

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF JAVONTAE T.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF JAVONTAE T., A CHILD UNDER 18 YEARS OF AGE.

STATE V. NEBRASKA, APPELLEE,
V.
JOY T., APPELLEE, AND JAMES T., APPELLANT.

Filed March 22, 2011. No. A-10-906.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge.
Affirmed.

Joseph Kuehl for appellant.

Donald W. Kleine, Douglas County Attorney, and Lindsey Grove for appellee State of
Nebraska.

Debra Tighe-Dolan, of White, Wulff & Jorgensen, for appellee Joy T.

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

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. James T. appeals from an order of the juvenile court, which adjudicated his son, Javontae T., to be a juvenile as defined in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). On appeal, James asserts that the juvenile court erred in finding him to be Javontae's biological father, in overruling his motions for continuance, and in finding sufficient evidence to warrant adjudication of Javontae pursuant to § 43-247(3)(a). For the reasons set forth below, we affirm.

II. BACKGROUND

Javontae was born in June 1993. In November 1995, a decree of paternity was entered in the district court finding James to be Javontae's father and ordering him to pay \$50 per month in child support. Because this appeal does not involve the adjudication of Javontae as to his mother, Joy T., her involvement in the juvenile court proceedings will not be discussed further.

James has been incarcerated for a majority of Javontae's life and, as a result, has never resided with Javontae. In January 1994, James was charged with unlawful possession of a controlled substance with the intent to deliver. He was convicted of the charge and was ultimately sentenced to 5 to 7 years' incarceration. In 1995, James was again charged with unlawful possession of a controlled substance with intent to deliver. He was convicted of the charge and was sentenced to 5 to 10 years' incarceration. In 2005, James was charged with three counts of unlawful possession of a controlled substance with intent to deliver. He was convicted of all three charges and was sentenced to a total of 12 to 18 years' imprisonment.

On June 3, 2010, while James was incarcerated for his most recent convictions, the State filed a petition alleging that Javontae was within the meaning of § 43-247 as to James. Specifically, the petition alleged that Javontae lacks proper parental care because James is currently incarcerated for felony drug convictions; James has had minimal contact with Javontae; and James has failed to provide Javontae with financial support, appropriate care, or supervision.

In July 2010, a hearing on the allegations in the State's petition began. At the start of the hearing, James made an oral motion to continue the proceedings. In support of his motion, James indicated that the State wanted to admit into evidence the November 1995 paternity decree to establish that James was Javontae's biological father. James requested additional time so that he could challenge this decree in the district court. The juvenile court denied the motion, and the hearing continued. During this first day of the hearing, the State called multiple witnesses, including Javontae's foster mother, who testified concerning Javontae's daily life and his minimal contact with James.

On August 6, 2010, the adjudication hearing continued. Prior to the start of the proceedings, James made another oral motion to continue the proceedings, again indicating he wanted additional time to challenge the paternity decree. The juvenile court denied the motion, and the hearing continued. During the hearing, James testified in his own behalf about his relationship with Javontae.

At the close of the hearing, the juvenile court entered an order finding that Javontae was within the meaning of § 43-247(3)(a) as to James. The juvenile court found that the State had presented sufficient evidence to demonstrate that James is currently incarcerated and that he has failed to provide Javontae with any kind of meaningful support. The juvenile court found that the State presented insufficient evidence to demonstrate that James had minimal contact with Javontae and dismissed that allegation.

James appeals here.

III. ASSIGNMENTS OF ERROR

On appeal, James assigns four errors. He alleges, restated and consolidated, that the juvenile court erred in (1) finding him to be Javontae's biological father, (2) overruling his

motions for continuance, and (3) adjudicating Javontae as a child within the meaning of § 43-247(3)(a).

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.*

2. NOVEMBER 1995 PATERNITY JUDGMENT

At the adjudication hearing, the State submitted into evidence a November 1995 paternity judgment which declared James to be Javontae's biological father. The juvenile court relied on this judgment, over James' objections, to find that James was Javontae's father. The juvenile court did not permit James to offer evidence to dispute Javontae's paternity.

On appeal, James argues that the paternity judgment is not sufficient to demonstrate that he is, in fact, Javontae's biological father, because it is a default judgment entered by the district court after he failed to appear at the paternity hearing. James also asserts that the juvenile court erred in prohibiting him from offering evidence to dispute Javontae's paternity.

James' assertions have no merit. Essentially, James' argument amounts to a collateral attack on a 15-year-old judgment. When a judgment is attacked in a way other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack. *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000). Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

If James had wanted to challenge the entry of the paternity judgment, he should have instituted proceedings in the district court to have the judgment vacated or reversed. Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) states the proper manner to challenge a paternity judgment:

An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test . . . establishes the exclusion of the individual named as a father in the legal determination.

James never challenged the paternity judgment in district court. Instead, he permitted the judgment to remain in effect for over 15 years before he questioned its validity in these juvenile court proceedings. Such a collateral attack on a valid judgment is simply not permissible.

The juvenile court did not err in finding that the November 1995 paternity judgment was sufficient to establish that James was Javontae's biological father. And, because there was a valid court order determining Javontae's paternity, the court did not err in excluding evidence which purported to challenge this determination.

3. MOTIONS FOR CONTINUANCE

At the start of the adjudication hearing, James made a motion to continue the proceedings in order to allow him time to challenge the November 1995 paternity judgment in the district court. The juvenile court denied this motion, and the hearing continued. On the second day of the adjudication hearing, James made another motion for continuance, again arguing that he wanted to contest the paternity judgment in the district court. The juvenile court denied the motion.

On appeal, James argues that the juvenile court erred in overruling his motions for continuance. His assertion has no merit.

The granting or denial of a continuance or a hearing is within the discretion of the trial court. *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000). In the absence of a showing of an abuse of discretion, a ruling on a motion for continuance will not be disturbed on appeal. *Id.*

As we discussed more thoroughly above, the paternity judgment James wished to challenge was entered 15 years prior to the adjudication hearing. James did not offer any evidence to indicate that he was not made aware of the judgment at the time it was entered. Rather, James argues in his brief to this court that he was unable to challenge the paternity judgment at an earlier time because he was incarcerated and did not have the financial means to contest the judgment.

Moreover, it is clear that James had notice of the pending adjudication proceedings and, as a result, had notice that Javontae's paternity would be an issue at that hearing. If James wanted to challenge the paternity judgment, he could have done so prior to the adjudication hearing, rather than waiting until the day of the hearing to request a continuance. There is nothing in the record to suggest that the juvenile court abused its discretion in overruling the motions for a continuance.

4. ADJUDICATION

Despite James' assertions that the juvenile court erred in finding him to be Javontae's father, James also argues that the juvenile court erred in finding sufficient evidence to warrant adjudicating Javontae as a child within the meaning of § 43-247(3)(a). After reviewing the record, we find no merit to James' assertion.

Section 43-247(3)(a) provides that the juvenile court shall have jurisdiction of

[a]ny juvenile . . . who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile[.]

The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication

phase. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Brian B. et al.*, *supra*. At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005); *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002).

In this case, the juvenile court found that Javontae is within the meaning of § 43-247(3)(a), because James is currently incarcerated and has failed to provide Javontae with any kind of meaningful support. Upon our de novo review of the record, we agree with the juvenile court's finding that the State presented sufficient evidence to prove by a preponderance of the evidence that James is currently incarcerated and is unable to provide Javontae with financial support, appropriate care, or supervision.

The evidence presented at the adjudication hearing establishes that James is currently incarcerated and that he has been incarcerated for the majority of the last 15 years. Most recently, in 2005, James was sentenced to 12 to 18 years' imprisonment for drug-related offenses. As a result of James' incarceration, he has not been able to provide Javontae with housing, financial support, or daily parental care.

Javontae has never resided with James. The record reveals that Javontae currently resides with his foster mother, who is his mother's friend. Javontae has resided at his foster mother's home for a majority of the time since 2002.

There was no evidence that James has financially contributed to Javontae's daily care in any significant way. There was some evidence that James has provided minimal financial support to Javontae. James testified that Javontae has gone to James' extended family to seek assistance in purchasing certain items. In addition, there is evidence that James was ordered to pay \$50 per month in child support and that this amount has been garnished from his bank accounts over the years. However, such evidence is not sufficient to establish that James has been or is able to provide for Javontae's daily needs.

There was no evidence to suggest that James is involved in Javontae's daily life. Javontae's foster mother testified at the adjudication hearing that although James would consistently visit Javontae when he was not incarcerated, James did not have any consistent contact with Javontae at the time of the hearing. There was evidence that James and Javontae have some contact over the telephone; however, Javontae's foster mother testified that this contact did not occur on a regular basis. She indicated that James has never sent cards or gifts to Javontae. She also testified that James and Javontae do not share a strong bond with one another because of their minimal contact.

Based on the evidence presented at the adjudication hearing, we find that the State proved by a preponderance of the evidence that James is currently incarcerated and is unable to provide Javontae with financial support, appropriate care, or supervision. We affirm the order of the juvenile court finding Javontae to be within the meaning of § 43-247(3)(a).

V. CONCLUSION

James' assertions on appeal have no merit. The juvenile court did not err in finding that the November 1995 paternity judgment established that James was Javontae's biological father or in denying James' motions to continue the adjudication hearing so that he could challenge the paternity judgment in district court. There was sufficient evidence to find that Javontae was within the meaning of § 43-247(3)(a) as to James. We affirm.

AFFIRMED.