

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Kevin H. )  
and Kaylee H., )  
children under 18 years of age. )  
State of Nebraska, )  
Appellee, )  
v. )  
Russell H., )  
Appellant. )

No. A-11-710

MEMORANDUM OPINION  
AND  
JUDGMENT ON APPEAL

**FILED**

MAR 12 2012

CLERK  
NEBRASKA SUPREME COURT  
COURT OF APPEALS

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

Russell H. appeals from an order of the county court for Otoe County, sitting as a juvenile court, terminating his parental rights to his children, Kevin H. and Kaylee H. We affirm. Pursuant to our authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), we have ordered this case submitted for decision without oral argument.

BACKGROUND

Kevin, born in April 2004, and Kaylee, born in April 2007, are the natural children of Russell H. and Kristi F. Russell and Kristi were never married.

On April 22, 2009, Deputy Dan Lionberger and Chief Deputy Michael Holland of the Otoe County sheriff's office were dispatched to Russell and Kristi's residence in Douglas,



Nebraska, in response to a disturbance. Russell was not home when the deputies arrived. Kristi reported being assaulted by Russell. Lionberger spoke with Kristi, who informed him that the family had been driving in their vehicle when she and Russell got into an argument. Kristi stated that Russell tried to choke her, drove the vehicle into a mailbox and then headed for a tree, saying that he would kill them all. Lionberger and Holland noticed that Kaylee had two black eyes. They also noticed that the house was dirty and cluttered, and that the kids were dirty and appeared unkempt. Kristi reported that they did not have money for food or cleaning supplies. Kevin and Kaylee were voluntarily placed with relatives on April 22 to allow the police time to investigate the assault and to give the parents the opportunity to clean the home.

On April 24, 2009, Lionberger noticed Kristi driving. He knew that her license was suspended so he stopped the vehicle and arrested her. Lionberger noted that Kristi was wearing the same clothes that she had been wearing on April 22 and it did not appear that she had bathed. On April 25, Deputy Briley and Deputy Starner received information that Russell was at his home. Because Russell had an outstanding warrant, the deputies went to the home. Kristi claimed that Russell was not at the residence, but once deputies were able to get inside the residence they located Russell and placed him under arrest. Both

Russell and Kristi admitted having used methamphetamine that day. The house was in the same condition as it had been on April 22. On April 28, it was determined that Russell and Kristi were not capable of caring for the children due to their finances, lack of food and cleaning supplies, and possible addiction issues. The children were placed in emergency protective custody. The children were placed with their maternal aunt and uncle, Jeff and Teresa, in Sterling, Nebraska, on April 28, and have been living with them ever since.

The State filed a juvenile petition in Otoe County Court on April 28, 2009, alleging that Kevin and Kaylee were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) by reason of the faults or habits of Russell and Kristi.

On August 12, 2009, the county court adjudicated Kevin and Kaylee to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) based on Russell and Kristi's admissions to the allegations in the petition. A factual basis was read into the record establishing that the parents' home was in an unsanitary condition and that the parents could not afford to purchase cleaning supplies.

On August 18, 2010, the State filed a motion for termination of Russell and Kristi's parental rights to Kevin and Kaylee pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 2008). The State alleged that: Russell and Kristi had

substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection; reasonable efforts to preserve and reunify the family had failed to correct the conditions leading to the adjudication; the children had been in an out-of-home placement for 15 or more months of the most recent 22 months, and termination was in the children's best interests.

The termination hearing was held on June 14, 15, 16, 22, and 29, 2011. The testimony was that Kristi's participation in this case has been virtually nonexistent. She does not have visitation with the children, did not participate in services, and rarely attended hearings. The last hearing she attended was in the fall of 2010. Kristi neither attended the termination hearing, nor had counsel represent her at the hearing. Russell was present at the termination hearing and was represented by counsel. Numerous witnesses testified as to Russell's progress on the case plan.

Steve Young, a child and family service specialist with the Nebraska Department of Health and Human Services (NDHHS), testified at the hearing. Young stated that he met with Russell and Kristi in their home on May 5, 2009. Young noted that on May 5, the house was clean and met minimal standards. Young told the parents about available services including visitation, in-home therapy, family support, and family assessment. Russell and

Kristi said they would participate. Young testified that Russell admitted using methamphetamine between April 23 and 25. Young testified that the first hearing was on May 6. The children were ordered to remain out of the home. The family assessment was to occur between May 28 and June 13.

Don Davis was a NDHHS child protective service worker in the summer of 2009. He started working with this family on July 18. Davis testified that in July 2009, Kristi's whereabouts were unknown, and Russell was living with his mother, Karen, in Unadilla, Nebraska. Russell was to have three visits per week with his children. Weekday visits were to occur in Sterling, where the children lived, and weekend visits were to occur in Unadilla, where Russell lived.

Davis first met with Russell on August 26, 2009. At that time, Russell had not completed the court-ordered comprehensive family assessment, claiming that he did not know that it was court-ordered. Russell verbally agreed to do the comprehensive family assessment. However, in September 2009, NDHHS stopped doing comprehensive family assessments and switched to pretreatment assessments. Russell did not complete his pretreatment assessment until October 28, 2010. At the meeting on August 26, Davis also discussed Russell's drug use, and Russell admitted to injecting methamphetamine.

A dispositional hearing was held on October 14, 2009. Davis testified that Russell was ordered to complete a pretreatment assessment, a drug and alcohol evaluation, a psychological evaluation, maintain employment, and find suitable housing for the children. After missing several appointments, Russell did complete his diagnostic psychological evaluation. The psychological evaluation recommended that Russell complete a parenting program and receive regular outpatient psychiatric care and individual psychotherapy. The evaluation also recommended that Russell complete a drug and alcohol assessment.

Davis testified that in November and December 2009, Russell was only visiting his children once per week on the weekends--Russell claimed he was too busy during the week, he was working, and that it was difficult to get to Sterling for weekday visits. Davis also testified that Russell was evading urinalysis (UA) testing from October through December. There were seven UA attempts: Russell completed one, which was negative; he refused two; and he did not return calls for the other four attempts.

Davis testified that a review hearing was held on January 5, 2010. Russell was ordered to follow treatment recommendations for his dual diagnosis; participate in alcohol, drug, and psychological therapy; comply with UAs; maintain employment; and maintain housing. NDHHS approved dual diagnosis therapy in

January 2010 with First Step, however there was a delay because a therapist was not immediately available. First Step was prepared to start in March, but Russell did not start until May because he "no-showed" for two earlier appointments.

Davis testified that NDHHS attempted to obtain UAs from Russell 25 times from January 5 through March 25, 2010. Russell only complied with five UAs, three of which were positive. Russell failed to comply with several more UAs from April through July 2010.

Russell met with Dr. Wesley Sime on May 5, 2010, to complete his diagnostic evaluation with First Step. Dr. Sime testified that he diagnosed Russell with major depressive disorder and alcohol dependence. Dr. Sime testified that at the time of his evaluation of Russell he was aware that Russell had had five different encounters with the legal system: attempted delivery of illegal drugs in 1986; DUI in 2002; driving under suspension in 2007; a bad check in 2009; and driving under suspension in 2009. When presented with exhibits 24 and 25, certified copies of Russell's 2003 conviction for possession of cocaine and his 2006 conviction for attempted possession of methamphetamine, Dr. Sime testified that he was not made aware of those convictions during his evaluation but that it would have been pertinent information. Dr. Sime also testified that he was not aware of Russell's previous positive methamphetamine

tests at the time of the evaluation. Dr. Sime recommended that Russell abstain from alcohol and drugs, participate in counseling and intensive outpatient treatment for substance abuse, participate in AA meetings twice per week, and have a psychiatric appointment to consider medications for depression.

Davis testified that Russell was to begin individual therapy in May 2010 at First Step, but did not take advantage of those services, saying that therapy interfered with his work schedule. Tim Huske, a licensed alcohol and drug counselor at First Step, testified that Russell started intensive outpatient group therapy on June 16, 2010. Huske testified that the program was 6 weeks, three sessions per week. Huske testified that Russell only attended a total of four sessions, and was discharged on July 9 because of his absences. In August, Russell tried to get back into First Step, but he was refused due to past issues.

In July 2010, Russell brought up the Veteran's Affairs (VA) as a treatment option. Davis testified that he also suggested Blue Valley to Russell for dual diagnosis treatment. Davis testified that he made a referral to Blue Valley on July 27, but does not believe that Russell enrolled. Russell did enroll in treatment through the VA from October 12 through October 28, 2010. The VA records which were received into evidence as exhibit 20 reveal that Russell indicated he needed treatment for



alcohol, but he did not focus on his methamphetamine or cocaine use. The VA records also reveal that Russell left treatment "a little sooner than would have been liked by the treatment team" because he wanted to spend Halloween with his children. A condition of Russell's discharge was that he continue with aftercare, enroll in a 12-step program, and maintain compliance with medications and follow-up appointments. Davis' last day on the case was November 30, 2010. Davis testified that as of November 30, Russell still had not enrolled in aftercare. Testimony from Russell and another caseworker was that Russell attended one or two aftercare appointments in February or March 2011, even though he was supposed to attend one appointment per month after being released from the VA. And Russell testified that he never enrolled in a 12-step program after being released from the VA. Furthermore, Russell testified positive for methamphetamine on March 20, 2011. He told a caseworker that it was either drugs or suicide. Russell also told a caseworker that he gets stressed out and a relapse might happen, but that "it's really not that big a deal."

Marlene Kwiatkowski, a family and permanency specialist with KVC, testified that in December 2010, Russell was allowed to transport his children for visitations but that ended in January 2011 because of safety concerns. Kwiatkowski testified that Russell made unapproved stops, allowed unapproved adults to

be around the children, allowed the children to see Kristi at a McDonald's, and the children reported that Russell let them sit in his lap and drive the car. Russell denied that he let the children steer the car, and said that the children were probably referring to a race track that they received as a gift. He also testified that the children did not see Kristi in person, but merely saw a picture of her.

Also in December 2010, Russell's mother, Karen, began supervising Russell's visits with the children. Russell has lived with Karen since August 2009. Kwiatkowski testified that Karen told her that it would be difficult for her to have the children reside in her home, and that visits alone were hard on her due to her age. Karen testified that she does not remember having that conversation with Kwiatkowski. Karen testified that she probably expressed concern about the children living at her home permanently, but stated that she was willing to do whatever it takes. Kwiatkowski also testified that from April 2011 until the termination hearing, Russell had cancelled numerous visits with the children.

Russell was court ordered to maintain employment. Russell testified that he works for B.A.B. construction and also receives disability payments. B.A.B.'s payroll regarding Russell from October 2009 through June 2011 was received into evidence as exhibit 28. The payroll records show that Russell did not

receive a paycheck during the following periods: between December 19, 2009 and January 16, 2010; between January 16 and April 10, 2010; between May 15 and June 5, 2010; between June 12 and November 6, 2010; and between January 1 and April 2, 2011. Russell testified that construction work is not year-round, and therefore he sometimes collects unemployment.

Jan Marion, the Court Appointed Special Advocate (CASA) for Kevin and Kaylee, testified that she was appointed to the case in June 2010. Marion was able to observe the children in Russell's home and in the foster home. She testified that there was mutual love between Russell and the children, but that Russell has a hard time disciplining the children. Marion testified that she is concerned about Russell's ability to care for the children because he has a hard time disciplining them, does not have job stability, and because it would be difficult for Russell to work full-time and provide a stable home for the children. Marion testified that Kevin told her he loves his dad but likes the foster home. She testified that it would be in the children's best interest to stay with the foster family.

Dr. Lee Zlomke, a psychologist, did an attachment assessment in November 2010 for Russell, the children, and the foster mother. Dr. Zlomke testified that the children had a firm attachment to Russell and the foster mother, but that the attachment to the foster mother was slightly stronger. He

testified that there would be mild trauma to the children to terminate either parental figure--Russell or the foster mother---but that there would be slightly more trauma to the children to terminate their relationship with the foster mother because they spend more time with her. When asked if he had an opinion within a reasonable degree of psychological certainty where the children should be placed due to their best interest, Dr. Zlomke responded "No."

Dr. Diane Marti, a licensed psychologist, has worked with Kevin since May 2010. Dr. Marti testified that Kevin has an adjustment disorder with disturbance of conduct and ADHD. Dr. Marti testified that Kevin requires predictability and stability in his life, and his caregiver needs to provide such with consistency. Dr. Marti said she has not observed a predictable, stable environment from Russell since May 2010. She testified that Russell has been inconsistent with visits, cancelling several, and that Russell taking the children to see Kristi would also create instability. Dr. Marti testified that stopping visits with Russell would be difficult for Kevin initially, but that his behavior would improve over time.

In an order filed on August 8, 2011, the juvenile court found that: Russell had substantially and continuously neglected to give the children necessary parental care and protection; following a determination that the children are as described in

§ 43-247(3)(a) and reasonable efforts under the direction of the Court, Russell has failed to correct the conditions leading to the determination; and that the children had been in an out-of-home placement for 15 or more months of the most recent 22 months--we note that these findings by the county court correspond to the grounds for termination found in § 43-292(2), (6), and (7). The court also found that Russell was an unfit parent. The juvenile court terminated Russell's parental rights to Kevin and Kaylee after finding that such was in the children's best interest. The juvenile court terminated Kristi's parental rights to the children for the same reasons it terminated Russell's parental rights. Only Russell has timely appealed to this court.

#### ASSIGNMENTS OF ERROR

Russell assigns that the juvenile court erred: (1) in finding that there was sufficient evidence to support the State's motion to terminate Russell's parental rights; (2) in finding that Russell is an unfit parent; (3) in finding that Russell substantially and continuously and repeatedly neglected and refused to give the children the necessary parental care and protection; (4) in finding that Russell failed to correct the conditions leading to the determination that the children were as described in § 43-247(3)(a); (5) in finding that termination of Russell's parental rights was in the children's best

interest; (6) in finding that reasonable efforts were provided under the direction of the court; (7) by violating Russell's due process rights when it terminated his parental rights based on allegations of substance abuse and domestic violence concerns even though such were not part of the factual basis presented at the original adjudication; and (8) in allowing or considering evidence presented by the State designed to show that the foster/adoptive home environment is superior to Russell's home environment.

#### 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 Hope L.*, 278 Neb. 869, 775 N.W.2d 384 (2009). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.*

#### ANALYSIS

##### *Grounds for Termination.*

In Nebraska statutes, the bases for termination of parental rights are codified in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010). Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the

best interests of the child. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

In its order terminating Russell's parental rights to Kevin and Kaylee, the juvenile court found that Russell: substantially and continuously neglected to give the children necessary parental care and protection (§ 43-292(2)); reasonable efforts under the direction of the court have failed to correct the conditions leading to the determination that Kevin and Kaylee are children as defined by § 43-247(3)(a) (§ 43-292(6)); and that the children had been in out-of-home of home placement for 15 or more months of the most recent 22 months (§ 43-292(7)). Russell does not assign or argue that the juvenile court erred in finding that grounds for termination existed under § 43-292(7). And our de novo review of the record clearly and convincingly shows that grounds for termination of Russell's parental rights under § 43-292(7) were proven by sufficient evidence.

Kevin and Kaylee were officially removed from Russell's home on April 28, 2009. At the time the motion to terminate parental rights was filed on August 18, 2010, the children had been in an out-of-home placement for 15 months. At the time the termination hearing began on June 15, 2011, the children had been in an out-of-home placement for 25 months. Clearly grounds for termination of Russell's parental rights under § 43-292(7)

were proven by sufficient evidence. Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the children's best interests.

We note that because we do not consider whether termination of Russell's parental rights was proper pursuant to § 43-292(6), Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2010), which requires reasonable efforts to reunify families, is not applicable to the instant case. *In re Interest of Andrew M.*, 11 Neb. App. 80, 643 N.W.2d 401 (2002). Section 43-283.01 is only incorporated into § 43-292(6), not into the remaining subsections of § 43-292. *Id.* *Best Interest of the Children.*

Russell argues that the juvenile court erred in finding that terminating his parental rights was in the best interest of the children. Neb. Rev. Stat. § 43-292 requires that parental rights can only be terminated when the court finds that termination is in the child's best interest. A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Therefore, with such severe and final consequences, parental rights should be terminated only "in the absence of any reasonable alternative and as the last resort." See *In re Interest of Kantril P.*, 257 Neb. 450, 467, 598 N.W.2d 729, 741 (1999). However,



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. *In re Interest of Andrew M. et al.*, 11 Neb. App. 80, 643 N.W.2d 401 (2002). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002).

*In re Interest of Stacey D.*, 12 Neb. App. 707, 717, 684 N.W.2d 594, 602 (2004).

Russell has failed to complete therapy, was discharged from intensive outpatient therapy for lack of attendance, has not been honest with service providers about his drug history, has not participated in aftercare, has not attended AA/NA meetings, has repeatedly failed to comply with UAs, and tested positive for methamphetamine less than 2 months before the termination hearing. Russell told a caseworker that it was either drugs or suicide. Russell also told a caseworker that he gets stressed out and a relapse might happen, but that "it's really not that big a deal." Clearly, Russell is unwilling or unable to address his methamphetamine addiction, which prevents him being able to effectively provide and care for his children. Clearly, the drug holds greater power over him than anything else, despite the obvious risk of losing his children.

For example, Russell has failed to take advantage of all of his visitations with Kevin and Kaylee, repeatedly cancels visitations, and has failed to move beyond supervised visitations. He has used the excuse of "his work" but the evidence shows that it would be generous to describe his work as "part-time." Dr. Marti testified that Kevin requires predictability and stability in his life, and his caregiver needs to provide such with consistency. Dr. Marti said she has not observed a predictable, stable environment from Russell since May 2010. At the time of the termination hearing Kevin and Kaylee had been in foster care for 25 months. And "[c]hildren cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity." *In re Interest of Walter W.*, 274 Neb. 859, 872, 744 N.W.2d 55, 65 (2008). Kevin and Kaylee need a stable, able and willing caregiver and unfortunately Russell has not proved himself to be such a caregiver. Therefore, the juvenile court did not error in finding that Russell is an unfit parent and that it is in Kevin and Kaylee's best interest that Russell's parental rights be terminated.

We note that Russell argues that his due process rights were violated because termination of his parental rights was based on allegations of substance abuse and domestic violence concerns even though such were not part of the factual basis

presented at the original adjudication--remembering that the factual basis was that the parental home was dirty. However, "[i]n deciding best interests, the court is obligated to review the evidence presented by all parties relative to the parent's current circumstances and determine if termination is in the best interests of the minor children based on those circumstances." *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 907-08, 782 N.W.2d 320, 327 (2010). Contrary to Russell's contentions, domestic violence concerns did not play a significant part in the juvenile proceedings. The only domestic violence concern was the initial domestic dispute in April 2009 that brought this family to the attention of the police. The police subsequently discovered a dirty home and potential addiction issues. At the time of removal, Russell's drug use was an issue as he had admitted to using methamphetamine. Russell's drug use continued to be a concern throughout the juvenile proceedings. Russell was ordered to comply with several recommendations and participate in numerous services to address his drug issues, all of which have previously been outlined in this opinion. However, he failed to do so despite court orders. Based on our review of the record, Russell's drug use has been an issue since the beginning of this case and he was given an opportunity to appear and be represented at court proceedings.

Russell's due process rights were not violated and this assignment is without merit.

Russell also assigns and argues that the juvenile court erred in allowing or considering evidence that the foster/adoptive home environment is superior to Russell's home environment. It is true that evidence was presented to show that the foster home was a more stable environment for the children and that Kevin liked his foster home. Even if such evidence was erroneously admitted, it does not lessen the impact of the clear evidence that Russell is not able to provide a stable and suitable home and environment for the children, and cannot do so as a methamphetamine addict--a situation he does not want to change or is unable to change. Thus, the evidence shows that it is in the best interest of the children that his parental rights should be terminated. Furthermore, we have reviewed this case de novo and have not considered the "superiority" of the foster home environment in our disposition of this case--rather we have focused on what Russell can or cannot provide for the children. This assignment of error is without merit.

#### CONCLUSION

We find that grounds for termination of Russell's parental rights exist under Neb. Rev. Stat. § 43-292(7) and that termination of Russell's parental rights is in Kevin and Kaylee's best interest. Therefore, we affirm the decision of the

juvenile court terminating Russell's parental rights to Kevin and Kaylee.

AFFIRMED.