

IN THE NEBRASKA COURT OF APPEALS

In re Interest of JahPray W.,)
a Child under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Whitney W.,)
)
Appellant.)

No. A-13-0144

**MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL**

FILED

SEP 18 2013

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

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

INBODY, Chief Judge.

INTRODUCTION

Whitney W., the biological mother of JahPray W., appeals the order of the Douglas County Separate Juvenile Court terminating her parental rights and finding that termination was in the child's best interests. For the following reasons, we affirm.

STATEMENT OF FACTS

Procedural Background.

JahPray was born in 2006. In January 2011, the State filed a petition alleging that JahPray was at risk of harm and lacked proper parental care by reason of the faults or habits of Whitney and came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Earlier that month, Whitney overdosed



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on prescription medicine in an attempt to commit suicide. When the paramedics arrived at Whitney's home, where she resided with JahPray, who was 4 years old, they discovered that the fire alarms were disconnected and several stove burners had been turned on. Whitney admitted to intentionally overdosing on Wellbutrin, a prescription drug that was not prescribed to Whitney. At the hospital, Whitney tested positive for marijuana and had to be restrained.

The State alleged in its petition that in addition to the suicide attempt, Whitney was intoxicated at the hospital, engaged in violent and aggressive behaviors, failed to comply with mental health treatment, and that her use of alcohol and controlled substances, failure to provide safe, stable, and appropriate housing, and proper parental care placed JahPray at risk for harm. On January 20, 2011, JahPray was removed from Whitney's care and placed in the custody of the Nebraska Department of Health and Human Services (DHHS).

The juvenile court ordered Whitney to complete a medical evaluation, a psychological evaluation, a psychiatric evaluation, to not possess or ingest alcohol or controlled substances unless prescribed by a licensed practicing physician, and to voluntarily submit to random drug testing. An amended petition was thereafter filed by the State, alleging that Whitney had been diagnosed with schizoaffective disorder,

bipolar disorder, and posttraumatic stress disorder; that Whitney suffered from depression, suicidal ideation, self-medicating, erratic and aggressive behaviors, paranoia, and auditory hallucinations; that Whitney required mental health treatment and medications; and as a result of these allegations, JahPray was at risk for harm.

On May 13, 2011, Whitney admitted to the allegations contained within the State's amended petition and the juvenile court adjudicated JahPray as a child within the meaning of § 43-247(3)(a). The court adopted the DHHS case plan and court report which ordered services for Whitney, not limited to daily case management, family support services, urinalysis testing, psychiatric and psychological evaluations, a chemical dependency evaluation, pretreatment assessment, relative foster care, visitation/parenting services, furniture, and bus tickets. Whitney was ordered to participate in the family support services offered to her, to follow the recommendations of the various evaluations, to submit to drug testing, and to take only those medications prescribed by her doctor.

In May 2011, the court report indicated that Whitney was having visitation with JahPray 6 days a week, four of which were supervised by an agency worker and two which were supervised by Whitney's mother, with whom JahPray was placed. The report indicated that Whitney had stopped being confrontational with

visitation workers and was accepting feedback. The report indicated that Whitney and JahPray were bonded and visitations were going well.

In December 2011, the court report indicated that Whitney was maintaining her housing but that the service provider, Nebraska Families Collaborative (NFC) had been paying for her electrical bills, in addition to fees for her intensive outpatient program, other utilities, and psychotropic medication. Whitney was consistent in her meetings with the family support worker and was working on medical and mental health needs. Whitney was scheduled to begin services at Immanuel but had no-showed or cancelled many appointments. Whitney had further not attended group sessions and had requested numerous bus tickets for transportation to therapy, but had failed to attend any appointments. The report further indicates that Whitney had tested positive for marijuana/THC in each of her urinalysis tests and there had been no significant drop in those levels. In July 2011, Whitney was ticketed for possession of marijuana and failed to attend any of the court hearings related to the charge. The report also indicated that Whitney had also requested a reduction in visitation time because she did not want service providers spending so much time watching her with her child.

The June 2012 report indicated that Whitney continues to have supervised visitation with JahPray and was appropriate at those visitations. Whitney missed three visitations, two of which were cancelled due to Whitney's incarceration. The report indicates that visitations remained supervised because of concerns about Whitney's ability to have unsupervised visitation as a result of her continued substance abuse and mental health issues. Whitney also continued to test positive for marijuana and only minimally participated in intensive outpatient services. The report indicated that at that time, JahPray had been out of the home for 18 months and only minimal progress had been made to alleviate the reasons for out-of-home placement.

In July 2012, the State filed a motion to terminate Whitney's parental rights pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 2008). The petition alleged that Whitney failed to consistently attend therapy, outpatient chemical dependency treatment, AA/NA meetings, and to submit to urinalysis testing. The December 2012 report indicated that Whitney had been set up with psychiatric services and was receiving medication management, but that there were continued concerns about Whitney taking those medications. Whitney also continued to test positive for marijuana and admitted to drinking alcohol. The report also noted that Whitney was

maintaining routine visits with JahPray and was appropriate in her parenting.

Termination of Parental Rights Hearing.

Several employees with NFC testified as to their involvement with Whitney and JahPray. Sarah Forrest testified that she worked as a family permanency specialist with Whitney and JahPray and explained that JahPray was removed from Whitney's care in January 2011, after Whitney's suicide attempt and admittance to the hospital for a psychiatric hold. Whitney was provided family support work, drug testing, and supervised visitation.

Lisa Minardi, a family permanency specialist for NFC, testified that in February 2011, Whitney was provided visitation and a family support worker, while the providers were working on gathering reports and releases. Over the next several months, Whitney underwent a chemical dependency evaluation, a psychological evaluation, and a psychiatric evaluation. Minardi explained that Whitney participated in UA testing, monthly family team meetings, and her medications were paid for by NFC. Minardi explained that Whitney had difficulties paying for medication and often let her medication run out due to her inability to pay. Minardi explained that Whitney had appropriate housing, but had issues with maintaining the utilities because she had no way to pay for the services. Minardi testified that

Whitney was unable to work due to her mental health capacity, and at that time had been denied disability benefits. Minardi testified that she was concerned about Whitney's ability to parent JahPray when she was unable to have a job due to her mental health. Minardi further testified that while Whitney was being consistent in making appointments for her psychiatric treatment, she was not addressing the chemical dependency recommendations and had failed to attend individual therapy, even when she was provided transportation vouchers.

Minardi testified that she was also concerned that Whitney was not attending any AA or NA meetings and admitted to continue using or being around someone using marijuana. Minardi testified that the juvenile court had ordered Whitney to remain clean and she continued to use, which prevented Whitney's supervised supervision from being more liberal. Minardi testified that Whitney was making a little progress in that she had a stable place to live, was bonded with JahPray, and had been attending supervised visitations, and was taking her psychiatric medications, but continued to use marijuana, and she was not participating in chemical dependency therapy.

Katherine Corbitt, also an NFC family permanency specialist, testified that she took over the case in October 2011, and Whitney was being offered dual diagnosis substance abuse treatment, a family support worker, visitation,

transportation, UA testing, and medication management. Corbitt testified that family support workers worked with Whitney on obtaining community resources to pay for items she needed and parenting skills. Corbitt testified that Whitney had received a certificate for a discharge from dual diagnosis treatment, but there was an ongoing concern with Whitney's continued use of marijuana and also that beer cans were observed in Whitney's home and Whitney admitted that she had been drinking alcohol. Whitney also continued to fail to participate in individual therapy, often giving numerous excuses as to why she was not attending therapy sessions. Corbitt testified that in October and November 2012, she had observed an AA card as documentation of Whitney attending meetings, but not at any time before. Corbitt testified that Whitney had made some positive progress in her relationship with JahPray, had maintained housing, and was on the right medication. However, Corbitt explained that JahPray had remained out of Whitney's home in foster care and that visitation had never been liberalized beyond supervised as a result of Whitney's continued substance abuse and how that substance abuse affected her mental health issues. Corbitt testified that Whitney admitted to forgetting to take her medication and has lost the entire medication bottle at times. Corbitt further testified that no further services could be offered to Whitney which would reunify her with JahPray because,

although Whitney had used the services provided, she had not made any changes to address the reasons which brought JahPray into care. Corbitt testified that in her opinion, she believed that JahPray needed permanency and it was in his best interests that Whitney's parental rights be terminated.

On cross-examination, Corbitt testified that Whitney had met her family support services goals. Corbitt agreed that Whitney had maintained housing, and had a steady income from disability benefits. Corbitt also indicated that during her visitations with JahPray, Whitney was able to respond appropriately to his needs, helped him with homework, and fed him without any reports of inappropriate behaviors.

Thereafter, the juvenile court entered an order terminating Whitney's parental rights. The court found that Whitney suffered from mental health issues including schizoaffective disorder, bipolar disorder, and post-traumatic stress disorder. The court found that Whitney had completed some of the services provided, such as obtaining disability benefits for a legal source of income, obtaining housing and transportation, as well as completing parenting skills training. The court also found that Whitney and JahPray were bonded. The court found that the evidence presented indicated that Whitney was not in a position to independently parent JahPray because she was ordered to participate in dual diagnosis mental health/substance abuse

treatment and failed to do so; Whitney continued to regularly use marijuana and admitted that it is difficult to stop and that she cannot stop using marijuana; Whitney had also been drinking alcohol and been warned that it is difficult for her to make better choices due to her mental health issues and marijuana use; Whitney failed to attend therapy; Whitney had not taken her medications consistently; and JahPray had not been returned to Whitney's care nor has visitation ever changed from supervised to a more liberal visitation. The court found that Whitney had failed to avail herself of therapeutic services and that JahPray deserved permanency and the State had provided clear and convincing evidence that termination of Whitney's parental rights was appropriate pursuant to § 43-292(2), (6), and (7), and also was in JahPray's best interests. The court further found that JahPray would turn 7 years old in September 2013, and had a meaningful relationship with Whitney, and had been in the care of Whitney's mother. The court noted that there was,

no doubt that even if the grandmother adopts the child that there will be continued ongoing family time for the mother with her son as often occurs in these sorts of case. (sic) In spite of that the Court finds that this case has been open long enough for both the mother and the minor child and Jahpray (sic) needs permanency.

However, we specifically note that, upon our review of the record and in our analysis below, we do not rely upon this

speculative evidence which appears to have been a part of the court's decision. It is from this order that Whitney has timely appealed to this court.

ASSIGNMENTS OF ERROR

Whitney assigns that the juvenile court erred by terminating her parental rights pursuant to § 43-292(2) and (6), and finding that termination was in the best interests of JahPray.

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 Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (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

Grounds for Termination.

Whitney argues that the juvenile court erred by terminating her parental rights pursuant to § 43-292(2) and (6).

For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in that section have been satisfied and that termination is in the child's best interests. See *In re Interest of Jagger*

L., 270 Neb. 828, 708 N.W.2d 802 (2006). 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.*

In this case, the State alleged and the juvenile court found that termination of Whitney's parental rights to JahPray was warranted pursuant to § 43-292(2), (6), and (7); however, Whitney did not assign error to termination under subsection (7). The evidence adduced at the termination hearing established that JahPray was removed from Whitney's home and care in January 2011. At no time during the pendency of this case, including at the filing of the motion to terminate on July 30, 2012, through the termination hearing held on February 4, 2013, did JahPray return to Whitney's care. Thus, the evidence reflects that JahPray had been in foster care for 18 months prior to the filing of the petition to terminate Whitney's parental rights.

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 Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010). Therefore, having found

that there is clear and convincing evidence to demonstrate that JahPray has been in out-of-home placement for 15 of the most recent 22 months pursuant to § 43-292(7), this court need not review termination of Whitney's parental rights pursuant to § 43-292(2) or (6).

Best Interests and Parental Unfitness.

Whitney argues that the juvenile court erred by finding that there was clear and convincing evidence that termination of her parental rights was in JahPray's best interests.

In addition to proving a statutory ground for termination, the State must show that termination is in the best interests of the child. *In re Kendra M., supra; In re Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit. *In re Kendra M., supra*. There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. *In re Kendra M., supra*. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit. Although the term "unfitness" is not expressly used in § 43-292, the concept is generally encompassed by the fault and neglect subsections of that statute and through a determination of the child's best

interests. *In re Kendra M., supra.* In the context of the constitutionally-protected relationship between a parent and a child, the Nebraska Supreme Court has stated, "'Parental unfitness means 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.'" *In re Kendra M.*, 283 Neb. 1014, 1033-34, 814 N.W.2d 747, 761 (2012) quoting *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992). The best interests analysis and the parental fitness analysis are fact-intensive inquiries and, although they are separate inquiries, each examines essentially the same underlying facts as the other. *In re Kendra M., supra.*

Whitney contends that she has not neglected or refused to give necessary parental care or support to JahPray, had taken the necessary steps to address the issues leading up to this case, and had progressed in her parenting abilities, which "were already more than competent." Brief for appellant at 21.

The record indicated that Whitney had made progress throughout the pendency of the case by completing family service goals of obtaining a legal source of income through disability benefits, obtaining stable housing and transportation, and had made progress in appropriately parenting JahPray during supervised visitations. The problem is that the core issues

which led to JahPray's removal from the home, the mental health issues combined with substance abuse, were never fully addressed by Whitney. While Whitney did have her prescribed medication, she admitted to often times forgetting to take it, losing the entire bottle on at least two occasions, and would sometimes allow the prescription to lapse for several days. Further, Whitney continued to use marijuana and, near the end of 2012, was also observed with beer in her home, which she admitted to drinking. The evidence is clear that providers consistently talked with Whitney about the adverse effects that substance abuse potentially had on her, but Whitney continued to use and admitted that she could not stop. It is unfortunate under these circumstances, because JahPray and Whitney exhibited signs of bonding and appropriate parenting during visitation, but Whitney failed to have any more liberalized visitation and JahPray was never any closer to returning to Whitney's care.

When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d (2008). Children cannot, and should not, be suspended in foster care or be made to await an uncertain parental maturity. *Id.* Whitney has been given time and services to place herself in a position to parent JahPray, but has been either unable or unwilling to do so. Upon our

review of the record, the facts show that Whitney is not a fit parent and that termination of her parental rights is in JahPray's best interests.

CONCLUSION

In conclusion, upon our de novo review of the record, we find that sufficient statutory grounds existed for the juvenile court to terminate Whitney's parental rights to JahPray. Furthermore, we also conclude that Whitney is an unfit parent and that termination of her parental rights is in JahPray's best interests. Therefore, we affirm.

AFFIRMED.