

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF AMERICAL T. ET AL.

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IN RE INTEREST OF AMERICAL T. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

DESTINI P., APPELLANT.

Filed May 4, 2010. No. A-09-1080.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY,
Judge. Affirmed.

Matthew R. Kahler, of Finley & Kahler, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, and Jennifer Chrystal-Clark for appellee.

IRWIN, SIEVERS, and Carlson, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Destini P. appeals from the order of the juvenile court which terminated her parental rights to two of her children. On appeal, Destini challenges the juvenile court's finding that her parental rights should be terminated pursuant to Neb. Rev. Stat. § 43-292(2) and (6) (Reissue 2008) and the court's finding that termination of her parental rights is in the children's best interests. Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Destini's parental rights. As such, we affirm the order of the juvenile court terminating Destini's parental rights.

II. BACKGROUND

The juvenile court proceedings involving Destini and her children were initiated in April 2007. On April 23, 2007, Destini gave birth to her daughter, Americal T. Immediately after Americal's birth, the State filed a petition with the juvenile court, alleging that Americal was within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006) because 1 month prior to Americal's birth, another child suffered extensive injuries while in Destini's care and Destini was unable to provide a reasonable explanation for the injuries. In addition, the State alleged that Americal was at risk for harm due to Destini's use of alcohol and controlled substances. Americal was placed in the custody of the Department of Health and Human Services (the Department).

Subsequently, Destini pled no contest to the allegation in the petition concerning her use of alcohol and controlled substances and Americal was adjudicated as a child within the meaning of § 43-247(3)(a). The remaining allegations in the petition were dismissed. From the time of her adjudication through January 2009, Americal remained within the juvenile court's jurisdiction and continuously resided in an out-of-home placement. During this time, the juvenile court ordered Destini to, among other things, undergo a chemical dependency evaluation and psychological evaluation; participate in individual psychotherapy; obtain and maintain a legal source of income; obtain and maintain safe and adequate housing; complete a parenting class; and participate in supervised visitation with Americal. On January 16, 2009, Destini relinquished her parental rights to Americal.

On October 26, 2008, approximately 3 months prior to Destini's relinquishing her parental rights to Americal, she gave birth to twin boys, Rumneilious P. and Romance P. The boys were removed from Destini's care on November 26, after Rumneilious was diagnosed as failure to thrive and was brought to the hospital with diarrhea. Destini refused to cooperate with the Department when a caseworker questioned her about the boys' health.

The State filed a supplemental petition alleging that Rumneilious and Romance were within the meaning of § 43-247(3)(a) because Destini had failed to make any progress toward reunification with Americal even though Americal had been out of the home since April 2007. The juvenile court entered an order placing Rumneilious and Romance in the immediate custody of the Department and indicated that placement of the children was not to include Destini's home. The boys have remained in the custody of the Department in an out-of-home placement since the entry of that order on November 26, 2008.

Ultimately, Destini admitted the allegations in the supplemental petition and Rumneilious and Romance were adjudicated as children within the meaning of § 43-247(3)(a). Destini was then ordered to undergo a psychological evaluation; participate in individual therapy; obtain and maintain a legal source of income; maintain safe, stable, and adequate housing; meet with the Department caseworker assigned to the case two times per month; and participate in supervised visitation with the boys.

On August 3, 2009, the State filed a motion for termination of Destini's parental rights to Rumneilious and Romance. The State alleged that termination of her parental rights was warranted pursuant to § 43-292(2), because Destini had substantially and continuously or repeatedly neglected and refused to give the minor children the necessary parental care and

protection, and § 43-292(6), because reasonable efforts to preserve and reunify the family failed to correct the conditions that led to the determination that the children were within the meaning of § 43-247(3)(a). In addition, the State alleged that termination of Destini's parental rights was in the best interests of the children.

On October 1 and 2, 2009, a hearing was held on the State's motion for termination of parental rights. While we have reviewed the evidence presented at the hearing in its entirety, we do not set forth the specifics of the testimony and exhibits here. Rather, we will set forth specific facts as presented at the hearing as necessary in our analysis below.

At the conclusion of the termination hearing, the juvenile court found that the State proved by clear and convincing evidence that grounds for termination of Destini's parental rights existed under § 43-292(2) and (6). The court also found that it would be in the children's best interests to terminate Destini's parental rights. The court then entered an order terminating Destini's parental rights.

Destini appeals here.

III. ASSIGNMENTS OF ERROR

On appeal, Destini challenges the juvenile court's finding that her parental rights should be terminated pursuant to § 43-292(2) and (6) and the court's finding that termination of her parental rights is in the children's best interests.

IV. ANALYSIS

1. 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 Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests. See *In re Interest of Jagger L.*, *supra*. The State must prove these facts by clear and convincing evidence. *Id.* 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 proven. *Id.*

2. STATUTORY GROUNDS

Destini assigns as error the juvenile court's finding that the State presented clear and convincing evidence to prove the statutory grounds for termination of her parental rights. Specifically, she challenges the juvenile court's determination that termination of her parental rights was warranted pursuant to § 43-292(2) and (6). Upon our de novo review of the record, we find that the State presented clear and convincing evidence to prove that termination of Destini's parental rights was warranted pursuant to § 43-292(6). As such, we need not specifically address the juvenile court's determination as to § 43-292(2).

Section 43-292(6) provides that a court may terminate parental rights when, “Following a determination that the juvenile is one as described in [§ 43-247(3)(a)], reasonable efforts to preserve and reunify the family . . . have failed to correct the conditions leading to the determination.”

On January 20, 2009, the juvenile court adjudicated Runneilious and Romance to be within § 43-247(3)(a), after Destini admitted to the allegations in the supplemental petition. Specifically, Destini admitted that the boys were at risk for harm because she had not made any progress toward reunification with Americal after 19 months of court-ordered rehabilitation plans and services from the Department. Essentially, Destini admitted that after 19 months of services, she had not progressed toward correcting the conditions that led to Americal’s adjudication and out-of-home placement in April 2007. Such conditions included Destini’s problem with alcohol and substance abuse.

Pursuant to Destini’s admission to the allegations in the supplemental petition, the juvenile court ordered a rehabilitation plan designed to correct the conditions leading to the adjudication. On January 16, 2009, the juvenile court ordered Destini to submit to a psychological evaluation and to make the results of the evaluation available to the court and to the Department. On March 10, 2009, the juvenile court ordered Destini to obtain and maintain a legal source of income; participate in individual therapy; maintain safe, stable, and adequate housing; meet with her caseworker from the Department two times per month; and participate in supervised visitation with the boys. On September 9, 2009, the juvenile court ordered the same rehabilitation plan as on March 10, 2009.

The record indicates that Destini has not consistently abided by the court’s rehabilitation orders. As a result, in the 10 months between the boys’ adjudication and the time of the termination hearing, Destini failed to make any significant progress toward reunification with Runneilious and Romance.

(a) Income

In March 2009, the juvenile court ordered Destini to obtain and maintain a legal source of income. From March 2009 to the time of the termination hearing in October 2009, Destini was not consistent in her efforts to obtain employment. Evidence in the record revealed that Destini was incarcerated from March to April 2009. As such, it is clear that she was not employed during this period of time. In June 2009, approximately 2 months after Destini was released from jail, she provided verification of her employment to Jodene Gall, her caseworker from the Department. Destini terminated this employment in July 2009. Gall testified at the termination hearing that Destini never provided her with any further verification of employment. However, Gall indicated that she had received collateral information that Destini had obtained employment at a fast-food restaurant approximately 1 month prior to the hearing. Gall did not have any specific information about Destini’s employment and was not certain if Destini continued to be employed at the time of the hearing.

(b) Individual Therapy

In February 2009, Destini obtained a psychological evaluation. The evaluation recommended that Destini participate in individual therapy to address her mental health needs

and her substance abuse problems. As such, in March 2009, the juvenile court ordered Destini to participate in individual therapy. Gall provided Destini with contact information for various therapists. Gall instructed Destini to set up an appointment and begin individual therapy sessions. Destini later informed Gall that she wanted to attend therapy with Betty Nelum. Destini had previously worked with Nelum in August 2008 when she underwent a chemical dependency evaluation.

Nelum testified at the termination hearing that Destini first contacted her in July 2009 and inquired about starting individual therapy. Nelum scheduled an appointment with Destini for July 9, but Destini failed to attend the appointment and failed to cancel it. Nelum rescheduled the appointment for July 29, but Destini again failed to attend the appointment and failed to cancel it. Nelum rescheduled the appointment a second time for August 7, but Destini again failed to attend the appointment and failed to cancel it. Because Destini had missed three consecutive appointments, Nelum discontinued her relationship with Destini without ever having met with her.

Gall testified at the termination hearing that Destini finally began attending individual therapy in September 2009, 1 month after the State had filed its motion for termination of parental rights. Gall indicated that she had received documentation from Destini's therapist regarding the appointments, but she noted that Destini had not attended her last scheduled appointment and had not called to cancel it. As such, Gall testified that she was unsure if Destini was still attending the therapy sessions.

Based on the evidence presented at the termination hearing, it is clear that Destini did not comply with the court's order to participate in individual therapy. Destini first inquired about attending therapy in July 2009, almost 4 months after the court ordered her to participate in therapy. Destini did not follow through with the therapy because she failed to attend every appointment scheduled with Nelum. It was not until after the State filed its motion for termination of parental rights that Destini attended any therapy. In addition, it is not clear if Destini intends to continue to participate in therapy, because prior to the termination hearing, she had stopped attending her therapy sessions.

In her brief to this court, Destini argues that the Department failed to provide reasonable efforts to assist her in participating in individual therapy. Contrary to Destini's assertions, it appears that Gall and the Department attempted to assist Destini, but she failed to cooperate or avail herself of the services offered to her. Gall provided Destini with transportation to the psychological evaluation. She provided Destini with the contact information of various therapists. Gall even went to Douglas County Hospital with Destini on multiple occasions to inquire about receiving therapy there. Gall spoke with Nelum about Destini's situation and her therapeutic needs. Gall did not offer to pay Nelum for Destini's therapy, but Nelum indicated that she was planning on working with Destini and charging her a nominal amount for each therapy session. It appears that Gall and the Department provided reasonable efforts to assist Destini with finding a therapist and attending therapy; however, Destini failed to avail herself of the Department's assistance.

(c) Housing

In March 2009, the juvenile court ordered Destini to maintain safe, stable, and adequate housing. Despite this order, Destini has not consistently maintained stable and adequate housing. Prior to Destini's incarceration in March 2009, she was living with her husband. There was some evidence that Destini's relationship with her husband was not stable. As such, there was some indication that Destini's home was not a safe and stable environment for the children.

After Destini's release from prison in April 2009, she obtained new housing near her mother's residence. However, Destini had a problem with the landlord and decided to move. Destini was unable to obtain independent housing, so she moved in with her mother so that she could save money.

In July 2009, Destini informed Gall that she had found a new residence. However, Destini subsequently reported that this housing had fallen through because of problems with the landlord.

Two or three weeks prior to the termination hearing, Destini obtained new housing. Gall visited the home to determine whether it was appropriate for the children. Gall reported that the house was "a structurally fit home; however, it's not adequately supplied and . . . there's not enough safety measures within the home to allow for the children to either be placed with her or for supervised visitation to take place at that home." Gall indicated that the house was completely unfurnished except for two air mattresses. In addition, the home did not have dishes, a kitchen table, toys, or safety gates.

The evidence presented at the termination hearing revealed that Destini had four residences in the 7 months between the juvenile court's March 2009 order and the October 2009 termination hearing. Destini's current residence is not suitable for the children.

(d) Meeting With Caseworker

In March 2009, the juvenile court ordered Destini to meet with Gall two times per month. At the termination hearing, Gall testified that Destini was not always consistent in meeting with her. Gall indicated that Destini's "best contact with [her] was during [Destini's] incarceration." Gall also indicated that Destini did make some efforts to maintain contact with her after Destini was released from jail.

(e) Supervised Visitation

The March 2009 order provided Destini with the right to supervised visitation with Rumneilious and Romance. However, Destini was actually provided with the opportunity to visit with the boys immediately after their removal from her home in November 2008. From November 2008 to the time of the termination hearing in October 2009, Destini failed to consistently attend visitation with the boys. When Destini did attend the visits, she often failed to provide diapers, food, and other necessities in order to care for the children.

Initially, in November 2008, Destini was provided with five visits a week. The visits were scheduled Monday through Friday from 9 a.m. until approximately noon. Destini typically participated in two of the five weekly visits. Destini provided a variety of excuses for the missed visits, including that she was a heavy sleeper, that she has a hard time waking up in the morning, that she had other things to take care of, and that the visits were scheduled too early in the day.

Due to the inconsistency in Destini's attendance at the visitations, the number of visits was reduced to three times per week for 3 hours per visit. In addition, Destini was required to call and confirm her attendance at the visits at least 1 hour prior to the time of the scheduled visit. Destini's attendance continued to be "sporadic." Sharon Witcher-Wells, the visitation specialist who conducted the visits between Destini and the boys, testified that Destini attended less than 50 percent of the visits. There were times that Destini would fail to call and confirm, and there were other times that Destini would call to confirm and would then fail to show up to the visit. In December 2008, Destini canceled 8 out of 16 scheduled visits. Witcher-Wells indicated in her monthly report that Destini was making only "minimal progress."

While Destini was incarcerated in March and April 2009, she was not able to have any visits with the boys because of the rules of the correctional facility. After her release from jail in May 2009, Destini elected to have only two scheduled visits per week. Destini only attended three of the eight scheduled visits in May.

In July 2009, Destini became somewhat more consistent in her attendance at visitations. Gall testified that from July 2009 to early September 2009, Destini attended approximately 75 percent of scheduled visits. However, in the weeks prior to the termination hearing, Destini's attendance began to diminish. From early September 2009 to October 2009, Destini attended only one visit per week.

Witcher-Wells testified at the termination hearing that when Destini did attend a visit, the boys' foster parents often had to provide food, clothing, and diapers because Destini would arrive with nothing. In addition, Witcher-Wells testified that Destini's behavior at visits was often inappropriate. At one visit, Destini positioned the boys so that they could climb over each other, hit each other, and grab each other. Destini indicated that she wanted to see which twin was dominant. She laughed and took pictures of this behavior. In addition, Witcher-Wells testified that Destini often left cigarette butts on the floor. One twin almost rolled off of the couch because Destini was distracted. Destini constantly used her cellular telephone while at the visits. At one visit when Destini was living with her mother, Destini and her mother got into a verbal altercation. At that point, Destini was no longer permitted to have visits in her home.

Taken together, the evidence presented at the termination hearing revealed that Destini made minimal progress toward reunification with her children from the time of their removal in November 2008 to the termination hearing in October 2009. She did not make any progress toward working on her mental health issues because she failed to attend individual therapy. She was not consistent in her housing, employment, or meeting with Gall. Perhaps most significant, she was not consistent in her attendance at visitation with her children. As such, she made minimal progress in improving her parenting skills.

Moreover, we note that although the boys had been out of Destini's home for 10 months at the time of the termination hearing, Destini had been involved with the juvenile court since April 2007 when Americal was removed from her care. After Americal was adjudicated as a child within the meaning of § 43-247(3)(a), Destini was ordered to complete an almost identical rehabilitation plan as the plan ordered in March 2009. Destini did not make any progress on this plan. In fact, at the adjudication hearing for Rumneilious and Romance in January 2009, she admitted that she had not made any progress toward reunification with Americal and that because she had not made any progress, the boys were at risk for harm. In total, Destini was

provided with approximately 29 months to rehabilitate herself and achieve reunification with her children. She made little to no progress during this time.

Based on our review of the record, we find that Destini did not make significant progress toward reunification with the boys despite the efforts of the Department and the juvenile court. As such, we affirm the decision of the juvenile court which determined that termination of Destini's parental rights was warranted pursuant to § 43-292(6).

Termination of parental rights is warranted whenever one or more of the statutory grounds provided in § 43-292 is established. There is clear and convincing evidence that termination of Destini's parental rights was appropriate pursuant to § 43-292(6). In light of this fact, we need not, and do not, further address the sufficiency of the evidence demonstrating that termination of Destini's parental right was also appropriate pursuant to § 43-292(2). Destini's assertion regarding the sufficiency of the statutory authority to support termination of her parental rights is without merit.

3. CHILDREN'S BEST INTERESTS

Destini also assigns as error the juvenile court's finding that termination of her parental rights is in the children's best interests. Upon our de novo review of the record, we affirm the order of the juvenile court. Destini failed to make significant progress toward reunification with her children despite the efforts of the Department and the juvenile court. Destini continues to be unable to provide stability for Rumneilious and Romance, and the children need and deserve permanency in their lives.

When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable period of time, the child's best interests require termination of parental rights. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.*

As we discussed more thoroughly above, Destini has failed to make any significant progress toward reunification with Rumneilious and Romance despite the length of time the boys have been out of her home. The boys were removed from Destini's care in November 2008. The termination hearing was held in October 2009. During the 11 months that the children were in an out-of-home placement, Destini did not attend therapy, did not obtain consistent and reliable employment, did not have stable and adequate housing, did not consistently meet with her caseworker, and did not consistently attend visitation with the boys. In short, at the time of the termination hearing, Destini was no closer to reunification with the children than she was in November 2008.

Moreover, Destini had been involved with the juvenile court since before the boys were born. In April 2007, Americal was removed from Destini's care. Destini was ordered to comply with a rehabilitation plan. Destini did not make any progress toward reunification with Americal from April 2007 to November 2008 when the boys were removed from her care.

As a result of Destini's inconsistent efforts and failure to comply with the rehabilitation plan, she is still not capable of effectively parenting the boys. In a report dated in May 2009, the visitation specialist, Witcher-Wells, indicated that the boys were struggling to form a bond with Destini because of the inconsistency of the visits. Witcher-Wells stated that Destini lacks the patience and understanding necessary to reestablish any bond with the children.

At the termination hearing, the Department caseworker, Gall, opined that it would be in the boys' best interests to terminate Destini's parental rights. Gall testified that as a result of Destini's inconsistent efforts, she was no closer to reunification with the boys than she had been in November 2008. Gall also testified that there were no other services available to assist Destini because she failed to avail herself of the help offered to her by the Department. Gall testified that Destini continues to lack organizational skills and the ability to maintain a schedule.

Upon our review of the record, we agree with Gall. Destini has been provided with reasonable time to comply with the rehabilitation plan. She has shown very little, if any, willingness to comply with the court's orders and appears to have made no significant efforts to rehabilitate herself. The boys' best interests require that a determination be made without further delay. They need stability in their lives and parental figures upon whom they can depend. Destini is simply unable to provide the stability that the boys require. We affirm the juvenile court's order which found that termination of Destini's parental rights is in the boys' best interests.

V. CONCLUSION

Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Destini's parental rights. As such, we affirm the order of the juvenile court terminating her parental rights to Rumneilious and Romance.

AFFIRMED.