

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF DUT A. & AKON A.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
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IN RE INTEREST OF DUT A. AND AKON A.,  
CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

v.

ACHOL A., APPELLANT.

Filed July 5, 2011. No. A-10-1036.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge.  
Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Nicholas E. Wurth for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, Ryan Lindberg, and  
Sara R. Brennan, Senior Certified Law Student, for appellee.

IRWIN and CASSEL, Judges, and HANNON, Judge, Retired.

IRWIN, Judge.

I. INTRODUCTION

Achol A. appeals from the order of the juvenile court which terminated her parental rights to two of her children. On appeal, Achol challenges the juvenile court's finding that her parental rights should be terminated pursuant to Neb. Rev. Stat. § 43-292(2) and (6) (Cum. Supp. 2010) and 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 Achol's parental rights. As such, we affirm the order of the juvenile court terminating Achol's parental rights.

## II. BACKGROUND

These proceedings involve two children: Dut A., born in January 1996, and Akon A., born in November 1999. Achol is the biological mother of both children. Achol, Dut, and Akon are Sudanese refugees. Achol does not speak English.

On March 25, 2008, the children were removed from Achol's care after police were called to the family home and observed Achol on top of Akon. Akon reported to police that Achol assaulted her. The State filed a petition with the juvenile court, alleging that each of the children was within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

The petition alleged that the children were within the meaning of § 43-247(3)(a) due to Achol's subjecting the children to inappropriate and/or excessive physical contact, Achol's using alcohol and/or controlled substances, and Achol's remaining incarcerated after the incident with Akon. The juvenile court entered an order, placing the children in the immediate custody of the Department of Health and Human Services (the Department) and indicated that placement of the children was not to include Achol's home. The children have remained in the custody of the Department in an out-of-home placement since the entry of that order on March 25, 2008.

On June 11, 2008, an adjudication hearing was held. At the hearing, Achol entered a plea of no contest to the portions of the petition which alleged that she had subjected the children to inappropriate and/or excessive physical contact and that she used alcohol and/or controlled substances. As a result of her plea, the children were adjudicated pursuant to § 43-247(3)(a).

Further hearings were held in August and November 2008 and February and August 2009. At these hearings, Achol was ordered by the juvenile court to participate in a rehabilitation plan. Specifically, Achol was ordered to obtain stable housing; obtain and maintain a source of income; complete a chemical dependency evaluation; participate in individual therapy; enroll in, and successfully complete, chemical dependency treatment; submit to random urinalysis testing; participate in family support services; and complete a parenting program. In addition to these orders, Achol was ordered to participate in therapeutic and supervised visitation with Dut and Akon. At a later hearing in February 2010, the juvenile court ordered Achol to complete an inpatient treatment program to address her substance abuse.

On March 30, 2010, the State filed a motion for termination of Achol's parental rights to Dut and Akon. The State alleged that termination of her parental rights was warranted pursuant to § 43-292(2), because she has substantially and continuously or repeatedly neglected and refused to give her children the necessary parental care and protection; § 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); and § 43-292(7), because the children had been in an out-of-home placement for 15 or more months of the most recent 22 months. In addition, the State alleged that termination of Achol's parental rights was in the best interests of the children.

On July 29, 2010, a hearing was held on the State's motion for termination of parental rights. The hearing continued on August 2 and concluded on September 27. While we have reviewed the evidence presented at the lengthy hearing in its entirety, we do not set forth the specifics of the voluminous testimony and exhibits here. Instead, we will set forth more specific facts as presented at the hearing as necessary in our analysis below.

After the termination hearing, the juvenile court entered an order finding that the State proved by clear and convincing evidence that grounds for termination of Achol's parental rights existed under § 43-292(2), (6), and (7). The court also found that it would be in the children's best interests to terminate Achol's parental rights. The court then entered an order terminating her parental rights to Dut and Akon.

Achol appeals here.

### III. ASSIGNMENTS OF ERROR

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

Achol also argues, but does not assign as error, that the juvenile court erred in terminating her parental rights because the Department failed to contact the Sudanese consulate during the pendency of the proceedings. Because Achol did not both assign and argue this issue in her brief to this court, we decline to address the issue further. Errors argued but not assigned will not be considered on appeal. *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011); *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010); *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009); *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

### 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

Achol asserts that the juvenile court erred in sustaining the motion to terminate her parental rights pursuant to § 43-292(2) and (6). Achol does not argue that the court erred in sustaining the motion pursuant to § 43-292(7). Upon our de novo review of the record, we find that the evidence clearly and convincingly demonstrates that Dut and Akon were in an out-of-home placement for at least 15 of the most recent 22 months, pursuant to § 43-292(7). As a result, we need not specifically address whether or not the State met its burden under § 43-292(2) or (6).

Termination of parental rights is warranted whenever one or more of the statutory grounds provided in § 43-292 is established. If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Jagger L., supra.*

In this case, the State alleged and the court found that termination of Achol's parental rights was warranted pursuant to § 43-292(2), (6), and (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." See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). 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 a parent. *In re Interest of Aaron D., supra.*

At the hearing on the State's motion to terminate Achol's parental rights, there was uncontradicted evidence which demonstrated that Dut and Akon were removed from Achol's home in March 2008. They remained in an out-of-home placement for the duration of the proceedings. As such, at the time the State filed its motion to terminate Achol's parental rights in March 2010, Dut and Akon had been in an out-of-home placement for 24 months. An additional 4 months passed from the time the motion was filed to the time the termination hearing began in July 2010. In sum, Dut and Akon had been in an out-of-home placement for 28 months at the time the termination hearing began. Accordingly, there is no dispute that Dut and Akon were in an out-of-home placement for 15 or more months of the most recent 22 months as § 43-292(7) requires.

There is clear and convincing evidence that termination of Achol's parental rights was appropriate pursuant to § 43-292(7). In light of this fact, we need not, and do not, further address the sufficiency of the evidence to demonstrate that termination was also appropriate pursuant to § 43-292(2) or (6). Achol's assignments of error which relate to the sufficiency of the statutory authority to support termination are without merit.

### 3. BEST INTERESTS

In the previous section, we found that termination of Achol's parental rights was appropriate pursuant to § 43-292(7). As a result, we declined to address the sufficiency of the evidence demonstrating that termination was also appropriate pursuant to § 43-292(2) or (6). We, therefore, treat our discussion of whether termination of Achol's parental rights is in the children's best interests as though § 43-292(7) is the only statutory basis for termination.

In cases where termination of parental rights is based solely on § 43-292(7), the Nebraska Supreme Court has held that appellate courts must be particularly diligent in their de novo review of whether termination of parental rights is, in fact, in the child's best interests. *In re Interest of Aaron D., supra.* In such a situation, because the statutory ground for termination does not require proof of such matters as abandonment, neglect, unfitness, or abuse, as the other statutory grounds do, proof that termination of parental rights is in the best interests of the child will require clear and convincing evidence of circumstances as compelling and pertinent to a

child's best interests as those enumerated in the other subsections of § 43-292. *In re Interest of Aaron D., supra.*

Achol argues that termination of her parental rights is not in Dut's and Akon's best interests. Specifically, she argues that she has been unable to comply with or make progress on the court-ordered rehabilitation plan due to her inability to speak English and due to the Department's failure to address the cultural issues surrounding this case. She asserts that if the juvenile court and the Department had taken into account the exact circumstances of her situation, she would have been able to reunite with her children.

Achol's assertions have no merit. Although we recognize that Achol's inability to speak English may have made it more difficult to comply with the court's orders, in this case, there is no evidence that she even attempted compliance. Instead, the evidence reveals that Achol did not want to comply with the court's orders and that despite the Department's efforts, Achol did not avail herself of any of the opportunities provided to her.

At the outset of this case, Dut and Akon were adjudicated to be within the meaning of § 43-247(3)(a) as a result of Achol's no contest plea to allegations that she subjected the children to inappropriate and/or excessive physical contact and used alcohol and/or controlled substances. As a result of Achol's plea, the juvenile court ordered her to participate in a rehabilitation plan. The plan required Achol to, among other things, maintain stable housing, obtain and maintain employment, participate in individual therapy and a chemical dependency treatment program, and comply with random urinalysis testing.

Before we address Achol's compliance with the rehabilitation plan, we note that Achol did not appeal from the various juvenile court orders which instituted the rehabilitation plan. In addition, there is no evidence that prior to the termination hearing, Achol raised any concerns to the juvenile court about the rehabilitation plan being unreasonable or too difficult due to her inability to speak English. We also note that despite Achol's assertions that the Department and the juvenile court did not make efforts to understand the Sudanese culture, there is evidence that early on in these proceedings, the Department contacted and met with a cultural anthropologist concerning the Sudanese culture. The information obtained during that meeting was utilized by the Department in implementing the juvenile court's orders.

We will now address Achol's compliance with the rehabilitation plan. Achol did not maintain safe and stable housing. From March 2008 to the conclusion of the termination hearing in September 2010, Achol lost her housing on two separate occasions due to her initiating fights with other tenants. In October 2009, Achol lost her housing due to such fighting, and the Department lost contact with her for a few months. When the Department reconnected with Achol in February 2010, she was homeless. The Department and Achol's family support worker assisted in placing Achol in a homeless shelter. She resided in that shelter for 3½ months. In June, Achol was approved for low-income housing. However, by the time the termination hearing concluded in September, Achol was residing in jail due to initiating another fight at her apartment. The Department caseworker testified that Achol's landlord had indicated that Achol was going to be evicted after she was released from jail.

Achol did not obtain and maintain a legal source of income. From March 2008 to the conclusion of the termination hearing in September 2010, Achol was employed only in June and July 2009, when she worked at a hotel as a housekeeper. She was fired from this job because she

was unable to read the numbers on the hotel room doors and, as a result, was unable to follow the directions given to her. While Achol was employed, her family support worker attempted to help Achol learn to read numbers. In addition, Achol was provided with job training classes and English as a second language classes.

After she was fired from the housekeeping job, Achol never obtained further employment, despite the efforts of both her interpreter and her family support worker. They repeatedly took Achol to different locations to fill out job applications. At times during these proceedings, Achol indicated that she could not work because she was sick; that she would not get a job; and that her children were old enough to go to work and care for her. Achol did not have any income. Achol indicated that many of her expenses were paid for by the Southern Sudanese Community Association. She also indicated that she was unwilling to discuss her finances with the Department.

Achol did not participate in individual therapy or any kind of chemical dependency treatment. In August 2008, Achol was provided with the opportunity to attend individual therapy to address both her mental health problems and her substance abuse. From August 2008 to March 2009, Achol's attendance at the therapeutic sessions was sporadic and occasional. She did not make any progress during these sessions. In fact, during this time, there was evidence that Achol continued to use and abuse alcohol. She was arrested for disorderly conduct in August 2009 due to being intoxicated and fighting. By August 2009, Achol was not attending any of the therapeutic sessions. When the subject was brought up to her, Achol refused to attend therapy. In November 2009, the Department recommended that Achol enroll in an inpatient treatment program based on reports from Achol's individual therapist. Achol initially indicated her willingness to attend such a program, but never followed through when an opportunity was presented to her.

In February 2010, the juvenile court formally ordered Achol to enroll in an inpatient treatment program. At this time, the Department and Achol's family support worker tried to find a program that would accept Achol. They were unable to find such a program. Evidence presented at the termination hearing revealed that many facilities would not accept Achol because she required an interpreter to assist her during therapeutic sessions. In her brief to this court, Achol points to the Department's inability to find an inpatient treatment program for her as evidence of the unreasonableness of the court-ordered rehabilitation plan. Achol's argument is misplaced for two reasons. First, while it is true that in February 2010, the Department could not find an appropriate inpatient treatment program, it is also true that at this time Achol was refusing to participate in any outpatient treatment, including individual therapy. As a result, it is not clear that Achol would have attended inpatient treatment even if it was made available to her. In addition, the juvenile court ordered Achol to enroll in inpatient treatment in February 2010, just 1 month prior to the State filing the motion to terminate her parental rights. It is clear, then, that the State's motion was not based on Achol's failure to participate in the inpatient treatment after it was court ordered.

Achol did not consistently comply with requests for urinalysis testing. By August 2009, over a year after the juvenile court proceedings were initiated, Achol had been requested to submit to 23 urinalysis tests. Achol had only completed two such tests. Achol reported to the Department caseworker that she did not want to comply with the requests because she did not

like the facility she had to go to for the tests. By February 2010, Achol was submitting to urinalysis testing, occasionally, but only when her family support worker took her to the facility. She did not ever comply with the test requests when she was by herself. Achol was supplied with bus passes by the Department, and her family support worker testified that Achol knew how to get around using the bus system.

In addition to the evidence that Achol failed to comply with the court-ordered rehabilitation plan, the State also presented evidence that the visits between Achol and her children were harmful to the children and were ultimately stopped at the children's request.

Visits between Achol, Dut, and Akon began during the summer of 2008. In August 2008, one of the visits had to be ended early because Achol was intoxicated. Achol kept the children in her residence until the visitation workers threatened to call the police. Achol was screaming and flailing her arms in the presence of the children. After this visit in August, the visits continued to not "go well." At the visits, Achol would blame Dut for the family's problems. She repeatedly indicated that she did not want visits with Dut and that she was willing to give him up in exchange for having Akon back in her home. She would indicate that she can always have more children. At one visit, Achol raised her hand to slap Akon, but was stopped by the visitation worker. Achol cut off Akon's hair braids during a visit, leaving a bald spot on her head. At another visit, Achol was intoxicated and locked herself in a bathroom. From the bathroom, she yelled obscenities until paramedics were called to assist her.

In May 2009, visits between Achol, Dut, and Akon ended because the children simply refused to attend, despite the encouragement of the Department caseworker and their foster mother to continue to give Achol a chance. Dut has not seen Achol since that time. Dut has indicated that he does not want to see Achol because he does not trust her and does not believe she will change. Dut's behavior has improved since visitations have ended. After visits, Dut would come back to his foster home very upset. He would slam doors, stomp his feet, refuse to listen or follow directions, and would take out his frustration on Akon. These behaviors have stopped.

Regular visitations between Achol and Akon ended in May 2009, after Akon refused to attend because she was afraid of Achol and believed Achol had not changed. However, in May 2010, Akon agreed to see Achol at Akon's therapy appointment. During this visit, Akon acted very guarded and scared. She expressed that she was overwhelmed and felt uncomfortable when Achol hugged her. Achol refused to let Akon have space, even after being repeatedly told to do so. After this visit, Akon indicated that she no longer wanted visitation with Achol. Akon has not seen Achol since May 2010.

Dut's and Akon's therapist testified at the termination hearing that it would be in the children's best interests to terminate Achol's parental rights because Achol is simply unable to provide them with the environment they need and deserve. She also indicated that the children do not have a strong bond with Achol.

Taken as a whole, the evidence presented at the termination hearing reveals that Achol has not made any progress toward reunification with her children despite the length of time that has passed since Dut and Akon were removed from Achol's home in March 2008. In fact, we agree with the Department caseworker who testified at the hearing that Achol is in a worse position now than she was in March 2008. She has been evicted from her home, she remains

unemployed, and she continues to struggle with a serious alcohol problem. In addition, she has not seen her children for quite some time because the children are afraid of her and do not believe she is capable of changing.

Contrary to Achol's assertions, this is not a situation where Achol was given an unreasonable rehabilitation plan or was given an inadequate opportunity for success. Rather, this is a situation where Achol failed to avail herself of the many opportunities presented to her and failed to try to achieve reunification. When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

Dut and Akon have been out of Achol's home for well over 2 years. During that period, Achol has not made any progress toward reunification. Based upon our de novo review of the record, we affirm the finding of the juvenile court that termination of Achol's parental rights is in the children's best interests.

#### V. CONCLUSION

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

AFFIRMED.