

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF MADISON S.

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IN RE INTEREST OF MADISON S., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

TRISHA S., APPELLANT.

Filed May 6, 2008. No. A-07-1259.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case was ordered submitted without oral argument. Trisha S. appeals from an order terminating her parental rights to Madison S. In her appeal, Trisha challenges both the statutory grounds for termination of her parental rights and the juvenile court's finding that termination of her parental rights is in Madison's best interests. We find sufficient evidence to support the juvenile court's termination of Jennifer's parental rights, and we affirm.

II. BACKGROUND

These proceedings originally involved Madison, who was born on October 16, 2002, and her older sister Nekeasha S., who was born on March 9, 1989. On October 13, 2005, the State filed a petition alleging that Madison and Nekeasha were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) because their mother, Trisha, subjected Nekeasha to physical abuse; used alcohol and/or controlled substances which placed both children at risk for harm; and failed to provide the children with safe, stable, and independent housing.

On that same day, the State also filed a motion for temporary custody of the children. The State asserted that placement and detention of the children was a matter of immediate and urgent necessity because there were reports that Trisha physically abused Nekeasha; used illegal substances, such as methamphetamines; and was no longer employed and was unable to provide

proper housing for the children. The court entered an order for immediate custody, finding that the need for placement and detention existed. The children were placed in the custody of the Nebraska Department of Health and Human Services (DHHS).

Trisha denied the allegations in the petition, and an adjudication hearing was held on December 22, 2005. At the close of the evidence, the juvenile court found that the allegations in the petition were true and that Madison and Nekeasha were within the meaning of § 43-247(3)(a). The court continued custody in DHHS for appropriate care and placement, specifically to exclude the parental home. In addition, the court ordered Trisha to (1) have reasonable rights of therapeutic visitation with the children; (2) cooperate with announced and unannounced home visits at the children's placement; (3) complete psychological, psychiatric, and substance abuse evaluations within 30 days; (4) participate in individual therapy; (5) immediately inform her attorney, DHHS, and the juvenile court in writing of any change of address or telephone number; and (6) not leave the jurisdiction of the court without authorization.

In the months following the initial adjudication hearing, multiple review and permanency planning hearings and disposition hearings were held. At these hearings, the juvenile court ordered the custody of both children to remain with DHHS. The court also ordered Trisha to comply with various requirements of a rehabilitation plan in addition to those requirements previously ordered after the initial adjudication hearing. Most notably, Trisha was ordered to (1) successfully complete a parenting class to learn alternative methods of discipline, to exclude physical discipline; (2) submit to random drug screens within 24 hours of the request by DHHS; (3) not possess or ingest alcohol and/or controlled substances; (4) obtain and maintain clean and appropriate housing for herself and her children; (5) obtain and maintain a sufficient and legal source of income to provide for herself and her children; (6) participate in family therapy with Nekeasha; (7) participate in individual therapy to address the recommendations given in the psychological evaluation; and (8) not allow males to reside in her home or have contact with her children.

On July 9, 2007, the State filed a motion for termination of Trisha's parental rights as to Madison. The State alleged that Madison was a child within the meaning of Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 2004) and that termination of Trisha's parental rights was in Madison's best interests.

On November 15 and 16, 2007, a hearing was held on the State's motion to terminate Trisha's parental rights. While we have reviewed the bill of exceptions from this termination hearing in its entirety, we do not present the extensive evidence offered by both sides in detail here. Rather, we will set forth the facts as necessary in our analysis below.

At the conclusion of the termination hearing, the juvenile court found that the State proved by clear and convincing evidence that Madison was a child within the meaning of § 43-292(2), (6), and (7) and that it would be in Madison's best interests to terminate Trisha's parental rights. The court then entered an order terminating Trisha's parental rights with regard to Madison. Trisha timely appeals from this order.

III. ASSIGNMENTS OF ERROR

In Trisha's appeal, she challenges both the juvenile court's finding that the State proved the statutory grounds for termination of her parental rights under § 43-292(2), (6), and (7) and the juvenile court's finding that termination of her parental rights was in Madison's best interests.

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 juvenile 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. *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 FOR TERMINATION

Trisha's first assignment of error is that the juvenile court erred in finding that the State presented clear and convincing evidence to prove the statutory grounds for termination of her parental rights. Specifically, Trisha alleges that the juvenile court erred in sustaining the motion to terminate her parental rights pursuant to § 43-292(2), (6), and (7). Upon our de novo review, we find that the evidence clearly and convincingly demonstrates that Madison was in an out-of-home placement for at least 15 of the most recent 22 months, pursuant to § 43-292(7). As such, 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*.

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 a parent. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

In this case, the State alleged and the juvenile court found that termination of Trisha's parental rights was warranted pursuant to § 43-292(2), (6), and (7). The record contains

uncontradicted evidence that Madison was removed from Trisha's home on October 13, 2005, and that Madison continuously resided in an out-of-home placement throughout the pendency of the proceedings. As a result, at the time of the hearing on the State's motion to terminate in November 2007, Madison had been in an out-of-home placement for over 2 years. Accordingly, there is no dispute that Madison was 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 Trisha'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) and (6). Trisha's assignment of error relating to the sufficiency of the statutory authority to support termination is without merit.

3. BEST INTERESTS

Trisha also asserts that the juvenile court erred in finding that termination of her parental rights was in Madison's best interests. Specifically, Trisha argues that she complied with the "material portions of the court ordered plan of rehabilitation" and that she and Madison had a continuing bond. Brief for appellant at 17. To the contrary, we find the evidence in the record establishes that Trisha did not make diligent efforts toward compliance with her rehabilitation goals. In addition, we find sufficient evidence to support the testimony of Madison's caseworker and therapist that Madison is in need of a permanent and stable home environment. As such, we find the evidence clearly and convincingly establishes that termination of Trisha's parental rights is in Madison's best interests.

In the previous section, we found that termination of Trisha'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) and (6). We, therefore, treat our discussion of whether terminating Trisha's parental rights is in Madison'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.*, 269 Neb. 249, 691 N.W.2d 164 (2005). 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. *Id.*

(a) Noncompliance With Court-Ordered Rehabilitation Plan

The Nebraska Supreme Court has previously stated, "[W]here 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 Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). The court has further recognized that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.*

In the instant case, approximately 20 months had passed from the time that Madison was removed from Trisha's home in October 2005 to the time the State filed its motion for termination of parental rights in July 2007. During these 20 months, Trisha did not take significant steps toward rehabilitating herself or correcting the problems which initially brought her and her children to the attention of the juvenile court. Contrary to her assertions, Trisha did not comply with the material portions of her court-ordered rehabilitation plan.

Over the course of the 20-month period when Madison was in an out-of-home placement, the juvenile court ordered Trisha to comply with the terms of her rehabilitation plan on numerous occasions. The various terms of this plan are laid out in detail in the factual background; however, we restate the terms of the plan most relevant to our discussion here. Trisha was ordered to (1) participate in individual therapy sessions, (2) undergo periodic urinalysis testing at the request of DHHS, (3) not possess or ingest alcohol and/or controlled substances, (4) obtain and maintain clean and appropriate housing for herself and her children, and (5) obtain and maintain a sufficient and legal source of income to provide for herself and her children. The record contains clear and convincing evidence that Trisha did not comply with these court-ordered requirements despite being provided with ample time and resources.

Trisha did not consistently attend her individual therapy sessions. The record reveals that the juvenile court instructed Trisha to participate in individual therapy in its orders dated January 3, June 26, and September 21, 2006, and January 22 and June 21, 2007. However, Trisha did not begin attending individual therapy sessions until November 2006, approximately 10 months after she was first ordered to do so. Trisha's therapist, Kay Eisenman, testified that during Trisha's first counseling appointment in November 2006, they decided that Trisha would meet with Eisenman once a week. Eisenman testified that Trisha attended a few counseling sessions in December 2006, but that she did not attend with any regularity until February 2007. In fact, Eisenman reported that Trisha did not attend therapy at all during January 2007.

After February 2007, Trisha's attendance at therapy continued to be sporadic. On some occasions, she would attend therapy on a weekly basis, and at other times, she would attend every 2 weeks. At times, she would not show up at all to her scheduled appointments. In July 2007, Eisenman discontinued Trisha's therapy because Trisha was no longer attending any appointments. Eisenman testified that from November 2006 to July 2007, Trisha attended only 12 counseling sessions.

In addition, Eisenman testified that Trisha made "minimal progress" toward addressing her parenting issues. Eisenman opined that Trisha needs further therapy to deal with these issues.

Trisha also did not comply with the court-ordered requirement that she undergo periodic urinalysis testing at the request of DHHS. The caseworker assigned to this case, Lisa Lewis, testified that she started requesting urinalysis tests from Trisha in January or February 2006. Lewis testified that Trisha "minimally complied" with the requests despite Lewis' efforts. Lewis was often unable to reach Trisha by telephone, and Trisha did not always provide Lewis with a current address. In addition, Trisha offered many excuses about why she could not complete the requested testing within the prescribed time period: she did not have gas in her car, she had a work conflict, or she had a personal conflict.

Lewis testified that she provided Trisha with gas vouchers, bus tickets, and maps of the public transportation system in order to facilitate her compliance with the urinalysis testing. In

addition, Lewis provided Trisha with the opportunity to have the testing done in her own home. However, on four separate occasions, Trisha was not at home when the testing agency arrived to complete the urinalysis tests. As a result, the testing agency refused to continue to provide the services.

Trisha moved out of the state on two separate occasions during the pendency of the proceedings. She moved to Missouri in December 2005 and returned to the Omaha area in February 2006. She moved to Wichita, Kansas, in January 2007 and moved back to Omaha in April 2007. Lewis informed Trisha that she would still need to comply with the urinalysis testing while she was out of the state; however, Trisha failed to provide Lewis with a current telephone number or address, so Lewis was often unable to notify Trisha that she needed to submit to a test.

Furthermore, Trisha did not comply with the court's orders to abstain from consuming alcohol or controlled substances. Trisha tested positive for controlled substances on three separate occasions. In June 2006, she tested positive for cocaine; in February 2007, she tested positive for propoxyphene, a prescription pain killer; and in April 2007, she tested positive for amphetamines and cocaine. In addition, on June 7, 2006, and February 1 and April 3, 2007, Trisha's samples presented with low creatinine levels, which indicated that there was a possibility that the sample had been diluted. On April 13, 2007, Trisha presented a urine sample with a temperature that was too low to be considered a legitimate sample. When she was asked to wait in the lobby so that she could complete another test, Trisha left.

When Lewis asked Trisha about her positive test results, Trisha denied that she had used any drugs and said that she believed "the whole thing was rigged." Trisha became angry, defensive, and argumentative when asked about the problems with some of her urine samples. Lewis testified that Trisha often yelled at her and used profanity during their conversations.

Trisha also did not comply with the court's orders to obtain and maintain clean and appropriate housing and a sufficient and legal source of income. The record reveals that Trisha struggled with her housing situation. At the time of the initial adjudication, Trisha informed Lewis that her house was going to be taken in foreclosure and that she could not afford to stay there. Shortly after this discussion, Trisha reported to Lewis that her utilities had been turned off and that she could not pay her bills. Trisha then moved into an apartment, but she was evicted after only 3 months. Trisha then resided with friends or family members until approximately April 2007, when she obtained another apartment. In September 2007, Trisha was evicted from this apartment because she failed to pay her rent.

The record also demonstrates that Trisha went through many periods of unemployment and brief periods of employment during the 20 months prior to the State's filing of the motion to terminate parental rights. Trisha testified at the termination hearing that she had approximately six different jobs during the pendency of the proceedings. She testified that at various times, she worked for a car dealership, for a real estate company, for a restaurant, and as a nurse. However, Lewis testified that she did not always receive any information or verification from Lewis about where she was employed.

(b) Visitation With Madison

In addition to ordering Trisha to comply with the requirements of her rehabilitation plan, the juvenile court provided Trisha with opportunities to engage in visitation with Madison. While

Trisha maintains that she regularly exercised her right to visitation and that she had a continuing bond with Madison, the record reflects that her attendance at scheduled visitations was sporadic and that her interactions with both Madison and Nekeasha often upset Madison and caused her to have ongoing behavioral problems.

The record revealed that Trisha's attendance at visitations with Madison was sporadic. Eva Abrams, a supervisor at Owens and Associates, testified that Owens and Associates provided visitation services for Trisha from December 4, 2005, to January 20, 2006. Abrams testified that Trisha was not "one hundred percent consistent" with her attendance at the scheduled visitation sessions. Abrams testified that out of the 10 visits that Owens and Associates provided to Trisha, Trisha attended only 7.

In addition, the record revealed that Trisha lived out of state on two separate occasions during the pendency of these proceedings. Madison's foster mother testified that as a result of Trisha's living out of state, there was a 6-week time period when Madison did not see Trisha at all. The foster mother testified that Madison was very confused by this. The foster mother testified that when Trisha canceled visits with Madison, Madison would get angry, would distance herself from others, and would act "unattached." Madison's therapist, Mary Ellen Christ-Anderson, testified that Madison was very upset when Trisha moved away and Madison did not get to see her.

When Trisha and Madison would have visitation, there was evidence that Trisha did not follow the rules established by DHHS and there was evidence that Trisha's interactions with Madison and Nekeasha were harmful to Madison's mental health. Madison reported that she and Trisha would often visit a man named "Dave" during their visitations. Trisha was then told of the importance of not exposing either of the children to Dave because of his criminal background. However, Madison continued to report that she and Trisha would visit Dave during their visitations. Additionally, there was evidence that Trisha would take Madison to places without telling DHHS where they were going. Madison would then report to her foster mother that she spent the entire visitation in the car or that she was not provided with adequate food.

In April 2007, Lewis separated the visits between Trisha and Madison and Trisha and Nekeasha because of evidence that when the three of them would have visitation together, Madison would often become very upset and would express her frustration by acting out violently. Madison's therapist, Christ-Anderson, testified that Madison reported to her about visits where Trisha hit or slapped Nekeasha. Madison would express fear about the situation and would have some anticipatory fear of future visits with Trisha. Christ-Anderson testified that Madison would often cry when she would talk about the fights between Nekeasha and Trisha. She testified that crying was very uncharacteristic of Madison. At one point, Madison made a comment about Trisha being "scary" and "angry." Christ-Anderson described the dynamic between Madison, Nekeasha, and Trisha as "unhealthy."

Christ-Anderson also reported that she would observe more anxiety behaviors in Madison after her visits with Trisha. Madison would be more hyper and more hypervigilant to sound. Madison's foster mother reported significant behavioral problems with Madison after particularly "volatile" visits with Trisha. Madison would wet the bed for up to 3 days after the visits, even though she was completely potty-trained. In addition, Madison often hit and kicked the foster mother's other children, yelled at adults, acted bossy, cussed, and instigated fights.

Madison would make very age-inappropriate comments about things she and Trisha had done during their visitation session and about things that Madison said Trisha had told her.

Christ-Anderson attributed Madison's anxiety behaviors and behavioral problems to the stress of the visits with Trisha and to the hostility that occurred during the visits. Christ-Anderson testified that there would be lasting effects to Madison as a result of her time with Trisha. She testified that Madison had learned to identify with violent behavior and was copying that behavior more and more. Christ-Anderson opined, "Some of the manipulative, some of the meanness and bossiness will probably carry through."

Both Christ-Anderson and Lewis testified that Madison needs permanency and stability in her life. Christ-Anderson testified that she believed that by putting Madison in a less volatile situation, her bossiness and manipulative behaviors would subside. Christ-Anderson testified that Madison needs to be in a safe environment where she can interact with trustworthy and mature adults. Madison needs a stable home where she can stay consistently and get her developmental needs met through healthy relationships.

Similarly, Lewis testified that Madison needs permanency and a stable home environment where she is not subjected to potential physical abuse. Lewis testified that Trisha never accepted responsibility for the physical abuse of Nekeasha and that, as long as Trisha did not see a problem with that physical abuse, Madison was at a greater risk for future abuse. Lewis opined that termination of Trisha's parental rights was in Madison's best interests.

We agree. We find that Trisha made inadequate progress on her rehabilitation goals during the approximately 20 months when Madison was in an out-of-home placement. Furthermore, Madison needs permanency, stability, and safety, which Trisha has not been able to provide. As the juvenile court noted, "As of June 21, 2007[, when the court filed its last order prior to the State's filing of its motion to terminate Trisha's parental rights,] Madison . . . had been in foster care for 42 percent of her life."

Trisha did not consistently exercise her right to visitation with Madison. When Trisha did attend the visitation sessions, she did not comply with the established rules. Madison often acted out behaviorally after her visitations with Trisha. Perhaps most notable is Madison's growing tendency to mimic Trisha's physically aggressive behaviors. We find clear and convincing evidence to support the juvenile court's finding that termination of Trisha's parental rights is in Madison's best interests. We affirm.

V. CONCLUSION

We find no merit to Trisha's appeal. There was sufficient evidence to support the juvenile court's order to terminate Trisha's parental rights. The juvenile court order is affirmed.

AFFIRMED.