

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

IN RE INTEREST OF ARIANA K.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

IN RE INTEREST OF ARIANA K., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

v.

JERRITA K., APPELLANT.

Filed April 21, 2020. No. A-19-969.

Appeal from the County Court for Lincoln County: KENT D. TURNBULL, Judge. Affirmed.

Patrick M. Heng, of Waite, McWha & Heng, for appellant.

Rebecca Harling, Lincoln County Attorney, for appellee.

MOORE, Chief Judge, and RIEDMANN and WELCH, Judges.

MOORE, Chief Judge.

INTRODUCTION

Jerrita K. appeals from the order of the Lincoln County Court, sitting in its capacity as a juvenile court, terminating her parental rights to her child, Ariana K. The court found that termination of Jerrita's parental rights was proper under Neb. Rev. Stat. § 43-292(1), (2), (4), (6), and (7) (Reissue 2016) and that termination of her parental rights was in Ariana's best interests. The court also found, as required by the Nebraska Indian Child Welfare Act (NICWA), Neb. Rev. Stat. §§ 43-1501 to 43-1517 (Reissue 2016), that active efforts had been made to prevent the breakup of the Indian family, which proved unsuccessful, and that the continued custody of Ariana by Jerrita was likely to result in serious emotional or physical damage to Ariana. Following our de novo review of the record, we affirm.

BACKGROUND

Jerrita is the biological mother of Ariana, who was born in July 2016. Because Jerrita is a member of the Rosebud Sioux Tribe (the Tribe) and Ariana is eligible for membership, NICWA applies to this case. Jerrita has two older children who were previously removed from her care and eventually placed in a guardianship with her mother (the grandmother). Ariana was removed from Jerrita's care and placed in the care and custody of the Nebraska Department of Health and Human Services (the Department) on October 24, 2017, after Jerrita was arrested and jailed for felony drug charges. At that time, the name of Ariana's father was unknown. The identity of Ariana's biological father has remained unknown throughout this case, although Jerrita provided the names of various putative fathers. Paternity testing was ordered on a particular individual, and Ariana was initially placed with his family. After genetic testing proved him not to be her father, Ariana was placed with a nonrelative family where she has remained. The juvenile court ultimately "default[ed]" for the father of record to be Ariana's "presumptive father," the man to whom Jerrita was married at the time of Ariana's birth, and we have referred to him as "the presumptive father" or "the father" in this opinion. He has never had any contact with Ariana. This individual's parental rights to Ariana were also terminated during the course of the present juvenile court proceedings. We have referred to him and to the earlier proceedings involving Jerrita's older children only as necessary to the resolution of Jerrita's appeal.

On October 25, 2017, the State filed a petition in the juvenile court, alleging that Ariana was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) in that on or about October 24, she was in a situation dangerous to life or limb or injurious to her health or morals. The State set forth details of Jerrita's arrest and incarceration for aiding and abetting possession of methamphetamine with intent to distribute and details of the active efforts that had been provided to Jerrita at the time her older children were made State wards due to her drug use. On that same date, the court entered an order of detention, placing Ariana in the Department's temporary custody. The court found that active efforts were made prior to Ariana's out-of-home placement to prevent or eliminate the need for her removal. The State subsequently filed an amended petition, naming an individual other than Jerrita's spouse at the time of Ariana's birth as Ariana's father (the individual who later proved not to be Ariana's biological father).

On November 7, 2017, at a first appearance hearing, Jerrita entered an admission to the allegations of the petition, and the juvenile court adjudicated Ariana as a child within the meaning of § 43-247(3)(a). The parties agreed that Ariana's first placement met NICWA requirements, and the court ordered her continued placement there, also finding that active efforts had been made to return Ariana to her home. The court also stated that supervised visitation could occur with Jerrita, who was in jail at the time.

On December 7, 2017, the Tribe filed a notice of intervention, and the juvenile court entered an order acknowledging the Tribe's right to intervene pursuant to NICWA.

A dispositional hearing was held on December 19, 2017, and the juvenile court adopted the Department's case plan and court report. The court continued Ariana in the Department's custody, finding that active efforts had been made to return her to her parental home. Jerrita, who

appeared at the hearing, was ordered to comply with the plan recommendations including obtaining a substance abuse evaluation, mental health evaluation, drug testing and visitation.

Jerrita appeared for a status hearing on February 6, 2018, at which time she was having supervised visitation with Ariana and had appointments set “with Region II for evaluations.” She was testing positive for methamphetamine and admitted her use. The court adopted the recommendations in the case plan and court report, and it ordered Jerrita to participate in Narcotics Anonymous and/or Alcoholics Anonymous, obtain a chemical dependency evaluation, and remain alcohol and drug free, again finding that active efforts had been made to return Ariana to the parental home. Jerrita did not appear at a status hearing on March 27. We note that Jerrita’s attorney appeared at this hearing and at other hearings referenced below at which Jerrita did not appear. Jerrita had made contact with the Department shortly after the previous hearing in February to indicate she was using methamphetamine “heavily” and did not think it was best for Ariana to be around her. The Department’s subsequent attempts to locate Jerrita prior to the March hearing were unsuccessful. Likewise, Jerrita did not appear at a status hearing on May 22. At that time, the Department was searching for a new placement for Ariana since after paternity testing results were received, her initial placement was no longer willing/able to provide care. After a NICWA placement hearing in June, at which Jerrita did not appear, the juvenile court found that the new placement obtained by the Department satisfied NICWA requirements. The court found that active efforts had been made to return Ariana to her home, but it noted that the whereabouts of the parents were unknown at that time.

After the contact from Jerrita in February 2018, the Department did not have further communication with her until August when she was incarcerated in the county jail. A caseworker met with her at that time and asked her to make contact upon her release. The Department was given a new phone number to contact her but attempts to do so proved unsuccessful. Jerrita was arrested again and jailed in October, and the Department met with her to discuss permanency options. The Department also met with her in jail in December.

Permanency and exception to termination of parental rights hearings scheduled for October 2018 were continued multiple times for various reasons. At a review hearing on March 19, 2019, Jerrita relinquished her parental rights and the juvenile court changed the permanency goal of the case from reunification to adoption. Jerrita’s relinquishment was later withdrawn due to inadequate paperwork required by NICWA.

On April 24, 2019, the State filed a motion to terminate the parental rights of Jerrita and “all possible fathers.” With respect to Jerrita, the State alleged statutory grounds for termination pursuant to § 43-292(1), (2), (4), (6), and (7); that termination of Jerrita’s parental rights was in Ariana’s best interests; that the State had made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, which had proved unsuccessful; and that continued custody by Jerrita was likely to result in serious emotional harm or physical damage to Ariana.

A termination hearing was held before the juvenile court on July 12, 2019. Jerrita appeared with her attorney; the father’s attorney was present, but the father did not appear. The State presented testimony from two Department caseworkers, the foster mother, and an Indian Child

Welfare Act (ICWA) expert, and the court received various documentary exhibits offered by the State, including copies of the files of Jerrita's criminal convictions.

There was evidence presented about Jerrita's criminal history. At the time Ariana was removed from Jerrita's custody in October 2017, Jerrita had a prior felony conviction for third degree assault on a peace officer in 2009 and felony convictions for possession of methamphetamine in 2015 and 2016. On October 24, 2017, she was on postrelease supervision for the 2016 felony drug conviction when police responded to her residence to assist a probation officer with a search of her vehicle, which search located \$1,360 cash, drug paraphernalia, and methamphetamine. Ariana was taken into protective custody, and Jerrita was charged with felony aiding and abetting the distribution of methamphetamine and felony child abuse. She later pled to felony child abuse and was sentenced to 300 days in jail with 219 days' credit and 9 months' postrelease supervision. Her postrelease supervision in the 2016 drug case was revoked, and she was sentenced to 300 days in jail with 219 days' credit, with the jail time in both cases to run concurrently. Her probation officer requested early discharge, and Jerrita was released satisfactorily from postrelease supervision in the 2017 case on January 25, 2018.

On October 10, 2018, Jerrita was charged with two counts of distribution of methamphetamine. In a separate case, she was charged on October 22 with first degree false imprisonment, terroristic threats, felon in possession of a firearm, and use of a firearm to commit a felony. Jerrita was convicted of both charges in the first 2018 case and sentenced in April 2019 to concurrent jail terms of 2 to 6 years with credit for 156 days served. In the second 2018 case, the firearms charges were dropped pursuant to a plea agreement, and Jerrita was convicted of the other two charges for which the court imposed concurrent sentences of 18 months, which were to run consecutively to the sentences in the other 2018 case.

During this juvenile court case, Jerrita has spent considerable time in either the county jail or prison. She was incarcerated from October 2017 through January 2018 and again in August and from October through the time of the termination hearing. In response to an inquiry from the juvenile court about her release date, Jerrita indicated that she would be able to be paroled by October 2020.

Jennifer Walker was the Department case manager for Ariana's case from October or November 2017 to January 2019. In addition to discussing Jerrita's criminal history, Walker testified about Jerrita's lack of compliance with the case plan, the Department's attempts to identify possible fathers for Ariana, and the Department's efforts to place Ariana and maintain contact with the Tribe.

Walker testified about Jerrita's case plan goals, indicating that they remained the same during her time as the case manager because Jerrita did not engage in the services provided to her by the Department. The first goal required Jerrita to address her substance abuse. Between January and February 2018, when Jerrita was not incarcerated and was in contact with the Department, she failed to obtain an urgent needs assessment regarding her drug abuse. Despite having the appointment set up for her, with her knowledge, Jerrita did not show up for the appointment. Walker was unaware of Jerrita attending any inpatient or intensive outpatient treatment or obtaining any drug abuse related counseling during her time on the case. Jerrita did submit to "drug patch testing" between January and February, during which time she tested positive for and

admitted to methamphetamine use. Walker was unaware of Jerrita having any negative test results during this time.

The second goal of Jerrita's case plan required her to work on resource management, basic needs, and parenting skills. Jerrita had supervised visitation with Ariana from January 2018 to early February when she called Walker and told her "she was not in a good place" with respect to her sobriety and felt it best not to visit Ariana at that time. Jerrita has not seen Ariana since then, although Walker noted that it was possible Jerrita saw Ariana at either the grandmother's or the first foster parents' residence. Jerrita had no contact with the Department from February 2018 to October when she was again incarcerated. The limited contact with Jerrita in this case has been initiated primarily by the Department, including visiting her in jail, and the Department's attempts to engage her in the case plan have been largely unsuccessful. With respect to other requirements of the second case plan goal, Walker testified that she was unaware of Jerrita having employment or suitable housing during the case and that she did not demonstrate consistent parenting or stay out of criminal trouble.

The third goal of Jerrita's case plan dealt with her mental health and coping skills. Jerrita did not obtain a mental health evaluation or utilize medication management.

Ariana's father also failed to comply with the requirements of his case plan. He has never been involved with Ariana and his whereabouts have been unknown aside from the occasional reports of his incarceration in Colorado. Walker testified about her numerous unsuccessful attempts to locate and contact him. He has never responded to any inquiries made by Department, and neither he nor Jerrita has ever provided any financial assistance for Ariana during this case.

Walker testified about the Department's efforts to secure a NICWA placement for Ariana. After the first foster family no longer wanted placement of Ariana, Walker "did a common referral which was sent out across the state regarding an ICWA placement" and attempted to locate more relatives for Ariana through a family finding service. The Department contacted family of both parents for placement, but the only individual who came forward was the grandmother, who was listed on the Nebraska Central Registry for Child Abuse and Neglect. The Department gave the grandmother information and the opportunity to apply to have her name removed from the registry, but she did not do so.

Walker testified about Ariana's current placement, which is working well, and the Department's attempts to provide visitation between Ariana and the grandmother and Ariana's siblings. Walker testified that visitation was arranged for every other weekend, but only one visit occurred in September 2018. After that, the grandmother either cancelled visits or did not maintain contact with the person arranging them.

Christine Bourquin-Lewien was the Department caseworker during the case involving Jerrita's older children and testified about her involvement with the family at that time. She noted that after the guardianship with the grandmother was established, one of Jerrita's older children was placed back in Department custody due to uncontrollable behaviors and self-harming issues. Bourquin-Lewien did not believe this child should be returned to the grandmother's care, although she testified that the grandmother had been cooperative "[f]or the most part." She testified that sometimes the grandmother was resistant to talking to her or doing things like setting up appointments.

In January 2019, Bourquin-Lewien took over the management of Ariana's case. She testified about the Department's active efforts for Ariana while she was on the case. In January, she received a letter from the presumptive father, claiming he was not Ariana's father and stating that Bourquin-Lewien should contact his mother. Bourquin-Lewien sent him letters advising him of his status as Ariana's presumptive father, and she also provided his mother with paperwork for an "ICPC" placement. The father's mother did not end up completing this process. Another individual indicated an interest in placement of Ariana but that individual also failed to follow through with contacting the Department. No other family had come forward for placement of Ariana. Bourquin-Lewien testified that Ariana is comfortable in her current placement and that she and the foster parents went over Ariana's updated Native American cultural plan.

As did Walker, Bourquin-Lewien provided the maternal grandmother with information on how to have her name removed from the child abuse registry. The grandmother did not follow through on this information and did not contact Bourquin-Lewien for placement of Ariana nor for visitation or sibling visitation. Neither caseworker felt that placement of Ariana with the grandmother would be appropriate. The record shows that the Department made an exception to allow the grandmother to become guardian of Jerrita's other children, but the ability to make an exception for placement when a potential foster parent is listed on the registry is no longer allowed.

With respect to Jerrita's compliance with case plan goals, Bourquin-Lewien testified that Jerrita informed her that she was attending AA meetings and a Bible study group while in jail, but she testified that Jerrita had done nothing else to provide care or support for Ariana.

Both Department caseworkers testified that termination of Jerrita's parental rights, based on her lack of effort to comply with the case plan goals, was in Ariana's best interests. The juvenile court took Jerrita's objections to these opinions under advisement.

Ariana has been in her current foster home since June 18, 2018. The current foster mother is not a member of any Native American tribe, but she testified that she is currently exploring her own Native American heritage through DNA testing. She has spoken regularly with Bourquin-Lewien about Ariana's cultural plan, which was admitted into evidence, and she testified about her contributions to the plan. She has contacted a Sioux Native American family in the area to assist the foster parents in following the cultural plan. She also expressed her willingness to travel to the reservation with Ariana and to facilitate contact between Ariana and her siblings, provided that such contact is safe for her.

Luke Yellow Robe testified by telephone with regard to his qualifications as an expert witness as required by NICWA. The parties did not object to the juvenile court deeming him an expert witness under Neb. Rev. Stat. § 43-1503 (Reissue 2016). He did not see Ariana or Jerrita personally, but he reviewed multiple documents, including Department records, and he listened to witness testimony during the termination hearing. Yellow Robe testified that the Department met all standards of active efforts required by NICWA, including attempts to find family placement for Ariana. He believed Jerrita's incarcerations were barriers to reunification. When asked his opinion as to whether continuation of Ariana in her parents' custody would likely result in serious emotional or physical damage to her, he testified that it would be "beyond injurious" to return Ariana to either of her parents. He recommended that Ariana remain in her current placement, and he testified that he had no concerns about "the cultural issues" of placement with them versus

placement with a family member. And, he testified that the foster parents' efforts to implement Ariana's cultural plan were appropriate.

On September 13, 2019, the juvenile court entered an order terminating both Jerrita's and the presumptive father's parental rights to Ariana. In its lengthy order, the court detailed the procedural background and the facts presented at the termination hearing, and it set forth a careful analysis of all the issues. With respect to Jerrita, the court found clear and convincing evidence of grounds for termination of her parental rights under § 43-292(1), (2), (4), (6), and (7). The court also found clear and convincing evidence of the Department's active efforts to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family. The court also stated that the evidence left it with "*no doubt*" that continued custody of Ariana with Jerrita would likely result in serious emotional or physical damage to Ariana. Finally, the court reviewed the evidence with respect to parental unfitness and best interests and found that it was "unmistakably" in Ariana's best interests that Jerrita's parental rights be terminated. The court noted that while it was sustaining the objections to the caseworkers' best interests opinions, it had not considered that particular evidence "as quite frankly, the evidence as to the parents' lack of involvement is so overwhelming that termination of their parental rights is clearly in the best interest[s] of the minor child."

ASSIGNMENTS OF ERROR

Jerrita asserts, reordered, that the juvenile court erred in (1) finding that Ariana came within the meaning of § 43-292, (2) finding that termination of Jerrita's parental rights would be in Ariana's best interests and that Jerrita was an unfit parent, (3) finding that it would be in Ariana's best interests to terminate Jerrita's parental rights and not place Ariana with an available Indian family member, and (4) finding that continued custody by Jerrita would result in serious emotional or physical damage to Ariana.

Jerrita also argues, but does not assign as error, that the State failed to make reasonable efforts to reunify the family. 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. *In re Interest of Reality W.*, 302 Neb. 878, 925 N.W.2d 355 (2019). However, in our de novo review, we have briefly addressed the Department's active efforts to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family.

STANDARD OF REVIEW

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 Giavonni P.*, 304 Neb. 580, 935 N.W.2d 631 (2019). 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. *In re Interest of Kane L. & Carter L.*, 299 Neb. 834, 910 N.W.2d 789 (2018).

ANALYSIS

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. *In re Interest of Donald B. & Devin B.*, 304 Neb. 239, 933 N.W.2d 864 (2019). Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Zachary D. & Alexander D.*, 289 Neb. 763, 857 N.W.2d 323 (2015).

The NICWA adds two additional elements the State must prove before terminating parental rights in cases involving Indian children. *In re Interest of Audrey T.*, 26 Neb. App. 822, 924 N.W.2d 72 (2019). First, the State must prove by clear and convincing evidence that active efforts have been made to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. *Id.* See Neb. Rev. Stat. § 43-1505(4) (Reissue 2016). Second, the State must prove by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. *In re Interest of Audrey T., supra.* See § 43-1505(6).

Statutory Grounds.

Jerrita asserts that the juvenile court erred in finding that Ariana came within the meaning of § 43-292. In this case, the court found clear and convincing evidence of statutory grounds to terminate Jerrita's parental rights to Ariana under § 43-292(1), (2), (4), (6), and (7). Upon our de novo review, we find that the State presented clear and convincing evidence to support termination of Jerrita's parental rights under § 43-292(7). Proof of one statutory ground is needed for termination, and the record clearly shows that statutory grounds for termination of her parental rights exist under § 43-292(7).

Section 43-292(7) provides grounds for termination when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." Section 43-292(7) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). Jerrita argues that the placement of a child outside the home for 15 or more of the most recent 22 months under § 43-292(7) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum degree of fitness. *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014). We agree that the fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness. *Id.* Regardless of the length of time a child is placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody. *Id.* In addition to proving a statutory ground, the State must show that termination of parental rights is in the best interests of the child. See *In re Interest of Jahon S.*, 291 Neb. 97, 864 N.W.2d 228 (2015). We have addressed Jerrita's arguments with respect to parental unfitness and best interests below.

Citing *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005), Jerrita also argues that although the plain language of § 43-292(7) provides for termination of parental rights when the juvenile has been in an out-of-home placement for 15 or more of the most recent 22 months, proceedings to terminate parental rights must comport with fundamental fairness. While this is true, the parent in that case was unaware that the child was his child, and this court found it

fundamentally unfair to terminate under § 43-292(7) in those circumstances. That is not the case here, and Jerrita does not suggest, nor does the record show, any other fundamental unfairness to termination when Ariana has been in out-of-home placement for the requisite period.

Ariana was removed from Jerrita's care on October 24, 2017, and has been in an out-of-home placement continuously since that time. The motion to terminate Jerrita's parental rights was filed on April 24, 2019, at which time Ariana had been in out-of-home placement for 16 months, and by the start of the termination hearing on July 12, she had been in out-of-home placement for more than 18 months. Our de novo review of the record clearly and convincingly shows that grounds for termination of Jerrita's parental rights under § 43-292(7) were proven by sufficient evidence.

The juvenile court also found sufficient evidence to support termination under § 43-292(1), (2), (4), and (6), but we do not need to consider whether termination of Jerrita's parental rights was proper pursuant to those subsections since § 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. See *In re Interest of Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012). However, we will consider evidence relevant to § 43-292(1), (2), (4), and (6) in our analysis of best interests. Generally, when termination of parental rights 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, as it would show abandonment, neglect, unfitness, or abuse. *In re Interest of Mya C. et al.*, 23 Neb. App. 383, 872 N.W.2d 56 (2015).

Best Interests and Unfitness.

Jerrita asserts that the juvenile court erred in finding that termination of her parental rights would be in Ariana's best interests and that Jerrita was an unfit parent. She also asserts that the juvenile court erred in finding that it would be in Ariana's best interests to terminate Jerrita's parental rights and not place Ariana with an available Indian family member. Jerrita argues that the Department created a hurdle, by way of the abuse registry, to prevent the grandmother from obtaining placement of Ariana during the case and after termination of Jerrita's parental rights.

In addition to proving a statutory ground, the State must show that termination is in the best interests of the child. *In re Interest of Jahon S.*, 291 Neb. 97, 864 N.W.2d 228 (2015). A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit. *Id.* There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. *Id.* Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit. *Id.* The term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests. *Id.* In the context of the constitutionally protected relationship between a parent and a child, parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *In re Interest of Alec S.*, 294

Neb. 784, 884 N.W.2d 701 (2016). The best interests analysis and the parental fitness analysis are fact-intensive inquiries. *In re Interest of Jahon S., supra*. And while both are separate inquiries, each examines essentially the same underlying facts as the other. *Id.*

The evidence shows that Jerrita made minimal efforts to comply with the case plan developed by the Department. She continued to use drugs and engage in criminal behavior and was either out of contact with the Department or incarcerated for most of this case. Although incarceration alone cannot be the sole basis for terminating parental rights, it is a factor to be considered. *In re Interest of Jahon S., supra*. Although incarceration itself may be involuntary as far as a parent is concerned, the criminal conduct causing the incarceration is voluntary. *Id.* In a case involving termination of parental rights, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration. *Id.* Even when Jerrita was not incarcerated, her participation in the case plan was minimal. Her drug tests were positive during the brief period when she submitted to drug testing, and she did not attend a substance abuse assessment of which she was aware. She did not obtain a mental health evaluation or otherwise address any mental health issues. She continued to engage in criminal behavior and did not maintain contact with the Department in the period when she was not in jail or prison. Although Jerrita was given supervised visitation, she discontinued her visits due to her drug use and has not seen Ariana since February 2018. Jerrita did not provide any financial support for Ariana during this case. Jerrita has clearly not placed herself in a position to have Ariana returned to her care. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Alec S., supra*. We conclude that the State showed by clear and convincing evidence that Jerrita was unfit and that termination of her parental rights was in Ariana's best interests.

We also conclude that the best interests prong was satisfied under NICWA and the court did not err in its placement of Ariana. Under § 43-1503(2), NICWA defines the best interests of the Indian child to include:

- (a) Using practices in compliance with the federal Indian Child Welfare Act, the Nebraska Indian Child Welfare Act, and other applicable laws that are designed to prevent the Indian child's voluntary or involuntary out-of-home placement; and
- (b) Whenever an out-of-home placement is necessary, placing the child, to the greatest extent possible, in a foster home, adoptive placement, or other type of custodial placement that reflects the unique values of the Indian child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe or tribes and tribal community.

Jerrita's arguments on appeal focus on the fact that Ariana was not placed with the grandmother, but the record shows that termination of Jerrita's parental rights does not preclude Ariana's future placement with the grandmother. Walker verified that if the grandmother contacted her after the termination trial about getting her name removed from the registry, she would work with her in that regard. The NICWA expert had no concerns about cultural issues with respect to Ariana's current placement. He stated that the current cultural plan for Ariana was complete and concise and that the foster parents were putting forth the effort to form positive ties and relationships with people from the Tribe and other indigenous nations. Nor did he have any

concerns about the Department's efforts to locate family members. Finally, he testified there was still time for placement with the grandmother if she were to get her name removed from the registry.

The record clearly supports the finding that the best interests of Ariana as defined by NICWA are served by termination of Jerrita's parental rights.

Active Efforts.

Although Jerrita did not separately assign that the juvenile court erred in finding that there was clear and convincing evidence that active efforts have been made to prevent the breakup of the Indian family and that those efforts proved unsuccessful, in light of her arguments about "reasonable efforts," we briefly address the court's determination about "active efforts." The "active efforts" standard under § 43-1505(4) requires more than the "reasonable efforts" standard that applies in cases involving non-Indian children, and it requires a case-by-case analysis. See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). To constitute "active efforts" under § 43-1505(4), at least some efforts should be "culturally relevant." *In re Interest of Walter W.*, *supra*. Both of the caseworkers testified about the Department's efforts to reunite Jerrita and Ariana. Walker set up an urgent needs assessment for Jerrita, which Jerrita failed to attend. Jerrita was provided with drug testing but she consistently tested positive for methamphetamine. Jerrita was provided with supervised visitation, but she stopped visits in February due to her continued drug use. While we do not repeat all of the evidence relating to active efforts toward reunification here, the evidence shows the Department's consistent contact with the Tribe, attempted contacts with both of Ariana's parents, continued efforts to find Indian placements, unsuccessful efforts to facilitate visitation between Ariana and her grandmother and siblings beyond a first visit, and the creation of a Native American cultural plan with the foster parents. The NICWA expert testified approvingly of the cultural plan created in this case, and he opined that the Department's active efforts had satisfied the statutory requirements. The juvenile court did not err in finding clear and convincing evidence of the Department's active efforts to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family.

Serious Emotional or Physical Damage.

Jerrita asserts that the juvenile court erred in finding that continued custody by Jerrita would result in serious emotional or physical damage to Ariana. Although she does not separately argue this assignment of error, our de novo review of the record shows that the court did not err in this regard. The testimony of the qualified NICWA expert shows that if Ariana was returned to Jerrita's care, she would be at risk of physical and emotional harm from Jerrita's drug use and criminal activity. In discussing the effect of Jerrita's frequent incarcerations, he testified that it would be "dangerous" and "beyond injurious" to return Ariana to her care. The record contains qualified expert testimony that proves beyond a reasonable doubt that continued custody of Ariana by Jerrita would result in in serious emotional or physical damage. The requirements of NICWA were satisfied.

CONCLUSION

For the reasons stated above, we affirm the juvenile court's order terminating Jerrita's parental rights to Ariana.

AFFIRMED.