

FILED

AUG 13 2014

IN THE NEBRASKA COURT OF APPEALS

**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

In re Interest of Catalino V., III)
 a child under 18 years of age.)
)
 State of Nebraska,)
)
 Appellee,)
)
 v.)
)
 Catalino V., II,)
)
 Appellant)
)
 v.)
)
 Kathleen H.,)
)
 Appellee and)
 Cross-Appellant.)

No. A-13-816.

**MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL**

IRWIN, RIEDMANN, and BISHOP, Judges.

IRWIN, Judge.

I. INTRODUCTION

Catalino V., II (Catalino) appeals and Kathleen H. cross-appeals from two orders of the county court, sitting as a juvenile court, which orders terminated their parental rights to their son, Catalino V., III. In their appeals, both Catalino and Kathleen allege that the county court erred in finding that termination of their parental rights was in their son's best interests. In addition, Kathleen challenges the statutory grounds for termination of her parental rights. Upon our de novo review of the record, we find sufficient evidence to support the county court's



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termination of Catalino's and Kathleen's parental rights. Accordingly, we affirm.

II. BACKGROUND

Catalino's appeal and Kathleen's cross-appeal focus on their ability to parent their son, Catalino III, who was born in March 2006. In the record, Catalino III is referred to by his nickname, "Dre." In order to differentiate between Catalino, and his son, Catalino III, in this opinion, we will also refer to Catalino III as "Dre."

In March 2012, the Department of Health and Human Services (the Department) received a report that Catalino and Kathleen were engaging in domestic violence in the presence of Dre, who was then approximately six years old. In response to these reports, a Department worker spoke with Dre about his home life. During that conversation, Dre reported that he had witnessed his parents fighting with each other. He had observed Catalino hit Kathleen and he had observed Kathleen hit Catalino. Dre indicated that he had intervened in his parents' fights in order to get them to stop. Dre also reported that there had been drug use in his home and in his presence. In fact, when prompted by the Department worker, Dre was able to accurately draw a "marijuana pipe."

The Department worker also spoke with Kathleen. Kathleen admitted to having a "volatile" relationship with Catalino and admitted that Dre had witnessed some of her arguments with

Catalino. However, Kathleen also stated that Dre had "never seen Catalino really 'whomp' on her." Kathleen admitted to using marijuana and admitted that she was open and honest with Dre about drugs.

The Department worker attempted to contact Catalino to speak with him about his relationship with Kathleen and Dre, but the worker's attempts were unsuccessful. Catalino would not answer the telephone when the worker called him and when he finally did answer his telephone and a meeting with the worker was scheduled, Catalino failed to appear.

As a result of the statements made by Kathleen and Dre, the Department created a safety plan to keep Dre safe. As a part of this safety plan, Kathleen and Dre were to move in with Kathleen's mother, who was to assist Kathleen in caring for Dre. Kathleen indicated to Department workers that she planned on ending her relationship with Catalino. In addition, the Department requested that Kathleen undergo drug testing.

After the Department initiated the safety plan, Kathleen continued to have regular contact with Catalino, in violation of the Department's safety plan and in violation of an active protection order which had been initiated by Kathleen. In fact, in May 2012, Catalino and Kathleen got into a fight at a bar, and Catalino physically assaulted Kathleen. In addition, Kathleen took

Dre to visit with Catalino, which was also in violation of the safety plan created by the Department.

Due to Kathleen's failure to adhere to the tenets of the safety plan and due to her ongoing relationship with Catalino, on May 14, 2012, the State filed a petition with the county court alleging that Dre was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) as to both Catalino and Kathleen. Specifically, the petition alleged that Dre was in a situation dangerous to life or limb or injurious to his health or morals because his parents "have a history of domestic violence that has continued to not be addressed or improved" and because Kathleen had admitted to using marijuana and to openly discussing her use of such drugs with Dre, providing him with an extensive knowledge of terms and devices associated with drug use.

Also on May 14, 2012, the county court entered an order placing Dre in the temporary custody of the Department of Health and Human Services. After the entry of this order, Dre continued to reside at the home of his maternal grandmother.

On July 10, 2012, the State filed an amended petition alleging that Dre was a child within the meaning of § 43-247(3)(a). This petition again alleged that Dre was in a situation dangerous to life or limb or injurious to his health or morals because of his parents' ongoing, violent relationship. In addition, the petition alleged that Dre was a child within the meaning of § 43-247(3)(a)

through no fault of Kathleen because she has been the victim of domestic violence perpetrated by Catalino. This section of the petition also alleged that Kathleen has admitted to smoking marijuana.

After the State filed its amended petition, Kathleen admitted to the section of the petition which alleged that Dre was within the meaning of § 43-247(3)(a) through no fault of her own. Based on Kathleen's admission, Dre was adjudicated to be a child within the meaning of § 43-247(3)(a) as to Kathleen. The court entered an order permitting Kathleen a limited amount of unsupervised visitation time with Dre. The court also entered orders adopting the Department's recommended case plans for Kathleen. As a part of these plans, Kathleen was to submit to random drug testing and a substance abuse evaluation; was to participate in a domestic violence awareness class; and was to find suitable, independent housing and stable employment. In addition, Kathleen was to demonstrate that she could provide safety for Dre "as evidenced by no reports of domestic violence or injuries."

On August 7, 2014, an adjudication hearing was held concerning the allegations in the State's amended petition which pertained to Catalino. Catalino did not appear at this hearing. In fact, prior to this adjudication hearing, Catalino had attended only one hearing during these proceedings. After the hearing, the county court adjudicated Dre to be a child within the meaning of § 43-

247(3)(a) due to the faults or habits of Catalino. The court ordered that Catalino was not to have any contact with Dre unless permitted to do so by the court. Subsequently, the court entered an order requiring Catalino to participate in therapeutic visitations with Dre.

Further hearings were held in September and October 2012 and in January 2013. During these hearings, it was reported to the county court that neither Catalino nor Kathleen were actively working towards reunification with Dre.

Catalino did not appear at any of the hearings held between September 2012 and January 2013. During this same time period, Catalino was not participating in any of the services available to him through the Department, nor was he keeping in regular contact with the Department workers assigned to his family's case. Kathleen did not appear at a hearing held in September 2012 or a hearing held in early October 2012. Due to Kathleen's failure to attend the hearings and reports that she was no longer cooperating with the tenets of her case plan, the court suspended her unsupervised contact with Dre. In addition, when Kathleen appeared at a hearing in late October 2012, the court warned her that termination of her parental rights was a strong possibility. At a hearing in January 2013, the county court changed Dre's permanency goal from reunification to adoption.

On February 22, 2013, the State filed a motion for termination of Catalino's and Kathleen's parental rights to Dre. In the motion, the State alleged that termination of their parental rights was warranted pursuant to Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2012), because they had substantially and continuously or repeatedly neglected and refused to give Dre necessary parental care and protection; § 43-292(4), because they are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which is found by the court to be seriously detrimental to the health, morals, or well-being of Dre; and § 43-292(6), because reasonable efforts to preserve and reunify the family failed to correct the conditions that led to the determination that Dre was within the meaning of § 43-247(3)(a). In addition to these allegations, the State asserted that termination of Catalino's parental rights was warranted pursuant to § 43-292(1), because he had abandoned Dre for at least the preceding six months. The State also asserted that termination of Catalino's and Kathleen's parental rights was in Dre's best interests.

On June 24, 2013, a hearing was held concerning the State's motion to terminate Kathleen's parental rights. While we have carefully reviewed the evidence presented at the hearing in its entirety, we do not set forth the specifics of the voluminous testimony and exhibits here. Instead, we will set forth more

specific facts as presented at the hearing as necessary in our analysis below.

After the hearing, the court entered a detailed order finding that the State proved by clear and convincing evidence that grounds for termination of Kathleen's parental rights existed pursuant to § 43-292(2), (4), and (6). The court also found that termination of Kathleen's parental rights was in Dre's best interests. Specifically, the court stated:

[Kathleen] has not reached "parental maturity." She has, throughout this case, established herself as a self-absorbed young woman that doesn't have time to be a mother. The relationship between [Kathleen] and [Dre] is like a brother and sister. They appear to love each other. But, love alone does not raise a child. This Court should not and cannot await [Kathleen]'s uncertain maturity.

The court then ordered that Kathleen's parental rights to Dre be terminated.

On July 17, 2013, a hearing was held concerning the State's motion to terminate Catalino's parental rights. Again, we do not recite the evidence presented at that hearing here; however, we do note that Catalino did not appear for this hearing.

After the hearing, the court entered an order finding that the State proved by clear and convincing evidence that grounds for termination of Catalino's parental rights existed pursuant to § 43-292(1), (2), and (6). The court also found that termination

of Catalino's parental rights was in Dre's best interests. The court summarized the evidence presented at the termination as follows:

[Catalino] has completely abandoned [Dre]. [Catalino] has not had any visits with his [s]on in over 14 months []. [Catalino] has not provided any support for [Dre] for over 14 months. A case plan was prepared for [Catalino]. [He] has not completed any of the goals in the case plan and court reports. [Catalino] has not even started any of the plans or goals in the case plans and court reports. [Catalino] has completely neglected all parental obligations for [Dre]. [Catalino] has abandoned [Dre] for at least 6 months prior to the filing of the petition.

The court ordered that Catalino's parental rights to Dre be terminated.

Catalino and Kathleen appeal from the orders terminating their parental rights.

III. ASSIGNMENTS OF ERROR

On appeal, Catalino alleges that the county court erred in finding that termination of his parental rights was in Dre's best interests.

On cross-appeal, Kathleen alleges that the county court erred in finding that the State proved that termination of her parental rights was warranted pursuant to § 43-292(2), (4), and (6), and in finding that termination of her parental rights was in Dre'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. CATALINO'S APPEAL

In his appeal, Catalino assigns as error only the county court's finding that termination of his parental rights is in Dre's best interests. Catalino does not challenge the statutory basis for termination of his parental rights. As such, he does not challenge the county court's finding that he had abandoned Dre for at least the six months preceding the State's filing of the motion

to terminate his parental rights in February 2013, pursuant to § 43-292(1); that he had substantially and continuously or repeatedly neglected Dre and refused to give him necessary parental care and protection, pursuant to § 43-292(2); or that following a determination of Dre as a child described in § 43-247(3)(a), reasonable efforts to preserve and reunify the family under the direction of the court failed to correct the conditions leading to that determination, pursuant to § 43-292(6).

The sole issue raised in Catalino's appeal is whether the State adduced sufficient evidence to demonstrate that termination of his parental rights is in Dre's best interests. In his brief to this court, Catalino argues that the State did not present sufficient evidence to demonstrate that terminating his parental rights would be beneficial to Dre in any way. Upon our de novo review of the record, we disagree with Catalino's assertion. The State presented sufficient evidence to prove that terminating Catalino's parental rights is in Dre's best interests.

The evidence presented by the State revealed that at the time of the termination hearing in July 2013, Catalino had not been a part of Dre's life for over a year. The last time that Catalino saw Dre was in May 2012 when Kathleen permitted an unsupervised visit between Catalino and Dre in violation of the voluntary safety plan established by the Department. After May 2012, Catalino did not have any contact with Dre. He had not seen Dre. He had not

spoken to Dre on the telephone. He had not sent Dre any letters or gifts. Catalino had not paid any child support in order to financially provide for Dre.

In addition, Catalino failed to cooperate with the Department in order to be able to see Dre or to improve his circumstances and achieve some kind of reunification with Dre. Catalino was informed by Department workers of the goals and requirements of his case plan. Catalino failed to make efforts to achieve any of the goals. In fact, Catalino failed to even stay in contact with Department workers, despite their best efforts. One worker testified that she telephoned Catalino every week, but Catalino never answered the calls, nor did he ever call her back.

Catalino failed to attend every single county court hearing except for one. Most notably, he failed to attend the adjudication hearing and he failed to attend the termination hearing.

The State also presented evidence which revealed that Dre did not have a strong bond with Catalino, nor had he shown any indication of wanting a relationship with him. Catalino's grandmother, who is also his foster mother, testified that Dre has never asked to see Catalino and has never provided any indication that he misses Catalino, even though he has not seen his father in over a year.

The evidence also revealed that Dre had observed Catalino commit acts of domestic violence against his mother, Kathleen, and

that Dre had even intervened in these incidents. In addition, the evidence demonstrated that Catalino has a history of violent and aggressive behavior and has been in and out of jail as a result of this behavior. There was no evidence that Catalino has done anything to address his violent and aggressive tendencies.

When we view the evidence presented by the State as a whole, it is clear that termination of Catalino's parental rights is in Dre's best interests. During the pendency of the lower court proceedings, Catalino repeatedly demonstrated, through his behavior, that he did not want to be a part of Dre's life. And, despite Catalino's absence, Dre has not shown any interest in reuniting with Catalino, perhaps because of the violence that Dre witnessed in his parents' home. Ultimately, we find that Dre should not be suspended in foster care without any hope of permanency, while Catalino has repeatedly demonstrated that he does not have a desire to be an appropriate or effective parent to Dre. See *In re Interest of B.A.G., Jr.*, 235 Neb. 730, 457 N.W.2d 292 (1990).

3. KATHLEEN'S CROSS-APPEAL

In her cross-appeal, Kathleen challenges both the statutory basis for termination of her parental rights and the county court's finding that termination of her parental rights is in Dre's best interests. We first address Kathleen's assertions concerning the statutory basis for termination.

(a) Statutory Basis for Termination

Kathleen asserts that the county court erred in sustaining the motion to terminate her parental rights pursuant to § 43-292(2), (4), and (6). Upon our de novo review, we conclude that the evidence clearly and convincingly demonstrated that Kathleen has substantially and continuously or repeatedly neglected Dre and refused to give him necessary parental care and protection, pursuant to § 43-292(2). Accordingly, we decline to address Kathleen's assertions with regard to § 43-292(4) or (6).

Section 43-292(2) provides that a court may terminate parental rights when "[t]he 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 evidence presented at the termination hearing revealed that for a majority of the time this case was pending in the county court, Kathleen failed to provide Dre with any parental care or protection.

Throughout this case, Kathleen has placed her relationship with Catalino before Dre, and, as a result, has failed to adequately protect Dre. Kathleen admitted that she and Catalino have a volatile relationship that often results in physical violence. Dre was present during many of these violent incidents and has even gotten in between Catalino and Kathleen to stop the fighting. However, despite her repeated promises to Department

workers, she failed to end her relationship with Catalino. In fact, in May 2012, after agreeing to the safety plan put in place by the Department, Kathleen permitted Dre to visit Catalino without any proper supervision. In addition, Kathleen continued to see and have contact with Catalino even after the State had filed its petition to adjudicate Dre as a child within the meaning of § 43-247(3)(a). Each of the Department workers assigned to the family's case testified at the termination hearing that Kathleen continued to have regular contact with Catalino throughout the time the case was pending. There was evidence that at a hearing in August 2012, Kathleen testified that she still loved Catalino and wanted to work things out with him. Kathleen made this statement, even as Kathleen's mother was forced to telephone the police on numerous occasions to protect Kathleen from Catalino. Perhaps most concerning was the testimony of the family's current Department worker, who testified that Kathleen had informed him that if she were to regain custody of Dre, she would permit Catalino to have contact with Dre. Permitting Dre to have unsupervised contact with Catalino presents a very real risk to his well-being.

Kathleen has failed to address her substance abuse problem in any way. Such failure has created an obstacle to her relationship with Dre. Kathleen has admitted that she continues to use marijuana on a regular basis. She has also refused to cooperate with any drug testing. At one point, Kathleen hid in her mother's garage to

avoid having to take a drug test. Kathleen has failed to participate in a substance abuse evaluation. In order to avoid this, she has repeatedly and consistently lied to Department workers about her participation.

As the case progressed, Kathleen began to have only "inconsistent" and "sporadic" visitation with Dre. When the case was initiated in May 2012, Kathleen lived with Dre and her mother. As such, Kathleen saw Dre on a regular basis. However, as Kathleen's willingness to cooperate with the county court and the Department dwindled, so did her contact with Dre. In fact, by October 2012, because of her lack of cooperation with the case plan, the Department recommended that Kathleen move out of her mother's home. After Kathleen moved, she was permitted only supervised visitation time with Dre. However, she failed to exercise this time on a regular basis. Kathleen did not see Dre from February to May 2013. When visits resumed, Kathleen would regularly cancel scheduled visits and would sometimes go weeks without seeing Dre at all. Kathleen also failed to regularly participate with Dre's counseling, even though she was asked to do so by Dre's counselor.

Kathleen has also failed to provide Dre with any substantial or consistent financial support. Kathleen's mother, who is Dre's foster parent, testified that Kathleen does not provide any substantial financial support to assist her in the care of Dre. In

addition, the visitation worker who monitors visits between Kathleen and Dre testified that Kathleen has not brought anything for Dre during the visits. There was also evidence that Kathleen has not had any regular employment throughout the duration of the case. She has lied to Department workers about having a job, when she actually was unemployed. There was evidence that from February 2013 to the time of the termination hearing in June 2013, Kathleen had only been employed for a few weeks.

At the termination hearing, Kathleen admitted that she had "slacked" during the case and that she could have done more. She testified that she is still working on getting her life together, and that she would like Dre to just continue living with her mother until she is ready and able to have him live with her. Kathleen also testified that she does not believe she is a bad mother and that she should not have to participate in her case plan or with Department workers.

When we view the evidence presented at the termination hearing as a whole, we find sufficient evidence to support the county court's finding that Kathleen has substantially and continuously or repeatedly neglected Dre and refused to give him necessary parental care and protection, pursuant to § 43-292(2). Essentially, we find that the evidence demonstrates that even though Kathleen knew what needed to be accomplished to achieve reunification with Dre, she purposefully chose not to make any

efforts to achieve that goal. Instead, Kathleen chose to "slack" because she believed that Dre could remain with her mother indefinitely and that she could remain some part of his life. Kathleen's assumption was not correct. The Nebraska Supreme Court has previously held, "[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." *In re Interest of J.N.V.*, 224 Neb. 108, 395 N.W.2d 758 (1986).

Kathleen neglected Dre by consistently and continuously failing to place herself in a position to achieve reunification with him. Accordingly, we find that the county court did not err in finding that termination of Kathleen's parental rights was warranted pursuant to § 43-292(2). Because we find that termination of Kathleen's parental rights was warranted pursuant § 43-292(2), we decline to address whether termination of her rights was also warranted pursuant to § 43-292(4) or (6).

(b) Best Interests Determination

Kathleen also assigns as error the county court's finding that termination of her parental rights is in Dre's best interests. Specifically, she alleges that the evidence presented at the termination hearing revealed that Dre is doing well in his grandmother's care and that, as such, there is no reason to terminate her parental rights and change the status quo. Moreover,

she argues that she did make some progress toward reunification early on in the proceedings and that her parental rights should not be terminated simply because she failed to complete a "drug evaluation." Brief for appellee/cross-appellant at 9. Kathleen's assertions on appeal have no merit. The evidence presented at the termination hearing revealed that Dre needs a permanent and stable home and that Kathleen has failed to make any significant progress towards reunification with Dre.

Dre has been attending counseling since September 2012. At the termination hearing, Dre's counselor, Sara Klein, testified that Dre needs permanency, stability, and consistency. She also testified that Kathleen is not currently capable of providing these things to Dre. Although there is a bond between Dre and Kathleen, the bond is more akin to that of a brother and a sister, rather than a mother and her son. When Kathleen attended a few of Dre's counseling sessions, Klein observed that she was often not very engaged with Dre and that she did not display much nurturing or affection for Dre. Klein testified that reunification with Kathleen was not in Dre's best interests. Klein opined that Dre appears to look to his relationship with his grandmother for safety and stability.

Klein also testified that Dre worries about Kathleen when she does not visit him on a regular basis. However, despite Kathleen's absence from Dre's everyday life, his behavior has improved since

his grandmother was appointed as his foster mother and regular caregiver.

We agree with Klein's opinion that Dre needs permanency and stability in his life. We also agree that Kathleen has proven herself unable to provide these things to Dre. Although Kathleen did cooperate with the Department and the county court at the inception of these proceedings, such cooperation quickly declined beginning in August 2012. Since that time, Kathleen has been unable to obtain employment, does not have stable housing, and has not sought out any treatment for her substance abuse problem. She failed to stay in regular contact with Dre and, basically, failed to put herself in a position to be an appropriate, effective parent to Dre.

Despite Kathleen's assertion in her brief on appeal that Dre is thriving under the status quo, we cannot agree. This court has repeatedly stated that a child cannot and should not be suspended in foster care or be made to await uncertain parental maturity. See *In re Interest of Anthony V.*, 12 Neb. App. 567, 680 N.W.2d 221 (2004). Although the current situation is working for Kathleen in that she is able to be some part of Dre's life while still not having to commit to being a full-time parent, this situation is not what is in Dre's best interests. He deserves more than to be indefinitely suspended in a foster care situation while Kathleen continues to work to improve her own circumstances.

Given all of the evidence presented at the termination hearing, we conclude that the county court did not err in finding that termination of Kathleen's parental rights is in Dre's best interests. Accordingly, we affirm the order of the county court terminating Kathleen's parental rights to her son, Dre.

V. CONCLUSION

Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Catalino's and Kathleen's parental rights. As such, we affirm the orders of the county court terminating their parental rights to their son, Dre.

AFFIRMED.