2014 IL App (3d) 140029-U

Order filed June 10, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

A.D., 2014

In the Matter of the Petition of	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Julie T.,	)	Peoria County, Illinois,
	)	
Petitioner-Appellee,	)	
	)	
To Adopt	)	Appeal No. 3-14-0029
	)	Circuit No. 12-AD-139
A.E.L.B., a Minor,	)	
	)	
v.	)	
	)	
Mallory B.,	)	Honorable
	)	Lisa Y. Wilson,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Lytton and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held*: Mother waived the constitutional claim on appeal by failing to provide prompt notice to the Attorney General of her constitutional challenge pursuant to Supreme Court Rule 19. The trial court's orders finding mother unfit to care for the minor and terminating mother's parental rights are affirmed.

¶ 2 Petitioner, Julie T., A.E.L.B.'s maternal grandmother, filed a petition seeking to adopt the minor, pursuant to the Adoption Act. 750 ILCS 50/1 *et seq*. (West 2012). The trial court found the minor's biological mother, respondent, Mallory B., to be unfit to care for the minor, and found it to be in the minor's best interest to terminate Mallory's parental rights. Mallory appeals. We affirm.

¶ 3 BACKGROUND

¶ 4 On May 17, 2009, A.E.L.B., the minor, was born to Mallory B. and Robert B. On August 21, 2012, petitioner Julie T., the minor's maternal grandmother, filed a "Petition for Adoption," alleging Mallory was unfit because she (1) failed to maintain a reasonable degree of interest, concern, or responsibility for the minor's welfare, (2) deserted the minor, (3) substantially and repeatedly neglected the minor, (4) was habitually addicted to drugs, (5) failed to provide the minor with adequate food, clothing, or shelter, and (6) other neglect. The petition also alleged the minor's father, Robert, was unfit[1] and requested a judgment allowing petitioner to adopt the minor.

¶ 5 On July 12, 2013, Mallory filed an amended answer, alleging, among other things, that section 1(D)(h) of the Adoption Act was void for vagueness. 750 ILCS 50/1(D)(h) (West 2012). On the same date, Mallory filed Rule 19 notice with the Attorney General notifying them of her constitutional claim concerning section 1(D)(h) of the Adoption Act.

¶ 6 I. Fitness Hearing

¶ 7 After several hearings concerning discovery issues, the matter proceeded to a fitness hearing on July 29, September 30, and November 18, 2013. According to petitioner's testimony before the court, Mallory started using drugs in 2005, during high school. Rachel Herndon, a

[1] Robert signed a "Final and Irrevocable Consent to Adoption" of the minor on January 28, 2013.

friend of Mallory's, testified Mallory used marijuana nearly every day from 2004 through 2007. In December 2006, Mallory graduated high school and started working. Mallory's parents helped Mallory secure an apartment, where Mallory resided for a few months, before periodically living with petitioner for short periods of time. In May 2008, Mallory began dating the minor's father.

¶ 8 The minor's paternal grandmother testified that Mallory and the minor's father dated for approximately three weeks prior to marrying in June 2008. The couple moved into a house on paternal grandmother's property where paternal grandmother frequently smelled marijuana emanating from the couple's residence, which they kept in "deplorable" condition.

¶ 9 Mallory and the minor's father were "together and apart, then together and apart," until the premature birth of the minor on May 17, 2009. Initially, Mallory stayed with the minor in the hospital "pretty much every day" for a "majority of the day." However, Mallory's visits during the child's two month hospitalization became more "sporadic" when Mallory began visiting the minor only a few times a week, for short periods of time. Cheri Guingrich, a registered nurse who treated the minor, testified she did not see Mallory present at the hospital after June 2009. The minor's father, however, testified Mallory stayed with the minor at the hospital every day after his birth.

¶ 10 Mallory left the minor's father in June 2009 after she obtained an order of protection against him for slamming the refrigerator door on her hand. Once the minor was released from the hospital on July 15, 2009, Mallory brought him back to petitioner's house, where she lived for a short time. On the minor's first day out of the hospital, Mallory left the house to help a friend and did not return until 4 a.m., even though the minor required feedings every three hours. According to petitioner, Mallory would "pop in" to shower or sleep during the minor's first week

out of the hospital. The minor's maternal grandfather estimated Mallory cared for the minor approximately 10% of the time.

¶ 11 Mallory's brother, Spencer J., testified Mallory was present to help with the minor approximately 15-20% of the time. According to Spencer, when Mallory visited the minor at her mother's house, Mallory seemed reluctant to respond to the minor's cries.

¶ 12 Petitioner believed Mallory had two to three overnight visits with the minor between the date of the minor's birth, in May, and August 2009. The minor required a second hospitalization on August 24, 2009, and Mallory left the hospital to spend time with the minor's father at home, while the minor remained hospitalized. Early the following morning, the baby's condition deteriorated. Initially, no one could reach Mallory on her cell phone to obtain consent for the minor's emergency surgery. Later, Mallory and the minor's father left the hospital during the surgical procedure. Mallory did not return to the hospital for more than twelve hours after the minor's surgery ended. As a result of the emergency surgery, the minor's intestines were positioned outside of his body to decrease the weight on the minor's lungs.

¶ 13 Petitioner testified she and Mallory agreed petitioner would stay at the hospital during the day and Mallory would stay overnight during this second hospitalization. However, Mallory did not follow through with her promise to watch the minor every night.

¶ 14 Approximately six days after his surgery, the minor required another surgical intervention to return the intestines to the body cavity. Mallory did not visit the minor the night before his scheduled second surgery. Due to her absence, she failed to provide written consent to perform the second surgery. As a result, Mallory consented to the second surgery by telephone. According to the minor's paternal grandmother, she heard laughing and yelling coming from Mallory and the minor's father's residence on the date of the minor's scheduled second surgery.

¶ 15 On September 24, 2009, the minor was released from the hospital. Mallory and the minor returned to live at the paternal grandmother's property. According to petitioner, from September until December 2009, Mallory and the minor's father watched the minor for a day or two, and then left the minor with petitioner for three to four days at a time.

¶ 16 In December 2009, Mallory again separated from the minor's father after discovering she was pregnant with another man's child. Mallory moved in with Chad, the unborn child's father, at petitioner's home. Mallory's second child was born prematurely on January 31, 2010, but passed away on February 14, 2010. Shortly thereafter, Chad moved out, and Mallory was not available to care for the minor. In April 2010, Mallory told petitioner her power was going to be turned off, therefore, petitioner began caring for the minor without any visits from Mallory for one month.

¶ 17 In October 2010, Mallory moved into her own apartment. Torrence Patterson, a friend of Mallory's, testified he observed the minor follow Mallory around her apartment and call Mallory "mommy." Mallory explained she provided food and medical care for the minor through government-based assistance programs. Mallory told the court she took care of the minor every day after work until February 2011, when her divorce from the minor's father was final and she moved to Chicago.

¶ 18 On February 18, 2011, Mallory agreed to give petitioner temporary guardianship[2] over the minor for one year while Mallory lived in Chicago, where she planned to attend school. Mallory testified she traveled to Peoria from Chicago to visit the minor approximately once a week until her arrest in April 2011 for attempted armed robbery.

---

[2] After Mallory's arrest in April 2011, petitioner filed for guardianship of the minor, which the trial court granted, in a separate case, on April 27, 2011.

¶ 19 Mallory's father spoke to Mallory in 2011, during her incarceration. Mallory told him she liked using drugs and probably would not stop using them. According to Mallory, she was not addicted to drugs, but instead, only "experimented." Mallory testified that between 2009 and 2011, she smoked marijuana approximately once per month. Mallory testified she smoked marijuana around the time she committed the crime. The minor's father testified the two had been using marijuana on a weekly basis.

¶ 20 Mallory, who remained incarcerated at the time of the fitness hearing, received a six-year sentence for her conviction for attempted armed robbery with an expected release date of April 6, 2014. According to Mallory, she committed the attempted armed robbery because the victim owed the minor's father money. The minor's father testified he participated in the crime because Mallory wanted the minor's father to beat up the victim for upsetting Mallory.

¶ 21 Petitioner brought the minor to the Peoria County jail approximately once each month to visit Mallory while she was enrolled in a Christ-based addiction program before she was sentenced to prison. Petitioner and the minor visited Mallory in prison during December 2011, and February and July 2012. While in prison, Mallory completed a 6-8 week parenting course, and a six-month substance abuse counseling program.

¶ 22 Mallory occasionally asked petitioner about the minor when she called petitioner from prison. Petitioner testified that, at the beginning, Mallory sent cards to the minor only on his birthday and holidays. However, after petitioner served Mallory with the petition to adopt the minor in September 2012, Mallory began sending letters with more regularity, approximately once every couple of weeks.

¶ 23 On November 14, 2013, the GAL filed a best interest report recommending the court terminate Mallory's parental rights and allow petitioner to adopt the minor.[3]

¶ 24 The trial court took judicial notice of the 2009 order of protection case filed by Mallory against the minor's father, the three separate cases involving the termination of the minor's father's parental rights to his other three children, and the separate guardianship case filed by petitioner. After hearing arguments on November 18, 2013, the trial court announced it "has to look at the totality of what has occurred with [the minor] and what has occurred with Mallory." The court found "unfitness has been proven by clear and convincing evidence and that unfitness arises out of failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare." The court commented that the now four-year-old minor "has not been the priority for Mallory," despite her attempts to "get some stability and to provide shelter, food, and clothing" for the minor.

¶ 25 In addition, the court specifically noted that Mallory's attempts to contact the minor by sending letters, "doesn't do it for the Court," because those letters began after the petition for adoption was filed. The court also found the evidence was clear and convincing and showed repeated or continuous failures by Mallory, although physically and financially able, to provide the minor with adequate food, clothing, or shelter. The court did not find Mallory was unfit due to a habitual drug addiction or that Mallory deserted the child for more than three months prior to the commencement of the proceedings. The court entered a written order and set the matter over to December 9, 2013, for the best interest phase.

¶ 26 II. Best Interest Hearing

[3] The trial court stated it did not read the best interest report filed by the GAL prior to announcing its ruling on the fitness issue.

¶ 27 During the best interest hearing on December 9, 2013, petitioner testified her four-bedroom home is located in a family-oriented neighborhood on a lake. She explained that, in addition to the minor, her 11-year-old daughter, McKenna, lives with her full time, and her older son Spencer, lives with her when he returns from college. Petitioner told the court McKenna and the 4-year-old minor have a "brother and sister" relationship, and McKenna reads to the minor and plays hockey and other games with him. She testified she is a human resources recruiter for Caterpillar, where she earns enough money to provide for herself and her family, including the minor. She testified she has been responsible for taking the minor to his doctor and dentist appointments. She testified she would like to adopt the minor to provide him with stability.

¶ 28 The GAL testified he visited the minor at petitioner's home on three separate occasions. During the most recent visit on November 4, 2013, the minor was unable to answer questions about "Mommy Mallory." The GAL described the minor as a "mature and articulate" "happy child." According to the GAL, the minor had a "very close-knit, tight bond" with petitioner who the minor "clearly looks to" as his mother.

¶ 29 Mallory testified she expected to be released from incarceration on April 4, 2014. Mallory also testified that, during her incarceration in the Peoria County jail from April 2011 to October 2011, the minor visited her approximately once each month. Mallory testified that since the date of the petition to adopt, she had not seen the minor. Mallory testified her relationship with petitioner was "non-existent" because petitioner was "very controlling" and "very self-absorbed." Mallory believed it to be in the minor's best interest for her to remain his mother because she tried to maintain a relationship with him despite being incarcerated. Mallory hoped to rekindle a relationship with petitioner after her release in order to continue a relationship with the minor.

¶ 30 After hearing arguments, the trial court stated it considered the GAL's report and the testimony. The court addressed each statutory factor set forth in the Adoption Act (750 ILCS 50/15.1 (West 2012)). With respect to the first factor, the wishes of the child, the court noted that the minor "has acknowledged petitioner as his mother, and there's no indication that he's asking that that be changed; and that's what he's known, quite frankly, for the majority of his life." The court noted the minor and petitioner have a good relationship with one another and petitioner has been able to provide a stable environment for the minor for three years. With respect to the minor's need for stability and continuity of relationship with parental figures, the court again noted the stability provided by petitioner and also commented that Mallory's letter writing "started or was more consistent after the petition for adoption was filed."

¶ 31 With regard to the wishes of the child's parent, the court noted Mallory's expressed desire to continue to be the minor's mother. The court stated the minor has adjusted to his current home situation with petitioner and was enrolled in daycare. With respect to the mental and physical health of the parties, the court noted that petitioner's "being overprotective is not necessarily a bad thing." The court also noted the GAL report and testimony showed petitioner's efforts to continue the relationship between the minor and his biological father's family. The trial court reiterated that petitioner has provided the minor with a safe and stable home and neighborhood, and petitioner's health appeared to be good.

¶ 32 The court concluded, based on the recommendation in the GAL report, that it would be in the best interest of the minor to terminate Mallory's parental rights and petitioner be allowed to adopt the minor. That same date, the trial court entered a written order, finding that, "after considering statutory factors of 750 ILCS 50/15.1," terminating the parental rights of mother and father is in the minor's best interest.

¶ 33 Mallory filed a notice of appeal challenging the trial court's November 18, 2013, order finding her unfit, and the trial court's December 9, 2013, order terminating her parental rights.

¶ 34 ANALYSIS

¶ 35 Mallory raises three issues on appeal. First, Mallory contends the Adoption Act violates her equal protection rights because the Adoption Act does not provide for the same protections as the Juvenile Court Act. Second, Mallory argues on appeal the trial court erroneously found her unfit to care for the minor. Finally, Mallory argues terminating her parental rights was not in the minor's best interest.

¶ 36 I. Equal Protection Claim

¶ 37 Petitioner argues in her responsive brief that Mallory's failure to comply with Illinois Supreme Court Rule 19 results in forfeiture of this court's consideration of the constitutional issue. Mallory's reply brief asserts she was not required to provide Rule 19 notice of the constitutional challenge until November 18, 2013, the date the trial court found her to be unfit. Since she filed her brief, raising the constitutional issue for the first time in this court on March 13, 2014, and provided Rule 19 notice to the Attorney General one day later, on March 14, 2014, Mallory argues her Rule 19 notice served upon the Attorney General four months after November 18, 2013, was timely.

¶ 38 Supreme Court Rule 19 requires the party challenging the constitutionality of a statute to provide notice to the Attorney General. Ill. S. Ct. R. 19 (eff. Sept. 1, 2006). The rule further provides that "notice shall be served at the time of suit, answer or counterclaim, if the challenge is raised at that level, or *promptly* after the constitutional or preemption question arises as a result of a circuit or reviewing court ruling or judgment." *Id.* (Emphasis added.) The purpose of this rule is to provide an opportunity for the State to intervene in the proceeding in order to defend

the law being challenged. *Id.* Supreme court rules "are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995).

¶ 39 Mallory should have been aware of the alleged unconstitutionality of the statute on September 12, 2012, the date petitioner served Mallory with the petition to adopt pursuant to the Adoption Act, which Mallory now contends on appeal is unconstitutional. Even if this court agrees Mallory first became aware of the constitutional issue when she was found to be unfit on November 18, 2013, Mallory failed to serve the Attorney General with Rule 19 notice until March 14, 2014, nearly four months later. We disagree Mallory served notice on the Attorney General "s*hortly after* she realized the 'alleged unconstitutional statute would be used against [her].' " *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 28, quoting *Villareal v. Peebles*, 299 Ill. App. 3d 556, 560-61 (1998) (Emphasis added.); See *Downtown Disposal Services, Inc. v. City of Chicago*, 407 Ill. App. 3d 822, 830 (2011) (failure to strictly comply with supreme court rule requiring a party challenging the constitutionality of a statute to serve notice of the challenge on the Attorney General may result in forfeiture).

¶ 40 We recognize that waiver is a limitation on the parties, not the court. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 518 (2000). We also acknowledge appellate courts have reached constitutional issues despite failure to notify the Attorney General. See *Poullette v. Silverstein*, 328 Ill. App. 3d 791 (2002). However, the expedited nature of this appeal demonstrates the importance of providing prompt notice to the Attorney General in order to allow the State to intervene. Under these circumstances, we conclude Mallory failed to "promptly" serve notice upon the Attorney General as required by Rule 19. Consequently, Mallory's constitutional argument is forfeited. *Villareal*, 299 Ill. App. 3d at 561 (party's failure

to raise the constitutional argument in the trial court and failure to timely comply with requirements of Rule 19 resulted in waiver).

¶ 41 Even if Rule 19 notice was not waived, Mallory's equal protection argument fails because respondents in an adoption proceeding are not similarly situated to respondents subject to proceedings pursuant to the Juvenile Court Act. The Adoption Act gives private parties the right to bring a petition for the purpose of an adoption of a child into a new family home. Under the Juvenile Court Act, the goal is reunification of the original family unit. Thus, equal protection does not apply.

¶ 42 II. Finding of Unfitness

¶ 43 Next, we turn to Mallory's contention that petitioner did not provide clear and convincing evidence that Mallory was unfit pursuant to sections 1(D)(b) and (D)(o) of the Adoption Act. A trial court's determination that a parent's unfitness has been established by clear and convincing evidence will not be disturbed unless it is contrary to the manifest weight of the evidence. *In re Gwynne P.*, 215 Ill. 2d 340, 354 (2005). "A court's decision regarding a parent's fitness is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent." *Id.* "Since the grounds for unfitness are independent, evidence supporting any one of the alleged statutory grounds is sufficient to uphold a finding of unfitness." *In re Adoption of K.B.D.*, 2012 IL App (1st) 121558, ¶ 197.

¶ 44 Pursuant to section 1(D)(b) of the Adoption Act, a parent may be found unfit when the parent fails to "maintain a reasonable degree of interest, concern or responsibility as to the child's welfare." 750 ILCS 50/1(D)(b) (West 2012). A trial court should consider the parent's efforts to visit and maintain contact with the child, as well as other indicia of interest, such as inquiries into the child's welfare, when making this determination. *In re Daphnie E.*, 368 Ill.

App. 3d 1052, 1064 (2006). If personal visits were impractical, courts consider whether a reasonable degree of concern was demonstrated through telephone calls and gifts to the child, taking into account the frequency and nature of those contacts. *Id.* A court can consider, among other things, whether the parent's lack of contact with the child can be attributed to a need to cope with personal problems, rather than indifference. *In re Jacorey*, 2012 IL App (1st) 113427, ¶ 28. A parent is not fit merely because she has demonstrated some interest or affection toward her child, rather, the parent's interest, concern, or responsibility must be reasonable. *In re T.A.*, 359 Ill. App. 3d 953, 961 (2005).

¶ 45 Mallory contends, on appeal, her failure to visit the minor was motivated by her need to cope with other aspects of her life, including the death of her second child, and her volatile relationship with the minor's father. The trial court heard testimony revealing Mallory had the minor in her custody for a day or two after his release from the hospital following his premature birth, but often returned the minor to petitioner for three to four days at a time. Malllory showed little interest in caring for the minor and could not be reached when consent for two separate surgeries became necessary.

¶ 46 In addition, for at least two months prior to her arrest in April 2011, Mallory did not provide any care for the minor after consenting to allow petitioner to care for the child as a temporary guardian. As noted by the trial court, Mallory maintained minimal written contact with the minor, during her incarceration, but increased the written communication after petitioner filed a petition to adopt the minor. In addition, petitioner testified Mallory "occasionally" inquired about the minor when she contacted petitioner from prison. Consequently, the trial court's finding that Mallory failed to "maintain a reasonable degree of interest, concern or responsibility as to the child's welfare" was not against the manifest weight of the evidence.

¶ 47 The trial court also found Mallory unfit based on section 1(D)(o) of the Adoption Act, which concerns "[r]epeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, or shelter." 750 ILCS 50/1(D)(o) (West 2012). However, since we have concluded the trial court's finding of unfitness based on section 1(D)(b) was not against the manifest weight of the evidence, we elect not to consider the alternate ground of unfitness.

¶ 48 III. Minor's Best Interest

¶ 49 Mallory's final contention on appeal asserts the trial court erred when it concluded it was in the best interest of the minor to terminate Mallory's parental rights. This court will not reverse a trial court's best interest determination unless it is against the manifest weight of the evidence. *In re Tiffany M.*, 353 Ill. App. 3d 883, 892 (2004). It is well-settled that the best interest hearing shifts the scrutiny of the court to the best interest of the minor to live in a loving, stable and safe home environment. *In re D.T.*, 212 Ill. 2d 347, 363-364 (2004).

¶ 50 In this case, the trial court clearly stated it weighed the statutory factors when deciding whether terminating Mallory's parental rights would be in the minor's best interest. The court noted the minor's strong bond with petitioner, the minor's acknowledgement of petitioner as his mother, and petitioner's ability to provide a safe and stable environment for the minor. The court also received evidence that petitioner encouraged regular contact with the minor's paternal side of the family. Under these circumstances, we conclude the trial court's determination that it was in the best interest of the minor to terminate Mallory's parental rights was not against the manifest weight of the evidence.

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 53 Affirmed.