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11/25/2026 01:12 AM CST



# IN RE INTEREST OF EMERALD C. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. RICHARD D., APPELLANT, AND JEFFREY A. WAGNER, APPELLEE AND CROSS-APPELLANT.

810 N.W.2d 750

Filed March 20, 2012. No. A-11-383.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
3. **Parental Rights: Proof.** In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010) exists and that termination is in the children's best interests.
4. ____: ____. Generally, when termination is sought under subsections of Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010) other than subsection (7), the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile.
5. **Parental Rights.** 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.
6. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
7. **Parental Rights: Attorney and Client: Guardians Ad Litem.** While the Nebraska Rules of Professional Conduct require a parent's attorney to zealously represent the wishes of the parent in a proceeding to terminate parental rights, a parent's guardian ad litem is to determine the best interests of the parent without reference to the parent's wishes.
8. **Parental Rights: Guardians Ad Litem.** A guardian ad litem appointed for a parent pursuant to Neb. Rev. Stat. § 43-292(5) (Cum. Supp. 2010) is entitled to participate fully in the proceeding to terminate parental rights.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Affirmed.

Matthew R. Kahler, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

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

Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., guardian ad litem for Richard D.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Richard D. appeals from the order of the separate juvenile court of Douglas County which terminated his parental rights to his minor children. Richard's guardian ad litem (GAL), Jeffrey A. Wagner, has cross-appealed. Our de novo review finds that there was sufficient evidence to support the juvenile court's finding that grounds existed to terminate Richard's parental rights and that such was in the children's best interests. Further, Richard's GAL has not shown how Richard was prejudiced by the decision of the juvenile court to deny Richard's GAL the opportunity to participate at the termination hearing. Accordingly, we affirm the decision of the juvenile court.

## BACKGROUND

Richard is the biological father of Danielle D. (born in August 1995), Richard D. II (Richard Jr.) (born in August 1996), Phyllip D. (born in February 1999), Timothy D. (born in April 2006), Elizabeth D. (born in March 2007), and Michael D. (born in July 2008), and he is the stepparent of Emerald C. (born in August 2002). All references in this case to "the children" or "Richard's children" apply only to Richard's biological children, unless otherwise specified.

The State filed a juvenile court petition on August 15, 2008, seeking to adjudicate Richard's children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Specifically, the State alleged that Richard had failed to provide the children with safe, stable, and/or appropriate housing; that on or about August 12, a protection and safety worker observed the home of the children to be in a filthy, unwholesome condition; that Richard had failed to provide the children with appropriate care, support, and/or supervision; that notwithstanding services offered to the parents on a voluntary basis by the Nebraska Department of Health and Human Services (the

Department), Richard had failed to follow through with services designed to prevent the removal of the children from the parental home; and that due to these allegations, the children were at risk for harm. The children were removed from Richard's home on the same day that the petition was filed. Following a first appearance and a detention and protective custody hearing, the juvenile court ordered that the children were to remain in the temporary care and custody of the Department to exclude Richard's home.

An adjudication hearing was held on November 18, 2008, and Richard entered an admission to a portion of the petition. Pursuant to the State's motion, the juvenile court dismissed the allegations that a protection and safety worker had observed the home in a filthy and unwholesome condition and that Richard had failed to follow through with services designed to prevent the removal of the children from the home. The court found the other allegations of the petition against Richard to be true based on the plea and adjudicated all of the children, including Emerald, as being within the meaning of § 43-247(3)(a). The court ordered that the children remain in the custody of the Department for appropriate care and placement.

A dispositional hearing was held on January 20, 2009, which hearing was continued to January 27. Following the continued hearing, the juvenile court, among other things, ordered Richard to participate in individual therapy, cooperate with family support worker services and other case professionals, and be allowed reasonable rights of semisupervised visitation.

On February 19, 2009, following another dispositional hearing, the juvenile court ordered Richard to attend individual and family therapy, cooperate with family support and other workers, complete a parenting course, and keep his home open to visits by the Department and all case professionals involved in the case. The court also ordered that on February 27, placement for Danielle, Richard Jr., Phyllip, and Emerald could include Richard's home with a written safety plan in place. The court also ordered that Elizabeth, Timothy, and Michael could transition back to Richard's home on March 28, when approved in writing by the case manager, the children's GAL,

and individual and family therapists. Danielle, Richard Jr., Phyllip, and Emerald returned to the family home on February 27. The transition of the other children to Richard's home did not occur. On April 28, the State filed a motion for temporary custody, asking the juvenile court to again remove Danielle, Richard Jr., Phyllip, and Emerald from Richard's home, which motion was granted by the court.

Following a dispositional hearing on August 24, 2009, the juvenile court ordered Richard to participate in individual therapy, complete a domestic violence program, cooperate with family support worker services, maintain safe and adequate housing for himself and his children, participate in marital counseling, and be allowed reasonable rights of supervised visitation. A similar order was entered following a review and permanency planning hearing on January 19, 2010, except Richard was also ordered to submit to random drug and alcohol testing. Richard and his wife separated at some point, and therefore marital counseling did not occur.

On May 27, 2010, the State filed a third motion for termination of parental rights with respect to Richard and his children. The State sought termination of Richard's parental rights under Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2010) and alleged that termination of Richard's parental rights was in his children's best interests.

A termination hearing was held before the juvenile court on November 5 and 18, 2010, and January 27, 2011. The court heard closing arguments from the parties on April 7.

At the start of the November 5, 2010, hearing, while clarifying other preliminary matters, the court stated, "Just so we're clear, [Richard's GAL], you will not be participating in examination of the witnesses as [the GAL] for the father." Richard's GAL objected for the record, and the court overruled the objection.

Testimony was received from a family therapist, a family support worker, a "family partner," a visitation worker, a visitation supervisor, the foster parents for two of the children, and the Department's caseworker. The children initially came into the Department's care in August 2008 because of allegations of a dirty home, improper supervision, and parental drug abuse.

The Department provided Richard with family therapy, family support services, visitation supervision and transportation of the children for visitation, and assistance with cleaning and maintaining his home. At the time of the termination hearing in January 2011, Danielle and Phyllip had been placed with their mother; Richard Jr. was at a youth center; and Elizabeth, Michael, and Timothy were in foster care.

Initially, Richard had supervised visits with all of the children four times a week. After the older children were returned to his home in February 2009, he was provided with 24-hour, in-home supervision for the older children, and he continued to have visitation with the younger children four times a week. The older children were again removed from the home in April, because of an altercation between Richard and his wife that took place when the younger children were present for a semisupervised visit. Thereafter, Richard continued to have visits four times a week until January 2010, when the visitations were reduced to three per week for the older children and two per week for the younger children due to the children's basic needs not being met at visits. In April 2010, Richard's visits with all of the children were reduced to one per week due to excessive cancellations by Richard.

The testimony revealed that Richard is a loving father, that there is a bond between Richard and all of the children, and that the children are happy to visit with Richard. Richard's interaction with the children is limited somewhat by certain health issues that make it difficult for Richard to physically care for the children. Richard occasionally had difficulty staying awake during visitations. In 2010, Richard experienced multiple hospitalizations, including surgery, for his medical issues. Richard is not able to supervise all six children at once, and he frequently relies upon the older children to help care for the younger children during visits. The youngest child, Michael, is autistic, has fetal alcohol syndrome, and has "a cyst on both sides of his brain." Richard has difficulty at times following Michael's dietary restrictions and interacting with Michael. Richard Jr. has a number of behavioral issues and has been diagnosed with oppositional defiant disorder, which is characterized by acting out feelings and not responding to

directions and rules. Richard's attendance at visitation was mostly consistent; however, he did cancel visits due to work, illness, or hospitalization. On some occasions, visits were canceled by Richard without a reason given. On one occasion, visitation was ended early and the police were called as a result of a verbal altercation between Richard and a visitation worker. Richard also ended visits early on occasion due to his work schedule and health concerns. The foster parents of Elizabeth and Michael testified to behavioral issues after the children visited Richard; however, they also testified to observing a bond between the children and Richard.

Family therapy was provided to Richard and three of the children—Danielle, Richard Jr., and Phyllip—beginning in December 2008. The goals for the family were to rebuild family relationships, increase communication, and help the children maintain good behaviors in their respective placements. Richard was an active participant in family therapy and displayed an affectionate bond with the children. The therapist testified that the three children made progress individually while in therapy, that they loved Richard and valued the time with him, but that they became discouraged, frustrated, angry, and sad over the course of therapy and the prospect of not being reunified in the same household. The last family therapy for Richard and the three children was in July 2010, and the sessions were not resumed after Richard failed to indicate that he would attend a session in August. The therapist was not concerned about the effect that termination of Richard's parental rights may have on Danielle and Phyllip, since they were placed with their mother, and the therapist believed that these children would continue to have a relationship with Richard.

Assistance was provided to Richard by the Department to improve the condition of his home, which was a concern when the children were initially removed from the home. A primary goal established for Richard was to make sure that his home was in a sanitary condition so that it was safe for the children. A family support worker checked the condition of Richard's home on a weekly basis, physically helped him to clean, assisted with a garage sale, and suggested methods to keep

the house more orderly. Richard's home was cluttered, and the Department helped Richard in this regard by providing several Dumpsters to clear items out of the house. According to the family support worker, Richard was inconsistent in maintaining a sanitary and safe home. Richard reported that he was having trouble paying his bills, that he was not able to use the air conditioner, that his home was in "bad shape," that "meat had gone bad" in the refrigerator, and that he was embarrassed about the home's condition. At one point during the case, Richard was not living in the house. Richard also indicated that his house was in foreclosure. The family support worker eventually stopped working with Richard due to his lack of consistency in attending their meetings and his issues in maintaining the condition of his home.

The Department caseworker for Richard's family testified at length about the history of the case, the Department's efforts to assist Richard, and the continuing concerns about his ability to parent the children. The caseworker acknowledged that Richard did participate in individual therapy, visited with the children, and completed a domestic violence program. The caseworker testified, however, that Richard had not made a lot of progress throughout the case. With respect to visitation, Richard was not placing the children's needs above his own and was still utilizing the older children to look after the younger ones. Richard still was unable to provide a stable home and environment. The caseworker noted that Richard's girlfriend had been living in the home and that there were reports they were physically fighting with relatives who also lived in the home. The home remained cluttered. Additional concerns included drug distribution charges against Richard, for which he spent some time incarcerated prior to January 2010. After this time, Richard was ordered to undergo urinalysis testing. Richard tested positive for morphine on several occasions, and the caseworker had not seen a prescription for morphine. Richard was also inconsistent in submitting to urinalysis testing. At the time of the termination hearing in January 2011, Richard was in jail for distribution of drugs and had been ordered to complete a 90-day evaluation. Richard was not having visits with his children or receiving family

support services at this time due to his incarceration. The caseworker was concerned about the amount of time Richard's children had been out of his care and testified, over objection, to her opinion that termination of Richard's parental rights was in the children's best interests.

The juvenile court entered an order on April 8, 2011, finding that there were sufficient grounds to terminate Richard's parental rights to his children under § 43-292(2), (6), and (7) and that termination of those rights was in the children's best interests. Richard subsequently perfected his appeal to this court.

## ASSIGNMENTS OF ERROR

Richard asserts that the juvenile court erred in (1) finding that his parental rights should be terminated under § 43-292(2), (6), and (7); and (2) finding that termination of his parental rights was in his children's best interests.

On cross-appeal, Richard's GAL asserts that the juvenile court erred by denying him the right to participate in the termination hearing.

## STANDARD OF REVIEW

[1,2] 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 Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

## ANALYSIS

*Statutory Grounds for Termination.*

[3] In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the children's best interests. See *In re Interest of Sir Messiah T. et al., supra*. In this case, the juvenile court found that the State proved grounds for termination under § 43-292(2), (6), and (7).

Under § 43-292(7), the State must show that the children have been in an out-of-home placement for 15 or more of the most recent 22 months. The record shows that the children were removed from Richard's home in August 2008. Although Danielle, Richard Jr., and Phyllip were placed in Richard's home in February or March 2009, they were again removed from Richard's home in April 2009 and have not returned to his care. The State proved the ground enumerated in § 43-292(7) by clear and convincing evidence.

[4] Because the State need prove only one ground for termination, we decline to address Richard's arguments relevant to the court's determination that the State proved the grounds enumerated in § 43-292(2) and (6) except as those arguments relate to the issue of best interests. Generally, when termination is sought under subsections of § 43-292 other than subsection (7), the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). Accordingly, we will consider evidence relevant to the other grounds in our analysis of the children's best interests.

*Best Interests.*

Richard asserts that the juvenile court erred in finding that termination of his parental rights was in the children's best interests.

In addition to finding termination appropriate under § 43-292(7), the juvenile court found grounds for termination under § 43-292(2) and (6). Subsection (2) concerns "parents [that] have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection," while subsection (6) concerns the failure of reasonable efforts on the part of the State to correct the conditions leading to the juvenile's adjudication. Under Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2010), the State is required, except in circumstances not present in this case, to make reasonable efforts to preserve and reunify families. Richard argues that the State did not provide reasonable efforts in this case.

A review of the record in this case shows that Richard was provided with numerous services but failed to fully utilize the services provided. He was provided with cleaning assistance and Dumpsters to clean his cluttered home. The support worker advised Richard regularly on issues related to his home, including ways to make it sanitary and safe for the children. The support worker stopped working with Richard due to his problems with consistency in attending their meetings and his issues in maintaining the condition of his home. The testimony of various witnesses shows that Richard's failure in this area was not due to the number of Dumpsters provided to him, as he asserts, but because of his inconsistent work with service providers. Richard did not achieve the goal of making sure his house was safe and sanitary for the children.

Richard did actively participate in therapy, at least through July 2010. According to the therapist, however, at the time of the last therapy session with the family, Richard was not in a position to parent his children. Richard eventually completed the domestic violence program as ordered. However, law enforcement officers were called to Richard's home because of a domestic situation after Richard had completed the program. Richard was ordered to submit to random drug and alcohol testing. Richard was inconsistent in submitting to testing, and some of his tests were positive for morphine.

Richard asserts that his hospitalizations should have been given greater consideration with respect to a determination of whether he consistently visited his children. The record shows that Richard canceled some visits due to medical issues or work, but other cancellations were not explained. Further, the record shows that Richard missed visits both before and after his hospitalizations. Richard has shown an inability to fully engage with or care for all of his children at the same time as evidenced by his reliance on the older children to provide care for the younger children. This problem is exacerbated by the special needs of Richard Jr. and Michael.

[5,6] While the record shows that Richard loves his children and they love him, the record also reflects that some of the children have become very frustrated with the length of time they have spent in foster care. 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). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.* Upon our de novo review, we find that termination of Richard's parental rights was in the children's best interests.

*Participation of Richard's GAL.*

[7,8] Richard's GAL asserts that the juvenile court erred by denying him the right to participate in the termination hearing. The GAL argues that Richard's due process rights were violated and relies on *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990). In that case, the GAL for the mother had to pose objections through the mother's attorney, was limited in his questioning at trial, and was not allowed to ask questions at the deposition of a psychologist. The Nebraska Supreme Court observed that an attorney acting as an advocate fulfills a different role than one acting as a GAL. The court further observed that while Canon 7 of the Code of Professional Responsibility, now found under the Nebraska Rules of Professional Conduct, requires a parent's attorney to zealously represent the wishes of the parent in a proceeding to terminate parental rights, a parent's GAL is to determine the best interests of the parent without reference to the parent's wishes. See *In re Interest of D.S. and T.S., supra*. The court noted, accordingly, that a parent's GAL might seek the admission or exclusion of different evidence than would a parent's attorney. The court concluded that a GAL appointed for a parent pursuant to § 43-292(5) (parent unable to discharge responsibilities due to mental illness or deficiency) is entitled to participate fully in the proceeding to terminate parental rights and found that it was error for the lower court to have prevented the parent's GAL from fully participating in the termination proceedings. However, the court found no prejudice from the error because no showing had been made as to what would have been admitted or kept out of evidence had the parent's GAL been allowed to participate more fully.

In the case at hand, the record is unclear why Richard was appointed a GAL, as there was no allegation that Richard was unable to discharge parental responsibilities due to a mental illness or deficiency under § 43-292(5). We note that under Neb. Rev. Stat. § 43-292.01 (Reissue 2008), the juvenile court may appoint a GAL for any party as deemed necessary or desirable in cases other than those where termination is sought under § 43-292(5). For purposes of our analysis, we will assume that the instruction from the Supreme Court in *In re Interest of D.S. and T.S, supra*, concerning the GAL's participation applies in this case such that it was error to preclude the GAL's participation at the termination hearing. As in *In re Interest of D.S. and T.S.*, the question before us is whether Richard was prejudiced by the denial of that right. Richard's GAL argues that he would have called the oldest child to testify, that he would have sought the admission or exclusion of evidence in advocating for Richard's best interests, and that his participation may have brought forth persuasive evidence that termination of Richard's parental rights was not in the children's best interests. However, the GAL has not shown specifically what evidence would have been brought forth or excluded through his participation.

Based on our de novo review of the entire record, we conclude that Richard was not prejudiced by the denial of his GAL's participation at the termination hearing. The record reveals a variety of impediments of significant duration that prevent Richard from being able to properly parent his children. The evidence that termination of Richard's parental rights was in the children's best interests was, in fact, rather overwhelming. Because Richard's GAL has not shown that Richard was prejudiced by the juvenile court's denial of his GAL's participation at the termination hearing, we find this assignment of error to be without merit.

## CONCLUSION

The juvenile court did not err in terminating Richard's parental rights.

Because Richard was not prejudiced by the juvenile court's failure to allow Richard's GAL to participate at the termination

hearing, the GAL's assignment of error on cross-appeal is without merit.

AFFIRMED.

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KENNETH NORDHUES, APPELLANT, V. STEVE MAULSBY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE AND CROSS-APPELLANT, B & W, INC., THIRD-PARTY DEFENDANT AND FOURTH-PARTY PLAINTIFF, APPELLEE, CROSS-APPELLEE, AND CROSS-APPELLANT, AND MAX HARGROVE, FOURTH-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLEE.

815 N.W.2d 175

Filed March 20, 2012. No. A-11-420.

1. **Contracts.** The determination of rights under a contract is a law action.
2. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
3. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
4. **Witnesses: Evidence: Appeal and Error.** An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.
5. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
6. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
7. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
8. **Res Judicata.** Res judicata is an affirmative defense which must ordinarily be pleaded to be available; and while an appellate court may raise the issue of res judicata sua sponte, it is infrequently done.
9. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
10. ____. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.