2023 IL App (4th) 220821-U

NO. 4-22-0821

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 25, 2023
Carla Bender
4th District Appellate
Court, IL

In re D.W., a Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Winnebago County
Petitioner-Appellee,	)	No. 18JA274
v.	)	
Eugene W.,	)	Honorable
Respondent-Appellant).	)	Francis M. Martinez,
	)	Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice DeArmond and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court granted appellate counsel's motion to withdraw and affirmed the trial court's judgment terminating respondent's parental rights, concluding no meritorious issues could be raised on appeal.

¶ 2 On September 7, 2022, the trial court entered an order terminating the parental rights of respondent, Eugene W., to his minor child, D.W. (born March 21, 2012). Respondent appealed, and counsel was appointed to represent him. Appellate counsel now moves to withdraw, citing *Anders v. California*, 386 U.S. 738 (1967), and *In re Alexa J.*, 345 Ill. App. 3d 985 (2003), on the basis that she cannot raise any potentially meritorious argument on appeal. The record indicates counsel sent a copy of her motion and accompanying memorandum of law to respondent by mail. Respondent has not filed a response. After reviewing the record and the

memorandum attached to counsel's motion, we grant the motion to withdraw and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Case Opening

¶ 5 On August 23, 2018, the State filed a petition for adjudication of wardship and temporary custody as to D.W. The petition alleged respondent and D.W.'s mother, Samantha S., both had substance abuse issues that created an environment injurious to D.W.'s welfare. It additionally alleged respondent had mental health issues and that respondent and Samantha S. had a history of domestic violence, which placed D.W. at risk of harm. Following a shelter care hearing, the trial court found that there was probable cause to believe that D.W. was neglected, and it ordered temporary guardianship and custody of the minor to be placed with the Illinois Department of Children and Family Services (DCFS). On December 19, 2018, the court adjudicated D.W. neglected pursuant to section 2-3(1)(b) of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/2-3(1)(b) (West 2018)). Following a dispositional hearing held on February 5, 2019, the court made D.W. a ward of the court and granted continued guardianship and custody with DCFS. Thereafter, there were seven permanency reviews. On February 25, 2022, the court changed the permanency goal to substitute care pending a determination on the termination of respondent's and Samantha S.'s parental rights.

¶ 6 On March 23, 2022, the State filed a petition to terminate respondent's parental rights. The petition alleged that respondent was an unfit parent in that he failed to (1) maintain a reasonable degree of interest, concern, or responsibility as to D.W.'s welfare (750 ILCS 50/1(D)(b) (West 2020)) (count I); (2) protect D.W. from conditions within the environment injurious to his welfare (750 ILCS 50/1(D)(g) (West 2020)) (count II); (3) make reasonable

efforts to correct the conditions that caused D.W. to be removed during a nine-month period after D.W. was adjudicated neglected, namely, the period of February 5, 2021, to November 5, 2021 (750 ILCS 50/1(D)(m)(i) (West 2020)) (count III); and (4) make reasonable progress toward the return of D.W. to his care during a nine-month period after D.W. was adjudicated neglected, namely, the periods of April 3, 2019, to January 3, 2020, and May 25, 2021, to February 25, 2022 (750 ILCS 50/1(D)(m)(ii) (West 2020)) (count IV). The State also filed a petition to terminate the parental rights of Samantha S., who is not a party to this appeal.

¶ 7 B. Fitness Hearing

¶ 8 The trial court commenced the fitness hearing on May 3, 2022. At the hearing, the State first presented the testimony of Lacey Timoti, who testified she had been D.W.'s caseworker for about one year. According to Timoti, D.W. had been in care since 2018 due to an alleged incident wherein Samantha S. struck D.W. on his head. Timoti testified she had only "on and off" contact with respondent since becoming D.W.'s caseworker, noting she had "attempted" but had "not actually spoken with him in several months." According to respondent's integrated assessment, he was to engage in the following services: individual therapy, substance abuse and mental health services, parental education and coaching, and family therapy. Respondent was further required to participate in a domestic violence assessment, comply with legal obligations, and maintain contact with Children's Home and Aid (CHA).

¶ 9 Respondent's service plans, which were admitted into evidence with no objection, showed between March 2019 (the date of his first evaluated plan) and March 2021, respondent's compliance with his service plans varied. During this time, respondent was often compliant in certain areas but evaluated as unsatisfactory in others. Between March 2019 and March 2021, respondent consistently attended visits with D.W. on Thursday nights and maintained adequate

communication with DCFS during this time. However, between March 2019 and March 2020, respondent failed to make progress in parenting and individual counseling because he was still on waiting lists for those services. Between March 2020 and March 2021, respondent had been consistently attending counseling, tested negative for drugs and alcohol, participated in substance abuse and mental health services, and attended parent coaching classes.

¶ 10 According to respondent's service plan report dated September 9, 2021, respondent failed to appear for all drug tests during the review period and had not been in contact with CHA since June 2021. Respondent had been missing individual counseling sessions without providing a valid excuse, and domestic violence had not been addressed in his counseling or group therapy sessions. The report further indicated that although respondent had not completely discontinued services, his engagement in substance abuse treatment at Rosecrance Ware Center (Rosecrance) "was decreasing" and the caseworker had not received reports from July or August 2021. Around July 2021, respondent missed three visits with D.W. in a row and was directed to contact the agency if he wished to reengage. Of the 20 visits offered to respondent during the reporting period, respondent attended only 12.

¶ 11 Timoti testified after the November 2021 permanency hearing, respondent transitioned to phone visits with D.W. Timoti explained respondent was planning to move to Chicago and had trouble with transportation. Respondent's consistency with phone visits "depend[ed] on the month." Some months it was "every week," and some months it was only "here and there." Respondent never progressed to unsupervised visits with D.W.

¶ 12 The fitness hearing was continued to June 28, 2022. Jennifer Brown testified on respondent's behalf. Brown testified she was employed at Rosecrance as a team leader for Assertive Community Treatment (ACT). Brown provided respondent with individual therapy

services, and respondent participated in the ACT group. Respondent currently attended his services at Rosecrance consistently and was "doing well but struggling emotionally *** with the possibility of not having any contact with his son." Respondent had made progress in his ability to problem solve, accept accountability for his actions, and understand his part in decision-making and consequences.

¶ 13 The hearing was continued to August 10, 2022, and again to September 7, 2022. At the beginning of the hearing on September 7, 2022, the trial court found respondent unfit as to counts I, III, and IV. Specifically, the court found as follows:

> "As to [respondent], major concerns in his—with [him] were domestic violence counseling, substance abuse, and mental health, and there were a number of services addressed. Ms. Timoti outlined the services that were meant to address those three major issues. She did characterize [respondent's] communication and participation as on and off. As a result, [respondent] never progressed to unsupervised visits.
>
> In July of 2021 there was a substantial change in [respondent's] performance. He did not engage with the agency for quite some time, until November. He did not visit during that period of time as well. He was offered phone visits and made 5 out of 11."

¶ 14 C. Best Interest Hearing

¶ 15 Following the unfitness finding, the trial court moved immediately into the best interest portion of the hearing. The State indicated it did not have any testimonial evidence to present but rather would rely on a best interest report prepared by CHA, and which had been filed with the court on August 24, 2022.

¶ 16 The authors of the report listed all of the statutory best interest factors and relayed their findings as to each factor. The authors noted D.W. had been in his foster parents' care since November 2018. His foster mother provided him with emotional support, physical safety, clothing, food, and shelter, and all of his medical needs were met. Respondent had not attended any of D.W.'s medical appointments since he had been in care and had not provided shelter, clothing, or other necessary items. D.W. participated in extracurricular activities, and his foster parents were supportive and encouraging. The foster parents were willing to maintain D.W.'s relationships with respondent and Samantha S., as well as with extended family members such as his maternal grandmother. D.W. was bonded with his foster parents and appeared to be secure in his placement. D.W. relied on his foster mother when he needed support, and the authors opined that remaining in his foster parents' care would be the least disruptive placement until D.W. could be adopted by his great aunt and uncle in Michigan. Although D.W. "d[id] care for" respondent, "it [was] not a close attachment." D.W. did not mind when respondent visited but often asked whether he would get more time with Samantha S. when respondent canceled visits. Throughout the pendency of the case, D.W. had been "very vocal" about his desire to live with Samantha S. but had not expressed any desire to live with respondent. Before the summer break, D.W. had been enjoying school and had several friends. D.W. attended summer camp and enjoyed science, swimming, and boy scouts. The report emphasized D.W.'s need for permanency and stability, and the authors indicated that termination of respondent's parental rights was in D.W.'s best interest.

¶ 17 Respondent testified when he had visits with D.W., they typically took place at the agency or at a park. D.W. seemed excited to see respondent at visits and was sad when they

ended. According to respondent, D.W. expressed wanting to come back home to him and did not want to remain at his foster home. Respondent loved D.W. and wanted to be a part of his life.

¶ 18 Following arguments, the court found termination of respondent's parental rights was in D.W.'s best interest. Specifically, the court emphasized D.W. had been in foster care for almost four years. Referencing the best interest report, the court noted D.W. desired to return home, but ultimately, "[t]hree years and nine months ha[d] failed to correct the conditions that led to the removal of [D.W.]" The court found D.W. was secure in his current placement and was bonded with his foster parents. The foster parents remained committed to D.W.'s continued relationship with his biological parents and other extended family members. Despite the fact "every opportunity ha[d] been exercised to find fitness and reunification," they had not succeeded, and D.W. deserved permanency.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, appellate counsel seeks to withdraw on the basis that she cannot raise any arguments of potential merit.

¶ 22 The procedure for appellate counsel to withdraw set forth in *Anders* applies to findings of parental unfitness and termination of parental rights. *In re S.M.*, 314 Ill. App. 3d 682, 685 (2000). According to this procedure, counsel's request to withdraw must "be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. Counsel must "(a) sketch the argument in support of the issues that could conceivably be raised on appeal, and then (b) explain why he believes the arguments are frivolous." *S.M.*, 314 Ill. App. 3d at 685. Counsel must then conclude the case presents no viable grounds for appeal. *S.M.*, 314 Ill. App. 3d at 685. In doing so, counsel should review both the

unfitness finding and the best interest determination and indicate in the brief that he or she has done so. *S.M.*, 314 Ill. App. 3d at 685-86 .

¶ 23 In the instant case, counsel asserts she has reviewed the record on appeal, including the report of proceedings of the termination hearing, and has concluded there are no appealable issues of merit. Counsel states she has considered raising the argument that the trial court's finding of unfitness was against the manifest weight of the evidence. She also indicates she has considered raising the argument the State failed to prove by a preponderance of the evidence it was in D.W.'s best interest to terminate respondent's parental rights. We address each argument in turn and ultimately agree with counsel's conclusion there are no issues of arguable merit to be raised on review.

¶ 24 A. Fitness Finding

¶ 25 We first address appellate counsel's assertion no meritorious argument can be made that the trial court's unfitness finding was against the manifest weight of the evidence.

¶ 26 Termination of parental rights under the Juvenile Court Act (705 ILCS 405/1-1 *et seq.* (West 2020)) is a two-step process. *In re Julian K.*, 2012 IL App (1st) 112841, ¶ 1. Parental rights may not be terminated without the parent's consent unless the trial court first determines, by clear and convincing evidence, the parent is unfit as defined in section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2020)). *In re Gwynne P.*, 215 Ill. 2d 340, 354 (2005). Pursuant to section 1(D)(m)(ii) of the Adoption Act (750 ILCS 50/1(D)(m)(ii) (West 2020)), a parent may be found unfit if he fails to "make reasonable progress toward the return of the child to the parent during any 9-month period following the adjudication of neglected *** minor." A "parent's failure to substantially fulfill his or her obligations under the service plan and correct the conditions that brought the child into care during any 9-month period following the

adjudication" constitutes a failure to make reasonable progress for purposes of section 1(D)(m)(ii). 750 ILCS 50/1(D)(m)(ii) (West 2020). "As the grounds for unfitness are independent, the trial court's judgment may be affirmed if the evidence supports the finding of unfitness on any one of the alleged statutory grounds." *In re H.D.*, 343 Ill. App. 3d 483, 493 (2003).

¶ 27 We will not disturb a finding of unfitness unless it is against the manifest weight of the evidence. *In re J.H.*, 2020 IL App (4th) 200150, ¶ 68. "A finding is against the manifest weight of the evidence only if the evidence clearly calls for the opposite finding [citation], such that no reasonable person could arrive at the circuit court's finding on the basis of the evidence in the record [citation]." (Internal quotation marks omitted.) *J.H.*, 2020 IL App (4th) 200150, ¶ 68. "This court pays great deference to a trial court's fitness finding because of [that court's] superior opportunity to observe the witnesses and evaluate their credibility." (Internal quotation marks omitted.) *In re O.B.*, 2022 IL App (4th) 220419, ¶ 29.

¶ 28 Here, the State proved by clear and convincing evidence that respondent had failed to make reasonable progress toward the return of D.W. during the nine-month period of May 25, 2021, to February 25, 2022, as alleged in count IV of the State's petition to terminate parental rights. Pursuant to respondent's integrated assessment, he was to engage in substance abuse services, attend visits with D.W., and maintain contact with the agency. According to the service plan dated September 9, 2021, which covered the previous six months, respondent failed to appear for any of his drug drops and had no contact with CHA from June to September 2021. Of the 20 visits offered to respondent during the review period, respondent only attended 12. After respondent missed three visits in a row, visits were suspended until respondent contacted CHA. Additionally, during those same months, respondent's engagement with and attendance at

Rosecrance had also decreased. After the November 2021 permanency hearing, he still failed to maintain regular contact with the agency. At the May 2022 fitness hearing, Timoti testified her communication with respondent had been "on and off" since she became D.W.'s caseworker, around the spring of 2021. Although respondent did resume visits with D.W. by phone after the November 2021 permanency hearing, his consistency once again varied; some months he attended every week, and others only "here and there." Significantly, at no point in the case did respondent ever progress to a point where he was able to have unsupervised visits with D.W.

¶ 29 Based on this evidence, respondent did not "substantially fulfill his *** obligations under the service plan" and therefore did not make reasonable progress toward the return of D.W. to his care. 750 ILCS 50/1(D)(m)(ii) (West 2020).

¶ 30 Because the State proved one ground of unfitness by clear and convincing evidence, we agree with appellate counsel no meritorious argument can be made that the trial court's finding of unfitness was against the manifest weight of the evidence. See *H.D.,* 343 Ill. App. 3d at 493 (2003) ("As the grounds for unfitness are independent, the trial court's judgment may be affirmed if the evidence supports the finding of unfitness on any one of the alleged statutory grounds.").

¶ 31 B. Best Interest Finding

¶ 32 Appellate counsel next asserts she can make no meritorious argument that the trial court's best interest finding was against the manifest weight of the evidence.

¶ 33 When a trial court finds a parent to be unfit, "the court then determines whether it is in the best interests of the minor that parental rights be terminated." *In re D.T.,* 212 Ill. 2d 347, 352 (2004). In making the best interest determination, the court must consider the factors set

forth in section 1-3(4.05) of the Juvenile Court Act (705 ILCS 405/1-3(4.05) (West 2020)). These factors include:

> "(1) 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 1063, 1071 (2009) (citing 705 ILCS 405/1-3(4.05) (West 2008)).

"The court's best interest determination need not contain an explicit reference to each of these factors, and a reviewing court need not rely on any basis used by the trial court below in affirming its decision." *In re Tajannah O.*, 2014 IL App (1st) 133119, ¶ 19.

¶ 34 At a best interest hearing, the State must prove by clear and convincing evidence that termination of parental rights is in the best interest of the child. *D.T.*, 212 Ill. 2d at 366. On review, "[w]e will not disturb a court's finding that termination is in the child[ ]'s best interest unless it was against the manifest weight of the evidence." *In re T.A.*, 359 Ill. App. 3d 953, 961 (2005).

¶ 35 Here, the trial court's determination it was in D.W.'s best interest that respondent's parental rights be terminated was not against the manifest weight of the evidence. The best interest report showed that D.W. felt secure in his current placement and that all of his

emotional, physical, and medical needs were being met. D.W. was bonded with his foster parents, who could provide stability for D.W. and were willing to maintain his relationships with respondent and Samantha S. until he could be adopted by relatives in Michigan. D.W. was involved in extracurricular activities and was excited about attending school. Although D.W. was very vocal about his desire to return home to Samantha S., he had not expressed any desire to live with respondent. According to the authors of the best interest report, D.W. liked spending time with respondent but it was not a "close" attachment. While respondent had made some strides in correcting his substance abuse and mental health issues, his progress stalled significantly in the summer of 2021, when he failed to attend drug drops, missed visits with D.W., and cut off contact with the agency. The court noted that "[t]hree years and nine months ha[d] failed to correct the conditions that led to the removal of [D.W.]," and while "every opportunity ha[d] been exercised to find fitness and reunification," they had not succeeded. After almost four years in care, D.W. deserved permanency and stability.

¶ 36 Based on this record, we agree with appellate counsel no meritorious argument can be made that the trial court's best interest determination was against the manifest weight of the evidence. Accordingly, we allow appellate counsel's motion to withdraw and affirm the trial court's judgment.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, consistent with Illinois Supreme Court Rule 23(b) (eff. Jan. 1, 2021), we allow appellate counsel to withdraw and affirm the trial court's judgment.

¶ 39 Affirmed.