IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF ASHANTAY H.

IN RE INTEREST OF ASHANTAY H., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,
V.
CHE H., APPELLANT.

Filed October 14, 2008. No. A-08-049.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Affirmed.

Janine F. Ucchino and, on brief, Paula J. Fritz for appellant.

Donald W. Kleine, Douglas County Attorney, Renee L. Mathias, Martin Conboy IV, and Lindsey Grove, Senior Certified Law Student, for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Che H. appeals from an order of the separate juvenile court of Douglas County terminating his parental rights to his daughter Ashantay H. Che challenges both the statutory grounds for termination of his parental rights and the juvenile court's finding that termination of his parental rights is in Ashantay's best interests. For the reasons that follow, we affirm.

BACKGROUND

On May 11, 2005, the State filed a petition alleging that Ashantay, born May 31, 2002, was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) because Che had been in prison since 2003 and therefore unable to provide and care for Ashantay which placed her at risk for harm. The petition also alleged that Ashantay was a child within the

meaning of § 43-247(3)(a) based on allegations made against Ashantay's mother. At the time the petition was filed, Ashantay had been removed from her mother's care. The present appeal does not involve Ashantay's mother.

An adjudication hearing was held, and the juvenile court found that the allegations in the petition against Che were true based on an admission plea by Che, and thus, the court found that Ashantay was a child within the meaning of § 43-247(3)(a).

On August 27, 2007, the State filed a motion for termination of Che's parental rights to Ashantay. The State alleged that Ashantay was a child within the meaning of Neb. Rev. Stat. § 43-292(2) and (7) (Reissue 2004) and that termination of Che's parental rights was in Ashantay's best interests.

On November 19 and December 5, 2007, trial was held on the motion for termination. The evidence showed that Che had been imprisoned since May 2003 and that he was still incarcerated when the petition to adjudicate was filed in May 2005 and when the motion to terminate was filed in 2007. He remained incarcerated at the time of trial. The record does not reveal the specific crime that led to his incarceration. Che had been eligible for parole on October 24, 2007, but was not released on that date. At the time of trial, Che would again be eligible for parole on January 25, 2008.

Jessica Stehlik, case manager since January 2007, opined that termination of Che's parental rights is in Ashantay's best interests. She based her opinion on the fact that Che has been unable to provide for Ashantay financially, physically, or emotionally because he has been incarcerated the majority of Ashantay's life. The trial judge specifically found in his order that Stehlik was a credible witness and that her testimony was reliable and probative. He found that Stehlik provided case oversight as a trained professional, had a smaller case load, and was able to meet more frequently with families due to having a 10-family case load average.

Stehlik testified that Ashantay was removed from her mother's home in May 2005 and that Ashantay has been placed in an out-of-home placement continuously since that time. Ashantay was placed with Che's sister on February 2, 2007.

Stehlik testified that when she became the case manager, Che was on work release in Omaha, which is where Ashantay was placed. She testified that during the time that Che was on work release, he was allowed supervised visits with Ashantay three times per week. Stehlik testified that before Che was on work release, he was incarcerated in Lincoln and was allowed two visits per month with Ashantay. Stehlik testified that Che's work release was revoked in March or April 2007, and he was sent back to corrections in Lincoln. Stehlik testified that after Che's work release was revoked, Che was scheduled to have visits with Ashantay at least once per month. She testified that she made arrangements with Che's sister to transport Ashantay to Lincoln to visit Che and that Che's sister indicated she would take Ashantay for visits every other weekend.

Stehlik testified that when she became the case manager, she was not made aware of any concerns with visitation between Che and Ashantay. Stehlik further testified that while she has been the case manager, she has had no concerns about Che's behavior or appropriateness at visits with Ashantay. She testified that during the time Che was on work release, she recommended to the court that Che's visits transition to semisupervised and then transition to unsupervised. She further recommended that the visits transition to include overnight visits. Stehlik testified that

Ashantay knows Che is her father and that she enjoys seeing him. Che's sister testified that Ashantay likes spending time with Che and talks about him.

Stehlik testified that given Che's incarceration, Che has not been available to parent Ashantay. Stehlik testified that it would be quite some time before Che would be in a position to have Ashantay placed with him and effectively parent her. Stehlik testified that Ashantay could not be placed with Che if he is in fact released in January 2008. Stehlik testified that before she would recommend that Ashantay be reunified with Che, she would need to see how he does out in the community, and he would have to demonstrate that he will not violate the law and that he is able to provide for Ashantay emotionally, physically, and medically. She further testified that Che would have to get a job, obtain housing, and participate in Ashantay's medical appointments. Ashantay has asthma and also has seizures at times, which require frequent doctor appointments.

Following trial, the juvenile court entered an order terminating Che's parental rights to Ashantay, finding that the State proved by clear and convincing evidence that Ashantay was a child within the meaning of § 43-292(2) and (7) and that it would be in Ashantay's best interests to terminate Che's parental rights. The trial court also granted Che's request for ongoing visitation with Ashantay.

ASSIGNMENTS OF ERROR

Che assigns that the juvenile court erred in finding that the State proved by clear and convincing evidence that grounds for termination of his parental rights existed under § 43-292(2) and (7) and in finding that the State proved by clear and convincing evidence that it was in the best interests of Ashantay to terminate his parental rights.

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 juvenile 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. *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.*

ANALYSIS

Statutory Grounds for Termination.

Che first assigns that the juvenile court erred in finding that the State presented clear and convincing evidence to terminate Che's parental rights to Ashantay pursuant to § 43-292(2) and (7). 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., supra.*

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." 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. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

In this case, the State alleged and the juvenile court found that termination of Che's parental rights was warranted pursuant to § 43-292(2) and (7). The record contains uncontradicted evidence that Ashantay was removed from her mother's home in May 2005 and that Ashantay has continuously resided in an out-of-home placement since that time, up to the date of trial. As a result, at the time of the trial on the State's motion for termination in November and December 2007, Ashantay had been in an out-of-home placement for 2½ years. Accordingly, there is no dispute that Ashantay 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 Che's parental rights was appropriate pursuant to § 43-292(7). Thus, we need not address the sufficiency of the evidence demonstrating that termination was also appropriate under § 43-292(2). Che's first assignment of error is without merit.

Best Interests.

Che next assigns that the juvenile court erred in finding that termination of his parental rights was in Ashantay's best interests. In cases where termination of parental rights is based solely on § 43-292(7), 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. *Id.*

At the time of trial in November and December 2007, Che was incarcerated and had been since May 2003. Ashantay was just 1 year old when Che became incarcerated, and she was 5 years old at the time of trial. We recognize that parental incarceration may not be utilized as the sole ground for termination of parental rights. See *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002), citing *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999); *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990); *In re Interest of Ditter*, 212 Neb. 279, 322 N.W.2d 642 (1982); *In re Interest of Wagner and Russell*, 209 Neb. 33, 305 N.W.2d 900 (1981); *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001); and *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996). See, also, *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). However, a parent's incarceration may be considered along with other factors in determining whether parental rights should be terminated. *In re Interest of*

Brettany M. et al., supra, citing *In re Interest of B.A.G., supra*; *In re Interest of Ditter, supra*; *In re Interest of Wagner and Russell, supra*. See, also, *In re Interest of Kalie W., supra*.

Although termination cannot be based solely on the fact that a parent has been incarcerated, courts may consider the attendant circumstances which are occasioned by incarceration. When the aggregate of these circumstances indicates clearly and convincingly that the children's best interests dictate termination of parental rights, such is proper. *In re Interest of Brettany M. et al., supra*.

In *In re Interest of Kalie W.*, 258 Neb. at 50, 601 N.W.2d at 756, the Supreme Court noted and considered the fact that the father's incarceration "ma[de] it nearly impossible for him to provide for any of Kalie's needs." In *In re Interest of B.A.G.*, 235 Neb. at 735, 457 N.W.2d at 297, the Supreme Court noted that the father's actions which resulted in incarceration were "every bit as voluntary as if he had purchased a ticket for a 6-, 7-, or 8-year trek into Siberia" and that the father had just as effectively placed himself in a position where he could not possibly offer his presence, care, love, protection, maintenance, and opportunity for displaying parental affection. In *In re Interest of M.L.B., supra*, the Supreme Court held that the mother's law violations and the resulting period of incarceration had substantially contributed to her daughter's spending most of her life in foster care. In *In re Interest of Azia B., supra*, this court upheld a finding of best interests where the primary factor was that the length of time the father would be incarcerated would prevent him from being able to support his daughter emotionally, psychologically, mentally, and physically and nurture her.

Similarly, in the instant case, Che's incarceration has made it nearly impossible for him to perform his parental obligations and to provide for any of Ashantay's needs. As Stehlik testified, Che has not been able to provide for Ashantay financially, physically, or emotionally as a result of his incarceration. She further testified that as a result, termination of Che's parental rights is in Ashantay's best interests. Che has been unavailable to provide and care for Ashantay for more than 4 years, the majority of Ashantay's life. Ashantay has spent 2½ of those 4 years in foster care. Although Che's incarceration was not voluntary, his illegal actions that put him in prison were voluntary. Thus, it was Che's own actions that placed him in a position where he could not offer Ashantay his presence, care, love, protection, maintenance, and opportunity for displaying parental affection.

At some point during Che's incarceration, he obtained work release in Omaha, during which time he was able to visit with Ashantay three times per week. However, he got his work release revoked, placing him farther away from Ashantay and reducing his visitation with her. Other than the time when Che was on work release, the only contact he had with Ashantay during the 2½ years she has been in out-of-home placement was two supervised visits per month. Because of his incarceration, he has been unable to have significant physical contact and to foster bonding with Ashantay during her very young years. The evidence indicates that Ashantay has bonded with Che's sister and her children. Although the evidence indicates that Che's visits went well and that Ashantay knows Che is her father, he has not been able to provide her with necessary parental care and protection for the 4 years prior to trial. It is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment; such factor is relevant in assessing parental fitness and child welfare. See, *In re Interest of Brettany M., supra*; *In re Interest of Azia B., supra.*

Although Che was scheduled to be released from prison in January 2008, it would be an indeterminate amount of time before Che would be in a position to have Ashantay placed with him. Che would have to show that he can effectively parent Ashantay and provide for her daily needs. Stehlik testified that before she would recommend that Ashantay be placed with Che, Che would have to demonstrate that he could hold a job, find suitable housing, and abide by the law. He would also have to demonstrate that he will attend to Ashantay's medical needs, including Ashantay's medical appointments for her asthma and seizures. He would further have to demonstrate his ability to provide and care for Ashantay's daily needs.

The trial judge's order sums up the situation well:

> With respect to [Che], the father of said child, the Court recognizes that [Che] has received several certificates while incarcerated. Exhibit 35 shows that the Parenting I/Toddlers Certificate was dated May 22, 2006 from the Metropolitan Community College, but the Parenting Now Certificate from Metropolitan Community College was dated May 15, 2006. The Court notes that the Certificate of Completion for [Che] regarding "Healing the Addicted Brain", an alcohol and drug education class, was completed November 17, 2005. [Che's] Certificate of completion of Non-Residential Outpatient Treatment Program was dated April 13, 2006. Unfortunately, while [Che] was enjoying work release, he acted in a way such that work release was revoked and he was reincarcerated due to his own voluntary acts. Therefore, other than the certificates which he completed earlier on, there has been no other therapeutic progress to place [Che] in a position to parent his child. In fact, by his having his work release status revoked, and being incarcerated, [Che's] independent and voluntary acts placed him farther away from his child.
>
> The Court concurs with . . . Stehlik that due to the father's incarceration for the majority of Ashantay's life, there is no emotional relationship with Ashantay which a loving, nurturing caregiver would have with his child. While the Court recognizes that [Che] may be released from incarceration in January, 2008, this child has been in foster care since May 11, 2005 and is in a relative foster/adoptive placement. The Court recognizes that [Che] is the foster/adoptive mother's brother. The Court has no doubt that [Che] will have contact with Ashantay. Given [Che's sister's] testimony, the Court grants [Che's attorney's] request for ongoing visitation for [Che]. However, the Court finds that it is in the best interests of the child that [Che's] parental rights be terminated for the reason that the child has truly bonded with [Che's sister] and it is in Ashantay's best interest that the adoption be completed as soon as possible.

Nebraska jurisprudence holds, generally, that it is in the child's best interests that a final disposition be made without delay. *In re Interest of Brettany M. et al., supra.* Where 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; children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999).

We conclude that Che is unable to rehabilitate himself within a reasonable time. He has been unable to provide and care for Ashantay for the 4 years prior to trial. Although Che was scheduled to be released from prison shortly after trial in this matter, he would not be able to

have Ashantay placed with him for an uncertain amount of time into the future. Thus, Che has substantially and continuously been unable to give Ashantay necessary parental care and protection. At the time of trial, Ashantay had already been in foster care for 2½ years. She should not have to languish in foster care for an additional indeterminate amount of time. We conclude that the evidence before us clearly and convincingly establishes that termination of Che's parental rights is in Ashantay's best interests.

CONCLUSION

After our de novo review of the record, we conclude that the juvenile court did not err in terminating Che's parental rights under § 43-292(7) and in finding that termination of his parental rights is in Ashantay's best interests. Accordingly, the order of the juvenile court is affirmed.

AFFIRMED.

SIEVERS, Judge, dissenting.

While I agree that statutory grounds for termination of Che H.'s parental rights have been proved, I must respectfully disagree with the majority's decision that the State has proved by clear and convincing evidence that the father's parental rights to Ashantay H. should be terminated.

As noted by the majority, our review in a case such as this is de novo on the record and we are required to reach a conclusion independent of the juvenile court's findings. And, although in that process we may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over the other, there simply is no factual dispute whatsoever in this case.

We have a 135-page evidentiary record in which the State sought in one hearing to terminate the parental rights of both the mother and the father, Che. Among any number of conspicuous gaps in the evidence is whether the mother and father are married to each other, and thus, we do not know whether Che was ever a custodial or noncustodial parent. In addition to some court reports, all of which dealt with the mother rather than Che, the State attempted to carry its burden of proof solely by the testimony of Jessica Stehlik, a protection and safety worker who has a bachelor's degree in criminology and worked 3 years for Sarpy County Juvenile Services before being hired by the Department of Health and Human Services (the Department), at which point she had 3 months of training. The record does not tell us what she did in her job for Sarpy County nor anything about her training. The great majority of the testimony, as well as all of the State's exhibits, such as court reports, deals with Ashantay's mother. My estimate is that if all of the testimony regarding the mother and her issues as a parent were removed from the record, we would be left with about 30 pages of testimony dealing with Che. Therefore, while the out-of-home placement basis for termination of Che's parental rights is obviously satisfied, the real question is whether in those roughly 30 pages of evidence there is clear and convincing proof that termination of the parental relationship between Ashantay and Che is in Ashantay's best interests.

Ashantay was born May 31, 2002. Her father has been incarcerated since May 2003, and at the time of this termination hearing on November 19, 2007, he was incarcerated in the

Nebraska State Penitentiary in Lincoln with a scheduled parole date of January 25, 2008. Ashantay has been in an out-of-home placement as a result of being removed from her mother's home in May 2005 up to the time of the hearing. Her placement is with Che's sister, who has three children of her own. Che's sister is a teacher at the Nebraska Children's Home. Conspicuously absent from the record is evidence of why Che is incarcerated, the nature and extent of his criminal record, and why his work release status was revoked in March or April 2007, nor do we know when he was placed on work release or what sort of work he did. We do know that while on work release, Che was located in Omaha, apparently at the Omaha Correctional Center, and he was able to have visitation with Ashantay which he exercised three times per week. After his work release status was terminated, for reasons not in the record, Che was having bimonthly visitations at the penitentiary in Lincoln as a result of the foster mother, his sister, transporting Ashantay there.

The State sought to terminate both parents' parental rights with a motion filed August 27, 2007. There was no evidence of any precipitating event with respect to Che for the filing of the termination motion. At the time of her testimony, Stehlik, the only person other than Che's sister to testify, had been the case manager for 11 months. She testified that she was unaware of any concerns with visitation between Che and Ashantay, that she had no concerns about Che's behavior or the appropriateness of visits with Ashantay, and that she had recommended that Che's visits transition from supervised to semisupervised and then unsupervised to include overnight visitation. Stehlik said that Ashantay knows that Che is her father and enjoys seeing him. Che's sister verified that Ashantay likes spending time with Che and talks about him and that there have not been any problems with visitation either while he was on work release or during his incarceration. Stehlik testified that Che has complied with all court orders concerning Ashantay, as well as all efforts by the Department. In evidence are certificates showing that while serving his sentence, Che has completed courses in Parenting I/Toddlers; Parenting Now; and "Healing the Addicted Brain" (designated as an alcohol and drug education class), as well as the "non residential treatment intensive outpatient program."

Throughout Ashantay's out-of-home placement, the Department's goal has been reunification, apparently until the filing of the motion to terminate--a marked change of direction unexplained in the evidence. Stehlik's testimony was that Che would like to have Ashantay live with him and his fiance upon his release from prison. Stehlik's opinion was that it was in the best interests of Ashantay to terminate Che's parental rights because Che has not been able to provide for Ashantay financially, physically, or emotionally because he has been incarcerated the majority of her life. But that fact did not suddenly come into existence in August 2007 because he has been incarcerated for more than 4 years before the Department filed for termination--during the last 11 months of which he was having regular and frequent visitation. No evidence was introduced concerning Che and Ashantay's relationship before Stehlik became involved.

Stehlik testified she would not recommend reunification with Che upon his release because she would need to see how he does in the community, that he abstained from law violations, and that he is able to provide for Ashantay by doing such things as getting a job, obtaining housing, and participating in her medical appointments. But, on the record before us, unless one so infers from the fact of his incarceration, there is no evidence that is reasonably

predictive of whether he will succeed or fail in these things. Che's sister recounted that Ashantay has had two seizures and has asthma. Few details were provided concerning either condition other than Che's sister's testimony that Ashantay would be due for a regular visit with the doctor in December.

It is beyond dispute that a parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). See, also, *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). Our sole focus is whether termination of Che's parental rights is in Ashantay's best interests, a proposition that the State must establish by clear and convincing evidence, which is the amount of evidence that produces in a trier of fact a firm belief or conviction about the existence of the fact to be proven. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

Obviously, Che's incarceration and perhaps his loss of work release status, even though we do not know the reason for such loss, are the factors which impose, from what this skimpy record tells us, the greatest impediment to Che's being an effective and present parent who supports and nurtures his child. Nonetheless, the law is well established that incarceration standing alone does not furnish a ground for automatic termination of parental rights, but is a fact to be considered. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). As a practical matter, a parent's incarceration will always interfere with, and sometimes, depending upon the circumstances, prevent a meaningful parent/child relationship. But the only evidence, insofar as it informs us, is that there has been a meaningful and positive parent-child relationship, once one looks beyond the fact that Che has been incarcerated. And the record strongly suggests to me that the decision to seek termination is arbitrary and capricious, remembering that the only witness to testify that this should be done recounted nothing but positives about visitation and the parent-child relationship, recounted no failures by Che to do what the court ordered or what the Department wanted, and testified that she was ready to transition visitation to overnight visits. And the termination comes a matter of months before Che was to be paroled--a point in time when he could really prove that he was ready and willing to do what it takes to be a father.

Thus, while Che's incarceration and loss of work release are not favorable facts, I would suggest that our focus ought to be on what the relationship is between father and child as revealed by the evidence and that suppositions and conjecture as to what may or may not happen after Che is released from prison have little, if any, place in our decisionmaking, given this extremely skinny evidentiary record. I might add, because of the paucity of evidence introduced by the State, we know nothing about the quality of Che and Ashantay's relationship before Stehlik became the case manager 11 months prior to the termination hearing. But when Stehlik became involved, Che was seeing his daughter three times a week, following all court orders, and there was no indication whatsoever that the visits were not meaningful, enjoyable, and positive for Ashantay and Che. In fact, the evidence is to the contrary.

There is no evidence about the level of attachment or bonding between daughter and father other than the permissible inferences from the descriptions of the visitations--all of which have to be seen as disfavoring termination. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005), teaches that where termination is under § 43-292(7), appellate courts must be particularly diligent in our de novo review as to whether the termination is in the child's best

interests. The Supreme Court in *In re Interest of Aaron D.* emphasized that in the context of analyzing the juvenile's best interest, the courts must respect a parent's "commanding" interest in the accuracy and justice of the decision to terminate parental rights. I am disturbed by the abject failure of the State to produce evidence to present a more complete "picture" of this man and his child. Without such, I cannot be "clear and convinced" that we are making the right decision, and one that is based on evidence rather that operating from supposition derived from Che's status as a convicted felon--but what "sort" of felon he is, is unknown to us and such clearly can make a difference in such cases. And while his conviction is his voluntary act that removes him in significant ways from his daughter's life, his status is insufficient to carry the State's burden of proof, remembering all of the important facts and considerations which are simply missing from the record.

In re Interest of Aaron D., supra, is a case of import in my assessment of the instant case. There, the Supreme Court said:

> Because the primary consideration in determining whether to terminate parental rights is the best interests of the child, a juvenile court should have at its disposal the information necessary to make the determination regarding the minor child's best interests regardless of whether the information is in reference to a time period before or after the filing of the termination petition. *In re Interest of Andrew M., Jr., & Marceleno M.*, 9 Neb. App. 947, 622 N.W.2d 697 (2001). Yet, the juvenile court in this case, and this court for its de novo review, was not provided with such evidence. Aaron's therapists did not testify. The Department's family support workers, who actually observed Aaron and Lorena [the mother], did not testify, nor did Aaron's foster parents, nor Aaron's teachers. The State seems to have forgotten that the focus of this proceeding is not Lorena, but Aaron, and the State thus did not present evidence directly adduced from many of the people most able to testify as to Aaron's condition, circumstances, and best interests, both before and after the filing of the termination petition. The standard for proving that termination of parental rights is in a juvenile's best interests is clear and convincing evidence, and the evidence in this record is, simply stated, neither clear nor convincing.

In re Interest of Aaron D., 269 Neb. at 263, 691 N.W.2d at 175.

In contrast to *In re Interest of Aaron D.*, the foster mother, Che's sister, did testify in this case, and her testimony about Che and Ashantay's relationship is uniformly positive. I must confess to being stunned that the juvenile court ordered a termination premised, insofar as I can discern, upon Che's status as a felon and the testimony and opinion of a caseworker who had never seen Che and Ashantay together--even for 10 seconds. I would respectfully suggest that the majority's affirmance seems to be premised on the fact that Che has been incarcerated, plus this caseworker's "preconditions" to reunification which might take a "long time." However, we know so little about Che that making a prediction about how he will perform as a father after his release from prison is a shot in the dark, which it should not be. And any prediction of failure necessarily largely ignores the obviously positive evidence of the relationship that he had with his daughter.

I cannot help but express my frustration that the evidence presented to the juvenile court and upon which we must act is substantially focused on Ashantay's mother, leaving huge gaps in

the information that a court should have in order to make a decision about Che's parental rights, remembering that the State's burden of proof is by clear and convincing evidence. Reduced to its essence, what we know about Che and Ashantay is as follows: (1) Che has been in prison roughly 4 out of 5 years of Ashantay's life; (2) in the last year before this trial, he was engaged in a frequent visitation program with her which by all the evidence was positive, appropriate, and enjoyed by the child; and (3) a caseworker who has never seen the two of them together thinks that parental rights should be terminated because he has been incarcerated and a reunification plan after his release from prison might take some time.

In my view, if this court were to affirm this termination, we would, in effect, be lowering the State's burden of proof to something materially less than clear and convincing evidence. Additionally, we would be sanctioning what can only be realistically described as an inadequate evidentiary presentation by the State. This is not to say that I am so naïve as to think that Che is a model father, but, rather, that we are duty bound to hold the State to the burden of proof which the law imposes, and in my view, the State simply has not carried its burden of proof. For these reasons, I would reverse the termination of the parental relationship between Ashantay and Che.