

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Cairo B., et al,)
children under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Jennifer B.,)
)
Appellant.)

No. A-11-1024.

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

SEP 17 2012

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

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

INTRODUCTION

Jennifer B. appeals from the decision of the separate juvenile court of Douglas County terminating her parental rights to her minor children, Cairo B. and Coby B.

BACKGROUND

Cairo was born on December 6, 2005 and Coby was born on July 24, 2007. Both boys are the biological children of Jennifer and her husband, Cameron B.

On April 3, 2009, the State filed a petition alleging that the minor children come within the meaning of Neb. Rev. Stat. §43-247(3)(a) (Reissue 2008) in that the minor children lacked proper parental care by reason of the faults or habits of Jennifer. In particular, the State alleged that Jennifer



subjected the children to inappropriate physical discipline and failed to provide the children with proper parental care, support, and/or supervision which placed them at risk for harm.

The petition was filed as a result of punishment inflicted upon Cairo by his mother and her boyfriend, Marvin. The record reflects that Cairo was punished for eating biscuits by being placed in cold bathwater and Marvin shoving soap down his throat. According to Cairo, Jennifer attempted to remove the soap by pouring hot water in his mouth.

A hearing on the petition was held on April 10, 2009 and the juvenile court found that police officers discovered Cairo with feces strewn about the child's bedroom, bathroom, and possible other areas of the residence; that the child was unresponsive; had soap in his mouth; vomited; and his eyes were rolling back. The child was taken to the University of Nebraska Medical Center where his core body temperature was measured at 84 degrees. The court further found that Cairo had bruises and scratches on his cheeks, finger marks around his neck, and a contusion on his forehead. The juvenile court ordered that the Nebraska Department of Health and Human Services should continue temporary custody of the children with placement not to include the home of Jennifer. The children have been in foster care from April 3, 2009 to May 17, 2011, the date the termination hearing began.

Dispositional/Review hearings (the proceedings of which do not appear in our record) were held August 26, 27, 28, September 28, December 17, 2009, June 17, and December 7, 2010. Following the disposition and permanency planning hearing held on December 17, 2009, the juvenile court entered an order finding that the permanency objective was reunification of the parents with the children. It ordered Jennifer to comply with the case plan which included therapeutic services, a mental status exam, completion of a parenting class, maintenance of safe and adequate housing, and a legal source of income. The State dismissed its petition for termination of the parental rights of the father.

On October 26, 2010, the State filed a motion for termination of Jennifer's parental rights of both children pursuant to Neb. Rev. Stat. §43-292(2), (6) and (7) (Cum. Supp. 2010). The State alleged that Jennifer had substantially and continually neglected and refused to give said children necessary parental care and protection, failed to have consistent supervised visitation with said children, failed to complete a parenting class, failed to maintain a legal source of income and provide verification of such, failed to complete a domestic violence empowerment program, failed to participate in family therapy with Cairo and in individual therapy, Cairo and Coby had been in an out-of-home placement for 15 or more of the

most recent 22 months, and that termination was in the best interests of the children.

The termination hearing was held on May 17 and 18, and October 13 and 14, 2011. Testimony was given regarding the reasons why the children were removed from Jennifer's home and her progress on the case plan as ordered by the juvenile court. A number of witnesses testified concerning the efforts that were made to assist Jennifer reunify with her children.

Kellie Bush, a licensed mental health practitioner employed at Capstone Behavioral Health, testified that she first had contact with Jennifer in October 2010 when Jennifer was referred by KVC. Bush developed a treatment plan for Jennifer that, in Bush's opinion, was very simple. This included: (1) enjoying activities three times a week, (2) reuniting with her children as demonstrated by utilizing coping skills, (3) addressing court-ordered concerns and classes, (4) developing the ability to handle conflicts appropriately through utilizing conflict resolution skills and appropriate voice tones, and (5) decreasing the frequency and intensity of her anxiety response through demonstrating the use of coping skills five days a week. Jennifer never agreed to the treatment plan. According to Bush, Jennifer had difficulty focusing on her own mental health therapy goals and did not believe the plan should include goals for her to accomplish.

Bush terminated her relationship with Jennifer on December 3, 2010 due to Jennifer's aggressive and assaultive behavior on that date. Bush testified that Jennifer started the session in an agitated manner, accused Bush of saying that Jennifer was not African American and that she could not help Jennifer because of their cultural differences. As Jennifer's tone became louder and more aggressive, another therapist in an adjoining office checked to see if Bush was alright. According to Bush, Jennifer did not accomplish any of the goals in the treatment plan.

Sara Stobbe, a licensed mental health practitioner and certified social worker employed as a therapist by Capstone Behavioral Health, testified that she provided family therapy to Jennifer and Cairo in November 2010. In December 2010, she began treating Cairo individually. Stobbe testified that the therapy goals were (1) to help Jennifer and Cairo have positive interactions, (2) for Cairo to have a safe place for family visits, and (3) for Cairo to feel safe. Stobbe also testified that there was little interaction during the sessions, that Jennifer would put headphones on Cairo while she wrote letters to him which, since Cairo could not read, did not seem to Stobbe to be age-appropriate. When Stobbe encouraged Jennifer to refrain from the letter writing and do age-appropriate activities with her son, Jennifer would get upset that Stobbe

was interrupting her letter writing and accused Stobbe of wasting her time. In Stobbe's opinion, some of the letters were inappropriate. Stobbe testified that on a few occasions, the sessions went well and Jennifer and Cairo interacted appropriately.

Stobbe's family therapy sessions ended due to Jennifer's outburst directed toward Cairo in December 2010. Jennifer had inquired of Cairo about a scratch on his cheek which Cairo said resulted when he was messing around with his little brother. Jennifer became angry with Cairo, called him a liar, yelled at both Cairo and Stobbe, accused Stobbe of being on drugs, of being a racist, stated that Cairo was a paycheck to everybody, and threatened Stobbe. Stobbe testified that this caused Cairo to "freeze" in his chair, to become expressionless, and it was necessary to get his driver from KVC to help get him up. When the driver and Stobbe were taking Cairo to the car, Stobbe testified that Jennifer followed them into the waiting area screaming. After Jennifer left, Stobbe testified that she took Cairo back into her office to speak with him and said that he was visibly upset.

Stobbe continued to provide individual therapy for Cairo. On January 21, 2011, Cairo disclosed to Stobbe the biscuit-eating incident. Cairo told Stobbe that Jennifer and her boyfriend, Marvin, put him in the bathtub, that the water got

very cold, and that Marvin stuck a bar of soap down his throat "really far" and that this hurt. Cairo said that Jennifer tried to get the soap out with hot water but could not get all of it out. The next thing he remembered was waking up in the hospital and that it was warm.

Stobbe also testified that Cairo told her that he had been hit, punched, and kicked by Jennifer and her boyfriend, Marvin. Stobbe drew stick figures and had Cairo mark on them where Jennifer and Marvin had hurt him. Cairo also related an incident where his father, Cameron B., had choked Jennifer in Cairo's presence. Stobbe testified that Cairo expressed no desire to see or visit Jennifer. In Stobbe's opinion, Cairo needs stability in his life on a daily basis and it is in his best interests that Jennifer's parental rights be terminated.

Following the removal of the children from Jennifer's custody on or about April 3, 2009, Jennifer was to have visitation with the children under the supervision of Owens and Associates. Three employees of Owens testified concerning these visitations, namely Eva Abrams, a supervisor, Candi Marcantel, also a supervisor, and Karen Shirkey, a family support worker. Originally, supervised visits were scheduled for two hours three times per week. These witnesses testified that Jennifer was very inconsistent in attending the visitations. Because of Jennifer's failure to confirm visits, she was placed on "confirmation

status" in September 2009. After Jennifer's failure to confirm visitation appointments in early September, she was removed from the on-going schedule and was requested to contact Owens for future scheduling. No visits took place from September through December 2009 due Jennifer's failure to contact Owens.

Visits resumed in January 2010 but again were inconsistent. The testimony of the employees of Owens was that of 177 scheduled visitations, Jennifer attended 106. Jennifer testified that many of the missed visitations were due to cancellations by Owens or the absence of the person who was to supervise visitation. Shirkey testified that on May 16, 2010 she was supervising visitation when the two boys were throwing food and running off. Jennifer wanted to terminate the visitation because she "couldn't handle it anymore," struck Cody on the arm, and threatened to "whoop" the boys.

Jessica Nemec, a family permanency specialist with KVC Behavioral Healthcare, testified that she took over this case on March 1, 2011. As a family permanency specialist she is responsible for setting up services for the family in working towards reunification and permanency objectives and would develop a case plan for the family to follow in order to work towards reunification. She described the case plan as an outline of what the parents need to do to reunify with their children and what services would be put in place to assist them. She

testified that Cairo and Coby became wards of the state on April 2 or 3, 2009, due to physical abuse and neglect allegations against Jennifer and her boyfriend, and they have never been returned to Jennifer's home.

Nemec testified that as a family permanency specialist she has the duty and responsibility to help set up services that have been ordered by a court and to monitor whether there is compliance with the services. In this case, Jennifer's court orders included individual therapy, a woman's empowerment program, family therapy as long as it was recommended by the children's therapist, a parenting class, maintenance of safe and adequate housing as well as a legal source of income. Nemec testified that Jennifer was not participating in therapy at this time and that her therapy with Kellie Bush was terminated in December of 2010 for aggressive and assaultive behaviors.

Nemec expressed concern over the safety and stability of the housing situation because Jennifer was residing with Marvin Neal who was present during the alleged abuse that precipitated this case. There had also been a prior domestic altercation involving Jennifer and Marvin in August of 2010. Further, Nemec testified that following a court hearing on April 11, 2011, where the case was referred to the Concord Center for mediation, Marvin confronted Nemec and her supervisor in the hall and

became very defensive. Security had to be summoned. Jennifer was present and did nothing to refrain or stop him.

Nemec testified that, as a family permanency specialist, she has received training in assessing whether it is appropriate to terminate parental rights. She testified that there are four factors that are considered in reaching such a conclusion, namely (1) the initial reason the case came into care, (2) the progress the parents have made in working towards reunification, (3) the length of time the child has been in out-of-home care, and (4) whether there is evidence of abandonment. It was Nemec's opinion that when the above factors are applied, it was in Cairo and Coby's best interests that Jennifer's parental rights be terminated. Nemec supported this conclusion by noting that the children had been out of the home for over two years, they were placed in care when Cairo was hospitalized with a core temperature of 84 degrees, Jennifer lacked progress with the plans adopted pursuant to the orders of the court, and Jennifer was inconsistent in complying with recommended therapy and visitation.

Melanie Auxier, a child and family service specialist for the Nebraska Department of Health and Human Services, testified that she was the case manager for Jennifer from May 2010 to March 2011. Her duties include working with families to determine what services might be appropriate for reunification

by reviewing the orders of the court, referring parents to providers for services deemed to be needed, and monitoring the compliance of the parent or parents with such services. As a part of her duties, Auxier would prepare court reports and a case plan for the family.

Auxier testified she was concerned with Jennifer's inconsistency with visitations, her behavior during the visitations, her lack of safe and stable housing, and lack of a stable source of income. Auxier testified that Jennifer never provided documentation regarding her housing or income although requested to do so. Auxier also testified that it was very difficult to work with Jennifer. Jennifer attempted to set the agenda for family team meetings and unilaterally ended the meeting on her own terms.

At a team meeting in September 2010, Jennifer's boyfriend, Marvin Neal, attended at her request and caused a disturbance with his language and behavior. When he came to the November 18, 2010 meeting, he was asked to leave because of his previous behavior. Marvin and Jennifer became upset and insisted that he remain. This meeting then ended. After the November meeting, Marvin telephoned Auxier and accused her of spreading lies about him in regard to domestic violence allegations and insisted she apologize. Shortly thereafter, Jennifer telephoned Auxier and

denied that there had been any domestic violence involving Marvin and accused the Department of being "child kidnappers."

Auxier testified that she tried to help remedy Jennifer's inconsistent visitations, which Jennifer blamed on the providers, by changing the supervision from KVC to Owens and Associates. However, Jennifer's attendance continued to be inconsistent. Auxier was critical of notes Jennifer wrote and placed in the pockets of the children which contained comments Auxier believed were inappropriate. These notes told the children that the service coordinator and foster parent received money for as long as they kept the children out of Jennifer's home.

Auxier was of the opinion that Jennifer's parental rights should be terminated using the factors that are applied in reaching such a conclusion, namely the severe abuse to Cairo which was potentially life threatening, Jennifer's unwillingness to take responsibility for the abuse, the length of time the children had been out of the home, and Jennifer's lack of progress with the plan for reunification.

James Holt testified on behalf of Jennifer. Although he introduced himself as "Dr. James Holt," he testified that he has a master's level degree, is a licensed clinical social worker, and a "Diplomat in Social Work." Holt provides assessments of families and children and provides individual and group therapy.

Holt performed a pretreatment assessment and a mental status of Jennifer in February of 2011. Although Holt testified in general regarding treatment plans, relationships between a therapist and client, and domestic violence, he expressed no opinions or testified about any findings as to Jennifer specifically other than a mother should be provided therapy during a parental termination proceeding.

Susan Michalski also was called to testify by Jennifer. Michalski is a registered nurse who provides expert witness testimony in civil and criminal cases, provides training on domestic violence, sexual assault, and the effects of violence on children. Michalski testified in general regarding the effects of domestic violence on the victim and children. Michalski reviewed medical and court records involving Jennifer and the children; however, there is no indication that she ever met Jennifer or the children.

Jeanie Hicks, a family support worker with Owens and Associates, also was called by Jennifer to testify. She testified that her duties with Owens includes working with families with children in foster care, supervising visitation, and family support work concerning parenting, community resources, drug and alcohol resources, and other services to assist in reunification. Her first visitation she had with Jennifer and the children was on April 17, 2009. Hicks testified

concerning the records that were made regarding the visitation and her personal observations of Jennifer and the children during their visits. Hicks testified that she did not recall ever cancelling a visit but admitted that she might have been late on several scheduled visits. She said that if Jennifer was running late, she would wait 15 minutes for Jennifer to arrive.

Hicks stated that Jennifer had excellent interaction with the children during the visitations, that she appeared to love them, and they appeared to be happy to see her. The only difficulty was that Jennifer became upset by the fact that the children were in foster care with her husband's mother. Hicks did testify about an incident during a visitation at the park where Jennifer was yelling at the children in such a manner that a passer-by became concerned and telephoned the police.

Eva Abrams, a supervisor at Owens, also was called to testify by Jennifer. She testified she did the intake on Jennifer in April of 2009, and also testified about the records kept by them in regard to the supervised visitations. She testified that the family partner who is assigned to each case is required to keep notes on every visitation and to submit these to her. Counsel for Jennifer reviewed the records of visitations with Abrams. Abrams did not recall Jennifer being confused about visitation times and testified that documentation is required even if the visitation did not occur. In September

2009, Abrams testified that Jennifer had expressed concern that her husband's family was stalking her so it was arranged for the visitations to occur at the Owens visitation center, a locked secure facility with a bus stop at the entrance. Abrams was of the opinion that Jennifer was not making progress towards reunification with regard to visitation.

Contrary to the State's evidence, Jennifer testified that she did everything asked of her or ordered by the court for reunification but that her efforts were thwarted by the visitation workers and others who were to be providing services to her. She testified that she kept a diary concerning daily occurrences which substantiates her version of these events and the diary was received in evidence. With regard to visitation, Jennifer testified that the visitation supervisors frequently were late in arriving which resulted in her missing these sessions or that they cancelled the visitations without her knowledge. She testified that she did have adequate housing and furnished evidence of this to the Department. She further testified that she was working at McDonalds and attending school full time. Jennifer testified that she was current with her child support as ordered by the court and claims to have completed domestic violence programs as ordered.

Jennifer testified that the dispute with Kellie Bush in December of 2010 occurred because Jennifer refused to sign a

treatment plan prepared by Bush which contained a diagnosis of Jennifer with which Jennifer disagreed. Jennifer testified that she was not going to sign "something that said I had problems that I didn't have." Jennifer claims that the treatment session ended early because she threatened to file a complaint against Bush.

At the time of the hearing, Jennifer was serving a sentence with the Nebraska Department of Correctional Services on a conviction for child abuse arising from the events of April 2, 2009 involving the hospitalization of Cairo. It also is noteworthy that at the time of trial, Jennifer was represented by the fourth attorney appointed by the court.

By an order dated December 1, 2011, the juvenile court found by clear and convincing evidence that the minor children are within the meaning of Neb. Rev. Stat. §43-292(2), (6) and (7) (Cum. Supp. 2010). Although the order of the juvenile court did not set forth detailed findings, it did find that other than the allegation that Jennifer had failed to complete a parenting class, the "other allegations in the Motion for Termination of Parental Rights are true as plead", namely that Jennifer had substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection, had failed to have consistent supervised visitation with the children, had failed to maintain a legal source of

income and provide verification of same, failed to complete a domestic violence empowerment program, failed to participate in family therapy with Cairo, and failed to participate in individual therapy. The juvenile court concluded that it is in the best interest and welfare of the minor children that the parental rights of Jennifer be terminated.

ASSIGNMENTS OF ERROR

Jennifer alleges that the juvenile court erred in finding that: (1) pursuant to Neb. Rev. Stat. §43-292(2), Jennifer had substantially, continuously, and repeatedly neglected and refused to give the children necessary parental care and protection; (2) Jennifer failed to comply with various plans of rehabilitation; and (3) termination of Jennifer's parental rights is in the best interest of the children.

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

Grounds for Termination.

In Nebraska statutes, the bases for termination of parental rights are codified in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010). Section 43-292 provides 11 separate conditions, any one

of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

In its order terminating Jennifer's parental rights to her children, the juvenile court found by clear and convincing evidence that the minor children are within the meaning of Neb. Rev. Stat. §43-292(2), (6) and (7) (Cum. Supp. 2010) and that it is in the children's best interest that Jennifer's parental rights be terminated.

The children were removed from Jennifer's home on April 2, 2009. The children had been in out-of-home placement in excess of 18 months when the Motion to Terminate Parental Rights was filed on October 26, 2010. At the time the termination hearing began on May 17, 2011, the children had been in out-of-home placement in excess of 25 months. Our de novo review of the record clearly and convincingly shows that grounds for termination of Jennifer'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. We note that 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. See *In re Interest of Justin H.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010). Therefore, this court need not review termination under subsection § 43-292 (2) or (6).

Best Interest.

Neb. Rev. Stat. § 43-292 requires that parental rights can only be terminated when the court finds that termination is in the child's best 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. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Therefore, with such severe and final consequences, parental rights should be terminated only "in the absence of any reasonable alternative and as the last resort." See *In re Interest of Kantril P.*, 257 Neb. 450, 467, 598 N.W.2d 729, 741 (1999). However,

Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Andrew M. et al.*, 11 Neb. App. 80, 643 N.W.2d 401 (2002). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002).

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

The evidence reveals that Jennifer refused to agree to the treatment plan that Bush established for her. Jennifer put up an insurmountable barrier by refusing to accept the fact that to improve her parenting, she needed to focus on her own personal shortcomings. Jennifer showed a pattern of refusing to accept responsibility by constantly placing the blame on others, despite the fact that at the time of trial, Jennifer was incarcerated for felony child abuse arising out of the bathtub incident. The evidence clearly reveals that throughout the attempted rehabilitation process, Jennifer exhibited a pattern of aggressive behavior that resulted in termination of her individual therapy with Bush and her family therapy with Stobbe.

While the evidence is conflicting as to who was responsible for the erratic and inconsistent visitations, the evidence is clear that from September through December 2009, Jennifer did not have any visits with her children. When visitation resumed in 2010, it continued to be erratic. The evidence indicates that even when visitation occurred, Jennifer engaged in non-age appropriate activities and continued to display aggressive behavior.

While the evidence reveals that Jennifer maintained housing and was current on her rent, she was required to obtain not only

adequate housing, but also safe housing. Despite the abuse to Cairo, Jennifer continued to live for a time with Marvin. In addition to the child abuse, there was also evidence of domestic abuse in August 2010 and other instances of aggressive behavior on the part of Marvin toward the therapists.

According to Stobbe, since visitation has ended, Cairo has been happier, more outgoing, entertaining, and talkative. He has expressed no interest in seeing Jennifer.

The evidence is clear that it is in the best interests of the children that Jennifer's parental rights be terminated.

CONCLUSION

For the reasons stated above, we affirm the juvenile court's order terminating Jennifer's parental rights to Cairo and Coby.

AFFIRMED.