

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF KEIJUAN W. & KEIJON T.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF KEIJUAN W. AND KEIJON T., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT,

V.

FREEDOM T., APPELLANT AND CROSS-APPELLEE.

Filed February 3, 2009. No. A-08-866.

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

Thomas C. Riley, Douglas County Public Defender, and Jami Lyn Birkel for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Carolyn H. Curry,
Senior Certified Law Student, for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111B(1), this case was ordered submitted without oral argument. Freedom T. appeals from an order terminating her parental rights to Keijuan W. and Keijon T. On appeal, Freedom challenges the juvenile court's finding that her parental rights should be terminated pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 2008) and the court's finding that termination of her parental rights is in the children's best interests. On cross-appeal, the State challenges the juvenile court's finding that there was insufficient evidence to terminate Freedom's parental rights pursuant to § 43-292(2).

Upon our de novo review of the record, we find that the evidence clearly and convincingly demonstrates that Keijuan and Keijon were in an out-of-home placement for at least 15 of the most recent 22 months, pursuant to § 43-292(7). Accordingly, we decline to

address Freedom's assertions that the juvenile court erred in finding termination of her parental rights was warranted pursuant to § 43-292(6) and the State's assertions that the juvenile court erred in finding that there was insufficient evidence to terminate Freedom's parental rights pursuant to § 43-292(2). We further find that termination of Freedom's parental rights was in the best interests of the children. We affirm.

II. BACKGROUND

These proceedings involve Freedom's two children, Keijuan, who was born on April 24, 1998, and Keijon, who was born on October 30, 2000. On October 2, 2006, the State filed a petition alleging that Keijuan and Keijon were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) because Freedom failed to provide the children with safe, stable, and appropriate housing and because of Freedom's use of alcohol and/or controlled substances. The State also filed a motion for temporary custody of the children because on September 27, Freedom left Keijuan and Keijon at an emergency shelter and did not return for them. The court granted the State's motion for temporary custody, and the children were placed in the custody of the Department of Health and Human Services (DHHS) in an out-of-home placement.

On March 12, 2007, an adjudication hearing was held. At the hearing, Freedom admitted to the allegations in the petition. As a result of her admission, the children were adjudicated pursuant to § 43-247(3)(a). The court found it would be in the children's best interests to remain in an out-of-home placement.

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 found it would be in Keijuan's and Keijon's best interests to remain in an out-of-home placement. The court also adopted the case plans of DHHS and ordered Freedom to comply with the various terms and conditions established in the plans. Most notably, the various case plans required Freedom to (1) undergo a chemical dependency evaluation; (2) undergo a psychological evaluation; (3) abstain from the use of alcohol and illegal drugs; (4) submit to random urinalysis testing; (5) participate in individual counseling, to include a domestic violence component; (6) keep all psychiatric appointments and take all medications prescribed by her psychiatrist; (7) obtain and maintain safe and adequate housing for herself and her children; and (8) obtain and maintain a legal source of income. In addition, the court permitted Freedom supervised visitation with the children.

On February 21, 2008, the State filed a motion for termination of Freedom's parental rights as to both Keijuan and Keijon. The State alleged that Keijuan and Keijon were children within the meaning of § 43-292(2), (6), and (7). The State also alleged that it would be in both children's best interests if Freedom's parental rights were terminated.

On July 10, 2008, a hearing was held on the State's motion for termination of parental rights. While we have reviewed the bill of exceptions from the termination hearing in its entirety, we do not detail the evidence offered, other than to note that a majority of the evidence demonstrated that during the almost 2 years the children were in an out-of-home placement, Freedom failed to make significant progress toward reunification. Freedom did not comply with a majority of the court's orders, did not consistently attend scheduled visitation with her children,

and did not appear motivated to regain custody of her children. We will set forth the specific facts as presented at the hearing 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 Keijuan and Keijon were within the meaning of § 43-292(6) and (7). The court found insufficient evidence to demonstrate that the children were also within the meaning of § 43-292(2). The court found that it would be in the children's best interests if Freedom's parental rights were terminated. The court then entered an order terminating Freedom's parental rights as to Keijuan and Keijon. Freedom appeals and the State cross-appeals from this order.

III. ASSIGNMENTS OF ERROR

On appeal, Freedom challenges the juvenile court's finding that her parental rights should be terminated pursuant to § 43-292(6) and the court's finding that termination of her parental rights is in the children's best interests. On cross-appeal, the State challenges the juvenile court's finding that there was insufficient evidence to terminate Freedom's parental rights pursuant to § 43-292(2).

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. *Id.* 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

Because Freedom's first assignment of error and the State's cross-appeal concern the statutory authority to support termination of Freedom's parental rights, we address both parties' assertions together here. Freedom'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, she alleges that the juvenile court erred in sustaining the motion to terminate her parental rights pursuant to § 43-292(6). On cross-appeal, the State asserts that the court erred in finding insufficient evidence to warrant termination of Freedom's parental rights pursuant to § 43-292(2).

Upon our de novo review of the record, we find that the evidence clearly and convincingly establishes that Keijuan and Keijon were 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. 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 that termination of Freedom’s parental rights was warranted pursuant to § 43-292(2), (6), and (7). After the hearing on the State’s motion, the juvenile court found that the State had proved by clear and convincing evidence that Keijuan and Keijon were within the meaning of § 43-292(6) and (7).

The record contains uncontroverted evidence that Keijuan and Keijon were removed from Freedom’s care on October 2, 2006, and that they continuously resided in an out-of-home placement throughout the pendency of the proceedings. As a result, when the State filed its motion for termination of parental rights in February 2008, the children had been in an out-of-home placement for over 15 months. Moreover, at the time of the hearing on the motion to terminate Freedom’s parental rights in July 2008, the children had been in an out-of-home placement for over 20 months. Accordingly, there is no dispute that Keijuan and Keijon were in an out-of-home placement for 15 or more months of the most recent 22 months as § 43-292(7) requires. In fact, in her brief to this court, Freedom acknowledges that “her children have been in an out-of-home placement for fifteen or more months of the most recent twenty-two months” pursuant to § 43-292(7). Brief for appellant at 20.

There is clear and convincing evidence that termination of Freedom’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 demonstrating that termination of Freedom’s parental rights was also appropriate pursuant to § 43-292(2) and (6). The parties’ assignments of error relating to the sufficiency of the statutory authority to support termination are without merit.

3. BEST INTERESTS

Freedom also asserts that the juvenile court erred in finding clear and convincing evidence that termination of her parental rights is in Keijuan’s and Keijon’s best interests. Upon our de novo review of the record, we affirm the decision of the juvenile court.

In the previous section, we found that termination of Freedom’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) or (6). We, therefore, treat our discussion of whether terminating Freedom’s parental rights is in the children’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.*, *supra*. 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. *In re Interest of Aaron D.*, *supra*.

When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Furthermore, the Nebraska Supreme Court has previously recognized that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.*

In this case, the evidence shows that despite almost 2 years of efforts by DHHS and the juvenile court, Freedom has been unable or unwilling to rehabilitate herself. During the 20 months her children were in an out-of-home placement, Freedom failed to adequately comply with the juvenile court's orders, failed to consistently attend visitation with her children, and failed to make progress toward achieving reunification.

Throughout the pendency of the juvenile court proceedings, the court ordered Freedom to (1) complete a chemical dependency evaluation, (2) complete a psychological evaluation, (3) submit to random urinalysis testing, (4) participate in individual counseling, (5) obtain and maintain safe and adequate housing, and (6) obtain and maintain a legal source of income. Freedom failed to comply with each of these court orders.

On March 12, 2007, the juvenile court ordered Freedom to complete a chemical dependency evaluation. At the time of the hearing on the State's motion for termination of parental rights in July 2008, Freedom still had not completed such an evaluation, despite the efforts of DHHS. In June 2006, May 2007, and July 2007, DHHS sent out referrals for Freedom to complete a chemical dependency evaluation. Each of these referrals expired. In April 2008, Freedom informed Pam Curry at DHHS that she wanted to schedule a chemical dependency evaluation as soon as possible. Curry assisted Freedom in obtaining an appointment with a therapist who agreed to meet with Freedom on May 7. Freedom subsequently canceled this appointment and rescheduled the evaluation for May 28. Freedom also canceled this appointment. In fact, there was evidence presented at the hearing which indicated that Freedom canceled five different appointments with the therapist. The therapist testified that the chemical dependency evaluation was never completed because Freedom "cancelled too many times."

The juvenile court also ordered Freedom to complete a psychological evaluation in its order dated March 12, 2007. At the time of the hearing on the State's motion for termination of parental rights in July 2008, Freedom still had not completed such an evaluation. When one of her case managers, Gwen Rutter, asked Freedom why the evaluation had not been completed, Freedom indicated that she had not yet scheduled an appointment for the evaluation. When Rutter informed Freedom of the importance of completing the evaluation, Freedom said that she would look into it.

On May 23, 2007, the juvenile court ordered Freedom to submit to random urinalysis testing as requested by DHHS. Evidence presented at the hearing indicated that Freedom frequently failed to comply with requested urinalysis testing and that when she did comply by going to the clinic for a urinalysis test, she was uncooperative, she did not follow procedures, and she behaved "suspiciously." Between July 12 and September 21, DHHS requested Freedom to submit to 12 urinalysis tests. Freedom complied with only 1 of those 12 requests.

Freedom went to the clinic on July 12, 2007, but she was unable to provide a “sufficient specimen.” When informed that she needed to provide a further sample, Freedom became angry and uncooperative. She left without providing a further sample, stating that she “did not have time to stay.”

On December 21, 2007, DHHS requested a urinalysis test. Freedom showed up to the clinic, but her sample was refused as a result of her “suspicious behavior.” An employee of the clinic reported Freedom secretly brought a urine sample into the clinic so that she would not have to provide a sample at the clinic. When Freedom was told that her sample would not be accepted because of the employee’s concerns, Freedom became “belligerent.” She refused to wait in the lobby until she was ready to provide another sample. Consequently, the clinic informed DHHS that it would no longer provide services for Freedom.

On July 13, 2007, the juvenile court ordered Freedom to participate in individual counseling. The court also ordered that such counseling include a concentration on the issue of domestic violence. Freedom only partially complied with the court’s order. Freedom did attend some therapeutic sessions with Lorraine Clark Benson; however, she often canceled sessions and did not regularly attend once every other week as Benson recommended. Benson testified that she last saw Freedom in April 2008. Since that time, Freedom had scheduled multiple appointments, but had failed to show for each one. Benson indicated that Freedom needed more therapy. Additionally, Benson indicated that she was never informed that Freedom’s therapy was to include a discussion of issues related to domestic violence. Accordingly, such issues were never addressed during their sessions.

On September 25, 2007, the juvenile court ordered Freedom to obtain and maintain safe and adequate housing for herself and her children. Evidence presented at the hearing indicated that Freedom was not able to consistently maintain safe and adequate housing. From December 2007 to April 2008, Freedom resided with her boyfriend. While such housing was considered to be “adequate and safe” for Freedom and her boyfriend, DHHS workers had concerns about the future stability of the residence. The biggest concern with the residence was that Freedom’s name was not on the lease. When Curry raised this concern with Freedom, Freedom responded by asking her boyfriend to create a “more permanent” relationship. Freedom’s boyfriend became upset and asked Freedom to leave the residence. At the time of the hearing, Freedom was living with a friend. She had informed her caseworker that this residence was only temporary until she could find a job and her own residence.

On September 25, 2007, the juvenile court also ordered Freedom to obtain and maintain a legal source of income. Freedom did not comply with this order. Freedom informed her caseworker that she was working for her boyfriend at his construction business. However, she did not provide any pay stubs to verify such employment, nor did she provide any information about the amount of income she received from this employment. Additionally, there was some suggestion that when Freedom and her boyfriend broke up in April 2008, she stopped working for him. There was no indication that Freedom had been employed since that time.

During the pendency of the proceedings, the juvenile court continuously provided Freedom with the right to supervised visitation with her children. However, Freedom did not consistently attend scheduled visitation sessions. The children’s foster parent characterized Freedom’s attendance at visitation as “sporadic.” At the beginning of the proceedings, Freedom

was permitted visitation twice per week. Eventually, Freedom's visitation was reduced to one time per week apparently because of the amount of visits she did not attend. More recently, Freedom had to call and confirm visitation 24 hours prior to a visit.

Freedom was never permitted anything less restrictive than supervised visitation with the children. Curry testified that Freedom's visits remained supervised "[b]ecause [of] the quality of the visitation and the discussion that the mother was having with the children [required redirecting] frequently." The family support worker testified that Freedom was receptive to her direction and suggestions, but she would have to redirect Freedom on the same issue multiple times.

Taken as a whole, the evidence presented at the termination hearing reveals that despite the length of time that had passed since the children were removed from her home, Freedom did not make sufficient progress toward reunification. Freedom was not any closer to achieving reunification at the time of the termination hearing than she was at the initial stages of the case. At the time of the hearing, Freedom had still not completed a chemical dependency evaluation or a psychological evaluation. She had stopped attending counseling. She was living with a friend "temporarily" and did not have a job. Perhaps most significantly, she was not consistently attending visitation with her children.

Freedom's behaviors had a negative impact on Keijuan and Keijon. The children's foster parent testified that the children were "sad each and every single time" Freedom did not show up at a scheduled visitation. The children acted out destructively to express their anger and hurt. The foster parent also testified that the children's behavior improves dramatically whenever there is a long period of time without visitation with Freedom.

Both Curry and Rutter testified that it would be in the children's best interests to terminate Freedom's parental rights. We agree. Keijuan and Keijon need a stable, permanent home. Freedom is simply incapable of providing that at this time, and there is no indication that she will be capable of providing such stability any time in the near future. Accordingly, we find the evidence clearly and convincingly establishes that termination of Freedom's parental rights is in the children's best interests. We affirm the order of the juvenile court.

V. CONCLUSION

Upon our de novo review of the record, we find sufficient evidence to support the juvenile court's order terminating Freedom's parental rights. The juvenile court order is affirmed.

AFFIRMED.