2019 IL App (4th) 190520-U

NOS. 4-19-0520, 4-19-0522 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 20, 2019
Carla Bender
4th District Appellate
Court, IL

In re J.S., a Minor	)	
	)	Appeal from the
(The People of the State of Illinois,	)	Circuit Court of
Petitioner-Appellee,	)	Coles County
v. (No. 4-19-0520)	)	No. 14JA21
David S.,	)	
Respondent-Appellant).	)	
----------	)	
In re R.M., a Minor	)	No. 14JA34
	)	
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	
v. (No. 4-19-0522)	)	
David S.,	)	Honorable
Respondent-Appellant).	)	Matthew L. Sullivan,
	)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Holder White and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Respondent forfeited his claim that the trial court should have required the State to serve him with its notice of the applicable nine-month periods.

(2) The trial court's order finding respondent unfit was not against the manifest weight of the evidence.

(3) Respondent forfeited his claim that the State's notice of the applicable nine-month periods included time frames beyond nine months.

¶ 2 Respondent, David S., is the father of the minors R.M. and J.S. He appeals the trial court's order terminating his parental rights to both minors. He contends (1) the trial court erred in

failing to require the State to serve him with its notice of the applicable nine-month periods, (2) the court erred in finding services were available to respondent after the goal was changed from return home to substitute care, and (3) the court erred in denying his motion to reconsider and/or vacate the order of termination. The State filed individual trial court cases for each minor and, respondent filed separate appeals from each case. Because his arguments in each appeal are identical, we consolidated the appeals and now affirm the court's judgment.

¶ 3 I. BACKGROUND

¶ 4 The minor, J.S., was born to respondent and Ashley M. on November 20, 2013, at 23 weeks gestation. Ashley M. is not a party to this appeal. There were several incidents of violence and noncompliance by and between respondent, Ashley, and the hospital staff while J.S. remained in the neonatal unit. In January 2014, the Illinois Department of Children and Family Services (DCFS) opened an intact case though J.S. remained in the hospital. In July 2014, DCFS ordered respondent and Ashley to stay at the hospital with J.S. to bond and participate in training for his extensive medical needs. However, respondent appeared at the hospital under the influence of alcohol, and Ashley threatened to harm herself and others, including her child. On another occasion, respondent and Ashley got into a verbal altercation at J.S.'s bedside. They were uncooperative with security, who tried to remove them from the premises. Thereafter, respondent was not allowed to visit J.S. in the hospital.

¶ 5 J.S. required 24-hour medical care, but by July 23, 2014, he was ready for discharge. He was tracheostomy, ventilator, and gastric-tube dependent and needed at least two full-time caretakers. DCFS and its contracting agency, One Hope United, notified the parents they were closing the intact case and taking protective custody of J.S. Ashley, who was again pregnant at the time, threatened to kill herself and her unborn child and reported respondent had threatened

to kill her. For his reaction to the news of protective custody, respondent screamed obscenities and profanities at the representatives. DCFS called the police.

¶ 6 On July 25, 2014, the State filed a petition for the adjudication of neglect, alleging J.S. was in an injurious environment (705 ILCS 405/2-3(1)(b) (West 2012)) and would not receive the proper or necessary support (705 ILCS 405/2-3(1)(a) (West 2012)) if he resided with respondent and Ashley due to their violent outbursts, history and pattern of domestic abuse, and their inability to address J.S.'s medical needs. The trial court entered a temporary custody order, granting DCFS temporary custody of J.S. with the right to place him and with the authorization to consent to his medical care.

¶ 7 R.M. was born on September 14, 2014, also premature, and was required to remain in the hospital until October 26, 2014. Upon his release, he was immediately taken into protective custody and placed in traditional foster placement. J.M. was transferred to a skilled nursing facility in Naperville. Respondent and Ashley were offered weekly visits to Naperville facilitated by Addus Healthcare, Inc. (Addus). However, those visits were suspended after Ashley threatened an Addus worker. According to DCFS's update on respondent's housing, as reported in a January 2015 case plan, respondent and Ashley rented a home in Mattoon. The home was labeled appropriate, but DCFS workers did not visit the home due to the threats and domestic violence.

¶ 8 J.S. did well in Naperville and was subsequently placed in a specialized foster home in Rock Island. Both foster parents were nurses and were capable of caring for his medical needs. By August 2015, respondent had not engaged in any recommended treatment or services. Respondent continued to be arrested for domestic-violence issues. Ashley was charged with arson when she attempted to set a bedroom on fire. Respondent pleaded guilty to domestic battery against

Ashley for a June 2013 incident. He was sentenced to probation and spent several weekends in jail. The workers described respondent and Ashley as difficult, noncompliant, and hostile.

¶ 9 On August 26, 2015, the trial court entered an adjudicatory order upon respondent's admission to the allegations of neglect on the basis of his history and pattern of violent outbursts. Accordingly, the court found both minors neglected. On September 17, 2015, the court entered a dispositional order, finding respondent unfit, unable for reasons other than financial circumstances alone, or unwilling to care for the minors. The court relied on respondent's significant and unresolved domestic-violence and substance-abuse issues. The court made the minors wards of the court.

¶ 10 According to respondent's case plans, he was to participate in a substance-abuse evaluation and treatment as recommended, domestic-violence counseling, parenting classes, and a psychological evaluation. He was involved in numerous criminal cases, including charges of domestic battery, burglary, theft, and driving while his license was revoked. He was noncompliant with services as of January 2016. He had not visited with J.S. regularly or demonstrated his ability to parent J.S. successfully given his extensive medical needs. He visited with R.M. more frequently due to his closer proximity.

¶ 11 Between January 2016 and November 2016, respondent was doing well with his services. He initiated and successfully completed treatment for his diagnosis of severe alcohol-use disorder. He and Ashley secured a four-bedroom home for the family and visits soon began in the home. He had met with the assigned nurse to learn about how to care for J.S. DCFS was considering returning the minors to the parents, and respondent reportedly was looking forward to having the minors home. On September 30, 2016, Ashley gave birth to their third son, L.S. He remained in the parents' care.

¶ 12 However, on December 16, 2016, respondent and Ashley were involved in a domestic dispute. Ashley called the police, stating respondent was choking her and hitting her in the head. Respondent had relapsed and was intoxicated. According to an April 2017 DCFS status report, Ashley told police she "didn't care what happened to their baby" and she reportedly "yank[ed]" him by the arm out of his car seat. She told police she did not want to care for her baby and left the home. L.S. was taken into protective custody. The incident began with the couple arguing about respondent driving around intoxicated with L.S. in the vehicle. Apparently, Ashley drove the family to Walmart and left L.S. in the vehicle with respondent when she went inside. Respondent moved the car while Ashley was in the store. When she returned to the vehicle, they argued, and respondent began choking her while she was driving. Ashley called the police. Respondent could be heard in the background yelling that he had a gun and he was going to shoot the responding police officers. Later, at home, when the argument turned physical again, Ashley again called the police. She told police this was the first domestic dispute they had had in two years. However, police indicated in their report, there had been calls to the home four times in 2016 for domestic-battery allegations. Respondent was on probation at the time from his most recent domestic-battery conviction. They had also been evicted from their home.

¶ 13 Between November 1, 2016, and April 1, 2017, numerous calls to the police were made from the residence alleging domestic violence. Respondent was no longer participating in services, and Ashley had threatened DCFS, her children, and her parents. She posted on Facebook "concerning messages," including a fake death certificate, claiming J.S. had died.

¶ 14 On April 10, 2017, the State filed a motion for termination of parental rights. The charges against respondent alleged he was unfit for the following reasons: (1) he was depraved, having at least three felony convictions with one of those convictions occurring within five years

of the filing of the petition (750 ILCS 50/1(D)(i) (West 2016)) and (2) he failed to make reasonable progress toward the return of the minors during any nine-month period following the adjudication of neglect (750 ILCS 50/1(D)(m)(ii) (West 2016)). The particular nine-month periods were not specified.

¶ 15 On April 14, 2018, the trial court conducted a fitness hearing. On the State's motion, the court took judicial notice of respondent's four Coles County felony convictions: (1) case No. 13-CF-235, a conviction for the Class 4 felony offense of domestic battery with a prior conviction; (2) case No. 13-CF-151, a conviction for the Class 4 felony offense of driving while revoked; (3) case No. 94-CF-329, a conviction for the Class 3 offense of felony theft; and (4) case No. 94-CF-328, a conviction for the Class 3 felony offense of forgery.

¶ 16 The only witness to testify for the State was case manager Debbie Smith, a child welfare specialist with DCFS. She testified neither minor had resided with respondent during any part of their respective lives. In Smith's opinion, since July 20, 2017, respondent had made neither reasonable progress nor reasonable efforts (failure to make reasonable efforts was not alleged as a basis for unfitness) toward the return of the minors. Respondent's "main issue" was his alcohol abuse. This problem, coupled with Ashley's mental-health and the trend for violence between the couple, meant their home was not safe for the minors. The couple had moved to Decatur, and Smith had "barely" heard from them since. Smith also testified as to respondent's other felony convictions: (1) Shelby County case No. 09-CF-111, a conviction for the offense of felony domestic battery; (2) Moultrie County case No. 05-CF-31, a conviction for the offense of driving while license revoked; (3) Moultrie County case No. 07-CF-20, a conviction for the offense of domestic battery; and (4) McLean County case No. 99-CF-416, a conviction for the offense of burglary.

¶ 17 Ashley testified she was 25 years old and was married to respondent. She acknowledged the domestic-violence issues between her and respondent and assigned blame to her mental health. Although, she said the majority of the domestic incidents at home were verbal altercations not physical confrontations. However, she admitted her and respondent's relationship was very volatile.

¶ 18 After considering the evidence and the parties' arguments, the trial court suggested to the State that it request the matter be rescheduled in three weeks for the purpose of providing notice as to the applicable nine-month period. Taking the court's suggestion, the State asked for leave to "reopen proofs and leave to amend by filing a specific notice." The court allowed the request and stated: "I'm going to allow that because I don't think you can claim some prejudice from not being given the dates and then say, well, it's unfair to let them give me the dates." The parties agreed in open court to continue the matter until June 15, 2018.

¶ 19 On April 17, 2018, the State filed a "Notice of Nine Month Periods of Failure To Make Reasonable Progress." The alleged nine-month periods were (1) August 27, 2015, through May 27, 2016, (2) July 10, 2016, through April 10, 2017, and (3) April 10, 2017, through April 13, 2018.

¶ 20 On June 15, 2018, the trial court conducted a continued fitness hearing. Respondent did not appear personally but appeared through counsel. Respondent's attorney moved to continue in his absence. The court denied that request.

¶ 21 Smith testified again for the State. She stated respondent had failed to make reasonable progress toward the return of either minor since July 21, 2017. On cross-examination, Smith testified respondent had made *some* progress toward reunification when he was involved in substance-abuse treatment and domestic-violence counseling. However, according to Smith,

respondent was also, at the same time, still drinking and still engaging in domestic-violence incidents.

¶ 22 At the close of the hearing, the trial court stated: "I will find the State has met their burden, that neither parent is a fit parent." The court proceeded immediately to the best-interest hearing.

¶ 23 Smith again testified for the State. She said neither minor had ever resided with either parent. She said they each were in foster care but not together. She said J.S. was "doing very well." He was in a traditional foster home, with both parents being nurses, after having successfully transitioned from specialized care. She said he was thriving in this "very stable" home. She also said R.M. was "doing really well" in his home. She said: "He's a happy little boy. Very stable, very bonded to the foster family as well." She said neither minor should leave their respective foster home. They visit each other and relate "[l]ike siblings." Smith testified that each foster family was willing to adopt. Smith said R.M. was in the same home with his younger brother L.S.

¶ 24 The trial court found it to be in the minors' best interests that respondent's parental rights be terminated. On June 15, 2018, the court entered a written order terminating respondent's parental rights on reasonable-progress grounds.

¶ 25 On July 9, 2018, respondent's counsel filed a motion to reconsider, stating he believed the continued fitness hearing on June 15, 2018, was scheduled at 1 p.m., not 9 a.m. He claimed he was denied the opportunity to participate in the hearing and requested a new hearing.

¶ 26 On July 19, 2018, the trial court vacated respondent's counsel's appointment and assigned the matter to new counsel. Respondent's newly appointed counsel filed a motion to vacate, claiming (1) prior counsel rendered ineffective assistance by not presenting evidence to rebut the presumption of depravity, (2) he did not receive notice of any specific nine-month period,

and (3) he was not warned that the trial court would proceed with the termination hearing in his absence.

¶ 27 On July 2, 2019, respondent testified at a hearing on his posttrial motions that (1) his counsel did not call him as a witness to testify about his rehabilitation, (2) he had not received a copy of the State's notice of the nine-month periods, and (3) he had not been warned that the trial court would proceed in his absence. The trial court denied respondent's motion.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 Respondent raises three arguments on appeal. First, he claims the trial court erred by failing to require that the State serve upon him its notice of the particular nine-month periods. Second, he claims the trial court erred in finding that services were available to him between July 21, 2017, and June 15, 2018. Third, he claims the trial court erred in denying the motion to reconsider and/or vacate the judgment when the State alleged periods longer than nine months.

¶ 31 A. Failure to Provide Notice

¶ 32 In its motion for termination of parental rights, the State alleged respondent failed to make reasonable progress toward the return of the child to the parent "within any [nine-]month period following the adjudication of the minor as an abused, neglected, or dependent minor. (August 27, 2015)[(the date of the entry of the order of adjudication).]"

¶ 33 At the close of the evidence at the fitness hearing, during its closing argument, the State recognized it had failed to comply with the notice requirement of the specific nine-month period alleged. See 750 ILCS 50/1(D)(m) (the State shall file with the court and serve on the parties a pleading that specifies the nine-month period no later than three weeks prior to the close of discovery).

¶ 34 The trial court, noting the State's failure to comply with the notice requirement, seemed to find the State had proven by clear and convincing evidence that respondent was unfit on depravity grounds. The court stated: "I'm prepared to indicate that I am going to make the finding the State has proven by clear and convincing evidence that there is depravity as to—as to each." Nevertheless, the court allowed the State leave to file the notice and to reopen proofs. The parties agreed in open court to reconvene on June 15, 2018, for the continued hearing.

¶ 35 On April 17, 2018, the State filed its notice, specifying three nine-month periods: August 27, 2015, through May 27, 2016; July 10, 2016, through April 10, 2017; and April 10, 2017, through April 13, 2018. However, no certificate of service was attached to the pleading, and there was no indication in the record that service was made upon respondent or respondent's counsel.

¶ 36 When the parties reconvened for the continued hearing on June 15, 2018, respondent did not appear personally. His attorney did not object to the lack of service. The trial court proceeded to consider the State's evidence on respondent's alleged failure to make reasonable progress during the noted three nine-month periods.

¶ 37 By not objecting to his lack of notice, respondent forfeited the issue. Our supreme court has ruled that the State's failure to file a notice specifying the applicable nine-month period does not equate to the State's failure to state a cause of action. *In re S.L.*, 2014 IL 115424, ¶ 21. Rather, the lack of notice constitutes a pleading defect, which under section 2-612(c) of the Code of Civil Procedure (735 ILCS 5/2-612(c) (West 2016) (all pleading defects not objected to in the trial court are waived)) was forfeited by respondent when he failed to raise the issue in the trial court at the June 15, 2018, hearing. *S.L.*, 2014 IL 115424, ¶ 27. Thus, we find no due-process violation during termination proceedings on these grounds.

¶ 38 B. Available Services

¶ 39 Respondent next contends services were not available between July 21, 2017, and June 15, 2018, and, therefore, he was hindered from making reasonable progress during that time. At the continued hearing on June 15, 2018, Smith testified DCFS changed the goal from return home to substitute care pending termination on July 21, 2017. According to DCFS's administrative regulations, once the goal has been changed to substitute care, visitation for the parents continues but all other services cease. 89 Ill. Adm. Code § 315.250. Respondent argues "the State focused its attention on the period between July 21, 2017, and June 15, 2018."

¶ 40 It is unclear what timeframe the trial court relied on, as the court did not specify when it found: "the State has met their burden, that neither parent is a fit parent." At the State's request, at the beginning of the first hearing on April 14, 2018, the court took judicial notice of all reports filed in support of the prior orders entered in the case. Therefore, the court had all the information from the entirety of the case to determine respondent's reasonable progress. Without specific findings from the court, our review is made more difficult, but it does not necessarily require reversal. See *In re Richard H.*, 376 Ill. App. 3d 162, 166 (2007) ("The lack of factual findings by the trial court does not impede our ability to review this clear case of parental unfitness."). "Moreover, as respondent does not contest the best-interest portion of the trial court's decision, we conclude the court's order terminating respondent's parental rights was appropriate." *Id.*

¶ 41 C. Denial of Motion to Reconsider and/or Vacate

¶ 42 Finally, respondent contends the trial court erred in denying his motion to reconsider and/or vacate its order of termination when the State's notice of the relied-upon nine-month periods was deficient. Respondent contends all three of the nine-month periods spanned

more than nine months. This issue, like respondent's first issue on appeal, has been forfeited under the same analysis as applied above. Because respondent did not object to the time frames set forth in the State's notice at the hearing on June 15, 2018, he has forfeited review of the claim for purposes of appeal. See *S.L.*, 2014 IL 115424, ¶ 27.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the trial court's judgment.

¶ 45 Affirmed.