

NOTICE

Decision filed 03/09/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 110441-U
 NO. 5-11-0441
 IN THE
 APPELLATE COURT OF ILLINOIS
 FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<p>CHARITY A. DUNHAM, f/k/a CHARITY A. DURAN, Petitioner-Appellee,</p>	<p>)))))))))))))</p>	<p>Appeal from the Circuit Court of Hamilton County.</p> <p>No. 03-D-12</p> <p>Honorable Barry L. Vaughan, Judge, presiding.</p>
<p>v.</p>		
<p>VINUS MIKE DURAN, Respondent-Appellant.</p>		

JUSTICE GOLDENHERSH delivered the judgment of the court.
 Justices Spomer and Wexstten concurred in the judgment.

ORDER

- ¶ 1 *Held*: The court exceeded its authority in granting petitioner's motion to terminate respondent's parental rights in a cause brought pursuant to the Illinois Marriage and Dissolution of Marriage Act, and its judgment is reversed.
- ¶ 2 Respondent, Vinus Mike Duran, appeals from the circuit court of Hamilton County's September 19, 2011, order granting petitioner Charity A. Dunham's motion for termination of parental rights in case number 03-D-12. For the following reasons, we reverse the court's judgment.

BACKGROUND

- ¶ 3
- ¶ 4 The parties were wed on June 28, 1998. One child, a now-11-year-old son, was born of the marriage. On June 20, 2002, petitioner filed a petition for dissolution of marriage, and the court entered a judgment dissolving the marriage on November 10, 2003. The court ordered, *inter alia*, that petitioner was to be awarded primary custody of their son and

respondent was to be granted visitation "only as supervised by the Illinois Department of Children and Family Services (Department) upon such times and in such places as the [Department] shall provide and require until further Order of this Court." Respondent was ordered to pay child support in the amount of \$450 per month, and the parties were ordered to evenly split any uncovered medical expenses incurred by their son.

¶ 5 Prior to the initiation of the dissolution proceedings, respondent had been charged in the circuit courts of Jefferson and Randolph Counties with multiple counts of aggravated criminal sexual abuse of a girl between the ages of 13 and 16 (720 ILCS 5/12-16(d) (West 2000)) and possession of child pornography (720 ILCS 5/11-20.1(a)(6) (West 2000)). He was detained from the time of his arrest on June 1, 2002, until he posted bond on July 25, 2003. As a condition of his bond, he was prohibited from having unsupervised contact with any minors under the age of 17. Respondent remained free on bond for nearly two years until, on April 27, 2005, he pled guilty to one count of possession of child pornography in Jefferson County and one count of criminal sexual abuse in Randolph County. He was sentenced to terms of four years' imprisonment in the Department of Corrections (DOC) on each of the charges, with the sentences to run concurrently with one another, and was ordered to serve a two-year term of mandatory supervised release upon his release. Respondent was then remanded to the custody of the Jefferson County jail and subsequently to DOC.

¶ 6 On April 3, 2006, respondent filed his first of several petitions to modify visitation. He argued that because "it is necessary to promptly re-establish and foster the parent/child relationship" the court should allow respondent visitation with his son at Big Muddy River Correctional Center, where he was then incarcerated.

¶ 7 On September 5, 2006, the court denied respondent's petition to modify visitation, finding that pursuant to section 607(e) of the Illinois Marriage and Dissolution of Marriage

Act (750 ILCS 5/607(e) (West 2004)) he was ineligible for visitation. Section 607(e) provides that no one who has been convicted of a felony sex crime involving a victim under the age of 18 is entitled to visitation rights until he has completed his sentence, including any term of mandatory supervised release, and has successfully completed a treatment program approved by the court. 750 ILCS 5/607(e) (West 2004). The court further found that despite being granted supervised visitation in the original judgment of dissolution, respondent had failed to take advantage of the opportunity and his efforts to arrange visitation at that time had been "minimal at best."

¶ 8 Respondent was released from the custody of DOC on February 16, 2007, whereupon he immediately began participating in a treatment program for sex offenders. He completed his two-year term of mandatory supervised release in February of 2009.

¶ 9 On January 11, 2008, respondent filed another motion to modify visitation. In this motion, respondent alleged that a substantial change in circumstances had occurred due to his release from DOC and his ongoing participation in a treatment program. Respondent sought the court's approval of the treatment program and the awarding of regularly scheduled visitation.

¶ 10 On February 11, 2008, the court ordered respondent to file a motion to approve his treatment program, along with supporting documentation. Respondent filed a combined motion to approve treatment program and to modify visitation, appended to which was a report from Linda Stover, a certified sex offender treatment specialist who had overseen respondent's treatment program. Stover wrote that respondent had complied with the requirements of his treatment plan and opined that he was at a "low risk to re-offend at this time as long as he continues to utilize what he has learned in treatment."

¶ 11 On December 28, 2009, counsel for petitioner, Rhonda Blades, filed a motion for the termination of respondent's parental rights. In the motion, petitioner alleged that respondent

was an unfit parent pursuant to section 1(D) of the Illinois Adoption Act (750 ILCS 50/1(D) (West 2008)). Petitioner, tracking the language of the Adoption Act, contended that respondent had failed to maintain a reasonable degree of interest, concern, or responsibility as to his son's welfare, that he had been found pursuant to section 2-21 of the Juvenile Court Act of 1987 (705 ILCS 405/2-21 (West 2008)) to have physically abused a child on more than one occasion, "the most recent of which was determined by the juvenile court hearing the matter to be supported by clean [*sic*] and convincing evidence," that he had committed other acts of neglect or misconduct toward his son, and that he had been convicted of aggravated battery of a child. Petitioner sought a finding by the court that respondent was unfit "to have this child under the Adoption Act," and that pursuant to such a finding his parental rights were "forever and irrevocably terminated."

¶ 12 No action was taken on the motion, and on May 5, 2010, petitioner and her current husband filed a separate action, Hamilton County case number 10-AD-1, seeking to adopt the parties' son pursuant to the Adoption Act. On October 7, 2010, at which point there had still been no hearing on respondent's motion to modify visitation or petitioner's motion to terminate parental rights, Blades sought leave to withdraw from the case. The court granted counsel leave to withdraw and gave petitioner 21 days within which to retain new counsel before it scheduled a hearing on respondent's motion to approve treatment program and motion to modify visitation.

¶ 13 On February 14, 2011, the court held a hearing on respondent's pending motions. The court granted respondent's motion to approve treatment program but denied his motion to modify visitation due to the possibility that its subsequent ruling on petitioner's motion for termination of parental rights might render the motion to modify visitation moot. The court set a hearing on the motion for termination of parental rights for March 10, 2011.

¶ 14 Following the hearing on petitioner's motion for termination of parental rights, at

which petitioner appeared *pro se*, the court orally pronounced that petitioner had proven by clear and convincing evidence the allegations in her petition regarding respondent's failure to maintain a reasonable degree of interest, concern, or responsibility as to his son's welfare. The court found that the other allegations in the petition to terminate parental rights had not been proven. The court then said it needed to "set a second-stage hearing on best interest, as [it] understand[s] the statute." However, no best-interests hearing was scheduled or conducted.

¶ 15 In its subsequent written judgment, the court held that because respondent had "minimal or no contact" with his son since July 2003 and had failed to schedule any supervised visits through DCFS as provided in the original dissolution order, it was in the best interests of his son that his parental rights be terminated. The court concluded its written judgment by ordering that "the motion for termination of parental rights *** is GRANTED and Respondent's Parental Rights are hereby TERMINATED."

¶ 16

ANALYSIS

¶ 17 On appeal, respondent argues that the court exceeded its authority in terminating his parental rights on motion of petitioner in their dissolution of marriage proceeding. Respondent further contends that even if the motion for termination of parental rights were properly before the court, it abused its discretion in granting the motion. We agree and reverse the court's judgment terminating respondent's parental rights.

¶ 18 A parent's interest in maintaining a parental relationship with his child involves a fundamental liberty interest, and the termination of such rights is a drastic measure. *In re D.R.*, 307 Ill. App. 3d 478, 718 N.E.2d 664 (1999). Pursuant to the Adoption Act, only upon a finding of parental unfitness may a court find that termination of the parent's rights is in a child's best interests. 750 ILCS 50/1 *et seq.* (West 2010). This requires a two-stage process in which a hearing is held on parental unfitness, and then, if the court finds by clear

and convincing evidence that the parent is unfit, a hearing is held on whether it is in the child's best interests to terminate parental rights. *In re A.P.*, 277 Ill. App. 3d 592, 600, 660 N.E.2d 1006, 1012 (1996). The risk of prejudice resulting from the consolidation of unfitness and best-interest hearings into a single proceeding means that a "separate hearing and determination of the child's best interests is mandatory in order to ensure the proper focus on those interests." *Id.* at 600, 660 N.E.2d at 1012.

¶ 19 "To invoke a trial court's jurisdiction over a matter, a party 'must initiate a proceeding that provides the trial court with the relevant statutory authority to act.' " *In re A.S.B.*, 381 Ill. App. 3d 220, 221, 887 N.E.2d 445, 447 (2008) (quoting *In re Marriage of Rhodes*, 326 Ill. App. 3d 386, 390, 760 N.E.2d 592, 596 (2001)). "A proceeding to involuntarily terminate parental rights may only be brought under the statutory authority of the Juvenile Court Act *** [citation] or the Adoption Act [citation]." *In re A.S.B.*, 381 Ill. App. 3d at 221, 887 N.E.2d at 447 (citing to *In re M.M.*, 156 Ill. 2d 53, 61, 619 N.E.2d 702, 708 (1993)). Where there has been a prior finding that a child has been abused or neglected, a petition for termination of parental rights is filed under the Juvenile Court Act. *In re M.M.*, 156 Ill. 2d 53, 61, 619 N.E.2d 702, 708 (1993). "Generally, all other involuntary termination actions proceed under the Adoption Act." *Id.* Courts sitting in dissolution proceedings do not possess the authority to terminate parental rights. *Patrick v. Patrick*, 59 Ill. App. 3d 11, 13-14, 374 N.E.2d 1084, 1085 (1978).

¶ 20 Here, petitioner and her husband have brought a separate action under the Adoption Act in Hamilton County case number 10-AD-1. They have filed a motion for the termination of respondent's parental rights in that case that raises similar, but not identical, issues as did the motion for termination in this case. The proper cause of action in which to move for the termination of respondent's parental rights is the adoption proceeding, and the court sitting in the dissolution proceedings lacked the authority to grant such a motion.

¶ 21 Furthermore, even if the court had been vested with the authority to rule on the petition, it failed to comply with the strictures of the Adoption Act by neglecting to conduct a separate hearing concerning the child's best interests, and its judgment was thus in error.

¶ 22 **CONCLUSION**

¶ 23 For the foregoing reasons, the court lacked the authority to terminate respondent's parental rights and its judgment is therefore reversed.

¶ 24 Reversed.