

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF MAURICE B. II

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

STATE OF NEBRASKA, APPELLEE,

V.

MAURICE B., APPELLANT.

Filed August 23, 2011. No. A-10-1115.

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

Julie A. Frank, of Frank & Gryva, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, Jordan Boler, and
Austin Vandever, Senior Certified Law Student, for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Maurice B. appeals from the order of the separate juvenile court of Douglas County which terminated his parental rights to his son, Maurice B. II (Maurice Jr.). On appeal, Maurice challenges the juvenile court's finding that his parental rights should be terminated pursuant to Neb. Rev. Stat. § 43-292(2) and (6) (Cum. Supp. 2010) and the court's finding that termination of his parental rights is in Maurice Jr.'s best interests. Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Maurice's parental rights. As such, we affirm the order of the juvenile court terminating Maurice's parental rights to Maurice Jr.

II. BACKGROUND

This appeal centers on Maurice's ability to parent his son, Maurice Jr., born in July 2009. However, these juvenile court proceedings were initiated prior to Maurice Jr.'s birth. We recount the initial stages of the proceedings to provide context for the family's circumstances at the time of Maurice Jr.'s birth in the summer of 2009.

In July 2008, police were dispatched to the home Maurice shared with his wife, due to reports that Maurice had assaulted her in the presence of their children. When police arrived, they learned that Maurice had locked himself inside the house with his two biological daughters, Mauriah B.-M., born in August 2005, and Maurina B.-M., born in January 2008. Police entered the house, retrieved the children, and arrested Maurice. While inside the house, police observed methamphetamines, a digital scale, and other drug paraphernalia.

On July 31, 2008, the State filed a petition alleging that Maurice's children, Mauriah and Maurina, and his two stepchildren were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to Maurice's and his wife's engaging in a domestic disturbance in the family home when at least one of the children was present and due to drugs and drug paraphernalia being located in the family home when at least one of the children was present. At the time the State filed the petition, Maurice remained in jail on the charges stemming from the domestic disturbance between him and his wife. All four of the children were placed in the custody of the Department of Health and Human Services (the Department).

Ultimately, in October 2008, Maurice pled no contest to the allegations in the petition and the children were adjudicated to be within the meaning of § 43-247(3)(a). The juvenile court ordered that the children remain in an out-of-home placement. In the months after October 2008, the court also ordered that Maurice participate in supervised visitation with the children, participate in individual counseling, complete a men's domestic violence program, submit to random urinalysis testing and abstain from the use of illegal drugs, complete extensive outpatient treatment for substance abuse, obtain and maintain employment, obtain and maintain appropriate housing, and complete a parenting class.

The record reveals that Maurice did not readily comply with the court's orders, in part, because he was incarcerated on multiple occasions from July 2008 through January 2009. Then, in March 2009, he began serving a much lengthier sentence of incarceration.

In July 2009, Maurice Jr. was born. At the time of Maurice Jr.'s birth, Maurice was incarcerated. In September 2009, the State filed a supplemental petition alleging that Maurice Jr. was a child within the meaning of § 43-247(3)(a) because Maurice was incarcerated and unable to provide the necessary and proper care and support for Maurice Jr. Maurice admitted to the allegations in the petition, and Maurice Jr. was adjudicated as a child within the meaning of § 43-247(3)(a).

In March 2010, the State filed a motion to terminate Maurice's parental rights to Mauriah, Maurina, and Maurice Jr. The State alleged that termination of Maurice's parental rights to all three of his children was warranted pursuant to § 43-292(2) because Maurice had substantially and continuously or repeatedly neglected and refused to give the minor children the necessary parental care and protection, and § 43-292(6) because reasonable efforts to preserve and reunify the family failed to correct the conditions that led to the determination that the

children were within the meaning of § 43-247(3)(a). The State also alleged that termination of Maurice's parental rights to Mauriah and Maurina was warranted pursuant to § 43-292(7), because the girls had been in an out-of-home placement for 15 or more months of the most recent 22 months. In addition, the State alleged that termination of Maurice's parental rights was in the best interests of the children. At the time the State filed its motion to terminate his parental rights, Maurice remained incarcerated.

Prior to the hearing on the State's motion to terminate his parental rights, Maurice admitted to the allegations in the motion which asserted that Mauriah and Maurina had been in an out-of-home placement for 15 or more months of the most recent 22 months and that termination of his parental rights was in Mauriah's and Maurina's best interests. As a result of Maurice's admissions, the juvenile court terminated Maurice's parental rights to Mauriah and Maurina. The court indicated that it considered Maurice's admissions to constitute a voluntary termination of his parental rights to the girls.

The hearing on the State's motion to terminate Maurice's parental rights proceeded, but the evidence focused only on Maurice's parental rights to Maurice Jr. While we have reviewed the evidence presented at the hearing in its entirety, we do not set forth the specifics of the testimony and exhibits here. Rather, we will set forth specific facts as presented at the hearing as necessary in our analysis below. We do note that at the time the termination hearing concluded in October 2010, Maurice remained incarcerated.

At the conclusion of the termination hearing, the juvenile court found that the State proved by clear and convincing evidence that grounds for termination of Maurice's parental rights existed under § 43-292(2) and (6) and that it would be in Maurice Jr.'s best interests to terminate Maurice's parental rights. The court then entered an order terminating Maurice's parental rights to Maurice Jr.

Maurice appeals here.

III. ASSIGNMENTS OF ERROR

On appeal, Maurice challenges the juvenile court's finding that his parental rights should be terminated pursuant to § 43-292(2) and (6) and that termination of his parental rights is in Maurice Jr.'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 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. See *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

Maurice assigns as error the juvenile court's finding that the State presented clear and convincing evidence to prove the statutory grounds for termination of his parental rights. Specifically, he challenges the juvenile court's determination that termination of his parental rights was warranted pursuant to § 43-292(2) and (6). Upon our de novo review of the record, we find that the State presented clear and convincing evidence to prove that termination of Maurice's parental rights was warranted pursuant to § 43-292(2). As such, we need not specifically address the juvenile court's determination as to § 43-292(6).

Section 43-292(2) provides that a court may terminate parental rights when, "The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection." The Nebraska Supreme Court has recognized that in termination of parental rights cases, it is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). A parent's incarceration may be considered along with other factors in determining whether parental rights can be terminated based on neglect. *Id.*

Maurice has never provided Maurice Jr. with necessary parental care and protection because Maurice has been incarcerated since prior to Maurice Jr.'s birth in July 2009. As a result of Maurice's incarceration, he simply has been unable to provide Maurice Jr. with such basic necessities as housing and food. In addition, Maurice has not been able to tend to Maurice Jr.'s daily needs or to provide any emotional support. At the conclusion of the termination hearing, Maurice Jr. was almost 1½ years old. He had been out of his father's home for his entire life.

Maurice also failed to provide Maurice Jr.'s siblings, Mauriah and Maurina, with necessary parental care and protection. The evidence presented at the termination hearing revealed that Maurice's current incarceration is not an isolated occurrence, but, rather, is part of a lengthy history of incarcerations which are directly tied to a lengthy history of drug use. Maurice's history affected his ability to parent Mauriah and Maurina and eventually resulted in Maurice's voluntarily relinquishing his parental rights to the girls. The Nebraska Supreme Court has previously recognized that one's history as a parent speaks to one's future as a parent. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010). A court need not ignore past parenting outcomes. *Id.*

The juvenile court proceedings involving Mauriah and Maurina were initiated in July 2008. At the termination hearing, Maurice admitted that prior to July 2008, he had been incarcerated on multiple occasions, and that most of the incarcerations were related to his drug use. In fact, in July 2008, Maurice had just been released from a period of incarceration and was out of jail on bond for pending charges of theft by deception and forgery.

In July 2008, Maurice was arrested as a result of a domestic disturbance between Maurice and his wife, which led to police finding drugs and drug paraphernalia in the family home. Maurice remained in jail through August 2008. Maurice returned to jail in October 2008 as a result of a previous conviction for possession of an illegal substance. He returned to jail again in January 2009 after failing to appear for a hearing related to his theft charges. He bonded out of

jail in late January 2009, but returned to jail again in March 2009 to begin serving a lengthy sentence for the theft convictions.

When Maurice was not incarcerated, he was unable to care for Mauriah and Maurina due to his drug use. Maurice testified that he used drugs every day and had a “severe” addiction. He testified that he used methamphetamines, marijuana, and OxyContin. Maurice also testified that his drug use interfered with his ability to comply with the juvenile court’s orders, including attending visitation with Mauriah and Maurina. Prior to his incarceration in March 2009, Maurice did not have safe and stable housing. He was not employed. He was not participating in any therapy or chemical dependency treatment. In addition, there was evidence presented that Maurice admitted to caseworkers for the Department that prior to his incarceration in March 2009, he was using drugs and making bad choices.

Upon our de novo review of the record, we conclude that the State presented sufficient evidence to demonstrate that Maurice had substantially and continuously or repeatedly neglected and refused to give Maurice Jr. and his siblings necessary parental care and protection pursuant to § 43-292(2). We find that the juvenile court did not err in finding that termination of Maurice’s parental rights was warranted pursuant to § 43-292(2). Because we find that termination of Maurice’s parental rights was warranted pursuant to § 43-292(2), we decline to address whether termination of his rights was also warranted pursuant to § 43-292(6).

3. BEST INTERESTS OF CHILD

Maurice also assigns as error the juvenile court’s finding that termination of his parental rights is in Maurice Jr.’s best interests. Specifically, he alleges that the evidence presented at the termination hearing revealed that he had demonstrated consistent and continued improvement in his parenting skills and that he had a beneficial relationship with Maurice Jr. Upon our de novo review of the record, we find sufficient evidence to conclude that termination of Maurice’s parental rights was in Maurice Jr.’s best interests. We affirm.

At the termination hearing, Maurice essentially admitted to the allegations which gave rise to the State’s assertions that he had neglected his children, including his drug use and repeated periods of incarceration. However, Maurice testified that he had changed and was ready to be a parent to Maurice Jr. He indicated that he had completed a drug treatment program and a parenting class while incarcerated and that he had abstained from using any illegal drugs while in prison, even though such substances were available to him. Maurice also testified that he was scheduled to be released on parole in the latter part of October 2010, just weeks after the conclusion of the termination hearing. Maurice indicated that upon his release, he will live in a halfway house while continuing his treatment, and that he would like Maurice Jr. to live at the halfway house with him.

We first note that we applaud Maurice’s efforts to enroll in and complete a drug treatment program and a parenting class. However, when we consider Maurice’s efforts during his latest incarceration alongside his efforts during the duration of these juvenile court proceedings, we conclude that Maurice has not made significant progress toward reunification with Maurice Jr.

Maurice’s efforts to complete the drug treatment program while incarcerated are only the first steps in becoming a sober and stable parent. Maurice indicated that his treatment would

continue on an outpatient basis once he was released from prison. Additionally, we note that Maurice has a history of resuming his drug use after a period of incarceration. Remaining drug free outside of prison is arguably very different than remaining drug free while incarcerated. Due to Maurice's history of drug use outside of prison, he would have to demonstrate his ability to sustain his sobriety for a period of time prior to achieving any kind of reunification with Maurice Jr.

Moreover, Maurice will not be employed upon his release from prison. He will not have safe and stable housing. Although he indicated that Maurice Jr. could come and live with him at a halfway house, such an environment would not be in Maurice Jr.'s best interests. It is not clear how long Maurice would remain in the halfway house or where he would go after leaving that residence.

Maurice Jr. does not have a strong bond with Maurice. He did not have any visitation with his father until April 2010, when he was almost 1 year old. Since that time, Maurice and Maurice Jr. have only interacted during brief visits at the prison. Maurice Jr. has never resided with his father or spent any substantial time alone with him.

Taken as a whole, the evidence presented at the termination hearing revealed that despite Maurice's desire to be reunited with Maurice Jr., he is simply not ready to be an effective parent. When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable period of time, the child's best interests require termination of parental rights. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.*

Maurice Jr. has been out of his father's home for his entire life. He deserves a permanent and stable home environment, which Maurice is not able to provide. We conclude that termination of Maurice's parental rights is in Maurice Jr.'s best interests. We affirm the order of the juvenile court terminating Maurice's parental rights to Maurice Jr.

V. CONCLUSION

Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Maurice's parental rights. As such, we affirm the order of the juvenile court terminating his parental rights to Maurice Jr.

AFFIRMED.