

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Tristan C.,)
A child under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Michael C.,)
)
Appellant.)

No. A-14-0149.

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

OCT 08 2014

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

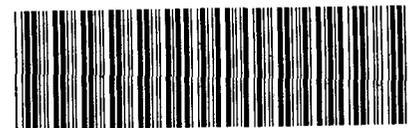
INBODY, RIEDMANN, and BISHOP, Judges.

BISHOP, Judge.

Michael C. appeals, and Nicole W. cross-appeals, from the decision of the county court for Hall County, sitting as a juvenile court, terminating their parental rights to their son, Tristan C. We affirm.

BACKGROUND

Tristan, born on June 21, 2012, is the biological child of Michael and Nicole. Michael and Nicole never married. While still in the hospital following his birth, Tristan tested positive for Methadone and was exhibiting withdrawal symptoms. Nicole tested positive for methamphetamine, marijuana, and opiates. Pursuant to an ex parte order filed on June 27, Tristan was placed in the temporary care and custody of the Nebraska Department of Health



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and Human Services (DHHS); he has remained in the custody of DHHS, and in an out-of-home placement, ever since.

On June 27, 2012, the State filed a petition alleging that Tristan was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013) due to the faults or habits of Michael and Nicole. In an order filed on December 27, the court found that paternity had not been established, but adjudicated Tristan to be within the meaning of § 43-247(3)(a) due to the faults or habits of Nicole. Both Michael and Nicole appealed the court's decision to this court. We affirmed the county court's decision in a memorandum opinion filed on August 23, 2013, *In re Interest of Tristan C.*, case No. A-13-067.

Our previous memorandum opinion, which was received into evidence as an exhibit at the subsequent termination of parental rights hearing, set forth a detailed account of the facts leading to the adjudication. We do not recount those facts in this opinion, rather, we will address what has occurred since the adjudication.

We note that in April 2013, after the juvenile court adjudicated Tristan to be within the meaning of § 43-247(3)(a), but while that decision was on appeal, genetic testing confirmed that Michael was Tristan's biological father; thus, paternity was subsequently established.

On September 10, 2013, the juvenile court, after a hearing on the parents' objections, approved a change of placement for

Tristan; he was moved from a foster home in Grand Island to a foster/adoptive home in Minden.

On October 15, 2013, Tristan's Guardian Ad Litem (GAL) filed a motion to terminate Michael and Nicole's parental rights to Tristan pursuant to Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012). The GAL alleged: (1) Michael and Nicole had each substantially and continuously or repeatedly neglected and refused to give Tristan necessary parental care and protection (§ 43-292(2)); (2) Michael and Nicole had abandoned Tristan for 6 months or more immediately prior to the filing of the motion to terminate parental rights (§ 43-292(1)); (3) Tristan had been in an out-of-home placement for 15 or more of the most recent 22 months (§ 43-292(7)); and (4) termination was in the child's best interests.

The termination hearing was held on January 13, 2014. Neither Michael nor Nicole appeared at the hearing, but both were represented by counsel. The court received into evidence numerous exhibits which will only be discussed as necessary later in this opinion. The only witnesses to testify were the two DHHS child and family service specialists assigned to Tristan's case: Suzana Borowski and Tamyra Pickering.

Borowski was assigned to Tristan's case from July 9 to October 31, 2012. She testified that she had limited contact with the parents, despite making several attempts. While Borowski was the case worker, Michael did not see Tristan, and Nicole only had one

visit. Borowski testified that DHHS did not restrict visits; the parents (who lived together in Adel, Iowa) simply had to schedule the visits. Borowski stated that before travel assistance is provided to parents, DHHS requires the parents to fill out a budget; neither Michael nor Nicole completed the required budget.

Borowski testified that she attempted to talk to Michael and Nicole about what needed to occur for them to regain custody of Tristan. However, Nicole always wanted to focus on why Tristan could not be placed with her mother, which made it difficult to focus on other aspects of the case. Borowski testified that DHHS did explore placement with Nicole's mother, but the mother was denied by the Interstate Compact for the Placement of Children (ICPC) as a result of a home study. DHHS also looked into numerous other family placements in Nebraska and Iowa, but the family members either chose not to take placement, or were deemed inappropriate or unsuitable for placement.

Borowski also testified that it was her understanding that Nicole completed a drug and alcohol evaluation as part of an Iowa case involving another child, but DHHS could not get a copy of the evaluation because Nicole failed to sign a release.

Pickering, who has a Ph.D. in Education Administration and worked in the education field for 29 years before retiring and obtaining employment with DHHS, was assigned to Tristan's case in October 2012 and remained his case worker at the time of the

termination hearing. Pickering testified that despite the fact that the parents had not provided a budget, she asked her supervisor to provide gas vouchers or bus tickets to the parents so that they could see Tristan. Pickering was able to obtain a gas voucher in March 2013. On March 22, Nicole and her mother came to Nebraska to visit Tristan; Michael stated that he could not come because he was caring for his elderly sick grandmother.

Pickering testified that since she has been assigned to this case, Nicole only had one visit, referenced above, with Tristan and that such occurred on March 22, 2013. After the March 22 visit, Nicole said she planned to come visit Tristan every weekend, but later informed Pickering that she could not come back until she took care of some outstanding warrants. At the time of the termination hearing, Nicole had not seen Tristan since the March 22 visit (nearly 10 months earlier). Pickering testified that gas vouchers remained available after March 22.

Pickering testified that she has had 10 contacts with Nicole, and 35 unsuccessful attempts at contact. When Pickering tried to talk to Nicole about Tristan's development, Nicole steered the conversation to discussing why her mother could not take placement of Tristan and why ICPC denied placement; Nicole did not ask about Tristan.

Pickering testified that she had spoken with Michael six times, most recently on January 10, 2014; there were 35

unsuccessful efforts to contact Michael. During their conversations, Michael did not ask about Tristan. On one occasion, Michael did ask if he could take placement (which would not have been allowed) and alternatively mentioned that he would talk to his aunt and uncle about taking placement; Michael never followed up with Pickering regarding placement. Pickering testified that since she had been assigned to the case, Michael had not visited Tristan, nor had he even requested a visit. Furthermore, Michael did not send cards, letters, or pictures to Tristan.

Pickering testified that Nicole apparently completed a drug and alcohol evaluation, and Nicole also reported completing a mental health evaluation and obtaining employment. However, Nicole never provided copies of her evaluations and provided no verification of her employment. Pickering testified that Michael did provide his drug evaluation and mental health evaluations, but that he had "inconsistently" followed through on the recommendations. Pickering stated that UAs were set up in the State of Iowa for both Nicole and Michael, but according to the information Pickering received, the parents were called to test three times, but neither showed; when asked, Nicole said no one called. (We note that no plan of rehabilitation was court ordered.)

Pickering testified that Tristan "absolutely" needs permanency and that terminating Michael and Nicole's parental rights would be in Tristan's best interests. In support of her

opinion, Pickering cited the parents' lack of follow-through with the case plan, their inconsistent communication with DHHS, and their lack of visitation with Tristan. Pickering stated that Michael and Nicole have "no relationship" with Tristan.

In its order filed on January 15, 2014, the juvenile court terminated Michael and Nicole's parental rights to Tristan after finding that grounds for termination existed under § 43-292(1), (2) and (7), and also finding that termination of parental rights was in Tristan's best interests. Michael has timely appealed, and Nicole cross-appeals.

ASSIGNMENTS OF ERROR

Both Michael and Nicole assign that the juvenile court erred in finding that (1) each of them had abandoned the minor child, (2) the minor child had been placed out of home for 15 out of 22 months "due to the fact that the case had been on appeal for approximately 7 months and that time should not have counted against the parent[s]," and (3) termination of parental rights was in the best interests of the minor child.

STANDARD OF REVIEW

Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the

witnesses and accepted one version of the facts over the other. *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013).

ANALYSIS

Grounds for Termination.

In Nebraska statutes, the bases for termination of parental rights are codified in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012). Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

In its order terminating Michael and Nicole's parental rights to Tristan, the juvenile court found that grounds for termination existed under § 43-292(1) (abandonment), § 43-292(2) (substantial and continuous or repeated neglect and refusal to give Tristan necessary parental care and protection); and § 43-292(7) (out-of-home placement for 15 or more months of the most recent 22 months).

The parents assign error to only two of the three grounds that the juvenile court found existed: abandonment of the minor child (§ 43-292(1)) and out-of-home placement for 15 out of 22 months (§ 43-292(7)). However, neither parent assigns or argues that the juvenile court erred in finding that grounds exist for terminating their parental rights under § 43-292(2) (substantial

and continuous or repeated neglect and refusal to give Tristan necessary parental care and protection). In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *In re Interest of Kodi L.*, 287 Neb. 35, 840 N.W.2d 538 (2013). Despite the parents' failure to assign or argue that the juvenile court erred in finding grounds exist for terminating their parental rights under § 43-292(2), we nevertheless have reviewed such finding given that a statutory basis is required to terminate parental rights.

One need not have physical possession of a child to demonstrate the existence of the neglect contemplated by § 43-292(2). See *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). See, also, *In re Interest of J.N.V.*, 224 Neb. 108, 395 N.W.2d 758 (1986) (a parent may as surely neglect a child of whom she does not have possession by failing to put herself in a position to acquire possession as by not properly caring for a child of whom she does have possession). As will be discussed more thoroughly below, the record reflects that Michael and Nicole have failed to maintain a relationship with Tristan. Michael has not seen Tristan since June 2012 and Nicole has not seen him since March 2013. And neither parent has inquired about Tristan's well-being. Thus, our de novo review of the record clearly and convincingly shows that grounds for termination of Michael and

Nicole's parental rights under § 43-292(2) were proven by sufficient evidence. Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the child's best interests.

Best Interests.

Under § 43-292, once the State shows that statutory grounds for termination of parental rights exist, the State must then show that termination is in the best interests of the child. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). But that is not all. A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit. *Id.* And there is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. *Id.* Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit. *Id.* Obviously, both the best interests analysis and the parental fitness analysis are fact-intensive inquiries. *Id.* And while both are separate inquiries, each examines essentially the same underlying facts as the other. *Id.*

We begin by addressing the juvenile court's implicit finding that Michael and Nicole were unfit, and we conclude that the GAL/State has met its burden of showing that the parents are unfit.

"Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being." *In re Interest of Nicole M.*, 287 Neb. 685, 706, 844 N.W.2d 65, 81 (2014).

In the instant case, Michael has not seen Tristan since the time of his birth in June 2012, and Nicole has only seen Tristan on two other occasions, the last time being in March 2013. DHHS provided travel assistance to the parents, despite the parents' failure to complete a required budget. Even with travel assistance provided, Nicole only managed to visit Tristan on one occasion in March 2013 (and on one previous occasion before assistance was provided) and Michael never attempted to visit Tristan. Nicole claimed she would visit Tristan every weekend, but apparently failed to "take care" of her outstanding warrants and thus did not follow through on her promise to visit. Michael never visited Tristan, claiming he had to care for an elderly, sick grandmother. In addition to their failure to visit Tristan, neither parent ever inquired about Tristan's well-being. Rather, they were focused on getting Tristan placed in Iowa because it was more convenient for them. It is clear that neither parent has made Tristan a priority. They chose to come to Nebraska for Tristan's birth in 2012, and then once Tristan was removed from their care, they returned to

Iowa. They continued to place the blame for their lack of visitation on distance, but failed to recognize that they are the ones responsible for the distance. And distance certainly would not preclude either of them from inquiring about Tristan's well-being, or sending letters, cards, or pictures. Tristan needs permanency and neither Michael nor Nicole are willing to put Tristan first. Accordingly, each has a personal deficiency or incapacity which has prevented performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to Tristan's well-being. *In re Interest of Nicole M., supra*. We conclude that the GAL/State has met its burden of rebutting the presumption that Michael and Nicole are fit parents.

We turn next to the question of whether it is in Tristan's best interests that Michael and Nicole's parental rights be terminated. While best interests is a separate inquiry from the determination as to parents' fitness, both are fact intensive and examine essentially the same underlying facts as the other. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

As noted above, Michael and Nicole have failed to maintain a relationship with Tristan. Michael has not seen Tristan since June 2012 and Nicole has not seen him since March 2013. And neither parent even inquired about Tristan's well-being. Pickering testified that Tristan needs permanency and that it is in his best

interests that Michael and Nicole's parental rights be terminated. We agree, and conclude that the GAL/State has met its burden to show that termination of Michael and Nicole's parental rights is in Tristan's best interests.

CONCLUSION

For the reasons stated above, we affirm the order of the juvenile court terminating Michael and Nicole's parental rights to Tristan.

AFFIRMED.