

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Keylen E.)
and Ty Onna J.,)
Children under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Paul W.,)
)
Appellant.)

No. A-13-842

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

FEB 14 2014

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

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

MOORE, Judge.

INTRODUCTION

Paul W. appeals from the order of the separate juvenile court of Douglas County, which terminated his parental rights to his minor child, Keylen E. Following our de novo review of the record, we conclude that sufficient grounds existed for the termination of Paul's parental rights and that the termination was in Keylen's best interests. Accordingly, we affirm.

BACKGROUND

Karlisa E. is the natural mother of a daughter, born in January 2003, and Keylen, born in March 2006. Paul is Keylen's father. Karlisa, her daughter, and her daughter's father are not involved in this appeal, and we do not reference them further in



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this opinion except as necessary to clarify the history of this case with respect to Paul and Keylen.

Keylen was removed from Karlisa's home and placed in foster care several times prior to the events that initiated the current case. Keylen was first placed in foster care in July 2007. Keylen was returned to Karlisa's care in approximately June 2009, but was returned to foster care 2 to 3 months later. Keylen was returned to Karlisa's care again in June 2010, but he was removed soon thereafter pursuant to the petition in this current case and has been in foster care continuously since that time. At the time of the hearing in this case on the motion to terminate Paul's parental rights, Karlisa's parental rights were not intact. Keylen has never resided with Paul or been placed in Paul's care since his birth.

On June 10, 2010, the State of Nebraska filed a petition in the juvenile court alleging that Keylen and his half-sister came within the meaning of Neb. Rev. Stat. § 43-247(3)(a), due to the faults and habits of Karlisa. Also on June 10, the State filed a motion for temporary custody, and the court entered an order for immediate custody, placing both children in the custody of the Nebraska Department of Health and Human Services. On July 19, the court entered an order adjudicating the children with respect to their mother and finding it in their best interests

to remain in the Department's temporary custody for appropriate care and placement.

On February 3, 2012, Paul filed a complaint for leave to intervene, alleging, among other things, that he was Keylen's father and that it was in Keylen's best interests to have visitation with Paul and for Paul to be considered for purposes of placement during the pendency of the case. On April 3, the juvenile court ordered Paul to undergo genetic testing.

On August 30, 2012, the State filed a supplemental petition in the juvenile court, alleging that Keylen came within the meaning of § 43-247(3)(a) and lacked proper parental care due to the faults or habits of Paul. Specifically, the State alleged that Keylen was at risk for harm because Paul had failed to provide proper parental care and support for him. The State also file a motion for temporary custody and supporting affidavit, stating that Paul had been confirmed as Keylen's father through genetic testing, that Keylen had been placed outside of his mother's home for the previous 24 consecutive months with other intermittent out-of-home placements dating back to July 2008, that Paul had been incarcerated and had had limited contact with Keylen, that Paul knew of Keylen's involvement with the Department since at least June 2010 but had not sought to intervene in the juvenile case until March 2012, and that Paul had not provided any support, financial or otherwise, for

Keylen's basic needs. On August 30, the court entered an order for immediate custody, ordering the Department to retain custody of Keylen for placement in foster care or other appropriate placement to exclude Paul's home. On October 31, the State filed an amended supplemental petition in the juvenile court, adding the allegation that Paul's use of alcohol and/or controlled substances placed Keylen at risk for harm.

On December 19, 2012, Paul filed a motion for visitation, and on that same date, the court granted him supervised visitation with Keylen.

On March 12, 2013, the juvenile court entered an order adjudicating Keylen under the amended supplemental petition. The court found the allegation of the amended supplemental petition true by a preponderance of the evidence, ordered that Keylen remain in the Department's temporary custody for appropriate care and placement, and also noted Karlisa's intent to relinquish her parental rights.

On May 3, 2013, the juvenile court entered an order following a disposition/permanency planning hearing. The court found that the permanency objective was adoption, that it would be contrary to the children's health, safety, and welfare to be returned home, and that it was in the children's best interests to remain in the Department's custody. The court ordered the children to participate in therapy and ordered sibling

visitation. The court also ordered Paul to complete a chemical dependency evaluation and follow the recommendations of the provider, participate in supervised visitation with Keylen as arranged by the Department if released from incarceration, and participate in family support services upon his release from incarceration.

On June 20, 2013, the State filed a motion for termination of Paul's parental rights with respect to Keylen. The State alleged grounds for termination under Neb. Rev. Stat. § 43-292(2) and (7) and alleged that termination of Paul's parental rights was in Keylen's best interests.

A termination hearing was held before the juvenile court on September 13, 2013. The court received various documentary exhibits into evidence and heard testimony from Paul and from Keylen's foster parent, therapist, and case worker.

The record documents Paul's criminal convictions and sentences since Keylen's birth. In 2006, Paul pled guilty to and was convicted of federal charges for distribution of crack cocaine and unlawful transport of firearms and was sentenced to imprisonment for concurrent sentences of 100 months. Paul's sentences were subsequently reduced, and he served 6½ years in a federal penitentiary until his release in November or December 2011. Paul testified that he was incarcerated again in October 2012 for "what the papers say was ecstasy." In January 2013,

Paul was sentenced in the Douglas County District Court to 60 days' imprisonment following his plea-based conviction for possession of cocaine, and he was given credit for time served of 60 days. Paul was arrested for driving under the influence in January 2013, was subsequently convicted for DWI third offense, aggravated, and in August, he was sentenced to imprisonment for a period of 3 years, with credit for 215 days served. Paul's federal probation was also revoked in federal court because of the DWI conviction, and he was sentenced to imprisonment for 21 months to be served consecutive to the district court sentence.

Keylen has been in foster care with his aunt, Barbara C., who is Paul's sister, since he was 2 years old, except for a brief period of a few months when he was 4 years old. While Paul was incarcerated in the federal penitentiary, he alerted Barbara that Keylen was in foster care and asked her to try to obtain placement of him. Since Paul's current incarceration, he has only called Barbara's home once. At that time, Paul called to speak to another son of his and did not ask to speak with Keylen. According to Barbara, Paul has never called her home to talk to Keylen and has never sent cards, gifts, letters, or money to her home for Keylen. Prior to Paul's most recent incarceration, Barbara did take Keylen to visit Paul while he was incarcerated, and Paul has visited Keylen at Barbara's home after he was released from the federal penitentiary. Barbara

testified that there was no set visitation schedule, but Paul would visit Keylen at her house a couple of times a week for about an hour, which occurred until Paul was incarcerated again in 2012. Paul has not visited Keylen since January 2013. Barbara never observed any behavioral issues with Keylen after he visited with Paul, and it appears to Barbara that Keylen and Paul have a positive relationship.

Janelle Simms has been Keylen's therapist since April 2013. Following a mental status examination completed by another individual, Keylen was diagnosed with ADHD and oppositional defiant disorder. Simms has been working with Keylen to modify his defiant behavior, as well as to improve his coping and social skills. Simms' goals for Keylen include compliance, coping and social skills. Simms testified Keylen needs to work on coping skills because he sometimes has difficulty expressing emotions and ends up expressing emotions such as sadness in a way that may look like anger, defiance or oppositional behavior. Simms has explored Keylen's sadness during therapy, and Keylen has told her that he worries about his family, particularly his half-sister, who is in a different foster care placement. Keylen is working on social skills because he has some issues with being respectful in the classroom at school, although he is doing well in school.

Keylen has mentioned Paul only a couple of times during therapy, but these comments have been positive. It was evident to Simms from these comments that there was a caring relationship between Keylen and Paul. Paul has never contacted Simms to inquire about Keylen's therapy, or progress, and he has not participated in any of Keylen's therapy sessions. Simms did not know, however, whether Paul had ever been informed that she was Keylen's therapist.

According to Simms, it is important for a child such as Keylen with oppositional defiant disorder to have permanency and stability in his life and to know that he has a place he belongs and people to help him with his needs. Simms testified that Keylen needs permanency because it is important for him to have someone that is active within his life and attentive to his special needs. According to Simms, Keylen is happy in his current placement and looks to Barbara and her family as family. Barbara is involved in Keylen's therapy, and Simms teaches Barbara strategies she can use in parenting Keylen. Simms testified it is important for Keylen to have a parent actively involved in his therapy.

Lindsay Longwell, a family permanency specialist with Nebraska Families Collaborative, has been Keylen's caseworker since October 26, 2012. Prior to Longwell's assignment to the case, Paul was offered services including a substance abuse

program and other offers of family support services. Longwell was not able to find any information on whether Paul completed the substance abuse program, but she testified that Paul did not accept the other offers of family support. After Longwell was assigned as caseworker and prior to Paul's incarceration in early 2013, Paul was offered and provided with supervised visitation and family support. Paul declined Longwell's offer of family support. Three supervised visits occurred between Keylen and Paul in January 2013 prior to Paul's current incarceration. When Longwell was assigned to the case, Paul was living in stable housing with his girlfriend, but he was not employed. During the period prior to Paul's incarceration, Longwell met with Paul once or twice and they discussed employment, other permanent housing, and financial responsibility. Paul told Longwell that it was difficult to find employment, and although Longwell offered him services, Paul stated that he was "taking care of it" himself. Paul did not explain to Longwell what he was doing to find employment. At Paul's dispositional hearing, Longwell recommended a chemical dependency evaluation and that Paul follow the recommendations of the evaluation pending his release from incarceration. At the time Longwell made the recommendation, she was unaware of how long Paul would be incarcerated. According to Longwell, Paul did complete the court-ordered chemical dependency evaluation, but she was not

able to review the recommendations because he did not execute a release for her to receive the results.

Longwell opined that termination of Paul's parental rights would be in Keylen's best interests for several reasons. Longwell testified that due to Paul's incarceration, it was evident that he would not be able to parent Keylen in the near future. Next, Longwell testified that Keylen needs permanency because he has been out of the home almost his entire life and has mental health and physical needs requiring consistency and people whom are able to provide for those needs. With respect to his physical needs, the record shows that Keylen has some physical delays on the right side of his body, for which he wears an arm and leg brace and engages in occupational therapy. Keylen also receives speech therapy. Finally, Longwell testified that Paul was not making any progress at reunifying with Keylen based on the amount of time Paul has spent incarcerated. This concerned Longwell because Paul has been absent for a majority of Keylen's life, spending more time in jail than with Keylen. Longwell stated Keylen needs a "forever family" to provide the permanency he needs to thrive and succeed. Longwell thought that Paul would be incarcerated for 4 years, but she stated that even if Paul's incarceration only lasted an additional 10 months, Keylen would still remain in foster care for a very long time

and any additional time could be detrimental to Keylen's progress, physically and psychologically.

Paul appeared in person and presented testimony on his own behalf. According to Paul, he was employed for 7 or 8 months following his release from federal prison in 2011 and child support was deducted from his paychecks during that time. Paul was ordered to pay support of \$50 a month, beginning in September 2012 and at the time of a court report dated April 19, 2013, he was approximately \$300 in arrears and was not making regular payments. Paul denied being offered any family support services by Longwell. With respect to his current incarceration, Paul testified that he would serve 18 months for his 3-year DWI sentence and that he had approximately 10 months left to serve. According to Paul, although he was sentenced to a 21-month consecutive sentence for the federal parole violation, the time was calculated in such a way that following his 18 months in prison, he would be released to a half-way house for an additional 3 months to complete the federal sentence.

On September 18, 2013, the juvenile court entered an order terminating Paul's parental rights to Keylen. The court found that the State proved by clear and convincing evidence grounds for termination under § 43-292(2) and (7) that termination of Paul's parental rights was in Keylen's best interests. Paul subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Paul asserts that the juvenile court erred in finding clear and convincing evidence to establish that (1) Paul substantially and continuously or repeatedly neglected and refused to give Keylen necessary care and protection, and (2) termination of Paul's parental rights was in Keylen's best interests.

STANDARD OF REVIEW

An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Danaisha W.*, 287 Neb. 27, 840 N.W.2d 533 (2013).

ANALYSIS

Statutory Grounds.

Paul asserts that the juvenile court erred in finding clear and convincing evidence to establish that he substantially and continuously or repeatedly neglected and refused to give Keylen necessary parental care and protection under § 43-292(2). The court found sufficient evidence to terminate Paul's parental under both §§ 43-292(2) and (7).

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 child's best interests. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). Clear

and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

Under § 43-292(7), the State must show that the child has been in an out-of-home placement for 15 or more months of the most recent 22 months. The evidence was unchallenged that Keylen has remained in out-of-home placement continuously since June 2010, or approximately 3 years since the filing of the motion for termination of Paul's parental rights. Accordingly, the State proved § 43-292(7) by clear and convincing evidence.

Because the State need prove only one ground for termination, we decline to consider Paul's assertion that the juvenile court erred in finding termination proper under § 43-292(2). Generally, when termination is sought under subsections of § 43-292 other than subsection (7), the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile. *In re Interest of Emerald C.*, 19 Neb. App. 608, 810 N.W.2d 750 (2012). Thus, we will consider evidence relevant to § 43-292(2) in our analysis of Keylen's best interests.

Best Interests.

Paul asserts that the juvenile court erred in finding clear and convincing evidence to establish that termination of Paul's

parental rights was in Keylen's best interests. Paul argues that the motion to terminate his parental rights was premature and that the State did not demonstrate that termination of parental rights was the last resort in this case.

A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010). 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 Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). Although incarceration alone cannot be the sole basis for terminating parental rights, it is a factor to be considered. *Id.* A parent may as surely neglect a child of whom he or she does not have possession by failing to put himself or herself in a position to acquire possession as by not properly caring for a child of whom he or she does have possession. See *In re Interest of Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012). Although incarceration itself may be involuntary as far as a parent is concerned, the criminal conduct causing the incarceration is voluntary. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). In termination of parental rights cases, it is proper to consider a parent's inability to perform his or her parental obligations because of

imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpetrated. *Id.*

Keylen was born in March 2006 and was 7½ years old at the time of the termination hearing. He was first placed in foster care in July 2007 and following two subsequent brief returns to his mother's care, he has been in foster care continuously since June 2010. Keylen has never resided with or been placed in Paul's care, and Paul has been incarcerated for most of Keylen's life. While Paul did make efforts upon learning of Keylen's involvement in foster care to have Keylen placed with a family member and did have some visits with Keylen when he was not incarcerated, Paul has never been in a position to physically care for Keylen and he has only paid minimal child support during the brief time in 2012 that he was not incarcerated. Paul has never called Barbara's house to talk to Keylen and has never sent cards, gifts, letters, or money for him. According to Paul, at the time of the termination hearing, he had approximately 10 months left on his current sentence to be followed by approximately 3 months in a half-way house. However, Paul presented no evidence to indicate that he would then be in a position to care for Keylen. Paul's criminal history shows involvement with drugs and alcohol, although it is unclear from the record whether he has addiction problems. Paul completed a chemical dependency evaluation, but he did not execute a release

to the Department to obtain the evaluation. Accordingly, any recommendations resulting from that evaluation were not placed in evidence.

During the bulk of Keylen's life and the entirety of his involvement with the foster care system, Paul has not put himself in a position to be able to care for Keylen. Paul has repeatedly engaged in criminal behavior resulting in periods of incarceration. There is nothing in the record to indicate that permanency could be achieved with Paul anytime in the near future. To suspend Keylen in the system any longer than he already has been is not in his best interests. Children 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, 744 N.W.2d 55 (2008). The juvenile court did not err in finding that termination of Paul's parental rights was in Keylen's best interests.

CONCLUSION

The juvenile court did not err in terminating Paul's parental rights.

AFFIRMED.