

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF BRITTANY M. ET AL.

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IN RE INTEREST OF BRITTANY M. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,

V.

TERESA S., APPELLANT, AND SHANE S., APPELLEE AND CROSS-APPELLANT.

Filed April 1, 2008. No. A-07-719.

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

IRWIN, Judge.

I. INTRODUCTION

Teresa S. appeals and Shane S. cross-appeals from an order terminating their parental rights to Brittany M., Alicia S., and Joseph S. In their appeals, both Teresa and Shane allege that the juvenile court erred in overruling their joint motion in limine regarding evidence of the children's allegations of sexual abuse and in finding that termination of their parental rights was in the children's best interests. In addition, Teresa challenges the statutory grounds for termination of her parental rights. Upon our de novo review of the record, we find that the juvenile court did not err in overruling the motions in limine and we find sufficient evidence to support the court's termination of Teresa's and Shane's parental rights.

II. BACKGROUND

These proceedings involve the three children mentioned above: Brittany, who was born on July 24, 1996; Alicia, who was born on June 25, 1997; and Joseph, who was born on December 14, 1998. On October 30, 2003, the State filed a petition alleging that all three children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) because Teresa and Shane failed to provide them with safe, stable, and independent housing; Shane engaged in inappropriate sexual contact with Joseph; and Teresa failed to protect Joseph from inappropriate sexual contact with Shane.

On that same day, the State also filed a motion for temporary custody of the children. The State asserted that placement and detention of the children was a matter of immediate and urgent necessity because Joseph reported that Shane had sexually abused him, all three children appeared to be in a “dirty and unkempt” condition, the children had not been to school for over a week, and Teresa reported that the family had no place to live. The court entered an order for immediate custody, finding that the need for placement and detention existed. The children were placed in the custody of the Nebraska Department of Health and Human Services (DHHS), and a hearing was set for November 10, 2003, to review the case.

At the detention hearing on November 10, 2003, Shane and Teresa denied the allegations in the petition. On March 23 and April 12, 2004, an adjudication hearing was held. At the close of the evidence, the juvenile court found that all three children were within the meaning of § 43-247(3)(a) as a result of Shane’s and Teresa’s failure to provide them with safe, stable, and independent housing. The court also noted that “no evidence was presented with respect to [the allegations of sexual abuse] and said counts should be dismissed for failure of proof.” The court continued custody in DHHS for appropriate care and placement, specifically to exclude the parental home.

On April 29, 2004, the State filed a supplemental petition alleging that all three children were within the meaning of § 43-247(3)(a) because Shane had engaged in inappropriate sexual contact with Brittany and Alicia, Teresa failed to protect Brittany and Alicia from this inappropriate sexual contact, and Teresa repeatedly engaged in sexual activity in front of the children. An arraignment hearing on the supplemental petition was held on May 6. At the hearing, Shane and Teresa denied the allegations in the supplemental petition.

On August 11, 2004, an adjudication hearing was held. Our record does not contain the transcription of this hearing, but the juvenile court’s order, filed August 12, indicates that Brittany and Alicia testified in chambers. The order also indicates that the court dismissed the supplemental petition for failure of proof. The children remained in the custody of DHHS.

On April 7, 2006, the State filed a motion for termination of parental rights. The State alleged that the children were within the meaning of Neb. Rev. Stat. § 43-292(6) (Reissue 2004) with respect to Teresa because following the court’s determination that the children were within the meaning of § 43-247(3)(a), reasonable efforts to preserve and reunify the family failed to correct the conditions leading to that determination. Specifically, the State alleged that Teresa had failed to (1) maintain a legal source of income and (2) complete a GED program. In addition, the State alleged that the children were within the meaning of § 43-292(7) with respect to both Shane and Teresa because the children had been in an out-of-home placement for 15 or more months of the most recent 22 months. The State also alleged that termination of Shane’s and Teresa’s parental rights was in the children’s best interests.

On June 24, 2006, in preparation for the hearing on the motion to terminate their parental rights, Shane and Teresa filed a joint motion in limine asking the court to keep out all testimony or other evidence relating to allegations of sexual abuse or failure to protect the children from such abuse. Shane and Teresa alleged that such evidence was not relevant and was in violation of (1) the principles of res judicata, (2) their right to due process, (3) their right to confront their accusers, and (4) their right against double jeopardy.

On August 14, 2006, the juvenile court filed an order overruling Shane and Teresa's motion in limine in all respects. The court noted that "evidence relating to sexual abuse or failure to protect from such may be relevant to the best interests of said children."

A hearing regarding the State's motion for termination of Shane's and Teresa's parental rights was held on July 28, 2006, and February 13, April 11, 19, and 20, and May 15, 2007. At the hearing, the State called numerous witnesses to testify about all three children's mental health and behavioral problems. Because Shane's and Teresa's arguments on appeal focus on the admissibility of much of the State's evidence and on the sufficiency of the evidence to support a finding that termination of their parental rights is in the children's best interests, we summarize the pertinent testimony here:

Dr. Michael Coy, a board-certified psychiatrist who is employed as the director of child and adolescent psychiatry services at Alegent Health, testified first. Dr. Coy testified that Alicia became his patient in November 2005. At that time, Dr. Coy diagnosed Alicia as suffering from attention deficit hyperactivity disorder and mood disorder not otherwise specified. Dr. Coy testified that he hospitalized Alicia in December 2005 because she was exhibiting dramatic mood swings, anger outbursts, sleeping problems, nightmares, and a tremendous amount of anxiety. He testified that Alicia was unable to function in a less restrictive setting.

While Alicia was hospitalized, Dr. Coy altered his prior diagnosis of Alicia to include posttraumatic stress disorder. Dr. Coy opined that the traumatic event which triggered the onset of Alicia's posttraumatic stress disorder was Shane's inappropriate sexual contact with Alicia. Dr. Coy testified that he based this opinion on information he received about Alicia's "increase in masturbation, talk about sex, and also, the occurrence - the intensity of her level of agitation and her nightmares." In addition, Dr. Coy testified that Alicia's foster mother reported that Alicia told her that Alicia was very fearful of seeing her father, Shane, and that after one of Alicia's visits with Shane and Teresa, Alicia reported that Shane whispered in her ear that he was going to have sex with her again.

Dr. Coy testified that he readmitted Alicia to a partial-care program at the hospital in June 2006 because she was again having significant problems sleeping, was exhibiting levels of agitation, and was making some "unusual" threats about killing babies. Dr. Coy testified that at the time of the termination hearing, his current diagnosis for Alicia included posttraumatic stress disorder, attention deficit hyperactivity disorder, and mood disorder not otherwise specified.

Dr. Leslie Joseph testified next. Dr. Joseph is a licensed psychologist who is employed at Alegent Immanuel. Dr. Joseph testified that he first had contact with Alicia on February 3, 2006, when he completed an intake interview of her. Dr. Joseph testified that he subsequently completed a psychological evaluation of Alicia on April 5. During his time with Alicia, she reported that she was struck by both of her parents and that her father, Shane, gave her and her siblings wine to drink. In addition, Alicia said that Shane did "nasty stuff to her." Dr. Joseph testified that when he asked Alicia to elaborate on this point, she said that it was "too gross" to talk about any further. Alicia's foster mother reported to Dr. Joseph that Alicia had tantrums that would occur for long periods of time and that she experienced an increase in agitation and misbehavior following visits with Shane and Teresa.

As a result of this evaluation, Dr. Joseph believed that Alicia was suffering from mood disorder not otherwise specified, posttraumatic stress disorder, reactive attachment disorder, and

attention deficit hyperactivity disorder. Dr. Joseph testified that it was his recommendation that Alicia “not be exposed to her parents again.” He testified that in his opinion, Alicia would be unable to make much therapeutic progress unless she clearly understood that she is not going to have any further contact with her parents: “[F]or [Alicia] to even think about the possibility of contact, visitation, returning to the parental home, will severely traumatize her over and over again and prevent her from moving forward in her therapy and treatment.” Dr. Joseph also testified that it was his opinion that termination of Shane’s and Teresa’s parental rights was in Alicia’s best interests.

Teresa Schumacher, a child adolescent therapist at Alegent Health Lakeside Psychiatric Associates, testified next. Schumacher testified that she had been Alicia’s individual therapist since October 25, 2005. Schumacher testified that during her therapy sessions with Alicia, Alicia repeatedly reported that she had been sexually abused. Schumacher testified that Alicia said that Shane had done “the nasty” to her many times, and when asked what this meant, Alicia would spell out the word “sex.” Alicia also told Schumacher that she was forced to have sexual contact with her mother, Teresa; her brother, Joseph; and a cousin named “Billy,” and that she had seen her parents having sexual intercourse numerous times. Schumacher testified about the graphic details of the sexual abuse Alicia provided to her. In addition, Schumacher testified that Alicia referred to Shane as “the raper” and that Alicia said that at night, she would “pray for everybody except the raper.”

Schumacher testified that Alicia said that she missed her parents, but that she was very scared of them. Alicia wanted to see her parents, but also did not want to see them because she was afraid they were going to hurt her again and do “nasty” things to her again.

Schumacher also testified about Alicia’s mental health and behavioral problems. Schumacher testified that in December 2005, Alicia was hospitalized because she was extremely anxious, she was not grounded in the present, she was flighty, and she was talking about things that did not make sense. In addition, Alicia was having such severe night terrors that she was unable to sleep, she was wetting the bed on a nightly basis, and was “emotionally out of control.”

Alicia was acting out at her foster home and at school. Her foster parents reported that Alicia was physically and verbally aggressive; she was having severe night terrors four or five times a week and would scream out, “Help, help”; and she was not following any of their rules. Alicia could not keep her hands to herself in social settings. She was very flirtatious with boys and had a hard time using appropriate social skills with any of her peers. In addition, Alicia masturbated frequently. Schumacher testified that Alicia told her that she knew that she should not masturbate, but that she could not help herself. Alicia said that Shane taught her how to masturbate.

In January 2006, after Alicia was released from the hospital, her visitation with her parents was suspended at the recommendation of her doctors. Schumacher testified that Alicia became more open during therapy, more relaxed, and more grounded in the present. In addition, Alicia was able to better concentrate and was making more progress therapeutically than she had previously. She was no longer having night terrors, her anxiety had decreased, she was not as clingy with her foster parents, and she was doing better behaviorally and academically in school. Schumacher testified that she believed that one of the reasons Alicia was doing better in therapy was because she was having no contact with her parents.

Schumacher also testified that even though Alicia was not having visitation with her parents, she continually expressed fear and uncertainty about being sent home. Alicia told Schumacher that she was scared to see her parents and that she was “scared that they are going to be mean to me and hurt me again.” Alicia also said that she was afraid that her parents would do “the nasty” to her if she was returned to them. Schumacher testified that when Alicia talked about Shane and Teresa during therapy, Alicia had increased stress, she became tearful, and she tended to behaviorally act out after the conversation.

Schumacher testified that Alicia was admitted to a partial-care program in June 2006 because she was having quite a few emotional problems and Dr. Coy thought it would be in her best interests to place her in partial-care to help stabilize her. Schumacher testified that while Alicia was at the respite home, she reportedly had a sexual encounter with another girl there.

Finally, Schumacher testified that, in her opinion, it is in Alicia’s best interests if Shane’s and Teresa’s parental rights are terminated. Schumacher testified that she believes that Alicia will be emotionally harmed if she continues in her current stage of uncertainty.

Jill A. also testified. Jill was Alicia’s community treatment specialist from January to May 2006 and then became Alicia’s foster mother. Jill testified that Alicia’s behavior had improved since Alicia began to live with her in May 2006. Alicia was having fewer night terrors, was no longer wetting the bed, had stopped throwing temper tantrums, was better able to stay on task for longer periods of time, and was behaving better at school and daycare.

Jill also testified that Alicia had not had any contact with her parents since residing with her in May 2006, but that she had contact with her siblings, Brittany and Joseph, on two separate occasions. Jill testified that after each visit, Alicia was very anxious and would have nightmares or night terrors that night. Jill also testified that after Alicia’s last visit with Brittany and Joseph in September 2006, Alicia had “the worst day that she had had in a long time” at school the next day. Jill reported that other triggers for Alicia’s night terrors included her having exposure to anything related to sexual relations or alcohol.

Dr. Glenda Cottam, a licensed clinical psychologist, also testified. Dr. Cottam testified that she conducted psychological assessments on Alicia, Brittany, and Joseph.

Dr. Cottam testified that she conducted an assessment of Joseph on April 26, 2006. She diagnosed Joseph as suffering from depression and also believed that he was suffering from symptoms of anxiety and possibly posttraumatic stress disorder. Dr. Cottam opined that the trigger for Joseph’s anxiety and possible posttraumatic stress disorder was the sexual contact between Joseph, his parents, his siblings, and a cousin named “Billy.” Dr. Cottam reported that Joseph did tell her that Teresa was a loving person and that he missed his mother and father.

Dr. Cottam testified that she conducted an assessment of Alicia on April 25, 2006. She diagnosed Alicia as suffering from an anxiety disorder, a mood disorder, and attention deficit disorder. Additionally, she noted that Alicia appeared to have symptoms of posttraumatic stress disorder. She opined that the trigger for Alicia’s anxiety and possible posttraumatic stress disorder was the sexual contact between Alicia, her parents, her siblings, and her grandparents.

Dr. Cottam testified that she conducted an assessment of Brittany on April 26, 2006. She diagnosed Brittany as suffering from anxiety disorder and adjustment disorders. Dr. Cottam also believed that Brittany was suffering from posttraumatic stress disorder and opined that her

anxiety was triggered by the sexual contact between Brittany and her parents. Dr. Cottam testified that Brittany reported that her father, Shane, had touched her private parts.

Sylvia Mazzell, a home-based therapist and an intensive family preservation therapist, testified next. Mazzell testified that she was Joseph's foster care specialist from October 2005 to November 2006. She testified that during this time period, she had contact with Brittany as well because Brittany and Joseph resided in the same foster home.

Mazzell testified that Joseph reported that he was sexually abused. Joseph told Mazzell that he had had sex with his mother, father, a friend of his parents named "Billy," and his grandparents. Joseph then wrote that he loved his mother and father. Mazzell also testified that she had received reports that Joseph was "obsessed with sex."

In addition, Brittany reported to Mazzell that she had had sexual contact with her mother and father.

Amy Torczon, who was Alicia's therapeutic foster care specialist from June 2005 to March 2006, also testified. Torczon testified that from June to October 2005, Alicia had difficulty with basic social skills. Alicia struggled with appropriate social distances, she had no form of basic social skills, and was unable to establish boundaries between herself and strangers. Torczon testified that beginning in October 2005, she observed additional problems in Alicia's behavior such as a lack of impulse control, an increase in clinginess toward adult authority figures, an increase in irritability, and an increase in nightmares.

Torczon also testified about a report she provided to Alicia's caseworker which detailed numerous instances of Alicia's revealing information about being sexually abused. For instance, Torczon reported that Alicia would ask her foster father if he would protect her. Alicia would tell her foster parents that her father used to protect her until he began to do the "nasty stuff" to her. In addition, Torczon's report revealed that Alicia told her foster mother that her parents had put their hands down her pants and that her cousin Billy had also put his hand down her pants.

Kelley Green, who is employed by OMNI Behavioral Health as a home based therapist and intensive family therapist, testified next for the State. Green testified that she provided supervised therapeutic visitation between Joseph and Brittany and their parents from June to November 2006. Green testified that she had concerns about the visitation sessions. She testified that when the visitations were held in the parents' home, there would often be people leaving the house as she and the children were arriving and that these people had some interactions with the children. In addition, she testified that at one point, Shane made comments to her about having a loaded gun (which he described as an AK-47) in the house. After these conversations about the gun, Green requested that the visitation sessions be held at OMNI.

Green also testified that she often felt like there was an "unordinary" amount of touching between Shane and Brittany during the visitation sessions. She testified that she felt like the vast majority of Brittany's interactions with her father were physical. As a result of her observations, Green developed a rule which stated that "parents and children must display appropriate boundaries at all times to include but not limited to: no tickling, sitting on laps, picking children up, cuddling." Green testified that after she implemented this rule, she did not see improvement in the area of parent-child boundaries.

Green testified that she stopped conducting the supervised visitations in November 2006 because she thought the visits might be "better managed" with a male therapist present. She

testified that she no longer felt comfortable conducting the visits because, among other things, she felt that she had put rules in place, but that no one was following the rules and nothing was changing.

Green also testified that in her opinion, termination of Shane's and Teresa's parental rights is in Brittany's and Joseph's best interests. She testified, "Brittany and [Joseph] have been out of the home . . . not knowing what's going to happen with them for a long enough time, and they need some permanency. They need to know where they're going to belong and where they're going to stay."

Finally, Nicole Nietfeld testified for the State. Nietfeld has been the children's DHHS caseworker since December 2003 and continued to act as their caseworker at the time of the termination hearing. Nietfeld testified that the children have been in foster care for approximately 3½ years. She also testified that while Shane and Teresa were having weekly visitation with Brittany and Joseph during most of that 3½-year period, they had not had any contact with Alicia since December 2005.

Nietfeld testified that in her opinion, the children were no closer to going home at the time of the termination hearing than they were when the matter was first adjudicated. She said in order for the children to be able to be returned to Shane's and Teresa's care, Teresa must complete a GED program and secure a steady source of income and both Teresa and Shane need to provide proof of adequate housing and need to address the underlying issues of the sexual abuse allegations that the children had been reporting.

Nietfeld stated that in her opinion, termination of Shane's and Teresa's parental rights was in the children's best interests.

After the State rested, Shane and Teresa testified about their compliance with the court-ordered rehabilitation plan and about their desire to have continued contact with their children. In addition, Teresa denied the allegations of sexual abuse and testified that the children were all lying. She testified that the children did not have a cousin named "Billy."

Shane then offered the testimony of Karen Gustafson, who provided him with individual counseling and who conducted family counseling with both Shane and Teresa. Gustafson testified that Shane's individual therapy ended because he "satisfactorily met his goals." She testified that Shane made "some" improvement in both parent/child relations and in anger management. She also testified that the individual therapy was terminated because Shane needed specialized treatment beyond what Gustafson could handle.

Gustafson testified that Teresa met the goals of family counseling and that the group sessions were terminated because Shane and Teresa needed specialized treatment.

At the close of the evidence, the juvenile court found clear and convincing evidence that the children came within the meaning of § 43-292(7) because they had been out of the parental home for 15 or more months of the most recent 22 months. In addition, the court found clear and convincing evidence that the children came within the meaning of § 43-292(6) because Teresa had failed to fully complete her court-ordered rehabilitation plan. The court then found that it was in the children's best interests to terminate Shane's and Teresa's parental rights. The court entered an order terminating Shane's and Teresa's parental rights to Brittany, Alicia, and Joseph. Both Shane and Teresa appeal from this order.

### III. ASSIGNMENTS OF ERROR

In their appeals, both Teresa and Shane allege that the juvenile court erred in overruling their joint motion in limine and in finding that termination of their parental rights was in the children's best interests. Teresa also challenges the statutory grounds for termination of her parental rights.

We note that Teresa assigns additional assignments of error. She asserts that the juvenile court erred in overruling her motion to dismiss and her motion for a directed verdict, in finding that all of the allegations in the State's motion for termination of her parental rights were true by clear and convincing evidence, and in finding that it was in the children's best interests to remain in the custody of DHHS for adoptive planning and placement. However, Teresa does not specifically argue these assignments of error in her brief. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). We therefore will not consider these additional assignments of error.

### 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 juvenile court observed the witnesses and accepted one version of the facts over the other. *Id.* In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Walter W.*, 14 Neb. App. 891, 719 N.W.2d 304 (2006).

For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). 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. JOINT MOTION IN LIMINE

Shane and Teresa both allege that the juvenile court erred in overruling their joint motion in limine regarding the children's allegations of sexual abuse. Shane and Teresa argue that the issue of whether or not they sexually abused the children was previously decided when the juvenile court dismissed the portion of the original petition which alleged that Shane and Teresa had inappropriate sexual contact with Joseph and the supplemental petition which alleged that Shane and Teresa had inappropriate sexual contact with Alicia and Brittany. Specifically, Teresa alleges that the motion in limine should have been sustained because of the principle of res judicata and because the issue of the sexual abuse allegations was irrelevant to the termination hearing. Shane alleges that the motion in limine should have been sustained because of the

principles of res judicata, collateral estoppel, and his right to confront his accusers. We address each argument in turn.

(a) Res Judicata

Shane and Teresa both argue that the juvenile court should have ruled that evidence regarding the children's allegations of sexual abuse was inadmissible at the termination hearing because of the principle of res judicata. We disagree.

Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *In re Interest of Marcus W. et al.*, 11 Neb. App. 313, 649 N.W.2d 899 (2002).

In *In re Interest of V.B. and Z.B.*, 220 Neb. 369, 372, 370 N.W.2d 119, 121 (1985), the Nebraska Supreme Court discussed the applicability of the principle of res judicata to parental termination cases:

“A custodial order is conclusive as to all matters prior to its promulgation. But the doctrine of res judicata cannot settle a question of a child's welfare for all time to come; it cannot prevent a court at a subsequent time from determining what is best for the children at that time. The usual way of expressing this rule is to say that “circumstances have changed” when the order is no longer in the children's interest.”

(Quoting *Marez v. Marez*, 217 Neb. 615, 350 N.W.2d 531 (1984).)

In *In re Interest of V.B. and Z.B.*, *supra*, the State had filed a previous motion to terminate parental rights which was denied by the court. The State then filed another motion to terminate parental rights, which was granted by the lower court and which was the subject of the parent's appeal. *Id.* On appeal, the parents argued that the principle of res judicata prohibited the State from utilizing evidence from the time period prior to the first motion to terminate to prove that termination of parental rights was now in the children's best interests. *Id.* In its opinion, the Nebraska Supreme Court found that the lower court was correct in using evidence from the time period prior to the first termination hearing in conjunction with evidence from the time period after the first termination hearing in determining whether termination of parental rights was in the children's best interests. *Id.*

While we note the factual distinction between the present case and *In re Interest of V.B. and Z.B.* is that in the present case the parents assert that the previous order which precludes the State from offering evidence of the sexual abuse allegations originated from an adjudication hearing, rather than a prior termination hearing, we find that the principle behind the “circumstances have changed doctrine” to be applicable here.

In the present case, Shane and Teresa allege that the issue of whether or not they sexually abused their children should not have been relitigated at the termination hearing. They assert that the issue was previously decided when the juvenile court dismissed all of the State's initial allegations regarding such sexual abuse at the adjudication hearings. The juvenile court found that the State had failed to provide sufficient evidence to demonstrate that Shane and Teresa had subjected their children to sexual abuse. In fact, in its first adjudication order, the juvenile court

noted that the State did not present any evidence regarding sexual abuse allegations as to the parties' son, Joseph. In its second adjudication order, the court noted that Alicia and Brittany testified in chambers. We do not have a record of this second adjudication hearing nor were we provided with any information about what the two girls testified to or why the juvenile court found that the State failed to prove that Brittany and Alicia were the victims of sexual abuse.

The record does indicate that a majority of the evidence the State provided at the termination hearing was generated after the initial adjudication hearings. The State called the children's therapists, their DHHS caseworker, and other mental health specialists to testify regarding the children's mental and behavioral health and therapeutic progress since they have been in foster care. Testimony at the termination hearing revealed that the children were still seeing their therapists and other mental health professionals at the time of the termination hearing.

The witnesses testified about the children's symptoms, diagnoses, and general behavior. As a part of this testimony, the witnesses discussed the children's allegations that they were repeatedly sexually abused by their parents. The therapists testified that they utilized this information in making diagnoses of the children and in properly directing their therapeutic goals. The State argued that it did not present this testimony in an effort to relitigate the issue of whether or not Shane and Teresa sexually abused their children, but rather, used the testimony to show the children's current state of mind and mental health.

While we note that we do not actually know what evidence was presented or exactly what issue was litigated in the initial adjudication hearings because we do not have the record, we do know that the issue being litigated at the termination hearing was the children's best interests, while the issue litigated at the adjudication hearing was jurisdictional in nature. The unique and important considerations present in termination cases require that the juvenile court be able to hear pertinent and relevant information in determining a child's current best interests. As the Supreme Court stated in *In re Interest of V.B. and Z.B.*, 220 Neb. 369, 370 N.W.2d 119 (1985), the question of a child's welfare and best interests is not static. Rather, it is a question that must be reexamined as circumstances change and time passes. For this reason, we find that the juvenile court did not err in finding that evidence concerning the children's allegations of sexual abuse did not violate the principles of res judicata. This argument is without merit.

#### (b) Collateral Estoppel

In his brief, Shane also asserts that the admission of evidence concerning the children's allegations of sexual abuse violated the principles of collateral estoppel. However, he did not raise this issue in his original motion in limine. Rather, he alleged that this evidence was inadmissible because it was not relevant and was in violation of (1) the principles of res judicata, (2) his right to due process, (3) his right to confront his accusers, and (4) his right against double jeopardy. As a result, the issue of such evidence violating the principles of collateral estoppel was not before the juvenile court. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000).

### (c) Right to Confront Accusers

Shane also argues that the admission of evidence regarding the children's allegations of sexual abuse violated his right to confront his accusers because the State's witnesses testified about statements the children had made to them during therapeutic sessions, but the children, themselves, did not testify and Shane could not cross-examine them regarding the sexual abuse allegations. We find that Shane's right to confrontation was not violated because he had the right to call the three children to testify during his case in chief and that the evidence of the sexual abuse allegations was properly admitted pursuant to an exception to the hearsay rule.

Because this is a juvenile proceeding and not a criminal case, the heightened standards of the Confrontation Clause are not applicable. See *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). Instead, the proper analysis is whether Shane's due process rights were violated. See *id.* Neb. Rev. Stat. § 43-279.01(1) (Reissue 2004) requires the juvenile court to inform the parties to a parental termination hearing of the following:

- (a) Nature of the proceedings and the possible consequences or dispositions . . . ;
- (b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer;
- (c) Right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent or custodian guilty of any crime;
- (d) Right to confront and cross-examine witnesses;
- (e) Right to testify and to compel other witnesses to attend and testify;
- (f) Right to a speedy adjudication hearing; and
- (g) Right to appeal and have a transcript or record of the proceedings for such purpose.

While Shane did have the right to confront and cross-examine witnesses pursuant to § 43-279.01(1)(d), he also had the right to compel witnesses to attend and testify pursuant to § 43-279.01(1)(e). As such, Shane could have called any or all of his three children to testify during his case in chief. At that time, he could have questioned the children about their allegations of sexual abuse. Because Shane did not exercise his right to call the children to testify, he cannot now complain that his due process rights were violated because he was not permitted to question the children regarding the sexual abuse allegations.

Furthermore, to the extent that Shane is arguing that evidence of the allegations of the sexual abuse constituted inadmissible hearsay, we address the admissibility of such evidence at the termination hearing. In proceedings to terminate parental rights, the Nebraska Evidence Rules do not apply. *In re Interest of Kindra S.*, 14 Neb. App. 202, 705 N.W.2d 792 (2005). The requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. The question becomes whether the evidence is relevant based upon the broad concerns of juvenile proceedings, with the Nebraska Evidence Rules serving as a guidepost. *Id.*

Using the Nebraska Evidence Rules as a guidepost, we find that the juvenile court properly admitted the evidence of the children's allegations of sexual abuse. The testimony of the children's therapists and other mental health specialists regarding the children's allegations of sexual abuse was admissible pursuant to Neb. Rev. Stat. § 27-803(3) (Cum. Supp. 2006).

Section 27-803(3) provides an exception to the hearsay rule, regardless of the availability of the declarant, for “statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” In addition, the statements made by the children’s foster parents to the children’s therapists about Alicia, Brittany, and Joseph’s behavior and allegations of sexual abuse was also admissible pursuant to § 27-803(3). In *In re Interest of B.R. et al.*, 270 Neb. 685, 691, 708 N.W.2d 586, 591 (2005), the Nebraska Supreme Court held:

Although the heart of [the exception found in § 27-803(3)] lies in statements made by a patient to a treating physician, the exception casts its net wider than the patient-physician relationship. Under the federal and Nebraska rules of evidence, statements admissible under the medical diagnosis and treatment exception are not restricted to statements made by the patient and the statements need not be made to a physician. . . . As a general rule, the exception applies to persons seeking medical assistance from persons who are expected to provide some form of health care. . . . Thus, “[t]he declarant need not be the patient—need not be the person who is experiencing the symptoms to be diagnosed or treated. In other words, the statement need not refer to the declarant’s own symptoms.” G. Michael Fenner, *The Hearsay Rule* 202 (2003).

At the termination hearing, the State’s witnesses testified that they utilized the children’s allegations of sexual abuse as a tool in their diagnoses as well as in forming their therapeutic goals for the children and in forming their opinion about the children’s best interests. In addition, the witnesses testified that they utilized statements from the children’s foster parents in much the same way. One witness testified that the information provided by foster parents is invaluable in diagnosing a child because the foster parent is around the child a lot more than the therapist and has the opportunity to view everyday behavior and communicate with the child on a regular basis. As such, we find that the testimony and exhibits relating to the children’s and foster parent’s statements to the therapists and mental health practitioners regarding allegations of sexual abuse is admissible pursuant to § 27-803(3).

We find that the children’s failure to testify at the termination hearing did not violate Shane’s right to confrontation and that the testimony of the children’s therapists about the children’s and foster parent’s statements concerning allegations of sexual abuse was admissible pursuant to the medical diagnosis and treatment exception. As such, we find that this assertion has no merit.

#### (d) Relevance

Teresa argues that evidence of the children being sexually abused was inadmissible at the termination hearing because it was irrelevant to the State’s allegations in its motion to terminate Shane’s and Teresa’s parental rights. She argues that the State alleged that termination of their parental rights was warranted pursuant to § 43-292(6) and (7) and that neither subsection requires proof that the children were sexually abused.

Section 43-292 states in pertinent part: “The court may terminate all parental rights between the parents . . . when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following [statutory] conditions exist.”

This language makes it clear that the State must not only prove the existence of one or more of the statutory factors in § 43-292, but it also must prove that termination of parental rights is in the children's best interests. Here, evidence regarding the children's allegations that their parents sexually abused them and evidence of the children's current state of mind, mental health, and behavioral problems as a result of the reported abuse is clearly relevant to whether or not termination of Shane's and Teresa's parental rights is in the children's best interests. This assertion also has no merit.

### 3. STATUTORY GROUNDS FOR TERMINATION

We next address Teresa's allegation that the State failed to prove by clear and convincing evidence the alleged statutory grounds for termination of her parental rights. Specifically, Teresa asserts that the juvenile court erred in sustaining the motion to terminate her parental rights pursuant to § 43-292(6). Teresa does not assign as error the juvenile court's determination that termination of her parental rights was warranted under § 43-292(7). Because we find that the evidence clearly and convincingly demonstrates that all three children were in an out-of-home placement for at least 15 of the most recent 22 months, pursuant to § 43-292(7), we need not specifically address whether or not the State met its burden under § 43-292(6).

Termination of parental rights is warranted whenever one or more of the statutory grounds provided in § 43-292 is established. If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). 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.*, *supra*.

In this case, the State alleged and the court found that termination of Teresa's parental rights was warranted under § 43-292(6) and (7). The record contains uncontradicted evidence that Brittany, Alicia, and Joseph were removed from their parents' home on October 29, 2003. At the conclusion of the hearing on the State's motion to terminate Teresa's parental rights, which was held on July 28, 2006 and February 13, April 11, 19, and 20, and May 15, 2007, the children had been in an out-of-home placement for approximately 3½ years. As such, there is no dispute that the three children were in an out-of-home placement for 15 or more months of the most recent 22 months as § 43-292(7) requires.

There is clear and convincing evidence that termination of Teresa's parental rights was appropriate pursuant to § 43-292(7). In light of this fact, we need not, and do not, further address the sufficiency of the evidence to demonstrate that termination was also appropriate pursuant to § 43-292(6). Teresa's assignment of error relating to the sufficiency of the statutory authority to support termination is without merit.

#### 4. BEST INTERESTS DETERMINATION

Both Shane and Teresa allege that the juvenile court erred in finding that it would be in the children's best interests to terminate their parental rights. Specifically, they both argue that there was insufficient evidence to support the court's determination that termination of their parental rights was in the children's best interests. Upon our de novo review of the record, we find clear and convincing evidence that termination of Shane's and Teresa's parental rights is in the children's best interests.

In the previous section, we found that termination of Teresa's parental rights was appropriate pursuant to § 43-292(7). As a result, we declined to address the sufficiency of the evidence demonstrating that termination was also appropriate pursuant to § 43-292(6). The juvenile court found that termination of Shane's parental rights was appropriate pursuant to § 43-292(7). We, therefore, treat our discussion of whether terminating both Shane's and Teresa's parental rights is in the children's best interests as though § 43-292(7) is the only statutory basis for termination.

In cases where termination of parental rights is based solely on § 43-292(7), the Nebraska Supreme Court has held that appellate courts must be particularly diligent in their de novo review of whether termination of parental rights is, in fact, in the child's best interests. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). In such a situation, because the statutory ground for termination does not require proof of such matters as abandonment, neglect, unfitness, or abuse, as the other statutory grounds do, proof that termination of parental rights is in the best interests of the child will require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as those enumerated in the other subsections of § 43-292. *In re Interest of Aaron D.*, *supra*.

In the present case, the State provided ample evidence of all three children's mental health and behavioral problems. The evidence demonstrated that all three children suffer from anxiety disorders, mood disorders, behavioral disorders, and symptoms of posttraumatic stress disorder. Numerous mental health professionals testified that the children's mental health problems were triggered by inappropriate sexual contact between themselves, their siblings, their parents, and other various family members.

While Shane and Teresa assert that the children are lying about the sexual abuse and that it never occurred, the State's witnesses testified that they did not believe the children were making up the stories. In addition, other evidence established that the children's mental health and behavioral problems were aggravated by interactions with their parents. Alicia's doctors recommended that all contact with her parents end because of her increasing anxiety and inability to control her emotions. Alicia's therapist testified that after Alicia stopped seeing her parents, she became more open, better able to concentrate, and better able to participate in the therapeutic process.

Similarly, the evidence demonstrated that Brittany would often have stomachaches or headaches after visits with her parents. The therapist in charge of Shane's and Teresa's visitation with Brittany and Joseph testified that often Brittany would complain about these ailments after visitations where Shane was particularly physical with her. In fact, the therapist testified that there was often an "unordinary" amount of touching between Brittany and Shane during the

visitations and that this problem persisted despite her repeated efforts to establish appropriate boundaries between the parents and the children.

Numerous mental health professionals as well as the children's caseworker, Nietfeld, testified that it is in all three children's best interest if Shane's and Teresa's parental rights are terminated. The evidence demonstrated that the children needed permanency and certainty about their living situation and that they could not make further progress in therapy without this kind of stability. Furthermore, Nietfeld testified that the children were no closer to going back to their parents' home at the time of the termination hearing than they were at the time of the initial adjudication.

Based upon our de novo review of the record, we find clear and convincing evidence that termination of Shane's and Teresa's parental rights is in the children's best interests.

#### V. CONCLUSION

We find no merit to Teresa's appeal and Shane's cross-appeal. The juvenile court did not err in overruling the parties' joint motion in limine regarding the children's allegations of sexual abuse. We find sufficient evidence to support the juvenile court's order terminating Shane's and Teresa's parental rights. The juvenile court order is affirmed.

AFFIRMED.