

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Elijah G. and)
Ezra G.,)
children under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Daryl H.,)
)
Appellant.)

No. A-13-790.

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED
MAY 16 2014

IRWIN, RIEDMANN, and BISHOP, Judges.

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

RIEDMANN, Judge.

INTRODUCTION

The separate juvenile court of Lancaster County terminated the parental rights of Daryl H. and Ruth G. to their minor children, Elijah G. and Ezra G. Daryl appeals, and Ruth cross-appeals. Based on our de novo review of the record, we affirm.

BACKGROUND

Daryl and Ruth are the biological parents of twin boys, Elijah and Ezra, born in Illinois in May 2008. Although they are not married, Daryl and Ruth resided together in Illinois and then relocated together to Lincoln, Nebraska in June 2009 to raise the boys as a family. However, they separated shortly thereafter in October 2009, and Ruth became the sole caregiver for the boys at that time.



Events leading to removal and adjudication.

On October 16, 2010, after becoming intoxicated and having a verbal argument with Daryl, Ruth called a crisis hotline and disclosed that she was considering killing herself and the children by carbon monoxide poisoning. The police were called and Ruth was voluntarily admitted into a mental health hospital that night, where she remained under evaluation for 3 days. Ruth explained to a Department of Health and Human Services worker that she had no support system and was having difficulties coping with the emotional and financial stress of being a single parent. Ruth admitted that alcohol was her only coping mechanism, and that she drank a 6-pack of alcohol every other day, sometimes more often.

Ruth reported that Daryl struggled with chronic alcohol and drug abuse as well, and had recently relapsed on cocaine within the past two weeks. According to Ruth, Daryl often drank alcohol in front of the children and was intoxicated while supervising them. Ruth reported that she and Daryl frequently engaged in serious verbal altercations in front of the boys, and that she had an active protection order against him in Illinois. Ruth agreed that it would be best for the children to be placed in temporary foster care so that she would have an opportunity to get her life back together.

Procedural History.

The juvenile court issued an ex parte temporary custody order on October 19, 2010. The children were removed from the home and placed in foster care with their daycare provider.

On October 20, 2010, the State filed a petition seeking to adjudicate the minor children under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013). The amended petition alleged three counts: (I) the minor children are in a situation dangerous to life or limb or injurious to their health or morals, in that Ruth reported having ongoing issues with alcohol abuse as of October 18, 2010; (II) the minor children lack proper parental care through no fault of Ruth, in that (a) Ruth reported having suicidal ideations that included killing herself and the minor children on October 16, 2010, and (b) Ruth has no support system and needs emotional, financial, and parenting support; and (III) the minor children lack proper parental care through the fault or habits of Daryl, in that (a) Daryl has a history of engaging in physical and/or verbal domestic altercations with Ruth in which he is the aggressor, and (b) Daryl suffers from dependence on alcohol and controlled substances, which impairs his ability to care for the children.

Ruth admitted the allegations in counts I and II, and the children were adjudicated as to those counts in November 2010. Daryl entered a denial to the allegations in count III, and a

formal adjudication hearing as to that count was held in March 2011. The court adjudicated the children based on the allegations of domestic violence in count III(a), but found insufficient evidence to prove Daryl's dependence on alcohol and controlled substances as alleged in count III(b).

Various disposition, review, and permanency hearings were held in 2011 and 2012. The court ordered that Ruth have supervised visitation, abstain from using alcohol and drugs, submit to random drug and alcohol testing, and participate in various substance abuse and psychological treatment programs, among other requirements.

The court ordered Daryl to have supervised visitation with the children, abstain from using alcohol and drugs, submit to random drug and alcohol testing, and participate in various domestic violence, anger management, and substance abuse treatment programs, among other requirements. Once Daryl was granted monitored and overnight visits, the court specifically ordered him not to allow Ruth to have any contact with the children, to report to DHHS any attempt by Ruth to make contact with the children, to cooperate with drop-ins, and to refrain from engaging in physical discipline of the children.

In July 2012, after the children had been in foster care for approximately 20 months, the Foster Care Review Board opined that reunification was not likely and recommended that the case

be referred for termination of parental rights and/or adoption. DHHS recommended changing the permanency plan to adoption in early August 2012, although the children's guardian ad litem disagreed, stating that it was in the children's best interests to allow Ruth additional time to correct the conditions that led to the adjudication.

In September 2012, the State filed a motion to terminate the parental rights of Ruth and Daryl pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 2008). The State alleged that Ruth and Daryl had substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection; that reasonable efforts had failed to correct the conditions leading to the adjudication; that the children had been in an out-of-home placement for 15 or more months of the most recent 22 months, and that termination was in the children's best interests.

The termination hearing was held in January, February, and March of 2013. Evidence was presented regarding the services provided and each parent's progress throughout the case.

Daryl's progress and participation in services.

Daryl was granted supervised visitation with the boys in late October 2010. For the first several months, Daryl participated in approximately 3 visits per month for 2 hours at a time. Daryl later increased his visitation schedule to once a

week, but he routinely cancelled visits and refused to participate in random drug testing due to his busy work schedule. He was convicted of aggravated driving under the influence in February 2011, for which he spent more than a week in jail.

Based upon a pretreatment assessment, Daryl began weekly therapy in May 2011 with Lynn Beideck, who diagnosed him with unspecified adjustment disorder and alcohol abuse. Beideck recommended that Daryl participate in weekly therapy for a minimum of 12 to 16 weeks, abstain from drugs and alcohol, and follow all requirements for reunification with his children.

Daryl entered a 24-week domestic violence program for men and completed a parenting class during the summer of 2011. By the end of July, Daryl had increased his visitation to 3 to 4 times per week and was consistently cooperating with random drug testing. Daryl provided appropriate meals, snacks, toys and activities for his children during visits, and maintained a suitable residence and a legal source of income.

Daryl successfully completed his recommended therapy with Beideck in the fall of 2011, although his case was kept open for additional supportive therapy as needed. Beideck reported that Daryl regularly attended weekly sessions, communicated readily, and was cooperative, open to suggestions, and engaged in self-

improvement. Beideck continued to counsel Daryl and supported him having placement of the children.

Based on Daryl's progress, the court moved his visitation from supervised to monitored and on November 3, 2011, the court ordered placement of the boys with Daryl.

Shortly thereafter, DHHS discovered that Daryl was allowing Ruth to have unauthorized contact with the boys at his apartment, and that he had consumed alcohol in the presence of his children. Daryl was allowed to retain placement of the boys at that time, with the understanding that he was not to consume alcohol or allow Ruth to have any further contact with the children. In addition, the frequency of drop-ins was increased and Daryl was required to resume therapy with Beideck.

On January 7, 2012, a drop-in worker stopped by Daryl's apartment and found Ruth hiding in the bath tub. As a result, the children were placed back in foster care.

The foster mother noticed significant behavioral changes in the boys following their placement with Daryl. They became aggressive, defiant, and began swearing despite being only 3 years old. Even more concerning, the boys reported to their foster mother that Daryl had hit them with a belt. Ezra also reported that his father had knives, and that Ezra wanted to get a knife and kill himself. At the termination hearing, Daryl admitted that he disciplined the boys with a belt but that it

never left a mark, was not done out of anger, and was not something he enjoyed.

In late January 2012, Daryl was terminated from therapy with Beideck due to his dishonesty about his continued use of alcohol. Beideck recommended that he undergo further assessment and possibly a higher level of treatment. The court ordered an updated substance abuse evaluation, which recommended that Daryl participate in outpatient alcohol treatment.

Daryl went back to fully supervised visits after the twins were removed from his care. However, in March 2012, the court suspended Daryl's visitation due to threatening remarks and behavior toward visitation workers, as well as continuing concerns about Daryl's use of profanity and physical discipline with the boys. It ordered Daryl to participate in anger management therapy.

Daryl successfully completed outpatient alcohol treatment and anger management therapy during the summer of 2012. Despite Daryl's compliance with these services, his visitation with the boys was never reinstated primarily because, by that point, the Foster Care Review Board did not think reunification was in the children's best interest and recommended termination of both parents' rights. Daryl has not had any contact with his children since March 2012.

At the termination hearing, Daryl testified that he believed it was in his children's best interests to be returned to him and that reunification could be achieved immediately. Daryl further testified that he would continue to have contact with Ruth, and that he wanted them to raise the children together as a family.

Ruth's progress and participation in services.

After being discharged from the hospital on October 19, 2010, Ruth immediately sought counseling and voluntarily underwent a pretreatment assessment. She was diagnosed with major depression disorder, alcohol abuse, and possible borderline personality disorder. It was recommended that she participate in 20 to 24 sessions of outpatient therapy with a dual diagnosis mental health and substance abuse therapist. Ruth began attending weekly therapy sessions and was also referred to a psychiatrist for medication assessment due to high levels of anxiety and depression.

She was granted supervised visitation with the boys 4 times per week, but was inconsistent in attending scheduled visits. In November 2010, she requested reduced visitation, and then asked to put visitation "on hold." As a result, she did not see her children for approximately 4 weeks. Ruth reported on several occasions that she did not want her children to return home and inquired about relinquishment.

Ruth's visits with the boys resumed in late December 2010. However, in mid-March, Ruth told her case worker that she felt adoption was in the children's best interests and that she wanted to relinquish her parental rights. She later changed her mind about relinquishment, after learning that the children could be reunified with Daryl instead of adopted.

Ruth's inconsistency in attending visits was detrimental to her children. The twins were angry and sad when Ruth cancelled visits. Testimony at trial indicated that inconsistent visitation can have a negative impact on the psychological development of young children. It can impact a child's sense of self-worth and ability to cope with trauma, and can cause them to develop mistrust of those that are supposed to love them. Despite Ruth's inconsistency in attending visits, the children were well-bonded with her. The evidence established that, for the most part, Ruth interacted well with her children during visits, utilized appropriate parenting and discipline techniques, and always provided appropriate meals and activities for them.

Ruth continued attending individual therapy sessions twice a week until the end of March 2011, when her therapist was laid off. Although she had already attended more than the recommended number of sessions at that point, her therapist recommended that she continue receiving treatment due to continued issues with

alcohol dependence and mood instability. The therapist's discharge summary indicated that Ruth was open and involved with the counseling process, but had difficulty accepting her diagnosis of alcohol dependence, and constantly fluctuated between the pre-contemplation, contemplation, and preparation stages of change. Over approximately 6 months of therapy from October 2010 to March 2011, Ruth's longest period of abstinence was 6 days.

In April 2011, Ruth was admitted to a local crisis center after police found her intoxicated and suicidal. Ruth had not been receiving consistent therapy at that time, however, as DHHS was having difficulty finding another provider that was agreeable to Ruth. Ruth rejected the first therapist because he was not a "good fit"; the next therapist required a psychological evaluation and Ruth refused. It was not until the court ordered a psychological evaluation and updated substance abuse evaluation that she finally agreed.

Dr. Rathburn conducted a psychological evaluation and diagnosed Ruth with major depressive disorder, alcohol dependence, and personality disorder. He recommended that Ruth participate in intensive outpatient therapy for individuals with co-occurring disorders, as well as group therapy and alcoholics anonymous. Dr. Rathburn testified that the presence of a personality disorder, in addition to chronic depression and

alcohol dependence, indicated that treatment would likely be long-term. According to Dr. Rathburn, Ruth required formal ongoing case management services, as she would likely have difficulty maintaining the necessary parenting services and supports on her own. Ruth began attending intensive outpatient treatment twice a week in mid-July 2011.

Ruth became homeless after being kicked out of her mother's house in July 2011. She again reported that she no longer wanted to have visitation, but later decided to reduce visits to 2 times per week rather than eliminate visits altogether. DHHS provided a parent partner to help Ruth obtain housing and employment. She obtained part-time employment during July, but remained homeless until September 2011 when she obtained temporary housing at a transitional living facility for women and children.

Ruth was minimally cooperative with court-ordered random drug and alcohol testing throughout this case. She refused to participate in any testing from August to December 2011, because she knew the kids were going to be placed with Daryl and she supported that placement. In fact, when Daryl obtained placement of the boys in November 2011, Ruth indicated that she no longer wanted visitation and did not participate in any visits for approximately one month. However, Ruth admitted that she was

spending time with the boys at Daryl's residence, in violation of the court order that her visits be fully supervised.

Starting in mid-December 2011, Ruth became concerned about the children's welfare due to Daryl's aggression, profanity, and use of physical discipline with the boys. She shared her concerns with the case worker, her attorney, her counselor, and eventually a State senator and ombudsman, but was not satisfied with the actions taken. Ruth explained that she did what was necessary to protect her children by continuing to check on them at Daryl's residence, even though she knew it was a violation of the court's orders.

In January 2012, Ruth began participating in various parenting and domestic violence programs, including individual therapy and a support group. Despite all of these supportive services, Ruth admitted in February 2012 that she was still drinking 1 to 2 times per week as a coping mechanism. She reported that she had been drinking for 20 years and her longest period of sobriety was only a few months.

Ruth was cited for disturbing the peace in January 2012 after she repeatedly contacted Daryl's therapist, and left threatening and inappropriate voice messages. In April, Ruth was asked to move out of the transitional living facility where she had been staying due to an altercation with another resident. She obtained a voucher for section 8 housing in May, but was

unable to move in to her new apartment until July. She reported that she was staying with friends in the interim.

In May 2012, Ruth was arrested for driving under the influence, refusal to submit to a chemical test, driving under suspension, and no proof of insurance. She was successfully discharged from outpatient alcohol treatment at the end of June; however, her therapist was unaware of Ruth's recent DUI at the time of discharge, and testified that she would have recommended further treatment if she had known about the DUI.

In August 2012, upon learning that the State was seeking termination of her parental rights, Ruth called her case worker and left threatening voice messages. Thereafter, Ruth refused to speak with the case worker or participate in any further drug and alcohol testing. Even when Ruth was participating in testing, she only complied with approximately 60 percent of the required tests throughout the pendency of this case.

At the time of the termination hearing, Ruth was serving a 90-day jail sentence for her DUI conviction. Ruth admitted that she was currently unable to care for her children due to her incarceration, but testified that she wanted her children to be returned to her. Ruth testified that she would like to raise her children as a family with Daryl. If the boys were returned to Daryl, Ruth admitted that she would not be able to refrain from having contact with Daryl or the boys.

Impact of Daryl's and Ruth's continued relationship.

Daryl's and Ruth's relationship has a well-established pattern of alcohol abuse and domestic violence. Before they moved to Nebraska, Daryl was convicted of aggravated battery in Illinois for shoving Ruth to the ground and choking her while she was pregnant with the twins. Ruth obtained a protection order against Daryl at that time, which was active until May 2012. The couple moved together to Lincoln, Nebraska in June 2009, but separated just 4 months later. The domestic disputes continued even after they had separated, often times in front of the children and almost always involving alcohol. In April 2012, police were called to Daryl's residence due to a domestic altercation with Ruth. Ruth was arrested and charged with vandalism and domestic assault as a result of this incident, although the charges were later dismissed.

Despite their tumultuous history, Ruth began spending more time with Daryl during the summer and fall of 2012. Ruth testified that Daryl was not nearly as aggressive as he had been, and that he was better able to communicate without getting angry after completing anger management therapy. Ruth subsequently moved in with Daryl in December 2012. There have been no reported incidents of domestic violence since the incident in April 2012.

Order terminating parental rights.

The juvenile court issued a written order terminating the parental rights of Daryl and Ruth on August 14, 2013. It found clear and convincing evidence that Daryl and Ruth had substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection, that reasonable efforts had failed to correct the conditions leading to the adjudication, that the children had been in an out-of-home placement for 15 or more months of the most recent 22 months, and that termination was in the children's best interests.

ASSIGNMENTS OF ERROR

On appeal, Daryl assigns that the State failed to prove by clear and convincing evidence that (1) Daryl had substantially and continuously or repeatedly neglected and refused to give the minor children necessary parental care and protection, (2) reasonable efforts had failed to correct the conditions leading to the adjudication, and (3) termination of Daryl's parental rights is in the best interests of the minor children.

On cross-appeal, Ruth assigns that the juvenile court erred in (1) terminating her parental rights, and (2) finding that the State presented sufficient evidence to prove that (a) Ruth failed to engage in meaningful alcohol treatment and therapy, (b) Ruth never truly addressed her mental health issues,

(c) Ruth delayed and undermined reunification efforts by rejecting proposed therapists, (d) the dynamics of Daryl and Ruth are such that ongoing disruptions are highly likely to continue, (e) DHHS made every reasonable effort to assist Ruth in achieving adequate stability, (f) Ruth substantially and continuously or repeatedly neglected to give the minor children necessary parental care and protection, and (g) termination of Ruth's parental rights is in the best interests of the minor children.

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 Nicole M.*, 287 Neb. 685, ___ N.W.2d ___ (2014). 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.*

ANALYSIS

Under Neb. Rev. Stat. § 43-292, in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in the section have been satisfied and that termination is in the child's best interests. *In re Interest of Nicole M.*, *supra*. In addition, because a parent's right to raise his or her child is

constitutionally protected, the State must also show that the parent is unfit. *See id.*

Statutory grounds.

The bases for termination of parental rights are codified in § 43-292. *In re Interest of Sir Messiah T. et al*, 279 Neb. 900, 782 N.W.2d 320 (2010). 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. *Id.*

Here, the juvenile court found clear and convincing evidence to support termination under subsections (2), (6), and (7) of the statute. Neither parent challenges the juvenile court's findings under subsection (7) that the children had been in an out-of-home placement for 15 or more months of the most recent 22 months. The record reflects that the children were removed from the home on October 19, 2010, and remained in foster care for all but 2 months during the pendency of this case. When the State filed for termination on September 6, 2012, the children had been in an out-of-home placement for approximately 20 months of the most recent 22 months. Thus, we conclude that the record contains clear and convincing evidence to support termination under subsection (7), and affirm the juvenile court's finding on that ground.

If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010). Therefore, we need not address the juvenile court's findings under § 43-292(2) or (6), except as those arguments relate to the issue of best interests. *Best interests and parental unfitness.*

In addition to proving a statutory ground, the State must also show that termination is in the best interests of the child. See, Neb. Rev. Stat. § 43-292. The best interests standard is subject to the overriding recognition that the relationship between parent and child is constitutionally protected. *In re Interest of Xavier*, 274 Neb. 331, 740 N.W.2d 13 (2007). There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. *In re Interest of Nicole M., supra.* 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 a parent is unfit. *Id.*

The fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate

parental unfitness. *Id.* Instead, the placement of a child outside the home for 15 or more of the most recent 22 months under § 43-292(7) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum degree of fitness. *Id.* Regardless of the length of time a child is placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody. *Id.*

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. *Id.* 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.* Thus, we will analyze them together.

The evidence presented at the termination hearing demonstrates that Ruth is unable to provide a safe and stable home for her children. Despite having ongoing case management, alcohol treatment, mental health therapy, and various parenting and community support services for the past two years, Ruth has been unable to maintain adequate stability and has made little

progress in rehabilitating herself. Ruth has been unsuccessful in addressing her alcohol dependence, and has continued to drink throughout the pendency of this case. She has been minimally cooperative with court-ordered drug and alcohol testing, completing only 60 percent of the required tests. Her alcohol abuse has resulted in repeated contacts with law enforcement for domestic disputes, criminal activity, and suicidal behavior. At the time of the termination hearing, Ruth was incarcerated for an alcohol-related offense, without her own residence or means of support, and in need of additional alcohol treatment. Despite these circumstances, Ruth refuses to acknowledge that her use of alcohol is problematic.

Although Ruth has participated in many services and has made some progress, DHHS has never been in a position to recommend monitored visitation for her, let alone reunification. Given the relatively minimal progress Ruth has made since the case has been open, it is highly unlikely that she would be able to correct the conditions leading to the adjudication within a reasonable amount of time if reunification efforts were continued.

Daryl also participated in many court-ordered services but has not been sufficiently rehabilitated to a minimum level of parental fitness. During the short period of time that the children were placed with Daryl, he blatantly disregarded court

orders by drinking alcohol in the presence of the children and allowing Ruth to have unauthorized contact with the children. After being confronted with these violations and given a chance to correct them, Daryl repeated the same behavior within a very short period of time. Daryl knew he was violating court orders by allowing Ruth to have unauthorized access to the children, but decided to do so anyway out of "compassion" for Ruth. This demonstrates his unwillingness to place the children's needs first.

Daryl's recent decision to allow Ruth to move in with him, despite their volatile relationship and history of domestic violence and alcohol abuse, does not demonstrate stability or responsible decision-making. Daryl testified that he would continue to have contact with Ruth and that they planned to live together as a family. Thus, it appears unlikely that Daryl would be willing or able to break ties with Ruth if he were reunited with the children, and the cycle of alcohol abuse and domestic violence would almost certainly continue, placing the children in a situation of perpetual instability. Furthermore, Daryl's use of physical discipline on three-and-a-half-year-old children is very concerning, especially given his history of assaultive behavior and anger management issues.

Both Daryl and Ruth have made some progress, but too much time has passed with insufficient progress to warrant continued

reunification efforts at this point in the case. At the time of the termination hearing, the children were 4 years old and had spent approximately half of their lives in foster care. Although the children are bonded with both of their parents, they need stability and permanency that Daryl and Ruth are unable to provide. The best interests of the children require termination of parental rights where a parent is unable or unwilling to rehabilitate themselves within a reasonable time. *In re Interest of Emerald C. et al.*, 19 Neb. App. 608, 810 N.W.2d 750 (2012). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.*

Elijah and Ezra have thrived in their current foster placement. The case worker testified that she did not believe permanency could be achieved in the near future with either Daryl or Ruth, and that termination of their parental rights would be in the best interests of the children.

Based on our de novo review of the record, we find clear and convincing evidence that the personal deficiencies of Daryl and Ruth have prevented them from performing reasonable parental obligations and will likely prevent them from doing so in the future, to the detriment of the children's well-being. Accordingly, the presumption of parental fitness for both Daryl and Ruth has been sufficiently rebutted. We also find clear and

convincing evidence that termination of their parental rights is in the children's best interests.

We decline to specifically address Ruth's remaining assignments of error regarding certain factual findings made by the juvenile court, as we have reviewed the record de novo and have reached our own factual conclusions, as set forth above, which support the juvenile court's order.

CONCLUSION

The juvenile court did not err in terminating Daryl's and Ruth's parental rights to their minor children. We therefore affirm.

AFFIRMED.