

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF FRANK S. ET AL.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF FRANK S. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

GARY S., APPELLANT.

Filed January 18, 2011. Nos. A-10-772 through A-10-774.

Appeal from the County Court for Scotts Bluff County: RANDIN ROLAND, Judge.
Affirmed.

William E. Madelung, of Madelung Law Office, for appellant.

Andrea M. Longoria, Deputy Scotts Bluff County Attorney, for appellee.

Maxie J. Morgan, of Sorensen & Hahn, P.C., guardian ad litem.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Gary S. appeals from a final order terminating his parental rights to Frank S., Malachi S., and Michael S. The only issue before us is whether such termination was in the best interests of the respective children. Upon our de novo review, we find that termination of Gary's parental rights is in the children's best interests. We therefore affirm the decision of the county court, sitting as a juvenile court.

BACKGROUND

Malachi, Frank, and Michael were born, respectively, in November 2005, March 2007, and June 2009.

On February 7, 2009, Malachi and Frank were removed from their mother's physical custody, and on March 3, they were adjudicated as juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Michael was removed shortly after his birth, upon being discharged from the hospital on July 8, and was adjudicated under the same statute on September 22. On January 29, 2010, the county court changed the children's permanency goal to adoption.

Although the State's motion for termination of parental rights is not included in our record, we discern from the court's final order that the State sought termination of Gary's parental rights based upon Neb. Rev. Stat. § 43-292(2), (6), (7), and (9) (Cum. Supp. 2010), although the court noted in its order that the State did not allege § 43-292(7) applied to Michael. Contemporaneously with the proceeding against Gary, the State was pursuing termination of the children's mother's parental rights. The record shows that at the time of trial, the mother voluntarily relinquished her parental rights.

At the time of each child's removal, Gary was in military confinement upon the court-martial conviction of one count involving two instances of sexual contact with, and sexual penetration of, his niece, who was 9 years old at the time of the offense, and of a second count for making a known false statement about the matter to a military investigator with the intent to deceive. A certified copy of the court-martial proceedings was received in evidence by the county court. According to a written stipulation of facts made before the military tribunal, the sexual assaults occurred over two periods, one consisting of 2 months in mid-2004 and the other consisting of 2 months from December 2004 through January 2005. The military investigation began after a school counselor overheard the victim tell another student that she had been sexually assaulted. The military prosecution apparently began after Gary admitted the allegations during an interview conducted on August 16, 2008. The court-martial order was made on May 6, 2009, was affirmed by the U.S. Army Court of Criminal Appeals on June 17, and further review was denied by the U.S. Court of Appeals for the Armed Forces on September 2. On May 3, 2010, the county court conducted an advisement hearing for Gary regarding the termination motion. This was the first time that Gary appeared in the juvenile case.

On June 15, 2010, the county court conducted a trial on the State's motion for termination of Gary's parental rights. To the extent necessary to do so, we discuss the trial evidence in the analysis section below.

On July 6, 2010, the court entered a lengthy order making numerous findings and terminating Gary's parental rights. Gary timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENT OF ERROR

On appeal to this court, Gary assigns only that insufficient evidence was adduced to prove that it was in the children's best interests that Gary's parental rights should be terminated.

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 Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). However, when the evidence is in conflict, an appellate

court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

Under § 43-292, in order to terminate parental rights, the State must prove, by clear and convincing evidence, 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. *In re Interest of Hope L. et al., supra.* The county court found that clear and convincing evidence established the existence of the statutory grounds under § 43-292(2), (6), and (9). On appeal, Gary does not contest the existence of the statutory grounds, but, rather, asserts only that the evidence was insufficient to establish that termination of his parental rights was in the children's best interests. Therefore, we turn our focus to the second requirement of the statute--best interests.

Gary argues that he was incarcerated at the time of the adjudication and disposition hearings, that he was not released from military confinement until just before the May 3, 2010, hearing, that he complied with the case plan to the best of his ability while incarcerated, and that upon release, he attended hearings and requested visitation but visitation was allowed only one time in a therapeutic setting. Thus, he contends, the State failed to provide him with a meaningful opportunity to "prove himself" to the court. Brief for appellant at 6.

The State and the children's guardian ad litem assert that the evidence establishes that termination was in the children's best interests and that Gary did not fully take advantage of the visitation he was permitted. We agree.

Gary's military confinement limited the range of actions available to the State. At the time of filing of the original juvenile petition, Gary's whereabouts were unknown. It was not until December 2009 that a caseworker was able to locate Gary. A case plan set forth goals specific to Gary's conviction, including completing programs within the facility, such as sex offender programs and parenting classes, and starting to communicate by the use of letters. Although Gary told the caseworker that he had completed a sex offender program and that the parenting class was not available because there were not enough participants, there was no evidence of the name of the specific program he completed, the length of the program, or its requirements. Gary did not offer any evidence to show completion of any specialized sex offender program.

Although parental rights may not be terminated solely for a parent's incarceration, parental incarceration is a factor which may be considered in determining whether parental rights should be terminated. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). In that case, the Nebraska Supreme Court quoted other states' case law and recognized that neither criminal conduct nor imprisonment alone necessarily justifies an order of permanent deprivation. The court also quoted a Washington appellate court which observed that in termination proceedings, the court considers a parent's inability to perform his or her parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpetrated, which are all relevant to the issue of parental fitness and child welfare, as is the parent's conduct prior to imprisonment and during the period of incarceration. On de novo review, we have considered these factors. Because of Gary's incarceration, he was unable to provide the children with any type of permanent living arrangement. He had been

absent from Malachi's and Frank's lives for a long time. Prior to his release, he had not met or seen Michael.

Moreover, the State argues, and Gary does not dispute, that Neb. Rev. Stat. § 43-283.01(4)(a) (Cum. Supp. 2010) relieves the State of the obligation to make reasonable efforts to preserve and reunify the family where "[t]he parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, . . . sexual abuse." Because Gary subjected "another minor child" to sexual abuse, the reasonable efforts requirement does not apply in the instant case.

Gary's participation in a single session of therapeutic visitation demonstrated his absence from the children's lives and his failure to interact with them in any significant way. Sara Klein, a licensed mental health practitioner who served as the children's therapist, observed Gary's only visitation session, which occurred on June 9, 2010. Gary was present with the children and the foster parents in a playroom. The children did not exhibit any excitement at the sight of Gary and continued their play. Gary did not expand upon Klein's direction to the children regarding play with Gary. Klein testified, "There was very little verbalization." The majority of the time, Gary sat and watched the children. Klein gave Gary permission to sit on the floor and interact with the children, but he remained standing for the first 15 minutes. After being again prompted by Klein, Gary sat and provided some assistance to the children's play around a sandbox. However, Klein described Gary's amount of play and verbalization with the children as "very minimal." There was no contact between Gary and Michael. Klein opined that the children have no relationship built with Gary. She added that the children's sense of security and safety--in other words, a bond with Gary--had not been established.

Frank's and Malachi's behavior had improved since beginning therapy with Klein. Prior to beginning therapy, Malachi had been displaying aggressive behavior, including sexualized behavior. Since beginning therapy, both Frank and Malachi improved in nurturing, loving, caring, manners, and other social skills. Their anger and aggression had decreased. They were doing much better with following directions, being compliant, and becoming more expressive with their feelings. According to Klein, the children have made great progress with their foster family, establishing a bond and "beginning to trust." Klein testified that adoption is in the children's best interests. As the county court judge summarized, "[w]ithout termination, [Klein] believes the children are being set[] up for abandonment and security issues that could impact the children through adulthood." The children's caseworker agreed that termination of Gary's parental rights was in the children's best interests.

CONCLUSION

After our de novo review, we agree that clear and convincing evidence established that it would be in the children's best interests that Gary's parental rights be terminated. We therefore affirm the final order of the county court.

AFFIRMED.