

FILED

JUN 13 2017

IN THE SUPREME COURT OF NEBRASKA

In re Interest of Skyleeya M.,)
A Child Under 18 years of Age,)
State of Nebraska,)
Appellee,)
v.)
Ronald F.,)
Appellant.)

No. S-16-763. CLERK
NEBRASKA SUPREME COURT
COURT APPEALS

Memorandum Opinion
and
Judgment on Appeal.

HEAVICAN, C.J., WRIGHT, MILLER-LERMAN, CASSEL, STACY, KELCH, and
FUNKE, JJ.

KELCH, J.

I. NATURE OF CASE

The biological father of a child adjudicated to be a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) appeals the juvenile court's order overruling his motion to have the child placed with her half-sibling and paternal grandmother. Before reaching the merits of this case, the court must decide whether it has jurisdiction over the appeal.

II. FACTS

1. EMERGENCY CUSTODY AND ADJUDICATION

Skyleeya M. was born on July 26, 2015. After Skyleeya's birth, both Skyleeya and her mother, Lindsey M., tested positive for methamphetamines. As a result, the Department of Health and Human Services (DHHS) was contacted, and a DHHS representative



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interviewed Lindsey. During the interview, Lindsey reported that she used methamphetamine throughout her pregnancy and that she knew she would not be a fit mother because she has a drug addiction and is homeless, jobless, and without transportation. For that reason, Lindsey signed temporary guardianship papers with Skyleeya's paternal aunt.

On July 27, the State sought emergency custody of Skyleeya and filed a petition alleging that Skyleeya was within the juvenile court's jurisdiction pursuant to Neb. Rev. Stat. § 42-247(3)(a). Emergency custody was granted, and Skyleeya was placed with a non-relative foster family. The juvenile court later determined that Skyleeya was a juvenile within the meaning of § 43-247(3)(a) and that she should remain in the temporary custody of DHHS for appropriate care and placement.

2. PLACEMENT

Testimony at a later hearing established that Skyleeya was not initially placed with her paternal aunt because paternity had not yet been established. Apparently, at the time Skyleeya was first made a state ward, Lindsey had identified two possible fathers for Skyleeya. Ronald F. was officially identified as Skyleeya's biological father on November 20, 2015. Ronald is currently incarcerated, serving a sentence of 80 to 130 years in prison.

To find a biological family with which Skyleeya could be placed, a family finder from Nebraska Families Collaborative (NFC) was assigned to the case. One of the family members considered for placement was Skyleeya's paternal grandmother.

A study of the paternal grandmother's home began in late January 2016, but was not completed until April of that year. This was because the grandmother's fiancé, who lived in the home, worked two jobs and could only meet on Saturdays. Because the NFC worker conducting the study was not available every Saturday, the fiancé and worker were not able to meet until April 9.

In addition to the grandmother's fiancé, Skyleeya's half-sibling also lives with the grandmother. She has been placed with the grandmother since June 14, 2015. The grandmother is the court-ordered guardian of the half-sibling.

The grandmother's home was found to be a suitable placement for Skyleeya. Nevertheless, NFC did not place Skyleeya there.

3. MOTION TO PLACE SKYLEEYA WITH HALF-SIBLING

In February 2016, the State moved to terminate the parental rights of both Lindsey and Ronald. Thereafter, Lindsey and Ronald filed a joint motion requesting that Skyleeya be placed with her paternal grandmother and half-sibling. Hearings on that motion were held on May 18 and July 18. Below is a summary of the evidence presented regarding (a) the grandmother's visits with Skyleeya,

- (b) the grandmother's desire to have Skyleeya placed with her, and
- (c) Skyleeya's best interests.

(a) Visitation

The paternal grandmother did not have her own separate visitation time with Skyleeya, but attended scheduled visits with the aunt and uncle. The aunt and uncle were allowed two visits per week. The NFC worker who supervised the visits testified that she did not know the exact number of times that the grandmother visited, but estimated that it was about "50 percent of the time," explaining that, "[i]t's not every single visit, but when she can." The grandmother testified that Skyleeya's half-sibling, a 7-year-old girl, accompanies both the grandmother and the aunt to visits with Skyleeya about once a week.

On cross-examination, the grandmother estimated that she had only visited Skyleeya approximately seven times. She explained that the aunt's visits were suspended for a time and then were granted back, so there was a period of time where she was not allowed to visit Skyleeya.

(b) Desire for Placement

The paternal grandmother testified that she loved Skyleeya and would love for Skyleeya to be raised in her home with her family. She explained that she started seeking placement of Skyleeya after it became clear that the aunt would not get

placement of her. She testified that she was willing to adopt Skyleeya.

(c) Best Interests

As for Skyleeya's best interests, the parties submitted evidence regarding i) the grandmother's bond with Skyleeya, ii) the foster family's bond with Skyleeya, and iii) Skyleeya's medical needs.

(i) Grandmother's Bond with Skyleeya

The paternal grandmother testified that she had a bond with Skyleeya and believed it would be in Skyleeya's best interests to be placed with her. To illustrate their bond, the grandmother testified that when she visited Skyleeya, Skyleeya would smile and come to her.

On cross-examination, counsel for the Guardian Ad Litem (GAL) asked the grandmother when Skyleeya's birthday was. The grandmother could not remember. When asked how old Skyleeya was, the grandmother guessed that she was 7 and a half to 8 months old. However, at the time of the hearing, Skyleeya was 9 months and 3 weeks old. The GAL then asked the grandmother if she knew who Skyleeya called "mom" and "grandma." The grandmother stated that she did not know.

The grandmother was also asked on cross-examination if she knew the phone number or address of Skyleeya's foster parents. The grandmother testified that she did not know. On redirect, the

grandmother explained that no one ever told her who Skyleeya's foster parents were and that she was never told she could contact them.

The grandmother was also asked if she knew who Skyleeya's doctor was. She responded that she did not know. The grandmother was then asked, "So you've never spoken to them about any kind of medical concerns for Skyleeya[?]" The grandmother indicated that was correct. On redirect, the grandmother explained that she was never told who Skyleeya's doctor was and that she was not allowed to attend any doctor appointments.

(ii) Foster Family's Bond with Skyleeya

An NFC worker who was involved in making recommendations for Skyleeya's placement testified that Skyleeya had been in her current placement for almost 1 year and that he believed it would be in her best interests to stay there. The worker testified that he had one opportunity to observe Skyleeya and her foster mother together and that he observed a bond between them. He admitted he had never observed Skyleeya with her grandmother. He also admitted that the visitation reports indicate that Skyleeya also had a bond with her biological family.

Another NFC worker testified that she had witnessed a "strong bond" between Skyleeya and the foster mother, explaining that when the worker tried to take the child or when the foster mother left the room, Skyleeya would become visibly upset. She also admitted

that she had not had the opportunity to observe any interactions between Skyleeya and the grandmother.

(iii) Skyleeya's Medical Needs

Also relevant to Skyleeya's best interests is the grandmother's ability to take care of Skyleeya's medical needs. Testimony from an NFC worker established that Skyleeya has acid reflux, a milk intolerance, and tremors in her legs. The only evidence regarding treatment of any of these conditions was that Skyleeya must drink a special milk formula and that she participates in physical therapy to address the tremors in her legs.

During the home study, the grandmother indicated that she felt capable of meeting Skyleeya's medical and emotional needs. The home study report states that that grandmother "spoke with awareness of Skyleeya's current medical needs" and "stated [that] she understands Skyleeya was born with exposure to drugs and tested positive for substances at her birth." The report also indicates that the grandmother is "willing to make sure Skyleeya is living in a smoke[-]free environment and in a home where she will not be exposed to anything [that] will overstimulate her." The grandmother reported that she will "take Skyleeya to all of her medical appointments and will work closely with Skyleeya's doctors to ensure she is progressing and meeting her developmental milestones."

The State and GAL have deemed the grandmother's tobacco use of significance because of Skyleeya's alleged diagnosis of "intranatal polycystic exposure," which the GAL told the court "basically means that she cannot have any exposure to smoke." However, as the juvenile court noted, no medical records or evidence from a doctor regarding Skyleeya's alleged condition were offered into evidence.

At the hearing on May 18, the grandmother testified that she quit smoking approximately 5 years prior. However, the home study report reveals that the grandmother "reported she has been trying to quit smoking cigarettes and her efforts have been nearly successful. She stated she is currently down to smoking only one or two cigarettes per day" and "hopes to be entirely finished with smoking before summer." The grandmother reported that when she does smoke, she does so "on the back porch and never within her house or car due to [the half-sibling's] asthma." The grandmother also reported that she "absolutely refuses" to let anybody smoke inside her home or around the half-sibling. The NFC worker conducting the home study reported that she did not detect any smell of cigarette smoke in the home during the walk-through or during either visit to the home.

4. DISPOSITION OF MOTION FOR PLACEMENT WITH HALF-SIBLING

On July 21, 2016, without explanation, the juvenile court denied the motion for change of placement. From that order, Ronald appeals.

5. TERMINATION OF RONALD'S PARENTAL RIGHTS

According to the State's brief, despite the appeal, the juvenile court proceeded with a trial to terminate Ronald's parental rights, and his rights were terminated on August 26, 2016. However, the record on appeal was never supplemented to reflect that fact. Therefore, the father's termination is not before this court to consider on appeal.

III. ASSIGNMENTS OF ERROR

Ronald assigns, combined and restated, that the juvenile court violated Neb. Rev. Stat. §§ 43-1,311.02(1)(a), 43-246(5), and 43-533 when it refused to grant the motion to place Skyleeya with her paternal grandmother and half-sibling.

IV. 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.¹ When the evidence is in conflict, however, an appellate court may give weight to the fact that the

¹ *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

lower court observed the witnesses and accepted one version of the facts over the other.²

V. ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.³ For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.⁴

Juvenile court proceedings are special proceedings under Neb. Rev. Stat. § 25-1902, and an order in a juvenile special proceeding is final and appealable if it affects a substantial right.⁵ The substantial right of a parent in juvenile proceedings is a parent's fundamental, constitutional right to raise his or her child,⁶ which includes "the right of a parent to authorize another to assume temporary care of a child."⁷

² *Id.*

³ *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

⁴ *In re Interest of Darryn C.*, 295 Neb. 358, 888 N.W.2d 169 (2016).

⁵ *Id.*

⁶ *In re Interest of Karlie D.*, 283 Neb. 581, 588, 811 N.W.2d 214, 222 (2012).

⁷ *In re Interest of Artharena D.*, 253 Neb. 613, 618, 571 N.W.2d 608, 612 (1997).

Thus, the issue presented is whether the juvenile court's order denying Ronald's motion to have the child placed with her half-sibling and grandmother substantially affects Ronald's right to authorize another to assume temporary care of Skyleeya. We have explained:

Numerous factors determine whether an order affects a substantial right for purposes of interlocutory appeal. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue. It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial. Whether the effect of an order is substantial depends on "'whether it affects with finality the rights of the parties in the subject matter.'" It also depends on whether the right could otherwise effectively be vindicated. An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review. Stated another way, an order affects a substantial right if it "'affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.'" ⁸

⁸ *In re Interest of LeVanta S.*, 295 Neb. 151, 160, 887 N.W.2d 502, 510 (2016) (quoting *Deines v. Essex Corp.*, 293 Neb. 577, 581, 879 N.W.2d 30, 33-34 (2016)) (emphasis provided).

Here, the order does not affect with finality Ronald's right to authorize the grandmother to assume temporary care of Skyleeya. The order merely states that "the Motion for Change of Placement is denied" and does not preclude Ronald from filing a subsequent motion requesting the same. Of course, Ronald's standing to file such a motion is contingent on the outcome of the State's motion to terminate Ronald's parental rights. If Ronald's parental rights have already been terminated, as the parties claim in their briefs, Ronald would no longer have standing to request that Skyleeya be placed with one of his family members. Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.⁹

Because we find that the order does not substantially affect Ronald's right to authorize the grandmother to assume temporary care of Skyleeya, we conclude that the order appealed from is not a final, appealable order. Therefore, we lack jurisdiction and dismiss the appeal.

CONCLUSION

For the foregoing reasons, we conclude that the juvenile court's order was not final and appealable. When an appellate court

⁹ *In re Interest of Enyce J.*, 291 Neb. 965, 970, 870 N.W.2d 413, 418 (2015).

is without jurisdiction to act, the appeal must be dismissed. We therefore dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.