IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF ERIKA J. & TYLER J.

IN RE INTEREST OF ERIKA J. & TYLER J., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,
V.
EDWARD J., APPELLANT, AND TONYA J., APPELLEE AND CROSS-APPELLANT.

Filed July 12, 2011. Nos. A-10-1038, A-10-1039.

Appeals from the County Court for Scotts Bluff County: JAMES M. WORDEN, Judge. Affirmed.

Todd D. Morten, of Madelung Law Office, for appellant.

Andrea M. Longoria, Deputy Scotts Bluff County Attorney, for appellee State of Nebraska.

Richard L. DeForge, Deputy Scotts Bluff County Public Defender, for appellee Tonya J.

Jason A. Ossian, of Douglas, Kelly, Ostdiek & Ossian, guardian ad litem.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

I. INTRODUCTION

Edward J. appeals the order of the Scotts Bluff County Court sitting as the juvenile court terminating his parental rights to Erika J. and Tyler J.; Tonya J. has similarly cross-appealed that same determination. For the following reasons, we affirm termination of both Edward's and Tonya's parental rights.

II. STATEMENT OF FACTS

Edward and Tonya are married and are the biological parents of Erika, born in 2007, and Tyler, born in 2008. Edward and Tonya had been involved with the Nebraska Department of Health and Human Services (DHHS) on several occasions regarding allegations of domestic violence, alcohol abuse, and neglect. In February 2009, DHHS became involved once more when concerns arose regarding domestic disputes in the home, Edward's alcohol consumption, and Tonya's failure to take her medication for her bipolar disorder. The efforts to work with DHHS were voluntary, a comprehensive family assessment was completed, and a safety plan was put into place, signed by both Edward and Tonya. Family support services were initiated prior to removal, which included supervision of Tonya while she was at home with the children, full-time daycare for the two children during the day, life skills teaching, and family team meetings. However, those efforts proved unsuccessful, and on April 28, 2009, the State filed a petition alleging that the children were within the meaning of Neb. Rev. Stat. § 43-247 (Reissue 2008) insomuch as the children lacked proper parental care as a result of Edward's and Tonya's history of domestic violence culminating in Tonya's conviction for third degree assault which occurred in the presence of the children and while Edward had been intoxicated. Further, the petition alleged that on a separate date, the children had been found alone with Edward who admitted to drinking 12 beers. The petition also alleged that the children were subject to the provisions of the Indian Child Welfare Act (ICWA), Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008). An amended petition was filed on July 20, containing essentially identical allegations. The matter came before the juvenile court for adjudication on July 21. Edward and Tonya admitted the allegations of the petition, and the children were adjudicated as children within the meaning of § 43-247(3)(a).

At the time of the initial petition, the children were removed from the home and DHHS attempted, but was unable, to locate a Native American family for placement of the children, who were eligible for enrollment with the Rosebud and Oglala Sioux Tribes. The tribes were both notified of the proceedings on various occasions, but it was not until March 25, 2010, that the Rosebud Sioux Tribe filed a notice of intervention, although the record does not indicate that any further action was taken by either tribe.

Several goals were initially set in order for Edward and Tonya to successfully be reunified with the children. Those goals included that Edward and Tonya provide a safe, violence-free environment; that Tonya control her anger and Edward refrain from alcohol usage; and that there be no further reports of violence or alcohol usage from family members, DHHS, doctors, counselors, or any other individual. Tonya's specific goals included recognition of the children's needs above her own, parenting skills, impulse control, appropriate communication, and medication management. Edward's specific goals also included recognition of the children's needs above his own, control of his alcohol use, communication skills, and parenting skills.

In order to reach those goals, Tonya was ordered to consistently take her medication for bipolar disorder and follow her doctor's instructions regarding the medication, participate in outpatient counseling for chronic mental health issues and medication management, participate with community support services, and address her court issues regarding her driver's license. Edward was ordered to participate in an inpatient or intensive outpatient substance dependency

program by October 31, 2009; attend Alcoholics Anonymous (AA) meetings; seek out a mentor to support him in the AA's 12-step program; participate in outpatient counseling; and participate with family support services. Both individuals were further ordered to attend family and couple's counseling.

The September 17, 2009, case plan and court report indicates that Edward and Tonya had been offered several options for visitation as well as food vouchers and budget education. The plan indicates that Tonya refused budget education and that Edward failed to participate in family support meetings. The report shows that Edward was only minimally exercising his visitation, and failed to appear entirely for visitation on several occasions, and that on those few occasions, the report indicates Edward did not participate well during those visitations. Both Edward and Tonya lacked any progression with their parenting skills, and it was reported that the two had declined in their skills, rather than improved in their skills. Tonya had also canceled several visitations but appeared to be making an effort to attend some visits. The report also indicates that the frequent intervention by the police with Edward and Tonya had ceased, but that their relationship was still volatile. At this time, Edward had failed to participate in any treatment or AA meetings. DHHS offered to set up treatment for Edward, which offer was also declined by Edward. The case plan indicates that both parents needed a "great deal of improvement."

Several dispositional hearings were held over the course of the following months, during which reunification remained the goal, until April 20, 2010, at which time the goal was changed to adoption for both children. At that dispositional hearing, evidence was presented which indicated that since February, Edward and Tonya had missed seven family support meetings, and that since March, they had missed 9 out of 24 visits with the children. The April 14 court report and case plan adopted by the juvenile court indicates that Edward and Tonya both continued to struggle with attending visitations. Both individuals continued in their resistance to budgeting support and refused to watch parenting videos. Tonya refused to participate in a mental status examination and had failed to attend any psychologist appointments. Tonya had voluntarily discontinued usage of her medication due to a pregnancy and, further, had "kicked" Edward out of the home in March. On the other hand, an alcohol-monitoring-bracelet program had been instituted for Edward in February and there had been little concern with Edward's drinking since that time. Edward had begun an intensive outpatient program, but walked out of the program, and although he told caseworkers he had a sponsor, he provided no verification that he had actually attended any AA meetings.

On March 24, 2010, the State filed a motion to terminate Edward's and Tonya's parental rights, asserting that termination was proper under Neb. Rev. Stat. § 43-292(2) and (4) (Reissue 2008) and was further in the best interests of Erika and Tyler. The motion also alleged that, pursuant to the ICWA, termination is appropriate because the continued custody of the children by the parents was likely to result in serious emotional or physical damage to the children and that active efforts had been made to prevent the breakup of the Indian family, which efforts proved unsuccessful.

The hearing on the State's motion to terminate Edward's and Tonya's parental rights was held before the juvenile court on August 20, 2010. At the hearing, Russell Burkey, a children and family service specialist with DHHS, testified that his first contact with the family was in July 2008, to assess allegations that Edward had been drinking, that Edward was not assisting with

the family, and that there was no food in the house for the children. Burkey testified that on several occasions, the local police were called to the home regarding reports of domestic violence occurring in the presence of the children. In February 2009, police were contacted regarding one of those frequent domestic disputes and Tonya was taken to the emergency room. Burkey testified that a voluntary safety plan was put into place to ensure the safety of the children, by which the children were placed in daycare while Edward was working so that Tonya was not alone with the children. Additionally, a family support worker was assigned to supervise Tonya and the children each evening for several hours during the week until Edward arrived home. Burkey testified that the safety concerns arose out of Tonya's mental health issues with bipolar disorder and her medication management.

Francis Thomas, a children and family services worker with DHHS, testified that she was the family's caseworker from April to October 2009 and that initially, during the voluntary portion of the case, Edward and Tonya were also provided with parenting and visitation services. Thomas testified that on April 27, 2009, Erika and Tyler were removed from the home. DHHS provided clothing, furniture, and other children's items for both Erika and Tyler as they had minimal clothing and supplies. Family support services, visitation, and transportation were instituted and provided, in addition to assistance with the purchase and security of Tonya's medications. Counseling services and foster care was also provided to the family. Thomas testified that the children were placed in a traditional foster home, although DHHS continually sought out placement for the children with a Native American family.

Thomas testified that Tonya showed little progression with her parenting skills, but did make minimal improvement in her medication management when a lockbox was purchased and assistance was given by a family support worker. Thomas indicated that Tonya had difficulty in maintaining her counseling appointments and with participating in community and family support services. Tonya consistently canceled her appointments and indicated to Thomas that she did not need to see her counselor as often as was scheduled, although the therapist indicated otherwise. Thomas further testified that during her work with the family, Edward had not utilized inpatient or outpatient treatment program services offered by DHHS. Near the end of her involvement, Thomas testified that Edward sought out a mental health provider for an initial appointment, but did not follow up with any further services through October 2009. Thomas also testified that Edward was required to attend 90 AA meetings in 90 days, but had not done so, in addition to being even less cooperative with family support services than Tonya. Thomas testified that through October 2009, both Edward and Tonya made minimal progress by failing to attend numerous supervised visitations and, while at the few visitations they did attend, were inattentive and uninterested in the children. Further, Thomas testified that couple's counseling services for Edward and Tonya had been offered and would be paid for by DHHS but had not been used.

Alisha Smith, formerly a children and family service specialist with DHHS, testified that she was assigned to the family from January to May 2010. At that time, Smith indicated that the main focus was on addressing the reunification efforts of Edward and Tonya. Smith testified that DHHS continued to provide services in order to achieve that goal, such as substance abuse services, mental health and family counseling, and visitation. DHHS also provided family support workers, gas vouchers, transportation, and counseling arrangements. The children

continued in out-of-home placement in a non-Native American family home; however, Smith testified that DHHS continued its efforts to comply with the ICWA requirements by providing education on Native American culture, providing a cultural plan, and discussing with the biological family specifics regarding the culture that they wanted in place for the children at the foster home.

Smith testified that it was difficult to monitor Tonya's medication management because, while Edward continued to sign off on her intake, she still canceled appointments with therapists and other providers. Smith testified that Tonya also failed to complete the requisite mental status examination in order to continue therapy under Medicaid coverage. Smith testified that Tonya failed to participate with community support services by declining parenting videos and mission sessions and by continuing to believe that suggestions made on parenting improvements did not apply to her. Tonya also failed to participate in family support services, by which DHHS provided visitation, transportation, medication, budgeting education, and parenting skills.

Smith testified that in February or March 2010, Edward began an intensive outpatient treatment program through a local mental health provider, although the program had not been completed because Edward had become upset and walked out of the program. Edward also failed to provide any verification that he had participated in AA classes or programs as ordered, although he had indicated that he did have a sponsor. Smith explained that Edward was minimally compliant with family support services, which was limited by his work schedule; however, there was no progress with parenting skills and family counseling when he was at home.

Smith testified that visitation by Edward and Tonya was inconsistent, with some months being well attended and others with very poor attendance. Smith testified that in September 2009, 5 out of 13 visits were attended; in October 2009, 5 out of 25 visits were attended; in November 2009, 30 visits were offered, with Tonya attending 22 and Edward attending 19; and in the first half of December 2009, 4 out of 16 visits were attended. There were also concerns during the visits with a lack of bonding and affection demonstrated by Edward and Tonya toward the children.

Michelle Wyre was also involved with the family as a child and family services specialist with DHHS. Wyre testified that she was assigned to the case on May 11, 2010, at which time DHHS was providing family support services in the home, team meetings, visitation, transportation, daycare, medical expenses, genetics clinic testing, and continued efforts at therapy for Edward and Tonya. Wyre explained that DHHS had also continued to search for Native American placement for the children, but had been notified by the tribe that all resources had been exhausted to find a Native American family without success. Wyre testified that in-home visitation had occurred but remained supervised.

Wyre testified that Tonya still had not participated in any type of therapy and was still having difficulty with her parenting skills at visitations. The visitations were not being attended regularly, although Wyre testified that Tonya was able to attend many visits. Wyre testified that oftentimes, Tonya ended the visitations early because of stress that Edward was not in attendance and because of her pregnancy. Wyre testified that the children were exhibiting behaviors such as biting and hitting in response to interactions with both parents. At the time of her first meeting with Tonya, Wyre explained that Tonya was no longer taking her medication because she was

pregnant and did not feel as though the medication was necessary and would not participate in any therapy until after the pregnancy. Further, Tonya had not yet completed a psychological evaluation. Wyre testified that DHHS had offered to coordinate and pay for therapy but Tonya declined the services because she knew that the therapists would want her to take medication.

Wyre testified that Edward was not attending all of the supervised visitations, but that many times it was due to his job. However, when Edward was able to attend visitations, he continued to have little or no interaction with the children. Wyre testified that Edward had specifically requested a visit with the children during the local pow-wow event but then failed to show up for the event and visitation. Tonya attended the visitation at the pow-wow, but kept the children in the stroller during the entire 2-hour visit and prevented them from participating in the cultural activities provided at the event. Wyre also testified that Edward had not provided any documentation of participation in AA meetings, although she had asked for verification from him at team meetings. Wyre testified that Edward had indicated he was seeing a sponsor once a week. Edward participated and successfully completed the alcohol-monitoring-bracelet program for 90 days from February to May 2010.

Wyre testified that she had reviewed the entire case file, in addition to working directly with the family, and opined that adoption was in Erika's and Tyler's best interests. Wyre explained that the issues leading to the petition and removal of the children had not been addressed and that little progress had been made by either Edward or Tonya. Wyre testified that Edward and Tonya showed little motivation to change and had not progressed with their parenting skills. There had been several reports of Edward's drinking again, quitting intensive outpatient treatment, and not participating in any type of substance abuse program, while Tonya failed to follow through with her medication management and had been resistant to the numerous services offered to the family.

Cassandra Whipple-Benitez, a member in good standing of the tribe, testified that she was familiar with the customs and culture of the tribe. Whipple-Benitez testified that she is a Spanish teacher at a local high school, but has previously worked with the Chadron Native American Center as a Native American community liaison providing family support and programs about cultural practices, celebrations, youth involvement, and future planning. Whipple-Benitez testified that she is also a liaison for the Circle of Pride youth group for Native American students and families. Whipple-Benitez testified that she has been qualified and testified as an ICWA expert specialist in court on four other occasions. Whipple-Benitez testified that the tribe places a great emphasis on the responsibility of the parents in child rearing and the support of elders in the family.

Whipple-Benitez testified that she reviewed the case files for Erika and Tyler, looking specifically at compliance with the ICWA requirements, tribal notice, placement of the children, and overall history of the family. Whipple-Benitez testified that, in her review, it appeared that the State had made active efforts to provide services to the family and had also made the appropriate efforts to find Native American placement for the children. Whipple-Benitez testified that the cultural plan for the family was appropriate and the State had appropriately addressed tribal and cultural concerns and that based upon her review of the case, Erika and Tyler would be at risk of substantial physical or emotional harm if they were to remain in the custody of Edward and Tonya.

Tonya testified that the events leading to the petition and removal of the children involved issues with her medication and alcohol abuse. Tonya testified that, at the time of trial, both she and Edward had quit drinking entirely and did not keep alcohol in the home. Tonya testified that she was compliant with the voluntary safety plan until the caseworker "started being discriminatory" toward her by instructing her to raise Erika and Tyler according to how the caseworkers raised their children and that she ended up "losing it." Tonya testified that she did not receive any parental skills training, but had signed up for a parenting class and was willing to take the class. Tonya testified she missed the first day of the parenting class and was not allowed to return.

Tonya testified that, shortly after the children were removed, DHHS provided transportation for her visitations with the children until she and Edward had resumed their relationship after a brief separation. Tonya testified that some of her visitations were canceled because of weather and also when a different agency took over visitations. Tonya testified that visitations with the children go "okay." Tonya explained that her relationship with Erika had really improved in the last 30 days after Erika had tubes placed in her ears and that she still had a difficult time interacting with both children because they really only wanted to do things on their own. Tonya testified that both children are aggressive with her, but she tries to interact by coloring or tickling them. Tonya testified that she had not ended visitations early, with the exception of one missed visit because she felt like she could not handle Tyler's aggressive behavior. Also, Tonya testified that the majority of her missed visitations were the result of the providers and not herself or Edward. Tonya explained that she loves the children and that termination of her parental rights was not in the children's best interests.

Tonya testified that she is bipolar and had prescription medication to treat the condition, but was pregnant and had stopped taking her medications because she felt the medication was only safe to take while breastfeeding. We note that Tonya declined the suggestion by her caseworkers that she obtain medical advice concerning what medications she could safely take during pregnancy. Tonya testified that her issues with the disorder did not, at any time, affect her ability to parent the children. Tonya explained that in January or February 2010, she completed her mental status evaluation for Medicaid, but could not find the letter with the outcome of the evaluation to bring with her to the hearing. Tonya testified that there were Medicaid cutbacks and she was going to be financially responsible for her therapy sessions and also that the individual who gave the evaluation indicated to Tonya that individual therapy was not necessary or that she no longer qualified for individual therapy. Tonya testified that Edward needed a referral for family or couple's counseling and that when asked whether she would be willing to participate if DHHS provided those services to her, Tonya testified she had never refused to do anything.

Edward testified that he is employed as a plumber and works from very early in the morning until late in the evening. Edward testified that he had "walked out" during some visitations with the children because he had to be at one of three places of employment. Edward testified that he had never been offered parenting classes and that he felt he was affectionate with the children. Edward testified that during visitation, he carries the children around, takes them out of the vehicle when they arrive, prepares meals for them, and sits down with them to watch

television. Edward testified that, while on occasion he would watch television during the visitations, he continually watches the children during the whole visit.

Edward testified that he was admitted to intensive outpatient treatment, but that he left the facility 5 minutes after arriving for treatment due to a confrontation with the counselor about missing a prior appointment. Edward testified that he did not wish for his parental rights to be terminated because, even if he had to divorce Tonya, he would fight for the children as he could raise them and was a hardworking man.

At the conclusion of the proceedings, the juvenile court announced in court that there was sufficient evidence to terminate Edward's and Tonya's parental rights and later, on September 20, 2010, issued a written order. In its order, the juvenile court found that even though the parents had been consistently warned of the urgency of their progress in the case, there had not been any measurable improvement and the family was no closer to reunification. The court found that the parents are still not able to parent or provide a safe living environment for the children. The court noted that Edward walked out of his alcohol dependency group and failed to attend or complete any further treatment, including AA meetings. The court noted that Tonya failed to attend family therapy and domestic abuse counseling and had been unable to manage her mental health condition. The court found that active efforts had been made to reunify the family and that Whipple-Benitez, a qualified expert witness in accordance with the ICWA, had testified that continued custody of the children by Edward and Tonya would result in serious emotional or physical damage to the children. See § 43-1505(4) and (5). The court found that the evidence was sufficient to support the termination of Edward's and Tonya's parental rights under § 43-292(2) and (3) and was in the best interests of the children, noting that the "evidence offered at the trial surpasses the burden of proof beyond a reasonable doubt." It is from this order that Edward has timely appealed and that Tonya has cross-appealed.

III. ASSIGNMENTS OF ERROR

Edward assigns, rephrased and consolidated, that the juvenile court erred in terminating his parental rights and in finding that termination was in the children's best interests. Edward also assigns that the juvenile court erred by determining that Whipple-Benitez was a qualified expert witness pursuant to the ICWA and that continued custody of the children by Edward would result in serious emotional and physical damage to the children.

Tonya has cross-appealed and also assigns that the juvenile court erred in terminating her parental rights and in finding that termination was in the children's best interests.

IV. STANDARD OF REVIEW

An order terminating parental rights pursuant to the Nebraska ICWA is reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. See, *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002); *In re Interest of Sabrienia B.*, 9 Neb. App. 888, 621 N.W.2d 836 (2001). However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001).

V. ANALYSIS

1. TERMINATION OF PARENTAL RIGHTS

Both Edward, and Tonya on cross-appeal, assign that the juvenile court erred by determining that there were statutory grounds for termination of their parental rights to Erika and Tyler.

The Nebraska Supreme Court has held the State must prove by 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, and, therefore, only one ground for termination need be proved in order to terminate parental rights. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003); *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000). The ICWA, however, adds two additional elements the State must prove before terminating parental rights in cases involving Indian children. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). First, § 43-1505(4) provides an "active efforts" element:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Second, § 43-1505(6) provides a "serious emotional or physical damage" element:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

See, also, *In re Interest of Phoebe S.*, 11 Neb. App. 919, 664 N.W.2d 470 (2003) (under ICWA, determination to terminate parental rights must be supported by evidence beyond reasonable doubt).

(a) Statutory Grounds Under § 43-292

The juvenile court found that the State had presented evidence beyond a reasonable doubt that termination of Edward's and Tonya's parental rights was proper pursuant to § 43-292(2) and (3). Edward argues, and we agree, that the court erred in finding termination was proper under § 43-292(3), as such subsection was not alleged in either the petition or the amended petition to terminate parental rights. However, since it is only necessary to find one ground for termination, we turn our analysis to § 43-292(2), which was alleged and found as a ground for termination. This section provides that parental rights may be terminated when the parent has "substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection."

The children in this case were removed from the home in April 2009, after several months of involvement with DHHS through voluntary actions of Edward and Tonya. At the time of removal, the domestic violence had escalated and Edward continued to drink alcohol excessively. After the children were adjudicated, several goals were set for Edward and Tonya in order to reunify them with the children, including providing a safe, violence-free environment,

anger management, refraining from alcohol use, and no further reports of violence. Tonya's goals were to recognize the children's needs over her own and to improve on her parenting skills, impulse control, appropriate communication, and medication management. Edward's goals included also recognizing the children's needs over his own, to refrain from using alcohol, and to improve both his communication and parenting skills. Both parties were also ordered to participate in various types of counseling and therapy services.

Over the next year, Edward and Tonya were provided supervised visitations with the children several times a week, which visitations were attended inconsistently each month. There was significant testimony by DHHS caseworkers that Edward had difficulty attending the visitations and that, on many occasions, he did not show up to visitations or left early. In addition, evidence was adduced that when Edward did attend visitations, he was not interested in the children and oftentimes watched television during the visitations. Likewise, while Tonya attended more visitations than Edward, she oftentimes canceled visitations or ended the visit early. During visitations, the record indicates that Edward and Tonya were unaffectionate and inattentive. The testimony given was that Tonya would begin the visit interacting with the children, but would quickly lose interest or become easily frustrated. Tonya refused any training on parenting skills and budgeting education, and she failed to complete a parenting class and to attend individual therapy. Early in the case, shortly after the children had been removed from the home, Edward and Tonya worked together to properly manage Tonya's medication and secure it in a lockbox. However, Tonya eventually stopped taking her medication and testified that she would not resume her medication or therapy until after her pregnancy.

Edward also failed to participate in the court-ordered substance abuse treatment and any kind of therapy. He was ordered to complete inpatient or intensive outpatient substance abuse treatment by October 31, 2009. It was not until March or February 2010 that Edward made an appointment for intensive outpatient treatment. This treatment lasted only 5 minutes until Edward had an argument with the counselor and walked out of the facility. Edward was further ordered to participate in AA, but he continually failed to provide any verification of attendance. Edward testified that he did have an AA sponsor and also had completed an alcohol-monitoring-bracelet program for 90 days in 2010. We give credit to Edward for maintaining his employment and working long hours at various jobs; however, there was little, if any progress by him on the circumstances leading up to the removal of the children.

The record clearly shows that Edward had not dealt with his ongoing issues of alcohol abuse and that Tonya failed to understand and seek proper treatment for her mental health disorder. Edward and Tonya entirely failed to participate in any therapy or treatment or to satisfy the bulk of the goals outlined for them in the various case plans. The record showed that Tonya had again asked Edward to leave the home. In sum, the record clearly and convincingly shows that Edward and Tonya are not in a position to provide the necessary parental care and protection for their children, Thus, we find that grounds existed to terminate both Edward's and Tonya's parental rights under § 43-292(2). Edward's and Tonya's assignments of error to the contrary are without merit.

(b) Continued Custody Under § 43-1505(6)

(i) Qualified Expert Testimony

Edward argues that the juvenile court erred by determining that Whipple-Benitez was a qualified expert witness under the ICWA.

Pursuant to the ICWA, qualified expert testimony is required on the issue of whether serious emotional or physical damage to the Indian child is likely to occur if termination of parental rights is not ordered. See § 43-1505(6). This evidence must be established by qualified expert testimony provided by a professional person having substantial education and experience in the area of his or her specialty. See, *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992); *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009).

The Nebraska Supreme Court has previously addressed the qualifications of experts to give testimony under § 43-1505. In *In re Interest of C.W. et al.*, 239 Neb. at 824, 479 N.W.2d at 111, the court noted the following guidelines set forth by the Bureau of Indian Affairs under which expert witnesses will most likely meet the requirements of the ICWA:

> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.
>
> (iii) A professional person having substantial education and experience in the area of his or her specialty.

In the case at hand, the only witness to provide any testimony that returning Erika and Tyler to Edward's care was likely to result in serious emotional or physical damage to the children was Whipple-Benitez. Edward contends that Whipple-Benitez is not a psychologist or therapist and did not present any evidence that she was recognized by the tribal community. Whipple-Benitez is, however, a member in good standing of the tribe and has a bachelor of arts degree in accounting and a teaching certificate for Spanish. Whipple-Benitez is a Spanish teacher at a local high school and has previously worked with the Chadron Native American Center as a Native American community liaison providing family support and programs about cultural practices, celebrations, youth involvement, and future planning. Whipple-Benitez is also a liaison for the Circle of Pride youth group for Native American students and families, and she has worked with family support workers with Speak Out, providing family classes for Native American families who are in need of extra support with child-rearing or cultural practices. Additionally, the record indicates that Whipple-Benitez previously worked with the DHHS integrated care coordination unit conducting workshops, which required knowledge of the ICWA.

Given her extensive background and continued involvement with the tribe and Native American families, we find that the record establishes that Whipple-Benitez was sufficiently qualified to testify as an expert witness under the requirements of the ICWA. The evidence clearly supports a determination that Whipple-Benitez has extensive knowledge of social and cultural standards in child-rearing practices within the tribe and also that she has experience in

child and family services with Native American families. Accordingly, the juvenile court did not err by finding that Whipple-Benitez was qualified to render expert testimony pursuant to the ICWA.

(ii) Continued Custody With Edward Under § 43-1505(6)

As set forth above, § 43-1505(6) requires a "determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." Edward's sole argument in support of his contention that the juvenile court erred by finding that continued custody of the children would result in serious emotional or physical damage to the children is that Whipple-Benitez was not a qualified expert pursuant to the ICWA. As determined above, Whipple-Benitez was properly qualified to render expert testimony under the ICWA, and this argument is without merit.

Nonetheless, given the heightened requirements of the ICWA, we will further address Edward's general contention that the evidence was insufficient to support such a finding. Whipple-Benitez testified that within the tribe, child rearing was a crucial piece of the tribe and its practices. Whipple-Benitez testified that children were the basis and foundation of the family unit and that the tribe placed great emphasis on the parents' ability to raise the children in conjunction with the tribe's emphasis and support of elders in the family. Whipple-Benitez testified that parental interaction and support of children were very important to the tribe and that prolonged removal of the children with little involvement raised significant concerns. And, based upon her review of the case file in this case, there was a risk of substantial physical or emotional harm if the children were to remain in Edward's or Tonya's custody.

DHHS caseworkers testified at length that since the children were removed in April 2009, visitation had been inconsistent at best. There was testimony and evidence that Edward missed numerous visitations with the children, on most occasions did not even contact workers to cancel, and instead just did not attend. Caseworkers also testified at length regarding the lack of any progression with Edward's parenting skills. The record indicates that on the few occasions Edward did attend visitation, he was inattentive and unaffectionate with the children, spending most of the visit watching television instead. Most concerning is Edward's issues with alcohol. Edward has a history of alcohol abuse, which was a contributing factor to the removal of the children to begin with. Edward refused to participate in any treatment program and failed to verify with any DHHS caseworker that he had complied with the requirement to participate in AA, other than through his testimony that he did have a sponsor.

Based on the totality of this evidence presented at the termination hearing, it is clear beyond a reasonable doubt that custody of the children by Edward is likely to result in serious emotional or physical harm to the children. Edward has significant, unaddressed issues with alcohol and has continually refused to address those issues by failing to comply with any court order to engage in treatment. Further, Edward has made little or no progress in improving his parenting skills. Edward works many hours with his various employers, which is commendable, but upon return home from work to the few visitations which Edward did attend, Edward did not interact with the children and failed to show affection toward either child. Therefore, the juvenile

court did not err by finding that continued custody is likely to result in serious emotional or physical harm to the children, and Edward's assignment of error is without merit.

2. Best Interests of Children

Edward and Tonya also contend that termination of their parental rights was not in the children's best interests. However, upon our review of the record, the evidence is clear that it is in the best interests of the children that both Edward's and Tonya's parental rights be terminated. Both parents have made minimal progress or improvement with their parenting skills and relationships with the children. Both have refused treatment and therapy and frequently missed visitations with the children, all while being offered numerous services and endless support by DHHS and the caseworkers assigned to the family. When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id*. Therefore, we conclude the State provided evidence beyond a reasonable doubt that terminating Edward's and Tonya's parental rights was in the children's best interests.

VI. CONCLUSION

In conclusion, we find that the juvenile court did not err by determining that Whipple-Benitez was a qualified expert witness pursuant to the ICWA and that the evidence and testimony presented supported the juvenile court's determination that continued custody of the children by Edward would likely result in serious emotional or physical damage to the children. Furthermore, we find that the State provided sufficient evidence that termination of Edward's and Tonya's parental rights was proper under § 43-292(2) and in the children's best interests. Therefore, we affirm.

Affirmed.