

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF ELVIS T.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
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IN RE INTEREST OF ELVIS T., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

TERRY T., APPELLANT.

Filed November 4, 2008. No. A-08-595.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge.  
Affirmed.

Dana M. London for appellant.

Gary Lacey, Lancaster County Attorney, Barbara Armstead, and Nicholas E. Freeman,  
Senior Certified Law Student, for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument. Terry T. appeals from an order terminating his parental rights to Elvis T. In his appeal, Terry 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 the best interest of Elvis. For the reasons set forth below, we affirm.

II. BACKGROUND

Elvis was born on May 3, 2006 to Terry and Angela B. Almost immediately after Elvis' birth, Elvis was removed from Terry and Angela's care. Initially, Elvis' removal was warranted

as a result of Angela's prior involvement with the Department of Health and Human Services (DHHS). Angela ultimately relinquished her parental rights to Elvis.

Subsequent to removing Elvis from Terry and Angela's care, the State filed a petition in juvenile court alleging that Elvis was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006) because he was without proper support through no fault of his father, Terry, in that

Terry [T.] has been diagnosed with the following conditions: Intermittent Explosive Disorder and Suspected Borderline to Mild Mental Retardation. Due to those diagnosed conditions, Terry [T.] is in need of treatment and therapy in order to be capable of caring for said child on a full-time basis. This above described situation exposes this child to a risk of harm.

Ultimately, Terry entered a plea of no contest to the allegations in the petition. As a result of this plea, Elvis was adjudicated pursuant to § 43-247(3)(a). The court ordered that Elvis remain in an out-of-home placement.

In the months following the initial adjudication hearing, multiple dispositional hearings were held. At each of these hearings, the juvenile court ordered the custody of Elvis to remain with DHHS in an out-of-home placement. The court also adopted the case plans of DHHS and ordered Terry to comply with the various terms and conditions established in those plans. Most notably, the various case plans required Terry to (1) participate in supervised visitation with Elvis, (2) participate in individual therapy, (3) complete a vocational rehabilitation assessment and participate in the recommended services, and (4) complete a parenting class.

On November 13, 2007, the State filed a motion to terminate Terry's parental rights to Elvis. In the motion, the State alleged that Elvis was a child within the meaning of Neb. Rev. Stat. § 43-292(5), (6), and (7) (Reissue 2004). The State also alleged that it would be in Elvis' best interests if Terry's parental rights were terminated.

On April 23 and 24, 2008, a hearing was held on the State's motion for termination of parental rights. While we have reviewed the lengthy bill of exceptions in its entirety, we do not detail the extensive evidence offered. However, we do note that a majority of the evidence presented at the hearing revealed that even though Terry seemed to comply with most of the requirements of the court-ordered rehabilitation plan to the extent he was capable of doing so and even though Terry loves Elvis very much and wants to parent him, Terry is incapable of independently parenting Elvis. We will set forth the 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 Elvis was within the meaning of § 43-292(5), (6), and (7). The court also found that it would be in Elvis' best interests if Terry's parental rights were terminated. In its findings, the court stated:

As the evidence shows, the minor child has been placed outside of his parental home since birth. During the two years that passed from that date until the date of the termination trial, [Terry] has been provided hands on parenting education with a family support worker, parenting classes, individual counseling, vocational rehabilitation services, and various assessments and evaluations. It is clear that, despite those efforts and attempts to assist [Terry] in putting himself in a position that he can obtain custody of

this [sic] son and allow him to parent independently of the Court and DHHS, he was never able to do so and there is no reason to believe he will be able to do so in the future. The court then entered an order terminating Terry's parental rights to Elvis. Terry appeals from this order here.

### III. ASSIGNMENTS OF ERROR

Terry challenges the juvenile court's finding that the State proved the statutory factors for termination of his parental rights under § 43-292(5), (6) and (7) and the juvenile court's finding that termination of his parental rights was in Elvis' 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 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. *Id.* 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. STATUTORY GROUNDS FOR TERMINATION

Terry's first assignment of error is that the juvenile court erred in finding that the State presented clear and convincing evidence to prove the statutory grounds for termination of his parental rights. Specifically, he alleges that the juvenile court erred in sustaining the motion to terminate his parental rights pursuant to § 43-292(5), (6), and (7).

The juvenile court found that the State had proved by clear and convincing evidence that Elvis was within the meaning of § 43-292(5), (6), and (7). Upon our de novo review, we find that the evidence clearly and convincingly demonstrates that Elvis was in an out-of-home placement for at least 15 of the most recent 22 months, pursuant to § 43-292(7). As such, we need not specifically address whether or not the State met its burden under § 43-292(5) or (6).

Termination of parental rights is warranted whenever one or more of the statutory grounds provided in § 43-292 is established. 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 Terry's parental rights was warranted pursuant to § 43-292(5), (6), and (7). The record contains uncontradicted evidence that Elvis was removed from Terry's care immediately after Elvis' birth

in May 2006 and that he continuously resided in an out-of-home placement throughout the pendency of the proceedings. As a result, at the time of the hearing on the State's motion to terminate Terry's parental rights in April 2008, Elvis had been in an out-of-home placement for almost 2 years. Accordingly, there is no dispute that Elvis was in an out-of-home placement for 15 or more of the most recent 22 months as § 43-292(7) requires.

There is clear and convincing evidence to prove that grounds existed to terminate Terry's parental rights 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 grounds to terminate Terry's parental rights as to Elvis because termination was also appropriate pursuant to § 43-292(5) and (6). Terry's assignment of error relating to the sufficiency of the statutory authority to support termination is without merit.

### 3. BEST INTERESTS DETERMINATION

Terry also argues that the juvenile court erred in finding clear and convincing evidence that termination of his parental rights is in Elvis' best interests. Upon our de novo review of the record, we affirm the decision of the juvenile court.

In the previous section, we found sufficient evidence to terminate Terry's parental rights 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(5) or (6). We, therefore, treat our discussion of whether terminating Terry's parental rights is in Elvis' 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*.

When 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.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Furthermore, the Nebraska Supreme Court has previously recognized that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.*

In this case, the evidence shows that despite almost 2 years of efforts by DHHS and the juvenile court, Terry has simply been unable to rehabilitate himself. The majority of evidence from the termination hearing reveals that even though Terry loves Elvis very much, he is incapable of independently parenting Elvis.

Elvis was initially adjudicated as a child within the meaning of § 43-247(3)(a) due to concerns over Terry's mental health and intellectual capacity. As a result of these concerns, DHHS provided Terry with access to mental health professionals. Throughout the duration of

this case, Terry participated in multiple mental health assessments and individual therapy sessions.

Terry's mental health evaluations revealed that his intellectual capacity falls in the "borderline range," which "indicates a general difficulty in learning and applying information, as well as a need for much more time than the average individual to process information." The testimony and reports of multiple mental health professions revealed that, as a result of Terry's cognitive functioning and IQ level, Terry is not capable of independently parenting Elvis.

A parental competency evaluation, conducted by Dr. Sean Samuels, revealed that Terry demonstrated the ability to apply fairly simplistic problem solving techniques so he could provide for his child's care on a fairly simplistic level, but as his child grows, and his needs become more complex, the difficulty with abstract reasoning is going to allure [sic] and become greater and greater in day to day functioning with his son.

Based on Dr. Samuels evaluation of Terry, he opined that there is not a great probability that Terry will be able to independently parent Elvis in the near future.

In order to address Terry's struggles with his intellectual functioning and its effect on his parenting abilities, Terry began attending individual therapy with Kelli Czarnick in March 2007. At that time, Czarnick identified three goals for Terry: (1) increasing problem-solving skills, (2) increasing judgment skills, and (3) improving positive parenting skills. Terry attended six therapeutic sessions. In addition to those six sessions, other sessions were scheduled, but Terry canceled some sessions, rescheduled some sessions, and failed to show for some sessions. At the termination hearing, Czarnick testified that Terry's progress in therapy was "pretty minimal." She testified that Terry was able to repeat what she said to him, but she questioned his ability to internalize the lessons. In addition, she testified that Terry often became distracted and talked about other topics, including relationship and family issues. Czarnick testified that she recommended the therapeutic sessions end in June 2007 because she did not believe Terry was benefiting from this type of service.

Czarnick also testified that, based on her interactions with Terry, she did not believe he had a realistic expectation of what parenting entails. Terry told her at one point that all Elvis really needs is love. Czarnick testified that Terry was not able to verbalize a realistic parenting plan, although Terry was clearly motivated to gain custody of Elvis and did seem to genuinely love Elvis.

Pursuant to the recommendations of the mental health professionals who met with Terry, DHHS provided Terry with services designed to improve his parenting skills, including parenting classes, vocational rehabilitation, and supervised visitation with Elvis.

DHHS enrolled Terry in a parenting class and spoke to a family specialist regarding Terry's capacity to learn in a classroom setting. The specialist agreed to schedule one-on-one sessions with Terry to offer him additional help with the class material. Terry only attended four of the eight scheduled classes and failed to attend any additional sessions with the family specialist. When Terry did attend the classes, his participation was described as "passive." He fell asleep during class and otherwise struggled to follow along or follow directions. At the termination of parental rights hearing, the evidence revealed that Terry eventually completed a parenting class on March 3, 2008, after multiple attempts.

DHHS also provided Terry with vocational rehabilitation services. Evidence in the record reveals that Terry was employed at various times throughout the duration of this case. However, the evidence also reveals that Terry's participation with vocational rehabilitation services was "sporadic" and that he failed to show he could maintain stable employment for any significant period of time.

DHHS also provided Terry with supervised visitations with Elvis. A family support worker was present at every visitation session to assist Terry in taking care of Elvis and to teach Terry basic parenting skills. Terry attended a majority of his scheduled visits with Elvis. He played well with Elvis, changed Elvis' diapers, and fed Elvis a snack. However, Terry struggled to keep his focus on Elvis during the visitations. He would occasionally have to be prompted to change Elvis' diaper, and he would often become distracted with toys or with talking to the family support worker about his other children or other life problems. At the termination hearing, the family support worker, Linda Kistler, estimated that she would have to redirect Terry two or three times each visit. She testified that on one occasion, she had to alert Terry's attention to Elvis because Elvis was playing with an electrical cord. In another instance, Kistler told Terry he needed to pay attention to Elvis after Terry continued to play with blocks while Elvis climbed up on a chair unattended. Kistler testified that, based on her interactions with Terry and Elvis, she did not think Terry was capable of providing for Elvis' needs or focusing on Elvis for any length of time without some supervision.

Kistler also testified that Terry struggled to learn and apply basic parenting skills. Kistler explained that even though Terry would pay attention to her instructions and fully cooperate with her, he could not apply what he learned about child development and parenting to his interactions with Elvis. Kistler testified that she did not believe that Terry understood Elvis' abilities, skills, or learning milestones as he progressed in his development. Terry often had unrealistic expectations of Elvis and did not know how to relate to Elvis in an age appropriate manner. For example, Terry did not understand that by reading to Elvis everyday, he would help to improve Elvis' linguistic ability. Kistler testified that as Elvis got older and his actions became more complex, she feared that Terry understood Elvis' development even less.

Despite the services and efforts of DHHS and despite Terry's participation in individual therapy, vocational rehabilitation, parenting classes, and supervised visitation, Terry did not make significant improvements in his ability to independently parent Elvis. During the 2 years the case was pending in juvenile court, Terry was never able to progress past the point of fully supervised visits with the hands-on assistance of a family support worker. At the termination hearing, DHHS caseworker Janna Conroy testified that the Department moves away from "one-hundred percent" supervised visits only when there are no concerns for the safety of the child and when the skills being learned during the visits are being adequately implemented.

Conroy testified that she never felt comfortable recommending anything other than supervised visitation between Terry and Elvis because Terry did not make any progress. He constantly needed redirection and assistance during his visits, and he failed to maintain constant attention on Elvis. Conroy also testified that she did not believe that there were any other services which could provide Terry further assistance in addressing his parenting limitations.

Similarly, Dr. Samuels testified that he does not believe that Terry can independently parent Elvis. Terry cannot apply newly learned information in a day-to-day situation, and Terry

cannot appropriately respond to Elvis as Elvis grows and develops. Dr. Samuels testified that he does not believe that Terry's parenting abilities will improve over time. In addition, he stated that more visitation time between Elvis and Terry would not change Terry's cognitive functioning nor would it improve his ability to parent.

The fact that Terry has persisted for approximately 2 years in trying to learn the necessary skills to care for Elvis makes a determination that he is unfit very difficult. However, the evidence is clear and convincing that he does not have the intellectual capacity to independently parent Elvis, in spite of his admirable efforts. "When a natural parent suffers from a mental deficiency and cannot be rehabilitated within a reasonable period of time, the best interests of the child require that a final disposition be made without delay." *In re Marcus W.*, 11 Neb. App. 313, 649 N.W.2d 899 (2002). We therefore conclude that it is in Elvis' best interests to terminate Terry's parental rights. The judgment of the juvenile court is affirmed.

#### V. CONCLUSION

Upon our de novo review of the record, we find sufficient evidence to support the juvenile court's order terminating Terry's parental rights. The juvenile court order is affirmed.

AFFIRMED.