

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF DAMION H. & ALEXANDRIA J.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF DAMION H. AND ALEXANDRIA J., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,

V.

TARA H., APPELLANT, AND MARK H., APPELLEE AND CROSS-APPELLANT.

Filed January 5, 2010. No. A-09-656.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH,
Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy F. Shanahan for
appellant.

Bassel El-Kasaby, of Kasaby & Nicholls, for appellee Mark H.

Donald W. Kleine, Douglas County Attorney, and Jennifer Chrystal-Clark for appellee
State of Nebraska.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Tara H. appeals, and Mark H. cross-appeals, from an order of the juvenile court, which order terminated their parental rights to their minor children. Both Tara and Mark challenge the juvenile court's finding that termination of their parental rights is in the children's best interests. In addition, Mark challenges the statutory grounds for termination of his parental rights. Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Tara's and Mark's

parental rights. As such, we affirm the order of the juvenile court terminating Tara's and Mark's parental rights.

II. BACKGROUND

These proceedings involve two children: Alexandria J., born in December 1992, and Damion H. (also referred to as Damien in the record), born in September 1996. Tara is the biological mother of both children. Mark is the biological father of Damion and the stepfather of Alexandria. Alexandria's biological father is not a party to this appeal, and thus, his participation in this case will not be discussed further.

On May 7, 2007, the children were removed from Tara and Mark's home after school officials observed multiple bruises on Damion and Damion reported that Mark had beat him with his hands and a plastic hanger. The State filed a petition with the juvenile court, alleging that each of the children was within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006).

The petitions alleged that the children were within the meaning of § 43-247(3)(a) due to Mark's subjecting Damion to "inappropriate and excessive physical contact" and Tara's taking "insufficient steps to protect Damion." The juvenile court entered an order placing the children in the immediate custody of the Department of Health and Human Services (the Department) and indicated that placement of the children was not to include Mark's or Tara's home. The children have remained in the custody of the Department in an out-of-home placement since the entry of that order on May 7, 2007.

On October 2, 2007, an adjudication hearing was held. At the hearing, Mark admitted to the portions of the petition which alleged that he had subjected Damion to inappropriate and excessive physical contact and Tara admitted to the portions of the petition which alleged that she had failed to protect Damion. As a result of the parties' admissions, the children were adjudicated pursuant to § 43-247(3)(a).

On January 30, 2008, a disposition and permanency planning hearing was held. At the hearing, the juvenile court ordered Tara and Mark to participate in a rehabilitation plan. As a part of that plan, Tara was ordered to (1) participate in therapeutic visits with the children; (2) participate in individual therapy; (3) continue to take all prescribed medications; (4) attend Codependence Anonymous and Al-Anon meetings; (5) participate in couple's therapy with Mark; and (6) obtain and maintain a stable, legal source of income. In addition, Mark was ordered to (1) have no contact with Alexandria and therapeutic visits with Damion; (2) participate in couple's therapy with Tara; (3) submit to random drug screens at the request of the case manager; (4) participate in the community support program with Omaha Campus for Hope; (5) attend Alcoholics Anonymous meetings at least three times per week; and (6) obtain and maintain a stable source of income.

On August 12, 2008, the State filed a motion for termination of Tara's and Mark's parental rights. The State alleged that termination of the parties' parental rights was warranted pursuant to Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2006), because Tara and Mark had substantially and continuously or repeatedly neglected and refused to give the minor children the necessary parental care and protection; § 43-292(6) because reasonable efforts to preserve and reunify the family failed to correct the conditions that led to the determination that the children

were within the meaning of § 43-247(3)(a); and § 43-292(7) because the children had been in an out-of-home placement for 15 or more months of the most recent 22 months. In addition, the State alleged that termination of Tara's and Mark's parental rights was in the best interests of the children.

On November 14, 2008, a hearing was held on the State's motion for termination of parental rights. The hearing continued on November 20 and December 17, 2008, and on January 27 and May 1, 2009. The hearing concluded on May 22. While we have reviewed the evidence presented at the lengthy hearing in its entirety, we do not set forth the specifics of the voluminous testimony and exhibits, other than to indicate that the majority of the evidence presented at the hearing revealed that Mark has a chronic and ongoing alcohol problem that hinders his ability to adequately and appropriately parent and that Tara insists on continuing her relationship with Mark despite his failure to obtain sobriety and to the detriment of her children. We will set forth more specific facts as presented at the hearing as necessary in our analysis below.

At the conclusion of the termination hearing, the juvenile court found that the State proved by clear and convincing evidence that grounds for termination of Tara's and Mark's parental rights existed under Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 2008). The court also found that it would be in the children's best interests to terminate Tara's and Mark's parental rights. The court then entered an order terminating the parties' parental rights.

Tara appeals, and Mark cross-appeals here.

III. ASSIGNMENTS OF ERROR

On appeal, Tara alleges that the juvenile court erred in finding that termination of her parental rights was in the children's best interests.

On cross-appeal, Mark alleges, restated and consolidated, that the juvenile court erred in (1) finding that the State proved the statutory factors for termination of his parental rights and (2) finding that termination of his parental rights was in Damion's best interests.

IV. ANALYSIS

1. STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests. See *In re Interest of Jagger L.*, *supra*. The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven. *Id.*

2. TARA'S APPEAL

Tara assigns as error only the juvenile court's finding that termination of her parental rights was in her children's best interests. Tara does not challenge the statutory basis for termination of her parental rights. As such, she does not challenge the juvenile court's findings that she had substantially and continuously or repeatedly neglected the children and refused to give the children necessary parental care and protection, pursuant to § 43-292(2); that following a determination of each of the children as a child described in § 43-247(3)(a), reasonable efforts to preserve and reunify the family under the direction of the court failed to correct the conditions leading to that determination, pursuant to § 43-292(6); or that the children have been in an out-of-home placement for 15 or more months of the most recent 22 months, pursuant to § 43-292(7).

The sole issue raised in Tara's appeal is whether the State adduced sufficient evidence to demonstrate that termination of her parental rights was in the best interests of the children. Tara contends that during the pendency of the proceedings, she "demonstrate[d] improvement . . . as a parent" and complied with the court's orders. See brief for appellant at 14. Tara contends that because there was evidence of her improvement and compliance, the juvenile court "did not have sufficient evidence to find that termination of [her] parental rights is in the best interest of the minor children." Brief for appellant at 17. Contrary to Tara's assertions in her appellate brief, we find that the evidence presented at the termination hearing demonstrated that she did not make sufficient progress toward reunification with her children. As such, we affirm the order of the juvenile court which found that terminating Tara's parental rights is in the children's best interests.

The Nebraska Supreme Court has stated, "[W]here a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights." *In re Interest of Joshua M. et al.*, 251 Neb. 614, 636, 558 N.W.2d 548, 563 (1997). The court has further recognized that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.*

In this case, approximately 15 months passed from the time that Alexandria and Damion were removed from Tara and Mark's home in May 2007 and the time that the State filed its motion to terminate parental rights in August 2008. An additional 9 months passed from the time the motion was filed to the time the termination hearing concluded in May 2009. In sum, the children had been in an out-of-home placement for 24 months at the time of the conclusion of the termination hearing. During these 24 months, Tara continued to have a relationship with Mark even though he did not stop drinking, made only minimal progress in dealing with her codependency issues, and failed to demonstrate that she could adequately care and protect her children.

The children were adjudicated as children within the meaning of § 43-247(3)(a) in part due to Tara's failure to protect Damion from Mark's physical abuse. Evidence presented at the termination hearing revealed that Tara regularly failed to protect the children from Mark after he had been drinking, failed to put the children's needs ahead of Mark's needs, and failed to understand the impact of her behavior on the children.

In July 2007, Tara submitted to a psychological evaluation. At that evaluation, she was diagnosed as suffering from a codependency problem with Mark because she enabled Mark to continue to drink and lacked insight into the family's problems. It was recommended that Tara submit to individual therapy, couple's therapy, and Codependence Anonymous meetings.

Beginning in June 2007, Tara attended individual therapy on a regular basis. At the termination hearing, her therapist, Cynthia McCullough, testified that after almost 2 years of treatment, Tara had made "some improvement," but that she still enables Mark. McCullough testified that Tara has no intention of separating herself from Mark and refuses to put a timeframe on how long she is willing to wait for him to obtain sobriety.

Tara also attended couple's therapy with Mark. However, because Mark continued to drink on a regular basis, they did not make any progress in addressing their relationship issues.

There was some evidence that Tara did attend Codependence Anonymous meetings; however, she failed to provide consistent proof of her attendance, so it is not clear how often she attended the meetings. Additionally, Tara told her caseworker that she did not think that the meetings were that helpful and that she did not want to attend as much anymore.

Tara also attended some therapy sessions with Alexandria; however, Tara's involvement with Alexandria's therapy ended because Tara blamed Alexandria for the family's problems, Tara discussed Mark at the sessions despite Alexandria's repeated requests to not discuss him, and Tara was unable and unwilling to listen to Alexandria or to put Alexandria above Mark. Alexandria's therapist indicated, "Tara does not demonstrate . . . an ability to focus on the needs and wishes of her daughter She chose Mark first. She always put him before her daughter." As a result of these problems, Tara's visitation with Alexandria was indefinitely suspended.

Tara secretly brought Mark to visitations between her and the children at a time when he was ordered not to have contact with either Alexandria or Damion. Tara would tell the children that Mark was waiting for them in the bedroom and wanted to see them.

Tara remained a part of Mark's life despite his failure to obtain or maintain sobriety. Mark testified at the termination hearing that he and Tara spent a great deal of time together going out to dinner, shopping, and visiting Tara's relatives.

Both of the family's caseworkers, Cristen White and Annie Driver, testified that it would be in the children's best interests to terminate Tara's parental rights. White based her opinion on Tara's continued support and alignment with Mark, her failure to put her children's needs ahead of Mark's needs, and her failure to understand that as long as Mark is drinking he is a risk to her children. Driver based her opinion on the lack of progress Tara has made and the length of time the children have been in an out-of-home placement.

We agree with the opinions of the family's caseworkers. Despite the efforts that have been made to help Tara overcome her codependency problems and to improve her parenting skills, very little improvement has been made. Tara has chosen to continue her relationship with Mark although he has not stopped drinking and although Mark has shown that he is a danger to the children as long as he chooses to drink. Essentially, little has changed in Tara's life that would warrant returning the children to her home. The children would be returned to the same, dangerous environment.

Because Tara has chosen to continue her relationship with Mark, despite the danger he presents to the children, and because she has failed to make significant progress toward

reunification during the 24 months the case has been pending, we affirm the order of the juvenile court which found that termination of her parental rights is in the children's best interests.

3. MARK'S CROSS-APPEAL

In his cross-appeal, Mark challenges both the statutory basis for termination of his parental rights and the juvenile court's finding that termination of his parental rights was in Damion's best interests. We first address Mark's assertions concerning the statutory basis for termination.

(a) Statutory Basis for Termination

Mark asserts that the juvenile court erred in sustaining the motion to terminate his parental rights pursuant to § 43-292(2) and (6). Mark does not assign as error the juvenile court's determination that termination of his parental rights was warranted pursuant to § 43-247(7). Because we find that the evidence clearly and convincingly demonstrates that Damion was in an out-of-home placement for at least 15 of the most recent 22 months, pursuant to § 43-292(7), we need not specifically address whether or not the State met its burden under § 43-292(2) or (6).

Termination of parental rights is warranted whenever one or more of the statutory grounds provided in § 43-292 is established. If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). This section operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. *In re Interest of Aaron D.*, *supra*.

In this case, the State alleged, and the court found, that termination of Mark's parental rights was warranted pursuant to § 43-292(2), (6), and (7). At the hearing, there was uncontradicted evidence which demonstrated that approximately 15 months passed from the time that Damion was removed from Tara and Mark's home in May 2007 and the time that the State filed its motion to terminate parental rights in August 2008. An additional 9 months passed from the time the motion was filed to the time the termination hearing concluded in May 2009. In sum, Damion had been in an out-of-home placement for 24 months at the time the termination hearing concluded. As such, there is no dispute that Damion was in an out-of-home placement for 15 or more months of the most recent 22 months as § 43-292(7) requires.

There is clear and convincing evidence that termination of Mark's parental rights was appropriate pursuant to § 43-292(7). In light of this fact, we need not, and do not, further address the sufficiency of the evidence to demonstrate that termination was also appropriate pursuant to § 43-292(2) or (6). Mark's assignment of error relating to the sufficiency of the statutory authority to support termination is without merit.

(b) Best Interests

In the previous section, we found that termination of Mark's parental rights was appropriate pursuant to § 43-292(7). As a result, we declined to address the sufficiency of the evidence demonstrating that termination was also appropriate pursuant to 43-292(2) or (6). We, therefore, treat our discussion of whether terminating Mark's parental rights is in Damion's best interests as though § 43-292(7) is the only statutory basis for termination.

In cases where termination of parental rights is based solely on § 43-292(7), the Nebraska Supreme Court has held that appellate courts must be particularly diligent in their de novo review of whether termination of parental rights is, in fact, in the child's best interests. *In re Interest of Aaron D., supra*. In such a situation, because the statutory ground for termination does not require proof of such matters as abandonment, neglect, unfitness, or abuse, as the other statutory grounds do, proof that termination of parental rights is in the best interests of the child will require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as those enumerated in the other subsections of § 43-292. *In re Interest of Aaron D., supra*.

Mark argues that termination of his parental rights is not in Damion's best interests because his parenting skills have "greatly improved"; because with continued therapy, he will continue to live a "clean and sober life"; and because he has a loving relationship with Damion. Contrary to Mark's assertions, however, the record reveals that Mark actually made very little progress during the pendency of the juvenile court proceedings. Mark continues to have a serious alcohol problem which hinders his ability to actively participate in any sort of therapy or to work on his parenting skills. Essentially, the evidence reveals that very little has changed in Mark's life since the time that Damion was removed from Mark's home.

At the outset of this case, Mark suffered from a chronic and ongoing problem with alcohol. Mark's alcohol problem affected his ability to parent. The record indicates that when Mark subjected Damion to "inappropriate and excessive physical contact" by hitting Damion with his hands and with a plastic hanger in May 2007, alcohol was a factor. In addition, there is evidence in the record which suggests that Mark has acted inappropriately with his stepdaughter, Alexandria, after he has been drinking.

Throughout the duration of these proceedings, Mark continued to struggle with his alcohol problem, despite the services provided to him by the Department. In November 2007, Mark submitted to a psychological examination, where he was diagnosed as suffering from alcoholism. It was recommended that he participate in inpatient alcohol treatment, individual therapy, and Alcoholics Anonymous meetings.

Mark did participate in some inpatient treatment; however, he failed to participate in the required aftercare program after his release. Mark stated that he no longer needed this type of treatment.

Mark did participate in individual therapy; however, his progress was minimal. Mark's initial therapist, Linda Stancil Dowden, met with Mark from March to May 2008. During this time, Mark did not take responsibility for his behaviors and came to sessions smelling of alcohol. When confronted about his drinking, Mark admitted that he was drinking and told Dowden that

he wanted to keep that information from Tara. Subsequently, Mark terminated his sessions with Dowden.

Mark's second therapist, Mark Miller, testified that Mark made "little progress" in therapy from May to December 2008. Mark admitted to Miller that he continued to drink alcohol and refused to look into inpatient treatment programs. Instead, Mark utilized medication to curb his cravings for alcohol. Miller testified that Mark continued to drink despite this medication. In fact, Miller testified that Mark experienced only a few days of sobriety at a time. Miller also testified that because Mark continued to drink, it was difficult to pursue any other therapeutic goals.

Mark did attend some Alcoholics Anonymous meetings; however, he failed to provide consistent documentation of his attendance. As such, it is impossible to know exactly how often he was attending the meetings.

Mark submitted to regular urinalysis testing throughout the pendency of the proceedings. Mark tested positive for alcohol on every test except for three. Beginning in April 2008, Mark had to submit to a Breathalyzer test prior to his visitations with Damion because he came to one visitation intoxicated. Mark was angry about this requirement, but he did submit to Breathalyzer testing on a regular basis. On June 12, 2008, the Breathalyzer test was positive. Mark reported to his caseworkers that he continued to drink regularly.

Taken as a whole, this evidence reveals that Mark continues to struggle with his alcohol problem. There is no evidence of any substantial changes in Mark's life since Damion was removed from Mark's home in May 2007. The family's current caseworker, Driver, testified that there are no other services that can be offered to Mark to help him obtain reunification with Damion. Both Driver and the family's previous caseworker, White, testified that it would be in Damion's best interests to terminate Mark's parental rights due to the length of time that this case has been pending and due to Mark's inability to rehabilitate himself. We agree. While we recognize that Damion and Mark have a relationship and a bond, we also recognize that Damion deserves permanency in his life. He cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. See *In re Interest of Joshua M.*, *supra*.

Because Mark has not been able to obtain or maintain a sober lifestyle, we affirm the order of the juvenile court which found that it is in Damion's best interests to terminate Mark's parental rights.

V. CONCLUSION

Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Tara's and Mark's parental rights. As such, we affirm the order of the juvenile court terminating their parental rights to their minor children.

AFFIRMED.