

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Symon S.,)
A child under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Ashleigh K.,)
)
Appellant.)

No. A-13-636

**MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL**

FILED
FEB 12 2014

**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

IRWIN, MOORE, and BISHOP, Judges.

BISHOP, Judge.

Ashleigh K. appeals from the decision of the separate juvenile court of Lancaster County terminating her parental rights to her son, Symon S. We affirm.

BACKGROUND

Ashleigh, age 26, is the biological mother of Symon, born in December 2011. Symon's biological father is unknown. Because Symon's father is not part of this appeal, he will not be discussed further.

Symon was removed from Ashleigh's care one day after his birth because he tested positive for methamphetamine at birth. Symon was placed in the temporary custody of the Nebraska Department of Health and Human Services (DHHS), which placed him



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in foster care. Symon has remained in DHHS' custody, and in foster care, ever since.

In December 2011, the State filed an amended petition alleging that Symon was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013) due to the faults or habits of Ashleigh. In an order filed on January 6, 2012, Symon was adjudicated due to the faults or habits of Ashleigh.

Several review and permanency hearings were held in 2012 and 2013, the proceedings of which do not appear in our record. Ashleigh was ordered to complete a residential treatment program and follow all recommendations for continuing/aftercare upon successful completion, attend at least two 12-step meetings per week, abstain from alcohol and all controlled substances not prescribed by a physician, submit to random drug and alcohol testing, participate in regular family team meetings, have reasonable supervised or monitored visitation, follow the rules of the Family Drug Court Program, and cooperate with child parent psychotherapy.

Ashleigh was accepted into the Family Drug Court in February 2012. While in Family Drug Court, Ashleigh participated in review hearings every 2 to 4 weeks (the proceedings of which do not appear in our record). On January 25, 2013, Ashleigh was discharged from Family Drug Court, and the case was returned to the regular juvenile court for further disposition. The reason

for discharge is not apparent from the court's order, but we note that the order states that it was the deputy county attorney and Symon's guardian ad litem who moved to terminate Ashleigh from Family Drug Court (their motion does not appear in our record).

On April 4, 2013, the State filed a motion to terminate Ashleigh's parental rights to Symon pursuant to Neb. Rev. Stat. § 43-292(2), (4), (6), and (7) (Cum. Supp. 2012). The State alleged that Ashleigh substantially and continuously neglected to give Symon necessary parental care and protection; Ashleigh was unfit by reason of debauchery or habitual use of intoxicating liquor or narcotic drugs, which conduct is seriously detrimental to the health, morals, or well-being of Symon; reasonable efforts failed to correct the condition which led to the adjudication; Symon had been in out-of-home placement for 15 or more months of the most recent 22 months; and that termination was in Symon's best interests.

On April 19, 2013, DHHS filed a motion to suspend Ashleigh's visits with Symon. In support of its motion, DHHS offered the affidavit of Nicole Lemke, the Child and Family Services Specialist assigned to Symon's case. In her affidavit, Lemke stated that earlier that day she had received a phone call from Ashleigh's mother, Melissa, stating that Ashleigh posted comments on Facebook that led Melissa to think Ashleigh may hurt

herself. Lemke suggested that Melissa call the Lincoln Police Department to do a well-adult check on Ashleigh. Lemke stated that later that morning she received a phone call from the Lincoln Police Department asking if Ashleigh knew the address of Symon's foster parents because Ashleigh had posted a statement on Facebook insinuating she was going to injure herself and her son. Lemke told the police officer that Ashleigh knew the foster parents' names, but was not certain if Ashleigh knew their address. Lemke stated that the police officer asked her to notify the foster parents and daycare providers of the situation to ensure Ashleigh did not try to get Symon. Lemke stated that due to Ashleigh's statement regarding harming herself and her son, DHHS believed it was in Symon's best interest for visitation to be suspended until it was determined that Ashleigh was mentally stable.

At a hearing on April 24, 2013, Ashleigh admitted posting the following statements on Facebook: "Me and my son will no longer be a burden on anyone"; "I have nothing left to lose"; and "My son -- I'm going to lose my life, love and everything." However, she testified that when she posted that no one would have to worry about her or her son, she meant she was going to try to get her life together on her own without asking her family for help. The juvenile court entered an order suspending

Ashleigh's visits with Symon. Visits remained suspended at the time of the termination hearing.

The termination hearing was held on June 25 and 26, 2013. Evidence was presented regarding Ashleigh's progress throughout this case.

Leigh Duff, a licensed mental health practitioner (LMHP) and a licensed alcohol and drug counselor (LADC), testified that she conducted a substance abuse evaluation of Ashleigh in December 2011. The evaluation was received into evidence. Duff testified that Ashleigh reported that she had previously been diagnosed with bipolar disorder and depressive disorder. Duff also diagnosed Ashleigh with amphetamine dependence with physiological dependence (meaning her body is physically dependent on the drug). Duff recommended that Ashleigh participate in a dual diagnosis short-term residential treatment program.

In January 2012, Ashleigh entered a short-term residential treatment program at St. Monica's Behavioral Health for Women. Ashleigh also applied for and was accepted into the Lancaster County Family Drug Court in February 2012.

Ashleigh completed her short-term residential treatment program at St. Monica's in February 2012. She then entered St. Monica's Project Mother Child program (PMC), a secondary transition program (and a fully supervised and structured

environment). Michelle Miller, a LMHP and a licensed clinical social worker, was Ashleigh's individual and group therapist at PMC until July 2012. Miller worked with Ashleigh on managing and decreasing anxiety, relapse prevention planning, life skills building, and relationship skill building. Miller and Ashleigh worked on family dynamics and repairing relationships (with Ashleigh's mother, for example), and increasing Ashleigh's support system. Miller also worked with Ashleigh on relationship dynamics, discussing healthy versus unhealthy relationships, red flags for abuse, and resolving conflicts in a healthy way. Miller testified that it was necessary to work with Ashleigh on relationship dynamics because of Ashleigh's relationship with Gene "Spiv" Salts.

We note that one of DHHS's concerns was Ashleigh's relationship with Salts. At the time of Symon's birth, Ashleigh identified Salts as Symon's father, but genetic tests positively excluded him as the father. Salts had an extensive criminal history and an open Child Protective Services case of his own. Additionally, he was an active drug user. Ashleigh continued to have contact with Salts from the time of Symon's birth until she filed for and was granted a protection order against him in January 2013. The juvenile court had previously entered a restraining order against Salts for the benefit of Symon in July 2012.

Miller testified that Ashleigh was having contact with Salts while at PMC. There were reports that she saw him while out "on pass" to see her grandmother, and he came to the PMC facility on two occasions. Miller's understanding from Ashleigh was that Salts had been violent toward her at some point, and that he was actively using drugs. Miller was concerned that Salts could trigger a relapse for Ashleigh.

Miller testified that Ashleigh was generally compliant with treatment at PMC. She made progress in both individual and group therapy.

While at PMC, Ashleigh also began participating in child parent psychotherapy with Symon. Miller acted as the psychotherapist for Ashleigh and Symon from March to July 2012. Miller testified that the bond between Ashleigh and Symon improved greatly over time, and that there were no major concerns about Ashleigh's parenting skills. Miller's main concerns were Ashleigh's relationship issues and those issues being triggers for relapse. Ashleigh was still in the PMC program when Miller left in July 2012.

Coral Frazell, a LMHP and LADC, took over as Ashleigh's therapist at PMC in July 2012. In August, Ashleigh graduated from PMC and moved into her own apartment. Frazell remained Ashleigh's therapist for two weeks after she graduated from PMC. Frazell was concerned during Ashleigh's transition. Frazell

noticed that Ashleigh was more depressed. Frazell was also concerned that Ashleigh might be in contact with Salts, might not be reaching out to positive supports, and might be returning to high risk behaviors that could potentially impact her relationship with Symon.

Frazell was also the psychotherapist for Ashleigh and Symon from July 2012 until January 2013. Frazell testified that Ashleigh completed the goals with Symon for child parent psychotherapy. Ashleigh was appropriate, positive, and nurturing towards Symon. However, in her January discharge summary, which was received into evidence, Frazell noted that Ashleigh had

an inability to build a strong, sober, support network on her own. She continued to be depressed and struggled with ways to cope with it appropriately. Her lack of progress in this area shows some continuing concern about her inability to provide a safe and stable environment for her son despite many positive interactions.

Frazell also testified that when she discharged Ashleigh, she still had concerns about Ashleigh not completing her goal of reaching out for positive supports, but discharged her anyway because "I was aware of Family Drug Court's concern. I was aware of other issues. And did not feel that supporting a positive interaction with her when she was still struggling in these areas, I was concerned about [Symon's] long term welfare." She testified that child parent psychotherapy builds attachment and

"it can be harmful for [Symon] in the long term to be bonded to somebody that might not . . . be able to provide a safe environment for him."

Frazell testified that Ashleigh's drug of choice is methamphetamine. According to Frazell, when people are high on methamphetamine, they might be agitated, have hallucinations, can have delusional behavior, and they are "not present." If Ashleigh is high while she is supposed to be caring for Symon, that could pose a safety risk for Symon because Ashleigh's decision making would be affected, as would her ability to manage a safe environment and her ability to interact positively and meet Symon's needs.

Rhonda Hill, LADC, provided outpatient individual and group substance abuse counseling for Ashleigh beginning on August 28, 2012. Hill testified that Ashleigh started using methamphetamines at 14 years old, and within a short period of time was using on a daily basis. Ashleigh had a one-year period of sobriety at age 18, but then returned to daily use. Hill agreed that Ashleigh had a "pretty severe addiction to methamphetamine."

Hill testified that in January 2013, Ashleigh relapsed on methamphetamines. In March and April, she began missing appointments. When Ashleigh came to a session on April 30, she reported relapsing two weeks prior and said that she had binged

on methamphetamines for 3 days. Hill testified that she and Ashleigh established a plan for Ashleigh to come for weekly sessions and re-engage in treatment. Ashleigh's next appointment was scheduled for May 7, but she did not show up. Ashleigh came to a session on May 21 and admitted using methamphetamines in May, stating that she last used on May 17. They discussed Ashleigh going back to short-term residential treatment. Because Ashleigh would need an updated substance abuse evaluation recommending that level of care (for payment purposes), an evaluation was scheduled for June 6. Ashleigh did not show up for her June 6 evaluation appointment. Hill testified that Ashleigh needs short-term residential treatment and that her prognosis for long-term sobriety is poor without going to residential treatment.

Lemke, a Child and Family Services Specialist, began as the caseworker on Ashleigh and Symon's case when it was transferred to the Family Drug Court on February 28, 2012. Lemke specializes in cases where drug abuse is the reason for removal.

Lemke testified that Ashleigh initially had supervised parenting time with Symon. Monitored visits began in April 2012; Ashleigh was in PMC residential treatment at the time, so she was living in a supervised setting, which aided in the recommendation for monitored visits with Symon. When Ashleigh graduated from PMC and got her own apartment in August, visits

went back to being fully supervised because of Ashleigh's recent contacts with Salts. In September, DHHS started doing random drop-ins at Ashleigh's apartment to see if she was being truthful about not having contact with Salts. While Salts was never seen at the apartment, there were several occasions when the drop-in worker heard noises coming from inside the apartment, but no one answered the door.

Lemke testified that in August 2012, Ashleigh tested positive for alcohol, yet denied she had been drinking. In September, the urinalysis results were invalid. In November, Ashleigh was not consistently attending AA/NA meetings, claiming that she did not have transportation. However, Lemke noted that there were meetings within walking distance of Ashleigh's apartment. In December, Ashleigh missed several drug tests. In January 2013, Ashleigh tested positive for methamphetamines and admitted that she had relapsed on January 24. Beginning in February, Lemke required Ashleigh to drug test prior to every visit with Symon. In March, Ashleigh became inconsistent in her visitation attendance. Ashleigh missed one or two visits in February, at least five visits in March, and only attended three visits in April (she was scheduled to have four or five visits per week). Ashleigh had positive methamphetamine tests in March and April.

Lemke testified that in April 2013, after the juvenile court suspended Ashleigh's visitation, she discussed with Ashleigh what was necessary in order to get her back on track. Lemke told Ashleigh that she needed to get back into individual therapy with Hill and she needed to start drug testing every time that she was contacted to do so. However the drug testing provider was not able to get ahold of Ashleigh. Lemke spoke with Ashleigh about drug testing and Ashleigh stated that she would not drug test "'until she gets a visit with [Symon].'"

Lemke testified that since Ashleigh left PMC, Lemke has never been able to recommend less than supervised visits because of Ashleigh's continued contact with Salts, her continued drug use, her lack of cooperation with court-ordered services, her inconsistent attendance at outpatient treatment, and her lack of attendance at AA/NA meetings. Lemke testified that Symon has been out-of-home his entire life (almost 19 months) and that he needs stability and consistency. Ashleigh has had numerous relapses in 2013 and was not currently having visitation. Lemke testified that it would be in Symon's best interests to terminate Ashleigh's parental rights.

In its order filed on July 5, 2013, the juvenile court terminated Ashleigh's parental rights to Symon pursuant to § 43-292(2), (4), (6), and (7), and found that termination was in

Symon's best interests. Ashleigh has timely appealed the juvenile court's termination of her parental rights.

ASSIGNMENTS OF ERROR

Ashleigh assigns that the juvenile court erred in finding that terminating her parental rights was in Symon's best interests.

STANDARD OF REVIEW

Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013). However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower 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. 2012). 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 Ashleigh's parental rights to Symon, the juvenile court found that Ashleigh substantially and continuously neglected to give the child necessary parental care and protection (§ 43-292(2)); Ashleigh is unfit by reason of debauchery or habitual use of intoxicating liquor or narcotic drugs, which conduct is seriously detrimental to the health morals, or well-being of Symon (§ 43-292(4)); reasonable efforts failed to correct the condition which led to the adjudication (§ 43-292(6)); and the child had been in out-of-home placement for 15 or more months of the most recent 22 months (§ 43-292(7)).

Ashleigh does not contest the juvenile court's finding that grounds for terminating her parental rights exist. And having reviewed the record, we find that grounds did exist. Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." Symon was removed from parental care in December 2011, one day after his birth. At the time the motion to terminate parental rights was filed on April 4, 2013, Symon had been in an out-of-home placement for nearly 16 months. And at the time of the termination hearing in June 2013, Symon had been in an out-of-home placement for 18 months. Our de novo review of the record clearly and convincingly shows that grounds for termination of Ashleigh'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 child's best interests.

Best Interests.

Under § 43-292, once the State shows that statutory grounds for termination of parental rights exist, the State must then show that termination is in the best interests of the child. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). But that is not all. A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit. *Id.*

Ashleigh initially made good progress in this case, successfully completing short-term residential treatment and PMC. She also completed her treatment with Symon via child parent psychotherapy. She responded positively to the structured setting provided at St. Monica's. However, when Ashleigh transitioned to independent living in August 2012, she started struggling. She tested positive for alcohol in August. In November, Ashleigh was not consistently attending AA/NA meetings, despite living within walking distance of the meetings. In December, Ashleigh missed several drug tests. She relapsed on methamphetamines in January, March, April, and May, 2013. She started missing counseling appointments and

visitations. And within 3 weeks of the termination hearing, Ashleigh failed to show up for a scheduled evaluation necessary to get her back into short-term residential treatment. Hill testified that Ashleigh needs short-term residential treatment and that her prognosis for long-term sobriety is poor without going to residential treatment.

Ashleigh has a long history of drug addictions. She has been using methamphetamines since she was 14 years old, and other than a one-year period of sobriety at age 18, the only time she remained clean was while she was in the structured residential setting at St. Monica's and for a few months after her transition to independent living. She no doubt loves Symon and is bonded to him, but she has fallen back into her old patterns of drug use.

Ashleigh argues that her situation is similar to *In re Interest of Jacob H.*, 20 Neb. App. 680, 831 N.W.2d 347 (2013). In *In re Interest of Jacob H.*, the father made strong efforts toward reunification with his children during the early stages of the case. He submitted to inpatient substance abuse treatment and appeared to maintain a safe and stable lifestyle. The positive changes the father made to his life facilitated the return of the children to his home. However, the father experienced some setbacks with his sobriety once his children were returned to his care and the children were returned to an

out-of-home placement. This court stated that the father's actions while his children were in his care were concerning and that the children had not been in the father's home for a terribly long period of time before he began to consume alcohol again. The court noted that such a rapid setback could indicate that he is simply unable to appropriately parent his children while maintaining his sobriety. We went on to say:

However, it is not entirely clear exactly what this setback meant in terms of Brett's ability to parent, because after his relapse, the Department's efforts to reunify Brett with his children dramatically decreased and eventually ended altogether. As a result, we do not have much information about what Brett did after the relapse or whether this relapse was an isolated event or a pattern of behavior. . . .

Based on the evidence presented at the termination hearing, we cannot say that there is sufficient evidence to demonstrate that termination of Brett's parental rights is in the children's best interests. Evidence that Brett had one setback on his road toward reunification with the children is simply insufficient to demonstrate that termination is the last resort available for this family. There was insufficient evidence to demonstrate that Brett's relapse in December 2010 was a pattern of behavior rather than an isolated event and that Brett is currently incapable of appropriately parenting the children. The Department's unilateral decision to terminate services to Brett and to terminate his visitation with the children

produced a lack of evidence about Brett's circumstances for the 16 months prior to the termination hearing.

In re Interest of Jacob H., 20 Neb. App. at 694-95, 831 N.W.2d at 357. Accordingly, this court reversed the county court's order terminating Brett's parental rights to his children.

This case is distinguishable from *In re Interest of Jacob H.* In that case, the State failed to present any evidence of the father's circumstances during the 16 months prior to the termination hearing. "The caseworkers did not know whether the father had maintained his sobriety, whether he was employed, or anything else about his current circumstances." *In re Interest of Jacob H.*, 20 Neb. App. at 693, 831 N.W.2d at 357. Here there was ample evidence regarding Ashleigh's current circumstances, and it was clear that her relapses were more than a mere setback. Furthermore, DHHS continued to provide Ashleigh with services up to the time of the termination hearing, she simply failed to take full advantage of such services.

Lemke stated that Symon needs stability and consistency. He should not be made to wait until Ashleigh decides to take the steps necessary to get back into residential treatment. And even if she went back to residential treatment, it would likely be many months until she is in a position to care for Symon. Lemke testified that terminating Ashleigh's parental rights is in Symon's best interest. We agree. 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 Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). At the time the termination hearing began in June 2013, Symon had already been in an out-of-home placement for 18 months. "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, 872, 744 N.W.2d 55, 65 (2008). Symon needs a safe permanent home and unfortunately Ashleigh cannot provide him with such. Ashleigh has not been able to overcome her addiction to methamphetamine and has never been able to parent Symon without some level of supervision and will not be able to do so in the foreseeable future. Accordingly, while she is an unfit parent for Symon due to her addiction, we note that Ashleigh has demonstrated appropriate parenting abilities when she is in a structured environment and is not under the influence of drugs, and because of that, our review has been especially difficult. It is clear she responds well when being treated, but it also appears she is going to need long-term, sustained treatment to succeed in beating her addiction. Unfortunately, in the months leading up to the termination hearing, there was simply no evidence that Ashleigh was committed to overcoming her addiction, and Symon cannot be made to wait indefinitely. Therefore, after our de novo review,

we find that it is in Symon's best interests that Ashleigh's parental rights be terminated.

CONCLUSION

For the reasons stated above, we affirm the order of the juvenile court terminating Ashleigh's parental rights to Symon.

AFFIRMED.