

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF JEREMIAH H.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
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IN RE INTEREST OF JEREMIAH H., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

MELVIN H., APPELLANT.

Filed July 31, 2012. No. A-11-1088.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY,  
Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Margaret M. Sullivan for  
appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Erin Hurley, Senior  
Certified Law Student, for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

PIRTLE, Judge.

**INTRODUCTION**

Melvin H. appeals from an order of the separate juvenile court of Douglas County terminating his parental rights to his son, Jeremiah H. Melvin challenges the overruling of his motion to continue, the overruling of his motion to appoint a guardian ad litem for him, and the court's finding that termination was in Jeremiah's best interests. Based on the reasons that follow, we affirm.

**BACKGROUND**

On October 23, 2009, the State filed a petition alleging that Jeremiah came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and lacked proper parental care by

reason of the faults or habits of Melvin in that Jeremiah did not attend school for 20 days out of a possible 39 schooldays; Melvin failed to actively assist Jeremiah in attending school and had failed to work with school authorities; and due to the above allegations, Jeremiah was at risk for harm. Melvin entered a plea of denial to the allegations.

On February 1, 2010, police officers were called to the home of Andrea H., Jeremiah's biological mother, based on reports that there was no food in the home and that the home was littered with trash, dog vomit, and dog feces. The officers found the home to be as reported and found Andrea to be intoxicated. Jeremiah was placed in protective custody on that date.

On February 2, 2010, the State filed an amended petition alleging that Jeremiah came within the meaning of § 43-247(3)(a) and lacks proper parental care by reason of the faults or habits of Melvin because Melvin engaged in domestic violence against Andrea; Melvin was incarcerated and unable to provide Jeremiah with appropriate care, supervision, and support; and due to the above allegations, Jeremiah was at risk for harm. The State also filed a motion for temporary custody of Jeremiah, which motion the court granted.

On March 25, 2010, the juvenile court held an adjudication hearing on the amended petition, wherein Melvin admitted that he engaged in domestic violence with Andrea and that Jeremiah was at risk for harm. The State dismissed the claim related to Melvin's being incarcerated. The court found that Jeremiah came within the meaning of § 43-247(3)(a) by a preponderance of the evidence based on the plea of admission entered by Melvin and the court's acceptance of the plea.

Following the adjudication, permanency planning hearings were held in June and December 2010 and February 2011. The court ordered Melvin to comply with numerous requirements in order to work toward reunification. The court-ordered requirements included undergoing a psychiatric evaluation, participating in individual therapy, cooperating with family support services as put in place by the caseworker, obtaining and maintaining a legal source of income, obtaining and maintaining safe and adequate housing, participating in family therapy with Jeremiah, taking all medications as prescribed by his attending physician, submitting to random drug and alcohol testing, and having supervised visitation with Jeremiah.

On July 28, 2011, the State filed an amended second motion for termination of parental rights, alleging that Melvin had substantially and continuously or repeatedly neglected and refused to give Jeremiah necessary parental care and protection pursuant to Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2010); that reasonable efforts to preserve and reunify the family failed to correct the conditions that led to the determination that Jeremiah was within the meaning of § 43-247(3)(a), pursuant to § 43-292(6); and that Jeremiah had been in an out-of-home placement for 15 or more months of the most recent 22 months pursuant to § 43-292(7). The amended second motion for termination of parental rights also alleged that termination of Melvin's parental rights was in Jeremiah's best interests.

On November 10, 2011, Melvin filed a motion to continue and a motion to appoint a guardian ad litem asking the court to continue the termination hearing that was set for November 14 to allow time for the appointment of a guardian ad litem for Melvin.

The termination hearing was held on November 14, 2011. Before hearing evidence on the termination, the juvenile court considered Melvin's motion to continue and motion to appoint a guardian ad litem and overruled the motions. The court then arraigned Melvin on the amended

second motion for termination of parental rights and Melvin entered a denial of the allegations. The termination hearing followed immediately after.

Kim Groenjes, a nurse practitioner who develops treatment plans, performs psychiatric assessments, prescribes medications, and treats people with mental disorders and illnesses, testified that she performed a court-ordered psychiatric assessment of Melvin on April 27, 2011. Based on her assessment, Melvin was found to have some paranoia and was diagnosed with psychotic disorder, not otherwise specified. Groenjes testified that she also did a global assessment of functioning on Melvin, which is an assessment of how someone is doing in general in life, and that Melvin's score indicated he had moderate difficulties in his everyday life due to being recently released from jail (he was discharged on February 15, 2011); being unemployed; and lacking a support system. Groenjes testified that after collaborating with a treating physician, she recommended that Melvin take medication for his psychotic disorder to help clarify his thoughts, organize his thinking, and help with hallucinations, if any. Groenjes testified that when she recommended medication, Melvin was resistant and stated he did not want to take any medication.

Lynn Gonzales, an in-home service coordinator responsible for setting up visitation between Melvin and Jeremiah and arranging workers to supervise the visits, testified that she began working with Melvin in January 2011, when Melvin was incarcerated, and that he attended his weekly visits with Jeremiah on a regular basis. Gonzales testified that following his release from jail on February 15, caseworkers had a difficult time getting in contact with him to set up a new visitation schedule. Once a visitation schedule was established, Melvin's attendance was inconsistent. Gonzales testified that Melvin attended 7 out of 10 scheduled visits in March 2011 and 4 out of 15 in April. Melvin failed to attend any visits with Jeremiah in May. In June, Melvin attended 3 out of 12 visits, and in July, he attended 4 of 14 visits.

Additionally, Gonzales testified that Melvin was confrontational with the visitation workers and did not like to be redirected. Melvin told Gonzales that he did not attend some visits because he did not like the worker who was supervising the visits. However, even after a new worker was assigned, Melvin's attendance did not improve.

The State also presented evidence in regard to Melvin's compliance with court-ordered random urinalysis (UA) testing. The evidence showed that between March 22 and 31, 2011, Melvin was contacted four times for a UA test, but only completed two tests. In April, Melvin was contacted 11 times for a UA test, but completed only 3. In May, Melvin completed 7 out of 10 requested UA tests, and in June, he completed 5 out of 9. One test in June was positive for alcohol use. All other UA's that Melvin completed were negative for alcohol and drug use.

In September 2011, a different company took over Melvin's random UA testing and initially had difficulty contacting Melvin because his telephone number was disconnected and he was no longer living at the address that had been given. Melvin was eventually located at his place of employment, and he completed four UA tests between September 25 and October 7. Melvin was unable to be located for UA testing after October 7.

Mary Wisnieski, Jeremiah's caseworker since January 2010, testified that when Melvin was released from jail in February 2011, she referred him to Lutheran Family Services for court-ordered individual therapy. He did not attend therapy and told the agency that he did not need therapy because he did not have any problems.

Also after being released from jail, Melvin was allowed three supervised visits each week, but he told the visitation worker that he did not want three visits a week because he was concerned about not being able to get to the visits and also stated that when he found a job, he would not be able to have visits after work because he would be too tired. Wisnieski testified that his lack of interest in visits concerned her because he should have been wanting to visit Jeremiah as much as possible and work on his relationship with him. Wisnieski also testified that Melvin often ignored Jeremiah's requests at visits and would sometimes wear headphones during the visits. She testified that Melvin's visits continued to be supervised because of his sporadic attendance and the concerns about his actions during visits.

Wisnieski testified that as of the date of trial, Melvin was not participating in individual therapy or family therapy and was occasionally completing random UA tests. Melvin participated in two family therapy sessions in March and April 2011. However, the sessions were supposed to take place on a weekly basis starting in March. Melvin did have appropriate housing and had a legal source of income at the time of trial. However, as a result, Melvin was not participating in court-ordered family support services because he did not think it was necessary since he had housing and a job.

Wisnieski also testified that Melvin was not taking any medication for his mental health issues. She testified that he told her on several occasions that he would not take any medications prescribed by a doctor or psychiatrist. This caused her concern given that the purpose of such medications was to help manage his psychiatric needs and ensure that he was stable and could successfully parent Jeremiah.

Wisnieski testified that Melvin has not made sufficient progress in satisfying the court's orders because he has not taken any psychiatric medications as ordered, has not participated in individual or family therapy successfully, did not successfully complete the family support services, has not completed UA tests on a consistent basis, and has not been visiting Jeremiah consistently. She opined that based on Melvin's lack of progress in satisfying court orders, as well as the fact that Jeremiah has been in foster care continuously since February 2010, it is in Jeremiah's best interests to terminate Melvin's parental rights.

Following the termination hearing, the juvenile court found that Jeremiah came within the meaning of § 43-292(2), (6), and (7) and that termination of Melvin's parental rights was in Jeremiah's best interests.

#### ASSIGNMENTS OF ERROR

Melvin assigns that the juvenile court erred in (1) overruling his motion to continue and motion to appoint a guardian ad litem for him and (2) finding that terminating his parental rights was in Jeremiah's best interests.

#### 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 Leland B.*, 19 Neb. App. 17, 797 N.W.2d 282 (2011). 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. *In re Interest of Leland B.*, *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.*

## ANALYSIS

### *Motion to Appoint Guardian Ad Litem.*

Melvin first argues that the juvenile court erred in overruling his motion to continue and motion to appoint a guardian ad litem for him. At the hearing on the motions, Melvin's counsel argued to the court that a guardian ad litem should be appointed because she questioned whether Melvin fully understood the allegations and consequences of the proceedings taking place and because she recently found out that Groenjes had considered referring Melvin to the local board of mental health after completing his psychiatric evaluation. The State responded that it was not disputing that Melvin had mental health issues, but argued that his mental health had been an issue that was apparent since April 2010 when he had a psychological evaluation that indicated he may have a thought disorder and may be psychotic. The State also noted that Groenjes' psychiatric evaluation of Melvin was offered at the review and permanency hearing in June 2011, showing that Melvin was diagnosed with a psychotic disorder.

Under Neb. Rev. Stat. § 43-292.01 (Reissue 2008), the appointment of a guardian ad litem for a parent in a juvenile proceeding is mandatory only when termination of parental rights is sought under § 43-292(5). In the present case, termination was not sought under § 43-292(5), and thus the trial court was not required to appoint a guardian ad litem for Melvin.

Section 43-292.01 also provides that the court "may, in any other case, appoint a guardian ad litem, as deemed necessary or desirable, for any party." It has further been determined that even in the absence of a statute, a trial court has the inherent power to appoint a guardian ad litem for a party "when reasonably convinced the litigant is not mentally competent to comprehend the significance of legal proceedings, the litigant is unable to intelligently and understandingly participate in the protection of her or his best interests, and such a guardian is needed to protect those interests." *In re Interest of D.A.*, 239 Neb. 264, 266, 475 N.W.2d 511, 513 (1991). Where termination is not sought under § 43-292(5), an appellate court will review for an abuse of discretion a refusal to appoint a guardian ad litem. See *In re Interest of D.A.*, *supra*.

Based on the record before us, the juvenile court did not abuse its discretion in overruling Melvin's motion to continue and motion to appoint a guardian ad litem. As pointed out by the State at the hearing on the motions, Melvin's mental health has been a known issue throughout the case. Further, when the court arraigned Melvin on the amended second motion for termination of parental rights following the court's denial of the motions, the court made sure that Melvin understood the allegations against him. Melvin's first assignment of error is without merit.

*Best Interests.*

In its order terminating Melvin's parental rights, the juvenile court found that termination was warranted pursuant to § 43-292(2), (6), and (7). On appeal, Melvin does not challenge the court's determination that the statutory criteria for termination were satisfied.

Rather, Melvin contests only the juvenile court's finding that termination of his parental rights is in Jeremiah's best interests. Melvin alleges that the juvenile court erred in such a finding because he and Jeremiah have a beneficial, loving relationship and because Melvin has made continued improvements toward reunification despite only being out of jail for 4 months before the State filed a motion to terminate his parental rights.

Jeremiah was adjudicated on March 25, 2010, and since that time, Melvin has been ordered by the court to comply with certain requirements of a plan designed to assist him in achieving reunification with Jeremiah. Melvin has not complied with the majority of these requirements. We acknowledge the evidence shows that Melvin took addiction education classes, parenting classes, and domestic violence classes while in jail and that he also had consistent weekly visits with Jeremiah. However, after Melvin was released from incarceration in February 2011, he made little effort to comply with the court's orders. He has never participated in individual therapy, and at one point, he stated that he did not need therapy because he did not have any problems. Melvin has only attended two sessions of family therapy since March 2011, when it was recommended that the sessions take place on a weekly basis. Melvin has failed to consistently submit to random UA tests. He has failed to complete family support services, and he has consistently stated that he will not take any medication prescribed for his psychotic disorder.

Most notable, however, is Melvin's inconsistent visits with Jeremiah after being released from jail. Melvin did not take advantage of the three visits per week he was allowed and even told a visitation worker that he did not want three visits a week and could not have visits after work because he would be too tired. Wisnieski testified that his lack of interest in visits concerned her because he should have been wanting to visit Jeremiah as much as possible and work on his relationship with him. Melvin claimed that he missed some visits because he did not like the visitation worker, but his attendance did not improve after a new visitation worker was assigned. Wisnieski also testified that Melvin often ignored Jeremiah's requests at visits and would sometimes wear headphones during the visits. There is no evidence in the record that Melvin and Jeremiah have a beneficial, loving relationship as Melvin contends. Rather, the evidence shows Melvin's lack of interest and lack of effort in reuniting with Jeremiah.

Wisnieski opined that based on Melvin's lack of progress in satisfying court orders, as well as the fact that Jeremiah has been in foster care continually since February 2010, it is in Jeremiah's best interests to terminate Melvin's parental rights. We agree.

Based upon our de novo review of the record, we conclude that the evidence presented at the termination hearing demonstrates that it is in Jeremiah's best interests to terminate Melvin's parental rights. The juvenile court did not err in so finding.

#### CONCLUSION

Upon our de novo review of the record, we conclude that the juvenile court did not err in overruling Melvin's motion to continue and motion to appoint a guardian ad litem for him and

did not err in finding that termination of Melvin's parental rights is in the best interests of Jeremiah. Accordingly, the order of the juvenile court terminating Melvin's parental rights to Jeremiah is affirmed.

AFFIRMED.