

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF DENASJHA P.

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IN RE INTEREST OF DENASJHA P., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

JIMMATA V., APPELLANT.

IN RE INTEREST OF ONYASHY A. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

JIMMATA V., APPELLANT.

Filed January 3, 2012. Nos. A-10-1233, A-10-1234.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge.

Susan L. Kirchmann for appellant.

Joe Kelly, Lancaster County Attorney, Christopher M. Turner, and James J. Krauer,
Senior Certified Law Student, for appellee.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jimmatta V. appeals from the orders of the separate juvenile court of Lancaster County which terminated her parental rights to her five children: DeNasjha P., Onyashy A., Josezier H., Dominique S., and Kavasea S. On appeal, Jimmatta challenges the juvenile court's finding that termination of her parental rights is in the children's best interests. Jimmatta also argues that the juvenile court erred in considering evidence demonstrating that she was responsible for Onyashy's broken arm because she was acquitted of criminal child abuse charges after a jury trial. Upon our de novo review of the record, we conclude that the juvenile court did not err in

considering evidence that Jimmatta was responsible for Onyashy's injuries and we find that the State presented sufficient evidence to warrant termination of Jimmatta's parental rights. As such, we affirm the orders of the juvenile court terminating Jimmatta's parental rights.

II. BACKGROUND

The appeals in cases Nos. A-10-1233 and A-10-1234 involve five children: DeNasjha, born in October 2009; Onyashy, born in October 2007; Josezier, born in May 2005; Dominique, born in January 2003; and Kavasea, born in April 2002. Jimmatta is the children's biological mother. The children's biological fathers are not parties to this appeal, and their involvement in the juvenile court proceedings will not be discussed further.

In February 2008, Jimmatta's four oldest children were removed from her care after doctors discovered that 4-month-old Onyashy had a broken arm and Jimmatta could not adequately explain the cause of the injury. Doctors believed that the type of injury Onyashy suffered was consistent with child abuse. A few days after the children's removal, on March 3, 2008, the State filed a petition with the juvenile court, alleging that Onyashy, Josezier, Dominique, and Kavasea were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006).

The petition alleged that the children were within the meaning of § 43-247(3)(a) due to the injury to Onyashy's arm being consistent with child abuse and due to Jimmatta's failure to seek appropriate medical treatment for Onyashy. The juvenile court entered an order, placing the children in the immediate custody of the Department of Health and Human Services (the Department) and indicated that placement of the children was not to include Jimmatta's home. Onyashy, Josezier, Dominique, and Kavasea have remained in the custody of the Department in an out-of-home placement since the entry of that order on March 3, 2008.

On May 15, 2008, an adjudication hearing was held. At the hearing, Jimmatta entered a plea of no contest to the allegations in the State's petition. As a result of her plea, the children were adjudicated pursuant to § 43-247(3)(a).

Further hearings were held in June and September 2008 and January and May 2009. At these hearings, Jimmatta was ordered by the juvenile court to participate in a rehabilitation plan. Specifically, Jimmatta was ordered to participate in a psychological evaluation and individual therapy, participate in parenting education, take her medication as prescribed, obtain and maintain a safe and stable residence, and obtain and maintain a legal means of supporting herself and her children. In addition to these orders, Jimmatta was ordered to participate in therapeutic and supervised visitation with the children.

On August 12, 2009, the State filed a motion for termination of Jimmatta's parental rights to Onyashy, Josezier, Dominique, and Kavasea. The State alleged that termination of her parental rights was warranted pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 2008) because reasonable efforts to preserve and reunify the family failed to correct the conditions that led to the determination that the children were within the meaning of § 43-247(3)(a) and § 43-292(7) because the children had been in an out-of-home placement for 15 or more months of the most recent 22 months. In addition, the State alleged that termination of Jimmatta's parental rights was in the best interests of the children.

A few months after the motion for termination of parental rights was filed, Jimmatta gave birth to her fifth child, DeNasjha. Because of Jimmatta's ongoing involvement with the juvenile court, DeNasjha was removed from Jimmatta's care immediately after her birth. On October 5, 2009, the State filed a petition alleging that DeNasjha was a child within the meaning of § 43-247(3)(a).

On January 7, 2010, the State filed a motion to terminate Jimmatta's parental rights to DeNasjha and an amended motion to terminate her parental rights to Onyashy, Josezier, Dominique, and Kavasea. In the amended motion to terminate Jimmatta's parental rights to her four oldest children, the State alleged that termination of her parental rights was warranted pursuant to § 43-292(2) because she had substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection; § 43-292(6) because reasonable efforts to preserve and reunify the family failed to correct the conditions that led to the determination that the children were within the meaning of § 43-247(3)(a); § 43-292(7) because the children had been in an out-of-home placement for 15 or more months of the most recent 22 months; § 43-292(8) because Jimmatta had inflicted serious bodily injury upon Onyashy, by other than accidental means; § 43-292(9) because Jimmatta had subjected Onyashy to aggravated circumstances, including torture or chronic abuse; and § 43-292(10)(d) because Jimmatta committed a felony assault that resulted in serious bodily injury to Onyashy. In addition, the State alleged that termination of Jimmatta's parental rights was in the children's best interests. Similarly, in the motion to terminate Jimmatta's parental rights to DeNasjha, the State alleged that termination of Jimmatta's parental rights was warranted pursuant to § 43-292(2), (9), and (10)(d) and that termination was in DeNasjha's best interests.

On March 15, 2010, a hearing was held on the State's amended motion to terminate Jimmatta's parental rights to Onyashy, Josezier, Dominique, and Kavasea, on the State's petition alleging that DeNasjha was a child within the meaning of § 43-247(3)(a) and on the State's motion to terminate Jimmatta's parental rights to DeNasjha. This lengthy hearing continued on various dates in March, April, and May 2010.

We have reviewed the evidence presented at this hearing in its entirety, including the more than 1,400-page bill of exceptions and each of the 89 exhibits presented by the parties. However, 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 termination hearing, the juvenile court entered two orders. The first order concerned Onyashy, Josezier, Dominique, and Kavasea. In that order, the court found that the State proved by clear and convincing evidence that grounds for termination of Jimmatta's parental rights existed under § 43-292(2), (6), (7), (8), (9), and (10)(d). As a part of this order, the juvenile court indicated its finding that Jimmatta was responsible for Onyashy's broken arm. The court also found that termination of Jimmatta's parental rights was in the children's best interests. The court terminated Jimmatta's parental rights to Onyashy, Josezier, Dominique, and Kavasea.

The second order entered by the juvenile court concerned Jimmatta's youngest child, DeNasjha. In that order, the juvenile court found that DeNasjha is a child within the meaning of § 43-247(3)(a). In addition, the court found that the State proved by clear and convincing

evidence that grounds for termination of Jimmatta's parental rights existed under § 43-292(2), (9), and (10)(d) and that termination of Jimmatta's parental rights was in DeNasjha's best interests. The court terminated Jimmatta's parental rights to DeNasjha.

Jimmatta appeals from the juvenile court's orders here.

III. ASSIGNMENTS OF ERROR

On appeal, Jimmatta asserts that the juvenile court erred in finding that termination of her parental rights is in the children's best interests. She also asserts that the juvenile court erred in considering evidence demonstrating that she was responsible for Onyashy's injuries because she was acquitted of child abuse charges after a jury trial.

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. STATUTORY FACTORS

On appeal, Jimmatta does not contest the juvenile court's finding that one or more of the statutory grounds listed in § 43-292 had been satisfied. Specifically, Jimmatta does not contest the court's finding that she had neglected each of her five children pursuant to § 43-292(2), that reasonable efforts by the Department and the juvenile court failed to correct the conditions that led to the determination that the four oldest children were within the meaning of § 43-247(3)(a) pursuant to § 43-292(6), or that the four oldest children had been in an out-of-home placement for at least 15 months of the most recent 22 months pursuant to § 43-292(2).

In addition, Jimmatta does not explicitly contest the juvenile court's finding that § 43-292(8), (9), and (10)(d) warranted termination of her parental rights. Each of these subsections relates to the allegations that Jimmatta was responsible for Onyashy's broken arm. However, Jimmatta does allege that the juvenile court should not have considered evidence that she intentionally injured Onyashy because she had been previously acquitted of criminal child abuse charges after a jury trial in district court. Jimmatta's assertion has no merit.

The appropriate standard of proof in a juvenile court proceeding to terminate parental rights is clear and convincing evidence, not proof beyond a reasonable doubt which is the standard of proof in criminal proceedings. See *In re Interest of Anthony V.*, 12 Neb. App. 567, 680 N.W.2d 221 (2004). Due to this differing standard of proof, even if a parent is acquitted of a

criminal charge, the acquitted parent's conduct may still provide grounds for termination of parental rights. See *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

Upon our de novo review of the record, we conclude that the State presented clear and convincing evidence to establish that Jimmatta was responsible for Onyashy's broken arm. Multiple doctors provided testimony which demonstrated that Jimmatta's explanation for Onyashy's injury did not make sense given the amount of force this type of injury requires. The doctors testified that the injury was consistent with child abuse and that whoever injured Onyashy almost certainly would have been acting intentionally. In addition, Jimmatta admitted that she was alone with Onyashy when the injury occurred and did not take Onyashy to the doctor for almost 24 hours. Doctors indicated that during that time, Onyashy would have been in extreme pain.

We conclude that the juvenile court did not err in considering evidence that Jimmatta had physically abused Onyashy or in specifically finding that Jimmatta was responsible for Onyashy's broken arm. We next consider Jimmatta's assertion that despite the juvenile court's finding that there was ample statutory authority pursuant to § 43-292 to warrant termination of her parental rights, that termination is not in the children's best interests.

3. BEST INTERESTS

Jimmatta argues that termination of her parental rights is not in her children's best interests. Specifically, Jimmatta argues that the evidence presented at the termination hearing demonstrated that "the children were positively bonded with their mother and would benefit from continued contact with her." Brief for appellant in case No. A-10-1234 at 8.

Jimmatta's assertion has no merit. Upon our de novo review of the record, we find the evidence presented at the termination hearing overwhelmingly demonstrated that Jimmatta is not capable of providing her children with a safe and stable environment and that thus, she is not capable of appropriately parenting her children. We affirm the orders of the juvenile court which found that termination of Jimmatta's parental rights was in the best interests of Onyashy, Josezier, Dominique, Kavasea, and DeNasjha.

In her briefs to this court, Jimmatta narrowly focuses her argument that termination of her parental rights is not in the children's best interests on a small portion of the testimony provided by Jennie Cole-Mossman, the children's family therapist. The portion of Cole-Mossman's testimony cited by Jimmatta provides that the children have a bond with Jimmatta and enjoy spending time with her. In addition, Jimmatta points to testimony where Cole-Mossman indicates her belief that rather than terminate Jimmatta's parental rights, Jimmatta should be provided with extended visitation time with the children so that the court and the Department can more accurately assess Jimmatta's parenting abilities and improvements. Jimmatta argues that such testimony proves that termination of her parental rights is not in the children's best interests.

We have read Cole-Mossman's testimony in its entirety. While we recognize that she did, in fact, testify that she did not believe that termination of Jimmatta's parental rights was in the children's best interests, we must read this portion of her testimony in the context of her testimony as a whole. And, the majority of Cole-Mossman's testimony indicates that Jimmatta is not capable of appropriately parenting her children.

Cole-Mossman testified that Jimmatta has not accepted responsibility for the “maltreatment” of her children. Instead, Jimmatta continues to blame her situation on other people, including “the system.” As a result of Jimmatta’s failure to accept responsibility, Cole-Mossman testified that there is a high risk that Jimmatta will neglect or abuse her children again if given the opportunity. Cole-Mossman testified that Jimmatta has a continued pattern of psychiatric issues that are untreated and unresolved. Jimmatta is not taking her psychiatric medication and is not in mental health treatment. Cole-Mossman also testified that Jimmatta has admitted to marijuana usage and that she has even admitted to using marijuana while pregnant with her children. Jimmatta has not sought out or participated in any substance abuse treatment. Cole-Mossman testified that Jimmatta has not demonstrated an ability to put her children’s needs ahead of her own needs and wants. Jimmatta has not shown a willingness to change, and she is not able to work constructively with professionals to improve her situation. Cole-Mossman testified that Jimmatta is simply unable to provide her children with stability, caring, and consistency.

Taken as a whole, Cole-Mossman’s testimony demonstrates that Jimmatta is not capable of appropriately parenting her children. Cole-Mossman testified that Jimmatta has failed to address her drug use and her mental health problems. And, perhaps most important, Cole-Mossman indicated that there is a high risk that Jimmatta will neglect or abuse her children if they are returned to her care. While we acknowledge that the children have a bond with Jimmatta and that it may be difficult for them if they are no longer permitted to see her, we must also consider that the children need permanency, stability, and safety that Jimmatta is simply not able to provide.

In addition to Cole-Mossman’s testimony, we must also consider the rest of the voluminous evidence presented in this case in determining whether termination of Jimmatta’s parental rights is in the children’s best interests. The vast majority of the evidence presented at the hearing revealed that Jimmatta is not capable of appropriately parenting her children.

Evidence in the record indicates that Jimmatta suffers from serious mental health problems. Such problems have led Jimmatta to attempt suicide on multiple occasions during the pendency of these juvenile court proceedings. In addition, there was evidence that Jimmatta is not participating in any type of therapy and is not taking any medications for her condition.

The State presented evidence that Jimmatta uses marijuana on a regular basis and that she and her boyfriend sell marijuana out of their home. In fact, the State presented evidence that Jimmatta engaged in selling drugs while she was having visitation with one of her children. There was also evidence that Jimmatta is in an unstable relationship with her boyfriend which has resulted in violence and police involvement.

In addition, as we discussed above, there was sufficient evidence presented to demonstrate that Jimmatta was responsible for Onyashy’s broken arm. There was also evidence that Jimmatta failed to seek out appropriate medical care for all of her children, and the evidence established that the children have certain physical and psychological problems that warrant regular and consistent medical care.

The record also reveals that Jimmatta chose not to attend most of the lengthy termination hearing and did not provide a reason for her extended absence.

Upon our de novo review of the record, we find that there is a great deal of evidence demonstrating that Jimmatta cannot currently provide a safe and stable environment for her children and that she will be unable to provide such an environment well into the future. Such evidence clearly outweighs the rather small amount of evidence that Jimmatta relies on to suggest that it would not be in the children's best interests to discontinue having contact with her because the children have a bond with her and enjoy seeing her.

The children have been out of Jimmatta's home for some time. The four oldest children have been in an out-of-home placement for well over 2 years, and DeNasjha has been in an out-of-home placement her entire life. The children need and deserve permanency, which Jimmatta has proven she is incapable of providing. We affirm the orders of the juvenile court finding that termination of Jimmatta's parental rights is in the children's best interests.

V. CONCLUSION

Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Jimmatta's parental rights. As such, we affirm the orders of the juvenile court terminating her parental rights to DeNasjha, Onyashy, Josezier, Dominique, and Kavasea.

AFFIRMED.