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CONCLUSION

The district court did not err in denying the motion for directed verdict.

AFFIRMED.

IN RE INTEREST OF LELAND B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RONALD B., APPELLANT.

797 N.W.2d 282

Filed May 10, 2011. No. A-10-936.

1. **Parental Rights: Abandonment.** In termination of parental rights cases, it is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment.
2. **Parental Rights.** A parent's incarceration, standing alone, does not provide grounds for termination of parental rights.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Reversed and remanded for further proceedings.

Beau G. Finley, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Geoffrey Thomas, Senior Certified Law Student, for appellee.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, guardian ad litem.

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

IRWIN, Judge.

I. INTRODUCTION

Ronald B. appeals from the order of the separate juvenile court of Douglas County which terminated his parental rights to his son, Leland B. On appeal, Ronald challenges the juvenile court's finding that his parental rights should be

terminated pursuant to Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2010) and the court's finding that termination of his parental rights is in Leland's best interests. Upon our de novo review of the record, we find that the State failed to adduce sufficient evidence to clearly and convincingly demonstrate that termination of Ronald's parental rights is warranted pursuant to § 43-292(2), and accordingly, we reverse, and remand for further proceedings.

II. BACKGROUND

These proceedings involve Ronald's son, Leland, born in December 2005. Leland's mother died in April 2009 during the pendency of these juvenile court proceedings, and as a result, her involvement in this case is not a subject of this appeal.

In May 2008, Ronald was incarcerated after being convicted of possession of and intent to distribute cocaine. At the time of Ronald's incarceration, Leland was residing with his mother. However, shortly after Ronald's incarceration, she requested assistance from the Department of Health and Human Services (the Department) because she was severely depressed and struggling to take care of her three children.

In October 2008, the State filed a petition alleging that Leland was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) as a result of his mother's mental health problems. Leland was placed in the custody of the Department. Then, in April 2009, his mother died. After her death, the Department sent Ronald a letter notifying him that Leland was in the custody of the Department. In response, Ronald sent the Department a letter indicating that he wanted Leland placed with Ronald's sister and that he wanted custody of Leland upon his release from prison.

On June 24, 2009, the State filed a supplemental petition alleging that Leland was a child within the meaning of § 43-247(3)(a) by reason of the faults or habits of Ronald. Specifically, the petition alleged that Leland's mother is deceased; that Ronald is incarcerated and unable to provide Leland with proper parental care and support and with safe, stable, and adequate housing; and that Leland is at

risk for harm. At the adjudication hearing held in August 2009, Ronald admitted to the allegations in the petition and Leland was adjudicated to be a child within the meaning of § 43-247(3)(a).

On June 15, 2010, the State filed a motion for termination of Ronald's parental rights. In the motion, the State alleged, among other things, that Leland was a child within the meaning of § 43-292(2) because Ronald has substantially and continuously or repeatedly neglected and refused to give Leland necessary parental care and protection. The motion also alleged that termination of Ronald's parental rights is in Leland's best interests.

On August 16, 2010, a hearing was held on the State's motion to terminate Ronald's parental rights. At the hearing, the State called three witnesses to testify: Leland's foster mother, Leland's therapist, and the Department caseworker assigned to the family.

Leland's foster mother testified that she has been his foster mother since December 2009. She testified that Leland has behavioral problems, including nightmares and trouble sleeping. She also indicated that Leland gets "very upset" after visits with his relatives and that "it can last a good hour, if not longer, of just flailing, crying, just screaming." She testified that Leland is "not easy to console when he gets too worked up about something." She testified that these problems have improved somewhat since Leland first came to live with her. She also testified that the only contact Ronald has had with Leland since December 2009 is through letters. Ronald has sent Leland approximately six letters since December 2009. In those letters, Ronald promised that one day Ronald and Leland will have a house together.

Leland's therapist testified that she has provided therapy to Leland since February 2010. She confirmed his foster mother's testimony that he suffers from behavioral problems. The therapist described these problems as grief issues, tantrums, impulsivity, poor eye contact, and poor listening skills. In addition, she opined that Leland may suffer from an attachment disorder. She testified that it is important for Leland to have a consistent placement because he needs stability and trustworthy

caregivers to assist him in building his confidence and self-esteem. She indicated that Leland has made good progress with his foster family and that he feels safe with them and loves them very much.

The therapist testified that when she asks Leland about Ronald, he does not know anything except that his father is "in jail." Leland cannot describe Ronald and cannot identify an activity that they enjoyed doing together prior to Ronald's incarceration. The therapist recommended that Ronald write letters to Leland because she did not believe it would be appropriate for Leland to visit Ronald in prison. She indicated that Leland does not have a bond with Ronald, but that he does have a bond with his foster family. Ultimately, she opined that termination of Ronald's parental rights is in Leland's best interests because Leland needs a stable caretaker now and Ronald is not in a position to be that caretaker and because she has no information about what kind of parent Ronald will be after his release from prison.

The Department caseworker testified that she has been assigned to Leland's case since approximately July 2008. She testified that it appears that Leland is happy with his foster parents and that he is "like a different little boy" because of his time there. She testified that Ronald's projected release date from prison is in March 2011. At that time, he will reside in a halfway house. She indicated that she is concerned about Ronald's ability to parent after his release from prison due to the length of time Leland has been separated from Ronald, Leland's behavioral problems, and questions about whether Ronald will be able to obtain appropriate employment and housing. She opined that it would be in Leland's best interests to terminate Ronald's parental rights.

In addition to the State's evidence, Ronald testified at the termination hearing. He testified that he is currently incarcerated at a prison in Yankton, South Dakota, but he may be released to a halfway house located in Council Bluffs, Iowa, as early as March 2011. Ronald admitted that this release date is not "an absolute" and that "anything can happen." Ronald testified that prior to his incarceration, he was one of Leland's

primary caregivers and either resided with Leland or had visitation with him on a regular basis. Ronald also admitted that during the time he was caring for Leland, he was dealing crack cocaine, was an associate of a gang, and had used and abused marijuana, alcohol, and crack cocaine.

Ronald's mother also testified. She testified that Ronald was Leland's primary caregiver prior to his incarceration and that Leland was a healthy and happy child. She indicated that she believed Ronald to be a capable father.

After the hearing, the juvenile court filed an order terminating Ronald's parental rights to Leland. The court found that Leland is a child within the meaning of § 43-292(2) and that termination of Ronald's parental rights is in Leland's best interests.

Ronald timely appeals from the juvenile court's decision to terminate his parental rights.

III. ASSIGNMENTS OF ERROR

On appeal, Ronald challenges the juvenile court's finding that his parental rights should be terminated pursuant to § 43-292(2) and the court's finding that termination of his parental rights is in Leland'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 for Termination

In Ronald's first assignment of error, he alleges that the juvenile court erred in finding that the State presented clear and convincing evidence to prove the statutory grounds for termination of his parental rights. Specifically, he challenges the juvenile court's determination that termination of his parental rights is warranted pursuant to § 43-292(2). Upon our de novo review of the record, we determine that the evidence does not clearly and convincingly establish that Ronald neglected Leland pursuant to § 43-292(2). We reverse the order of the juvenile court terminating Ronald's parental rights and remand the matter for further proceedings.

[1,2] Section 43-292(2) provides that the court may terminate parental rights when the parent has "substantially and continuously or repeatedly neglected and refused to give the juvenile . . . necessary parental care and protection." The Nebraska Supreme Court has recognized that in termination of parental rights cases, it is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). A parent's incarceration may be considered along with other factors in determining whether parental rights can be terminated based on neglect. *Id.* However, a parent's incarceration, standing alone, does not provide grounds for termination of parental rights. *Id.*

In this case, the State's evidence concentrated on Ronald's drug-related convictions and sentences. This evidence reveals that Ronald was convicted of possession of and intent to distribute cocaine and was incarcerated for that conviction beginning in May 2008, when Leland was 2 years old. The evidence also reveals that Ronald may be released from prison as early as March 2011.

The State did present evidence to demonstrate that Ronald has not seen Leland since May 2008, when he began serving his sentence. However, there was also evidence that Leland's

therapist recommended that Leland not visit Ronald in prison and that their interaction be restricted to letter writing. Ronald complied with this restriction and began writing letters to Leland on a regular basis.

The State also offered expert testimony from Leland's therapist and the Department caseworker concerning termination of Ronald's parental rights. Both witnesses opined that termination was in Leland's best interests. However, their opinions were based entirely on Ronald's being incarcerated and not on any information about Ronald's ability to parent Leland. In fact, many of their concerns were speculative in nature. The therapist indicated that she had concerns about what type of father Ronald might be after he was released from prison. Similarly, the caseworker testified that she had concerns about whether a bond still existed between Ronald and Leland and whether Ronald would be able to cope with Leland's behavioral problems.

It is clear from the evidence presented by the State that as a result of his time in prison, Ronald has not been able to provide Leland with necessary parental care and protection since May 2008. It is also clear that Leland may not have a strong bond with Ronald because of the time Ronald has spent apart from Leland and because of Leland's young age when Ronald began his incarceration. Taken together, this evidence seems to demonstrate that Ronald has neglected Leland pursuant to § 43-292(2). Yet, all of this evidence is anchored on Ronald's incarceration, and as we explained above, Ronald's incarceration, standing alone, does not provide grounds for termination of his parental rights.

The State offered no evidence other than Ronald's incarceration to prove that Ronald has neglected Leland pursuant to § 43-292(2). Moreover, the State appears to disregard that Ronald is likely to be released from incarceration in the very near future and will be able to participate in a reunification plan.

We are aware that Ronald will not be in a position to immediately regain custody of Leland upon his release. However, the evidence suggests that Ronald has a strong desire to be a parent to Leland. In May 2009, when the Department sent

Ronald a letter notifying him that Leland had been placed in the Department's custody, Ronald immediately responded to the letter, asking that Leland be placed with a relative and indicating that he desired to regain custody of Leland when he was released from prison. Since that time, Ronald has remained in contact with the Department.

During his incarceration, Ronald made efforts to improve his ability to parent Leland. He testified that he participated in a parenting class. And, although Ronald admitted at the termination hearing that prior to his incarceration, he dealt cocaine, used and abused alcohol and other controlled substances, and was an associate of a gang, he testified that while incarcerated, he enrolled in and participates in a "drug program." His completion of this program reduces his sentence by 1 year.

Ronald also testified that prior to his incarceration, he was one of Leland's primary caregivers and spent a great deal of time with Leland for the first 2½ years of his life. Ronald was present for Leland's birth and had almost daily contact with Leland from his birth through the time of Ronald's incarceration. Ronald indicated that he wanted to continue to parent Leland when he was released, and he provided the juvenile court with a plan to achieve reunification.

Specifically, Ronald testified that his plan was to obtain employment as soon as possible after his release to the halfway house, in Council Bluffs, in March 2011. He indicated that he was currently researching available jobs that were posted in a local newspaper. Ronald testified that once he obtained employment and received his first paycheck, he would be placed on house arrest. Ronald indicated that he could be placed on house arrest as soon as 2 to 3 weeks after being released from prison. For the period of house arrest, he planned to move in with his grandmother, who, he testified, had a previous relationship with Leland. Ronald indicated that he had spoken with his grandmother and that she was willing to have Ronald and Leland come live with her. Ronald testified that he would be released from house arrest in September 2011. At that time, he would be in a position to obtain his own residence, where he and Leland could reside together.

Upon our de novo review of the record, we conclude that the State failed to present clear and convincing evidence to demonstrate that Ronald has neglected Leland pursuant to § 43-292(2). The State's evidence focused exclusively on Ronald's current incarceration, and as we stated above, a parent's incarceration, standing alone, does not provide grounds for termination of parental rights. We reverse the order of the juvenile court terminating Ronald's parental rights and remand the matter for further proceedings.

3. Best Interests

Ronald also alleges that the juvenile court erred in determining that termination of his parental rights is in Leland's best interests. However, because we conclude that the State failed to provide sufficient evidence to prove that termination of Ronald's parental rights was warranted pursuant to § 43-292(2), and because we accordingly remand for further proceedings, we do not address Ronald's second assignment of error. An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it. *Curtis v. Curtis*, 17 Neb. App. 230, 759 N.W.2d 269 (2008).

V. CONCLUSION

Upon our de novo review of the record, we find that the State failed to adduce sufficient evidence to clearly and convincingly demonstrate that termination of Ronald's parental rights is warranted pursuant to § 43-292(2). As such, the juvenile court erred in terminating Ronald's parental rights, and we reverse, and remand for further proceedings.

Reversed and remanded for further proceedings.