

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF SHYAN W.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

IN RE INTEREST OF SHYAN W., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

ROGER W., APPELLANT.

Filed November 1, 2011. No. A-11-398.

Appeal from the County Court for York County: CURTIS H. EVANS, Judge. Affirmed.

David L. Kimble, of Kimble Law Office, for appellant.

Jaime L. Hopp, York County Special Prosecutor, for appellee.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Roger W. appeals from the order of the county court for York County, sitting as a juvenile court, which terminated his parental rights to his daughter, Shyan W. On appeal, Roger challenges the juvenile court's finding that his parental rights should be terminated pursuant to Neb. Rev. Stat. § 43-292(6) and (7) (Cum. Supp. 2010) and the court's finding that termination of his parental rights was in the child's best interests. Upon our de novo review of the record, we find that the State established by clear and convincing evidence a statutory ground for termination of parental rights and that termination was in the child's best interests. Accordingly, we affirm the order of the juvenile court.

BACKGROUND

Roger and Annie W. are the biological parents of Shyan, born in September 2008. They each have other children older than Shyan, including a son of Roger and a daughter of Annie, but this appeal concerns only Roger's parental rights to Shyan.

On May 12, 2009, the State filed an amended petition to adjudicate Shyan as being within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to her parents' "[o]ngoing difficulties and disagreements." On that same day, Roger admitted the allegations of the amended petition and the court adjudicated Shyan. The court found that it would be in Shyan's best interests to be placed in the care, custody, and control of the Nebraska Department of Health and Human Services (DHHS). On May 21, the court held a placement hearing and determined that Roger's and Annie's issues had not been resolved and that Shyan may not be returned home. At that time, Shyan was placed with her maternal grandparents.

On September 8, 2010, the State moved to terminate Roger's parental rights to Shyan. It alleged that termination of Roger's rights was in Shyan's best interests because (1) Roger had substantially and continuously or repeatedly neglected and refused to give Shyan necessary parental care and protection, (2) Shyan had previously been adjudicated and reasonable efforts to preserve and reunify the family had failed to correct the conditions leading to the determination, and (3) Shyan had been in an out-of-home placement for 15 or more months of the most recent 22 months.

The court conducted a hearing on the termination motion beginning on March 21, 2011. The State adduced evidence that Shyan was removed from her parents' home on March 9, 2009, due in part to domestic violence between Roger and Annie. Shyan has not returned to live with her parents.

Sgt. Bradley Melby of the York County sheriff's office testified that on February 19, 2009, he responded to a domestic call regarding Roger and Annie. When he arrived, he observed that Roger was upset, that Roger's glasses were askew on his face, and that he had a scratch on his face which Roger said Annie caused. Melby testified that Roger told him a vase and recliner had been broken and his glasses bent during the altercation. Melby testified that Annie had "a swollen spot on one of her temples" and a scratch on her face, which she reported were caused by Roger. Melby did not recall seeing Shyan at that time, but Roger's son and Annie's older daughter were in the home. Melby testified that he had responded to Roger and Annie's home at least three times.

Another employee of the York County sheriff's office investigated a DHHS intake that he received on March 9, 2009. He spoke with Roger's son and Annie's older daughter. He testified that Roger's son said that Roger and Annie were arguing a lot and that he was concerned about the younger children because it was not a good environment.

Amy Winter, a children and family services specialist with DHHS, worked with the family from March 2009 to December 2010. She testified that on April 9, 2009, she received a telephone call from Annie about a physical argument with Roger which resulted in the dispatch of a law enforcement officer. Winter testified that before Shyan could return home, Roger and Annie needed to address their mental health issues, identify and resolve domestic violence, and provide a safe and stable living environment. Winter testified that Roger was unemployed from

March to May 2009. She prepared a court report on June 19 which contained a dispositional plan. The goals for Roger were to maintain a “healthy and positive mental health,” to provide a stable living environment for the children, and to ensure that the children were free from living in domestic violence at all times. These same goals remained throughout the pendency of the case. Around that time of the dispositional plan, Roger and Annie were having joint supervised visits with Shyan in their home for 9 hours a week. Winter testified that family support workers raised concerns about tension between Roger and Annie during the visits.

The court ordered Roger to attend a “batterer’s class.” Darrin Wyatt, an employee with a men’s domestic violence group, testified that Roger attended a domestic violence class on October 19, November 2, and November 16, 2009. Wyatt testified that Roger “fully participated” in those sessions, but Mary Rock, a therapist with the group, testified that most of Roger’s comments during the sessions were to the effect that what the facilitators were talking about did not apply to him. Rock testified that due to Roger’s work schedule as a truckdriver, the men’s domestic violence program was not counting his work-related absences against him. However, Roger did not come close to attending the 36 sessions needed to successfully complete the program. Wyatt testified that generally domestic violence will continue if there is no intervention.

Roger denied any domestic violence in his relationship with Annie. Winter testified that Roger’s lack of recognition that domestic violence ever occurred hindered him from completing the goals. Annie reported that Roger was physically aggressive toward her; that he called her derogatory names; and that he told her she was worthless, not a good mother, and crazy. Winter testified that law enforcement had been called to the family’s home on more than one occasion postadjudication. And Winter testified that at the time the children were removed, the older children made statements that they were scared of the domestic violence situations. A counselor for Annie’s older daughter testified that this child was very worried about Annie’s safety due to fighting that she witnessed between Roger and Annie in the home. This child was diagnosed with posttraumatic stress disorder in May 2009.

On January 19, 2011, Roger obtained a protection order against Annie. In support of the application, Roger wrote that on January 14, Annie was angry and would not stop hitting him. He also filed a petition to obtain a protection order against Annie on April 9, 2009, in which he alleged that he told Annie to move out that day and that she then spit on him, jumped on him, held his neck, and smashed his head into her head. On September 16, 2009, Annie obtained a protection order against Roger. Her petition alleged acts of verbal abuse.

Jack Carlson, a mental health counselor, conducted a mental health assessment on Roger on March 18, 2009, and was Roger’s counselor for a period of time that year. He diagnosed Roger with adjustment disorder with anxiety and depressed mood on “Axis I” and a personality disorder not otherwise specified on “Axis II.” Based upon the mental health assessment, Carlson recommended that Roger participate in individual counseling and that they assess a risk for self-harm due to Roger’s level of emotion. Although Carlson recommended that Roger participate in 12 to 16 therapy sessions, Roger attended only 7 sessions, the last of which occurred on September 23. Carlson testified that Roger did not successfully complete treatment because they “had a ways to go as far as working on the issues with [Roger’s] relationship and . . . following things that had come up in the . . . case plan.” Because they never worked through

the initial issues, Carlson did not have an opportunity to address Roger's anger issue. Carlson felt that Roger needed to develop better communication skills with Annie and his family, resolve the conflicts in his family, resolve anger issues, and comply with the case plan. Carlson testified that they spent a lot of time just trying to resolve Roger's immediate anger at being involved in the juvenile justice system. Winter testified that she spoke with Roger at least twice about continuing individual therapy. He initially told her that he was missing appointments with Carlson due to his work schedule. But Winter testified that in the beginning of November, Roger told her that he was no longer going to participate in any services other than visitation. She opined that Roger had never accepted the fact he had a mental health issue and that therefore, he failed to address it through any services.

Winter prepared an "early review update" on September 4, 2009, in preparation for a review hearing. At that time, Roger was making very minimal progress toward his goals. Although Roger had obtained a job and was participating in visitation, he continued to engage in domestic violence with Annie, but denied doing so. DHHS had arranged for family support with Annie and Roger when they were living together, but when Annie moved out of the home in August or September, Roger ceased working with family support. Thus, Roger did not actively or completely participate in strategies dealing with budgeting. Winter testified that Roger failed to meet the goal of providing a safe and stable living environment.

Winter testified that Roger continued to participate in visitation, but usually for approximately 6 hours per week rather than the full 9 hours due to his work schedule. Roger's work as a truckdriver took him out of the area for approximately 10 days in a row. This work schedule concerned Winter because Roger was essentially a single parent at the time and "[h]e was not home consistently to meet all of [Shyan's] needs on a day-to-day basis." Winter's review of notes from Roger's visitation revealed safety concerns and a consistent concern about Roger's inability to provide basic items such as diapers or formula for Shyan during visitation.

Winter prepared a case plan and court report on May 21, 2010. It included a new goal: Roger was not to have any contact with Annie per a March 8 court order. Winter believed that she advised Roger on more than one occasion that he was not to have contact with Annie, but Roger stated that he had no intention of following the order and he admitted to maintaining ongoing contact with Annie, both telephonic and in person. Winter testified that Roger and Annie's continued relationship placed Shyan at risk of harm due to ongoing domestic violence and their failure to participate in court-ordered domestic violence services. Winter testified that over the past 2 years, Roger and Annie broke up and got back together approximately 24 times.

Winter testified that Roger was unemployed between February and May 2010. Although Roger continued to live in the same rental property at that time, Winter had concerns about his ability to continue paying rent. In May, Roger was evicted for failure to pay rent and utilities and Winter testified that Roger told her he was living under a bridge. She received information from Roger, Annie, and Annie's parents that Roger was living in motels in various cities between May and September. Winter testified that Roger obtained employment from approximately August to November. As of the date of the termination hearing, Winter still did not know where Roger was living. In Winter's opinion, Roger did not meet any court-ordered goals between January and May and was not making progress on any of them. She testified that Roger was offered 182 hours of visitation during that time period and that he engaged in approximately 118 hours.

Further, Winter testified that Roger and Annie continued to have arguments and that law enforcement was called to respond at least once.

Winter opined that termination of Roger's parental rights was in Shyan's best interests because Roger failed to correct any of the identified safety threats and because Shyan needed stability and permanency. She testified that many reasonable efforts were offered to the family from March 2009 to the trial date, including completing the initial assessment investigation, safety planning, case planning for case plans and court reports, visitations, team meetings, transportation, and coordination of services.

Jeff Baker, a child and family services specialist with DHHS, was the case manager for the family from July to December 2010. During that timeframe, Roger visited Shyan twice, which Baker said was "very concerning" because Roger "comes in and out of her life as it's convenient for him. She doesn't really know who he is." Roger did not attend any of the six team meetings during that time, but attendance is not mandatory.

Sara Stauffer, a children and family services specialist with DHHS, has been the family's ongoing case manager since December 2010. She testified that Roger and Annie lived together at times despite the court order prohibiting them from having contact with each other. They did not live together from December 24 to January 11, 2011. Stauffer testified that Roger reported being assaulted by Annie in December 2010 and January 2011, the latter of which resulted in Annie's jailing. In March, they were living together with Roger's parents. Stauffer testified that Roger had not met any of the court-ordered goals or even made progress toward them. She was concerned that Roger was unable to provide for Shyan during a 4-hour visit and wondered how he would be able to provide for her needs for 24 hours a day and 7 days a week. Stauffer opined that it was in Shyan's best interests to terminate Roger's parental rights because Shyan needed permanency and a stable living environment to help meet her developmental needs.

Individuals working with the family reported issues with Roger's temper. One female who supervised visitations for the family and provided family support testified that she experienced Roger's temper during a telephone call--she could not remember what was said, but she recalled him yelling at her, which led her to speak with her supervisor and request that she no longer work with Roger. Another individual, Carey Stutzman, supervised joint visits for the family from March to May 9, 2009. During the last visit, Stutzman told Roger's son that he needed to come inside because the children needed to be together, but the son refused. Stutzman testified that Roger yelled at her and called her derogatory names, so Stutzman told him that she was ending the visit. Stutzman testified that Roger blocked the door so she could not leave. She told Roger not to threaten her, and he responded, "you haven't seen threatening yet," which scared Stutzman. The children witnessed the incident, and Annie's older daughter was crying. Darrel Miller worked with the family for 5 or 6 months in 2009, providing visitation, family support work, and transportation. He testified that in October, Roger rushed toward him, took off his coat, got in Miller's face, and yelled at him. Miller felt like Roger was going to attack him. After that incident, Miller told his supervisors that he would not work with Roger. Bill Williams, the director of operations for an agency committed to youth and families, testified that two of his female employees described Roger as intimidating and that, based upon their statements, Williams was not willing to have them work with Roger. Williams testified that Roger had been

“volatile” with him numerous times during telephone conversations--raising his voice, talking faster, swearing, and hanging up the telephone--but never in person.

Williams testified about Roger’s visits in 2010: Roger had two visits in February, four visits in March, one visit in April and in May, no visits in June or July, one visit in August, no visits in September, one visit in October, no visits in November, and one visit in December. He had one visit each in January 2011, February, and March. By the time of trial, Roger was providing diapers and food for Shyan during visits, but Williams testified that there was a period of time when Roger was unable to do so. Williams testified that he did not have any concerns about Roger’s ability to parent during the visits and that Roger “was a very engaged parent.” Williams testified that on January 23, 2011, Roger mentioned not having a vehicle and being dependent on others for transportation, not having a job, and not having the ability to provide for Shyan’s basic needs.

Roger’s in-laws have been Shyan’s foster parents since May 2009. Roger’s mother-in-law did not believe that removing Shyan from her home would be in the child’s best interests, and she testified that Shyan never asks for Roger. Roger’s father-in-law testified that Annie called him at times to come get the children because she was fighting with Roger. He testified about one incident where Roger was holding Shyan while yelling and screaming at Annie. Roger’s father-in-law did not feel that it was in Shyan’s best interests to be returned to her parents due in part to their fighting.

On April 15, 2011, the juvenile court entered an order terminating Roger’s parental rights to Shyan. The court found that Shyan was removed from her parents’ home on March 10, 2009, and had not been returned home to either parent. The court found that Roger failed to correct the conditions leading to adjudication because Roger (1) failed to complete therapy as requested, (2) refused to participate in any services other than visitation, (3) continued to see Annie in spite of the court’s order that he not have contact with her, (4) did not have a home for Shyan, and (5) had not resolved his temper issues and it did not appear that will occur in the near future. The court found grounds to terminate Roger’s rights under § 43-292(6) and (7) and found that termination was in Shyan’s best interests.

Roger timely appeals. 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.

ASSIGNMENTS OF ERROR

Roger alleges five assignments of error, which we consolidate, restate, and reorder. First, he assigns that the court erred in finding that the State proved by clear and convincing evidence grounds for termination under § 43-292(2), (4), (6), and (7). Second, he alleges that the court erred in finding that termination of his parental rights was in Shyan’s best interests.

We observe that the court’s order specifically found that the State proved the existence of grounds for termination under § 43-292(6) and (7). Thus, we disregard Roger’s assignments of error pertaining to § 43-292(2) and (4).

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 Thomas M.*, 282 Neb.

316, 803 N.W.2d 46 (2011). 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. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

ANALYSIS

Statutory Grounds for Termination.

In order to terminate an individual's parental rights, the State must first prove by clear and convincing evidence that one of the statutorily enumerated grounds for termination exists. See *In re Interest of Sir Messiah T. et al.*, *supra*. The court found grounds for termination under § 43-292(6) and (7).

Under § 43-292(7), the State must show that Shyan had been in an out-of-home placement for 15 or more months of the most recent 22 months. Shyan was removed from Roger's home in March 2009 and has remained in out-of-home placements since that time. Accordingly, the State proved § 43-292(7) by clear and convincing evidence.

Because the State need only prove one ground for termination, we decline to address the assigned error relevant to the court's determination that the State proved the ground enumerated in § 43-292(6). Generally, when termination is sought under subsections of § 43-292 other than subsection (7), the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). We will therefore consider evidence relevant to the other ground in our analysis of Shyan's best interests.

Best Interests.

In order to terminate an individual's parental rights, the State must also prove by clear and convincing evidence that termination is in the children's best interests. *In re Interest of Sir Messiah T. et al.*, *supra*. We conclude that the State met its burden.

Shyan was initially removed from the family home due largely to domestic violence between Roger and Annie. Wyatt, an employee with a men's domestic violence group, described domestic violence as being based on power and control, which can include verbal, physical, sexual, and psychological violence and actions. Here, there was evidence that Roger and Annie each physically abused the other and that Roger verbally abused Annie. Wyatt testified that domestic violence within a family affects children by creating uncertainty, fear, and mixed loyalties to parents. And a therapist with the group testified that domestic violence is difficult for children because even if they are not directly involved, they can sense what is occurring. She explained that children may experience fear and anxiety and could suffer from posttraumatic stress disorder. The State adduced evidence that Annie's older daughter does suffer from posttraumatic stress disorder and that she worries about Annie's safety due to the fighting that she has witnessed at home.

Roger failed to sufficiently make progress to address the adjudicated issue. His participation in individual therapy and in a batterer's group was brief, and he did not successfully complete either one. He was not continually employed and had difficulty providing for Shyan's basic needs during their visits, which always remained supervised. Further, Roger did not maintain a stable place to live. He continued to see Annie despite the court's order that they not

have contact, and they continued to engage in domestic violence. Others providing services for the family reported Roger's volatile and intimidating behavior. The system cannot and should not allow children to languish in foster care waiting to see if the parent will mature. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007). Winter opined that it was in Shyan's best interests for Roger's parental rights to be terminated because he failed to correct the safety issues and because Shyan needed stability and permanency. Stauffer offered a similar opinion because Roger had not met or made progress toward any of the court-ordered goals and because Shyan needed a stable living environment to help meet her developmental needs. We conclude that clear and convincing evidence establishes that termination of Roger's parental rights is in Shyan's best interests.

CONCLUSION

We conclude upon our de novo review that the State proved by clear and convincing evidence the existence of a statutory ground for termination and that termination of Roger's parental rights was in Shyan's best interests.

AFFIRMED.