

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

IN THE MATTER OF THE)
TERMINATION OF THE PARENTAL)
RIGHTS OF JANE (2011-08) DOE.)

IDAHO DEPARTMENT OF HEALTH &)
WELFARE,)

Petitioner-Respondent,)

v.)

JANE (2011-08) DOE,)

Respondent-Appellant.)

Docket No. 38601

IN THE MATTER OF THE)
TERMINATION OF PARENTAL)
RIGHTS OF JOHN (2011-09) DOE.)

IDAHO DEPARTMENT OF HEALTH &)
WELFARE,)

Petitioner-Respondent,)

v.)

JOHN (2011-09) DOE,)

Respondent-Appellant.)

Docket No. 38602

2011 Unpublished Opinion No. 569

Filed: August 3, 2011

Stephen W. Kenyon, Clerk

**THIS IS AN UNPUBLISHED
OPINION AND SHALL NOT
BE CITED AS AUTHORITY**

Appeal from the Magistrate Division of the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cathleen MacGregor-Irby, Magistrate.

Decree terminating parental rights, affirmed.

Alan E. Trimming, Ada County Public Defender; Adam C. Kimball, Deputy Public Defender, Boise, for appellant Jane Doe.

Theresa A. Martin, Meridian, for appellant John Doe.

Hon. Lawrence G. Wasden, Attorney General; Mary Jo Beig, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

In these consolidated appeals, Jane Doe (Mother) and John Doe (Father) challenge the magistrate court's decision terminating their parental rights due to neglect and abandonment of their children. The Does assert that the magistrate failed to consider evidence against termination, and they challenge the magistrate's conclusion that the best interests of the children warranted termination. We affirm.

I.

BACKGROUND

The Does are married and have two children, a daughter born in August 2004 and a son born in November 2006. In late September 2009, law enforcement authorities were summoned to Mother's Boise residence on a report that Mother was using illegal drugs and that an injury may have been inflicted on the son. A search of Mother's belongings revealed methamphetamine, numerous prescription bottles, and syringes. Mother had fresh track marks and bruises on her arms, and she admitted intravenous drug use. Mother was arrested and charged with possession of methamphetamine, and the children were taken into state custody after a declaration that they were in imminent danger. Mother ultimately pleaded guilty to the drug charge and enrolled in drug court.

The Idaho Department of Health and Welfare (DHW) filed a petition under the Child Protective Act, and the children were placed in foster care. A case plan was adopted with the goal of reuniting the parents with the children. It called for Mother to comply with drug court and probation requirements, maintain employment to provide for the needs of herself and her children, provide adequate housing for herself and her children, and attend counseling and parenting classes.

Mother and other family members refused to disclose Father's location, apparently because he was wanted on misdemeanor arrest warrants for probation violations. Therefore, he was served with the petition and case plan by publication. The DHW case manager later learned that Father did not maintain a Boise residence and was out of town most of the time because of his employment as a long-haul truck driver. The manager obtained Father's cellular telephone number and called him regularly, informing him of the status of the case and urging him to return to Boise and to address his outstanding warrants. Until late in the case, Father limited his case

plan compliance to regularly telephoning the children at the foster home and visiting them when he was in town, about once a month.

In September 2010, DWH filed a petition to terminate Mother's and Father's parental rights, followed by an amended petition alleging that Mother had neglected the children, that Father had neglected and abandoned the children, and that termination of their parental rights was in the best interests of the children. Trial was held on January 24, 2011. Thereafter, the magistrate entered a decree terminating both parents' parental rights. Mother and Father appeal.

II.

ANALYSIS

A parent's interest in maintaining a relationship with his or her child is a fundamental liberty interest, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *State v. Doe*, 144 Idaho 839, 842, 172 P.3d 1114, 1117 (2007); *Doe v. State*, 137 Idaho 758, 760, 53 P.3d 341, 343 (2002). Consequently, a judicial decision to terminate a parent-child relationship must be supported by clear and convincing evidence. *In re Doe*, 143 Idaho 343, 345, 144 P.3d 597, 599 (2006); *Doe*, 137 Idaho at 760, 53 P.3d at 343. On review, this Court will uphold the trial court's findings if they were based on substantial and competent evidence. *Id.* Substantial and competent evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion, even if the evidence is conflicting. *In re Doe*, 143 Idaho at 345-46, 144 P.3d at 599-600; *In re Doe*, 142 Idaho 594, 597, 130 P.3d 1132, 1135 (2006); *Folks v. Moscow School Dist. No. 281*, 129 Idaho 833, 836, 933 P.2d 642, 645 (1997). The trial court is better positioned than an appellate court to observe a witness's demeanor, assess credibility, detect prejudice or motive, and make character judgments. *State, Dep't of Health & Welfare v. Doe*, 145 Idaho 662, 664, 182 P.3d 1196, 1198 (2008); *In re Aragon*, 120 Idaho 606, 608, 818 P.2d 310, 312 (1991). Therefore, the facts, and reasonable inferences to be drawn from those facts, will be viewed in the light most favorable to the trial court's decision. *Doe v. Doe*, 148 Idaho 243, 246, 220 P.3d 1062, 1065 (2009); *In re Doe*, 142 Idaho at 597, 130 P.3d at 1135.

The magistrate's decision in this case was based in part upon Idaho Code § 16-2005(1)(b), which provides that a parent-child relationship may be terminated when it is in the child's best interest and the parent has abused or neglected the child. The statutory definition of neglect that is applicable here is found in I.C. § 16-1602(25)(a), which defines a "neglected"

child as one, “[w]ho is without proper parental care and control, or subsistence, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them”

A. Mother Neglected the Children

The magistrate found that Mother had neglected the children because her conduct or omissions left them without proper parental care and control necessary for their well-being, and because Mother had failed to adequately address her substance abuse and had no ability to independently provide for the children’s basic needs.

Mother has a long history of drug abuse, including the abuse of prescription medications, and this was the primary reason that the children were removed from her custody. After she pleaded guilty to the drug charge, Mother was afforded the opportunity to avoid incarceration by participating in drug court. The primary aim of a drug court diversionary program is to help drug users address and overcome their addictions. Mother’s drug use was also a primary concern addressed by her case plan. Evidence presented at the termination hearing shows that Mother did not take her case plan or drug court seriously, that she had a negative attitude, and her performance in both was poor. From January to November 2010, Mother was jailed four times for drug court violations. When she was not in jail, she resided in homeless shelters. Mother did not attend classes aimed at helping her gain employment; did not obtain employment until a year into the case plan; did not complete in a timely manner community service that was required in lieu of employment when she was unemployed; did not attend treatment programs on time or complete assigned homework; was dishonest in treatment; attended counseling but did not meaningfully participate in it; forged compliance documents; begged out of program requirements; made excuses; and, although given fifteen months to do so, never obtained a sponsor for Alcoholics Anonymous or an equivalent program. At the time of the termination trial, Mother had made no real progress in drug court and she remained in the first phase of that four-phase program. Because Mother did not take responsibility for her past behaviors or receive meaningful treatment for her addictions, her counselor deemed her at high risk to relapse.

Even though facing the permanent loss of her children and a prison term if she did not succeed in drug court, Mother did not curtail her drug-seeking behavior. She entered the drug court program in October 2009. Over the next two months she went to a hospital emergency room seven times seeking prescription medication. In August 2010, ten months after her

acceptance into drug court, Mother was required to sign a behavioral contract due to her stagnation in the program and her continuation of drug-seeking behaviors. The next month, September 2010, Mother obtained and used addictive narcotic prescription medication from a health care provider and, as a drug court penalty, was jailed for a month until the end of October 2010. According to her drug counselor, from October 2009 to October 2010 Mother made thirty-two visits to hospitals, clinics, and health care providers seeking prescription medication.

On appeal, Mother asserts that the magistrate erred by “ignoring or at least not discussing” a counselor’s testimony that in the two-month period immediately preceding the termination hearing, after her release from her most recent term of incarceration, Mother had made “positive changes,” that her drug court and case plan performance had improved, and that the counselor was unaware of further drug-seeking behavior by Mother during this time. When this evidence is considered, Mother argues, there was not clear and convincing proof that her addictions impaired her ability to parent her children. Mother omits to mention, however, that the counselor questioned the sincerity of Mother’s recent efforts, attributing the change in her behavior to the pending termination hearing. Further, contrary to Mother’s assertion, the magistrate did consider this evidence, stating that with respect to Mother’s recent performance, “[a]lthough commendable and important to her recovery,” it was too little and too late to overcome the extensive evidence of Mother’s neglect and incapability to provide for her children’s needs. Thus, the magistrate did not fail to consider Mother’s recent efforts, as Mother contends, but instead found those efforts outweighed by Mother’s lack of significant effort or progress for the preceding thirteen months.

A parent’s inability or unwillingness to remain drug-free or to make efforts to undergo treatment for addictions can constitute neglect. *See Idaho Dep’t of Health & Welfare v. Doe*, 149 Idaho 59, 64-65, 232 P.3d 837, 842-43 (Ct. App. 2010). The magistrate’s finding that Mother had neglected her children is supported by substantial and competent evidence and is affirmed.

B. Father Neglected the Children

The magistrate determined that Father had neglected the children by failing to demonstrate his ability and/or willingness over the previous fifteen months to be available as a full-time parent for the children. Because we affirm the magistrate’s finding of neglect, we do not review the magistrate’s additional determination that Father also abandoned the children.

Father had not seen the children regularly for at least eight months prior to the child protective case. Shortly after the case plan was adopted, the DHW case manager learned that Father did not maintain a Boise residence and did not regularly stay in Boise with Mother because of his employment as a long-haul truck driver, and that Father was wanted on Idaho arrest warrants for probation violations. According to the case manager's testimony, after obtaining Father's cell phone number, the case manager telephoned Father regularly to inform him of the status of the case, and urged him to return to Boise and to address his outstanding warrants. Father's responses were consistent--he was of the view that Mother was to blame for the children being in state custody and that it was her job to get them back, that it was Mother's job to parent the children, that because it was not his fault he did not need a case plan, that his parental duties were limited to working to earn an income, and that he was too busy driving truck to return to Boise and attend the Child Protective Act proceedings. Father's participation in parenting consisted of telephoning the children at the foster home from the road and visiting them under supervision when he was in town, about once a month. Father always left town again for extended periods, each time leaving the children in foster care. Father attended none of the numerous Child Protective Act proceedings, save for the termination hearing. Although Father promised the case manager many times that he intended to take care of his outstanding Idaho warrants, he did not turn himself in to authorities until after the termination petition was filed. After he bonded out of jail, he again left town to drive truck. Father had no established residence in Idaho or elsewhere, electing instead to live in his truck.

On appeal, Father argues that there was not clear and convincing evidence that he neglected his children because at the time of the hearing he was incarcerated on his warrants, and he contends that once released he "would have completed the case plan as ordered." This assertion bears no support in the evidence. Before the children were taken into state custody, Father delegated all parental responsibilities to Mother and rarely saw the children. As noted by the magistrate, this is not an altogether unusual parenting arrangement when one parent takes responsibility for child-rearing while the other is away at work, but this model is unsustainable when the "custodial" parent is unable or unwilling to discharge parental responsibilities. After Mother was arrested on drug charges and the children were taken into state custody, Father still declined to step up and provide a home and parental care for the children, but instead was content to leave his children indefinitely in the custody of the State and the care of their foster

parents. In doing so, he gave priority to his choice of employment, and perhaps his wish not to be incarcerated on his arrest warrants, over the interests of his children. At the termination hearing, Father presented no testimony that he was now willing and able to take on the role of full-time parent to his children; in fact he presented no evidence at all.

Parental neglect may be found if a child is left to be raised by others or by the State. *State, Dep't of Health & Welfare v. Doe*, 133 Idaho 826, 829-30, 992 P.2d 1226, 1229-30 (Ct. App. 1999); *Thompson v. Thompson*, 110 Idaho 93, 96-97, 714 P.2d 62, 65-66 (Ct. App. 1986). With respect to Father, that is precisely what occurred. The magistrate's conclusion that Father neglected his children is affirmed.

C. The Best Interests of the Children

When a court finds a statutory ground for termination of parental rights, such as neglect, it must then decide whether termination of parental rights is in the best interests of the children. *Doe v. Dep't of Health & Welfare, Human Serv. Div.*, 141 Idaho 511, 516-17, 112 P.3d 799, 804-05 (2005); *Doe v. State, Dep't of Health & Welfare*, 123 Idaho 502, 504, 849 P.2d 963, 965 (Ct. App. 1993). Here, the magistrate court focused on the children's needs for a structured, safe, stable, and nurturing home environment. The court found that Mother had failed to address the substance abuse issue that caused the children to be placed in protective custody in the first instance, and that Mother's failure to complete or even adequately progress through the drug court program and other treatment and counseling programs left her in no better position to parent the children than she occupied at the beginning of the case. The court found that Father had never been the primary caregiver for these children; that he considered it to be Mother's job to raise the children; that he continually gave his job priority over the needs of his children; that he never expressed the desire or demonstrated an independent ability to parent his children; and that Father was lackadaisical, irresponsible, and immature in his approach to his parental responsibilities. Based on these findings, among others, the magistrate concluded that termination of Mother's and Father's parental rights was in the best interests of the children.

Both Father and Mother contend that the magistrate court erred in its conclusions because the court did not consider important evidence. They first argue that the magistrate failed to mention that the children's foster father testified that the children do not express anxiety about being in foster care or express concerns about their future, but Father and Mother do not explain how, in their view, this evidence weighs against termination. Mother and Father also claim that

the foster father testified that the daughter said that she wants to go home to Mother. However, Mother and Father misrepresent the testimony. What the foster father actually said was that the girl had said she wanted to go home, meaning, apparently, to Mother's former residence, but that she wanted to take her foster parents with her. He also testified that before going for visits with their parents, the children would ask for confirmation that they would be returned to the foster home afterwards. This evidence falls far short of showing that termination is not in the children's best interests.

Finally, Mother and Father argue that the magistrate failed to give weight to Mother's trial testimony that the children need to be with their mother. This testimony, however, amounts to nothing but self-serving opinion, and the magistrate court repeatedly found that Mother was not capable of parenting the children, a finding that is well supported by the evidence.

There is substantial and competent evidence supporting the magistrate court's findings and its conclusion that the best interests of the children will be served by terminating the parental rights of Mother and Father.

III. CONCLUSION

The Does have shown no error in the magistrate court's findings and conclusions. Therefore, the decree terminating the Does' parental rights is affirmed.

Chief Judge GRATTON and Judge MELANSON **CONCUR.**