

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Nyajok P.,)
Wiu P., and Ruey P.,)
Children under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Peter P.,)
)
Appellant.)

No. A-13-534

**MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL**

FILED

FEB 26 2014

**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

IRWIN, MOORE, and BISHOP, Judges.

IRWIN, Judge.

I. INTRODUCTION

Peter P. appeals from the order of the juvenile court which terminated his parental rights to three of his children. On appeal, Peter challenges the juvenile court's finding that termination of his parental rights is warranted pursuant to Neb. Rev. Stat. § 43-292(2) and (6) (Cum. Supp. 2012) and that termination is in the children's best interests.

Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Peter's parental rights. Accordingly, we affirm the order of the juvenile court.



II. BACKGROUND

1. PARTIES

The juvenile court proceedings which gave rise to this appeal were initiated in October 2009. At that time, the proceedings involved five children: Nyamal, born in April 1995; Nyakim, born in December 1997; Nyajok, born in January 2000; Ruey, born in March 2001; and Wiu, born in August 2002. The children's biological father is Peter. Their biological mother is Nyaruot D. While Peter and Nyaruot were married at one time, they were no longer married in October 2009. At the time of the children's removal from their home, they were residing in Omaha, Nebraska, with Nyaruot. Peter was residing in Kansas City, Kansas, with his second wife and their six children. The entire family is Sudanese.

We note that Nyaruot and the two oldest children, Nyamal and Nyakim, are not involved in this appeal. Although Nyaruot's parental rights were also terminated during the juvenile court proceedings, she has not appealed from that decision. And, the motion to terminate Peter's parental rights did not include Nyamal or Nyakim, presumably because both were nearing the age of 18 by the time of the termination proceedings. We will discuss Nyaruot's, Nyamal's and Nyakim's involvement in the juvenile court proceedings only to the extent necessary to provide some context about the history of this case.

2. PROCEDURAL HISTORY

On September 28, 2009, all five children were removed from Nyaruot's care after she was arrested and jailed for causing a disturbance at the homeless shelter where she and the children had been residing. The juvenile court then entered an order placing the children in the immediate custody of the Department of Health and Human Services (the Department). The children were divided into two foster homes such that the girls, Nyamal, Nyakim, and Nyajok, were placed in one home and the boys, Ruey and Wiu, were placed in another home. The children have remained in foster care for the duration of the juvenile court proceedings.

Subsequent to the children's removal, the State filed a petition with the juvenile court, alleging that each of the children was within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the faults or habits of Nyaruot. A hearing was held on the allegations contained in the petition in December 2009. At that hearing, Peter appeared before the juvenile court and requested that he be appointed counsel so that he could intervene in the juvenile court proceedings. The court granted Peter's request and, a few months later, Peter filed a petition for leave to intervene. At around this same time, the juvenile court entered an order mandating that Peter

attend family therapy with his children. It is not clear from our record whether this family therapy ever occurred.

In February 2011, Peter filed a motion requesting that the children be placed in his care and custody. Before a hearing was held on Peter's motion, however, the State filed a supplemental petition alleging that the children were within the meaning of § 43-247(3)(a) as to Peter. Specifically, the petition alleged that the children were within the meaning of § 43-247(3)(a) due to Peter knowing that the children had been in foster care since October 2009 and failing to place himself in a position to have the children placed with him and Peter failing to maintain consistent contact with the children or to provide them with proper parental care or support. The supplemental petition also alleged that Peter's parental rights to all five children should be terminated pursuant to § 43-292(2) and (7) and that such termination would be in the children's best interests.

After the State filed its supplemental petition, the juvenile court entered an order indicating its finding that it would be in the children's best interests to continue in the custody of the Department and in their current foster care placements. This order effectively denied Peter's previous motion requesting that the children be placed with him.

On July 28, 2011, an adjudication hearing was held. At the hearing, Peter admitted to the portions of the petition which

alleged that the children were within the meaning of § 43-247(3)(a) due to his faults or habits. The State dismissed the portions of the petition which concerned the termination of Peter's parental rights.

Further hearings were held in October 2011 and April 2012. At these hearings, Peter was ordered by the juvenile court to maintain safe and stable housing for all 11 of his children and to provide monthly proof of that housing to the Department. He was also ordered to maintain a legal source of income. In addition, the court indicated that Peter was to have the right to unsupervised visitation with the children.

Another hearing was held in February 2013. Peter did not appear at this hearing. Despite Peter's absence, the court renewed its previous orders for Peter to maintain safe and stable housing and a legal income. In addition, the court suspended Peter's visitation with children until he "presents himself to the Court with a visitation plan for visiting his children."

In April 2013, the State filed a motion for termination of Peter's parental rights as to Nyajok, Ruey, and Wiu. The State alleged that termination of his parental rights was warranted pursuant to § 43-292(2) because he had substantially and continuously or repeatedly neglected and refused to give his 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); 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 Peter's parental rights was in the best interests of the children.

On May 20 and 21, 2013, a hearing was held on the State's motion for termination of parental rights.

3. EVIDENCE PRESENTED AT TERMINATION HEARING

At the termination hearing, the State presented evidence to demonstrate that Peter made very little effort to maintain any sort of relationship with Nyajok, Ruey, and Wiu during the 3½ years they resided in foster care. There was evidence that although the juvenile court had granted Peter the right to unfettered, unsupervised visitation with his children, Peter only exercised that right on approximately 10 occasions. And, on one such occasion, Peter picked up his children from their foster homes and left them with a distant relative whom they did not know. Other evidence revealed that Peter also did not have much telephone contact with the children.

After the court suspended Peter's right to visitation in February 2013 because of his lack of participation in the children's lives, Peter did not ever appear before the court to

ask that his visitation be reinstated. Instead, he simply did not see the children from February to May 2013.

The children's CASA workers testified that the children had expressed an interest in remaining in their current foster care placements rather than moving in with Peter. In fact, the boys' CASA worker testified that Ruey and Wiu were no longer even disappointed by their father's absence. Instead, they had become "numb" to the situation. Specifically, the CASA worker testified:

[The boys are] disappointed. They feel [Peter] hasn't shown interest in them. They've been very disappointed in him scheduling some visits with them and not showing up, not calling, and I would say they have lost interest in him somewhat. They're not hurt anymore by it. They're kind of numbed at this point, you know, by not seeing him.

Similarly, the girls' CASA worker testified that "the girls have been disappointed . . . due to the lack of consistency from their father."

The State also presented evidence to demonstrate that Peter never obtained housing that was appropriate to accommodate all 11 of his children. In addition, he never provided any proof that he was employed. Although he stated to Department workers that he had a job, he was unable to provide them with the name of his employer. Peter also did not stay in contact with the Department workers. His telephone number was disconnected in

October 2012 and the workers were not able to communicate with him after that time.

The State offered evidence to show that Peter had not made any progress towards achieving reunification with his children even though the case had been pending for over 3 years. The State also offered evidence that termination of Peter's parental rights was in the children's best interests.

Contrary to the State's evidence, Peter testified that he is a good father who has raised his children since they were born. He testified that he wants custody of the children and indicated his belief that he could provide for them financially. Peter wants to be able to teach his children about their Sudanese culture. Peter also testified that during the pendency of the juvenile court proceedings, he had obtained a bigger residence that had five bedrooms instead of four bedrooms. He did not provide any specific information about his employment status. Peter did indicate that there were times that he was denied visitation by the children's foster parents.

Peter also testified about the Sudanese culture. He stated that in his culture, it was customary for the fathers to provide financially for the children while the mothers provided the day-to-day care.

Peter also offered the testimony of one of his children who resided with him in Kansas City. She testified that Peter is a good father who is involved in his children's lives.

4. JUVENILE COURT ORDER

After the termination hearing, the juvenile court entered an order finding that the State proved by clear and convincing evidence that grounds for termination of Peter's parental rights existed under § 43-292(2), (6), and (7). The court also found that it would be in the children's best interests to terminate Peter's parental rights. The court then entered an order terminating his parental rights to Nyajok, Ruey, and Wiu.

Peter appeals here.

III. ASSIGNMENTS OF ERROR

On appeal, Peter alleges that the juvenile court erred in finding that his parental rights should be terminated pursuant to § 43-292(2) and (6) and in finding that termination of his parental rights is in the children's best interests.

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 GROUNDS

Peter asserts that the juvenile court erred in sustaining the motion to terminate his parental rights pursuant to § 43-292(2) and (6). Peter does not argue that the court erred in sustaining the motion pursuant to § 43-292(7). Upon our de novo review of the record, we find that the evidence clearly and convincingly demonstrates that Nyajok, Ruey, and Wiu were in an out-of-home placement for at least 15 of the most recent 22 months, pursuant to § 43-292(7). As a result, we need not specifically address whether the State met its burden under § 43-292(2) or (6).

Termination of parental rights is warranted whenever one or more of the statutory grounds provided in § 43-292 is

established. If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Jagger L., supra.*

In this case, the State alleged and the court found that termination of Peter's parental rights was warranted pursuant to § 43-292(2), (6), and (7). Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." See also *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). This section operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. *In re Interest of Aaron D., supra.*

At the hearing on the State's motion to terminate Peter's parental rights, there was uncontradicted evidence which demonstrated that Nyajok, Ruey, and Wiu were put in the Department's custody and placed in foster care in October 2009. They remained in an out-of-home placement for the duration of the proceedings. As such, at the time the State filed its motion to terminate Peter's parental rights in April 2013, the children

had been in an out-of-home placement for approximately 41 months, or 3 years and 5 months. Accordingly, there is no dispute that Nyajok, Ruey, and Wiu were in an out-of-home placement for 15 or more months of the most recent 22 months as § 43-292(7) requires.

There is clear and convincing evidence that termination of Peter's parental rights was appropriate pursuant to § 43-292(7). In light of this fact, we need not, and do not, further address the sufficiency of the evidence to demonstrate that termination was also appropriate pursuant to § 43-292(2) or (6). Peter's assignments of error which relate to the sufficiency of the statutory authority to support termination are without merit.

3. BEST INTERESTS

In the previous section, we found that termination of Peter's parental rights was appropriate pursuant to § 43-292(7). As a result, we declined to address the sufficiency of the evidence demonstrating that termination was also appropriate pursuant to § 43-292(2) or (6). We, therefore, treat our discussion of whether termination of Peter's parental rights is in the children's best interests as though § 43-292(7) is the only statutory basis for termination.

In cases where termination of parental rights is based solely on § 43-292(7), the Nebraska Supreme Court has held that appellate courts must be particularly diligent in their de novo

review of whether termination of parental rights is, in fact, in the child's best interests. *In re Interest of Aaron D., supra.* In such a situation, because the statutory ground for termination does not require proof of such matters as abandonment, neglect, unfitness, or abuse, as the other statutory grounds do, proof that termination of parental rights is in the best interests of the child will require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as those enumerated in the other subsections of § 43-292. *In re Interest of Aaron D., supra.*

Peter argues that termination of his parental rights is not in the children's best interests. Specifically, he argues that he loves his children; that he "made significant, obvious attempts to comply with the court's requirements and to prove his fitness;" and that his parental rights were terminated solely because he had financial difficulties and because he had "distinctive cultural traditions." Brief for appellant at 19-20.

Peter's assertions have no merit. Contrary to the assertions in his brief, the evidence presented at the termination hearing revealed that Peter actually made very little effort to maintain a relationship with his children; to comply with the juvenile court's orders; or to cooperate with the Department.

Peter did not take advantage of his right to unfettered, unsupervised visitation with his children. The evidence revealed that pursuant to the court's order, Peter could essentially see the children whenever he wanted. And, the children's foster parents were very accommodating to Peter's right to visitation. In fact, the girls' foster parent actually contacted Peter and encouraged him to spend time with the children and to be a part of their lives. Despite the liberal visitation time afforded to Peter, he only visited the children approximately 10 times in 3½ years. The evidence revealed that Peter often did not keep his promises to the children about visiting and, even when he did come to visit, he would leave the children with virtual strangers while he did other things. Peter also did not initiate telephone contact with the children on a regular basis.

Because of Peter's failure to maintain consistent contact with the children, the children were no longer interested in having a relationship with him by the time of the termination hearing. They had been disappointed by him one too many times and indicated their preference that they not move in with him. Such evidence clearly reveals that the children did not have a strong bond with Peter.

Moreover, Peter failed to obtain appropriate housing for all of his children. And, while there was evidence that Peter did move from a 4-bedroom apartment to a 5-bedroom residence

during the proceedings, there was also evidence that even this housing was simply not set up to accommodate Peter, his wife, and all 11 of his children. When the Department visited Peter's home, they observed that there was not enough space for all of the children and there was not enough food to accommodate 13 people. Peter never notified the Department that he had made any changes to the home to make it appropriate.

Peter did not ever provide evidence to prove that he was employed. He appeared to be somewhat evasive when he told the Department workers that he was employed but was not able to tell them the name of his employer.

Peter did not stay in contact with the Department workers. His telephone number was disconnected in October 2012 and no one was able to contact him after that time. In addition, around that same time, Peter stopped appearing at the juvenile court hearings.

When we view the evidence presented at the termination hearing as a whole, we find that there is sufficient evidence to support the juvenile court's conclusion that termination is in the children's best interests. The juvenile court proceedings were pending for 3-1/2 years. During this time, the children were residing in foster care without permanency or long-term stability. During this same time, Peter failed to make any progress towards reunification with his children. He did not

have housing suitable for all of his children; he did not demonstrate that he had employment or income to support all of his children; and he did not cooperate with the Department's efforts to assist him or to communicate with him. When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

Most importantly, though, Peter did not maintain a relationship with his children. Despite the liberal visitation provided to Peter, he chose not to see or talk to the children but for a handful of times. Peter knew the children were in foster care and that they wanted a relationship with him, but he failed to facilitate such a relationship. Peter's actions clearly affected his children's view of him and any bond that they may have had with him.

Contrary to Peter's assertions, this is not a situation where Peter's parental rights were terminated solely because of his inability to financially provide for his children. While Peter's housing and his employment are factors we must consider in our analysis of the children's best interests, we consider these factors in the context of the other evidence presented.

Peter did not have suitable housing. This was due, in part, to the size of his family. Peter knew that the Department did

not deem his housing appropriate, but he did not ever make efforts to make changes to his housing nor did he ever ask for any assistance in this regard.

Peter did not demonstrate that he was employed. This fact is important not only because there is some concern about Peter's ability to provide for the children, but also because this is an example of Peter's failure to cooperate with the Department and to comply with the court's orders. Other examples of this behavior include Peter's failure to stay in contact with the Department and his failure to attend all juvenile court hearings.

And, we must examine all of this evidence alongside the evidence that Peter failed to maintain a relationship with the children. When we view all of this evidence together, it becomes clear that Peter simply was not interested in making any effort toward reunifying with his children or in being a full-time parent to them.

This is also not a situation where Peter's cultural background affected his ability to comply with the juvenile court's orders or to reunify with this children. Although Peter testified that in the Sudanese culture it was the father's role to provide for his children financially while it was the mother's role to care for the children, Peter also testified that he had been involved in raising all of his children since

their birth. He also presented evidence that he was very involved in the lives of his children who resided with him in Kansas City. Clearly, then, Peter was aware of the importance of being involved with his children and with maintaining a relationship with them. And, if he did not know what was expected of him as a parent prior to the juvenile court proceedings, the court made it very clear to him on multiple occasions what he needed to do to achieve reunification.

Pursuant to our de novo review of the record, we conclude that termination of Peter's parental rights was in the children's best interests. Accordingly, we affirm the juvenile court order terminating Peter's parental rights to Nyajok, Wiu, and Ruey.

V. CONCLUSION

Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Peter's parental rights to Nyajok, Ruey, and Wiu. As such, we affirm the order of the juvenile court terminating his parental rights to the minor children.

AFFIRMED.