

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF KENNEDY B. & MACKENZIE B.

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IN RE INTEREST OF KENNEDY B. AND MACKENZIE B.,
CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

v.

LAURA S., APPELLANT.

Filed September 28, 2010. No. A-10-274.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH,
Judge. Reversed and remanded for further proceedings.

James Blinn, of Blinn, Rees & Loveland, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, and Jennifer C. Clark for appellee.

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

CASSEL, Judge.

INTRODUCTION

Laura S. appeals from an order of the separate juvenile court of Douglas County terminating her parental rights to Kennedy B. and MacKenzie B. Upon our de novo review, we find that Laura has complied with virtually every requirement specified by the juvenile court and that termination is not in the children's best interests. We therefore reverse, and remand for further proceedings.

BACKGROUND

Laura and Kenneth L. are the biological parents of Kennedy, born in July 2006, and MacKenzie, born in December 2003. However, because the proceedings relating to Kenneth are not part of this appeal, we describe his circumstances only as they relate to Laura's situation.

On April 22, 2007, the Nebraska Department of Health and Human Services (DHHS) received a report that MacKenzie was very dirty and unkempt, did not appear to be bathed, had a strong odor, and wore dirty clothes. A well-child check was requested with the police department that same day. Officers reported to DHHS that the home was filthy and had “junk” everywhere, the home had a strong odor, the sinks in the home were clogged and had “junk” floating in them, there was what appeared to be feces of unknown origin on the floor of the home, there was no electricity in the home, and there was drug paraphernalia and pornographic material in the home and accessible to the children. On April 23, DHHS went to the home and found the same conditions as previously described by officers. The children were not removed from the home on either date because Kenneth said the family was in the process of moving in with the children’s grandparents, a claim later denied by the grandparents.

The State filed a petition with the juvenile court on April 24, 2007, alleging that Kennedy and MacKenzie were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006) by reason of the faults or habits of Laura and Kenneth. The State alleged as follows: (1) the family residence was observed to be in a filthy and unwholesome manner to include a foul odor, filth everywhere, feces on the floor, and no electricity; (2) the children have been observed to be unkempt, a strong odor about them, and not bathed; (3) pornographic material was within reach of the minor children; (4) the parents have been provided services by DHHS but have not utilized them; (5) the parents’ use of alcohol and/or controlled substances places the minor children at risk for harm; and (6) due to the above allegations, the minor children are at risk for harm. A motion for temporary custody was filed and granted that same day. The children have been in the custody of DHHS continuously since that time.

On August 6, 2007, the juvenile court adjudicated Kennedy and MacKenzie to be within the meaning of § 43-247(3)(a) based on the parents’ admissions that their use of alcohol and/or controlled substances placed the minor children at risk for harm. The juvenile court dismissed the remaining allegations. The court ordered that (1) the children were to remain in the custody of DHHS, (2) Laura and Kenneth were to complete chemical dependency evaluations, and (3) visits were to occur twice a week for no more than 2 hours.

On October 1, 2007, the trial court continued the disposition and permanency planning hearing to December 20, because the caseworker did not appear for the scheduled hearing and no case plan or court report had been provided. On December 21, the juvenile court continued the matter to January 4, 2008, because reports were not received by the parties in sufficient time to adequately address the disposition. On January 4, the State filed a motion to continue, stating that the case manager would like to attend a funeral and that the parents did not object to a continuance. The juvenile court granted the continuance and continued the matter until January 23.

Following a disposition and permanency hearing (which proceedings are not in our record), the juvenile court entered an order on February 11, 2008, imposing certain requirements on Laura necessary to correct the conditions leading to the adjudication and to achieve reunification with her children. The court found that the permanency objective was reunification, that reasonable efforts had been made to return the children to the parental home, that it would be contrary to the health and safety of the minor children to be returned home at that time, and that the children should remain in the temporary custody of DHHS. The juvenile court ordered that

Laura undergo weekly and random urinalysis (UA) testing; maintain adequate housing and a legal source of income; make herself available for unannounced and announced visits from the case manager, guardian ad litem, UA screener, and other professionals involved; have supervised visitation as arranged by DHHS; participate in weekly family support services; participate in outpatient treatment as arranged by DHHS; attend weekly Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meetings; and participate in individual therapy. Similar orders were filed on June 11, October 2, and November 7, 2008, as well as on March 27, 2009. The October 2, 2008, order stated that Laura had completed a drug class but ordered her to participate in drug treatment.

On May 22, 2009, the State filed a motion for termination of Laura's parental rights to Kennedy and MacKenzie, pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 2008). The State alleged that Laura had substantially and continuously or repeatedly neglected and refused to give Kennedy and MacKenzie the necessary parental care and protection (§ 43-292(2)); following a determination that the children were juveniles as described in § 43-247(3)(a), reasonable efforts to preserve and reunify the family had failed to correct the conditions leading to the determination (§ 43-292(6)); Kennedy and MacKenzie had been in an out-of-home placement for 15 or more of the most recent 22 months (§ 43-292(7)); and termination was in the children's best interests. The State also filed a motion to terminate Kenneth's rights, alleging the same statutory grounds.

The termination hearing was held on September 16 and November 30, 2009, and on January 13, 2010. Testimony was given regarding the condition of Laura's home. Andrea Kahn was a child and family services specialist for DHHS. She took over the family's case in July 2008. Kahn had an ongoing concern regarding the parents' housing. Kahn testified that on her first visit to the house, there was a strong odor from the animals and at times there were animal feces on the floor. Kahn testified that she met with the parents monthly in the home and that the cleanliness of the home fluctuated quite a bit. Kahn testified that oftentimes there were piles of pet hair in the kitchen, the living room would have a very strong smell of animal feces and urine, there would be dried food on the floor, and the toys were not clean. Kahn testified that both she and Kim Milner, a visitation specialist, discussed the housing conditions with the parents and that Laura agreed to clean the house. Kahn testified that she had to direct the parents to do upkeep on the home at least four times since July 2008--most recently in March 2009. Kahn testified that visits had to take place out of home at least twice--once in early 2009, because of cleanliness. On cross-examination, Kahn admitted that the condition of the home had improved. Kahn also testified that the foster parents have reported that the children return from visits with a strong animal smell and that Kennedy often comes home with a full diaper--although we note that there is a 35- to 40-minute drive between visitations and the foster parents' home.

Milner was the family's visitation specialist from October 16, 2007, through January 26, 2009. She testified that visits occurred two times per week for 2 hours per visit. Milner also provided family support which included more hands-on involvement such as teaching, role modeling, redirecting, and prompting. Milner testified that she "sometimes" had concerns regarding the cleanliness of the house. The household pets included a dog, a puppy, a cat, a ferret, and a guinea pig. At times, Milner observed dog hair, pennies, beer bottle caps, cigarette butts, and bottles of beer on the floor. On cross-examination, Milner clarified that the dog hair

was consistent throughout the visits, but that she observed beer bottles on only one occasion and cigarette butts on two occasions. The parents' response was that they would pick it up. According to Milner, Laura also stated that she does not like to clean. Milner testified that the house was never so unsafe that the children could not have a visit.

Ann Holstrom, a provisionally licensed family therapist at Behave'n Community Services (Behave'n), testified that she began family therapy with this family in July 2008 after receiving a referral for MacKenzie. Holstrom met with the parents during their supervised visits, twice a week until December 2008 and then once a week. Holstrom testified that there had been a decline in the cleanliness of the family home--maybe a little more pet hair and some trash on the floor--but not so much that she felt it was a danger to the children.

Laura testified that she recently had bought a trailer and was in the process of fixing it up; she admitted it was not yet in good condition for the children to be there. She testified that she only had one dog and that the other family pets had been given away.

Testimony was also given regarding Laura's compliance with court orders, specifically the orders that she complete outpatient drug treatment and attend weekly AA/NA meetings. Kahn testified that when she got the case, visitation was already in place, UA testing was ongoing, and family support was already being utilized. Kahn testified that both parents had already had chemical dependency evaluations, but that neither was in treatment. Kahn sent referrals for outpatient treatment to Heartland Family Services (Heartland). Kahn testified that Laura completed chemical dependency counseling with Cynthia McCullough in 2009. Kahn also testified that the parents were not attending AA/NA meetings every week as ordered. Although Laura said she would become consistent, she attended AA/NA meetings only two to four times each month, rather than every week as ordered. On cross-examination, Kahn was questioned regarding Laura's compliance with court orders. Kahn stated that Laura was lacking in only two areas: (1) she had not done outpatient treatment and (2) she had not attended AA/NA meetings every week. However, Kahn testified that she is not concerned about Laura's drug use as it is not a factor that interferes with her parenting. In fact, the parties stipulated that Laura regularly undergoes UA testing and her only positive result was in August 2007.

Laura testified that she was ordered to complete outpatient treatment but DHHS only set up a drug class, which she completed. When the court still ordered her to complete treatment, she went to McCullough. After completing two sessions, she found out that DHHS would not pay for McCullough's services. Laura testified that she went to Heartland where DHHS would pay, but Heartland wanted her to obtain a new evaluation because hers had expired. Laura testified that she called "a few times" to set up the evaluation, but went back to McCullough and paid for treatment herself. Laura testified that she completed the program.

McCullough, the owner and chief executive officer of McCullough Counseling and Recovery, explained the status of Laura's drug and alcohol treatment. McCullough is a licensed mental health therapist and has a "LAADC" which allows her to be a substance abuse counselor. McCullough testified that Laura successfully completed a substance abuse program with her; Laura did a Level 1, basic outpatient treatment program for chemical dependency. When Laura finished treatment, McCullough did not think that Laura was "using" anymore and did not believe that she had done so in quite some time. McCullough testified that Laura had a good

prognosis for the future and that drugs and alcohol would not interfere with Laura's parenting ability.

In addition to concerns specifically regarding Laura's drug use and the condition of the home, testimony was also given regarding her improved ability to parent and interact with the children. MacKenzie had previously been diagnosed with adjustment and behavior disorders. MacKenzie had behaviors of noncompliance and aggression at daycare, with his foster parents, and with his parents on visitations. Milner testified that MacKenzie attended the Behave'n program, which was for children whose behavioral problems could not easily be corrected by normal parenting skills. Milner testified that Laura applied the skills she learned at Behave'n and was successful in helping MacKenzie's behavior problems. Although the parents disagreed about the parenting skills to be applied, Laura continued to gain and enhance her parenting skills. Milner testified that Laura was attentive to the children throughout the visits.

Holstrom testified that in March 2009, she learned the State was going to file for termination of parental rights. Holstrom testified that based on how visitation was going, she was surprised at the decision because MacKenzie's behavior had improved and the parents were following Holstrom's recommendations. Holstrom testified that she had even talked with the family's case manager about increasing visitation and moving forward toward reunification. Holstrom testified that Laura was acting in the best interests of the children, and Holstrom had no concerns for the children's safety when they were with Laura. Holstrom testified that she did not believe Laura's parental rights should be terminated because termination would not be in the children's best interests.

Kahn testified that she has observed the parent-child interaction three to four times and that Laura's interactions with the children were "loving and caring." Kahn testified that the children have been out of home the entire time she has had the case and that the level of supervision has not changed. Kahn testified that Laura informed her in September 2009 that she is divorcing Kenneth. Kahn testified that Laura's parental rights should be terminated because she has continued to allow Kenneth to have contact with the children and be in the home and because she cannot provide consistency.

Kahn testified that she has no concerns with Laura's parenting as long as Kenneth is not present. Kahn opined that Laura shows better parenting abilities than Kenneth, and at one point, Kahn told Laura that if she had left Kenneth, the children would have been returned to her. Kahn testified that since the separation, Kenneth has attended one of Laura's visits at her residence--although she admitted that permission was given by the visitation worker prior to the visit because Kenneth did not have a place to do his own visit.

Paula Malatek, a visitation specialist who had been working with the family since March 24, 2009, testified that the parents were consistent with visitation and that visits were appropriate. Malatek testified that the parents started having separate visitations beginning in October.

Malatek testified regarding observations which led her to believe that Kenneth and Laura had been together on two occasions after their separation. First, on December 4, 2009, Malatek saw Kenneth and Laura together in a vehicle, although Malatek also testified that the parents share a vehicle. Second, on December 31, Malatek had to cancel a visit because of car trouble. She called Laura's parents' house, where Laura was then staying, to inform her. According to

Malatek, Laura was not home but her mother gave Malatek the telephone number where Laura could be reached, and Malatek noticed it was Kenneth's telephone number. Malatek testified that she never discussed either of these occasions with the parents.

Laura testified that she separated from Kenneth in September 2009 because she realized that he was holding her back from being with the children. She testified that she had filled out the divorce forms but was still saving up the money to file for divorce. Laura testified regarding the two occasions on which she was with Kenneth after their separation. Laura admitted that she was in a car with Kenneth on December 4, 2009. She testified that he took her to work because they shared the car. Laura testified that on December 31, she had contact with Kenneth to see where he was staying and to discuss the case. Laura testified that she updated him on the hearing that he missed. Laura testified that she had last spoken with Kenneth 2 weeks prior to the hearing on January 13, 2010, when she called to see how his visit with the children went. Laura testified that given the choice between Kenneth and the children, she would choose the children "every time."

In an order filed on February 18, 2010, the juvenile court found that grounds for termination of Laura's and Kenneth's parental rights to Kennedy and MacKenzie existed under § 43-292(2), (6) and (7). The juvenile court terminated Laura's and Kenneth's parental rights to the children after finding that grounds for termination existed and that termination was in the children's best interests. Only Laura appeals the juvenile court's order.

ASSIGNMENTS OF ERROR

Laura alleges that the juvenile court erred (1) in finding that terminating her parental rights was in the best interests of her children, (2) in finding that reasonable efforts have failed to correct the conditions leading to adjudication, (3) in finding that she continuously neglected and refused to provide necessary parental care and protection, and (4) because it is fundamentally unfair to terminate her parental rights under § 43-292(7).

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.* An order terminating parental rights must be based on clear and convincing evidence. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

ANALYSIS

Laura argues that the juvenile court erred in finding that terminating her parental rights was in the best interests of the children. We agree.

Although termination of parental rights is determined by a child's best interests, case law dictates that such rights should be terminated only as a last resort. Section 43-292 requires that parental rights can only be terminated when the court finds that termination is in the child's best interests. A termination of parental rights is a final and complete severance of the child from the

parent and removes the entire bundle of parental rights. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Therefore, with such severe and final consequences, parental rights should be terminated only “[i]n the absence of any reasonable alternative and as the last resort.” See *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 467, 598 N.W.2d 729, 741 (1999).

The record establishes that Laura has improved significantly as a parent and does not establish the lack of any reasonable alternative. “[T]he law does not require perfection of a parent. Instead, we should look for the parent’s continued improvement in parenting skills and a beneficial relationship between parent and child.” *In re Interest of Crystal C.*, 12 Neb. App. at 465, 676 N.W.2d at 384.

The evidence before us shows that at the time of the children’s removal from the home in April 2007, the home was filthy, there was an “awful” odor that the officers could not identify, there was “junk” everywhere, there was what appeared to be feces of unknown origin on the floor, and there was no electricity. There was an ongoing concern regarding the cleanliness of the family home.

Kahn testified that she has had to direct the parents to do upkeep on the home at least four times since July 2008, most recently in March 2009. Kahn testified that visits had to take place out of home at least twice--including once in early 2009--because of cleanliness. However, on cross-examination, Kahn admitted that the condition of the home has improved. By the time the termination hearing started in September, 6 months had passed since the last report of a “dirty house.” And by the time the termination hearing concluded in January 2010, 10 months had passed since the last such report.

Most of the reports on the home stated that there were large amounts of pet hair in the home, feces and urine on the floor, and a strong odor. Thus, the family pets were major contributors to the cleanliness problem. Laura testified that at the time of the termination hearing, she had only one dog and the rest of the pets had been given away. Laura has made substantial efforts to improve the condition of the home and cleanliness has not been an issue since March 2009.

Although Kahn testified that Laura is not in compliance with court orders because she has not completed outpatient drug treatment and she has not attended AA/NA meetings each and every week, the evidence before us is that Laura successfully completed outpatient drug treatment with McCullough and Laura no longer uses drugs. In fact, the parties stipulated that Laura regularly undergoes UA testing and that her only positive result was in August 2007. Although Laura has missed attending AA/NA meetings some weeks, the evidence shows a significant record of attendance, and she explained that she missed some weekly meetings because she had “work issues” and “visitation issues.” In light of her successful outpatient drug treatment and her record of abstaining from use of controlled substances, her failure to demonstrate perfect attendance is not a sufficient reason to terminate her parental rights.

Finally, in its brief, the State attributes great weight to Laura’s continued contact with Kenneth, who the State feels is not an appropriate caregiver for the children. The State argues that Laura’s continued contact and communications with Kenneth show that for purposes of reunification, she is not taking their separation seriously. As detailed above, Laura admitted having minimal contact with Kenneth after their separation. The fact of the matter is that Laura

and Kenneth are and will always be the biological parents of these children. Reasonable explanations were given for the continued contact between the parents, and the circumstances of those contacts show nothing out of the ordinary for two people who have children together. We are not persuaded by the State's argument that Laura is not taking the separation seriously.

Laura has cleaned up her home and no longer uses drugs. Although she has maintained some contact with Kenneth, the circumstances show that the contact was limited and reasonable. Additionally, the evidence shows that Laura was attentive during visits, applied the skills she learned at Behave'n and was successful in helping MacKenzie's behavior problems, and continued to gain and enhance her parenting skills. Holstrom testified that Laura was acting in the best interests of the children, and Holstrom had no concerns for the children's safety when they were with Laura. Even Kahn testified that she had no concerns with Laura's parenting as long as Kenneth was not present.

After our de novo review of the record, we find that Laura has substantially complied with everything that she was asked and ordered to do. We also find that the State failed to prove by clear and convincing evidence that terminating Laura's parental rights serves the children's best interests.

CONCLUSION

For the reasons stated above, we reverse the order of the juvenile court terminating Laura's parental rights to Kennedy and MacKenzie and remand the matter for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.