

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF COREY W. ET AL.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF COREY W. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA ET AL., APPELLEES,

V.

CHRISTY S., APPELLANT.

Filed February 15, 2011. No. A-10-893.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge.
Affirmed as modified.

Matt Catlett for appellant.

Christopher J. Roberts, Special Assistant Attorney General, for appellee Department of
Health and Human Services.

Gary E. Lacey, Lancaster County Attorney, and Carolyn Bosn for appellee State of
Nebraska.

John C. Ball, of Pollack & Ball, L.L.C., for appellee Timothy S.

Marcia Little for appellee Rocky W.

Vanessa J. Gorden, of Kinsey, Rowe, Becker & Kistler, L.L.P., guardian ad litem.

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

SIEVERS, Judge.

Christy S. appeals from an order of the Lancaster County Juvenile Court placing her three
children with their respective fathers outside the State of Nebraska while the primary
permanency objective was “reunification.” We affirm, but modify the permanency objectives to
vacate “adoption,” and we replace such with “change of custody” to be concurrent with
“reunification.”

BACKGROUND

Christy is the biological mother of three children: Corey W., born in September 1997; Carissa W., born in June 1999; and Cassidy S., born in January 2002. Rocky W. lives in Ohio and is the biological father of Corey and Carissa. Timothy S. lives in Texas and is the biological father of Cassidy. Christy had physical custody of all three children. In August 2008, all three children were living with Christy and her live-in boyfriend, Ty T.

The State filed a petition with the juvenile court on December 1, 2008, alleging that Corey, Carissa, and Cassidy were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) by reason of the faults or habits of Christy. The State alleged that (1) on or about August 21, 2008, Christy was assaulted by her live-in boyfriend, Ty, in the presence or vicinity of the minor children, and Christy and the children reported to law enforcement previous instances of physical abuse and violence; (2) on or about August 22, Christy applied for and was granted a protection order against Ty; (3) during the early morning hours of November 14, Christy and Ty were together in violation of the protection order, and Ty was arrested for the violation of such order; (4) during the late morning hours of November 14, Christy filed a motion to vacate the protection order and the protection order was subsequently vacated; and (5) the above allegations placed the children at risk for harm.

In an order filed on January 16, 2009, the juvenile court adjudicated Corey, Carissa, and Cassidy to be within the meaning of § 43-247(3)(a) based on Christy's admission to the allegations contained in the petition. Final disposition on the petition was continued pending completion of a case plan and court report by the Nebraska Department of Health and Human Services (DHHS).

After a disposition hearing, the proceedings of which do not appear in our record, the juvenile court filed an order on February 25, 2009, giving temporary legal custody of the children to DHHS, but allowing Christy to retain physical custody. The court ordered that Christy maintain a safe and stable living environment; participate with family support services as arranged and approved by DHHS; participate in individual therapy as arranged and approved by DHHS; locate, attend, and successfully complete a community support service for women who have been the victims of domestic violence; not allow Ty to reside in her home; not have visits with Ty in the presence of her children; and not allow the children to have any contact with Ty. The court also ordered DHHS to conduct random drop-ins of the family home to ensure that the children were safe and that Ty was not there.

The State filed a motion for approval of immediate placement change on April 23, 2009. In support of its motion, the State attached the affidavit of Sarah Gassen, a DHHS caseworker. In her affidavit, Gassen stated that DHHS received an intake on April 20 that alleged Christy was allowing a friend to live in her home with her and the children. DHHS also learned that Christy went to Texas for a family emergency and that the children were staying with Barbara T., Corey's and Carissa's paternal grandmother. When DHHS contacted Barbara, she indicated that although Christy had asked her to watch the children while she went to Texas, Christy did not call and confirm that Barbara needed to watch the children or pick them up from school. Christy went to Texas but did not call Barbara to confirm the arrangements. The children were not picked up from school on Thursday, April 16, and had to walk to their babysitter's home.

Christy's friend picked up the children from the babysitter and kept them overnight. Barbara stated she heard from Christy on Friday, and Christy claimed that she had confirmed with Barbara and that it was Barbara who was confused. Barbara picked the children up Friday after school and kept them until Monday, at which time Gassen was notified of the situation. Gassen further noted that Christy did not notify DHHS that she would be traveling out of state and leaving her children with a relative. Although the record is not clear as to exactly how long Christy was out of state, it appears that she was gone for 4 to 7 days.

Gassen stated that she spoke with the children on April 21, 2009. Gassen learned that Christy's friend had been having trouble with her boyfriend and that she and her two children had been spending time at Christy's home, sometimes spending the night. Christy's children indicated that Christy's friend was allowed to watch them overnight on at least one occasion. One of the children indicated that Christy's friend left the home one night after all the children had gone to bed. Gassen stated that Christy adamantly denied that her friend would leave the children unattended.

Gassen stated that she learned Christy had driven the children in her car despite the fact that Christy did not have a valid driver's license and had been told by DHHS that she could not drive the children. The children disclosed that Christy sometimes dropped them off at a park to play by themselves while Christy visited Ty in jail. Gassen was concerned that the children were unsupervised and in an unfamiliar area without Christy. When asked if there was anything Christy had asked them not to talk to Gassen or other people about, two of the children stated that Christy directed them not to tell people "our business," and one of the children elaborated that "their business is things that happen in their home."

Gassen was concerned because upon discussing the above situations and her April 23, 2009, affidavit with Christy, Christy stated that "if [Gassen] was going to take her children then she would leave with them and go to Texas." Gassen requested the court approve a change of placement to Barbara's home. The court granted the change of placement to Barbara's home in an ex parte order filed on April 23. At some point after April 23, the children were placed in a nonrelative foster home, but the record does not show exactly when this occurred.

In its order of review filed on November 30, 2009, the court found that reasonable efforts had been made to return the legal and physical custody of the children to Christy's home, but that poor progress was being made to alleviate causes of the out-of-home placement. Therefore, the court ordered that the children remain in the legal custody of DHHS for placement, treatment, and care. The court noted that the permanency plan was reunification with an alternative plan of adoption. The court ordered that Christy maintain a safe and stable living environment; participate in individual therapy as arranged and approved by DHHS; complete a community support service for women who have been the victims of domestic violence; not allow Ty to reside in her home; not have visits with Ty in the presence of her children; not allow the children to have any contact with Ty; participate in family therapy with the children as recommended by the children's pretreatment assessments and as arranged and approved by DHHS; and have supervised visitation with the children. The court also ordered that Rocky and Timothy have reasonable rights of visitation with their children as arranged by DHHS.

On April 1, 2010, Rocky filed a motion for a placement change, requesting that all three children be placed with him in Ohio. Even though Cassidy is not Rocky's child, he alleged that it was important for the children to stay together.

In an order filed on April 20, 2010, the juvenile court noted that the hearing for review, for permanency, and on the motion for placement change was continued. However, the court ordered that Christy's level of visitation be modified to "monitored" and that she cooperate with random drop-ins.

After a hearing for a review of disposition and motion for placement change, the court filed an order on June 17, 2010. The court found that reasonable efforts had been made to return the legal and physical custody of the children to Christy's home, including the following: case management, monthly contact, family support services, visitation services, a comprehensive family assessment, individual therapy, pretreatment assessments, safety assessments, "family engage service," inhome safety service, cab vouchers, service coordination, and a psychological evaluation. However, the court found that returning the children to Christy's home would be contrary to the health, safety, and welfare of the children. Therefore, the court ordered that the children continue in the legal custody of DHHS and in an out-of-home placement. The court noted that the primary permanency plan was reunification with an alternative plan of adoption. The court ordered that Christy maintain a safe and stable living environment; participate in individual therapy, as arranged and approved by DHHS; attend a community support service for women who have been the victims of domestic violence; not allow Ty to reside in her home; not have visits with Ty in the presence of her children; not allow the children to have any contact with Ty; participate in family therapy with the children, as recommended by the children's pretreatment assessments and as arranged and approved by DHHS; and have monitored visitation with the children. The court also ordered that Rocky and Timothy have reasonable rights of visitation with their children as arranged by DHHS.

We note that after the court proceeding on June 7, 2010, all three children went to Ohio for a summer visit with Rocky and his wife. Cassidy left Ohio on July 16 and flew to Texas to be with her father, Timothy. All three children were present in Nebraska for the review and placement hearing on August 10.

At the August 10, 2010, hearing on the review of disposition and motion for placement change, most of the testimony focused on where the children should be placed, given that Christy's home was not an appropriate placement.

Misty Pratt, a DHHS case manager, had been working with the family since October 2009. Pratt testified that Christy was employed and going to school. Pratt also testified that Christy had been attending therapy and her codependency group, but that she had missed several domestic violence group meetings because of work.

Pratt testified that one of her concerns was that Christy allowed the children to be around "inappropriate" people and people who had not been approved by DHHS. For example, she allowed a man named "Chris" to stay at her house even though he had not been approved by DHHS. However, Pratt admitted on cross-examination that she had no knowledge of Chris' having had contact with the children. Pratt testified that a man named "Darryl" had been having lunch with Christy and the children. Darryl has since been approved by DHHS.

Christy testified that the children were present for two lunches with Darryl and that a service worker was present for both lunches. Christy further testified that Darryl had been approved by DHHS by the time the second lunch occurred. As for Chris, Christy testified that he only had contact with the children at church. Christy also testified that Chris was not staying at her house, but that his dogs were. She testified that on one occasion while she and the children were gone, Chris went to her house to let the dogs out and “it was just a coincidence that [a worker] from Cedars showed up” while he was there.

Pratt testified that DHHS favors placing the children with their fathers, rather than keeping them in a nonrelative foster home. She testified that the children spent the summer with their fathers and did well. Pratt testified that Corey has indicated a desire to live with Rocky and that while Carissa would rather stay in Lincoln with her friends, she would be “okay” living with Rocky if the court so ordered. Pratt testified that Rocky’s home, which he shares with his wife and three children, has been approved. Pratt testified that DHHS was still working with Texas on getting Timothy’s home approved. Timothy’s home was initially denied approval because his brother, a registered sex offender, lived on the property.

Timothy testified that he lives in Texas with his wife and son. His home is located on 20 acres, and his brother also has a home on the property. Timothy testified that his brother’s home is a separate residence. Timothy testified that his brother was convicted of indecent exposure to a minor when a girl saw him masturbating in his car 8 or 9 years ago--his brother was 18 at the time. Timothy has no concerns regarding his brother. And he testified that his brother has custody of his own two children. Timothy testified that he would be willing to comply with any safety plan put into place. Timothy also testified that he was willing to do a hair follicle test, or any other drug testing, to alleviate concerns about his past drug use--he testified that he used marijuana 4 years prior and had tried methamphetamine in the past.

Eric Johnson, a service coordinator for K.V.C. Behavioral Health Care, has been involved with this case since December 2009. Johnson visited Timothy and Cassidy in Texas a week before the hearing. Johnson testified that Timothy’s brother’s house is a separate residence on the same property, approximately 100 yards away from Timothy’s home. Johnson stated that Cassidy’s grandparents also have a home on the property. Johnson testified that Timothy indicated a willingness to comply with any safety plan regarding his brother. Johnson stated that Timothy’s house is a work in progress and that there are cement floors throughout. Timothy testified that he was going to stain and polish the floors to look like marble and that rugs would be used throughout the home. Johnson testified that Cassidy was happy and excited when he saw her and that he had no safety concerns.

During closing statements, the State said it was in agreement with Pratt’s recommendations that the children be placed with their biological fathers. However, Christy’s counsel argued that the children should be kept together.

In its order filed on August 19, 2010, the court found that reasonable efforts had been made to return the legal and physical custody of the children to Christy, including the following: case management, monthly contact, family support services, visitation services, a comprehensive family assessment, individual therapy, pretreatment assessments, safety assessments, family engage service, inhome safety service, cab vouchers, service coordination, and a psychological

evaluation. The court noted that the primary permanency plan was reunification with an alternative plan of adoption.

The court ordered that the children remain in the legal custody of DHHS for placement, treatment, and care. The court ordered that the physical custody of Corey and Carissa be placed with their father, Rocky. The court ordered that the physical custody of Cassidy be placed with her father, Timothy.

The court ordered that Christy maintain a safe and stable living environment; participate in individual therapy as arranged and approved by DHHS; attend a community support service for women who have been the victims of domestic violence; not allow the children to have any contact with Ty; participate in family therapy, as arranged and approved by DHHS; and have monitored visitation with the children. The court ordered Timothy not to use any illegal drugs and to submit to random testing as arranged by DHHS. The court also ordered Timothy and Rocky to cooperate with “random dropins” as arranged by DHHS.

In a separate order filed on August 19, 2010, the court found that even though the children had been in foster care under the responsibility of the State for 15 or more months of the most recent 22 months, an exception under Neb. Rev. Stat. § 43-292.02(3) (Reissue 2008) exists in that “[DHHS] has documented in the case plan or permanency plan a compelling reason for determining that filing such a petition would not be in the best interests of the children.” Accordingly, the State did not have a duty to file a petition to terminate parental rights.

Christy has timely appealed.

ASSIGNMENT OF ERROR

Christy assigns that the juvenile court erred in placing her three children outside the State of Nebraska while also finding the primary permanency objective to be reunification of the children with her.

STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court’s findings. *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

Christy argues that by placing her children outside the State of Nebraska, the court has created a situation where reunification is a practical impossibility. Christy argues that this case presents a “virtually indistinguishable” situation that we dealt with in *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006). In that case, we ordered that the child be “placed in a situation in Nebraska that is conducive to reunification.” 15 Neb. App. at 158, 723 N.W.2d at 371. However, the State argues that the facts and posture of the instant case are distinguishable from *In re Interest of Ethan M.*

In *In re Interest of Ethan M.*, *supra*, Ethan M. lived with his father, Daniel M., who had primary physical custody of Ethan pursuant to a divorce decree. While Ethan was in Daniel’s

custody, Daniel lived with and later married Amanda H., who had custody of her two children. While Amanda and Daniel lived together, but before they married, Amanda's two children suffered serious bodily injuries. Both of Amanda's children and Ethan were removed from the home and adjudicated to be children within the meaning of § 43-247(3)(a) (Reissue 2004). However, in this time period, Ethan sustained no physical injuries and was not abused or neglected.

The county court found that DHHS did not have to make reasonable efforts to reunify the family because a parent had "subjected the juvenile to aggravated circumstances, including, but not limited to . . . chronic abuse." See Neb. Rev. Stat. § 43-283.01(4) (Cum. Supp. 2010). Based upon this finding, the court placed Ethan with his mother, who resided in California.

We reversed the county court's finding that reasonable efforts to reunify the family under § 43-283.01 were not required as to Ethan because (1) Amanda did not fulfill the statutory definition of "parent" as to Ethan, because she was not married to Daniel when the petition for adjudication was filed, and thus not a stepmother, and (2) Daniel had not harmed his own child. We stated that "given our finding that reasonable efforts to reunify Ethan and Daniel must be made, a placement of Ethan with [his mother] in California poses a substantial and unnecessary hindrance to efforts of reunification of Ethan with Daniel." *In re Interest of Ethan M.*, 15 Neb. App. at 157-58, 723 N.W.2d at 371. After that observation, we also noted that Daniel was awarded physical custody of Ethan at the time of Daniel and Ethan's mother's divorce and that the record revealed Ethan's mother had mental illnesses of consequence, and had previously left the child in Daniel's sole care for extended periods of time. We ordered that "Ethan should be placed in a situation in Nebraska that is conducive to reunification with Daniel." *Id.* at 158, 723 N.W.2d at 371. However, we did not order that Ethan be immediately returned to Daniel's custody, because Daniel was then married to Amanda, who had admitted to abusing one of her own children.

The present case is clearly distinguishable from *In re Interest of Ethan M.*, *supra*. In that case, reasonable efforts to reunify the parent and child had not previously been made, which is the opposite in respect to Christy and these children. Unlike in *In re Interest of Ethan M.*, reasonable efforts were provided in Nebraska to allow Corey, Carissa, and Cassidy to be reunified with Christy, and in our factual background section, we have listed the numerous services provided to Christy in an attempt to keep the family intact. At the August 10, 2010, hearing, the court orally set forth its reasoning:

[T]his is a case that did come to the Court's attention back in [November] 2008 . . . when the petition was filed in the interest of the minor child, alleging that the children lacked proper parental care by reason of the fault or habits of their mother Christy S[.] Ultimately, those allegations were found to be true and the Court did adopt a rehabilitative plan that was designed to -- to at the time, maintain the children in the home with their mother because they were in the home of their mother at the time of the filing of this case in 2008. And there have been numerous hearings held since then, disposition hearing in February 2009 where the initial plan was approved. Designed to correct the conditions, keep the kids in the home with their mother and have the case close successfully. . . . [T]wo months after that dispositional hearing was held, the Court did order that the children be removed from their home . . . based on . . . the affidavit

indicating that [Christy] had not been able to properly supervise or make adequate arrangements for the children on more than one occasion[.] . . . Now since then, in the 14 months since then, there's been -- there have been ongoing efforts to reunify the children with their mother. . . . [A]nd during the 14 months since removal, there [has been] some progress, some progress has been made by [Christy], but not to the point that there has been a recommendation or a belief by the Court that they can be reunified with their mother, that's still the case today 14 months after their removal.

In fact, the children had been in foster care for so long that an exception hearing was scheduled to determine whether or not the State had a duty to file a petition to terminate parental rights. Additionally, in *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006), we clearly considered, in addition to the difficulty of effective reunification efforts with Daniel in Nebraska when the child was in California, the fact that the mother had ongoing issues making placement with her less than desirable. Here, prior to placement of Corey and Carissa in Ohio with their father, Rocky, he had been "vetted" by DHHS and found to be a suitable parent with acceptable living arrangements. As to Timothy, Cassidy's father who lived in Texas, DHHS approved placement of Cassidy pending the completion of a new home study, and the court found that such placement was appropriate even without the completed study--and the record supports that decision. Furthermore, the children had just spent a lengthy summer visitation with their respective fathers that had been successful and satisfactory. Finally, *In re Interest of Ethan M.*, *supra*, does not lay down a hard and fast rule against an out-of-state placement with a natural parent--even though reunification with a parent located in Nebraska is one of the stated goals of the court-ordered plan. Therefore, in short, our opinion in *In re Interest of Ethan M.*, *supra*, does not make the juvenile court's placement order under discussion wrong or unlawful.

We cannot ignore the fact that Christy's children were in the legal custody of DHHS for nearly 16 months and were in an out-of-home placement for nearly 14 months at the time of the August 10, 2010, hearing. Nebraska courts have long held that "[c]hildren cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity." *In re Interest of Walter W.*, 274 Neb. 859, 872, 744 N.W.2d 55, 65 (2008). Moreover, it has been said that placing the children with the natural fathers is preferable to a nonrelative foster placement. Nebraska law creates a presumption in favor of child custody with a biological parent as against an unrelated third party. *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996) (holding that parental preference doctrine is recognition that relationship between parent and child is constitutionally protected). That said, when children are adjudicated and under the jurisdiction of a juvenile court, the parental preference doctrine is not controlling and the best interests of the children is the proper test. *In re Interest of Eric O.*, 9 Neb. App. 676, 617 N.W.2d 824 (2000) (finding that it was in children's best interests to remain in custody of guardians and granting guardians permission to take children with them when moving out of state).

These children are fortunate in that they have biological fathers who are able and willing to care for them, too often a rarity in juvenile cases when children have been removed from their mother's custody. By placing the children with their fathers, we prevent them from languishing in foster care for any further period of time. Christy had 14 months of reasonable efforts, but was still unable to be reunified with her children. Her shortcomings should not cause her children to suffer the uncertainty of the foster care system, especially when they have capable fathers

willing to care for them. We find that it is in the children's best interests to be placed with their fathers. We therefore affirm the juvenile court's order placing Corey and Carissa with Rocky in Ohio and placing Cassidy with Timothy in Texas.

We note a final matter in the course of our de novo review. The juvenile court's order under review has the concurrent goals of reunification (which we assume means with Christy) and "adoption." Given the placement with their natural fathers by the court, adoption is clearly an inappropriate goal. Rather, the concurrent goal should properly be "change of custody." Thus, we vacate that portion of the juvenile court's order and modify the juvenile court's order of August 19, 2010, so that the concurrent goal of the plan is "change of custody."

AFFIRMED AS MODIFIED.