

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF MARIO K.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
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IN RE INTEREST OF MARIO K., JR., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

MARIO K., SR., APPELLANT.

Filed December 11, 2012. No. A-12-246.

Appeal from the Separate Juvenile Court of Douglas County: ROGER J. HEIDEMAN,  
Judge. Affirmed.

Jane M. McNeil for appellant.

No appearance for appellee.

Thomas G. Incontro, P.C., L.L.O., guardian ad litem.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

**INTRODUCTION**

Mario K., Sr. (Mario Sr.), appeals from the decision of the separate juvenile court of Douglas County terminating his parental rights to his minor child, Mario K., Jr. (Mario Jr.). We affirm.

**BACKGROUND**

Mario Jr. was born in February 2010. He was removed from his mother's care at the hospital due to her erratic behavior. He was placed in the care of foster parents when he was 2 days old.

In April 2010, the State filed an amended petition alleging that Mario Jr. comes within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) in that he lacked proper parental

care by reason of the faults or habits of Mario Sr. In particular, the State alleged that Mario Sr. committed domestic violence toward Mario Jr.'s mother when she was pregnant with Mario Jr.; that Mario Sr. had been incarcerated since April and was unable to provide Mario Jr. with proper care and support; that Mario Sr. had current criminal charges pending; that Mario Sr. engages in inappropriate aggressive and/or violent behavior; that Mario Sr.'s use of alcohol and/or controlled substances placed Mario Jr. at risk for harm; and that Mario Sr. failed to provide Mario Jr. with appropriate care, support, and/or supervision. In June, a hearing on the amended petition was held and the juvenile court found Mario Jr. to be within the meaning of § 43-247(3)(a).

In September 2010, Mario Jr.'s guardian ad litem filed a second motion for termination of parental rights pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2012). The guardian ad litem alleged that Mario Sr. had substantially and continually neglected and refused to give said child necessary parental care and protection; failed to consistently submit to random urinalysis testing within 24 hours of the request; failed to consistently visit with said child; failed to obtain and maintain appropriate, safe, and stable housing; failed to consistently participate in his treatment; failed to abstain from the use of drugs and/or alcohol; failed to cooperate with Family Support Services; failed to obtain and maintain a sufficient and legal source of income to provide for himself and said child; and failed to follow medical directives regarding said child. The guardian ad litem further alleged that Mario Jr. had been in an out-of-home placement for 15 or more of the most recent 22 months and that termination was in his best interests.

A termination hearing was held February 24, 2012. Mario Sr. did not attend the termination hearing, but his counsel did. Preliminarily, Mario Sr.'s counsel objected to the testimony of two witnesses, Elizabeth Lawton and Ryan LeGrande, who had been added to the witness list on February 2. The court overruled the objection. Witnesses testified concerning the efforts that were made to assist Mario Sr. reunify with Mario Jr. and Mario Sr.'s progress on the case plan as ordered by the juvenile court.

Jessica Nemec, a supervised visitation family support worker with Nebraska Children's Home Society, testified that she was assigned to work on Mario Jr.'s case from April 2010 until October 2011. Nemec testified that initially, Mario Sr. had visits with Mario Jr. 5 days a week for 1 hour, and that Mario Sr. was compliant, on time, and participated appropriately. During the visits, Mario Sr. interacted appropriately with Mario Jr. However, Mario Sr. was incarcerated from June through October 2011, and there were no visits while Mario Sr. was incarcerated. Nemec testified that Mario Sr. was allowed to have visits with Mario Jr. while incarcerated, but that she did not see the value in them when Mario Jr. was only 1½ years old and there could be no physical contact between father and son.

Nemec also testified as to other concerns the court orders addressed with respect to Mario Sr. The court ordered Mario Sr. to participate in "level 1" outpatient treatment. He began treatment with Lutheran Family Services in January 2011, but did not successfully complete the program. Mario Sr. attended "12-step meetings" while in treatment, but Nemec testified that she never received documentation that he continued attending after leaving treatment. Mario Sr. was ordered to submit to twice a week random drug screenings, but according to Nemec, he refused most of the requests. Mario Sr. was ordered to attend a domestic violence program but did not comply. Mario Sr. was required to obtain and maintain a legal source of income, and although

Mario Sr. told Nemec he was doing odd jobs contracting and painting, he never provided proof of his income source.

Mario Sr. did, however, obtain and maintain appropriate housing according to Nemec. Mario Sr. was also ordered to follow medical directives with respect to Mario Jr., who has “milk soy protein intolerance.” In Nemec’s opinion, Mario Jr. would be at risk if placed with Mario Sr. because Mario Sr. was not compliant with the court orders addressing his substance abuse problem and domestic violence issues. Nemec opined that terminating Mario Sr.’s parental rights would be in Mario Jr.’s best interests.

LeGrande, a family permanency specialist at KVC Behavioral Health, testified, over objection, that he was Mario Jr.’s family permanency specialist from October 2011 until February 2012. He also testified as to the case plan the juvenile court put in place, stating that Mario Sr. was ordered to complete domestic violence classes, to do “level 1” outpatient treatment, to submit to random drug tests, to attend supervised visits with Mario Jr., and to attend medical appointments and follow any medical directives with respect to Mario Jr. According to LeGrande, Mario Sr. did not comply with any of the court orders.

During LeGrande’s time as Mario Jr.’s family permanency specialist, Mario Sr. attended only 1 out of 14 scheduled visits. In LeGrande’s opinion, Mario Jr. would be at risk if he was returned to Mario Sr. because of the lack of contact between father and son and the fact that Mario Sr. had not attended any medical appointments and therefore did not know how to care for Mario Jr.’s health issues. LeGrande testified that he believed terminating Mario Sr.’s parental rights would be in Mario Jr.’s best interests.

Mario Jr.’s foster mother also testified. Mario Jr. was placed with her and her husband in February 2010 and had resided with them continuously as of the date of the termination hearing. The foster mother testified that the last visit Mario Sr. had with Mario Jr. was in November 2011. The foster mother attended this visit because Mario Jr. had been experiencing some anxiety issues when away from his foster parents. During the visit, Mario Sr. sat in a chair and took video and pictures of Mario Jr. but was not engaged in the visit. The foster mother and the caseworker attempted to involve Mario Sr. in the visit but were not successful, and the visit ended 20 or 30 minutes early. Prior to November, Mario Sr. had not had a visit with Mario Jr. since June.

Lawton, a program support worker employed at KVC Behavioral Health, testified that she also attended the November 2011 visit. According to Lawton, Mario Sr. had visits set up for every Thursday at 3:45 p.m. and was on a “call and confirm” basis. This means Mario Sr. was to call Lawton 24 hours in advance of the visit in order for the visit to take place. They attempted the weekly Thursday visits for approximately 5 or 6 weeks beginning in early November and were successful on only the one occasion in November. Lawton testified that during the November visit, Mario Sr. was not engaged--Lawton, the foster mother, and Mario Jr. would roll a ball back and forth and try to engage Mario Sr., but he would not roll the ball back. Mario Sr. ended the visit approximately 20 minutes early, asking, “[A]re we ready to go?” and getting up and starting to walk away.

By an order dated February 27, 2012, the juvenile court found clear and convincing evidence that the minor child was within the meaning of § 43-292(2), (6), and (7). Although the order of the juvenile court did not set forth detailed findings, it did find that other than the

allegations that Mario Sr. failed to refrain from using drugs and/or alcohol and failed to follow medical directives with respect to Mario Jr., all other allegations were true by clear and convincing evidence, namely that Mario Sr. failed to consistently submit to random urinalysis testing within 24 hours of the request; Mario Sr. failed to consistently visit with Mario Jr.; Mario Sr. failed to obtain and maintain appropriate, safe, and stable housing; Mario Sr. failed to consistently participate in his treatment; Mario Sr. failed to cooperate with Family Support Services; Mario Sr. failed to obtain and maintain a legal source of income; and Mario Jr. had been in an out-of-home placement for 15 or more of the most recent 22 months. The juvenile court concluded that it was in the best interests and welfare of Mario Jr. that the parental rights of Mario Sr. be terminated.

#### ASSIGNMENTS OF ERROR

Mario Sr. alleges the juvenile court erred in terminating his parental rights (1) because clear and convincing evidence established that Mario Sr. made progress in his efforts to be reunited with Mario Jr.; (2) because the guardian ad litem did not present clear and convincing evidence that termination of parental rights was in Mario Jr.'s best interests; (3) because Mario Sr. was not afforded a fundamentally fair process; and (4) by finding that Mario Sr. neglected and refused to give Mario Jr. necessary parental care and protection.

#### 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 Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

#### ANALYSIS

##### GROUND FOR TERMINATION

The bases for termination of parental rights are codified in § 43-292, which 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 Mario Sr.'s parental rights, the juvenile court found by clear and convincing evidence that Mario Jr. was within the meaning of § 43-292(2), (6), and (7) and that it was in Mario Jr.'s best interests that Mario Sr.'s parental rights be terminated.

Mario Jr. was placed with his foster parents in February 2010. Mario Jr. had been in out-of-home placement for approximately 19 months when the second motion to terminate parental rights was filed. At the time the termination hearing occurred, Mario Jr. had been in out-of-home placement in excess of 24 months. Our de novo review of the record clearly and convincingly shows that grounds for termination of Mario Sr.'s parental rights under § 43-292(7) were proved by sufficient evidence.

If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791

N.W.2d 765 (2010). Therefore, this court need not review termination under § 43-292(2) or (6). Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the child's best interests.

Section 43-292 requires that parental rights can be terminated only when the court finds that termination is in the child's best interests. 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. *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 “[i]n the absence of any reasonable alternative and as the last resort . . . .” See *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 467, 598 N.W.2d 729, 741 (1999). However,

[w]here 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. & Shannon D.*, 12 Neb. App. 707, 717, 684 N.W.2d 594, 602 (2004).

The evidence reveals that Mario Sr. failed to comply with most of the requirements imposed by the juvenile court. To address concerns with substance abuse, the court ordered Mario Sr. to participate in outpatient treatment and submit to random drug tests. Mario Sr. did not successfully complete treatment and refused most of the requests for random urinalysis. To address domestic violence issues, Mario Sr. was ordered to attend domestic violence classes, but he failed to do so. He also failed to produce evidence of a legal source of income with which he could support himself and Mario Jr.

Mario Sr. also failed to consistently attend visits with Mario Jr. Initially, Mario Sr. attended regular visits with Mario Jr. and interacted appropriately with him. There were no visits, however, from June through October 2011 while Mario Sr. was incarcerated, and although Mario Sr. argues there could have been visits had someone arranged them, Mario Sr. attended only one visit with Mario Jr. in the 4 months from the time he was released from incarceration until the date of the termination hearing. There were weekly visits scheduled, but Mario Sr. failed to call and confirm 24 hours prior to the visit as required. In fact, Mario Sr. attended only 1 out of 14 scheduled visits. Thus, from June 27, 2011, until February 24, 2012, Mario Sr. had only one visit with Mario Jr. In total, in the first 2 years of Mario Jr.'s life, there was an 8-month period during which he saw his father only one time. Notably, Mario Sr. even failed to appear at the termination hearing.

The evidence is clear that it is in the best interests of the child that Mario Sr.'s parental rights be terminated.

#### FUNDAMENTALLY FAIR PROCESS

Mario Sr. alleges that the juvenile court erred in terminating his parental rights because he was not afforded a fundamentally fair process. Mario Sr. argues it was a violation of due process to allow the guardian ad litem to add LeGrande and Lawton to the witness list a mere 22 days before trial. Additionally, Mario Sr. alleges that the guardian ad litem failed to supply him

any of the exhibits or a certified copy of the pleadings he intended to offer at the termination hearing, in further violation of due process.

In determining whether admission or exclusion of particular evidence in a parental rights termination case would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007). The improper admission of evidence by a juvenile court in a parental rights termination proceeding does not, in and of itself, constitute reversible error; a showing of prejudice must be made. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

Given our de novo review of this record, even assuming that the juvenile court erred in allowing the disputed witnesses to testify, such error was harmless.

Our review is de novo on the record; any error is cured so long as this court does not rely on the challenged evidence. Improper admission of evidence in a parental rights proceeding does not, in and of itself, constitute reversible error, for, as long as the appellant properly objected, an appellate court will not consider any such evidence in its de novo review of the record.

*In re Interest of Hope L. et al.*, 278 Neb. 869, 888-89, 775 N.W.2d 384, 398 (2009). Although our facts section above summarizes the testimony of LeGrande and Lawton, there is sufficient evidence to support the termination of Mario Sr.'s parental rights, apart from the evidence to which he objected.

LeGrande's testimony was very similar to Nemeč's testimony because LeGrande was the caseworker who replaced Nemeč. Both testified as to what the court had ordered Mario Sr. to do, and both testified that Mario Sr. had not complied with the court orders. Additionally, both Nemeč and LeGrande testified as to the inconsistent nature of Mario Sr.'s visits with Mario Jr. Nemeč's testimony alone establishes that there were no visits between June and October 2011 and that Mario Sr. failed to comply with most of the court orders with the exception of obtaining appropriate housing. Significantly, Nemeč's testimony establishes that Mario Sr. failed to address his substance abuse issues through successful completion of an outpatient treatment program and his domestic violence issues through completion of domestic violence classes.

Likewise, Lawton's testimony was similar to the foster mother's testimony in that they also testified as to the inconsistent nature of Mario Sr.'s visits with Mario Jr. Additionally, both Lawton and the foster mother were present at the November 2011 visit and testified that Mario Sr. was not engaged in the visit and that the visit ended approximately 20 minutes early. The foster mother's testimony alone establishes that from June 2011 through February 2012, Mario Sr. had one visit with Mario Jr., and that Mario Sr. was not engaged in that one visit, which ended approximately 20 minutes early. Therefore, even without considering testimony from LeGrande and Lawton in our review, there was sufficient evidence to find that terminating Mario Sr.'s parental rights was in Mario Jr.'s best interests.

Mario Sr. also claims he did not have sufficient time to prepare, review, and receive evidence prior to trial because the guardian ad litem did not provide him copies of the exhibits intended to be introduced at the termination hearing. The exhibits to which Mario Sr. objects are certified copies of the juvenile court's prior orders in this case. Thus, Mario Sr. had previously been provided copies of the orders when they were issued by the court and had a chance to

review them well before February 24, 2012. Any reference to the orders at the termination hearing would not prejudice Mario Sr. Accordingly, his argument regarding the admission of the witnesses' testimony and exhibits lacks merit.

#### CONCLUSION

For the reasons stated above, we affirm the juvenile court's order terminating Mario Sr.'s parental rights to Mario Jr.

AFFIRMED.