

In re Shayla H., 17 Neb. App. 436 (2009)

SUMMARY: In a case involving the Indian Child Welfare Act (ICWA), the State must amend its pleadings to reflect the standards required under ICWA regardless of whether the court nevertheless makes the required findings. A DHHS caseworker with 11 years of experience and history of working with Native American families was not an expert witness for ICWA purposes under 43-1505.

Shayla H. (DOB 8/21/01), Shania H. (8/1/03) and Tanya H. (9/26/04) are the children of David H. Through David, the children are eligible for enrollment with the Rosebud Sioux Tribe. On February 15, 2008, the State filed a petition and motion for temporary custody alleging the children came within the meaning of 43-247(3)(a) due to David's failure to provide medical care, his involvement domestic confrontations with the mother and his use of methamphetamine while being the primary caregiver. The petition did not contain any reference to ICWA. A custody order was issued and the children were placed in foster care. At the first hearing, it was determined that the children were eligible for enrollment in the tribe. The court continued the hearing to allow for expert testimony pursuant to ICWA. At the adjudication hearing, the DHHS caseworker testified that returning the children to the father would result in serious emotional or physical damage. Additional evidence was heard, including the children's grandmother, police officers, the initial caseworker, and the children's mother, and on August 15, 2008, the court found that the State was not required to include ICWA language in its pleadings and adjudicated the children under 43-247(3)(a). The court made the required ICWA findings in its order, finding that active efforts were made to prevent removal and return them to the parent's care and that keeping the children in the parental home would likely result in serious emotional or physical harm to the children. The father appealed, alleging, inter alia, that pleadings must include ICWA language and that the State failed to produce an expert witness required by ICWA.

The Court of Appeals reversed the adjudication. The Court of Appeals noted the finding in *In re Interest of Sabriena B.*, 9 Neb. App. 888, 621 N.W.2d 836 (2001), where the Court held that pleadings in the petition to terminate parental rights had to include relevant ICWA language, and the application of this finding to an adjudication proceeding in *In re Interest of Dakota L.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006). In this case, the Court of Appeals held that even though the court made the proper findings under ICWA it was error to omit ICWA language in the petition and motion for temporary custody. The Court of Appeals noted that the omission could have been cured by amendment, but was not done in this case.

As to expert witness testimony required under ICWA as to whether serious emotion harm or physical damage would occur if the child were not removed from the home, the Court of Appeals held that the DHHS caseworker did not have the qualifications under 43-1505 to be considered an expert witness for these purposes but declined to address whether a DHHS caseworker could ever qualify as an expert witness.

In re Kenna S., 17 Neb. App. 544 (2009)

SUMMARY: The time a parent spends incarcerated shall not be excluded from the determination of whether a child has been out-of-home 15 of the most recent 22 months. As the father did not take steps to undergo sex offender treatment in the two months prior to incarceration or immediately after his release, and, after commencing, stopped undergoing treatment after 4 sessions after learning he had to take a polygraph test, thus choosing to delay compliance with therapy required for reunification, there was sufficient evidence for termination of his parental rights.

Kenna, DOB 7/26/99, is the child of David. The maternal parental rights were terminated prior to this proceeding. Kenna was removed from David's care on January 5, 2006, after allegations that David had sexually assaulted his 11-year-old stepdaughter and view child pornography. She was adjudicated under 43-247(3)(a) in November 2006. At disposition in January 2007, the court ordered David to participate in sex-offender treatment or therapy. In February 2007, David pled guilty in criminal court to sexual assault and child pornography charges, and was incarcerated until June 2007. At a disposition hearing in June 2007, the court ordered David to participate in the R-SAFE sex-offender therapy program. David contacted the program, attended 3 sessions in July 2007 and refused to continue with the program when he learned he would have to submit to a polygraph test. On August 9, 2007, the State filed for termination of David's parental rights. Prior to the hearing on the termination of parental rights, David set up an appointment with another provider and completed a psychological evaluation. Trial was held on November 16, 2007. Closing arguments were provided, and the court allowed the parties to brief the case. The court indicated it would revisit the case in less than 90 days and noted to David that he should continue treatment. Additional hearings were held on March 19, June 25, and July 16, 2008. Evidence was presented as to treatment progress. On July 16, the court dismissed the State's motion to terminate. The State appealed.

The Nebraska Court of Appeals reversed the juvenile court's dismissal and ordered the court to terminate David's parental rights. The child had been in out-of-home care 15 of the most recent 22 months. The Court held that the time that David spent incarcerated should not be deducted from the 15/22 calculation, but should rather be a factor in the consideration of best interests. The Court found that David did not take steps to enter treatment between January and February 2007 prior to being incarcerated, or take steps to inquire about how to set up a treatment program while he was in jail. Neither did David immediately seek treatment upon his release in early June 2007, and only attended 3 sessions in July 2007 before stopping. The Court therefore noted that "David continually put off the court's order concerning sex offender treatment." The Court rejected David's contention that participating in the program would violate the right against self-incrimination, noting that David procrastinated in seeking any sex offender treatment and had already pled guilty to criminal charges. Kenna had been out-of-home for almost 2 years at the termination hearing, and with sex offender treatment often taking 2 years David would not regain custody of Kenna for a substantial amount of time. The Court found that Kenna cannot wait indefinitely for David to rehabilitate and that termination is in her best interests.

A dissenting opinion filed by Judge Irwin noted a lack of evidence suggesting David intentionally delaying participating in a treatment program, as adjudication took 10 months and

David was incarcerated for 4 more months, thus giving him 3 months to undergo treatment. David's search for alternate treatment programs was not consistent with a refusal to participate.

In re Tayla R., 17 Neb. App. 595 (2009)

SUMMARY: An order determining a change in the permanency plan to adoption but keeping the same rehabilitation plan for the mother is not a final order.

Christina R. is the mother of Lea D. (DOB 10/94), Charlie D. (DOB 1/97), Sierra R. (DOB 11/00), and Tayla R. (DOB 9/08). The father is not involved in this case. Lea, Charlie and Sierra were removed from the mother's care on May 25, 2007, based on the mother's shoplifting in the presence of the children and subjecting the children to inappropriate discipline resulting in "physical and/or emotional injury or pain." The children were adjudicated under N.R.S. 43-247(3)(a) and on August 27, 2007, the court found at disposition that the mother was not able to demonstrate appropriate parenting skills and judgment to ensure the children's safety and ordered the mother to comply with several provisions. At review hearings on January 11, 2008, and May 2, 2008, the court held the permanency plan to be reunification. On April 14, 2008, the court ordered the visitation to be changed from supervised to monitored. On July 18, 2008, DHHS recommended in its court report that the permanency plan be changed to adoption. Sierra was born on September 16, 2008, and removed from the mother. A petition was filed under 43-247(3)(a) on failure to correct the conditions that led to her siblings' out-of-home care. At a review and permanency hearing on September 22, 2008, a LMHP testified that the mother was making progress in her parenting skills and she had no concerns about visitation but that consistency was a problem and she had concerns that the mother could keep the young children safe at home but may not be able to properly nurture them. The caseworker testified that a boyfriend had sexually abused one of the children and the mother never responded. She testified that the mother had lack of consistency. She was willing and cooperative but did not always follow through. The mother does have a supportive family willing to help. On October 3, 2008, the court entered an order finding the permanency plan for the older three children to be adoption and an order of continued temporary custody of Tayla with DHHS. The mother appealed both orders.

The Court of Appeals held that in this case the order changing the permanency plan to adoption was not a final order affecting a substantial right because the order still included the rehabilitation plan for the mother, thus implicitly providing the mother with an opportunity for reunification by complying with the plan. The Court of Appeals also held that in the issue of continuing custody of Tayla with DHHS, there was a preponderance of evidence that placement with the mother would be contrary to Tayla's health, safety or welfare in that supportive services would be necessary if the child were returned home and the mother has not consistently cooperated with services.

In re Leslie S., 17 Neb. App. 828 (2009)

SUMMARY: The juvenile court did not err in denying transfer of the case to tribal court because the case was in its advanced stages (i.e., termination of parental rights), the father did not file the motion to transfer until 2 years into the case, and the juvenile court would have nevertheless retained delinquency case files on two of the children.

Leslie S., Glory S., Crystal S., Iyn C., and Rena C. are the children of mother Kinda S., who is a member of the Omaha Tribe. Iyn C. and Rena C. are the children of Francis, who is also a member of the Omaha Tribe. A 3a petition was filed on July 11, 2006. The Omaha tribe filed a motion to transfer the case to its tribal courts on November 27, 2006, which was denied on January 22, 2007, after the mother objected to the transfer. Since the petition was filed, Leslie and Glory have been involved with delinquency and/or truancy cases, and a 3a petition has been filed on Glory's child. On October 3, 2008, Francis filed a motion to transfer to tribal court. Prior to the hearing, a termination of parental rights petition was filed. After hearing, the court denied the motion finding that good cause existed to deny the transfer, namely that it retained jurisdiction over the cases of Leslie, Glory and Glory's child, and that the father delayed filing the motion for two years.

The Nebraska Court of Appeals affirmed the juvenile court's denial to transfer. It noted that good cause was required under N.R.S. 43-1504(2) to deny transfer and the Bureau of Indian Affairs Guidelines shows good cause existing when "the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." 44 Fed. Reg. 67,584, 67,591. The Court of Appeals held that these circumstances existed in the current case: a termination of parental rights petition was being filed and Francis waited until 2 years into the case to file a motion to transfer.

In re Louis S., 17 Neb. App. 867 (2009)

SUMMARY: In an ICWA case, active efforts should include direct guidance rather than passive referrals. The active efforts need only be culturally relevant if the conditions that led to out-of-home placement have some cultural basis. Evidence that termination is in the children's best interests does not need to include testimony given by a qualified expert witness as defined under ICWA.

The children, Alicia F. (DOB 10/95), Louis S. (DOB 9/99), Chad S. Jr. (DOB 10/01), Unique S. (DOB 10/02), Heaven S. (DOB 9/03), Henry S. (DOB 1/05), and Charlotte S. (DOB 10/06), were removed (except Charlotte) from the parents' home on October 18, 2005, due to filthy living conditions and hygiene and evidence of drug use. Notice was sent to the Omaha tribe on October 24, 2005, that the children were Indian children under ICWA, and the children were adjudicated under 43-247(3)(a) on February 23, 2006. Prior to September 2006, the father was federally incarcerated, which led to a 7 to 12 year sentence. The children were returned to the mother's home in November 2006 but were back in foster care in May 2007 due to a drug relapse. On June 25, 2008, the mother requested transfer to the tribal court but the court denied for good cause due to the length of time the case has been open in its court. In June 2008, the State filed motions to terminate parental rights of both parents under 43-292(1), (2), (6) and/or (7). The Court terminated the both parents' parental rights on January 9, 2009. The mother and father appealed.

The Nebraska Court of Appeals affirmed the terminations. It held that denial of the motion to transfer was proper based on the length of time the case had been in juvenile court and because the tribe had not intervened. It also found grounds to terminate under 43-292(6) due to the condition of the home and inability of the parents to maintain a home, the drug relapses of the mother, and the inconsistency of visits and therapy. In considering whether active efforts were made to provide services to prevent breakup of the Indian family, which is required prior to termination under 43-1505(4), the court interpreted the ruling in *In re Interest of Walter W.*, 274 Neb. at 865, 744 N.W.2d at 61, that some efforts be "culturally relevant" as only applying to conditions leading to out-of-home placement that are culturally based and that the culturally relevant efforts be likely to assist in preventing the breakup of the Indian family. The Nebraska Court of Appeals further noted that active efforts should be more than passively pointing the parents in the right direction and should instead include steps to actively assist them. The Court of Appeals concluded that active efforts had been made in this case, including financial and home maintenance assistance, evaluations, transportation, tutoring and therapy, and that active efforts would have been futile regarding the father. Addressing the requirement under 43-1505(6) regarding Indian children, the Court of Appeals concluded that based on the father's incarceration, lack of contact with the children and unwillingness to admit drug use and complete treatment, reunification would be likely to result in serious emotional or physical harm to the children. It also concluded that due to the mother's inability to complete several treatments and drug court, maintain housing, consistently attend visitation and therapy, reunification would likely result in serious emotional or physical harm to the children. The qualified expert witness who provided testimony was sufficient qualified to do so, and 43-1505(6) does not require that the qualified expert witness provide testimony as to all elements of the case, only the serious emotional or physical damage element.

In re Josiah T., 17 Neb. App. 919 (2009)

SUMMARY: Termination of parental rights on the ground of abandonment and substantial neglect through incarceration was improper because there was no concrete evidence that established the length of incarceration and that the mother abandoned the child. To have records from a prior proceeding judicially noticed, the party must mark and identify the evidence and make it part of the record at trial.

Josiah, born in 2006, was removed from the mother's home in January 2008 after the mother was arrested. On May 13, 2008, the child was adjudicated pursuant to 43-247(3)(a) and on August 5, 2008, a motion for termination of parental rights was filed pursuant to 43-292(1) and (2). The father is not part of this appeal. After a hearing on October 17, 2008, the court terminated the mother's parental rights.

At the termination hearing, the DHHS caseworker testified that she had some contact with the mother, specifically the mother requesting photos of Josiah. The caseworker also testified that the mother told her she had been sentenced to 12 to 15 years for distribution and possession of drugs. The mother was not present at the hearing, and the mother's attorney submitted a letter from the mother asking for visitation with Josiah and noting that she was sentenced to up to 4 years.

The Court of Appeals reversed the termination of parental rights. Although the mother had not had contact with Josiah for over 6 months, there was no proof of abandonment. Although incarceration may be considered as a factor of abandonment, the State produced no evidence on the mother's sentence or release date and the mother indicated in a letter that she could be released in 2 ½ years. Absent evidence as to sentence length, incarceration by itself cannot warrant termination. The State failed to produce any other evidence of abandonment. Incarceration may also be a factor in establishing termination based on neglect; however, the State failed to produce evidence as to length of incarceration or the nature of the sentence. An exhibit from a prior proceeding that referenced patterns of drug abuse were referred to at the termination hearing, but were not properly made part of the record. For a court to take judicial notice of evidence from a prior hearing, the party must mark and identify the evidence and make it part of the record. Because the State did not so, there was insufficient evidence to warrant termination under 43-292(2).

In re Ethan M., 18 Neb. App. 63 (2009)

SUMMARY: Permanent modification of custody in an abuse/neglect case cannot be made in a dispositional order and instead must occur pursuant to Neb. Rev. Stat. section 42-364 through a complaint to modify, a modification hearing and findings that there has been a material change in circumstances and that best interests are served by modification.

The father of Ethan M. was given primary physical custody in a divorce decree but allegations of abuse of the children against his wife resulted in custody of Ethan being placed with Ethan's mother and entry of a finding that reasonable efforts to reunify did not have to be made. The Court of Appeals reversed the order. Weekly visitation was arranged between Ethan and the father, but changed to therapeutic visitation and eventually stopped because a mental health professional was not available. The only visitation occurring was occasional phone visitation. Ethan has extensive mental health issues.

On January 15, 2009, DHHS submitted a case plan recommending care, custody and control of Ethan be with the mother. On February 20, 2009, the court adopted the case plan and recommendations, ordered that "care, custody[,] and control of Ethan...be placed with [the mother]" and dismissed the case. The father appealed.

The Nebraska Court of Appeals reversed the juvenile court's order. Although not raised as an issue by any of the parties, the Court of Appeals held that the court's February 20th order did not modify child custody. Although juvenile courts have the jurisdiction to modify custody under Neb. Rev. Stat. section 42-364, due to the passing of Neb. Rev. Stat. section 25-2740 which provides that "a county court or separate juvenile court which already has jurisdiction over the child whose paternity or custody is to be determined has jurisdiction over such paternity or custody determination", the court in this case did not exercise such jurisdiction and instead only made its findings in a dispositional order.

For a juvenile court to modify custody pursuant to 42-364, the parties must follow the same standards applicable to custody modifications in district court. A complaint to modify custody must be filed by a party, the juvenile court must hold a custody modification proceeding and the moving party must show that there was a material change in circumstances and that is in the child's best interest that custody be modified. In this case, when the juvenile court entered its dispositional order and terminated jurisdiction, the court lost the power to enforce its dispositional orders and the placement it ordered became ineffective, thus shifting custody back to the prior enforceable order which is the divorce decree placing custody with the father.

In re Marcella B. and Juan S., 18 Neb. App. 153 (2009)

SUMMARY: The Nebraska Supreme Court affirms the decision of the Nebraska Court of Appeals dismissing the appeal on the basis that a denial to allow in-chambers testimony from the child is not a final, appealable order.

In re Presten O., 18 Neb. App. 259 (2010)

SUMMARY: Termination of parental rights was improper because one of the bases was N.R.S. 43-292(5) relating to the parent's mental condition, which requires the appointment of a guardian ad litem to the parent.

Presten O., DOB 12/05, and Porsha O., DOB 5/07, are the children of Crystal and were removed from her care in April and May 2007 due to concerns about Crystal's mental health. In September 2007, the children were adjudicated under N.R.S. 43-247(3)(a) and on January 7, 2009, a motion to terminate her parental rights as to both children was filed. Prior to the motion, Crystal completed a competency evaluation, which found that she was competent to proceed to trial. After trial, on April 28 and May 20, 2009, the court terminated parental rights. Crystal appealed.

The Nebraska Court of Appeals reversed the termination on the sole basis that a guardian ad litem was not appointed for Crystal. N.R.S. 43-292.01 requires that a guardian ad litem for the parent be appointed whenever termination is sought under 43.292(5), that is, the parent is unable to discharge parental responsibilities due to a mental condition. In *In re Interest of M.M., C.M., D.M.*, 230 Neb. 388, 431 N.W.2d 611 (1988), the Court held that failure to comply with this statutory provision is plain error and requires reversal of the termination of parental rights. In this case, because a guardian ad litem was not appointed for Crystal, the Court of Appeals reversed the termination.

Judge Irwin filed a concurring opinion that noted the statutory language and caselaw in *In re M.M., et. al.*, but concluded that he did not believe Crystal was prejudiced in any way by the failure to appoint a guardian ad litem given her competent counsel and the conclusion of the competency evaluation.

In re Christian L., 18 Neb. App. 276 (2010)

SUMMARY: It is a violation of due process to adjudicate on findings relating to mental health status of the mother when mental health was not an allegation in the petition nor was referred to in the allegation of “fault.”

Christian L., 16 months of age, was removed from the mother in January 2009 after law enforcement found the mother’s house “in total disarray” and without any baby food. While the house was dirty and cluttered, Christian would remain in the living room area which was closed in by baby gates. This area was not dirty and there were no allegations of it being unsafe except for general testimony at adjudication about the existence of a pair of scissors. On January 2, 2009, a petition was filed that alleged Christian lacked proper parental care due to the filthy home and lack of food. During the adjudication hearing on March 31 and June 26, 2009, there was testimony about the mental health of the mother. After trial, the court adjudicated the child within the meaning of N.R.S. 43-247(3)(a).

The Nebraska Court of Appeals reversed the adjudication with orders to dismiss the case. It held that due process was violated because the allegations in the petition did not include the mother’s mental health issues and they therefore should not have been at issue during adjudication. The mother must be properly notified that her mental health status would be an issue at adjudication, which could have been satisfied by specific factual allegations or that the allegation of the risk due to the mother’s fault included an assertion that the mental health condition was a contributing factor. Excluding the evidence relating to the mother’s health, the Court of Appeals found that there was not sufficient evidence to find the child within the meaning of 43-247(3)(a).

In re Carrdale H., 18 Neb. App. 350 (2010)

SUMMARY: Evidence proving mere possession of crack cocaine by the father without any showing that it affected the child does not establish a definite risk of future harm, and adjudication of the child on this basis was therefore improper.

Carrdale II, DOB 10/08, was removed from the home in May 2009. In its original petition, the State alleged his father, Carrdale, put Carrdale II at risk of harm due to his use of alcohol and/or controlled substances, engagement in domestic violence with the mother and failure to provide stable housing. At the adjudication hearing, the State withdrew all allegations except that claiming that Carrdale was found in possession of .3 grams of crack cocaine in March 2009. The juvenile court, finding that such possession subjects Carrdale to arrest and incarceration and inability to care for Carrdale II, found Carrdale II to be within the meaning of 43-247(3)(a). Carrdale appealed.

The Nebraska Court of Appeals reversed the adjudication. The Court of Appeals noted that this case is similar to *In re Interest of Brianna B. & Shelby B.*, _____, where the court held that mere consumption of alcohol without a showing of impact on the children was not a sufficient basis for adjudication, but also noted that possession of alcohol is not illegal. Although incarceration of a parent can prevent the parent from caring for the child, there was no evidence in this case that Carrdale had been convicted and/or incarcerated. Furthermore, there was no evidence that Carrdale put the child at risk of harm; for example, that he had a history of drug use or prior offenses, that the child was present when Carrdale was in possession of the drug or that the child was affected by Carrdale's actions. The Court of Appeals explained that "[b]ased only upon an exhibit showing that Carrdale had a controlled substance in his possession in March 2009, and without evidence of charges filed or a sentence imposed or any impact on the juvenile, the risk of harm to the juvenile cannot be considered 'definite'." 18 Neb. App. at 354.

Judge Cassel filed a dissenting opinion stating that it is reasonable to assume that possession of crack cocaine will lead to injury to the child given overwhelming evidence found in juvenile cases, governmental reports and local and national studies showing the harmful effects of parental drug use on their children. He noted that it is a reasonable inference to conclude that Carrdale was using substances based on his possession of them.

In re Emma J, 18 Neb App 389 (2010)

SUMMARY: The proper burden of proof for the adjudication of an Indian child is by a preponderance of the evidence, not clear and convincing.

Emma, DOB approx. 1994, was placed in foster care on May 20, 2009, based on her allegations of physical abuse by her father, Geneo. On May 15, 2009, Emma alleged that Geneo became enraged with her for her relationship with her boyfriend and hit her on the right side of the head, made her stand in a corner of the kitchen and threatened her. Family members were present in the house but did not witness the incident. Similar allegations by Emma's sisters have been made in the past against Geneo. Police arrived at the home but Emma did not allege anything at that time and police did not notice any redness or bruising. On May 18th, Emma left the home and filed an abuse report. Police and CPS responded but did not notice any bruising or marks. However, Emma was taken into protective custody. After the incident, a caseworker spoke with Geneo who told her that he had done "nothing to her worse than had been done to him in prison." Geneo had also become verbally abusive with the caseworker on several occasions. After an adjudication hearing on August 20 and September 29, 2009, the juvenile court found Emma to be within the meaning of N.R.S. 43-247(3)(a) by clear and convincing evidence and found active efforts had been made. Geneo appealed.

The Nebraska Court of Appeals affirmed the adjudication but reversed the juvenile court's findings that active efforts were made and expert testimony provided. The Court of Appeals first found that although the burden of clear and convincing evidence for adjudication had been made in dicta of appellate decisions, there was nothing in the Nebraska ICWA requiring the heightened burden of proof for adjudication, only when "seeking to effect a foster care placement of, or termination of parental rights, to an Indian child." It therefore concluded that the burden of proof at adjudication for ICWA cases is by a preponderance of the evidence. It also affirmed the adjudication by noting that the juvenile court believed Emma's testimony and the evidence offered was sufficient for adjudication. Finally, the Court of Appeals found that although the court noted in its Protective Custody order that active efforts were provided, "including a pretreatment assessment, visitation for [Venessa], counseling services, and a comprehensive family assessment," there was no actual evidence submitted regarding active efforts nor was there expert testimony given as required by ICWA. The Court of Appeals gave directions to return Emma to Geneo's home unless a hearing is held to remove her from the home in compliance with ICWA.

In re Antonio O. and Gisela O., 18 Neb. App. 449 (2010)

SUMMARY: Failure to notify the appropriate foreign consulate as required by the Vienna Convention and N.R.S. 43-3804 is not a violation of the parent's due process rights.

Antonio, DOB 10/04, and Gisela, DOB 7/06, are the children of Jose, a Mexican national. Antonio and his (and Gisela's) half-sister Yelitza G., DOB 6/98, were removed from the home in March 2006. Gisela was removed at birth due to testing positive for amphetamine. On July 12, all three children were adjudicated as to the mother. On July 24, 2006, the State filed a petition as to Jose, with allegations of domestic violence against the mother. Jose was served by publication, and the children were adjudicated as to Jose on January 11, 2007. In July 2008, the mother filed and later withdrew a petition for a domestic violence protection order against Jose. On August 12, 2008, Yelitza called police after Jose hit the mother. Jose was arrested and subject to deportation. The mother filed a second petition on August 13th. There was no disagreement that the State provided no notice to the Mexican consulate. On May 11, 2009, the State filed a petition to terminate Jose's parental rights. Up to that time, Jose had no contact with the caseworker, provided no current contact information and did not visit the children. After trial on August 3 and September 23 and 24, 2009, of which Jose was served notice on by publication, the juvenile court terminated Jose's parental rights. Jose appealed, claiming the lack of notice to the consulate to be a violation of his due process and claiming several other errors that weren't specifically argued in his brief.

The Nebraska Court of Appeals affirmed the termination of parental rights. As to consular notification, the Court of Appeals noted the finding in *In re Angelica L & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009), that consular notification pursuant to N.R.S. 43-3804 was not a jurisdictional prerequisite but then clarified that Jose was only claiming failure to notify was a violation of his due process rights. Accordingly, the Court of Appeals held that failure to notify the Mexican Consulate was not a violation of Jose's due process rights because a parent's due process goes to adequate representation, notice of proceedings, and ability to cross-examine and participate in proceedings, and that Jose was afforded those rights. In this case, although Jose had to be served by publication, he was given notification and had the same counsel throughout the proceedings who appeared on his behalf. Furthermore, though, in addressing Jose's failure to notify the court of his whereabouts, the Court of Appeals noted there is no showing Jose was prejudiced by failure to notify the consulate because as "demonstrated by his conduct...it was extremely unlikely he would have contacted the Mexican consulate at any time regarding these proceedings. 18 Neb. App. at 461. Finally, the Court of Appeals noted that "we cannot help commenting that DHHS should put in place procedures to ensure that the dictates of N.R.S. 43-3804 (Reissue 2008) are followed. 18 Neb. App. at 461. The Court of Appeals dismissed the remaining allegations after finding no plain error.

In re Emma J., 18 Neb Ap 529 (2010)

SUMMARY: A modification of text was made in the opinion of In re Interest of Emma, 18 Neb. App. 389, 782 N.W.2d 330 (2010), namely that a September 30, 2009, where active efforts findings were improperly made was a continuation of a previous order and therefore not final and appealable.

On a motion for rehearing, the Nebraska Court of Appeals overruled the motion but modified the section entitled "Active Efforts and Expert Testimony." In summary, the Court of Appeals found that it was error for the juvenile court to make active efforts findings in its September 30, 2009, adjudication order because no evidence was adduced at that hearing regarding active efforts or expert testimony. However, the Court of Appeals concluded the error was harmless because the issues were full addressed in the previous order issued after the June 11, 2009, hearing, and that the September 30, 2009, adjudication order was a continuation of the June 11, 2009, order and not final and appealable as to the issue of continued out-of-home placement.

In re Spencer O., 277 Neb. 776 (2009)

SUMMARY: A permanency hearing is required for every child in foster care more than 12 months, even those in delinquency cases. As the result of the permanency hearing cannot include termination of parental rights, it was not a violation of due process not to inform him of the possibility of termination of parental rights.

Spencer O. was placed into state care in August 2006 as the result of acts of delinquency. In March 2008, at the request of DHHS, the court held a permanency hearing pursuant to N.R.S. 43-1312(3). The court then approved DHHS' permanency plan of reunification with the mother. Spencer appealed, claiming that 43-1312(3) does not apply in delinquency cases and that his due process rights were violated because he received insufficient notice of the potential consequences of the permanency hearing, specifically termination of parental rights.

The Nebraska Supreme Court affirmed the juvenile court's order. It concluded that the plain language of 43-1312(3) includes all children in foster care, regardless of the reason for entering. The Court also cited *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999) and N.R.S. 43-533(4), noting that when read together, they "suggest that no matter why a court removes a child from his or her home – whether it is for delinquency or parental abuse or neglect – the Legislature intended a review of the long-term plans for any child in foster care." The Court also held termination of parental rights was not a possible consequence of the permanency hearing as a separate petition would have to be filed under 43-247(3) or 43-291, and he therefore received adequate notification.

In re Elias L., 277 Neb. 1023 (2009)

SUMMARY: Under its right to intervene in ICWA proceeding, a Tribe's designated representative does not have to be authorized to practice law and may fully participate in proceedings.

The Ponca Tribe of Nebraska made a motion to intervene in child custody proceedings involving Indian children. The Tribe's representative filing the motion is an ICWA specialist and not a licensed attorney. The court denied the motion on the basis that state law prohibited the unauthorized practice of law. The Tribe appealed.

The Nebraska Supreme Court reversed the court's decision. It concluded that tribal interests in intervening in matters involving Indian children outweighed the State's interest in protecting against the unauthorized practice of law. Under federal law, Tribes have the right to intervene at any point in a proceeding involving Indian children. The Supreme Court reasoned that although N.R.S. 7-101 prohibits non-attorneys from practicing law there already exist several exceptions and the use of ICWA specialists in place of attorneys would not necessarily compromise proceedings. The Supreme Court also noted that Indian tribes do not typically have the resources available to provide legal representation in child custody cases and that they have a compelling interest in ensuring their continuing existence and integrity.

In re Angelica L. and Daniel L., 277 Neb. 984 (2009)

SUMMARY: Termination of the parental rights of a deported mother was improper because the State did not prove parental unfitness especially as the mother submitted overwhelming evidence in two home studies of her fitness as a parent. The “best interest” standard does not mean finding one environment to be superior to another. State courts retain jurisdiction over child custody matters even if federal issues arise regarding deportation. Compliance with the N.R.S. 43-3804 requiring notification of consulates for foreign nationals is not a prerequisite to jurisdiction.

Daniel L., DOB 2/13/98, and Angelica L., DOB 1/04, were removed from the mother, Maria, an illegal resident, on April 7, 2005, after she was arrested for lying to police officers about her identity. Law enforcement visited her home after receiving a report that Maria had failed to bring her infant to a follow-up medical visit after the child was diagnosed with an infection. The infant, who was born prematurely, had previously received medical attention in March 2004 for dehydration and other conditions. Maria had then begun services with Healthy Starts, a program for healthy babies, but returned her infant to the hospital on April 3, 2005, with a fever. Social services personnel then contacted law enforcement after Maria failed to bring the infant to a follow-up visit.

After Maria was detained, she was deported to Guatemala and DHHS chose not to allow the children to return with her. The case continued without her presence, and the case plan required Maria to provide a safe environment, maintain a job, complete a psychological evaluation, maintain contact with the caseworker and children and take a parenting class. In Guatemala, Maria contacted missionaries who began helping her with the requirements of the case plan. One missionary gave her parenting classes and counseling, and two home studies were completed. The caseworker had periodic phone contact with Maria but did not monitor her progress. A petition to terminate parental rights was filed on September 22, 2006, and her rights were terminated after the December 2007 trial. Testimony was received noting that the quality of life the children would receive in the U.S. would be superior to Guatemala. Maria testified that she had established a stable home, had available medical care and had attended counseling. Maria appealed the termination and also challenged jurisdiction based on the failure to notify the consulate and the inclusion of federal authorities in deportation proceedings. The Nebraska Supreme Court reversed the termination of parental rights. It held that the juvenile court did have jurisdiction as the issue of child custody cannot be superseded by a federal matter and because compliance with 43-3804 requiring consulate notification is not a jurisdictional prerequisite. The Supreme Court ruled that in terminating Maria’s parental rights, it failed to consider her constitutional interest in the care of her children and the State failed to rebut the presumption that the best interests of the children was reunification. Maria followed most instructions during her infant’s medical care and there were no allegations that the other child was being neglected. The evidence Maria submitted from two home studies was that she had a stable living environment, completed the majority of the case plan and had the ability to provide medical and other care to the children. The Supreme Court held that the State failed to rebut this evidence, instead focusing on the fact that the children’s lives in the U.S. would give them more opportunity than in Guatemala, and that the juvenile court ignored the evidence from the home studies. In summary, the Supreme Court held that the evidence failed to establish that Maria was an unfit parent.

Judge Gerrard issued a concurring opinion, joined by Justices Heavican, Connolly and Stephan, reinforcing the importance of notifying consulates under the Vienna Convention, as early and active involvement of the consulate is beneficial to the case. He noted that had the Guatemalan consulate become involved in this case, the results may have been quite different.

In re Hope L., 278 Neb. 869 (2009)

SUMMARY: A parent's past history of mental illness and ability to recover is relevant to the issues of whether the parent can be rehabilitated and whether termination is in the children's best interests. As Neb. Rev. Stat. section 43-292(6) was not a ground alleged, the State does not need to show that reasonable efforts to reunify were made. The parents' repeated false medical reporting for their children, which resulted in unnecessary medical procedures, and their withdrawal of feeding tubes to the point that the child entered starvation mode establish that the parent substantially and continuously neglected and refused to give necessary parent care and subjected the children to aggravated circumstances.

Hope, DOB 10/03, Sam, DOB 4/05, Xavier, DOB 10/06, and Gracie, DOB 2/08, are the children of Joanna and Ben. The children were removed from the parents care on March 30, 2007, after the parents were arrested for repeatedly disconnecting the feeding tube of Xavier. Gracie was removed from the parents' care at birth. Over the course of a few years, the first 3 children were repeatedly taken to medical professionals with symptoms not apparent to the medical providers. All 3 children were also found to be underweight and in a starvation state at some point. Based on parental reports, medical interventions were taken that later were determined to have been based on false information by the parents. The mother has had mental issues, including Munchausen's syndrome, Munchausen's by proxy and other psychotic disorders. Once the children were removed from the parents' care, their development and weight progressed normally; however, they had anxiety issues due to the parents' obsession with medical problems. The State filed a petition to terminate the parental rights of Joanna and Ben as to all four children, and after trial the court terminated parental rights, finding that reasonable efforts were not necessary. The parents appealed.

The Nebraska Supreme Court affirmed the termination. It first held that evidence of Joanna's past and ongoing mental illnesses were appropriately considered as prior events are not prohibited from being considered, and Joanna's mental illnesses, and multiple attempts at treatment, are relevant to her ability to be rehabilitated and whether it was in the children's best interests to have her parental rights terminated. The Supreme Court also held that because the grounds for termination of parental rights were not those that required reasonable efforts to be made (Neb. Rev. Stat. section 43-292(6)), it is irrelevant whether they were in fact made. The Supreme Court also upheld the grounds for termination under Neb. Rev. Stat. section 43-292(2) and (9) due to the parents' repeated false medical reporting, resulting in unnecessary medical procedures and their ongoing interference with the children's eating. It concluded that termination was in the children's best interests because the parents lacked insight into their issues – Joanna's mental illnesses and Ben's complicity – shown by Joanna's repeated failure at treatment and their persistent inability to acknowledge fault.

In re Chance J., 279 Neb. 81 (2009)

SUMMARY: A difference in physical appearance between the parent and child or a suspicion based on infidelity are not just causes for abandonment of a child born in wedlock.

Chance, DOB 4/17/06, was removed from the mother's care in June 2007. On February 6, 2002, the mother, Miranda, married Andrew. They separated in June or July 2005 based on the Miranda's use of drugs and engagement in prostitution, and in April 2006 Andrew learned that Miranda was giving birth. He traveled to the hospital to discover that the child was "white, had blue eyes and red hair." Andrew is black and Miranda reasoned that the child was a product of one of her "tricks." Andrew had no further contact with Miranda or Chance. After the child was removed from the mother's care, DHHS sent certified letters to 3 known past addresses. Andrew testified to never having received any letters and there was no evidence of his having received the letters; however, one of the letters was sent to an address where he was living at the time. DHHS also tried calling Andrew on a phone number given by Miranda, and received a reply from Andrew on February 14, 2008, giving them a new number. The termination petition was filed on February 14, 2008, alleging abandonment and repeated or continuous neglect. A genetic test taken in April 2008 revealed Andrew to be the father of Chance. Andrew drove to Omaha in July to visit Chance but the visits did not occur due to a series of mix-ups. On August 8, 2008, the court terminated Andrew's parental rights pursuant to 43-292(1), (2) and (9). The father appealed and the Court of Appeals reversed the termination, finding that the father did not intend to abandon the child because he did not have actual knowledge of his existence. *In re Interest of Chance J.*, 17 Neb. App. 645. The State petitioned for further review.

The Nebraska Supreme Court reversed the Court of Appeals decision, finding that Andrew did abandon the child and noting that the finding in *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707, does not apply because the father was not notified and because there was no child within marriage. In the decision, the Supreme Court held that "paternal uncertainty based on physical appearance of a child or suspicions of infidelity is not just cause or excuse for abandoning a child born into wedlock, especially when there are ample means to verify one's paternity." 279 Neb. at 91. Furthermore, because the grounds for termination did not include 43-292(6), there was no requirement to show that reasonable efforts to preserve and reunify the family have been provided. The Supreme Court finally concluded that termination is in Chance's best interests because the father never made any contact with Chance after birth and Chance has many special needs that have been addressed by the foster parents and of which the father does not know how to address.

In re Sir Messiah T., 279 Neb. 900 (2010)

SUMMARY: Because it must be determined that termination is in the best interests of the child which requires a consideration of the child's current situation, 43-292(2) is not unconstitutional just because the factual basis for it may be focused primarily on prior neglect of siblings. In this case, the mother's prior neglect of her children, inability to abstain from alcohol or parent her children unsupervised, her failure to attend many random urinalysis tests and the special needs required to care for two of the children support termination of her parental rights.

Sir Messiah, DOB 7/99, Mirage, DOB 12/00, Crystasia, DOB 2/05, and Carlieon, DOB 4/06, were removed from the mother's home on September 9, 2007, after the mother, Yolanda, was arrested and police found the children home alone with a knife stabbed in the door to prevent their escape. Yolanda's parental rights to three older children had been terminated in 2003. On November 1, 2007, the children were adjudicated within the meaning of N.R.S. 43-247(3)(a) and Yolanda was ordered to comply with a rehabilitation plan. Yolanda had been enrolled in 3 chemical dependency programs since 2007 but had 5 positive uses of alcohol since March 2008. She failed to attend scheduled urinalysis testing and once showed up to a visit drunk and acting out. The two older children have special needs and both stated that Yolanda had physically abused them. Yolanda also continued a relationship with the father of the youngest two children even though he engaged in domestic violence with Yolanda. Several of the therapists and the case manager emphasized the children's need for stability. On October 2, 2008, the State filed a termination of parental rights pursuant to N.R.S. 43-292(2) and (6). After trial on April 27, 2009, the court terminated Yolanda's parental rights as to all 4 children. Yolanda appealed, challenging the constitutionality of 43-292(2) and the sufficiency of evidence for termination.

The Nebraska Supreme Court affirmed the termination. The Supreme Court rejected the claim that 43-292(2) was unconstitutional because it permitted termination on the basis of prior neglect of siblings and not on current parental conduct, finding that prior neglect can be a basis for termination only in conjunction with proof of best interests of the children which requires evidence regarding the parent's current circumstances. The Supreme Court noted that prior neglect and terminations are relevant to future proceedings and cannot be ignored, stating "one's history as a parent speaks to one's future as a parent." 279 Neb. at 909. Finally, the Supreme Court upheld the sufficiency of the evidence for termination, noting the prior neglect, physical abuse of the children, exposure to domestic violence, continued alcohol use, inability to care for her children especially as testified to by the family's therapists and the case manager.

In re Gabriela, 280 Neb. 284 (2010)

SUMMARY: Where a child has been adjudicated pursuant to N.R.S. 43-247(3)(a) and a permanency objective of adoption has been established, a juvenile court has authority under the juvenile code to order DHHS to accept a tendered relinquishment of parental rights.

Gabriela H., DOB 9/97, was left at an Omaha hospital by her mother on November 7, 2008. She was adjudicated on February 23, 2009, pursuant to N.R.S. 43-247(3)(a) and has remained in care the entire time. The mother was ordered to pay child support. At a permanency hearing on March 30, 2009, the court ordered that reasonable efforts were not required because both the mother and father indicated that they wanted no relationship with her and wanted to relinquish their parental rights. At a permanency hearing on November 10, 2009, the permanency goal was changed to adoption. However, DHHS refused to accept relinquishment because they had no adoptive home available and because they wanted to continue receiving child support payments for Gabriela's care. Therefore, the court ordered DHHS to accept the relinquishments. DHHS appealed.

The Nebraska Supreme Court affirmed the court's order. Although the appropriate statute on relinquishment, 43-106.01, includes as a condition that DHHS "has, in writing, accepted full responsibility for the child," the Supreme Court found that juvenile courts have the authority to determine placement of a child as established by 43-284 (where courts can order DHHS to accept the child's placement) and 43-285(2) (where courts can reject a placement plan created by DHHS). Furthermore, the Supreme Court found that DHHS is limited in its authority by 43-285(1), which provides that DHHS has "authority, by and with the assent of the court, to determine the care, placement...." Finally, the Supreme Court noted that under 43-1312(2), "[i]f the return of the child to his or her parents is not likely...., [DHHS] shall recommend termination of parental rights...", and that refusal to accept a relinquishment in the current situation would violate the principle of this statute. The Supreme Court concluded by rejecting the loss of child support argument stating that "it cannot justify the legal perpetuation of a parental relationship which no longer exists in fact, thereby permitting an abandoned child to linger indefinitely in foster care." 280 Neb. at 291.

In re Cornelius K., 280 Neb. 291 (2010)

SUMMARY: An adjudication and permanency plan must be established before the juvenile court can accept a voluntary relinquishment from the parent.

Cornelius, DOB 5/93, was adopted by Laura in 2003. Laura moved and left Cornelius with a relative in August 2008, and on August 19, 2009, a petition was filed alleging abandonment. At the adjudication hearing on October 23, 2009, Laura relinquished her parental rights to Cornelius. An amended petition was then filed and Cornelius was adjudicated pursuant to N.R.S. 43-247(3)(a) based on Laura's abandonment. DHHS appealed.

The Nebraska Supreme Court held that, although the court has authority to accept a relinquishment under *In re Interest of Gabriela H.*, 280 Neb. 284, ___ N.W.2d ___ (2010)), the relinquishment in this case was not proper because it was accepted prior to any adjudication or permanency plan. However, the Supreme Court found that the adjudication was still valid because the record established that Cornelius had been abandoned by Laura and that there was no adult to care for him.