumption is rebuttable, a parent may present evidence that, despite his or her convictions, he or she is not depraved. *In re A.M.*, 358 Ill. App. 3d 247 (2005). The statutory ground of depravity requires that the trier of fact closely scrutinize the character and credibility of the parent, to which a reviewing court will give deference. *In re J.A.*, 316 Ill. App. 3d 553 (2000).

Here, the respondent's four felonies were for domestic battery. Such conduct is regrettable and is not condoned by this court. Nonetheless, the respondent provided evidence rebutting the presumption of depravity. This evidence indicated that he reconciled with his wife and enrolled in substance abuse and anger management counseling. The trial court found that the respondent was remorseful, and we defer to the trial court's scrutiny of the respondent's character and credibility. The record supports the trial court's finding that the petitioner failed to prove the respondent was unfit on the basis of depravity.

Therefore, the trial court's finding that the respondent was a fit parent was not against the manifest weight of the evidence. As such, we affirm the trial court's finding of fitness.

CONCLUSION

The judgment of the circuit court of Henry County is affirmed.

Affirmed.