

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Danial B.,
child under 18 years of age.

State of Nebraska,

Appellee,

v.

Shawna B.,

Appellant.

No. A-13-0066

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

AUG 19 2013

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

INBODY, Chief Judge.

INTRODUCTION

Shawna B., natural mother of Danial B., appeals the order of the Douglas County Separate Juvenile Court terminating her parental rights pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 2008). She contends that the juvenile court erred in terminating her parental rights pursuant to subsections (2) and (6) and finding that termination was in Danial B.'s best interests. Although the juvenile case involved multiple children at the juvenile court level, this appeal involves only one child, Danial; therefore, in this opinion, we include only facts and analysis relating to Danial.



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STATEMENT OF FACTS

Shawna is Danial's biological mother. He was born on January 14, 2003. In late October 2009, when Danial was 7 years old, he was removed from Shawna's home after law enforcement officials observed the home to be in a filthy condition. Later that year, Danial was adjudicated as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the faults or habits of Shawna in that on October 29, 2009, law enforcement officials observed the family home to be in a filthy, unwholesome condition and, due to these allegations, Danial was at risk for harm. Danial was placed back in Shawna's home in June 2010, but removed again in October 2010. Since that time, Danial has remained in foster care.

In January 2012, the State filed a motion to terminate Shawna's parental rights pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) and alleged that termination was in Danial's best interests. The termination hearing was held on dates in July, August, and November 2012.

The State's first witness was Otto Burton, the first child protective services worker assigned to Shawna's case after Danial was removed from Shawna's home in late October 2009. Burton worked with Shawna from November 2009 to November 2010. At his initial meeting with Shawna in November 2009, Burton offered Shawna the following services: a pre-treatment

assessment including a parenting assessment, Title XX services, individual and family therapy, intensive family preservation services (IFP), and family support services. According to Burton, he set up IFP services to allow Shawna the opportunity to work on issues at a more rapid pace within the family home so that Danial might return home more quickly.

Danial was returned to Shawna's home in June 2010; Burton's reasoning to recommend placing Danial back with Shawna was that Shawna was demonstrating the ability to keep her home clean, she was participating in services, Danial was eager to return home, and Burton felt Danial would be safe in the home with home-based services in place. Shawna had also informed Burton that she was employed at Kwik Shop in the spring of 2010, which was verified by Burton; however, Shawna's employment at Kwik Shop lasted a month at the longest. After Danial was returned to Shawna's home, Burton employed home-based services for Shawna including a family support worker and IFP services.

Despite the fact that Shawna was complying with services for the most part, Burton testified that part of the time, Shawna did not comply with the services that were offered. For example, Shawna missed some sessions with the family support worker because she was sleeping or because of scheduling conflicts. Burton was also concerned about Shawna's housekeeping because she would do the minimal amount of cleaning in the home,

which Burton described as cleaning only the portion of the home where the team met, while leaving other portions of the home, such as the bathroom and the bedrooms, unkempt.

Burton's concerns continued to develop during the time period from June to October 2010. During this period, Burton visited Shawna's home at various times and began to develop concerns for Danial's well-being because Shawna's decisions were not in his best interests. Burton gave an example that Shawna took Danial out of town for the weekend and did not inform him, so he was not able to locate them for a while. Shawna also was not taking responsibility for failing to keep the house clean.

Sometime in August and September 2010, Shawna and her spouse separated, Shawna made allegations of domestic violence, and she and Danial moved into a Catholic Charities shelter. Shawna and Danial had their own room at the shelter and Burton visited "quite often" to be sure Danial was safe. During the time that Shawna was staying at the shelter, Burton received numerous telephone calls from the shelter with information that Shawna was not keeping her room clean, there was an odor coming from Shawna's room, and that Shawna was leaving Danial alone at the shelter. Burton observed Shawna's room to be unkempt and trash not emptied. In October 2010, Danial was removed from Shawna's care again. Shawna left the shelter and stayed with various friends for a while, then moved into another shelter,

the Lydia House. Burton testified that during his time on the case, Shawna's visits with Danial were both supervised and semi-supervised. Burton testified that when he left the case in November 2010, Shawna could not maintain progress to resolve the issues that brought her into the court system.

The State's second witness was Melanie Auxier who replaced Burton as ongoing worker and worked with Shawna from December 2010 to October 2011. The services that were in place in December 2010 to assist Shawna included: family support services, semi-supervised and overnight visits, the Journey to Work program at the Lydia House, parenting and domestic violence classes, and individual and family therapy. Shawna's failure to utilize services became a concern for Auxier in April 2011. At that time, Shawna had been suspended from the Lydia House for 30 days for noncompliance for not keeping her room to the expected standards and staff at the Lydia House informed Auxier that Shawna left and did not return. In May 2011, Auxier was able to locate Shawna at a hotel where she was residing with her boyfriend. At that point in time, Shawna was not attending therapy, although there was a payment issue that interfered for a short time, and she was not participating in family support services. After the May contact, Shawna failed to respond to Auxier's attempts to contact her until the end of July 2011. Although Shawna was participating in visitation, concerns about

Shawna at this time included her lapse in participation in therapy and other services and her failure to take her medication, as ordered by the Court, because Shawna was pregnant.

In August 2011, Shawna moved into an apartment with someone she had met through Lydia House and, although there were cleanliness concerns, the apartment was ultimately approved for visits. However, Shawna never provided any documentation that she was on the lease for the apartment. Further, Shawna never provided Auxier with any documentation or information about a legal source of income.

According to Auxier, Shawna's visitation never became more liberal than semi-supervised and overnights during Auxier's time on the case and in August 2011, the visitations went back to supervised due to several concerns noted during the semi-supervised visits such as: there were times that Danial did not have an appropriate place to spend the night when Shawna was residing at a hotel with her boyfriend, who was also an active child protective services case; there were times when the visitation worker was unable to contact Shawna during visitation because Shawna did not have a cellular telephone; Shawna was arrested during a June 2011 visitation with Danial; Shawna brought unauthorized people to the visits with Danial; and that Shawna did not do much active parenting or discipline during

visits and Danial was not receptive to the little parenting and discipline she did do.

At the time that Auxier left the case in October 2011, she did not feel that Shawna had made sufficient progress which she attributed to Shawna's history of doing well and then backtracking. During Auxier's time on the case, from December 2010 until October 2011, Danial had remained in foster care and at that time, he had spent a total of 18 out of 24 months in foster care. Auxier testified that this was concerning due to both the amount of time that Danial had spent in foster care due to his age and the fact that children of all ages, especially Danial's age, need permanency. At the time that Auxier left the case in October 2011, it was her opinion that termination of Shawna's parental rights was in Danial's best interests based upon her concerns regarding Shawna's lack of progress, the length of time that Danial had been in foster care, and choices that Shawna had been making including leaving the Lydia House and living with, and becoming pregnant by, an individual who was involved with child protective services.

The third witness that testified for the State was Jessie Hansen who took over for Auxier when she left the case in October 2011. Hansen was assigned as a family permanency specialist on Shawna's case from October 2011 until May 2012. Hansen testified that Shawna needed to participate in or

complete a number of court-ordered services including domestic violence classes, individual therapy, visitation, and family support which was to include housing, employment, and any other community resources that Shawna might need. In October 2011, Shawna's visits with Danial were fully supervised and occurring two to three times per week, and Shawna was participating in individual therapy. Additionally, during the time that Hansen was on the case, family team meetings occurred on a consistent monthly basis.

In November 2011, Shawna informed Hansen that she had been employed at Ozark Meats for 3 months. Shawna reported that she maintained this job throughout Hansen's time on the case up until July 2012. However, despite repeated requests by Hansen, Shawna only provided her with one paycheck stub from December 2011. Shawna never provided her with any documentation regarding a lease of the apartment where she was staying.

In November 2011, Hansen was concerned about Shawna's lack of participation in services, the length of time that Danial had been in foster care, and continued concerns of Shawna bringing inappropriate adults around Danial. However, Hansen admitted that Shawna was consistently attending visitation and individual and family therapy and that Shawna's therapist reported that Shawna was making progress and that she was going to decrease individual therapy to once every other week.

According to Hansen, from October 2011 to May 2012, Shawna's visitation was never liberalized from supervised visits due to continued concerns regarding inappropriate adults being present at visits and concerns regarding Shawna's ability to provide for Danial during visits, such as lack of clothing for Danial to change into in case of an accident. According to Hansen, during the February 2012 family team meeting they discussed that in January 2012, the juvenile court ordered that no reasonable efforts were required and services provided to Shawna would be discontinuing or tapering off at that point. Hansen did not feel that Shawna was making progress because Shawna did not provide documentation that she had completed any services other than individual therapy and supervised visitation and expressed concern about Shawna's progress due to the length of time Danial had been in foster care and his need for permanency. After the juvenile court order, Shawna stopped attending therapy, even though she had been referred to community resources by her individual therapist and Hansen, so that Shawna would be able to continue therapy. Also during this time, Shawna reported to Hansen that she was not taking her psychotropic medication after giving birth in January 2012 upon recommendation by a midwife and Shawna had not reported that she had resumed taking her medication. The only service still in place following the juvenile court's January 2012 order was

supervised visitation with Danial, which was occurring two to three times per week. After March 2012, Hansen did not have any information on where Shawna was residing, whether or not she was employed, or whether she had resumed individual therapy.

Hansen testified that during her time on the case, from October 2011 through May 2012, Shawna did not make sufficient progress due to the amount of time that Danial was in foster care, Shawna failed to complete domestic violence classes, she allowed inappropriate adults to be around Danial, and she failed to complete or follow through with family support services. Hansen further testified that Shawna's failure to complete family support was a concern as the purpose of it was to help Shawna to provide for Danial with food, clothing, shelter, maintaining housing and employment, and parenting skills. Further, during the entire time Hansen worked with Shawna, Shawna was not able to demonstrate consistency or permanency for Danial and, due to Shawna's lack of participation, all of the services offered to try and help her to be consistent and maintain stability were unsuccessful and no other services could have been provided that would have allowed reunification to occur. Based upon her education, experience, training, and work with Shawna and Danial, Hansen testified that it was her opinion that termination of Shawna's parental rights would be in Danial's best interests due to his age, the amount of time that

he had been in foster care, and the fact that he needed a permanent and stable home environment.

The fourth witness for the State was Ann Saniuk, a family advocate with Children's Square USA. Saniuk supervised visits between Shawna and Danial from August to November 2011. Saniuk worked with Shawna on parenting assistance, primarily discipline such as using time-outs appropriately and following through with time-outs. According to Saniuk, Shawna's attendance at visits was consistent, her residence was clean when visits occurred there, Shawna was fairly consistent with discipline, there was affection between Shawna and Danial, they did age-appropriate things, Shawna provided food on the visits, and Shawna was teaching Danial to pick up after himself, helped him with his homework, and made sure Danial was safe at visits. However, there were times when half of a 2- to 4-hour visit was devoted to time-outs or disciplinary issues because the disciplinary techniques were not affecting Danial's behaviors and his behaviors were escalating to the point where he was throwing things or hitting objects. Saniuk also had concerns regarding Shawna's housing and employment situation because there were times that Shawna's visits took place in the community instead of Shawna's home because her residence had not been approved for visits.

The fifth witness for the State was Caroline Thompson, a family support worker and visitation supervisor with Child Connect. Thompson supervised visitation for Shawna's case from September 2010 to August 2011. The visits occurred approximately three times per week for 2 to 3 hours per visit. Thompson testified that she assisted Shawna in areas of parenting skills and discipline because Danial did not listen to Shawna very well. During the time that Thompson worked with Shawna, she did see improvements in Shawna's parenting in that Danial started listening to her and accepting consequences and started eating healthier foods. During the visits, Shawna consistently allowed unauthorized people to attend the visits, which was a safety concern because no background checks on those individuals had been performed. During the time Thompson worked with Shawna, Shawna had four different residences. Thompson testified that Shawna had not achieved her goals for family support and, although Thompson assisted Shawna in obtaining employment applications, Shawna was never employed during Thompson's time on the case.

The sixth witness for the State was Nicki Barber, a family permanency specialist, who took over the case from Hansen in June 2012. At the time Barber took over the case, the juvenile court had already ordered no reasonable efforts, so no family support services were being offered to Shawna; as a result,

Barber's role primarily involved Danial and the foster parent. Barber testified that she had not been contacted by Shawna since July 2012, so she had no information about Shawna's current residence, employment, or whether Shawna is taking her prescribed medication, and Shawna had not requested any services. In a brief July meeting, Shawna provided Barber with a rent receipt for November 2011 written on the back of a business card; gave her what was supposed to be a work schedule from Jiffy Lube, but the name of the company was not on the schedule; and provided her with a certificate of completion for a 4-week domestic violence class that she had completed in April 2012.

Barber testified that she met with Danial privately every month and she also met with Danial's foster mother monthly. Danial was being provided therapy along with other ongoing services that might need. Barber testified that based upon the information that she had reviewed as well as the information that she had gathered during the time that she had spent on the case, in her opinion, termination of Shawna's parental rights was in Danial's best interests because, over the course of time that the case had been open, Shawna's progress had been slow and piecemeal, and with the length of time the case had been open, based upon what she knew from Danial and his actions, he was in need of consistency and permanency and Shawna was unable to provide that for Danial.

Carrie Anderson, previously known as Carrie Fick, was called as a witness on Shawna's behalf. Anderson, a licensed mental health practitioner and licensed marriage and family therapist, was employed with OMNI Behavioral Health from April 2010 to March 2012, as a home-based therapist. Her duties as a home-based therapist were to provide individual and family counseling in a community-based environment, generally the home, document transactions and provide treatment planning and coordination of care for clients. While employed with OMNI, Anderson provided individual and family therapy for Shawna beginning in May 2010. In the time that she worked with Shawna, Anderson saw positive changes in Shawna's parenting skills including consistency in her interactions with Danial, the development of skills to communicate on Danial's level, empathy, and the use of warnings and consequences for inappropriate behavior.

Barbara Jackson was the second witness called on Shawna's behalf. Jackson supervised visitations with Shawna and Danial from December 2011 through May 2012. Jackson testified that when the visits were at Shawna's residence, the apartment was clean and there were positive interactions between Shawna and Danial and Danial enjoyed his time with Shawna. Shawna would work with Danial on his homework, making dinner and eating together, playing video games or watching movies. According to Jackson,

Danial was having difficulty at school, so keeping Danial focused on his homework was a struggle so Shawna had to work hard to keep him focused. Shawna and Danial would say that "I love you" and "I love you more" at the end of the visits.

Shawna was the final witness, testifying on her own behalf. She testified that she has lived in her current apartment since October 2011, that she was employed at Ozark Meats from September 2011 to July 2012, and that she has been employed at Jiffy Lube since July 2012. Shawna testified that she has taken a parenting class and a domestic violence class, she has participated in individual and family therapy, she took a psychological evaluation, and that she took her medication until her midwife told her that she did not have to continue taking it. She testified that her relationship with Danial is strong, that she had turned her life around and she was able to take care of Danial now "the way that I wanted to." Shawna testified that she loves Danial "more than anything," she wants Danial to live with her, and she wants what is best for him, which is to be with her.

The juvenile court terminated Shawna's parental rights pursuant to § 43-247(2), (6), and (7) and found that termination of Shawna's parental rights was in Danial's best interests.

ASSIGNMENTS OF ERROR

Consolidated and restated, Shawna assigns as error that the juvenile court erred in terminating her parental rights pursuant to § 43-292(2) and (6) and in finding that termination of her parental rights was in Danial's best interests.

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 Kendra M.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). 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

Statutory Basis for Termination of Parental Rights.

In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Kendra M.*, *supra*. The juvenile court found by clear and convincing evidence that three of the statutory grounds existed, including the circumstance described in § 43-292(7), i.e., that "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months."

The evidence adduced at the termination hearing established that Danial was removed from Shawna's care in late October 2009. Danial was returned home from June to October 2010, at which time he was again removed from Shawna's home. He has remained in out-of home placement up until the termination hearing which was held on dates in July, August, and November 2012. Thus, at the time of the termination hearings held in 2012, Danial had only been in Shawna's care for a total of 5 months since late October 2009.

Only one statutory ground for termination need be proved in order for parental rights to be terminated. *In re Kendra M., supra.* The evidence reflects that Danial was in foster care for the entire 22 months prior to the filing of the petition to terminate Shawna's parental rights in January 2013. Because we conclude that there is clear and convincing evidence that Danial has been in an out-of-home placement for 15 or more months of the most recent 22 months, we need not discuss Shawna's assignments of error regarding the other statutory grounds which the juvenile court found to exist, and we proceed to the issues of best interests and parental unfitness.

Best Interests and Parental Unfitness.

In addition to proving a statutory ground for termination, the State must show that termination is in the best interests of the child. *In re Kendra M., supra; In re Ryder J., 283 Neb. 318,*

809 N.W.2d 255 (2012). 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. *In re Kendra M., supra*. 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 Kendra 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 the parent is unfit. Although the term "unfitness" is not expressly used in § 43-292, the concept is generally encompassed by the fault and neglect subsections of that statute and through a determination of the child's best interests. *In re Kendra M., supra*. In the context of the constitutionally protected relationship between a parent and a child, the Nebraska Supreme Court has stated, "'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 has caused, or probably will result in, detriment to a child's well-being.'" *In re Kendra M.*, 283 Neb. 1014, 1033-34, 814 N.W.2d 747, 761 (2012) quoting *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992). The best interests analysis and the parental fitness analysis are fact-intensive inquiries and, although they are separate

inquiries, each examines essentially the same underlying facts as the other. *In re Kendra M., supra.*

Shawna contends that she has turned her life around and she is ready to parent Danial. Shawna testified that she has had an apartment since October 2011, and that she has been consistently employed since September 2011. She testified that she has attended parenting classes and provided proof of attendance at a domestic violence class. She attended individual and family therapy and visitations with Danial.

Despite these gains, there have been corresponding setbacks. Danial was initially removed from Shawna's care in October 2009 due to cleanliness issues in the home. After Danial had been returned to Shawna's care in June 2010, he was removed for a second time 6 months later in October 2010 due to cleanliness issues, even after services had been put in place to assist with this issue. Shawna has admitted that she has not been taking her psychotropic medication because she says her midwife told her that she did not need to take it; there is no evidence that a doctor has authorized Shawna to discontinue her medication and she continued to be under court order to take the medication.

Numerous services have been provided to Shawna throughout the nearly 3 years that this case has been pending up through the last termination hearing; however, Shawna has still has not

placed herself in a position to parent Danial full-time. Further, although Shawna did consistently exercise supervised visitation with Danial, she failed to correct the circumstance of allowing inappropriate adults to attend the visits. Further, although Shawna's visits with Danial were semi-supervised at one point during the case, at the end, the visits were back to being fully supervised.

When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.* Shawna has been given sufficient time to place herself in a position to parent Danial and she has been either unable or unwilling to do so, despite the services provided to her, all of the services offered to try and help her to be consistent and maintain stability were unsuccessful and no other services could have been provided that would have allowed reunification to occur. Danial needs stability and permanency. All of the facts taken together in this case show that Shawna is not a fit parent for Danial and that termination of Shawna's parental rights is in Danial's best interests.

CONCLUSION

In our de novo review of the record, we conclude that sufficient statutory grounds existed for the juvenile court to terminate Shawna's parental rights to Danial pursuant to § 43-292(7). We also conclude that Shawna is an unfit parent and that terminating Shawna's parental rights to Danial was in Danial's best interests. Therefore, we affirm the judgment of the juvenile court.

AFFIRMED.