

IN THE NEBRASKA COURT OF APPEALS

In re Interest of James B.,)
a child under the age of 18.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Donald B.,)
)
Appellant.)

No. A-12-0025

**MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL**

FILED

JUL 25 2012

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

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

INTRODUCTION

Donald B. appeals from the order of the separate juvenile court for Lancaster County which terminated his parental rights to his son, James B., born December 24, 2005. Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Donald's parental rights. We affirm the order of the juvenile court terminating Donald's parental rights to James.

STATEMENT OF FACTS

Donald is James' biological father. James' mother, Megan S., was not a party to the proceedings or to this appeal. She has had custody of James since his birth, and her involvement in the juvenile court proceedings will not be discussed further



except where necessary to explain or describe aspects of the court's dispositional plans and requirements as to Donald.

In July 2008, the State filed a petition with the juvenile court, alleging that James was within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). As amended in December 2008, the petition alleged that Donald had a history of confrontations with Megan while in the presence of, or in the home of, James. The State further alleged that Donald's actions placed James at risk of physical or emotional harm. Donald pled no contest to the allegations at the adjudication hearing in November 2008, after which the juvenile court entered an order finding that James was a child within the meaning of § 43-247(3)(a).

Following a dispositional hearing in December 2008, Donald was permitted reasonable rights of monitored visitation with James. He was ordered to refrain from the use or possession of drugs or alcohol, submit to substance abuse testing, not become involved in any incidents of domestic violence or assaultive behaviors, cooperate with random drop-in visits by family support workers during visits with James, have no contact with Megan, and complete a domestic violence program. Further hearings were held throughout 2009 and part of 2010, with additional requirements added for Donald, including his attendance at parent training and AA meetings and his

cooperation with "psycho education" on the effects of alcohol and with individual therapy. Donald was later ordered to complete an outpatient drug and alcohol treatment program and, ultimately, the court ordered him to complete a residential program to address his drug and alcohol issues. In the meantime, the terms of his visitations with James went from monitored visitation to "intensely monitored" visitation, supervised visitation, and finally, in March 2010, his visitation was suspended altogether.

On May 18, 2011, the State filed a motion to terminate Donald's rights to James. As later amended, the State alleged that termination of Donald's parental rights was warranted pursuant to Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2010), because he had abandoned James for 6 months or more immediately prior to the filing of the motion; § 43-292(2), because he had substantially and continuously or repeatedly neglected and refused to give James necessary parental care and protection; § 43-292(4), because he was unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd or lascivious behavior, which is seriously detrimental to James' health, morals, or well-being; and § 43-292(6), because reasonable efforts to preserve and reunify the family failed to correct the conditions that led to the determination that James was within the meaning of § 43-

247(3)(a). In addition, the State alleged that termination of Donald's parental rights was in James' best interests.

At the hearing on the motion to terminate Donald's parental rights, Megan testified that she and Donald lived together, along with Megan's two older children, at the time of James' birth in December 2005. She stated that Donald was often angry with her older children and would become destructive, throwing things against the wall and calling all of them names. Megan moved out with all of the children in August 2006, despite Donald's threats that she would never see James again if she left. Thereafter, Megan was the subject of 15 child neglect reports instigated by Donald, all of which proved to be unfounded. For a time, Donald exercised weekly visitation with James at the conclusion of which he would often threaten Megan in front of James. Megan was also subjected to multiple daily phone calls and banging on her doors at night. In February 2007, Megan called Donald to tell him she would be a few minutes late in picking up James from a visitation. When she arrived, Donald refused to let James leave with her. Megan stated that Donald grabbed her by the collar of her coat and threw her down the stairs. Megan testified that Donald threatened that she would never see various family members again. She stated that her children's pediatrician terminated his professional relationship with the family because of threatening contact with Donald.

Megan described other incidents with Donald, such as being threatened with a knife or witnessing him punch through a screen door.

Jared Ray, a substance abuse counselor, evaluated Donald in August 2009. Ray testified that Donald had an extreme alcohol problem, at times testing at a blood alcohol level of around .4. Ray initially recommended intensive outpatient treatment but found Donald to be unmotivated and unaccountable, and generally in denial about his alcohol problem. Ray stated that Donald was "discharged incomplete" and that Ray recommended residential treatment for Donald. Ray acknowledged that he had not seen Donald since February 2010 and did not know if he had complied with the recommendation for inpatient treatment.

Jim Kealy, a service coordinator at "Antlers," testified that he set up residential treatment services for Donald in 2010 but that Donald was a no-show. Kealy described Donald as smelling heavily of mouthwash at their first meeting and stated that Donald refused to participate in the team meeting, saying that "everybody lied" and he could not trust the various caseworkers. Donald told Kealy that he would not participate in services until he was permitted to visit with James.

Pamela Gouty was a facilitator for the domestic violence program at Orr Psychotherapy Resources. Gouty worked with Donald from May 2009 until his unsuccessful release from the program in

November 2009. Gouty described Donald as an unwilling participant in the program and said that he attended only 12 of 24 classes provided to him. She stated that he placed all of the blame for his problems on Megan and claimed he had done nothing wrong. Gouty stated that Donald appeared under the influence of alcohol many times, was belligerent in the classroom, and once was confrontational with her in the parking lot. She stated that he never made any progress and predicted that he would not be able to correct his problems with domestic violence on his own.

Deb Strudl, a children and family services specialist with the Department of Health and Human Services (DHHS), testified that she was the case manager for James' juvenile case from 2008 until December 31, 2010. She testified that Donald was subject to alcohol testing which often indicated positive results and that Donald was often noncompliant with testing. Strudl stated that Donald failed to complete court-ordered substance abuse counseling. She described a meeting set for February 2010 which did not take place because Donald "blew up" in the hallway prior to the meeting. She said that Donald appeared to be under the influence of alcohol and that he was threatening to her and Gouty. Strudl stated that by December 2010, Donald was not participating in any services. Because of Donald's positive UA's and noncompliance with alcohol testing as well as his failure to complete a domestic violence program, Strudl recommended that

visitation with James be suspended in February 2010. She testified that Donald's visits with James were terminated because of his heavy alcohol use, noting that his blood alcohol content was testing between .3 and .4, even at times he knew James was scheduled to visit. Strudl testified that it was in James' best interests that Donald's parental rights be terminated based on his long history of alcohol abuse and domestic violence. Strudl stated that James would not be safe as long as Donald's parental rights were intact.

Carolyn Kuhn, a family permanency specialist at KVC, testified that she took over as James' case manager from Strudl in November 2010. She described numerous unsuccessful attempts to contact Donald and stated that Donald had never completed any court-ordered services. In a court report admitted into evidence, Kuhn recommended that Donald's parental rights be terminated because of his failure to complete services, an opinion she reiterated at the hearing.

After the conclusion of the termination hearing, the juvenile court entered an order finding that the State proved by clear and convincing evidence that grounds for termination of Donald's parental rights existed under § 43-292(2), (4), and (6). The court further found that it was in James' best interests to terminate Donald's parental rights. Donald timely appealed from the juvenile court's order.

ASSIGNMENTS OF ERROR

Donald asserts that the juvenile court erred in finding that the allegations of the amended motion for termination of his parental rights were true by clear and convincing evidence and when it found that termination of his parental rights was in James' best interests.

STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Leland B.*, 19 Neb. App. 17, 797 N.W.2d 282 (2011). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

In order to terminate an individual's parental rights, the State must first prove by clear and convincing evidence that one of the statutorily enumerated grounds for termination exists. See *In re Interest of Leland B.*, *supra*. A court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009). The juvenile court found that the

State proved grounds for termination of Donald's parental rights under § 43-292(2), (4) and (6).

When a court adjudicates a juvenile under § 43-247(3)(a), a termination of parental rights under § 43-292(6) requires a finding that reasonable efforts to preserve and unify the family under the direction of the court have failed to correct the conditions leading to the determination. *In re Interest of Shelby L.*, 270 Neb. 150, 699 N.W.2d 392 (2005). It is the burden of the State, and not the parent, to prove by clear and convincing evidence that the parent has failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the case plan. *In re Interest of Angelica L. & Daniel L.*, *supra*.

The evidence presented in this case demonstrates that Donald's participation in court-ordered services was inconsistent to nonexistent. Donald failed to complete domestic violence counseling or substance abuse counseling, and routinely refused to submit to urinalysis testing or failed such testing with extremely high readings. Those seeking to assist Donald were often unable to reach him or had difficulty in obtaining a response to their calls or letters.

We conclude that Donald failed to make sufficient progress toward reunification with James despite the efforts of DHHS and other agencies and programs. Accordingly, we affirm the juvenile

court's determination that the State proved the statutory ground for termination set forth in § 43-292(6). Because the State need prove only one ground for termination, we decline to address Donald's assigned errors relevant to the court's determination that the State proved the grounds enumerated in § 43-292(2) and (4).

In order to terminate an individual parent's rights, the State must also prove by clear and convincing evidence that termination is in the child's best interests. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010). Donald challenges the court's finding that termination of each of his parental rights was in James' best interests. We are mindful that when a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights. See *In re Interest of Shelby L.*, 270 Neb. 150, 699 N.W.2d 392 (2005).

As recounted above, the evidence showed that Donald was offered an array of State services to address his issues with domestic violence as well as his serious alcohol abuse, and that he never successfully participated in any of those services. Instead, he denied he had a need for any such services and he often behaved in an abusive and contemptuous manner toward the providers and case workers.

Donald argues that there is no evidence showing that James is a child in need of care and protection as he has never been taken out of the care of his mother. He contends that there are alternatives to terminating his parental rights. However, as noted by the juvenile court in its order, Donald was offered numerous opportunities to correct the conditions leading to the adjudication of James as a child as described in § 43-247(3)(a) in the 3 years that have elapsed since disposition. The court observed that Donald was unsuccessfully discharged from the domestic violence program in 2009 and never returned, that he has continued to drink and harass Megan "for the entirety of the nearly 6 years that [James] has been on this earth," that he failed to take responsibility for his actions, and that he was often absent from the hearings in the case, as he has been absent from his son's life. The evidence presented in this case shows that termination of Donald's parental rights is in James' best interests.

CONCLUSION

We conclude that the State proved by clear and convincing evidence statutory grounds for termination under § 43-292(6) and that termination of Donald's parental rights was in James' best interests. Accordingly, we affirm the juvenile court's order.

AFFIRMED.