

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Elijah M.,)
a child under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Pamela M.,)
)
Appellant.)

No. A-13-945.

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

JUN 19 2014

MOORE, PIRTLE, and RIEDMANN, Judges.

PIRTLE, Judge.

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

INTRODUCTION

Pamela M. appeals the order of the Separate Juvenile Court for Lancaster County terminating her parental rights to her son, Elijah M.

BACKGROUND

Pamela M. first became involved with the Nebraska Department of Health and Human Services as part of a prior case in November 2006. That case resulted in the termination of Pamela's parental rights to three children prior to Elijah's birth.

In the prior case, DHHS received reports that Pamela used a belt to discipline her then three-year-old daughter, Raven. At the time, Pamela had two other children, Trevon, born in 1998,



and Breia, born in 2001. The juvenile court adjudicated the family and attempted to reunify Pamela with the children. Pamela received numerous services over the course of thirty-three months and Pamela had weekly visitation with the children. However, the record shows the more time the children spent in Pamela's care, the more negative behaviors the children exhibited, and the more frustrated Pamela became with them. Pamela was unable to demonstrate that she could place herself in a position to be able to properly parent the children on an ongoing basis.

The State filed a motion to terminate Pamela's parental rights to Raven, Trevon, and Breia on October 30, 2009. After hearings on the issues, the juvenile court found the State proved there were statutory grounds to terminate Pamela's parental rights to Raven, Trevon, and Breia pursuant to Neb. Rev. Stat. 43-292(2), (6), (7), and that termination was in the children's best interests. The juvenile court's order was affirmed by this court on September 27, 2011.

While the appeal of the prior case was pending, DHHS learned that Pamela was pregnant with a fourth child, Elijah, who is the subject of the current appeal. Elijah was born in August 2011 to Pamela and Andy Williams. Williams initially attempted to gain custody of Elijah, but later relinquished his parental rights and is not a party to this appeal.

The State filed a motion for temporary custody of Elijah two days after Elijah's birth, and the juvenile court issued an order for ex party temporary custody of Elijah. Elijah was subsequently removed from Pamela's care while at St. Elizabeth Hospital in Lincoln. Elijah was removed to ensure his safety, due to the alleged abuse Pamela's prior children suffered while under her care. Elijah was placed in an out-of-home foster care with Adam and Andrea W. on August 18, 2011, and he has remained in their home since that day.

Initially DHHS facilitated visitation sessions for Pamela with Elijah. When the case manager discussed additional services with Pamela, she originally stated that she would only participate in visitation. The case manager reported that Pamela did not believe she had done anything wrong, and there was no reason for Elijah to be removed. Although there were not many safety concerns during the initial visitation sessions, case managers reported Pamela spent most of her time complaining about how the foster parents were dressing and raising Elijah. In the prior case, Pamela often disapproved of the foster parents' parenting skills and blamed them for problems, rather than taking personal responsibility.

On December 7, 2011, the juvenile court held a hearing regarding temporary custody of Elijah, and the State's motion requesting the court to find that reasonable efforts to preserve

and reunify were not required. Pamela appeared in court and was represented by counsel. Evidence was presented on both matters. Pamela's counsel submitted a statement at this hearing. Counsel did not argue that sustaining the State's motion would be unconstitutional, and counsel did not assert that Pamela was at an economic disadvantage compared to other individuals.

The juvenile court entered an order, pursuant to Neb. Rev. Stat. 43-283.01(4)(c), relieving DHHS of its duty to provide reasonable efforts toward reunification, as Pamela's parental rights to Elijah's siblings were involuntarily terminated in a prior case. Once DHHS was no longer required to provide reasonable efforts, it became Pamela's responsibility to arrange and pay for services. As a result, scheduled visitation ceased in December 2011.

The juvenile court's order regarding visitation, filed April 20, 2012, required Pamela to provide DHHS with an updated parenting assessment, a written plan for visits, and records from her therapy sessions with James Holt, a licensed independent mental health therapist, prior to DHHS approving further visits between Pamela and Elijah. None of these items were provided to DHHS at any time.

DHHS provided Pamela with a list of approved professionals who could conduct a parenting assessment, though DHHS was not required to do so. In June 2012, DHHS also notified Pamela in

writing that she needed to provide certain documents to the parenting assessment provider. Pamela was informed that she needed to sign a release, granting James Holt permission to disclose her therapy records. Holt did not perform a psychological assessment or evaluation on Pamela. Holt referred Pamela to Dr. Beverly Doyle, for the completion of a parenting assessment. In September 2012, DHHS received notice that Pamela was completing her parenting assessment with Dr. Beverly Doyle. On October 31, 2012, the case manager contacted Dr. Doyle to obtain a copy of the assessment, but Doyle was unable to release it, as Pamela had not paid for the assessment by that time. By the termination hearing in June 2013, Pamela had not provided any case worker with a visitation plan, and Pamela had had no contact with Elijah, from the time he was three months old.

During the pendency of this case, Pamela lost her job at a cash advance business, and was receiving unemployment benefits. She was also cited for disturbing the peace on March 5, 2012. On that day, she entered a McDonald's to complain about her niece's duties as a restaurant employee, and threatened another employee. A witness testified that Pamela used a loud, intimidating voice, called the employee derogatory names, and threatened physical harm to the employee. Pamela testified that she did "nothing" to disturb the peace, but she pled no contest to the charge and was sentenced to pay a \$239 fine.

At a team meeting on July 9, 2012, Pamela had a verbal altercation with the case manager and accused her of preventing Pamela from seeing Elijah, and she argued that the foster parents were mistreating Elijah. Pamela also became upset with Williams. Ultimately Williams' attorney told Pamela that she was being inappropriate, and Williams and his attorney left the meeting early as a result. During the meeting Pamela's tone was very loud, and she paced the room, spent time in the hall, and eventually left.

The State filed a motion to terminate Pamela's parental rights to Elijah on December 3, 2012. In support of the motion, the State alleged statutory grounds for termination under 43-292(1), (2), (7), and (9), and alleged that termination would be in Elijah's best interests.

James Holt, Pamela's therapist testified that he worked with Pamela in therapy sessions during this case. He testified that she experienced some "adjustment to having her children removed from her care, which was creating some symptoms of depression, anxiety, manifested by anger." Holt testified that these conditions can affect a mother's ability to properly parent a child. He stated that depression can take energy away from day-to-day activities, possibly causing a parent to physically neglect their child. He also stated anxiety manifested by anger can negatively impact parenting because it

may cause a parent to project her anger onto the children, causing physical and emotional abuse. Holt had not treated Pamela for these issues since October 2012, but stated her progress regarding her depression at the time was "sporadic."

Beverly Doyle's psychological evaluation of Pamela was received as Exhibit 27. In the evaluation, Doyle reported Pamela has been unable to "put herself in a position to successfully parent her children; Pamela failed to improve her parenting skills due to her inconsistent implementation of the skills she had been taught and has not acquired the responsibility needed to parent her children." The evaluation also reported Pamela demonstrated a complex pattern of psychological problems and physical symptoms; reacting to stress by whining and complaining about her health and life. Doyle stated that Pamela becomes cynical and hostile if her wishes are not met, and that the same parenting problems and issues have remained present since the removal of Elijah's siblings.

At the termination hearing, Pamela denied that she abused, neglected or used inappropriate discipline toward any of her children, and she did not acknowledge responsibility for her role in the termination of her parental rights to Elijah's siblings. Pamela testified that she did not believe she had any issues to work on, and did not acknowledge that any anger issues needed to be addressed prior to providing care for a child.

Robin Gibreal, a former case manager in this case, testified that she was also involved in Pamela's prior case, and that it was in Elijah's best interests to terminate Pamela's parental rights. Gibreal testified that she never got the impression that Pamela's focus was on Elijah. She stated that Pamela did not make any attempt to provide money, gifts, or cards for Elijah, and Pamela never inquired with the case managers about him. Gibreal testified that she observed Elijah with his foster parents on many occasions, and that his interaction with them was "pretty awesome." She stated that Elijah's current environment was very loving and the family was attentive to Elijah's needs. Gibreal stated that Elijah was happy, friendly and personable, and that he had bonded with the family, including the other children in the home, who he considered siblings.

Sagen Snyder, the case manager at the time of the hearing testified that she also believed termination of Pamela's parental rights was in Elijah's best interests considering Pamela's history, the bond Elijah shares with his foster parents, and Pamela's lack of progress in developing and maintaining a case plan.

In an order filed September 20, 2013, the juvenile court found the State proved there were statutory grounds to terminate Pamela's parental rights to Elijah pursuant to Neb. Rev. Stat.

43-292(1), (2), (7), and (9), and that termination was in the Elijah's best interests.

Pamela timely filed her notice of appeal to this court.

ASSIGNMENTS OF ERROR

Pamela's assignments of error, consolidated and restated, are: that the juvenile court erred in finding that there was clear and convincing evidence to support a finding that termination was in Elijah's best interests and the juvenile court erred by not requiring the State to provide Pamela with services and visitation with Elijah.

STANDARD OF REVIEW

Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Athina M.*, 21 Neb. App. 624, 842 N.W.2d 159 (2014).

ANALYSIS

Grounds for Termination.

In the Nebraska statutes, the bases for termination of parental rights are codified in § 43-292. 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, the juvenile court found that the evidence supported the termination of Pamela's parental rights pursuant to Neb. Rev. Stat. 43-292(1), (2), (7), and (9).

Pamela does not contest the juvenile court's finding that grounds for terminating her parental rights exist and concedes that grounds for termination existed under Neb. Rev. Stat. § 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."

Having reviewed the record, we find that one or more of the statutory grounds for termination did exist. Elijah was removed from parental care in the hospital after his birth in August 2011, and he was immediately placed with a foster family. Since that time, Elijah has remained in foster care in the same home. At the time the motion to terminate parental rights was filed on December 3, 2012, Elijah had been in an out-of-home placement in excess of 15 of the most recent 22 months. Our de novo review of the record clearly and convincingly shows that grounds for termination of Pamela's parental rights under § 43-292(7) were

proved by sufficient evidence. Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the child's best interests.

Best Interests.

Pamela asserts the juvenile court erred in determining that there was clear and convincing evidence to support a finding that termination was in Elijah's best interests.

A juvenile's best interests are the primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Sir Messiah T.*, 279 Neb. 900, 782 N.W.2d 320 (2010). In deciding best interests, the court is obligated to review the evidence presented by all parties relative to the parent's current circumstances and determine if termination of parental rights is in the best interests of the minor children based on those circumstances. *Id.*

The Nebraska Supreme Court has stated that termination of a person's parental rights is in the best interests of the child when the parent proves to be unfit. *In re Kendra M.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). "Parental unfitness" is defined as a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *Id.*

The Nebraska Supreme Court has previously recognized that one's history as a parent speaks to one's future as a parent. *In re Sir Messiah*, supra. Although a court must review evidence of a parent's current circumstances in determining a child's best interests, prior neglect of a sibling is still relevant, and a court need not ignore past parenting outcomes. *Id.* Additionally, although a child has not yet experienced actual injury or physical harm, a court need not await certain disaster to come to fruition before taking protective steps in the interest of a minor child. *In re Interest of Jamie M.*, 14 Neb. App. 763, 714 N.W.2d 780 (2006).

The juvenile court terminated Pamela's parental rights to Raven, Trevon, and Breia, after finding that she physically, verbally, and emotionally abused these children. Pamela did not actually subject Elijah to harm or neglect, as he was removed shortly after birth. However, the State was not required to wait for Elijah to suffer before removing him from Pamela's care and requiring her to demonstrate that she was in a position to be his caregiver.

Pamela has not acknowledged that there was a reason for the termination of her parental rights to Elijah's siblings or that she had any issues to address to be able to adequately parent Elijah. She stated "I do not believe I have any issues that I need to work on." Rather than admitting responsibility for her

actions, Pamela blamed other individuals for the consequences of her actions. She focused her energy on complaining about how the foster parents were caring for Elijah. She also was a guest on a public radio show and complained of her disagreement with the outcome of the prior case.

After the court found that reasonable efforts to reunify the family were not required, it became Pamela's responsibility to fulfill certain requirements to establish visitation with Elijah. Pamela was ordered to create a visitation plan and complete a parenting assessment. The visitation plan was never provided to DHHS and, although an assessment was completed, Pamela did not provide it to DHHS. As a result, Pamela has had no visitation with Elijah since December 2011, when he was just three months old. Since that time, Pamela has not inquired about Elijah's well-being and has not communicated with him in any way. There is no evidence that Pamela had a beneficial relationship with Elijah at the time of trial.

The record shows Pamela engaged in some therapy sessions to address her anger and depression. However, she did not complete a program, and her therapist, James Holt, testified that her progress was "sporadic." Holt testified that her condition can negatively impact parenting because it may cause a parent to project her anger onto the children, causing physical and emotional abuse. There is evidence that Pamela exhibited

aggressive and threatening behavior during the pendency of this case. In March 2012, Pamela was arrested and later convicted of disturbing the peace for yelling at and threatening McDonald's employees. Pamela also became accusatory and acted inappropriately toward the case manager and Elijah's father during a team meeting.

The law does not require perfection of a parent; instead, courts should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child. *In re Interest of Jacob H.* 20 Neb. App. 680, 831 N.W.2d 347 (2013).

The evidence shows Pamela has not made any progress in correcting the conditions which led to the termination of her parental rights in the prior case. It also demonstrates personal deficiencies which have prevented her from forming a beneficial relationship with Elijah and would prevent her from fulfilling her parental obligations to the detriment of her child's well-being.

The evidence shows that Elijah has been placed with the same foster family since he was just a few days old, and that he is bonded with his foster family and their children. Elijah is a young child who has been in foster care his entire life. Case workers testified that it is in Elijah's best interests to terminate Pamela's parental rights and allow him to be adopted

into a permanent home with a family who can provide a loving and stable environment. We find the evidence clearly and convincingly shows that termination of Pamela's parental rights is in Elijah's best interests.

Reasonable Efforts.

Pamela asserts the juvenile court erred by not requiring the State to provide Pamela with services and visitation with Elijah. She asserts she was held responsible for the cost of visitation, and she was unable to afford it. Thus, she asserts she was denied equal protection of law when the juvenile court relieved DHHS of its duty to provide reasonable efforts at reunification.

Pursuant to § 43-283.01(4), the juvenile court found that reasonable efforts to preserve and reunify the family were not required because Pamela's rights to Elijah's siblings had been involuntarily terminated, and because Pamela had subjected Elijah or his siblings to aggravated circumstances. See 43-283.01(4)(a) and 43-283.01(4)(c). She asserts that the responsibilities placed upon her, to pay for visitation and assessments, meant she was denied the opportunity to nurture, bond with, and care for her child. She asserts she was denied equal protection because the statute treated her differently than it does parents with greater economic means.

Though Pamela alleges an error by the juvenile court, her argument really focuses on the constitutionality of Neb. Rev. Stat. § 43-283.01. She acknowledges her attack on the constitutionality of the statute by stating that "a party attacking a statute as violative of equal protection has the burden to prove that the classification violates the principle of equal protection." Appellant brief 16, citing *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006).

When attacking the constitutionality of a statute, a particular procedure must be followed. The rules of the Nebraska Supreme Court impose a specific requirement on parties seeking to challenge the constitutionality of a statute on appeal. *In re Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658. The Nebraska Court Rules of Appellate Procedure provide that "A party presenting a case involving the federal or state constitutionality of a statute must file and serve notice thereof with the Supreme Court Clerk by a separate written notice or by notice in a Petition to Bypass at the time of filing such party's brief." Neb. Ct. R. App. P. § 2-109(E) (Rev. 2012) The Nebraska Supreme Court has previously stated that "'strict compliance' with the provisions of rule 9(E) is required in order for an appellate court to consider a challenge to the constitutionality of a statute." *In re Rebecka P.*, supra. Additionally, an appellate court will not consider a constitutional question on appeal that

was not raised and properly presented for disposition by the trial court. *In re Interest of Lisa W.*, 258 Neb. 869, 606 N.W.2d 804 (2000). A lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *Id.*

The record shows that Pamela had notice of the State's motion to relieve DHHS of its requirement to provide reasonable efforts. The record also shows Pamela was present at the hearing on the issue, and did not object, or state her position that holding her responsible for the cost of services would be violative of her rights to equal protection. She did not file a written notice in compliance with Rule 2-109(E). Therefore, we find the issue of whether § 43-283.01 is unconstitutional as a violation of equal protection is not properly before this court and may not be considered within this appeal.

CONCLUSION

We find the State proved by clear and convincing evidence that there were statutory grounds for termination of Pamela's rights pursuant to 43-292, and that termination was in Elijah's best interests. We find Pamela did not properly raise the issue of the constitutionality of Neb. Rev. Stat. § 43-283.01. Thus, we cannot consider her assignment of error with regard to the alleged violation of her equal protection rights in this appeal.

AFFIRMED.