

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF KYJSHA T. ET AL.

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IN RE INTEREST OF KYJSHA T. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,

V.

LAKISHA T., APPELLEE AND CROSS-APPELLANT, AND DAVID B., APPELLANT.

Filed May 8, 2012. No. A-10-376.

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

Carol Pinard-Cronin for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Kailee Smith,
Senior Certified Law Student, for appellee State of Nebraska.

Mariette C. Achigbu for appellee Lakisha T.

Sandra E. Stern, guardian ad litem for Lakisha T.

Janine F. Uchino, guardian ad litem for children.

INBODY, Chief Judge, and SIEVERS, Judge.

INBODY, Chief Judge.

I. INTRODUCTION

David B. appeals the termination of his parental rights to Davonisha T.-B. and Shy'Retha B. The biological mother of the minor children, Lakisha T., has cross-appealed, arguing that the juvenile court erred in terminating her parental rights to Kyjsha T., Davonisha, and Shy'Retha. (David's appeal concerns only two of the three minor children, because he is not Kyjsha's biological father and there was no custody order in place.) For the reasons set forth herein, we affirm as modified.

II. STATEMENT OF FACTS

1. PREVIOUS ADJUDICATION INVOLVING FAMILY

In January 2003, the State filed a petition alleging that Davonisha, who was born in January 2002, was a minor child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) due to the faults and habits of David and Lakisha, which petition was subsequently amended in April. The children were adjudicated on April 15, 2003, when David and Lakisha admitted that Davonisha had been admitted to a children's hospital due to inadequate weight gain, that Lakisha had failed to consistently work with services provided to them prior to Davonisha's removal, and that, as a result, Davonisha was at risk for harm. Davonisha was the only child under the juvenile court's jurisdiction, because the parties' oldest child, Kyjsha, who was born in December 2000, had not been made a ward of the State at that time and the parties' youngest child, Shy'Retha, was not born until September 2003.

Otto Burton, the family's Department of Health and Human Services (DHHS) case manager from January 2003 to July 2006, testified that Davonisha had been born 8 weeks premature, weighing 2 pounds. In January 2003, Davonisha was borderline failing to thrive, was failing to gain weight, and was developmentally delayed, when she was placed in foster care where she remained until June 7, 2005, at which time she was returned to David's home. Even after Davonisha was returned to David's home, services continued to be provided to the family to ensure that David participated in services that would keep Davonisha safe regarding her health and to ensure that David's home was safe for Davonisha.

During this time, both David and Lakisha were provided with services. Lakisha was provided with services that included parenting classes and a psychological evaluation, both of which she completed. Other services provided to Lakisha, in which she only sporadically participated, were supervised visitations, individual therapy, and random drug urinalysis (UA) testing. Further, although she only sporadically participated in intensive family preservation services, she did successfully complete that service. Although services were provided to address safety issues regarding Lakisha's ability to parent Davonisha, her cooperation was inconsistent, so safety concerns remained at the time this case was closed in June 2006. David was provided with services that included family support services, visiting nurses association, intensive family preservation services, individual therapy, and psychological evaluation. He also participated in some of Davonisha's day appointments at Monroe Meyer Institute and early intervention services through the Omaha Public Schools.

When Burton closed the case in June 2006 and jurisdiction of the juvenile court was terminated, he made it clear to David that David would have to make sure that the children were safe and that he could not leave the children with Lakisha, because she did not complete her rehabilitative services.

2. CURRENT CASE

(a) Adjudication

On November 22, 2006, approximately 5 months after the previous case was closed, the State filed another adjudication petition regarding the family, alleging that Kyjsha, Davonisha, and Shy'Retha were children within the meaning of § 43-247(3)(a) (Cum. Supp. 2006) in that

they lacked proper parental care by reason of the faults or habits of David, because David subjected the children to excessive and inappropriate discipline and because Lakisha knew or should have known of the inappropriate discipline that David was using and she failed to protect the minor children from harm. On the same date, the State also filed a motion for temporary custody and the juvenile court issued an order immediately placing the children in the custody of DHHS.

On September 19, 2007, pursuant to the third amended petition, the district court found that Davonisha and Shy'Retha were children within the meaning of § 43-247(3)(a) insofar as David was concerned, because the children lacked proper parental care by reason of David's faults or habits in that, on or about January 17, Sadie Burr, an intensive family preservation therapist, observed Kyjsha with a butcher knife and Shy'Retha with a lighter while in David's care and custody; that on or about January 12, Cristen White, a case manager and supervisor, observed the minor children with a lighter while in David's care and custody; that David failed to install a lock to secure his bedroom from the children, even though a lock was provided by Burr; and that as a result, the children were at risk for harm.

On December 3, 2007, the district court found Kyjsha, Davonisha, and Shy'Retha to be children within the meaning of § 43-247(3)(a) insofar as Lakisha was concerned, because the children lacked proper parental care by reason of Lakisha's faults or habits in that Lakisha was unable to provide safe and stable housing for the children; that during visits with the children during the summer of 2007, Lakisha was inappropriate in terms of anger, frustration, and supervision of the children; and that due to this, the children were at risk for harm.

(b) Termination

The State filed a motion for termination of Lakisha's parental rights on April 1, 2008, alleging that Kyjsha, Davonisha, and Shy'Retha came within the meaning of Neb. Rev. Stat. § 43-292(2) (Reissue 2008) because Lakisha had substantially and continuously or repeatedly neglected and refused to give said children or a sibling of said children necessary parental care and protection. The motion further alleged that the minor children came within the meaning of § 43-292(6), because Lakisha had failed to correct the conditions leading to adjudication despite reasonable efforts in that Lakisha had failed to obtain a legal, stable source of income and to provide proof to the DHHS case manager that Lakisha had failed to consistently visit with the minor children; that Lakisha had failed to obtain and maintain safe, stable, and adequate housing; and that Lakisha had failed to submit to random UA testing within 6 hours of the request by the DHHS case manager. Finally, the motion alleged that the minor children came within the meaning of § 43-292(9), that reasonable efforts were not required because Lakisha had subjected the children to aggravated circumstances, and that termination was in the minor children's best interests.

With regard to David, the motion for termination of parental rights alleged that Davonisha and Shy'Retha came within the meaning of § 43-292(2) because David had substantially and continuously or repeatedly neglected and refused to give said children or a sibling of said children necessary parental care and protection. The motion further alleged that Davonisha and Shy'Retha came within the meaning of § 43-292(6) because David had failed to correct the conditions leading to adjudication despite reasonable efforts in that David had failed

to submit to random UA testing as requested by the DHHS case manager, that David had permitted contact between Lakisha and the children beyond visitation arranged by the DHHS case manager while the children were residing with him, and that David had failed to make sufficient progress with his parenting instruction and family support services. Finally, the motion alleged that Davonisha and Shy'Retha came within the meaning of § 43-292(9), that reasonable efforts were not required because David had subjected the children to aggravated circumstances, and that termination was in Davonisha and Shy'Retha's best interests.

(i) Termination Hearings

Nearly 2 years elapsed from the filing of the motion for termination of parental rights to the juvenile court's order terminating parental rights. During this time, 33 witnesses testified over the course of 31 days generating an approximately 5,000-page bill of exceptions for the termination portion of this case contained in 23 volumes and an additional 4 volumes of exhibits. There was substantial testimony regarding sexual behaviors displayed by the minor children; however, since the juvenile court did not terminate based upon § 43-292(9), i.e., aggravated circumstances including sexual abuse, any references in this opinion to such behavior has deliberately been kept to a minimum.

The children have been State wards since November 2006 and have been in out-of-home placement continuously since July 5, 2007. Since November 2006, Lakisha has not had any visitation less restrictive than supervised or therapeutic visitation. Since July 2007, David has not received any visitation less restrictive than supervised or therapeutic visitation.

Since being placed into DHHS' custody in November 2006, the following services have been provided to one or more of the minor children: mental status examinations, psychological evaluations, psychiatric evaluations, a behavioral program at a children's respite care center, inhome therapy services, a fetal alcohol syndrome evaluation, testing for cerebral palsy, a behavioral assessment, community treatment services with a community treatment aide, individual play therapy, therapeutic visitation, childcare, medication management, individual therapy, agency-based foster care, registration with developmental disability services, and transportation to a school for children with a higher level of needs.

a. Parental Orders, Goals, and Performance

David was ordered by the juvenile court to participate in a parenting assessment; participate in a psychological evaluation; obtain and maintain a legal and stable source of income; submit to random UA testing; participate in individual therapy; participate in family support services; obtain safe, stable, and adequate housing; receive training regarding the nature and origin of reactive attachment disorder and posttraumatic stress disorder (PTSD); and participate in therapeutic visitation. Lakisha was ordered by the juvenile court to submit to random UA testing; participate in therapeutic visitation; participate in family support services; obtain and maintain a legal and stable source of income; obtain safe, stable, and adequate housing; participate in individual therapy; and participate in a psychiatric evaluation and a psychological evaluation.

During the course of this case, David has received numerous services, including three rounds of intensive family preservation; "Fathers for a Lifetime" program; individual therapy;

therapeutic visitation; foster care, medical care, and childcare for the children; random UA testing; a family support worker; assistance from the visiting nurses association, early childhood specialists, and an inhome therapist; respite care; anger management classes; and assistance with transportation and car repairs.

Lakisha was offered or received services, including an initial assessment; a family assessment; a psychological evaluation; psychiatric services; a chemical dependency evaluation; individual therapy; therapeutic visitation; random UA testing; foster care, medical care, individual therapy, and childcare for the children; assistance with transportation; family support services/coaching; vocational rehabilitation; and developmental disability services.

The evidence established that David had positive UA tests for cocaine on two occasions in March and June 2008, a positive UA test for alcohol in November, and diluted UA tests on three other occasions. From April 2008 to March 2009, David missed 23 requested UA tests. From April 2008 until March 2009, Lakisha missed 33 requested UA tests.

b. Cynthia McCullough

Cynthia McCullough, a mental health therapist and substance abuse counselor, conducted a chemical dependency evaluation of David on July 2, 2008. McCullough diagnosed David with cocaine abuse disorder based upon his positive UA tests and recommended that he participate in an outpatient substance abuse program. David attended her outpatient substance abuse program, participating in eight individual sessions and eight group sessions, and according to McCullough, David attended most of the sessions and successfully completed treatment. However, McCullough testified that David informed her of only two, not three, diluted UA tests, never took total responsibility for the UA tests that were positive for cocaine, and never admitted to intentionally using cocaine, instead stating that someone could have put something in his drink. McCullough agreed that her discharge report was inaccurate because it stated that David had maintained abstinence during his involvement with the substance abuse program, when in fact, he had failed to maintain abstinence regarding his alcohol use as evidenced by a UA test that was positive for alcohol in November 2008.

c. Joaquin Guerrero, Jr.

Joaquin Guerrero, Jr., a family support worker/parent educator, worked with David from approximately April 2008 until September 2009, with only a slight break in his service to the family. He also supervised some visitations between David and the children. Guerrero testified that he worked with David on eight goals: (1) helping David come up with interactive, constructive age-appropriate family activities for visits; (2) developing a list of age-appropriate household rules and expectations; (3) helping David identify ways to express his frustrations appropriately; (4) identifying specific nonphysical consequences for the children; (5) identifying qualities of a responsible adult versus a nonresponsible adult; (6) identifying supports for assistance when medical issues flared up; (7) encouraging David to identify alternative means of transportation for court-ordered activities, children's activities, et cetera; and (8) assisting in finding employment and housing.

According to Guerrero, David vented about the court proceedings which interfered on more than one occasion with David's progress and David was inconsistent with his one-on-one

sessions, which was a barrier to his progress. Also, during sessions, David would become distracted and required persistent redirection toward working on his goals; David made only minimal progress on several of his goals; and David was insulted by the goal of identifying qualities that make an adult responsible to be around children, so there was no progress made on that goal.

d. Sarah Forrest

Sarah Forrest was White's supervisor at DHHS and was assigned the family's case from December 2006 to June 2008, at which time White became the supervisor and Zina Crowder became the ongoing case manager. Forrest met with Kyjsha on two occasions and Shy'Retha on one occasion. On June 29, 2007, Forrest met with Kyjsha and Shy'Retha, at which time the girls were still residing with David. At that time, the girls lacked age-appropriate boundaries in that they were very clingy and were touching, hugging, and climbing on Forrest despite her efforts to redirect them.

Forrest testified that separate monthly family team meetings were set with David and Lakisha, but not all of Lakisha's meetings took place because she did not attend and her attendance was critical to the meeting. The goals and strategies outlined for David were to care for the children, to have a responsible adult present at all times, for the children not to report a fear of David, for David not to use physical discipline and instead use affection-based parenting, to work with the family support worker during visits to receive feedback on his parenting, to continue with individual therapy, and to manage his stress by cleaning his home or watching religious programs when needed to calm himself.

Lakisha's case plan goals and strategies were to parent without using physical discipline, to work with her individual therapist, to work with the therapist facilitating therapeutic visits, and to work with the family support worker. Forrest testified that although David was offered weekly telephone contact with the children's play therapist, he only spoke to her on one occasion. Additionally, David and Lakisha were offered a parenting class specifically geared toward children with special needs and they chose not to participate.

e. Cristen White

White was case manager for the family from December 2006 until June 2008, at which time she became the supervisor on the case. White testified that shortly after the children were removed in July 2007, she requested that she be allowed to stop by and pick up an antibiotic that Davonisha was taking for an ear infection and to pick up clothing and a comfort item for the children to help with their transition; however, David would not permit her to do so.

On July 27, 2007, White transported the children for psychological evaluations with Dr. Ann Potter. During the hour that the children were at the doctor's office, all three children displayed concerning behaviors in the waiting room, including running down the hallways; screaming, yelling, cussing, spitting, and hitting each other; and destroying items in the waiting area. One of the children stripped off her clothes, ran out of the building, and then, when a worker retrieved the child and was attempting to redress her, she urinated on the worker.

When White visited David's home from December 2006 until the children were removed in July 2007, David was typically sitting on the couch, he was often yelling at the children and

could not control their behaviors, the children did not have many activities and frequently had nothing to do, they were very clingy, and they would ask her for food or ask if they could go home with her. White testified that despite receiving numerous services, David still had a difficult time managing the children's behaviors.

White testified that during the time that visits were suspended from December 21, 2007, to February 19, 2008, David and Lakisha were offered the opportunity to send letters to the children, but they did not do so. Lakisha did not consistently attend visits with the children and did not have any visits with them at all during March, April, and May 2007. Although Lakisha's visits were initially set for twice per week, due to Lakisha's lack of consistency, they were cut back to one time per week. When Lakisha did attend visits, she had a difficult time controlling and maintaining the children's behaviors and would often threaten the children. Additionally, Lakisha did not maintain stable housing.

f. Sadie Burr

Burr was the intensive family preservation therapist for David and the children from December 2006 to March 2007. Burr worked with David and the children on the following goals: that David would develop and practice effective strategies for appropriate parenting skills; that the children would learn to accept their responsibilities according to their age and development; and that David would assist in teaching the children how to live together without verbal arguments, have healthy relationships with each other, and increase their communication. The family failed to meet the goals, and David made no improvement in his scores on the risk scale assessment. Burr testified that even at the completion of the 15-week intensive family preservation, Burr recommended continued therapy because David did not have a consistent technique for appropriately parenting the children and there were concerns regarding safety risks in the home, including that it had taken David 10 days to place a lock on his bedroom door in order to keep the children away from dangerous objects such as a lighter and a butcher knife.

g. Phyllis Rooney

Phyllis Rooney was Lakisha's individual mental health therapist beginning in December 2007. Lakisha missed numerous appointments and was eventually removed from Rooney's schedule in May 2008. Lakisha did reinstate contact with Rooney in August 2008 and has attended sessions since that time.

h. Yvonne Wortman

Yvonne Wortman, a visit supervisor coordinator, supervised visitation between David and the children in the summer of 2007. David's interactions with the children were very authoritarian; his tone of voice was loud, gruff, demanding, and aggressive; and on one occasion, two children ran out of the house, while David did not pay attention to the situation and simply continued to clean his house. Wortman estimated that only 5 to 10 percent of David's interactions with the children during visitations could be characterized as nurturing.

i. Anna Stech

Anna Stech worked with Lakisha and the minor children as a family support worker during the summer of 2007. Lakisha was late for several visits, and on one occasion, she called

the visitation workers “stupid bitches” in front of the children. The children, particularly Shy’Retha and Davonisha, displayed inappropriate behaviors during the visits, such as failing to follow directions and hitting, kicking, and spitting. Stech testified that when Lakisha would give the girls a direction or expectation, and they would not follow through, rather than initiating a consequence, Lakisha would yell and threaten to take something away, such as cookies or candy, but had little followthrough with either expectations or consequences. Other concerning behavior exhibited by Lakisha included providing a gift for Kyjsha without providing a gift for the other two children; giving \$1 to Kyjsha and Shy’Retha, but not to Davonisha; threatening the children during their visits that she would not bring them food on the next visit, that she was going to “get” them if they did not listen to her, and that they had to pay more attention to their father during visits with him or she would not bring them anything at their next visit. Stech testified that Lakisha was frustrated by the children’s behaviors during the 2-hour visitation sessions, and she never felt that Lakisha was capable of handling all three of the children’s behaviors. Further, according to Stech, Lakisha was unable to sustain positive change--she would return to threatening the girls and raising her voice and she continued to lack followthrough.

j. David Yoble

David Yoble, a family support worker, supervised visits between the parents and children from August to December 2007. According to Yoble, although he never had to end a visit before its scheduled end time, Lakisha was unable to handle the children’s disruptive behaviors during visits and David had a low frustration level for the children consistently throughout the visits. Yoble indicated that the parents did not make any improvements in their parenting behaviors during the time that he was supervising visits.

k. Justin Mickles

Justin Mickles provided therapeutic visitation for Lakisha and the children beginning in June or July 2008. Mickles testified that of the 11 visits, around 6 were canceled by Lakisha or were canceled as a result of Lakisha’s arriving late for the visit. Additionally, on one or two occasions, Mickles had to end a visit early due to Lakisha’s inability to manage the children’s behaviors such as the children’s yelling and their refusal to comply with reasonable requests. In response to the children’s behaviors, Lakisha became frustrated; lacked patience in redirecting the children; elevated her tone of voice; and threatened timeouts, denial or restriction of privileges or snacks, and cancellation of future visits. Despite frequent redirection, Lakisha was unable to make lasting changes to her behaviors, continued to use an elevated tone of voice, and threatened timeouts and cancellation of future visits. Additionally, Lakisha was unable to consistently address each of the child’s needs during the visits and she had a difficult time managing the children’s behaviors during visits. Mickles testified that he found Lakisha’s threat to cancel future visits highly inappropriate considering that she only saw the children for about an hour each week. Mickles testified that he would not recommend that Lakisha’s visitations increase in duration nor would he recommend a less restrictive level of supervision at Lakisha’s visitations.

I. Dr. Joseph Rizzo

Dr. Joseph Rizzo, a clinical psychologist, testified that he had been conducting therapeutic visitation with the family since March 15, 2008. He stated that there was typically no meaningful interaction between Lakisha and the minor children and that Lakisha was unable to incorporate suggested changes into her interactions with the children. Dr. Rizzo testified that by the end of their therapeutic relationship in June 2008, neither Lakisha nor David was able to satisfactorily address the needs of the children, parent the minor children independently, or sustain meaningful or positive change in their interactions with the minor children. Additionally, Lakisha had not made any progress on her parenting abilities, did not appear to understand her daughters' special needs, and did not possess the ability to parent her daughters independently. As early as April 2008, Dr. Rizzo stated in a letter that

[i]t is grossly apparent that Lakisha is extremely immature, has no consistent sense of what to do with all three of these children, tends to encourage upheaval and chaos and is a destructive force with these children. . . . Lakisha cannot offer any solace[,] meaningful support, meaningful awareness, or meaningful interaction with these children and there is no question that her [parental] rights should be terminated.

Further, Dr. Rizzo's letter stated that "Lakisha has not demonstrated any adequate parenting of these children and she is very destructive of them." In May 2008, Dr. Rizzo stated that visits with Lakisha were "very damaging and should be discontinued immediately."

Although David arrived at the visitations very warm and engaging, David would become frustrated with the children, become abrupt, and would raise his voice. Additionally, David did not understand age-appropriate expectations of the children and did not understand the importance of eye contact. Although Dr. Rizzo talked with David about keeping his tone of voice in control and making eye contact, David could not sustain change. In May 2008, Dr. Rizzo stated that visitation with the parents has proved to be detrimental to the children's adjustment and should be immediately discontinued.

(ii) Statements by Children to Workers and Therapists

During the termination hearings, the State sought to introduce testimony from various witnesses regarding out-of-court statements made by the minor children to workers or therapists. David and Lakisha objected to various statements which were admitted by the court pursuant to the excited utterance exception to the hearsay rule and statements admitted for the purposes of medical diagnosis or treatment. Some of the statements by the minor children related to alleged sexual abuse and are not repeated here. Additionally, we have not included every statement made by the children in this opinion.

a. Statements Admitted Pursuant to Excited Utterance Exception

The State adduced testimony from Amy Safford, White, and Forrest regarding statements that Kyjsha made to them. White was the family's caseworker from December 2006 until June 2008. Her testimony was admitted pursuant to the excited utterance exception to the hearsay rule,

when objections were posed. Forrest was White's supervisor at DHHS and was assigned the family's case from December 2006 to June 2008. Safford was a community treatment aid who provided services to Kyjsha from September 7, 2007, to June 23, 2008, for 6 to 10 hours per week.

Safford testified that from the onset of services, Kyjsha began to spontaneously disclose physical, emotional, and sexual abuse by Lakisha and David. Throughout the time that Safford worked with Kyjsha, Kyjsha gave warning signs before her disclosures of physical, emotional, or sexual abuse, which included an instant change in behavior where she would be running around, knocking things over, cussing, hitting her sisters, and become very erratic, nervous, and agitated. Kyjsha also displayed behaviors of shame, including crying, not making eye contact, biting her nails, pulling on her hair, and making statements such as "It's all my fault." Safford testified that there was never a time when Kyjsha would discuss physical, sexual, or emotional abuse that she was not nervous, withdrawn, or anxious, and she always exhibited a change of behaviors before, during, and after the disclosures. Safford testified that Kyjsha was afraid that her parents would see Safford's notes of their sessions and learn of her disclosures and that Kyjsha was afraid she would be whipped if she told the secrets. Forrest and White also testified as to similar behaviors exhibited by Kyjsha before she would make disclosures.

Several of the disclosures made by Kyjsha were statements relating to food: that David would go to drive-through windows at restaurants and get food for himself and not for them; that she would hide food in the vents; that David never made breakfast; and that they were hungry all day and sometimes they would go 2 days without eating.

Kyjsha made disclosures that the children used to have to sleep in the closet when they got into trouble; that she was in charge of keeping her sisters from touching or handling David's gun and that the girls were able to reach the gun by standing on a kitchen chair; that David was always tired and was in bed all day; that David would smoke medicine on the couch and be sick; that David blamed her for being in foster care; and that she was afraid that she would be whipped if David found out that she was making disclosures. Kyjsha made the following disclosures regarding verbal abuse by Lakisha: that Lakisha called Davonisha retarded, that Lakisha said that she did not love them, that Lakisha told Kyjsha to keep her mouth shut or she was never going to get to go home, and that David told her not to tell anyone about the whippings.

Kyjsha also recounted physical abuse: that she was sad that Lakisha and David would hit her sisters all the time; that Lakisha would sit on top of them and choke them; that Lakisha had long fingernails and used to scratch Davonisha's face to make her be quiet; that Lakisha used to pull Davonisha's hair out and David would shave Davonisha's hair off and tell the children to say that they had lice; that when they said bad words or talked back, Lakisha would make them eat jalapeno peppers while holding her hand over their mouths until they choked; that both David and Lakisha would spank the children with a big, black belt; that Davonisha used to have to drink out of the toilet or toilet plunger; that David threw shoes at them; and that a whipping was getting hit on the buttocks or the legs with a belt, mop, or broom.

b. Statements Admitted Pursuant to
Medical Exception

Robin Stratton, a licensed mental health practitioner, is the minor children's therapist and had been providing play therapy since August 2007. The court found that Stratton was providing play therapy which the court found to be a form of health care and permitted her testimony as allowable under *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005). Stratton testified that from the onset of therapy, Kyjsha was focused on food and had themes of aggression, control, and nurturing. According to Stratton, Kyjsha's disclosures were all spontaneously made during therapeutic games and playing with therapeutic toys. Stratton said that when Kyjsha disclosed a secret, she would become anxious and agitated, including physically climbing the walls and jumping on furniture; her breathing became rapid; and her eyes became wide.

Some of the disclosures that Kyjsha made to Stratton during therapy included: that Kyjsha would steal popsicles, stick them in her shirt, and eat them in her bedroom; that there was no food at David's house; that Lakisha and David would force Davonisha to eat food and shove it down her throat; that Lakisha pushed Davonisha's head in the toilet; that Kyjsha stated "kids sometimes get hit when they are naughty"; that Lakisha would get very mad at Davonisha and call her a "bitch" and push her down; and that Lakisha yelled at Davonisha and called her a "retard." Kyjsha also made disclosures to Stratton that David would smoke his medicine and sleep in bed all day; that Kyjsha wanted Stratton to tell the judge that the only secret she had was that David had a big, black gun and that she wanted the judge to know that was the only secret she had so she could go home; and that she was afraid that she would get the "biggest whipping ever" if they found out she had made disclosures.

(iii) Best Interests Testimony

a. Tiffany Woosley

Tiffany Woosley, a special education prekindergarten teacher, was Davonisha's teacher for the 2006-07 school year. When Davonisha began the school year in August 2006, she was living with David; during that time, Woosley had concerns about Davonisha's hygiene. Specifically, Davonisha came to school with feces on her clothing, her arms and legs appeared to be dirty, and her hair did not appear to be washed. Davonisha was very quiet, did not smile, and displayed self-harming behaviors, including banging her head on the floor, pulling at the skin on her arms, and removing her clothing. Woosley testified that after Davonisha entered foster care, Davonisha seemed much happier, she began to smile and laugh, she was clean and her clothes were clean, she stopped banging her head, she stopped pulling on her skin, and she stopped removing her clothing during school.

b. Leslie Richter

Leslie Richter, a behavioral health manager at a children's respite care center, testified that both Davonisha and Shy'Retha were enrolled in behavioral programs at the center. When Davonisha entered the program in January 2007, she was displaying behaviors such as swearing, climbing under furniture, banging her head, biting herself, pulling her hair, aggression, taking her

clothes off, failing to use language to express herself or ask for what she needed, and demonstrating sexualized behaviors. Richter testified that initially, Davonisha's hair and clothing were dirty, her clothes were ill-fitting, and her ear was draining; however, once Davonisha entered foster care, her appearance improved in that she gained weight, her hair was styled more frequently, and she had new clothes. When Davonisha left the program in January 2008, her behaviors had improved overall, she was better able to follow rules and directions, she was able to stay more emotionally stable, and she had better coping skills. Richter testified that when Shy'Retha entered the center's behavioral program in October 2007, she had difficulty with directions and was swearing. When Shy'Retha was discharged from the program in August 2008, she was following instructions better and using more appropriate language.

c. Amy Safford

Safford worked with Kyjsha on the goals of anger management, coping skills, decreasing physical aggression, accepting responsibility and target behavior, and compliance, which goals had been set by Stratton, the children's therapist. When Kyjsha began working with Safford, she had a difficult time accepting redirection, becoming frustrated, crying, getting angry, fidgety, and throwing things; Kyjsha was hitting her siblings, hitting objects, taking down curtains, slapping herself, pulling her own hair, and biting herself; Kyjsha was blaming others for her behaviors such as using physical aggression; and Kyjsha was displaying difficulties with compliance, such as not staying in her car seat, unbuckling other children's car seats, hitting her siblings, not following rules at bedtime and mealtime, and watching television when she was not allowed to do so. By June 2008, Kyjsha showed progress in her goals: she was more focused; she was attuned to her surroundings and the people around her; she was not as frustrated; she was not displaying as much physical aggression; she decreased her swearing; she made progress in identifying and expressing her feelings, using language; she was more easily redirected; she was communicating better with authority figures; she was looking at how her actions played a role in her getting into trouble; and she made progress in listening and following directions on a day-to-day basis.

d. Dr. Stephanie Peterson

Dr. Stephanie Peterson, a clinical psychologist, conducted a psychological evaluation of David, first in 2003, and then she performed an update to the evaluation in 2007. Based upon documents and information provided to her, Dr. Peterson testified that the evidence strongly suggested that David had failed to make timely and adequate progress toward the goals set forth by DHHS and the court. Dr. Peterson was concerned that David was a rigid and controlling parent, that the children's behaviors and psychopathology were unusually severe, and that David's personality features were likely to impair his ability to empathize with the children and would complicate his working relationship with professional educators and caregivers assigned to the children.

e. Dr. Ann Potter

Dr. Potter, a licensed clinical psychologist, conducted psychological evaluations of the minor children in July and October 2007. Kyjsha had diagnostic impressions, including reactive

attachment disorder, oppositional defiant disorder, PTSD, rule-out conduct disorder childhood onset, rule-out developing antisocial traits, rule-out attention deficit hyperactivity disorder (ADHD) combined type, and rule-out neurological basis for psychological symptoms. Dr. Potter's diagnostic impressions of Davonisha were reactive attachment disorder, oppositional defiant disorder, ADHD combined type, mild mental retardation, and neurological problems. Dr. Potter's diagnostic impressions of Shy'Retha included reactive attachment disorder, oppositional defiant disorder, PTSD, ADHD combined type, disruptive behavior disorder not otherwise specified, and rule-out developmental delays and neurological problems due to her speech and language delays.

Dr. Potter felt that play therapy would be appropriate for the minor children, and she consulted with Stratton, the children's play therapist, on a monthly basis. Dr. Potter testified that based upon her observations of the children and her review of collateral information, the deficits of David's and Lakisha's parenting abilities and the children's special needs, Dr. Potter could not envision a combination of services that would have allowed David or Lakisha to parent the children. Dr. Potter recommended that efforts at reunification be discontinued for all three children.

f. Robin Stratton

Stratton, a licensed mental health practitioner, is the minor children's therapist and has been providing play therapy since August 2007. Stratton testified that, after over a year of providing therapy to Kyjsha, she formed a diagnostic impression that Kyjsha had experienced physical, emotional, and possible sexual abuse that led to her diagnosis of PTSD.

Stratton testified that Davonisha has been diagnosed with disruptive behavior disorder, PTSD, and reactive attachment disorder. Davonisha was not very verbal and functioned at the level of a 2 or 3 year old, which made it difficult for her to focus, concentrate, sit down, or answer questions. Stratton formed a diagnostic impression that the cause of Davonisha's PTSD was due to physical abuse and neglect and possible sexual abuse. Stratton testified that Davonisha was focused on food, specifically getting enough food; displayed a lot of traumatic play, including recurring themes of babies' getting hit or hurt, not getting food, and getting pushed down and needing to be taken to the doctor; and was fearful of male figures who she called "daddy."

Stratton testified that Shy'Retha had been diagnosed with disruptive behavior disorder, PTSD, and reactive attachment disorder. Stratton formulated a diagnostic impression that Shy'Retha suffered from PTSD due to being the victim of physical, emotional, and sexual abuse and neglect. Stratton also testified that her therapeutic opinion was that Shy'Retha experienced either abuse, neglect, or sexual abuse and that she also witnessed physical abuse.

Stratton testified that based upon the fact that she had provided therapy to the minor children for over a year; her observations, expertise, and knowledge; that all three children had been in and out of foster care for years; that all three children displayed patterns and themes of abuse and fear; and that the children have been victims of neglect and abuse, it was her opinion that termination of David's and Lakisha's parental rights was in the minor children's best interests.

g. Dr. Joseph Stankus

Dr. Joseph Stankus, a clinical psychologist, conducted a psychological evaluation of Lakisha, including a parenting assessment. Dr. Stankus performed the Wechsler Abbreviated Scale Intelligence Test to determine Lakisha's general IQ and intellectual ability, which scores indicated that she was functioning in the range of mild mental retardation, the implications of which could be difficulty learning and understanding new information and parenting practices, difficulty applying new information, and a tendency to revert back to prior behaviors.

Dr. Stankus also administered the Adult-Adolescent Parenting Inventory, Second Edition, to Lakisha, which test addresses inappropriate parenting expectations, parental lack of empathy, strong belief in corporal punishment, parent-child role reversal, and oppressing children's independence. Dr. Stankus testified that in the 3 years that he had administered the test, Lakisha's scores were the lowest he had ever seen and he had not seen any scores that low since. Lakisha scored low on inappropriate parenting expectations, meaning she expected children to do things that they really are not developmentally able to do; empathetic awareness, meaning she did not understand children's feelings and was probably more concerned with her own feelings; parent-child role reversal, meaning that the parent tends to expect the children to take care of them, they will want the children to perform more tasks and chores, and forget that they are the parent and their job is to take care of the child, not vice versa; oppressing the children's power and independence, indicating the parent feels threatened when children speak for themselves, the parent expects strict obedience to their commands, and the parent is likely to misinterpret a child's desire to express feelings as an attack on authority, leading the child to suppress the expression of feelings and hampers the open line of communication between the child and the parent.

Dr. Stankus' evaluation recommended that the children should remain in foster care. He said that given Lakisha's lack of progress, serious consideration should be given to having Lakisha voluntarily relinquish her parental rights or have those rights terminated based upon Lakisha's history of abusing the children; her failure to protect the children against sexual abuse; the fact that Lakisha's children fear her and have not appropriately bonded with her; Lakisha's mood disorder, the symptoms of which include irritability and depression, which makes it difficult for her to properly respond to the children; Lakisha's admitted anger control problem, which has led to the abuse of the minor children; the fact that the Adult-Adolescent Parenting Inventory indicated that she has very little parenting potential and that she had not gained much from the parenting class that she had already taken; that despite the services Lakisha had been provided, she had been unable to make changes to her parenting; and she was intellectually deficient and unable to address the children's extreme needs. Dr. Stankus testified that based on the evidence available at that time, there was no combination of services available that would enable Lakisha to parent the children successfully on her own and that her prognosis to improve her parenting skills to the level that would enable her to parent was poor, which translates to an extremely limited capacity, if at all. Further, due to Lakisha's unaddressed mental illness, Dr. Stankus believed that the minor children were in danger of consistent maltreatment.

h. Cristen White

White opined that it was in the minor children's best interests that Lakisha's parental rights be terminated because the children have been out of the home since July 2007 and none of the services made available to Lakisha enabled her to place herself in a position to parent the children. White also opined that termination of David's parental rights was in the minor children's best interests because of the fact that David remained unable or unwilling to protect the minor children from Lakisha, failed to accept any responsibility for the fact that the children were in foster care, and despite the amount of services offered, David was unable to place himself in a position to parent the children. White testified that she never felt comfortable that David and Lakisha could parent the minor children appropriately and that she felt there was no combination of services that would allow them to parent the children.

i. Greg Hepburn

Greg Hepburn, a mental health practitioner, testified that he had been conducting therapeutic visitation with David and the children from the summer of 2008 to May 2009. David's goals were to regulate his tone of voice; to use age-appropriate communication techniques with the children; to use appropriate topics of discussion around the children; and to assume a more active role in the scheduling, coordination, and financial responsibilities in Davonisha's and Shy'Retha's daily lives. In December 2008 and April 2009, Hepburn's progress reports recommended that the goal for David be reunification; however, Hepburn noted that David struggled to implement the objectives of his therapeutic goals.

(iv) Termination Order

On March 31, 2010, the juvenile court entered an order finding the State had proved, by clear and convincing evidence, that termination pursuant to § 43-292(2) and (6) (Cum. Supp. 2010) for both parents was in the best interests of the minor children. The juvenile court dismissed the allegations of § 43-292(9) as to both parents and the allegations that reasonable efforts were not required because the parents had subjected the children to aggravated circumstances for failure of proof. In its order, the juvenile court noted that "[b]y clear and convincing evidence, the record establishes that these three children, individually and collectively, have behaviors completely atypical of children their ages attributable to [the parents'] individual inability to parent." The juvenile court further noted that "[f]or the most gifted parents with unquestioned superior skills and/or insight, these children are a handful. For whatever reason, neither parent has been able to sustain the skills necessary to parent." It is from this order that David appeals and Lakisha cross-appeals.

III. ASSIGNMENTS OF ERROR

David contends that the juvenile court erred in terminating his parental rights pursuant to § 43-292(2) and (6), in finding that termination was in the minor children's best interests, and in violating his due process rights by repeatedly allowing hearsay statements into evidence. Likewise, Lakisha has cross-appealed, contending that the district court erred in terminating her parental rights pursuant to § 43-292(2) and (6), in finding that termination was in the minor

children's best interests, and in violating her due process rights by repeatedly admitting impermissible hearsay statements attributed to the children into evidence.

Lakisha also contends that the juvenile court erred in finding that the children's behaviors are attributable to her inability to parent and that she has not sustained the skills necessary to parent. However, these are factual findings, and this court reviews cases de novo on the record and reaches its own conclusions independently of the juvenile court's findings. *In re Interest of Lakota Z. & Jacob H.*, 282 Neb 584, 804 N.W.2d 174 (2011). Thus, we make our own independent determination regarding these issues.

IV. 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 Lakota Z. & Jacob H.*, *supra*. 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. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006); *In re Interest of Leland B.*, 19 Neb. App. 17, 797 N.W.2d 282 (2011).

V. ANALYSIS

1. TERMINATION PURSUANT TO § 43-292(2) AND (6)

Both David and Lakisha contend that the juvenile court erred in terminating their parental rights pursuant to § 43-292(2) and (6). Before addressing the merits of the assignment of error, we note that in paragraph 12 of the juvenile court's order terminating the parties' parental rights, the order inadvertently dismisses for lack of proof paragraph IX (relating to substantial, continuous, and repeated neglect) rather than paragraph XI (relating to chronic torture and abuse). It is apparent from the context of the court's order that this was a mere typographical error, and we proceed treating it as such.

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. *In re Interest of Leland B.*, *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 proved. *Id.*

We will first consider whether the State adduced sufficient evidence to support termination pursuant to § 43-292(6). Pursuant to § 43-292(6), when a court adjudicates a juvenile under § 43-247(3)(a), termination under this section requires a finding that reasonable efforts to preserve and reunify the family, if required under Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2010), under the direction of the court, have failed to correct the conditions leading to the determination. See, *In re Interest of Shelby L.*, 270 Neb. 150, 699 N.W.2d 392 (2005); *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). It is the burden of the State, and not the parent, to prove by clear and convincing evidence that the parent has failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the case plan. *In re Interest of Shelby L.*, *supra*.

(a) David

With respect to David, the motion for termination of parental rights alleged that Davonisha and Shy'Retha came within the meaning of § 43-292(6) because David had failed to correct the conditions leading to adjudication despite reasonable efforts in that David had (1) failed to submit to random UA testing, (2) that David has permitted contact between Lakisha and the children beyond visitation arranged by DHHS, and (3) that David failed to make sufficient progress with his parenting instruction and family support services. The children had been adjudicated on the basis that the minor children had been observed in possession of a butcher knife and lighter while in David's custody, that David failed to install a lock to secure his bedroom from the children even though one had been provided to him, and that, as a result, the children were at risk for harm.

David was ordered by the juvenile court to participate in a parenting assessment; participate in a psychological evaluation; obtain and maintain a legal and stable source of income; submit to random UA testing; participate in individual therapy; participate in family support services; obtain safe, stable, and adequate housing; receive training regarding the nature and origin of reactive attachment disorder and PTSD; and participate in therapeutic visitation.

The evidence established that Davonisha and Shy'Retha have been in out-of-home placement continuously since July 2007, and since that time, David has not had visitation less restrictive than supervised or therapeutic visitation. Thus, at the time of the entry of the order terminating his parental rights, Davonisha and Shy'Retha had been in out-of-home placement for nearly 3 years and the family had been involved with DHHS almost continuously since 2003.

During the course of this case, David has received numerous services, including three rounds of intensive family preservation; "Fathers for a Lifetime" program; individual therapy; therapeutic visitation; foster care, medical care, and childcare for the children; random UA testing; family support services; assistance from the visiting nurses association; early childhood specialists; an inhome therapist; respite care; anger management classes; and assistance with transportation and car repairs. Despite these services, David still had a difficult time managing the children's behaviors. Further, even after David completed the intensive family preservation program, David did not have a consistent technique for appropriately parenting the children, there were still concerns regarding safety risks in David's home, and David made no improvement on his scores on the risk scale assessment.

Guerrero testified that David required constant redirection in working on his goals, and Guerrero, Burr, and Dr. Peterson all testified that David made minimal progress on his goals. Further, David had a low frustration level for the children during visits and was unable to make sustained improvements in his parenting behaviors. Although David was offered weekly telephone contact with Stratton, the children's therapist, he only spoke to her once, and although he was offered a parenting class specifically geared toward children with special needs, he chose not to participate. David had a positive UA test for cocaine twice, had a positive UA test for alcohol, had diluted UA tests three times, and missed 23 requested UA tests. Further, despite the numerous services provided to David, the consensus of witness testimony was that there are no additional services that are available that would enable David to parent Davonisha and Shy'Retha.

(b) Lakisha

In December 2007, the juvenile court adjudicated the children insofar as Lakisha was concerned in that the children lacked proper parental care by reason of Lakisha's faults or habits in that Lakisha was unable to provide safe and stable housing for the children; during visits with the children during the summer of 2007, Lakisha was inappropriate in terms of anger, frustration, and supervision of the children; and due to this, the children were at risk for harm.

Lakisha was ordered by the juvenile court to submit to random UA testing; participate in therapeutic visitation; participate in family support services; obtain and maintain a legal and stable source of income; obtain safe, stable, and adequate housing; participate in individual therapy; and participate in a psychiatric evaluation and a psychological evaluation.

Lakisha was offered or received services, including an initial assessment; a family assessment; a psychological evaluation; psychiatric services; a chemical dependency evaluation; individual therapy; therapeutic visitation; random UA testing; foster care, medical care, individual therapy, and childcare for the children; assistance with transportation; family support services/coaching; vocational rehabilitation; and developmental disability services.

The evidence established that Lakisha's visits with the children were inconsistent and that she did not visit the children at all during March, April, and May 2007. Although Lakisha's visits were initially set for twice per week, due to Lakisha's lack of consistency, they were cut back to one time per week. Further, when Lakisha did attend visits with the children, she was often late, she had a difficult time controlling and maintaining the children's behaviors and would often threaten the children, and she was unable to make sustained changes in her parenting behaviors.

Lakisha did not maintain appropriate stable housing; she missed numerous individual therapy appointments and was eventually removed from her therapist's schedule, and she did not comply with requests for UA testing, as shown by her missing 33 requested UA tests from April 2008 to March 2009. The evidence established that Lakisha failed to attend several monthly team meetings and that although she was offered a parenting class specifically geared toward children with special needs, she chose not to participate.

Dr. Stankus, who conducted a psychological evaluation and parenting assessment of Lakisha, testified that there was no combination of services available that would enable Lakisha to parent and that her prognosis to improve her parenting skills to the level that would enable her to parent is poor. Dr. Stankus' evaluation recommended that Lakisha could not parent the children because of the history of abusing the children, her failure to protect the children from sexual abuse, the lack of bonding between her and the children, and her mood disorder and anger control problem. Dr. Stankus went on to say that despite the services Lakisha had been provided, she had been unable to make changes to her parenting, she was intellectually deficient, and she was unable to address the children's extreme needs. Dr. Stankus testified that Lakisha's unaddressed mental illness placed the minor children in danger of consistent maltreatment.

(c) Conclusion

This family was involved with the juvenile court for several years, they were provided and/or offered numerous services, and pursuant to testimony, there were no other services or combination of services that could be offered to the family that had not already been offered. Despite the services provided, neither David nor Lakisha had substantially complied with the

orders of the court or corrected the conditions that led to the adjudication of the minor children. As such, the State proved grounds for termination pursuant to § 43-292(6).

Only one ground for termination need be proved in order to terminate parental rights. *In re Interest of Heather G. et al.*, 12 Neb. App. 13, 664 N.W.2d 488 (2003). An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000); *In re Interest of Heather G. et al.*, *supra*. Since we have determined that grounds for termination of parental rights exist under § 43-292(6) and since adequate proof of only one of the grounds for termination is necessary, we will not consider the sufficiency of the evidence to support termination under § 43-292(2).

2. BEST INTERESTS

David and Lakisha also contend that the juvenile court erred in determining that termination of their parental rights was in the minor children's best interests.

The evidence established that each of the three minor children has special needs that the parents are incapable of understanding or meeting. Dr. Potter testified that she could not envision a combination of services that would have allowed either David or Lakisha to parent the minor children, and she recommended that efforts for reunification be discontinued.

Stratton, the minor children's therapist, testified that based upon the fact that she had provided therapy to the minor children for over a year; her observations, expertise, and knowledge; that the children had been in and out of foster care for years; that all three children displayed patterns and themes of abuse and fear; and that the children have been victims of neglect and abuse, it was her opinion that termination of David's and Lakisha's parental rights was in the minor children's best interests.

Dr. Rizzo testified that by the end of their therapeutic relationship, neither Lakisha nor David were able to satisfactorily address the needs of the minor children, parent the minor children independently, or sustain meaningful or positive change in interactions with the minor children. Neither Lakisha nor David understood the importance of eye contact with the minor children, and neither were able to make progress in their parenting abilities. Further, David did not understand age-appropriate expectations of the children, and there was typically no meaningful interaction between Lakisha and the children, as she was unable to understand her daughters' special needs and could not incorporate suggested changes into her interaction with the children.

Dr. Rizzo stated that although David arrived at visitations warm and engaging, he would become frustrated with the children, become abrupt, and raise his voice. David could not sustain changes in his parenting, and Dr. Rizzo stated that the children's visits with David were detrimental to the children's adjustment and should be immediately discontinued.

Dr. Rizzo described Lakisha as "extremely immature" with "no consistent sense of what to do with all three of these children," and he said that she "tends to encourage upheaval and chaos and is a destructive force with these children." Further, he opined that "Lakisha cannot offer any solace[,] meaningful support, meaningful awareness, or meaningful interaction with these children and there is no question that her [parental] rights should be terminated" and that

the children's visits with Lakisha were "very damaging and should be discontinued immediately."

White testified that termination of Lakisha's parental rights was in the minor children's best interests because none of the services made available to her had enabled her to place herself in a position to parent the children. White also recommended termination of David's parental rights based upon the fact that David was unable or unwilling to protect the children from Lakisha, failed to accept any responsibility for the fact that the children were in foster care, and despite the amount of services offered, David was unable to place himself in a position to parent the children. White did not believe that David and Lakisha could parent the children independently and felt there was no combination of services that would allow the parents to parent the children.

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); *In re Interest of Emerald C. et al.*, 19 Neb. App. 608, ___ N.W.2d ___ (2012). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Walter W., supra*; *In re Interest of Emerald C. et al., supra*.

Despite the considerable scope of services provided, these parents have been unable to place themselves in a position where they could parent the children independently and neither parent has been able to sustain meaningful change. Further, the evidence shows that although the children continue to have issues, they have shown progress during the time that they have been in out-of-home placement: their behaviors have improved, they appeared to have better coping skills, and they were better able to follow directions. Therefore, the State established that termination of David's and Lakisha's parental rights is in the minor children's best interests.

3. DUE PROCESS AND HEARSAY

David contends that the juvenile court erred in violating his due process rights by repeatedly allowing hearsay statements into evidence. The only specific instances of hearsay which David's brief identifies as objectionable relate to statements made during children's play therapy and were admitted for the purposes of medical diagnosis or treatment. In her brief, Lakisha also identifies as objectionable statements admitted pursuant to the excited utterance exception to the hearsay rule.

The juvenile court accepted hearsay statements pursuant to two exceptions to the hearsay rule, and David and/or Lakisha have raised objections. The two exceptions are (1) Neb. Rev. Stat. § 27-803(3) (Reissue 2008), statements made "for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations," and (2) § 27-803(1), the excited utterance exception.

We note that the Nebraska Evidence Rules do not apply in cases involving the termination of parental rights. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007). Instead, due process controls and requires that the State use fundamentally fair procedures before a court terminates parental rights. *Id.* In determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost. *In re Interest of Destiny A. et al., supra*.

Rather than the formal rules of evidence, we evaluate the admission of evidence in termination of parental rights cases using a due process analysis. Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003).

In the instant case, the record reflects that both David and Lakisha received proper notice of the termination hearing and that during the termination hearing, both were represented by their respective counsel. Additionally, Lakisha was appointed a guardian ad litem. David and Lakisha were given a reasonable opportunity to refute or defend against the grounds alleged for termination of their parental rights and had a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence in regard to the termination.

Further, the witnesses testified at length as to the changes in the children's demeanor and behaviors prior to, during, and after they made the disclosures of abuse. For a statement to qualify as an excited utterance, there must have been a startling event, the statement must relate to the event, and the statement must have been made by the declarant while under the stress of the event. *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011). Time lapse is not dispositive. *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990), citing *People in Interest of O.E.P.*, 654 P.2d 312, 318 (Colo. 1982) (asserting that "[t]he element of trustworthiness underscoring the excited utterance exception, particularly in the case of young children, finds its source primarily in the 'lack of capacity to fabricate rather than the lack of time to fabricate'"). Further, it has been recognized that special circumstances exist with regard to the statements of very young children and that a child's young age should be considered in determining whether the child is capable of the conscious reflection necessary to fabricate a story of abuse. *State v. Plant, supra*.

In the instant case, the children's statements are clearly related to the events of abuse, which are startling events. Additionally, the changes in the children's demeanor and behavior around the time of the disclosures lends an indicia of reliability to the statements. Further, the children's ages and the nature of the disclosures make it highly unlikely that the children were capable of fabricating the disclosures. Therefore, we find that the juvenile court did not err in considering the children's statements.

With regard to the statements made by the children during play therapy and which the court found were allowable pursuant to § 27-803(3), we note that, as set forth in the statement of facts, Safford was the children's therapist since August 2007 and had been providing play therapy to the children. The disclosures were made during therapy sessions, and we also note, Stratton also testified regarding the changes in the children's demeanor and behaviors around the time that disclosures were made. We find no error in the juvenile court's considering the children's statements made during therapy.

Having conducted a de novo review of the record, we find that the juvenile court employed fundamentally fair procedures during the proceedings and that the children's statements regarding allegations of abuse were properly considered by the juvenile court.

VI. CONCLUSION

Having found that the State proved, by clear and convincing evidence, termination of David's and Lakisha's parental rights pursuant to § 43-292(6); that termination was in the applicable minor children's best interests (Davonisha and Shy'Retha with regard to David and all three minor children with regard to Lakisha); and that David's and Lakisha's rights of due process were not violated, the juvenile court's order terminating their parental rights is affirmed. We note that in paragraph 12 of the juvenile court's order terminating the parties' parental rights, the order inadvertently dismisses for lack of proof paragraph IX (relating to substantial, continuous, and repeated neglect) rather than paragraph XI (relating to chronic torture and abuse). It is clear that this was a mere typographical error, and we affirm the termination order in its entirety, with this slight correction.

AFFIRMED AS MODIFIED.

CASSEL, Judge, participating on briefs.