

In re Interest of Austin G.

Caselaw No.

No. A-16-947

Filed on

Tuesday, June 13, 2017

SUMMARY: Kayla S., the biological mother of Austin G. , appeals from an order of the Wayne County Court, sitting as a juvenile court, for the termination of her parental rights to Austin.

Austin was born in April 2012. On August 6, 2012, the State filed a petition alleging that Austin came within the meaning of Neb. Rev. Stat. § 43-247(3)(a). The allegations were that Austin lacked proper parental care by reason of the fault or habits of Kayla in that she had left him home alone and unattended for an extended period of time. There was also a motion for temporary custody filed and the court entered an order placing Austin in the temporary care, custody and control of DHHS.

At the adjudication hearing on August 13, 2012, Kayla entered a plea of admission to the allegation in the petition and the court adjudicated Austin pursuant to § 43-247(3)(a). On November 5, 2012 at the disposition hearing, the stated permanency goal was guardianship with Terry G., Austin's paternal grandmother. In December, the court entered an order discharging the Department from its legal custody of Austin and appointed Terry and her husband as Austin's legal guardians.

In May of 2013, Kayla filed a motion for a visitation plan and in August, the court entered an order providing a visitation plan for the parties. This plan granted Kayla supervised visits, every Monday and Friday, for two hours.

In October 2013, Kayla filed a motion to terminate the guardianship. In April 2014, a stipulation was agreed to by the parties allowing the guardianship to continue and it was approved by the court in May.

On May 7, 2015, the GAL for Austin filed a motion to terminate Kayla's parental rights, alleging that statutory grounds existed to terminate under Neb. Rev. Stat. § 43-292(1) through (3) and (6) and that termination was in Austin's best interests.

At the trial, the caseworker that was appointed to Austin testified that she had a difficult time locating Kayla after Austin was removed and when contact was finally made, Kayla did not have a home for Austin to go to. Additionally Kayla did not have the means to support Austin. In December 2012, the caseworker's involvement ceased because the guardianship was established.

Upon review, the court discovered that Kayla was charged with child abuse as a result of leaving Austin home alone and was sentenced to probation in October 2012. Her probation was revoked after she was charged with driving under suspension and sentenced to 23 days in jail. Kayla also testified that she was using methamphetamine between August and November 2012.

As a result of the methamphetamine use, Kayla completed an alcohol and drug evaluation in December 2012, which recommended "intensive outpatient treatment." She participated and completed this treatment in the fall of 2013 and testifies that she has not used alcohol or drugs since November 2012.

Kayla has had numerous housing situations since 2012 that include; homeless shelters, her parents (Kayla's father is a convicted sex offender), her mother-in-law, and a hotel. Since Austin's removal, Kayla has had two additional children and on the last day of trial has stated that she was pregnant. Kayla also has testified that she has held numerous employments with different companies and on the last day of trial, Kayla did not have a job.

Kayla testified that she has been paying child support "here and there." The only payments that have been made have been taken out of her paychecks during times she was working and she has not made any payments on her own. Additionally, Kayla testified that she has not provided anything else for Austin.

The last visit between Kayla and Austin was in August 2014, before Kayla moved to Missouri. Both Kayla and Terry testified that Kayla had Terry's contact information and throughout Kayla's moves, she had access to a telephone. Terry kept record of Kayla's visits on calendars which indicated that Kayla had no visits with Austin between January and April 2013. Between September 2012 and February 2015 there were 251 visits scheduled and Kayla attended 108 of the visits and missed 143 visits. Terry further testified that there has been no contact between Austin and Kayla since August 2014.

Kayla testified that she did not have many visits with Austin between June and August 2014 because Terry's house was destroyed by a tornado and therefore Terry could not meet for visits. Kayla also testified that there were numerous occasions that she would contact Terry and not receive a response.

Terry testified that after the tornado hit in June 2014, she offered Kayla the Monday and Friday visits at an alternative location. She also testified that she did not receive any voice message or texts from Kayla on her telephone from Kayla in 2015.

Kayla argues that the juvenile court erred in finding that there was clear and convincing evidence that statutory grounds existed to terminate her rights and the court erred in finding there was clear and convincing evidence to establish that terminating her parental rights was in Austin's best interests.

To terminate parental rights upon statutory grounds, a court must find clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. § 43-292 (1) requires proof that "the parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition."

"Abandonment is defined as a parent intentionally withholding from a child, without just cause or excuse, the parent's presence, care, protection, maintenance, and the opportunity for the display of parental affection for the child." In re Interest of Justine J. & Sylissa J., 288 Neb. 607, 849 N.W.2d 509 (2014).

Applying that rule to the current facts, the motion to terminate Kayla's parental rights was filed in May, 2015. At the time the motion was filed, Kayla had not had a visit with Austin since August, 2014 and she had no contact with Austin during that time. She also moved out of the

state from August 2014 to March or April 2015 and after moving back to Nebraska, has failed to have contact with Austin. All of these examples indicate an intent to withhold her presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for Austin.

Although Austin was in a guardianship, it does not excuse Kayla's lack of contact. Although the guardian becomes the caretaker of the child, the parent must still retain an interest and relationship with the child. The failure of the parent to have any contact with the child for far longer than the 6 months required by § 43-292 (1), demonstrates the intent to withhold the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.

Because only one statutory ground for termination need be proved in order for parental rights to be terminated and there is clear and convincing evidence to show that Kayla abandoned Austin pursuant to § 43-292 (1), the other statutory grounds do not need to be discussed.

Kayla additionally argues that the juvenile court erred in finding that termination of her parental rights was in Austin's best interests. In addition to proving a statutory ground, the State must show that termination is in the best interests of the child. Because there is a constitutional right for a parent to raise his or her child, to terminate those rights the State must also show that the parent is unfit.

There is a distinction between the current case and most termination cases because Austin is in a guardianship situation and the Department is not involved. Because of this, no Department or family support workers are involved.

Although Kayla relied on *Kenneth C. v. Lacie H.* to support her argument because it is similar to the present case, the court found that the current facts could be distinguished from that case based on where the case is at procedurally.

The court concluded that there was sufficient evidence to make a determination of whether the current circumstances are such that termination of Kayla's parental rights would be in Austin's best interests. Based on Kayla's past actions from the time Austin was initially removed to the time of trial, have demonstrated her unwillingness to be Austin's parent. Kayla has been inconsistent with her scheduled visits.

Austin was removed from Kayla's care when he was less than four months old and during the course of this trial turned four years old. In that time, there has been no relationship that would resemble a parent-child relationship nor a bond between the two.

The court concluded from the evidence that Austin will not suffer any consequences from the termination of the parental relationship with Kayla. Kayla also has demonstrated that she has been and continues to be content with Terry's providing Austin the emotional and physical care he needs. Although Kayla has made improvements to her lifestyle, she still struggles with instability in housing and employment.

Therefore, the court held that there was clear and convincing evidence that Kayla's personal deficiencies have prevented her from performing her reasonable parental obligations to Austin in the past and would likely prevent her from doing so in the future. Additionally, there was clear and convincing evidence that termination of Kayla's parental rights would be in Austin's best interests.

Based upon these conclusions, the county court for Wayne County, sitting as a juvenile court, did not err in terminating Kayla's parental rights to Austin and the court's order is affirmed.
