

NEBRASKA APPELLATE CASELAW UPDATE

THROUGH THE EYES OF THE CHILD INITIATIVE

2010 REGIONAL CONFERENCE

SCOTTSBLUFF, NEBRASKA

SEPTEMBER 23, 2010

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The following materials are intended to provide seminar attendees with an update on decisions handed down by the Nebraska appellate courts in 2010 and late 2009 which have a bearing on the practice of juvenile law and, in particular, on the issues that arise in 3(a) cases. The summaries presented in the following pages are informational summaries only and are not intended to provide legal advice – practitioners should be cautioned to review the actual decisions and not rely solely on these summaries when referring to this outline.

Relevant Statutory Language

Neb. Rev. Stat. § 43-247 provides, in relevant part, that the juvenile court of each county shall have jurisdiction of:

(3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile.

Neb. Rev. Stat. § 43-247(3)(a).

Case Summaries

- 1. In re: Interest of Jorge O., 280 Neb. 411 (July 30, 2010) – authority to determine discharge from detention center**

The juvenile court committed two juveniles to the custody of DHHS’s Office of Juvenile Services (“OJS”) for placement at the Youth Rehabilitation and Treatment Center (“YRTC”) in Kearney. In each case, the juvenile court ordered that the court, rather than OJS, would determine whether to discharge the juvenile from YRTC. On appeal, the Nebraska Supreme Court ruled that, once the juvenile court commits the juvenile to YRTC, the juvenile comes under the authority of OJS and any decision to discharge rests solely with OJS pursuant to the OJS Act and the rules promulgated thereunder.

2. In re: Interest of Gabriela H., 280 Neb. 284 (July 23, 2010) – juvenile court’s authority to direct DHHS to accept a voluntary parental relinquishment

In Gabriela H., Gabriela’s biological mother left 11-year-old Gabriela at an Omaha hospital. A juvenile petition was filed and temporary custody was placed with DHHS. Gabriela was subsequently adjudicated under § 43-247(3)(a) and ordered to remain in the temporary custody of DHHS. The juvenile court also ordered the biological mother to pay DHHS child support. At a subsequent permanency hearing, the juvenile court found that further reunification efforts were not required because Gabriela’s parents did not wish to have a relationship with her and were contemplating voluntary relinquishment. Ultimately, the State Foster Care Review Board, the county attorney, and the guardian ad litem recommended that the permanency objective be changed to adoption because both parents were willing to voluntarily relinquish, but DHHS refused to accept their relinquishments because no permanent home had yet been found and because the mother was paying a “substantial amount” of child support. The juvenile court ordered DHHS to accept the voluntary relinquishments, and DHHS appealed.

On appeal, DHHS argued that it alone had discretion to accept relinquishments and that the juvenile court could not order it to do so. The Nebraska Supreme Court disagreed, finding that, while DHHS has a certain degree of discretion in accepting relinquishments, that discretion is subject to the superior right of the juvenile court to determine what is in the juvenile’s best interests and that DHHS can be ordered by the juvenile court to accept the parent’s voluntary relinquishment. In so holding, the Court stated:

It is clear from the record that DHHS declined to accept the relinquishment of parental rights because one of the parents was paying a “pretty substantial amount” of child support which partially offset DHHS’ cost with respect to Gabriela’s care. While conservation of public resources is a worthy objective, 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. We agree with the observation of the juvenile court that the position taken by DHHS has made Gabriela a “de facto orphan.”

But see In re: Interest of Cornelius K., 280 Neb. 291 (July 23, 2010) (holding that an adjudication and permanency plan must be established before the juvenile court can accept a parent’s voluntary relinquishment).

3. In re Interest of Emma J., 18 Neb. App. 389 (May 11, 2010) – standard of proof in adjudications involving ICWA

In Emma J., the petition alleged that Emma’s father and mother were subject to earlier juvenile court adjudications relating to the father’s inappropriate physical discipline of Emma’s two older sisters and the mother’s failure to protect those sisters, that Emma was now subject to inappropriate physical discipline, that her father had threatened to force her to have an abortion, and that the issues relating to the earlier adjudications remained uncorrected. The petition further alleged that this was an ICWA case. The facts presented at the adjudication hearing established that Emma’s father had hit her around the head on multiple occasions, threatened to force her to have an abortion because he assumed she was pregnant (although he had not been told she was pregnant, nor did Emma herself think she was pregnant), and that various other forms of physical assault had occurred at the hands of her father.

The juvenile court concluded that the State had proved by clear and convincing evidence that Emma was a child within the meaning of § 43-247(3)(a), that active efforts had been made to prevent the breakup of the Indian home, and that a qualified expert (in the form of Emma’s therapist) had provided the requisite testimony that Emma’s continued custody with her parents would result in serious emotional or physical damage to Emma.

On appeal, the Court of Appeals first clarified that a heightened evidentiary standard was not required by ICWA at the adjudication phase, stating that clear and convincing evidence is only required “where a party is ‘seeking to effect a foster care placement of, or termination of parental rights, to an Indian child’” (quoting § 43-1505(4)). Because this elevated standard is not specifically required by the ICWA statutes at the adjudication phase, the Court concluded that the State must prove the allegations in its petition by a preponderance of the evidence at the adjudication phase for both Indian and non-Indian children. The Court then concluded that the State had met its burden by a preponderance of the evidence.

That said, the Court still reversed that part of the juvenile court’s order relating to Emma’s out-of-home placement because, while the order stated that the juvenile court’s review of the evidence established that active efforts had been made and that an expert credibly testified about the substantial harm which continued custody by her parents would have on Emma, the appellate record was actually devoid of any evidence related to these two issues. The Court remanded with directions that Emma be returned to her parents’ home unless a hearing was held in compliance with ICWA to remove her from the home.

**4. In re: Interest of Shayla H., et al., A-09-1142 (May 18, 2010)
(unpublished) – judicial notice issues**

In this case, the State originally filed a 3(a) petition against the father of three minor children, alleging that the father failed to provide medical care to at least one of the children on at least one occasion, engaged in acts of physical and verbal violence toward the children’s mother while the children were present, and used methamphetamine on more than one occasion while he was the primary caretaker for the children. Through the father, the children were eligible for enrollment in the Rosebud Sioux Tribe, but the original petition did not contain allegations related to the Indian Child Welfare Act (“ICWA”).

At the original adjudication, the father sought to dismiss the petition because the petition contained no allegations related to ICWA; the juvenile court denied this motion. Following the testimony of witnesses, the juvenile court found evidence support the second and third claims against the father, but concluded that there was insufficient evidence to support the claim that the father had failed to provide necessary medical care, and adjudicated the children under § 43-247(3)(a). The father appealed this adjudication order, and the Nebraska Court of Appeals reversed the adjudication order, concluding that the juvenile court erred in failing to grant the father’s motion to dismiss for failure to include ICWA allegations in the original petition. However, the Court of Appeals also concluded that the omission was curable and remanded with directions that the State amend its petition.

Following amendment of the petition to include the requisite ICWA allegations, the juvenile court again held an adjudication hearing. At the request of the State and over the objection of the father, the juvenile court took judicial notice of the testimony and exhibits offered at the prior adjudication hearing. The juvenile court then allowed the father to present additional evidence and ultimately concluded again that the allegations relating to the abuse of the mother and the methamphetamine use were proven. The father again appealed this order.

On this second appeal, the father argued in relevant part that the juvenile court erred in taking judicial notice of the testimony and exhibits offered at the previous adjudication hearing. The Court of Appeals concluded that judicial notice was proper, finding that the record identified specifically what testimony and exhibits were involved, stating that the juvenile court took judicial notice only of evidence offered at prior adjudications where the rules of evidence apply and did not take judicial notice of evidence offered at prior disposition hearings where the rules of evidence do not apply, and concluding that the father had not in any event shown how he might have been prejudiced by the juvenile court’s action.

The State filed a cross appeal, contending that the juvenile court had not used the proper burden of proof because the court alternately stated that the State had met its burden by clear and convincing evidence and also by a preponderance of the evidence. The Court of Appeals reaffirmed its holding in Emma J., stating that ICWA does not require an elevated burden of proof at the adjudication stage and that the proper burden of proof in an ICWA or a non-ICWA case is a preponderance of the evidence.

5. In re: Interest of Patience I, A-09-1024, 2010 WL 1817555 (May 4, 2010) (unpublished) – reasonableness of delay between ex parte temporary custody order and detention hearing

Patience’s mother suffered from delusions for which she was occasionally medicated. These delusions included the belief that her ex-husband was a member of the Hell’s Angels; that the Hell’s Angels had raped her, killed her, and brought her back to life; and that the Hell’s Angels tapped her house and one of her children so they could listen in on her conversations. These delusions culminated in the mother’s decision to drive from Nebraska to Washington, D.C. to ask the President to help her. En route, she became convinced that a member of Hell’s Angels was trying to run her off the road in Ohio, she pulled over, and she was ultimately taken to a psychiatric hospital in Ohio. Patience, who was then 10, was placed in a foster care home in Ohio.

On that same date, August 7, 2009, a Nebraska juvenile court entered an ex parte temporary custody order placing custody of Patience with the Department of Health and Human Services. However, Patience remained in Ohio. The detention hearing was continued from August 12th when the State was unable to locate the mother to provide her with notice. On August 26th, the mother appeared in the Nebraska juvenile court, objecting to the custody order, but the court determined that these issues were premature because the State was still attempting to convince Ohio to transfer jurisdiction to Nebraska. Patience was ultimately returned to Nebraska in mid-September and, on September 22nd, the juvenile court set a detention hearing for October 7th. At the October 7th hearing, the juvenile court concluded that custody should properly remain with DHHS.

After the juvenile court entered an adjudication order finding that Patience was a child within the meaning on § 43-247(3)(a), the mother appealed. In relevant part, the mother argued that the 60-day delay between the entry of the ex parte custody order and the detention hearing was unreasonable. The Court of Appeals concluded that the unusual circumstances in this case, which included the fact that the entry of the ex parte order did not coincide with the actual physical custody of Patience by Nebraska DHHS, meant that the elapsed time in this

instance was not unreasonable and did not violate the mother's constitutional rights.

6. In re: Interest of Americal T., A-09-1080 (May 4, 2010) (unpublished) – evidence of parent's failure to work case plan

This case provides an excellent and detailed analysis of the evidentiary proof required to show the mother had not made any significant efforts in attempts to work her case plan and to support the Court's ultimate conclusion that the termination of the mother's parental rights was proper.

7. In re: Interest of Carrdale H. II, 18 Neb. App. 350 (Apr. 27, 2010) – State must show definite risk of harm to juvenile to prove (3)(a) case

In Carrdale H., the child was less than a year old when his father was found with .3 grams of crack cocaine in his possession. On the basis of this fact alone, the juvenile court found that Carrdale was a child within the meaning of § 43-247(3)(a) and entered an adjudication order accordingly.

The father appealed, and the Court of Appeals reversed the juvenile court's order. In so doing, the Court recognized that, generally, the State does not have to prove actual harm to the child in order to support an adjudication order, but stated that the State does have to prove that, without intervention, the child is a definite risk of future harm. In concluding the State had not met this burden, the Court of Appeals noted that there was no evidence presented that any charges had been filed against the father, that a sentence was imposed, or that Carrdale was impacted in any manner by this possession (i.e., that his father had used crack while in his presence or otherwise placed Carrdale at risk). The Court noted that the dearth of evidence on these issues could mean that the father was simply holding the crack cocaine for another or that this was the first time he had had crack in his possession and that any risk of harm to the child was therefore not definite but merely speculative.

8. In re: Interest of Ipolita B., A09-1023, 2010 WL 1600640 (Apr. 20, 2010) (unpublished) – review of county court order implementing different plan from DHHS for the care and custody of the juvenile

In this case, one-year-old Ipolita was removed from her mother's care after the mother was arrested on drug charges. Ipolita was immediately placed with a couple who had previously adopted Ipolita's older half-brother. According to the caseworker's evidence, Ipolita bonded with this couple and with her older half-brother, playing with him every day, and the older half-brother had become very protective of Ipolita.

Six months after Ipolita's placement with this couple and after she was adjudicated as a child within the meaning of § 43-247(3)(a), her mother filed a Motion for Change of Placement, requesting that Ipolita be placed with Veronica and her husband, friends of the mother. In support of her request, the mother presented evidence that a home study had been conducted, and the reviewer found no concerns with Veronica's home; Veronica and her husband had been caring for the mother's youngest child since birth and had applied to become his guardians; Veronica had cared for Ipolita in the past on weekends and the two had bonded; Veronica was Mexican and could take Ipolita to Mexico to see her family if the mother was deported as was expected; and Veronica and her husband were financially stable and willing to take care of Ipolita. DHHS objected and noted that Ipolita had bonded with the couple where she was currently placed and had bonded with her half-brother who was very protective of her and with whom she played every day, that Ipolita had never met the younger sibling who was living with Veronica, and that current foster couple had Hispanic family members and were also actively teaching Ipolita about her heritage. The evidence also established that Veronica was unaware of the mother's drug use, even though the mother had lived with Veronica when she was using, and Veronica had close family members who had drug abuse issues.

The juvenile court found that it was in Ipolita's best interests to be placed with Veronica and her husband and granted the mother's motion for Change of Placement. The original foster family immediately sought review by a juvenile review panel pursuant to § 43-287.03. The juvenile review panel reversed the juvenile court, and the order was appealed. The Court of Appeals agreed that Veronica did, in many respects, present an appealing placement picture for Ipolita but agreed that a change in placement would not be in Ipolita's best interests due almost entirely to the fact that Ipolita had formed such a strong bond with her original foster family and her older half-brother. In reaching this conclusion, the Court did also note concerns that Veronica was unaware of the mother's drug use, Veronica had close family members that had drug-related issues, and Ipolita did not know and had never met the younger sibling in Veronica's care, but re-emphasized that the primary reason for continuing placement with the original foster family was the strong bond that had developed between Ipolita and that family.

9. In re: Interest of Marcella B. and Juan S., 279 Neb. 568 (March 12, 2010) – appeal of GAL motion to allow child to testify in chambers

In this case, the Court of Appeals and then the Nebraska Supreme Court both concluded that the juvenile court's order denying the guardian ad litem's motion to allow the juvenile in this case to testify in chambers and outside the presence of the mother was not a final appealable order.

10. In re: Interest of Christian L., 18 Neb. App. 276 (Feb. 16, 2010) – failure to allege proper basis for 3(a) finding in petition

In Christian L., the juvenile court petition alleged that 16-month-old Christian was endangered in his mother’s custody due to the filthy condition of the home and the absence of appropriate food for Christian. At the adjudication hearing, however, and over the objection of the mother’s attorney, the “bulk of” the State’s evidence focused on the mother’s mental health conditions. The juvenile court allowed the testimony, stating that the petition alleged that the mother failed to take proper care of Christian and therefore the mother was on notice that her mental health could be at issue. The juvenile court ultimately ruled that Christian was a child within the meaning of § 43-247(3)(a).

On appeal, the Court of Appeals reversed the juvenile court. In so doing, the Court noted that the petition alleged only that Christian was in danger due to the condition of the house and the absence of appropriate food and, as such, the evidence relating to the mother’s mental health was improperly admitted. Absent this evidence, the only evidence relating to the allegations in the petition did not support the contention that Christian had access to the dirty areas of the home and did support the conclusion that Christian was kept safely in a gated area that was clean and not dangerous, that he was properly clothed and clean when he was removed, and that he was then in good health and did not show any signs of a lack of proper nutrition. Based on this admissible evidence, the Court of Appeals reversed the adjudication order.

11. In re: Interest of Presten O., 18 Neb. App. 259 (Feb. 9, 2010) – failure to appoint GAL when motion to terminate parental rights involves mother’s mental health issues

In this case, an infant and a toddler were removed from the mother’s care due in large part to concerns about the mother’s mental health. During subsequent proceedings, the mother underwent a competency examination, the conclusions of which were that the mother had the capacity to understand legal proceedings and that consequences should be imposed if the mother did not behave appropriately in the courtroom. When the State ultimately filed a motion to terminate the mother’s parental rights, the State alleged as one basis for the motion the mother’s inability to discharge her parental duties due to her mental condition pursuant to § 43-292(5). The juvenile court did not appoint a guardian ad litem for the mother and ultimately terminated her rights, in part, on the basis of § 43-292(5).

On appeal, the Court of Appeals reversed the juvenile court’s order on plain error grounds. The Court found that the juvenile court was required to appoint a

guardian ad litem for the mother in the termination proceedings pursuant to § 43-292.01, because one of the allegations for termination involved the mother's mental health under § 43-292(5). Concluding that the appointment of a guardian ad litem in this instance was statutorily mandated, the Court of Appeals reversed and remanded.

12. In re: Interest of Chance J., 279 Neb. 81 (Dec. 31, 2009) – standard for proving parental abandonment in termination of parental rights case

In Chance J., the biological father and mother were married at the time of Chance's birth, but the father, who was present at the birth, concluded from looking at Chance that Chance could not be his. He did not see Chance for three years from the date of his birth, until this juvenile case was opened. Once he received notice of the juvenile proceedings, he appeared in court and contended that his rights should not be terminated on the basis of abandonment because he had not known that Chance as his (a fact which was confirmed through paternity testing during the juvenile proceedings) and did not know he could send cards or otherwise make contact.

When his rights were terminated, the father appealed to the Court of Appeals, which reversed the juvenile court's termination order. Upon petition for further review, the Supreme Court reinstated the juvenile court's order, concluding that, while there was nothing in the record to indicate that Chance was the father's biological child at the time of birth, there was also no evidence to indicate that the father was prevented by financial or other circumstances at that time from confirming his parentage through paternity testing and noting the presumption that a child born to a married mother is the child of the mother's husband. As the Court noted, the "obligations of parenthood cannot be set aside . . . based on nothing more than mere physical appearance or unconfirmed suspicions. We will not set the bar so low for responsible parental involvement." Because the evidence demonstrated that the father had indeed withheld his parental care from Chance for the requisite statutory period, the Court found that he had abandoned Chance and affirmed the juvenile court's termination of his parental rights.

13. In re: Interest of Hope L., 278 Neb. 869 (Nov. 13, 2009) – when evidence of reasonable efforts to reunify and preserve family is required before terminating parental rights

In Hope L., the Supreme Court reaffirmed earlier decisions in which it has concluded that proof of reasonable efforts to reunify and preserve the family is only required when termination of parental rights is sought under § 43-292(6). When termination of parental rights is sought on any other statutory basis found in § 43-292, no such proof is required.

14. In re: Interest of Ethan M., 18 Neb. App. 63 (Oct. 13, 2009) – power of juvenile court to make a permanent modification to a district court child custody order

In Ethan M., the district court had given custody of Ethan to his father in prior divorce proceedings. During the juvenile proceedings at issue, the juvenile court attempted to enter a dispositional order permanently placing custody of Ethan with his mother and then dismissing the juvenile proceedings. The Court of Appeals recognized that the juvenile court does have the authority to modify child custody arrangements previously ordered by the district court in an ongoing juvenile proceeding pursuant to § 25-2740, but reversed the juvenile court's order because the juvenile court did not apply the appropriate standards for custody modification proceedings and further did not conduct a child custody modification hearing in the manner such a hearing would have been conducted in district court. Because the juvenile court's additional order dismissing the proceedings also robbed it of jurisdiction and the modification order was of no force and effect, clearly not the result the juvenile court intended, the Court of Appeals reversed the order and remanded for further juvenile court proceedings consistent with the appellate opinion.

15. In re: Interest of Louis S., 17 Neb. App. 867 (Sept. 1, 2009)

This case provides an excellent analysis of burden of showing active efforts in an ICWA case.