

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Caleb A.,)
Christian A., and Raina A.,)
Children under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Michelle A.,)
)
Appellant.)

No. A-13-0168
No. A-13-0169
No. A-13-0170

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

SEP 09 2013

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

PIRTLE and RIEDMANN, Judges, and MULLEN, District Judge,
Retired.

MULLEN, District Judge, Retired.

Michelle A. appeals from the decision of the county court for Lincoln County, sitting as a juvenile court, which terminated her parental rights to her children, Caleb A., Christian A., and Raina A. We affirm.

BACKGROUND

Michelle and Clarence A. are the biological parents of: Christian, born in September 2005; Raina, born in August 2006; and Caleb, born in November 2008.

On April 10, 2009, the Nebraska Department of Health and Human Services (DHHS) received an intake regarding the well-being of the children. The intake advised that the previous night, Clarence and Michelle had hosted a party at their house



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that lasted into the early morning hours. The caller advised that the partygoers were using marijuana in the residence and that the house was in complete shambles. The caller advised that the children were in the home during the party. When Officer Josh Jacobi of the North Platte Police Department and a worker from the DHHS went to the home to check on the welfare of the children, they observed a large pile of trash on the sidewalk in front of the house. Inside the home, there was broken glass scattered throughout the residence while children walked around barefoot, holes in the walls, doors broken off of their hinges, and vomit on the floor. Michelle and Clarence advised that there had been a party at the residence the night before, and that the two of them were involved in a domestic dispute after the party ended. They advised that items were broken and holes were punched into the wall during the domestic dispute. Michelle and Clarence admitted that Raina and Caleb were in the house during the party and the subsequent fight.

While walking through the house, Officer Jacobi detected the odor of marijuana. Two pipes and a baggie of marijuana were found hidden within Michelle and Clarence's bedspread. Due to the unsafe conditions in the home, and the children being subjected to drug usage and domestic violence, the children were taken into protective custody. The children were placed with

their paternal great-grandmother, where they have remained since April 10, 2009.

On April 13, 2009, the State filed separate petitions alleging that the children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). In journal entries filed on July 31, the juvenile court adjudicated Caleb, Christian, and Raina to be within the meaning of § 43-247(3)(a).

Michelle continued to have visits with the children after their removal from her home. In February 2010, Michelle's attendance at visits became sporadic. In March and April 2010, Michelle tested positive for methamphetamines. Michelle's last visit with the children was on April 15, 2010. After that visit, Michelle disappeared for nearly 2 years, having no contact with her children or DHHS. In February 2012, Michelle contacted DHHS requesting visitation with her children. On February 17, 2012, Michelle filed a motion for supervised therapeutic visitation. Michelle's motion was denied after a hearing in March 2012.

On February 27, 2012, the State filed separate motions to terminate Michelle's parental rights to Caleb, Christian, and Raina pursuant to Neb. Rev. Stat. § 43-292(1), (2), (6) and (7) (Cum. Supp. 2010). The State alleged that: Michelle had abandoned the children for 6 months or more immediately prior to the filing of the motion; Michelle had substantially and continuously or repeatedly neglected and refused to give the

children necessary parental care and protection; reasonable efforts to preserve and reunify the family had failed to correct the conditions leading to the adjudication; the children had been in an out-of-home placement for 15 or more of the most recent 22 months; and termination was in the children's best interests.

The State also moved to terminate the parental rights of Clarence, which the juvenile court ultimately granted. But because Clarence has not appealed that decision, we will not discuss any evidence presented as to him at the termination hearing. We simply note that Michelle and Clarence are now apparently divorced.

The termination hearing was held on October 16, 2012. Testimony was given regarding the reasons why the children were removed from the home and Michelle's progress on the case plan.

Kim Seelmeyer, a DHHS children and family services supervisor, testified that the children were removed from the home because of safety hazards, marijuana and drug paraphernalia found in the home, the parents' admission of drug use, and domestic violence between Michelle and Clarence. Seelmeyer testified that from April 2009 until February 2010, Michelle's visits with the children went well. However, in February 2010, Michelle's visitation attendance became sporadic. And in March and April 2010, Michelle tested positive for methamphetamines.

Michelle's last visit with the children and DHHS was on April 15, 2010. Michelle did not contact DHHS again until February 2012, when she contacted Seelmeyer asking to resume visitation with the children.

Seelmeyer testified that she met with Michelle in March 2012. She asked Michelle where she had been the past 2 years, and Michelle responded that she had been working on getting clean. Michelle told Seelmeyer that she had not been "using" for a year, but that she had not been ready to reunify with her children. Michelle told Seelmeyer that she knew where her children were and she felt comfortable that their needs were being met. Despite Michelle's claim that she had been drug free for a year, she tested positive for marijuana in March and May 2012. Seelmeyer testified that Michelle acknowledged receiving the case plans and said that she was aware of what was going on with the case.

Seelmeyer testified that she either supervised or authored a number of the case plans in this case. She testified that the case plan listed three goals for Michelle, including the case plan dated January 26, 2012. The first goal states that Michelle is to provide for the basic needs of the children. Seelmeyer testified that this goal was not satisfied. Michelle was absent for 23 months and Seelmeyer had no information about Michelle's housing or employment situation during that time. As of March

2012, Michelle reported living with a friend and working at Taco John's. The second goal states that Michelle is to provide a drug-free environment for the children. Seelmeyer testified that on March 22 and May 9, 2012, Michelle testified positive for marijuana. And at the March 13 hearing on her motion for therapeutic visitation, Michelle admitted daily marijuana use. Additionally, Seelmeyer testified that Michelle had not followed through on the recommendations of her drug and alcohol evaluation, such as participating in outpatient counseling. The third goal states that Michelle is not to be in any abusive relationships. Seelmeyer has no knowledge of Michelle's progress on this goal due to Michelle's 23-month absence.

Seelmeyer testified that Christian and Raina both have behavioral problems and need a very structured environment. At the time of the termination hearing, Christian was in the 2nd or 3rd grade, had an IEP, attended speech therapy and counseling. Raina was physically aggressive both in the home and at school. She was on medication for ADHD and had asthma issues. Raina also attended counseling. Seelmeyer testified that all three children need a stable, structured environment with supervision. She testified that the children have been out of Michelle's home for more than 3 years, and there was a 2-year time frame when Michelle had no contact with her children or DHHS. Seelmeyer testified that the children are currently in a stable placement,

a home free of drug use and domestic violence. Seelmeyer also testified that the children are very bonded to their great-grandmother. Seelmeyer testified that it would be in the children's best interest to terminate Michelle's parental rights.

Jessica Cross is a DHHS children and family services specialist who has been assigned to this case since April 2012. Cross testified that she met with Michelle on June 22, 2012, regarding Michelle's progress on the case plan. Michelle reported meeting with Mark Hunt, a licensed drug and alcohol counselor. Michelle also reported "trying" to attend AA/NA meetings, but Michelle did not provide any documentation of her attendance at AA/NA meetings to DHHS. Michelle also reported living in a 3-bedroom residence with a roommate and working full-time. Contrary to Seelmeyer's testimony, Cross testified that Michelle has now completed the goals of the case plan dated January 26, 2012, except any part of the goals she cannot complete because she is not allowed visits with the children. On cross-examination, Cross testified that she has not cleared Michelle's housing nor has she done a background check on Michelle's roommate. Cross testified that it would be in the children's best interest to be adopted by their great-grandmother.

Dr. John Striebel is a clinical psychologist. He met with Christian six times. Dr. Striebel met with Michelle one time in March 2012. Cassie Stark was also present during the meeting with Michelle, because Stark is the therapist for Raina and Caleb. Dr. Striebel testified that he and Stark agreed that (1) before there can be initiation of contact between Michelle and the children, a decision needs to be made regarding termination; (2) if contact is allowed, it should be supervised; and (3) Michelle needs to be drug and alcohol free. Dr. Striebel testified that the court would need to decide if Michelle's marijuana use is a major concern. However, Dr. Striebel testified that if a parent is under the influence of marijuana on a daily basis, it would be difficult to then function as a consistent and reliable, independent parent. He also testified that marijuana can be a gateway drug, although not necessarily to methamphetamine abuse. However, he said that the fact that Michelle has already gone on to methamphetamines would be an ongoing concern in this case. Dr. Striebel testified that if Michelle was going to have contact with her children, it would require long-term stability.

Mark Hunt is a licensed drug and alcohol counselor who initially completed a drug and alcohol evaluation on Michelle in September 2009. At that time he recommended individual counseling, but Michelle did not comply. Hunt completed a new

assessment on Michelle in April 2012. At the time of her 2012 assessment, Michelle reported that she had not used methamphetamines for the past 14 months and that she had "cut back" on her marijuana use. Hunt met with Michelle 38 times between April 2012 and the termination hearing. Hunt testified that Michelle reports being substance free since May 9, 2012, and he has not seen evidence to contradict her report. Hunt testified that Michelle is "very determined" and that she has followed through on everything he has suggested to her, such as outpatient substance abuse counseling, group counseling, and 12-step meetings. He testified that right now her prognosis is "good in as far as sobriety."

Michelle testified that she disappeared for 2 years because she could not provide for her children and she needed to "get clean." She testified that she knew her children were being well cared for by their great-grandparents. Michelle testified that she stopped using methamphetamines on her own on January 27, 2011. At that point, she did not attempt to make contact with her children because she needed to "better herself" in order to be around her children. Michelle got a job and a place to live. In January 2012, she contacted her attorney because she was "ready" to have contact with her children. Michelle admitted that she was still smoking marijuana in January 2012 and that she did not quit until after the March 2012 hearing regarding

therapeutic visitation. She testified that she is going to counseling and group therapy. Michelle testified that she attends NA three times per week, and her NA attendance cards were received into evidence. The attendance cards show that Michelle attended NA meetings 17 times from August 16 through October 15. Also received into evidence were Michelle's negative drug test results from July 10, August 22, and September 25, 2012.

In its orders filed on January 31, 2013, the juvenile court terminated Michelle's parental rights to Caleb, Christian, and Raina. The juvenile court terminated Michelle's parental rights to the three children pursuant to § 43-292(1), (2), (6) and (7) and found that termination was in the children's best interests. Michelle has timely appealed the juvenile court's termination of her parental rights.

While these three appeals are separately docketed, they have been consolidated for briefing and disposition.

ASSIGNMENTS OF ERROR

Renumbered and restated, Michelle assigns that the juvenile court erred in (1) denying her motion for supervised therapeutic visitation, (2) not requiring the DHHS to make additional reasonable efforts to reunify the family, (3) finding there was sufficient evidence to terminate her parental rights, and (4)

determining that termination of parental rights would be in the best interests 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 Kendra M.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). 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.*

ANALYSIS

Motion for Supervised Therapeutic Visitation.

Michelle argues that the juvenile court erred in denying her motion for supervised therapeutic visitation. A hearing on the motion for supervised therapeutic visitation was held on March 13, 2012. Seelmeyer testified that Michelle had not had any contact with her children since April 2010. And Michelle made no attempts to contact DHHS from April 15, 2010, until February 2012, after DHHS sent a request to the State to terminate her parental rights. Michelle had not had any contact with her children for 23 consecutive months. Seelmeyer testified that she spoke with the children's therapist and the therapist had concerns about starting visitation. The children's father had previously sought visits with the children, but did not

follow through, causing emotional turmoil for the children. The therapist felt that since the State is seeking termination, it would not be healthy to start visits between Michelle and the children, only to have the visits end in the near future. We note that at the time of the therapist's recommendation, the termination hearing was scheduled to begin within 2 months, but the hearing was ultimately delayed by the parents' motions to continue.

At the hearing, Michelle testified that when the children were first removed from her, she was working her case plan with DHHS and it was going well. She then lost her housing, her car, and her job, and her drug use got worse. She testified that marijuana was her drug of choice, but that she started using methamphetamines too. She testified that she did not have contact with her children because she could not be a mother and a "druggie," and that she needed to "get clean." Michelle testified that she had not used methamphetamines since January 2011. However, she admitted that she continued to use marijuana daily. In 2010, Michelle's visits with the children were conditioned on her testing negative for any controlled substances prior to visiting her children. And Michelle acknowledged that she would still test positive for marijuana in March 2012. She also acknowledged that in the past 2 years she had not attended counseling or NA/AA groups.

At the conclusion of the hearing on March 13, 2012, the juvenile court denied Michelle's motion for therapeutic visitation without prejudice. The court told Michelle that she "better stay clean, and [she] better get clean on the marijuana use." The court instructed Michelle to meet with the children's therapist, and then submit a report from the therapist as to the therapist's opinion about therapeutic visitation. The juvenile court told Michelle she could refile her motion for therapeutic visitation. Michelle never refiled her motion for therapeutic visitation. Based on our review of the record, we find that the juvenile court did not err in denying Michelle's motion for therapeutic visitation.

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 Michelle's parental rights to Caleb, Christian, and Raina, the juvenile court found that Michelle abandoned her children for 6 months or more immediately prior to the filing of the State's motion to terminate her

parental rights (§ 43-292(1)); substantially and continuously neglected to give the children necessary parental care and protection (§ 43-292(2)); failed to follow the case plan goals as required by the Court and failed to correct the condition which led to the adjudication (§ 43-292(6)); and the children had been in out-of-home or home placement for 15 or more months of the most recent 22 months (§ 43-292(7)).

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." This section operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of the parent. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

This court has previously described the proper application of § 43-292(7) as follows:

The proper application of this subsection consists of counting the most recent 22 months preceding the filing of the petition to terminate parental rights, followed by counting how many of those 22 months the child was in out-of-home placement. If the child was in out-of-home placement for 15 of those 22 months, the statutory grounds for termination of parental rights are satisfied and termination of parental rights is appropriate, subject to a determination that such termination is in the child's best interests.

In re Interest of Kindra S., 14 Neb. App. 202, 210, 705 N.W.2d 792, 801 (2005).

The children were removed from Michelle's home on April 10, 2009. At the time the motion to terminate parental rights was filed on February 27, 2012, the children had been in an out-of-home placement for 34 months. Our de novo review of the record clearly and convincingly shows that grounds for termination of Michelle'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 because we do not consider whether termination of Michelle's parental rights was proper pursuant to § 43-292(6), Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2012), which requires reasonable efforts to reunify families, is not applicable to the instant case. *In re Interest of Andrew M.*, 11 Neb. App. 80, 643 N.W.2d 401 (2002). Section 43-283.01 is only incorporated into § 43-292(6), not into the remaining subsections of § 43-292. *Id.*

Best Interest.

Michelle argues that the juvenile court erred in finding that terminating her parental rights was in the best interest of the children. 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. & Shannon D., 12 Neb. App. 707, 717, 684 N.W.2d 594, 602 (2004).

The evidence is clear that it is in the best interests of the children that Michelle's parental rights be terminated. Michelle's last visit with her children was in April 2010. She then disappeared for nearly 2 years. Michelle claims to have stopped using methamphetamines in January 2011, yet she still

made no effort to contact her children or DHHS. Michelle resurfaced in February 2012, seeking therapeutic visitation with her children. Despite the fact that she wanted her children back, Michelle admitted to daily marijuana use at the time of the March 2012 hearing on her visitation motion. We acknowledge that Michelle has made some progress in this case. She had negative drug tests in the 3 months leading up to the termination hearing. Michelle has also apparently started drug counseling and attending NA meetings, although she did not provide evidence of such to DHHS prior to the termination hearing. She also reports having housing and a job. Unfortunately, her efforts are a case of "too little, too late." Dr. Striebel testified that if Michelle was going to have contact with her children, it would require long-term stability. And at the time of the termination hearing, Michelle was just beginning to establish some stability. At the time of the termination hearing the children had already been in an out-of-home placement for 42 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). Michelle is an unfit parent. Therefore, after our de novo review, we find that it is in the children's best interests that Michelle's parental rights be terminated.

CONCLUSION

Based on the foregoing reasons, we affirm the decision of the juvenile court terminating Michelle's parental rights to Caleb, Christian, and Raina.

AFFIRMED.