

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF ANDREA J.

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IN RE INTEREST OF ANDREA J., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

ANDRE J., APPELLANT.

Filed February 24, 2009. No. A-08-914.

Appeal from the County Court for Dodge County: KENNETH VAMPOLA, Judge. Affirmed.

Shane J. Placek, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellant.

Jeri L. Grachek, Deputy Dodge County Attorney, for appellee.

CARLSON, MOORE, and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

Andre J. appeals from an order of the county court for Dodge County, sitting as a juvenile court, terminating his parental rights to his daughter Andrea J. Andre claims that his due process rights were violated, and he challenges both the statutory ground for termination of his parental rights and the juvenile court's finding that termination of his parental rights in is Andrea's best interests. Based on the reasons that follow, we affirm.

BACKGROUND

Andrea, born August 13, 1995, is the daughter of Heather B. and Andre. Andre was present at Andrea's birth but his name was not put on the birth certificate. At the time of Andrea's birth, Heather was married to another man, but was not living with him. Andre lived with Andrea and Heather for 2 years in Nebraska, and in 1997, Andre moved to South Dakota. In

November 1997, Andre was arrested for first degree burglary, first degree robbery, grand theft, and aggravated assault. Pursuant to a plea agreement, he was sentenced to 18 years' imprisonment for first degree burglary and the other charges were dismissed. The last time Andre saw Andrea was in 1997, when Andrea was 2 years old.

In August 2003, Andrea was removed from Heather's home and was subsequently adjudicated as being a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) in regard to Heather. Andrea was placed into foster care and has been in foster care for the majority of the time since her removal. She has continually remained under the jurisdiction of the Department of Health and Human Services (the Department) since August 2003. The Department did not notify Andre of Andrea's removal or adjudication.

On March 22, 2007, Andre was released from prison and put on parole. On July 10, the State filed a supplemental petition to terminate Andre's parental rights. The supplemental petition alleged that Andre "has subjected [Andrea] to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse" and that terminating Andre's parental rights is in Andrea's best interests. On August 22, Andre was ordered to submit to a paternity test, and on December 12, Andre was found to be the biological father of Andrea. On June 18, 2008, trial was held on the supplemental petition to terminate Andre's parental rights.

Carrie Leffler, the caseworker initially assigned to Andrea's case and who had the case through the end of 2004, testified that while she was the caseworker she knew that Andre was Andrea's father and that he was in prison in South Dakota. She acknowledged that the first case plan that she prepared identified Andre as Andrea's father. She testified that she never notified Andre that Andrea was in the Department's custody. She also testified that Andre never contacted her during the time she was the caseworker. Leffler further testified that as far as she knew, Andre had never asked the court to determine his paternity.

Leffler testified that in February 2004, she received an e-mail from another Department employee indicating that Andre's mother had inquired about Andrea. She testified that the e-mail indicated that Andre had found out through a friend that Andrea was in foster care. Leffler testified that she contacted Andre's mother and that they discussed visitation and the process of placement with a relative. Leffler testified that after that one conversation, there was no more contact from Andre's mother, nor was there any contact from Andre.

Renee Duffek, who had been Andrea's therapist for 2 years, testified that Andre has not been a part of Andrea's life since she was 2 years old. She testified that consistency and stability are very important to a child's development and that based on Andre's absence from Andrea's life, Andre has not provided that for Andrea. Duffek testified that Andrea does not consider Andre to be her father. She testified that it is possible that Andrea and Andre could develop a relationship in the future if given the opportunity, but that it would take more than a year to establish a parenting relationship. She opined that it would be in Andrea's best interests to terminate Andre's parental rights. She testified that her opinion was based on Andre's failure to nurture Andrea and provide her with consistency in her life. Duffek further testified that Andrea has indicated that she does not want a relationship with Andre because she does not know who he is and because Heather has told her some traumatic stories about Andre. Duffek testified that

whether the stories Andrea has been told about Andre are true or not, they affect her perception of Andre.

Tracey Gabehart was Andrea's caseworker at the time of trial and had been for almost 3 years. She testified that she never attempted to contact Andre, indicating that when she received the case a legal father (Heather's estranged husband) was established. However, Gabehart acknowledged that the case plans indicate that Andre is Andrea's father. She testified that the case file prepared by the previous caseworkers does not indicate that Andre ever contacted the Department, but that it does contain the e-mail regarding Andre's mother contacting the Department that Leffler testified about. Gabehart also testified that Andre has not provided any financial support for Andrea since the Department became involved in 2003.

Gabehart testified that Andre contacted her in July 2007, after the supplemental petition to terminate his rights was filed, but before Andre had been served. She testified that Andre told her he had been paroled about 4 months earlier and was living in Florida. Gabehart testified that Andre indicated that after he got out of prison he called Heather because he wanted to speak with Andrea. Andre told Gabehart that Heather led him to believe that Andrea was in her custody, but that Andrea did not want to talk to Andre at that time. Gabehart testified that she told Andre that a petition to terminate his parental rights had been filed and suggested that he contact an attorney. Gabehart testified that Andre was served with the supplemental petition a few days after their conversation. She further testified that she spoke with Andre one or two other times in July 2007 after their initial conversation. Gabehart testified that Andre was requesting contact with Andrea and that she told him that he could not contact Andrea because paternity had not been established and because a petition to terminate his rights had been filed.

Gabehart testified that Andrea was doing well in her current foster home, where she had been for almost a year at the time of trial, and that she has stability in her life for the first time in a long time. She testified that Andrea has a hard time trusting people, but she is developing a trusting relationship with her foster parents and starting to feel like it is home.

Gabehart opined that it would be in Andrea's best interests to terminate Andre's parental rights. She testified that there are many "roadblocks" that would make it difficult to establish a parental relationship between Andre and Andrea. She testified that one "roadblock" is the negative feelings that Andrea has toward Andre based on the information Heather has told Andrea about Andre. She also testified that due to Andrea's trust issues and the fact that she is starting to trust her foster parents and has stability in her life, it would be risky to disrupt that. Gabehart also testified that the fact that Andre lives in Florida and Andrea is in Nebraska is a roadblock to establishing a relationship. She further testified that Andrea considers another individual who has been in her life to be her father, rather than Andre. Gabehart testified that Andrea has indicated to her that she would like to see Andre for the purpose of asking him questions, but does not desire a relationship with him.

Andre testified that while he was in prison he sent Andrea "several" letters and cards and sent her gifts at Christmas and on her birthday. He testified that the last time he wrote to Andrea was in 2005. He testified that he estimated that between 1997 and 2005, he sent two letters per month to Andrea and Heather. Andre also testified that he would call Heather and talk to her because Andrea was too young to talk on the telephone. He testified that he did talk to Andrea a few times on the telephone, the last time being in 2003. He testified that it was difficult for him

to make telephone calls while he was in prison because he was in lockdown during most of his time in prison, meaning he was only out of his cell for 45 minutes each day. Andre also testified that at times it was hard to locate Andrea because Heather moved around, but he could usually find her through family and friends.

Andre testified that he had information in 2003 that Andrea was in foster care and that by 2005, he knew for certain that Andrea was a ward of the State. Andre admitted that in 2004, he told his mother that Andrea was in foster care and that his mother contacted the Department to find out if Andrea was in fact in foster care. Andre testified that he did not follow up with his mother to find out what she learned, nor did he attempt to contact the Department himself.

Andre testified that he was paroled in March 2007 and moved to Florida to live with his mother. He testified that South Dakota would not allow him to be paroled to Nebraska or South Dakota. Andre testified that a few days after being paroled, he called Heather and asked to speak with Andrea. Andre testified that Heather told him that Andrea was there but that she did not want to talk to him. He testified that he believed what Heather told him.

Andre testified that he first contacted Gabehart in April or June 2007, rather than July 2007 as Gabehart testified, to find out if Andrea was in foster care. Andre later testified that it could have been July when he first spoke with Gabehart. Andre testified that he explained to Gabehart that Heather had led him to believe that Andrea was with Heather. He also testified that he inquired about sending Andrea school supplies, cards, or balloons, and was told by Gabehart not to contact Andrea.

At the close of the State's case in chief, Andre made a motion to dismiss, which the court took under advisement. At the conclusion of trial, the juvenile court entered an order in which it overruled Andre's motion to dismiss, finding that Andre's lack of notice of proceedings prior to the filing of the supplemental petition did not violate his right to due process. The court further found that the State proved by clear and convincing evidence that grounds for termination of Andre's parental rights existed under Neb. Rev. Stat. § 43-292(9) (Reissue 2008), and thereby implicitly found that reasonable efforts under Neb. Rev. Stat. § 43-283.01 (Reissue 2008) were not required. The court also found that termination of Andre's rights is in Andrea's best interests. The juvenile court's order also terminated Heather's parental rights, which are not at issue in this appeal.

ASSIGNMENTS OF ERROR

Andre assigns, restated, that the juvenile court erred in (1) failing to grant his motion to dismiss made at the close of the State's evidence on the basis that the State deprived him of due process, (2) finding that the State proved by clear and convincing evidence that grounds for termination of his parental rights existed under § 43-292(9) and in finding that reasonable efforts under § 43-283.01 were not required, (3) finding that termination of his parental rights is in Andrea's best interests, and (4) incorporating Andre into its analysis under § 43-292(6) when said section was not filed against him in the supplemental petition to terminate his parental rights.

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 juvenile 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. *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.*

ANALYSIS

Due Process.

Andre first assigns that the trial court erred in failing to grant his motion to dismiss made at the close of the State's evidence on the basis that the State deprived him of due process. Andre argues that his due process rights were violated because he was not notified when Andrea was removed from Heather's care and adjudicated.

Neb. Rev. Stat. § 43-263 (Reissue 2008) requires that in an adjudication hearing the person who has custody of the juvenile must be served with summons. In like manner, summons must be served before parental rights may be terminated. Neb. Rev. Stat. § 43-291 (Reissue 2008).

A proceeding to terminate parental rights, which parents are entitled to attend, must employ fundamentally fair procedures satisfying the requirements of due process. *In re Interest of K.M.S.*, 236 Neb. 665, 463 N.W.2d 586 (1990).

In *In re Interest of K.M.S., supra*, the Supreme Court addressed the issue of whether a putative father was denied due process because he was not made a party in the original detention and adjudication hearing. The court noted that the statute regarding the termination petition provides in part that "[f]acts may also be set forth in the original petition, a supplemental petition, or motion filed with the court alleging that grounds exist for the termination of parental rights." § 43-291. The court found that the putative father had been served with the petition, summons, and notice of hearing for the termination/adjudication proceeding regarding his parental rights. Thus, the court concluded that the State had fully complied with the requirements of due process.

In the instant case, Andre was not Andrea's custodial parent. The State complied with the statutory notice requirements for Heather, the custodial parent, as she was served with summons in the adjudication hearing. Andre was properly served with the petition, summons, and notice of hearing for the termination proceeding regarding his parental rights. Therefore, the State complied with the requirements of due process for Andre. Andre's assignment of error is without merit.

Statutory Grounds for Termination.

Andre next assigns that the juvenile court erred in finding clear and convincing evidence for termination under § 43-292(9) and in finding that reasonable efforts under § 43-283.01 were not required. Section 43-292(9) provides that a court may terminate parental rights if termination is in the child's best interests and if the court finds that "[t]he parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse." Section 43-283.01(4)(a) provides that reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that the parent has subjected the juvenile to aggravated circumstances, including abandonment.

The aggravated circumstance at issue in this case is abandonment. We have found no published cases discussing abandonment under § 43-292(9) as grounds for termination of parental rights. That being so, we will look at cases discussing abandonment under § 43-292(1). Abandonment under § 43-292(1) provides that there are grounds for termination when a parent has "abandoned the juvenile for six months or more immediately prior to the filing of the petition." As used in § 43-292(1), the term "immediately prior" regarding abandonment means the time period determined by counting back 6 months from the filing date of the petition. *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). In this case, the supplemental petition was filed on July 10, 2007, so the relevant period runs from January 10 to July 10, 2007.

The record shows that in January 2007, Andre was still in prison. He was paroled on March 22, 2007, to Florida. Andre testified that since 2003, he had heard that Andrea was in foster care, and that by 2005, he knew for certain that she was a state ward. Despite this information, there is no evidence that Andre made any effort between January and March to contact the Department or to have anyone else do so on his behalf.

The evidence also shows that between the time Andre was paroled and the supplemental petition was filed, he made little effort to find out where Andrea was and if and how he could reconnect with her. Andre testified that a few days after being paroled, he called Heather and she told him that Andrea was there with her but did not want to talk to him. Andre testified that he believed that Andrea was with Heather and no longer in foster care. However, despite his belief, there is no evidence that he called Heather on other occasions to see if Andrea would speak with him or to even inquire as to how Andrea was doing. In addition, Andre did not contact Gabehart for over 3 months after he had been paroled. At that point, the supplemental petition to terminate Andre's parental rights had been filed.

In the 6 months before the supplemental petition to terminate was filed, Andre had no contact with Andrea and made minimal effort to locate her or to find out how to reconnect with her. We conclude that there is sufficient evidence to support a finding that Andre abandoned Andrea for 6 months immediately prior to the filing of the supplemental petition.

For purposes of § 43-292(1), abandonment has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of Deztiny C.*, 15 Neb. App. 179, 723 N.W.2d 652 (2006). Parental intent is a question of fact and may be determined by circumstantial evidence. See *id.*

The parental obligation is a positive duty which encompasses more than a financial obligation. *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996). Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child. *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999). Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child. *Id.*

The record is void of any significant contact between Andre and Andrea from November 1997 until July 2007, when the supplemental petition to terminate was filed. As the juvenile court found, Andre has intentionally subjected Andrea to a prolonged period of abandonment due to his imprisonment and his failure to maintain contact or to provide support. The trial court summed up the evidence well:

From 1997 until March 2007, there is no evidence other than [Andre's mother's one conversation with Gabehart] that [Andre] made any attempt to address other arrangements or exercise [any] parental responsibility on behalf of his child notwithstanding his knowledge of state involvement and his child's placement in foster care. The Court finds from the evidence presented that the father's lack of effort was intentional by placing himself in the circumstances of his segregated incarceration and by the lack of any significant demonstrative attempts to exercise or maintain any form of parent-child relationship, legally or personally.

We conclude that the juvenile court did not err in concluding that the State proved by clear and convincing evidence that Andre subjected Andrea to abandonment under § 43-292(9). Accordingly, the court also did not err in concluding that reasonable efforts were not required pursuant to § 43-283.01.

Best Interests.

Andre next assigns that the juvenile court erred in finding that termination of his parental rights is in Andrea's best interests. At the time of trial in June 2008, Andrea was almost 13 years old and had not seen Andre since she was 2 years old. Andre has had little contact with Andrea since she was 2 years old, much less a parental relationship. Andre's absence in Andrea's life is largely a result of Andre's incarceration for 10 years.

We recognize that parental incarceration may not be utilized as the sole ground for termination of parental rights. See *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002). However, a parent's incarceration may be considered along with other factors in determining whether parental rights should be terminated. *Id.*

Although termination cannot be based solely on the fact that a parent has been incarcerated, courts may consider the attendant circumstances which are occasioned by incarceration. When the aggregate of these circumstances indicates clearly and convincingly that the children's best interests dictate termination of parental rights, such is proper. *In re Interest of Brettany M. et al.*, *supra*.

In the present case, Andre's incarceration resulted in his inability to perform his parental obligations and to provide for Andrea's needs. As a result of Andre's incarceration, he has not been able to provide for Andrea financially, physically, or emotionally for 10 years. Although Andre's incarceration was not voluntary, his illegal actions that put him in prison were voluntary.

During Andre's 10 years in prison, he made little effort to maintain a relationship with Andrea. Even after he learned that she was in foster care, he made no effort to contact the Department or have anyone else do so on his behalf, with the exception of his mother's one conversation with Gabehart, nor did he take any action to establish paternity. Thus, his failure to maintain a relationship or even maintain contact with Andrea and his failure to contact the Department after he learned Andrea was in foster care were also voluntary acts.

We further point out that even before Andre was incarcerated, he moved to South Dakota, away from Andrea, without establishing paternity and, thus, without establishing any parental rights to Andrea.

Although Andre is no longer in prison, he has been absent for 11 out of 13 years of Andrea's life. Andrea has not seen Andre since she was 2 years old. Duffek testified that Andrea does not know Andre and does not identify him as her father. Duffek and Gabehart both testified that Andrea does not want a relationship with Andre. Duffek testified that consistency and stability are very important to a child's development and that Andre has not provided that for Andrea. Gabehart testified that Andrea was doing well in her current foster home, where she had been for almost a year at the time of trial, and that she has stability in her life for the first time in a long time. She testified that Andrea has a hard time trusting people, but she is developing a trusting relationship with her foster parents and starting to feel like it is home. Duffek and Gabehart both testified that it is in Andrea's best interests to terminate Andre's parental rights.

Nebraska jurisprudence holds, generally, that it is in the child's best interests that a final disposition be made without delay. *In re Interest of Brittany M. et al., supra*. Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights; children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999). Andrea has been under the Department's jurisdiction since 2003 and has spent the majority of that time in foster care. Andrea deserves stability and should not have to be suspended in foster care any longer. We conclude that the evidence before us clearly and convincingly establishes that termination of Andre's parental rights is in Andrea's best interests.

Analysis Under § 43-292(6).

Finally, Andre assigns that the juvenile court erred in terminating his parental rights by incorporating him into an analysis of § 43-292(6) in its order when that subsection was not alleged against him in the supplemental petition. Andre refers to a paragraph within the juvenile court's best interest's analysis. In such paragraph, the court cites a proposition of law related to what a trial court may review in regard to a parent's reunification efforts and states, "In this case, the mother's parenting history and the father's lack of parenting history does not bring either of the parents closer to reunification with their child. Andre argues that the court's reference to himself and reunification constitute an analysis of whether Andre's rights could be terminated pursuant to § 43-292(6). Whether the paragraph is or is not an analysis of § 43-292(6) in regard to Andre, it does not affect the termination of Andre's parental rights. The juvenile court did not terminate Andre's parental rights based on § 43-292(6). Rather, it found that the State proved by clear and convincing evidence that grounds existed to terminate Andre's parental rights under

§ 43-292(9). 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 Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). Accordingly, based on our previous analysis, there was sufficient evidence to terminate Andre's parental rights under § 43-292(9), the ground alleged in the supplemental petition, and the court's implication of § 43-292(6) does not affect the outcome of this case. Andre's assignment of error is without merit.

CONCLUSION

After our de novo review of the record, we conclude that the juvenile court did not err in overruling Andre's motion to dismiss, as the State did not deprive him of due process; the juvenile court did not err in finding that the State proved by clear and convincing evidence that grounds for termination of Andre's parental rights existed under § 43-292(9) and in finding that reasonable efforts under § 43-283.01 were not required; the juvenile court did not err in finding that termination of Andre's parental rights is in Andrea's best interests; and the juvenile court did not err by incorporating Andre into an analysis under § 43-292(6). Accordingly, the order of the juvenile court is affirmed.

AFFIRMED.