

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Jaylyn B.,)
a child under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Tyrone S.,)
)
Appellant.)

No. A-11-850

**MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL**

FILED

MAY 03 2012

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

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

INBODY, Chief Judge.

INTRODUCTION

Tyrone S., the biological father of Jaylyn B., appeals the order of the Separate Juvenile Court for Douglas County terminating his parental rights. Pursuant to this court's authority under Neb. Ct. R. of App. P. § 2-111(B)(1), this case was ordered submitted without oral argument. For the following reasons, we affirm.

STATEMENT OF FACTS

Background.

Jaylyn was born on April 19, 2008, to Miniko B., her biological mother. On October 23, 2009, Jaylyn was removed from Miniko's home and a petition was filed alleging that Jaylyn lacked proper parental care after she had been left with



inappropriate caregivers and that Miniko had failed to provide safe, stable, and appropriate housing; and proper parental care, support, and supervision. Miniko's parental rights were terminated on September 9, 2011, and are not at issue in this appeal.

On May 6, 2010, a complaint to establish paternity and support was filed against Tyrone. Genetic testing was done, after which, in July 2010, Tyrone was determined to be Jaylyn's biological father. Before that time, Tyrone had not been involved in Jaylyn's case as a result of his incarceration at the Tecumseh State Correctional Institution (TSCI). In June 2009, Tyrone was arrested and on September 28, 2009, charged with attempted second degree murder, use of a deadly weapon to commit a felony, first degree assault, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. In February 2010, Tyrone pled no contest to attempted second degree murder and possession of a deadly weapon by a prohibited person and was later sentenced to 40 to 50 years' imprisonment, and to 30 to 50 years' imprisonment, to run consecutively. If Tyrone serves his full sentence, he is scheduled to be released from prison in approximately 2059, at which time Jaylyn will be 51 years old.

Termination Proceedings.

On May 5, 2011, the State filed a supplemental petition against Tyrone alleging that he had failed to provide Jaylyn with care and support; was incarcerated and not in a position to parent Jaylyn; and had abandoned, substantially and continuously neglected, and refused to give Jaylyn the necessary parental care and protection. The petition further alleged that Jaylyn had been out of home for 15 of the most recent 22 months, that Tyrone had subjected her to aggravated circumstances, and as such, reasonable efforts by the State were not required.

On September 8, 2011, the juvenile court held a hearing on Tyrone's supplemental petition for adjudication and termination. At the beginning of the proceedings, Tyrone's counsel requested that the juvenile court grant a motion for discovery filed two days prior to the hearing, which motion is not contained within the record, and also made an oral motion to continue because she claimed that she had not received any documents from the State. The juvenile court granted the motion for discovery, noting that the signing of the order was "meaningless as we're at the adjudication today . . ." and overruled the motion to continue.

Jaylyn's foster mother testified that Jaylyn had been placed with her since January 2010, and since that time, Jaylyn had no visitations with Tyrone. Since that time, Jaylyn had also not received any cards, gifts, or letters from Tyrone, in

addition to not having received any financial support from Tyrone.

Alicin Carlson, Jaylyn's DHHS case manager from January through April 2011, testified that Tyrone was incarcerated at the time she took over the case and that she had no contact with Tyrone. Carlson testified that she verified Tyrone's status of incarceration using the Nebraska Department of Corrections website. Carlson testified that Jaylyn has had no contact with Tyrone and that Tyrone had not sent DHHS and cards, gifts, letters, or financial support for Jaylyn. Carlson also indicated that Tyrone had never called DHHS to inquire about Jaylyn. Carlson opined that termination of Tyrone's parental rights was in Jaylyn's best interests as Tyrone would not have the opportunity to parent Jaylyn while she was a minor. Carlson testified that there were letters in the file addressed to Tyrone, but she did not recall what those stated and that she was not involved in any attempt to contact Tyrone.

April Carlson was next assigned as the DHHS caseworker for Jaylyn's case in May 2011. April testified that she located Tyrone through an inmate locator website and that, to her knowledge, Jaylyn had no contact with him. April explained that she had not received any cards, gifts, letters, or phone calls on Jaylyn's behalf from Tyrone. April testified that Tyrone had made a single request for pictures of Jaylyn, which she

responded to in August 2011, with a letter and photographs. April testified that she had made no efforts to contact Tyrone's family. April opined that, given Tyrone's extended sentence and that he would be unable to provide a home for Jaylyn, termination was in Jaylyn's best interests.

Juvenile Court Findings and Order.

On September 9, 2011, the juvenile court entered an order which found that Tyrone had been advised of his rights and the possible consequences and overruled the oral motion to continue. The juvenile court found that the State had proven by a preponderance of the evidence that, as to Tyrone, Jaylyn was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The juvenile court found that the State had also proven by clear and convincing evidence that, as to Tyrone, the statutory grounds for termination pursuant to Neb. Rev. Stat. § 43-292(1), (2), (7), and (9) (Reissue 2008), and that termination of Tyrone's parental rights was in Jaylyn's best interest. It is from this order that Tyrone has appealed.

ASSIGNMENTS OF ERROR

Tyrone assigns that the juvenile court erred by denying his motion to continue and that termination was not in the best interests of Jaylyn because DHHS did not make any efforts with regards to Tyrone.

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 Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

ANALYSIS

Denial of Motion to Continue.

Tyrone argues that the juvenile court erred by denying his oral motion to continue the September 8, 2011, termination hearing.

A motion for continuance in a proceeding to terminate parental rights is addressed to the discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of an abuse of discretion. See, *In re Interest of H.P.A.*, 237 Neb. 410, 466 N.W.2d 90 (1991); *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983).

The record reflects that on May 18, 2011, the juvenile court held the first appearance and detention/protective custody hearing in which Tyrone and his counsel were present. Tyrone was advised of his rights and entered a denial of the allegations contained within the supplemental petition. The juvenile court set the matter for a hearing on the supplemental petition on September 8. On August 8, Tyrone's counsel made an oral motion

for the transport of Tyrone to the September hearing, which was granted by the juvenile court.

At the September 8, 2011, hearing, while dealing with various matters, Tyrone's counsel indicated that she had filed a motion for discovery two days before the hearing because she had not received any documents. The trial court signed the order associated with the motion, but thought that it was "meaningless" and denied the oral motion to continue. The motion for discovery is not included in the transcript before this court for us to review. It is the appellant's burden to present a record to support the errors assigned, and in the absence of a complete bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence and that it was correctly determined. *In re Interest of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007).

Tyrone's counsel indicated that the oral motion for continuance was made in conjunction with the motion for discovery, which we do not have to review. Thus, what this court is left with to review is that in May 2011, Tyrone received proper notice of the supplemental petition and of the hearing to be held in September, and that in August 2011, Tyrone's counsel made arrangements to transfer Tyrone to the hearing. Given this information contained within the record, we find that the

juvenile court did not abuse its discretion in denying the motion to continue the termination hearing.

Best Interests.

In order to terminate an individual's parental rights, 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 children's best interests. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010). In this case, Tyrone has not assigned or argued error in the statutory grounds for termination, only that termination was not in the best interests of Jaylyn. Tyrone specifically argues that was not in Jaylyn's best interests because the State failed to put forth any efforts at reunification with Jaylyn.

Neb. Rev. Stat. § 43-283.01 (Reissue 2008) generally provides that reasonable efforts to preserve and reunify families are required in juvenile cases. However, § 43-283.01(4)(a) specifically provides that such reasonable efforts are not required if a court of competent jurisdiction determines that the parent has subjected the juvenile to aggravated circumstances, including abandonment. In this case, the juvenile court found that reasonable efforts were not necessary because Tyrone had subjected Jaylyn to aggravated circumstances, namely abandonment. As previously mentioned, Tyrone did not assign error to any of the juvenile court's findings regarding the

statutory grounds and therefore, we decline to address this specific contention. See *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party asserting error).

With regard to the general best interests argument, in this case, the record indicates that, even prior to Jaylyn's removal from Miniko, Tyrone had been arrested and was later charged and convicted of very serious and violent offenses. The record indicates that if Tyrone serves his full sentence, he could be released in approximately 2059, at which time Jaylyn will be 51 years old. In a case involving termination of parental rights, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). Clearly, the parental role becomes a more limited role in raising a child when the parent is in jail, and in this case, Tyrone will remain in jail for the entirety of Jaylyn's juvenile years and a significant portion of her adult life. So, although we are cognizant that incarceration alone cannot be the sole basis for terminating parental rights, it is a factor to be considered. *Id.*

Aside from the matter of Tyrone's incarceration, the record indicates that Tyrone has not reached out to Jaylyn, and had not

sent any gifts, cards, or financial support to Jaylyn at any time. Tyrone did not contact DHHS to inquire about Jaylyn, aside from sending the caseworker a single request for photos of Jaylyn.

Taking into consideration all of the circumstances of this case, we find that termination of Tyrone's parental rights is in Jaylyn's best interests and the juvenile court did not err in terminating Tyrone's parental rights. 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 DeWayne G. & Devon G., supra.*

CONCLUSION

Upon our de novo review of the record, we conclude that the juvenile court did not abuse its discretion by overruling Tyrone's motion to continue and, furthermore, that terminating Tyrone's parental rights to Jaylyn was in Jaylyn's best interests. Therefore, we affirm the judgment of the juvenile court.

AFFIRMED.