

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Izabella W.,)
A child under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Jose C.,)
)
Appellant.)

No. A-14-0208.

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

OCT 03 2014

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

MOORE, Chief Judge, and IRWIN and PIRTLE, Judges.

MOORE, Chief Judge.

INTRODUCTION

Jose C. appeals from the order of the Madison County Court sitting as a juvenile court, which terminated his parental rights to his minor child. Jose asserts that termination was not in his child's best interests but does not challenge the statutory grounds for termination. He also asserts that his due process rights were denied. Because we find that termination of Jose's parental rights was in Izabella's best interests and that Jose was not denied his due process rights, we affirm.

BACKGROUND

Jose is the father of Izabella W., born in April 2011. Jose and Izabella's mother, Jenni W., did not reside together from the time of Izabella's birth through the time of the termination



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hearing. Jose has been in jail or incarcerated for much of that time. Jenni, who had physical custody of Izabella from her birth through the time of her removal from Jenni's care in January 2012, relinquished her parental rights to Izabella following the hearing on the State's motion to terminate Jose's parental rights in this case. Because Jenni is not involved in the present appeal, we discuss her only to the extent necessary to resolve the issues raised by Jose's appeal.

On August 25, 2011, Jose was arrested on one charge of first degree sexual assault of a 15-year-old juvenile and one charge of third degree sexual assault of a 10-year-old juvenile, for incidents that allegedly occurred between August 25, 2010 and August 25, 2011. Jose was unable to make bond and remained in jail while these charges were pending. While in jail on these charges, Jose was charged with two counts of conspiracy to tamper with a witness for events allegedly occurring between August 1, 2011 and January 31, 2012.

On January 13, 2011, the State filed a juvenile petition, alleging that Izabella came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the fault or habits of her parents. Specifically, the State alleged that Jenni admitted to law enforcement on January 12 that she recently used methamphetamine and marijuana; that both Jenni and Izabella tested positive for these drugs while Jenni also tested positive

for opiates; that Jenni had a long history of illegal drug use; that a sibling of Izabella had been adjudicated in another case due to Jenni's drug use; and that Jenni subsequently relinquished her parental rights in that case due to her inability to refrain from using drugs. The State also alleged that Jenni's whereabouts were unknown, though she was believed to be staying with friends in a particular location, and that Jose was currently residing in the county jail. The juvenile court granted an ex parte custody order on January 13, placing Izabella in the custody of the Nebraska Department of Health and Human Services. Izabella was placed in foster care and has remained in foster care continuously since that time. The State filed an amended petition on January 19, noting that while Jose was believed to be Izabella's father, no father was named on the birth certificate and paternity had not been established.

On November 23, 2011, the State filed a complaint for establishment of paternity and support in the district court, initiating proceedings against Jose on behalf of Izabella. Jose did not appear for a hearing before the child support referee on January 19, 2012, and the referee granted the State's motion for default judgment after finding that Jose had been personally served on November 23, 2011 and had failed to answer or file any pleading within the time allowed. Jose was ordered to pay child support of \$50 per month beginning on February 1. A child

support payment history record entered into evidence in the juvenile court termination proceedings, shows that income withholding was in place and that as of January 14, 2014, only \$3.78 had been collected from Jose. Genetic testing later confirmed that Jose was Izabella's father.

Jose appeared at the first hearing on the juvenile petition on January 19, 2012 with his court-appointed counsel. Jenni pled no contest to the allegations, and the court entered an order adjudicating Izabella as a child within the meaning of § 43-247(3)(a).

Neither Jose nor his counsel appeared at the March 13, 2012 disposition hearing. At that time, the juvenile court adopted the Department's case plan and court report, which noted that visits had not taken place between Izabella and Jose due to Jose's incarceration and that Jenni did not want Jose to be part of Izabella's life due to his pending sexual abuse charges. The case plan also noted that Jose had been ordered to pay child support for Izabella of \$50 per month, starting on February 2, 2012 and that he was currently in arrears.

Both Jose and his counsel appeared at the first review hearing on September 18, 2012. At that time, the juvenile court adopted the Department's case plan and court report, which included the goal that Jose would actively participate in permanency planning for Izabella by maintaining contact with the

Department caseworker, staying current on his child support obligations, and showing an active interest in juvenile proceedings. The court found reasonable efforts had been made by the State and directed all parties to comply with its terms.

During the pendency of the juvenile court case, the charges against Jose in both criminal cases were tried in the district court for Madison County. In the sexual assault of a child case, Jose pled guilty to one count of first degree sexual assault and one count of third degree sexual assault. On September 28, 2012, the court entered an order sentencing Jose to prison for a term of 20 years for the first degree sexual assault conviction and to a consecutive term of 5 years for the third degree sexual assault conviction. In the other case, Jose was convicted of one count of conspiracy to tamper with a witness, and on September 28, 2012, the court entered an order sentencing him in that case to prison for a term of 20 months to 5 years. The sentence in the witness tampering case was to be served consecutive to the sentence in the sexual assault case. Evidence presented at the termination of parental rights hearing in this case established that Jose's earliest release date from prison is in November 2026, when Izabella will be 15 years old.

On March 21, 2013, a second review was held in the juvenile case, and Jose's counsel appeared at the hearing. The court adopted the Department's current court report and case plan,

which included identical goals for Jose to those found in the previous court report and case plan.

On September 9, 2013, the State filed a motion to terminate Jose's parental rights to Izabella. The State alleged that termination was proper under Neb. Rev. Stat. § 43-292(2), (4), (6), and (7) and that termination was in Izabella's best interests. The State set forth specific allegations with respect to § 43-292(2), (6), and (7), but did not do so with respect to §43-292(4). On September 24, Jose was transported from prison and appeared with his counsel for advisement of his rights and to enter a denial to the allegations. His counsel also appeared at a review hearing/pretrial conference on November 4 and asked the juvenile court to have Jose transported for the joint pretrial conference with respect to both Jose and Jenni scheduled for December 2. The court denied the motion to transport.

At the December 2, 2013 hearing, the State offered and the juvenile court adopted a case plan and court report, which reflected the same goals for Jose as those found in previous plans. The court took judicial notice of the fact that Jose's counsel had requested a transport order so that Jose could be present for the hearing, which request had been denied by the court. Jose's counsel indicated to the court that he would request that Jose be transported from prison for the termination

hearing. The court ordered Jose's counsel to discuss with Jose whether he could appear via video conferencing and to notify the court by January 6.

On February 3, 2014, the juvenile court heard the State's motion to terminate Jose's parental rights. Jose's counsel appeared in person, and Jose appeared via video conference technology. Jose's counsel asserted his prior due process objections to Jose not being present in person. The court overruled the objection. The record reflects that efforts were made throughout the hearing to aid Jose in his ability to see and hear the proceedings. The courtroom was also cleared during the hearing to allow Jose and his counsel to speak privately. We discuss the mechanics of Jose's participation in the hearing in greater detail in the analysis section below. The State presented testimony from Izabella's foster parents, the initial intake and current Department caseworkers, law enforcement personnel, a Foster Care Review Board specialist, the director of the Madison County Victim Witness Unit, and the county jail administrator. The juvenile court also received various documentary exhibits.

Izabella has remained in foster care continuously since being placed in care in January 2012. She is thriving in her foster home and bonded with her foster parents, who are willing to provide permanency for her. The evidence at the hearing

reflects that Jose has only had in-person contact with Izabella on one occasion, when she was a month old, at which time he provided clothes and diapers for her. While Jose was in jail and the sexual assault charges were pending, Jose was not allowed to have visitation with Izabella since she was less than 15 months old and the only visitation allowed by the jail was by telephone intercom and through a glass window. During this time, Jose sent no money or cards and had no other contact with Izabella. Nor did he send anything for Izabella once incarcerated after sentencing. Jose did not provide evidence of his involvement in any programs to improve his parenting or of doing anything to show his interest in Izabella's well-being.

The record reflects that the Department is limited in its ability to provide services to imprisoned parents. The Department is limited by the type and manner of visitation allowed by the prison institution, the programs offered by the institution, the parent's willingness to seek out those programs, and the type of information obtainable from the institution about any programs participated in or completed by the parent. We discuss further details of the evidence as necessary to our resolution of this appeal in the analysis section below.

On February 11, 2014, the juvenile court entered an order terminating Jose's parental rights. The court found that the

State met its burden of proving by clear and convincing evidence statutory grounds for termination pursuant to § 43-292(2), (6) and (7) and that termination of Jose's parental rights was in Izabella's best interests. Jose subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Jose asserts that the juvenile court erred in (1) violating his due process rights by terminating his parental rights without providing a fundamentally fair hearing and (2) finding that the State presented clear and convincing evidence that termination of his parental rights was in Izabella's best interests.

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 Joseph S.*, 288 Neb. 463, 849 N.W.2d 468 (2014). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.*

The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *In re Interest of Joseph S.*, *supra*. In reviewing questions of law, an

appellate court in termination of parental rights proceedings reaches a conclusion independent of the lower court's ruling. *Id.*

ANALYSIS

Due Process.

Jose asserts that the juvenile court erred in violating his due process rights by terminating his parental rights without providing a fundamentally fair hearing. He argues that his rights were denied because he was not given a meaningful opportunity to be heard. Specifically, he argues that he should have been allowed to appear at the termination hearing in person. Jose acknowledges that he was allowed to participate via video conference but argues that he had difficulty hearing the proceedings.

The parent-child relationship is afforded due process protection. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). Consequently, procedural due process is applicable to a proceeding for termination of parental rights. *Id.* Procedural due process requires notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or

statutes; and a hearing before an impartial decisionmaker. *In re Interest of Landon H.*, 287 Neb. 105, 841 N.W.2d 369 (2013).

Parental physical presence is unnecessary for a hearing to terminate parental rights, provided that the parent has been afforded procedural due process for the hearing to terminate parental rights. *In re Davonest D.*, 19 Neb. App. 543, 809 N.W.2d 819 (2012). If a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion. *Id.*

The record reflects that Jose was afforded procedural due process in this case. He was represented by court-appointed counsel throughout the juvenile court proceedings and his counsel was present at the termination hearing. Jose was transported to court on several occasions, including for the advisement of his rights on the motion to terminate in September 2013. He was provided with and took advantage of the opportunity to appear at the termination hearing via video conferencing. Throughout the hearing, the court ensured Jose's participation, by asking him to acknowledge whether he was able to hear and/or see the proceedings. On those occasions when Jose informed the court that he could not see or hear, steps were taken to rectify

the problem. The courtroom was cleared on several occasions so that Jose could confer privately with his attorney and the State's witnesses were made available to Jose's counsel for recall after discussion with Jose. He had access to the exhibits offered prior to the hearing and had the ability to present evidence and cross-examine witnesses through counsel.

It is clear from the record that Jose was afforded procedural due process and thus his physical presence was unnecessary for the hearing to terminate his parental rights. The juvenile court took great care to ensure Jose's ability to participate and did not abuse its discretion in denying his physical attendance at the hearing. This assignment of error is without merit.

Best Interests.

The juvenile court found that the State presented clear and convincing evidence that Jose's parental rights under § 43-292(2), (6), and (7) and that termination was in Izabella's best interests. Jose does not challenge the statutory grounds for termination of his parental rights but asserts that the court erred in finding clear and convincing evidence that termination was in Izabella's best interests. Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is

in the juvenile's best interests. *Wayne G. v. Jacqueline W.*, 288 Neb. 262, 847 N.W.2d 85 (2014). A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013).

In a case involving termination of parental rights, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration. *In re Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). Although incarceration alone cannot be the sole basis for terminating parental rights, it is a factor to be considered. *Id.* Although incarceration itself may be involuntary as far as a parent is concerned, the criminal conduct causing the incarceration is voluntary. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). In termination of parental rights cases, it is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpetrated. *Id.*

As noted above, the circumstances of this case have presented certain challenges. At the time of Izabella's removal from her mother's care, Jose was identified as Izabella's father, but no father was listed on the birth certificate and

paternity had not been formally established. The intake caseworker sent a copy of her initial report to Jose at the county jail along with her contact information, but Jose never contacted her, either by telephone or letter. Visits were not set up between Jose and Izabella at that time because it was against Department policy to bring such a young child to the jail for visitation. The caseworker also testified that telephone visitation through a glass barrier would not have been productive or beneficial given Izabella's young age and her very limited prior contact with Jose. One witness, the director of the county victim witness unit, listened to numerous recordings of Jose's telephone calls and visits while in county jail, which were recorded per jail policy. Jose only referred to Izabella on three occasions and none of these references showed care or concern on Jose's part for Izabella's well-being. The current caseworker spoke with Jose in September 2012, at which time he told her he had only seen Izabella one time, when she was a month old, and had supplied diapers and clothes on that occasion. When genetic testing confirmed that Jose was Izabella's father, the caseworker sent a letter with the results to Jose in prison. The caseworker testified that there were few, if any, services that the Department could provide to Jose given his lengthy incarceration. She requested that he provide her with a list of classes or treatment programs he had taken or

participated in while in prison, but he never provided her with any such information. Jose failed to comply with the goals in the case plans because he did not stay current on his child support obligations and failed to contact the caseworker by letter or telephone. The caseworker acknowledged that Jose would not be able to earn a significant wage in prison, but she testified that Jose did not send even token amounts of money or any letters, pictures, or gifts for Izabella. She did not feel that Jose's interest in Izabella was genuine and testified that termination of Jose's parental rights would be in Izabella's best interests, noting the charges upon which Jose was incarcerated and the length of his incarceration.

We find no error in the court's determination that termination of Jose's parental rights was in Izabella's best interests. Izabella will be at least 15 years old before Jose is released from prison, and the charges upon which he was convicted are of concern. While Jose is limited in his ability to provide for Izabella's needs while he is in prison, he is in that position due to his own voluntary criminal conduct. Jose has not done even the minimal things available to someone in his position to show his care and concern for Izabella. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). The juvenile court did

not err in finding that termination of Jose's parental rights was in Izabella's best interests or in terminating Jose's parental rights.

CONCLUSION

The juvenile court did not deny Jose his due process rights and did not err in finding that termination of Jose's parental rights was in Izabella's best interests and in terminating his parental rights.

AFFIRMED.