

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF AMARI G.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
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IN RE INTEREST OF AMARI G., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

MARCUS B., APPELLANT.

Filed September 27, 2011. No. A-11-001.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH,  
Judge. Reversed and remanded.

Rodney C. Dahlquist, Jr., of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer C. Clark, and Austin Vandever,  
Senior Certified Law Student, for appellee.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, guardian ad litem.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

INBODY, Chief Judge.

I. INTRODUCTION

Marcus B., biological father of Amari G., appeals from the order of the separate juvenile court of Douglas County that denied his motion to dismiss the adjudication petition against him and ordered that custody of Amari remain with the Department of Health and Human Services (DHHS).

II. STATEMENT OF FACTS

In May 2010, under docket 125-800, the State filed a petition to adjudicate “Baby Boy [G.]” (Amari), born on that same day, pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), as well as to terminate the parental rights of the child’s mother, Kenyatta G. On that same date,

the juvenile court entered an order for DHHS to take immediate custody of Amari with placement to exclude Kenyatta's home. On May 28, a detention hearing was held and Amari was ordered to remain in DHHS' custody, outside the parental home, until further order of the juvenile court, which was not resisted by Kenyatta at that time. The transcript indicates that Marcus was present at this hearing and that the juvenile court, in court, gave permission for Marcus and Kenyatta to have supervised visitation with Amari, who was placed with a relative at that time.

On August 9, 2010, on docket 125-200, Marcus filed a complaint to intervene as the biological father of Amari. In a separate docket number, 125-870, on August 18, the State filed a petition to adjudicate Amari as to Marcus, but did not seek any change in the custody arrangement for Amari at that time. The petition alleges that Amari was a child within the meaning of § 43-247(3)(a) as to Marcus because Marcus was incarcerated; had failed to provide Amari with safe, stable, and appropriate housing; and had failed to provide proper parental care, support, and/or supervision.

An order filed August 23, 2010, indicates that the case at 125-870 came on for a hearing during which a detention hearing was ordered to be held on August 25. At the August 25 hearing, the juvenile court advised Marcus of the allegations contained within the petition filed by the State, advised Marcus that he had the right to have a trial, the right to have counsel appointed if he could not afford to do so, and the right to remain silent. At no time during the hearing was a detention hearing discussed, nor was there any discussion of Amari's custody or placement. Marcus admitted to count I of the petition, which alleged that he was incarcerated, and denied the remaining counts. At the request of Marcus' counsel, the matter was set for a pretrial hearing on September 16, and no requests, motions, or objections were made by any party regarding Amari's custody.

On October 15, 2010, the State filed a motion to consolidate dockets 125-200 and 125-870, stating that, due to an oversight, the petition regarding Marcus was improperly filed under a separate docket number and should have been filed under 125-200. The motion was sustained by the juvenile court on the same day, and the two cases were thereafter consolidated.

On November 8, 2010, Marcus filed a motion to dismiss the juvenile action as it related to him, alleging that no detention hearing had been held and, as such, that Marcus' due process rights had been violated. The motion further alleges that the State had failed to produce any evidence that placement with Marcus was contrary to Amari's health, safety, or welfare and that reasonable efforts had been made to prevent removal.

On November 29, 2010, the State filed a motion for temporary custody, which requested that Amari remain in the custody of DHHS with placement to exclude Marcus' home. The affidavit attached to the motion alleges that Marcus failed to protect Amari by allowing Kenyatta to use drugs while she was pregnant with Amari, by allowing Kenyatta to continue to reside in the home after testing positive for cocaine on August 15, and by allowing Kenyatta to return to his home while she was high from her cocaine usage on October 2. The juvenile court granted the motion on the same day and ordered that a hearing be held on December 15 to determine whether the temporary order should be continued.

An adjudication, review and permanency planning, detention review, and motion to dismiss hearing was held before the juvenile court on December 15, 2010. The juvenile court

found that a detention hearing had been held for Amari on May 26, at which time Marcus was present, and Amari was placed in the custody of DHHS where he has remained. The court found that Marcus had made no request regarding the detention of the child until November, when he filed a motion to dismiss, even though he had made a motion to intervene in the case in August. The juvenile court ordered Amari to remain in the custody of DHHS and denied Marcus' motion to dismiss, which order was filed on December 17. It is from this order that Marcus has timely appealed.

### III. ASSIGNMENTS OF ERROR

Marcus assigns that the juvenile court erred by refusing to conduct a detention hearing, continuing temporary custody with DHHS, and denying his motion to dismiss.

### IV. STANDARD OF REVIEW

An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

### V. ANALYSIS

#### 1. JURISDICTION

On the court's own motion, we directed the parties to address the issue of whether the juvenile court's November 29 and December 17, 2010, orders continuing Amari's custody with DHHS and excluding Amari from Marcus' home were appealable. In a juvenile case, as in any other appeal, 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. *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

According to Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *In re Interest of Meridian H., supra; Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009). The first and third types of final orders clearly are not present in this case, but, the second type may be, as a proceeding before a juvenile court is a special proceeding for appellate purposes. *In re Interest of Meridian H., supra; In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

In his response to the jurisdictional issue, Marcus argues that the orders appealed in this case are new orders because, at the time of the first detention hearing, he was not a party to the case, and thus, they are final, appealable orders. The State argues that we do not have jurisdiction, because the November 29, 2010, order was an ex parte order and is not appealable, and that the December 17 order, the denial of Marcus' motion to dismiss, was likewise not appealable as it was not a final order affecting Marcus' substantial rights. Meanwhile, the guardian ad litem contends that the November 29 order was not appealable, while a portion of the December 17 order was a final, appealable order only as to the exclusion of Amari from

Marcus' home, while the portion of the order denying Marcus' motion to dismiss was not appealable.

(a) November 29, 2010, Order

We agree with the State and the guardian ad litem that the November 29, 2010, order is not a final, appealable order. The November 29 order is a temporary order for immediate custody granted upon the State's motion for immediate temporary custody of Amari, which order directs that DHHS shall retain custody of Amari for placement to exclude Marcus' home. It is well settled that an ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time is not a final order. See *In re Interest of Andrew S.*, 14 Neb. App. 739, 714 N.W.2d 762 (2006), quoting *In re Interest of Stephanie H. et al.*, 10 Neb. App. 908, 639 N.W.2d 668 (2002). Therefore, because this court is without jurisdiction to consider orders which are not final in nature, we shall not address any assignment of error as it pertains to the November 29 order.

(b) December 17, 2010, Order Continuing  
Custody With DHHS

It is well settled that although an ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time is not final, an order under Neb. Rev. Stat. § 43-254 (Cum. Supp. 2010) and § 43-247(3)(a) after a hearing which continues to keep a juvenile's custody from the parent pending adjudication of a hearing is final and thus appealable. *In re Interest of Stephanie H. et al.*, *supra*. Thus, we have jurisdiction to address Marcus' assignments of error regarding the December 17, 2010, order continuing Amari's custody with DHHS.

(c) December 17, 2010, Order Denying  
Marcus' Motion to Dismiss

The final jurisdictional question presented to us in this case is regarding the portion of the December 17 order denying Marcus' motion to dismiss. Again, according to § 25-1902, the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011); *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009). The order at issue in this case does not fall into the first or third categories, as it did not determine the action and was not made on summary application after the entry of a judgment. Orders which fall into the second category of § 25-1902 must meet two requirements: A substantial right must be affected and the court's order must be made in a special proceeding. *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005). A "substantial right" is an essential legal right, not a mere technical right. *Id.* A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *Id.* Thus we must consider the order which overruled Marcus' motion to dismiss and what parental rights, if any, were affected by the order.

A substantial right is affected if an order 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. *Id.*

In *In re Interest of L.W.*, 241 Neb. 84, 95-96, 486 N.W.2d 486, 495 (1992), the Supreme Court stated:

“To be final, an order [regarding a motion to dismiss] must dispose of the whole merits of the case and must leave nothing for the further consideration of the court. Thus, when no further action of the court is required to dispose of a pending cause, the order is final. However, if the cause is retained for further action, the order is interlocutory. [Citation omitted.] Furthermore, if a party’s substantial rights are not determined by the court’s order and the cause is retained for further action, the order is not final. [Citations omitted].”

(Quoting *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991).) See, also, *In re Interest of Clifford M.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

In the present case, it is apparent that following the dismissal of Marcus’ motion to dismiss, further action will be required in juvenile court. Marcus’ rights were not substantially affected by the denial of his motion to dismiss, and the portion of the juvenile court’s order pertaining to this issue was not a final order for purposes of appeal.

## 2. REFUSAL TO CONDUCT DETENTION HEARING AND CONTINUED CUSTODY OF AMARI WITH DHHS

Marcus argues that the juvenile court erred by refusing to conduct a detention hearing as to his rights regarding Amari at the December 15, 2010, hearing. This case presents somewhat unusual circumstances in that, while no express detention hearing was held, the juvenile court nonetheless entered an order regarding the continued custody of Amari. It appears from the record that the juvenile court did not refuse to hold a detention hearing per se, but instead found that a detention hearing had already been held. As set forth above, the juvenile court entered the ex parte temporary custody order on November 29. It is clear from the record that Amari, at that time, was in the protective custody of the State and was also in the custody of DHHS as the case related to Kenyatta. At the time of the December 15 hearing, Marcus was no longer incarcerated and was present at the hearing. The juvenile court found that a detention hearing was held for Amari on May 26, as to Kenyatta, at which time Marcus was present and Amari was placed in the custody of DHHS where he has remained. The court found that Marcus had made no request regarding the detention of the child until November, when he filed a motion to dismiss, even though he had made a motion to intervene in August.

We agree that no action was taken by Marcus until November 2010 to indicate that he had any objections or concerns regarding Amari’s continued custody with DHHS; however, once the State took actions to gain temporary custody of Amari as to Marcus, Marcus should have been given the same rights as afforded to any parent, including a meaningful hearing after the entry of the ex parte temporary custody order.

Section 43-254 sets forth the requirements for continuing to withhold a juvenile from his or her parent pending adjudication, and it provides in part as follows:

If a juvenile has been removed from his or her parent, guardian, or custodian pursuant to subdivision (2) of section 43-248, the court may enter an order continuing detention or placement upon a written determination that continuation of the juvenile in his or her home would be contrary to the health, safety, or welfare of such juvenile and that reasonable efforts were made to preserve and reunify the family if required under subsections (1) through (4) of section 43-283.01.

A detention hearing is a parent's opportunity to be heard on the need for removal and the satisfaction of the State's obligations, pursuant to Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2010), and is not optional when a child is detained for any significant period of time. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Continued detention pending adjudication is not permitted under the Nebraska Juvenile Code unless the State can establish by a preponderance of the evidence at an adversarial hearing that such detention is necessary for the welfare of the juvenile. *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

A review of the record indicates that this burden was not met. At the hearing on December 15, 2010, arguments were made in conjunction with the motion to dismiss; however, the record shows that no evidence was presented by the State in support of continued custody, and, therefore, the juvenile court erred by ordering that Amari remain in the custody of DHHS as it relates to Marcus. The Nebraska Supreme Court has made it clear that the removal of a child from his or her parent without any evidence whatsoever is clearly violative of a parent's recognized liberty interest in raising his or her child and will not be tolerated. *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997). In *In re Interest of Borius H. et al.*, the court found that the juvenile court erred by granting the continued detention of the children where no evidence was presented in support of the State's motion for continued custody. The court concluded that the appropriate remedy was that the cause be remanded with orders to dismiss and to return the children to their mother. *Id.*

Thus, in this case, we find that the matter must be remanded with orders to dismiss the petition against Marcus; however, this case again presents unusual circumstances insomuch as Marcus was not the custodial parent at the time of the original petition and, even with his motion to intervene and responses to the petition filed against him, he has not requested or indicated in any manner to the juvenile court that he wishes to have custody of Amari or placement in his home. Therefore, while we order the petition as to Marcus dismissed, since he was not previously the custodial parent, we further order on remand that the juvenile court immediately conduct a custody hearing to determine the appropriate custody of Amari.

## VI. CONCLUSION

In conclusion, we find that this court has jurisdiction of the portion of the December 17, 2010, order that Amari remain in the custody of DHHS and that the juvenile court erred in continuing the custody of Amari with DHHS pending adjudication. The State's failure to provide any proof substantiating the necessity for continued detention of Amari as to Marcus requires the cause to be remanded with directions to dismiss the petition as it relates to Marcus and for further proceedings.

REVERSED AND REMANDED.