2016 IL App (3d) 160330-U
Consolidated with 160331-U

Order filed October 31, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

In re G.K. and K.K.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Minors	)	Peoria County, Illinois.
	)	
(The People of the State of Illinois,	)	
	)	
Petitioner-Appellee,	)	Appeal Nos. 3-16-0330
	)	3-16-0331
v.	)	Circuit Nos. 13-JA-114
	)	13-JA-115
F.K.,	)	
	)	
Respondent-Appellant).	)	Honorable Timothy J. Cusack,
	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice O'Brien and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not violate respondent's right to due process. In addition, the trial court's termination of respondent's parental rights was not against the manifest weight of the evidence.

¶ 2 Respondent, F.K., appeals from an order of the circuit court of Peoria County terminating his parental rights. On appeal, respondent argues: (1) the combined, numerous violations of the

Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/1-1 *et seq.* (West 2012)) throughout the proceedings violated his right to due process; and (2) the trial court's finding that it was in the best interests of the minor children to terminate his parental rights was against the manifest weight of the evidence. We affirm.

¶ 3 FACTS

¶ 4 On April 30, 2013, the State filed a petition for adjudication of wardship, alleging that G.K. and K.K. were neglected minors under section 2-3 of the Juvenile Court Act. 705 ILCS 405/2-3 (West 2012). The petition named respondent as the minors' putative father and alleged that the minors' environment was injurious to their welfare.

¶ 5 Specifically, the petition alleged that on April 23, 2013, respondent grabbed the minors' mother by the throat and choked her with his bare hands while the minors were present. The petition further alleged that the minors' mother had an Intelligence Quotient (IQ) of 69, respondent had a criminal history that included two domestic battery convictions, and the house respondent and the minors' mother shared contained dog feces, puddles of dog urine, cockroaches, and mice. After the State submitted its petition, the trial court held a shelter care hearing and placed the minors in the temporary custody of the Illinois Department of Children and Family Services (DCFS).

¶ 6 Following a July 1, 2013, paternity review hearing, the trial court found that respondent was K.K.'s biological father and appointed attorney Tim McCarthy to represent him. At a separate paternity review hearing on July 16, 2013, the court found that respondent was also G.K.'s biological father. Respondent thereafter filed an answer to the State's petition, denying the domestic violence allegations. On August 6, 2013, respondent amended his answer to stipulate to the domestic violence allegations, and the trial court found the minors neglected. At

respondent's request, the court referred him for a psychological examination, anger management classes, and counseling.

¶ 7 At a dispositional hearing on September 3, 2013, the trial court found both parents unfit. With regard to respondent, the court found him unfit on the basis of a pattern of domestic violence and controlling behavior. The court made the minors wards of the court, and gave DCFS the right to place. In order to correct the conditions that led to placement, the court ordered respondent to: (1) submit to a psychological examination and follow any recommendations; (2) participate in and successfully complete a parenting course, domestic violence course, anger management classes, and counseling; and (3) obtain and maintain a legal source of income and show proof of employment. The court ordered DCFS and The Center for Youth and Family Solutions (CYFS) to pay for respondent's domestic violence classes and set the initial permanency review hearing for February 11, 2014.

¶ 8 On February 11, 2014, respondent's attorney moved for a continuance on the grounds that "further investigation [was] needed." The court continued the hearing to March 11, 2014. On March 11, respondent's attorney moved for another continuance, stating that the minors' attorney was unavailable and they were waiting on medical records subpoenas to issue. The court continued the hearing to April 29, 2014. On April 29, respondent's attorney orally moved to withdraw as counsel, citing breakdown of attorney-client communication. Respondent agreed that his attorney should withdraw and stated he would obtain private counsel.

¶ 9 On May 20, 2014, respondent appeared in court and stated he could not obtain private counsel. The trial court appointed respondent a second attorney and set the initial permanency review hearing to July 9, 2014. On July 9, respondent's new attorney, Adam Bowton, moved for a continuance to review documents, and the court set the hearing for August 6, 2014.

¶ 10 On August 6, 2014, the initial permanency hearing took place. In a review order from that date, the trial court stated that the permanency goal of "22-return home within one year" was not appropriate and set a new permanency goal of "24-substitute care pending court decision." The court noted that respondent had failed to make reasonable efforts to achieve the prior goal. Specifically, respondent had been unsuccessfully discharged from counseling, anger management, and domestic violence programs, and he had been overly focused on criticizing others throughout the proceedings.

¶ 11 In a service plan dated October 6, 2014, and filed on October 8, 2014, CYFS caseworker Paul Wilkinson stated that respondent had been unsuccessfully terminated from individual counseling and had not completed anger management treatment or domestic violence treatment. In addition, respondent had not complied with his court-ordered psychiatric assessment and had been unsuccessfully discharged from family counseling. Respondent had attended two anger management sessions, but had stopped going. He reported employment, but had not provided documentation of wages. The service plan also stated that the trial court had previously set a permanency goal of "return home within 12 months." Under "Reason for Permanency Goal," the plan stated: "A Permanency Hearing has not yet been held. Parents still need to make progress in their services."

¶ 12 On February 11, 2015, the trial court held a second permanency review hearing. At the hearing, Wilkinson reported that respondent had completed a psychological evaluation and a parenting class in October 2013. He was also currently participating in counseling through Family Core. However, as of that date, respondent had yet to successfully complete any form of counseling, had failed to submit to a psychiatric evaluation, had failed to submit any proof of

employment, and had not completed any of the court-ordered urine drops. After hearing the testimony, the court declined to change the permanency goal.

¶ 13 On July 22, 2015, the State filed a petition for termination of respondent's parental rights. The petition alleged that respondent was unfit in that he had failed to make reasonable progress toward the return of the minors during any nine-month period, specifically October 15, 2014, to July 15, 2015. Respondent denied the allegations of the petition in its entirety.

¶ 14 On February 24, 2016, the trial court held a trial on the State's petition to terminate respondent's parental rights. At trial, Wilkinson testified that he had advised respondent that the agency would no longer be paying for any services as a result of the goal change to 24, but that he would still be expected to complete the services. During the relevant time period, respondent had still not completed any court-ordered urine drops. Respondent claimed that this was because the facility the agency recommended would not take his health insurance. Respondent was also reportedly working for cash, but had not provided any proof of employment. Respondent had given Wilkinson his address, but he had not consented to an inspection because "the house would not pass any type of inspection." With regard to court-ordered services, respondent informed Wilkinson that he was addressing domestic violence in his anger management course through Family Core. Wilkinson did not believe this satisfied the court order for respondent to complete a domestic violence program.

¶ 15 In closing arguments, respondent's attorney, now Susan O'Neal, argued the proceedings against respondent had been conducted in a slipshod manner. Throughout the proceedings, respondent had three separate court-appointed attorneys, with no motions to withdraw or for substitution on file. In addition, there had been six guardian *ad litems* (GALs) and three judges. Lastly, she argued that it was fundamentally unfair for the State to have selected a time period

that fell after the court had set the permanency goal at 24 because a permanency goal of 24 meant no services would be paid for by the agency. The court took the matter under advisement and set the matter over to March 2, 2016.

¶ 16 On March 2, 2016, the trial court ruled that the State had proven parental unfitness for respondent's failure to make reasonable progress. However, the court found that the State had failed to meet its burden with respect to the minors' mother in light of the fact that the record indicated a significant intellectual defect. With regard to respondent's allegations of unfairness, the court noted that respondent "knew well why certain attorneys were no longer employed by the public defender's office and couldn't represent him." In addition, the court found that the number of GALs and judges was not unreasonable in light of the fact that the case had continued for over three years.

¶ 17 On May 11, 2016, the trial court conducted a best-interest hearing. At the hearing, the State submitted several of Wilkinson's reports into evidence, and respondent called Wilkinson to testify on his behalf. Wilkinson testified that there was a "type of bond" between respondent and the minors. Respondent attended visitation with his children regularly and those visits generally went well. A background check performed on respondent's girlfriend revealed no identified problems. By the time of the best-interest hearing, respondent had completed a parenting class, an anger management course, and the required psychiatric evaluation. He had also engaged in some counseling. However, Wilkinson did not feel respondent had learned anything. In Wilkinson's mind, the biggest issue in the case was that respondent had not formally completed a domestic violence course since the case was opened.

¶ 18 In closing arguments, respondent's attorney argued that if there is a lack of a bond between respondent and the minor children, it is because he was only allowed one hour per

month as a result of the permanency goal being set at 24 at the first permanency hearing, which was not held until 15 months after the children were placed with DCFS. She further argued that because the State did not prove its petition as to the minors' mother, the court would not be creating permanency for the minor children, it would simply be making them "fatherless children."

¶ 19 She then noted that respondent had substantially completed a domestic violence class as a result of a 2011 domestic violence conviction, but due to "so many shifting players," nobody had noticed. She argued that since the State did not charge respondent following the April 2013 incident, there had been no new domestic violence charges for respondent to be required to complete a new domestic violence class. The State agreed to stipulate that respondent had not been charged in connection with the April 2013 domestic violence incident, nor had he been charged with any form of domestic violence since that date.

¶ 20 At the conclusion of the hearing, the GAL asked the court to terminate respondent's parental rights. She stated that the minors' physical safety and welfare were being provided exclusively by their foster parents. The minors were extremely attached to their foster parents, and the foster parents treat the minors as if they were their own. The foster parents have put substantial effort into making sure all of the minors' needs, specialty or otherwise, are being met. For these reasons, the GAL believed that termination of respondent's parental rights was in the minors' best interests.

¶ 21 Following the hearing, the trial court agreed with the GAL and found that it was in the minors' best interests to terminate respondent's parental rights. The court stated that whether or not any charges had been filed concerning the April 2013 incident was of no consequence, as respondent had stipulated to the domestic violence allegations in the petition. It then noted that

respondent had not completed simple tasks, such as submitting paystubs or completing domestic violence counseling, which, in turn, showed that he did not have the minors' best interests in mind. Respondent had demonstrated a contrarian attitude throughout the duration of the proceedings, and had not made any significant efforts to place the interests of his children above his own interests. Based on the GAL's findings, the court stated that the other statutory factors weighed in favor of termination. On May 12, 2016, the court entered a written order terminating respondent's parental rights.

¶ 22 Respondent appealed.

¶ 23 ANALYSIS

¶ 24 I. Respondent's Right to Procedural Due Process

¶ 25 On appeal, respondent claims the multiple violations of the Juvenile Court Act that occurred in this case were fundamentally unfair and violated his right to procedural due process.

¶ 26 The due process clause of the fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. The principle that parents possess the fundamental right to make decisions about the care, custody, and control of their children without unwarranted state intrusion is embedded in our jurisprudence. *In re Sophia G.L.*, 229 Ill. 2d 143, 171 (2008). Accordingly, the procedures involved in terminating parental rights must comply with the requirement of procedural due process. *In re Haley D.*, 2011 IL 110886, ¶ 49. Under these circumstances, due process requires both compliance with the provisions of the Juvenile Court Act and fundamental fairness. *In re O.S.*, 364 Ill. App. 3d 628, 637-38 (2006).

¶ 27 Here, respondent claims the Juvenile Court Act was violated when: (1) he had three different court-appointed attorneys with no motions to withdraw or for substitution on file; (2)

the trial court assigned six different GALs to the case in violation of the "one GAL rule"; (3) three different judges presided over the case in violation of the "one judge rule"; (4) the first permanency review hearing was not held within 12 months of the date temporary custody was taken; (5) the trial court selected "termination of parental rights" as the first permanency goal, skipping over all three of the "return home" goals without making the necessary written findings as to why those reunification goals were not selected; and (6) no service plan was filed before the first permanency review hearing. We will address these arguments in turn.

¶ 28 A. Three Court-Appointed Attorneys

¶ 29 Respondent first claims it was a violation of the Juvenile Court Act for the trial court to have appointed him three separate attorneys when there were no motions to withdraw or for substitution on file. Section 1-5(1) of the Juvenile Court Act provides that appointed counsel "shall appear at all stages of the trial court proceeding, and such appointment shall continue through the permanency hearings and termination of parental rights proceedings subject to withdrawal or substitution pursuant to Supreme Court Rules or the Code of Civil Procedure." 705 ILCS 405/1-5(1) (West 2012).

¶ 30 Illinois Supreme Court Rule 13(c)(2) provides:

> "An attorney may not withdraw his appearance for a party without leave of court and notice to all parties of record, and, unless another attorney is substituted, he must give reasonable notice of the time and place of the presentation of the motion for leave to withdraw, by personal service, certified mail, or a third-party carrier, directed to the party represented by him at his last known business or residence address. Such notice shall advise said party

> that to insure notice of any action in said cause, he should retain other counsel therein or file with the clerk of the court, within 21 days after entry of the order of withdrawal, his supplementary appearance stating therein an address at which service of notices or other documents may be had upon him." Ill. S. Ct. R. 13(c)(2) (eff. July 1, 2013).

¶ 31 Here, respondent's first attorney, Tim McCarthy, orally moved to withdraw, claiming there had been a breakdown in attorney-client communication. Although typically an oral motion to withdraw is ineffective, respondent agreed that attorney McCarthy should withdraw and requested time to hire private counsel. We conclude that respondent waived any right to complain about the oral nature of attorney McCarthy's motion when he acquiesced in the course of action. See *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) ("To permit a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal 'would offend all notions of fair play[.]' ").

¶ 32 When hiring private counsel did not pan out, the trial court appointed attorney Bowton, who, at some point, was replaced by attorney O'Neal. There is nothing in the record concerning when or why this substitution took place, much less any objection by respondent. The only mention of the substitution at all is where the trial court noted respondent's argument with respect to attorney Bowton was disingenuous, as he "knew well why certain attorneys were no longer employed by the public defender's office and couldn't represent him."

¶ 33 Nevertheless, even if there were some procedural error surrounding the substitution of attorneys in this case, respondent cannot show he was prejudiced by having three separate attorneys represent him. While he claims a single attorney would have had a better chance of

catching "all of the many errors," attorney O'Neal successfully preserved all claimed errors by raising them at the trial on the State's petition to terminate respondent's parental rights. Moreover, as we will discuss in more detail below, we find no error in the court's termination proceedings.

¶ 34 B. Violation of the "One GAL Rule"

¶ 35 Respondent next asserts the trial court violated the "one GAL rule" when it appointed six separate GALs in this case. See 705 ILCS 405/2-17(7) (West 2012) (providing that the appointed GAL shall remain the child's GAL throughout the entire proceedings "unless there is a substitution entered by order of the court"). However, respondent does explain how the GAL changes violated *his* due process rights in this case. GALs are appointed to represent the minors, not the parents. 705 ILCS 405/2-17(1) (West 2012). Accordingly, respondent's procedural due process rights were unaffected by the GAL substitutions in this case.

¶ 36 C. Violation of the "One Judge Rule"

¶ 37 Next, respondent claims the trial court violated the "one judge rule." Illinois Supreme Court Rule 903 states: "Whenever possible and appropriate, all child custody [and allocation of parental responsibilities] proceedings relating to an individual child shall be conducted by a single judge." Ill. S. Ct. R. 903 (eff. July 1, 2006). Here, the trial court noted this rule, but found that the number of judges in this case was reasonable under the circumstances, as the case continued for almost three years. We find no error in this determination.

¶ 38 D. The Initial Permanency Review Hearing

¶ 39 Respondent next argues his right to due process was violated when the first permanency review hearing was not held within 12 months of the date temporary custody was taken. See 705

ILCS 405/2-22(5)(a) (West 2012) (providing that the initial permanency review hearing shall be held within 12 months from the date temporary custody was taken).

¶ 40 While it is true that the trial court did not hold the initial permanency hearing in this case until 15 months after temporary custody was taken, this is a direct result of respondent having filed motions for a continuance on February 11, 2014; March 11, 2014; and July 9, 2014. As the State correctly points out, respondent cannot complain on appeal about a situation he created. A defendant "may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003).

¶ 41 E. The Permanency Goal

¶ 42 Next, respondent argues the trial court violated the Juvenile Court Act when it selected "termination of parental rights" as the permanency goal without making the necessary written findings as to why it did not select the preceding goals. Section 2-28 of the Juvenile Court Act provides that, in selecting any permanency goal, the court "shall indicate in writing the reasons the goal was selected and why the preceding goals were ruled out." 705 ILCS 405/2-28 (West 2012). Here, respondent's argument is directly contradicted by the record. In its August 6, 2014, order, the trial court wrote that it was selecting termination of parental rights as the permanency goal because respondent had failed to make reasonable efforts to achieve the prior goal. Specifically, respondent had been unsuccessfully discharged from counseling, anger management, and domestic violence programs, and he was overly focused on criticizing others.

¶ 43 Alternatively, respondent claims it was fundamentally unfair for the State to be able to choose a nine-month period for unfitness that fell after the trial court set the permanency goal at 24, which meant that no services would be paid for by the agency and the visits between respondent and the minors went to once a month. This argument, too, fails. Section 1(D)(m)(ii)

of the Adoption Act states that failure by a parent to make reasonable progress toward the return of the child "during *any* 9-month period *** following the adjudication of neglected or abused minor" constitutes unfitness. (Emphasis added.) 750 ILCS 50/1(D)(m)(iii) (West 2015). Thus, the State was well within its rights to choose the period it chose.

¶ 44 In any event, we find it important to emphasize that the trial court did not select the termination goal until 15 months after the minors were placed with DCFS. During those 15 months, respondent had ample opportunities to correct the conditions that led to placement at the expense of CYFS. He failed to make any reasonable effort to do so.

¶ 45 F. Lack of a Formal Service Plan

¶ 46 Finally, respondent alleges the Juvenile Court Act was violated when no service plan was filed before the first permanency review. He claims the trial court was required to make written findings in its permanency review order as to whether the services provided were appropriate or not, and that this section on the court's August 6, 2014, order was left blank.

¶ 47 Section 2-28(3)(ii) of the Juvenile Court Act provides that, following the permanency hearing, the court shall enter a written order that sets forth "[w]hether the services required by the court and by any service plan prepared within the prior 6 months have been provided." 705 ILCS 405/2-28(3)(ii) (West 2016). A plain reading of this statutory provision reveals that the trial court is only required to reference a service plan in its written order if there was, in fact, a service plan on file. Nothing in this language mandates a service plan be filed before the permanency hearing.

¶ 48 While there was not a formal service plan on file, the trial court had previously set out specific services respondent was required to complete in order to correct the conditions that led to placement. As stated above, respondent failed to complete these tasks. In its August 6, 2014,

order, the trial court specifically explained that respondent had been unsuccessfully discharged from counseling, anger management classes, and a domestic violence program. Accordingly, we find that the court complied with section 2-28(3)(ii) and, in turn, did not violate respondent's right to procedural due process.

¶ 49 II. Best Interests Finding

¶ 50 In the alternative, respondent argues it was against the manifest weight of the evidence for the trial court to have found that his parental rights should be terminated, especially in light of the fact that the minors' mother's rights were not being terminated. We disagree.

¶ 51 A petition to terminate parental rights is filed pursuant to section 2-29 of the Juvenile Court Act. 705 ILCS 405/2-29 (West 2016). Section 2-29 delineates a two-step process in seeking involuntary termination of parental rights. 705 ILCS 405/2-29(2) (West 2016); *In re J.L.*, 236 Ill. 2d 329, 337 (2010). First, the court must find by "clear and convincing evidence, that a parent is an unfit person as defined in Section 1 of the Adoption Act." 705 ILCS 405/2-29(2), (4) (West 2016); 750 ILCS 50/1(D) (West 2016); *In re E.B.*, 231 Ill. 2d 459, 472 (2008). Second, once a finding of parental unfitness is made, the court considers the "best interest" of the child in determining whether parental rights should be terminated. 705 ILCS 405/2-29(2) (West 2016); *In re J.L.*, 236 Ill. 2d at 337.

¶ 52 Here, respondent does not dispute the trial court's finding that he was unfit. In one sentence, he claims he is not conceding that the trial court was correct in finding that he failed to make reasonable progress during the relevant period. However, respondent fails to make any argument on this point, and thus, our only issue on appeal concerns whether termination was in the best interests of G.K. and K.K. "At the best-interest stage of termination proceedings the

State bears the burden of proving by a preponderance of the evidence that termination is in the child's best interest." *In re Jay H.*, 395 Ill. App. 3d 1063, 1071 (2009).

¶ 53 When determining whether termination is in the minors' best interests, the court must consider the following factors:

> "(1) [T]the child's physical safety and welfare; (2) the development of the child's identity; (3) the child's background and ties, including familial, cultural, and religious; (4) the child's sense of attachments, including love, security, familiarity, and continuity of affection, and the least-disruptive placement alternative; (5) the child's wishes; (6) the child's community ties; (7) the child's need for permanence, including the need for stability and continuity of relationships with parental figures and siblings; (8) the uniqueness of every family and child; (9) the risks related to substitute care; and (10) the preferences of the persons available to care for the child." *In re Jay H.*, 395 Ill. App. 3d at 1071 (citing 705 ILCS 405/1-3(4.05) (West 2008)).

¶ 54 On review, we will not reverse the trial court's best interest determination unless it was against the manifest weight of the evidence. *Id.* "A decision is against the manifest weight of the evidence only if the facts clearly demonstrate that the court should have reached the opposite result." *Id.* (citing *In re D.M.*, 336 Ill. App. 3d 766, 773 (2002)).

¶ 55 Respondent argues that terminating his rights does not achieve permanency in the minors' lives in light of the fact that the trial court did not terminate the mother's parental rights. He asserts that terminating his rights does nothing more than create fatherless children. In

support of this contention, respondent cites an appellate court case out of California, claiming there is no Illinois case directly on point. See *In re Jayson T.*, 97 Cal. App. 4th 75 (2002) (finding that, as a matter of public policy, a child should not be condemned to legal orphanage merely because possible problems with his or her adoptability were not discovered or glossed over by the trial court).

¶ 56 Setting aside the fact that the California Supreme Court has since disapproved of the approach its appellate court took in *Jayson T* (*In re Zeth S.*, 31 Cal. 4th 396), in Illinois, one parent's retention of his or her parental rights does not preclude a finding that it would be in the minor child's best interest to terminate the other's parental rights. *In re F.P.*, 2014 IL App (4th) 140360, ¶ 92 ("Although the lack of an adoptive placement for [the minors] was a factor to consider, it did not necessary preclude a finding that terminating respondent's parental rights would be in [the children's] best interest.").

¶ 57 Respondent next argues the court's best-interest finding was against the manifest weight of the evidence. He claims the evidence presented below shows that he had a bond with his children and that their visits went well. He had completed almost all of his services, had a home, and was employed. While respondent has recently made some progress, his argument ignores the fact that he never completed a domestic violence course, something Wilkinson considered to be the biggest issue in the case.

¶ 58 Moreover, at the best-interest stage of proceedings, the issue is no longer whether respondent's parental rights *can* be terminated; the issue is whether, in light of the minors' needs, respondent's parental rights *should* be terminated. *In re D.T.*, 212 Ill. 2d 347, 364 (2004). At this stage, "the parent's interest in maintaining the parent-child relationship must yield to the child's interest in a stable, loving home life." *Id.*

¶ 59 Here, the GAL presented her findings to the trial court. Those findings documented the minors' strong relationship with their foster parents and overwhelmingly favored termination of respondent's parental rights. Given these findings, the trial court's termination of respondent's parental rights was not against the manifest weight of the evidence.

¶ 60 CONCLUSION

¶ 61 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County.

¶ 62 Affirmed.