

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF LUKA W. ET AL.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

IN RE INTEREST OF LUKA W. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE

V.

ELIZABETH L., APPELLANT.

Filed December 18, 2012. No. A-12-158.

Appeal from the County Court for Hall County: GERALD R. JORGENSEN, JR., Judge.  
Reversed and remanded for further proceedings.

Paul Muia, of Law Offices of Paul Muia, for appellant.

Mark Young, Hall County Attorney, and Robert J. Cashoili for appellee.

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

SIEVERS, Judge.

Elizabeth L. appeals from the decision of the county court for Hall County, sitting as a juvenile court, which terminated her parental rights to three of her minor children, Ngunar B., Utong W., and Nyachay C. Because we find that Elizabeth was not accorded her statutory due process rights at the termination phase of the proceedings, we reverse, and remand for further proceedings.

**BACKGROUND**

Elizabeth is the biological mother of Luka W., born in January 1993; Nyagoa W., born in January 1997; Changkauth W., born in January 2000; Ngunar, born in October 2004; Utong, born in August 2006; and Nyachay, born in February 2008. Elizabeth is from Sudan. In 2006, Elizabeth and her children (she had four at the time and was pregnant with her fifth child) left a refugee camp in Ethiopia and relocated to the United States, where they made their home in Virginia. In 2007, Elizabeth and her children (five at the time) moved from Virginia to Nebraska.

Her sixth child was born in Nebraska. Elizabeth's native language is Nuer, but she does speak some English. Her children all speak English, although her older children also speak some Nuer. The children have three different fathers, all of whom apparently reside in Africa. The fathers were not part of the juvenile proceedings and are not part of this appeal; therefore, they will not be discussed any further.

All six children were removed from Elizabeth's home on June 29, 2008, after law enforcement found Utong, who was not yet 2 years old, wandering in the street alone. Elizabeth's home was also found to be infested with cockroaches. Law enforcement had had multiple contacts with Elizabeth's family in the past due to Elizabeth's lack of supervision of her children. She would leave Luka in charge of the younger children, Luka would then leave the home and leave Nyagoa in charge, Nyagoa would then leave the home and leave Changkauth (who was 8 years old at the time) in charge of the younger children. Elizabeth would not know the whereabouts of her older children when they left the home.

The State filed a petition on July 1, 2008, alleging that all six children were within the meaning of Neb. Rev. Stat. § 3-247(3)(a) (Cum. Supp. 2006) by reason of the faults or habits of Elizabeth. The State alleged that (1) on June 27, the children lacked proper parental care and (2) on June 27, the children were in a situation dangerous to life or limb or injurious to the health or morals of such juveniles.

The children returned to Elizabeth's home on July 18, 2008, after the home had been cleaned and a safety plan had been put into place. Intensive family preservation workers also came to Elizabeth's home three to four times per week to work with Elizabeth on supervision issues, discipline, budgeting, and keeping a clean home.

At a first appearance hearing held on September 16, 2008, Elizabeth did not have counsel, but an interpreter appeared via telephone. The juvenile court advised Elizabeth that she had the right to remain silent and that anything she said could be used against her; that she had a right to a lawyer and that if she could not afford a lawyer, one would be appointed for her at no cost to her; that she could either admit or deny the allegations in the juvenile petition; that if she denied the allegations in the petition, a trial would be scheduled and it would be the State's burden to prove the allegations of its petition by a preponderance of the evidence; that at trial, she would be entitled to confront and cross-examine any witnesses against her; that she would have the right to testify in her own defense; that she would be entitled to request subpoenas directing her witnesses to attend and testify on her behalf; and that if she was unhappy with any decision that the juvenile court makes, she could appeal to the Court of Appeals. The juvenile court advised Elizabeth that if the State could not prove its case, the case would be dismissed and she would get her children back. The juvenile court also advised Elizabeth that if the State did prove its case, then the juvenile court would decide what should happen to the children, and the juvenile court could permit the children to remain in her home subject to supervision of the Nebraska Department of Health and Human Services (DHHS); commit the children to the care of some suitable institution; commit the children to the care of a suitable family; or most likely, commit the care and custody of the children to DHHS. When asked if she understood her rights, Elizabeth said that she did not understand. When asked what she did not understand, she said she did not "understand the petition against me because it is not [indiscernible]." The juvenile court then asked Elizabeth if she would like to have a lawyer help her with the case, to which she said

yes. The juvenile court then appointed counsel to represent Elizabeth and entered a denial of the allegations for that day.

An adjudication hearing was held on December 4, 2008. At the hearing, Elizabeth was represented by counsel and an interpreter appeared via telephone. Elizabeth admitted that the children were in a dangerous situation in June 2008. The juvenile court adjudicated all six children to be within the meaning of § 43-247(3)(a) (Reissue 2008) insofar as Elizabeth was concerned. The court found that the children should remain in the custody of DHHS.

A disposition/permanency hearing was held on January 27, 2009. At the hearing, Elizabeth was represented by counsel. It does not appear that an interpreter was present. The State offered its case plan dated that same day, which Elizabeth's counsel asked that the court approve. The case plan showed that all children, except Nyagoa, were living with Elizabeth. Nyagoa had been removed from Elizabeth's home in November 2008 and placed into foster care due to Nyagoa's runaway behaviors in the home. The juvenile court did approve the case/visitation plan which stated that Elizabeth is to (1) provide age-appropriate supervision for her children and be aware of their whereabouts at all times; (2) pursue employment; and (3) follow through with case management requests so that she can provide clean and appropriate shelter, food, and clothing for her family. The court found that the children could continue to remain in Elizabeth's home.

A review/permanency hearing was held on July 21, 2009. At the hearing, Elizabeth was represented by counsel and an interpreter was present. The State offered its case plan dated that same day. As noted previously, Nyagoa was removed from Elizabeth's home in November 2008. The case plan dated July 21, 2009, stated that Luka was removed from Elizabeth's home in April because of a physical altercation between Luka and Elizabeth. The other four children, Changkauth, Ngunar, Utong, and Nyachay, were removed from Elizabeth's home and placed into foster care in June because Elizabeth had been involved in an assault with another woman in front of the children. The juvenile court approved the case/visitation plan dated July 21, 2009, and the children were to remain in the care and custody of DHHS. The juvenile court advised Elizabeth that if she fails to complete the case plan or if the case is open for 15 or more months, the State could move to terminate her parental rights.

A review/permanency hearing was held on January 26, 2010. Although Elizabeth did not appear, she was represented by counsel. The State offered its case plan dated January 13, 2010. The State informed the court that Elizabeth is late to visits, shortens or cancels visits, and has requested that visits be decreased. The State also informed the court that while the previous objective for all six children was reunification, the permanency objective is now guardianship for the older three children and adoption for the younger three children. The State noted that it would be filing for termination of Elizabeth's parental rights in April. The juvenile court approved the case plan dated January 13, 2010, and ordered all parties to comply with the case plan. The case plan stated that Elizabeth is to (1) find safe, affordable, and permanent housing for herself and her children; (2) learn and demonstrate age-appropriate parenting; (3) provide age-appropriate supervision for her children and be aware of their whereabouts at all times; and (4) pursue employment and follow through with case management requests so that she can provide clean and appropriate shelter, food, and clothing for her family. The children remained in the care and custody of DHHS.

On April 23, 2010, the State filed a motion for termination of Elizabeth's parental rights to all six children pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2012). The State alleged that Elizabeth had substantially and continuously or repeatedly neglected and refused to give the juvenile, or a sibling of the juvenile, necessary parental care and protection; reasonable efforts to preserve and reunify the family had failed to correct the conditions leading to the adjudication; and the juveniles had been in out-of-home placement for 15 or more of the most recent 22 months.

In a journal entry and order filed on May 11, 2011, the court stated that an agreement was entered into the record in open court at a hearing on April 18, wherein Elizabeth agreed to relinquish her parental rights to Ngunar, Utong, and Nyachay, making them available for adoption. The court stated that the juvenile case was to remain open with respect to Nyagoa and Changkauth. The juvenile court dismissed the case with respect to Luka, because he had turned 18 and was no longer subject to the care, custody, and control of DHHS or the jurisdiction of the juvenile court.

In a journal entry and order filed on July 12, 2011, the court stated that at a hearing on July 5, Elizabeth's counsel informed the court that Elizabeth was no longer willing to sign relinquishment paperwork as she had previously agreed to do. The termination hearing was scheduled to commence on October 17. We note that according to the court reporter, there were no recorded proceedings of the July 5 hearing.

The termination hearing was held on October 17 and 27, 2011, and on November 1. At the time of the termination hearing, the State was requesting to terminate Elizabeth's parental rights to only the three youngest children--Ngunar, Utong, and Nyachay. Testimony was given regarding the reasons why the children were removed from the home and Elizabeth's progress on the case plan. The testimony showed that all of Elizabeth's children were removed from her home on or before June 9, 2009, and have not been returned to her care since that time (except for Luka who has since aged out of the system and has resumed living with Elizabeth). Elizabeth has had visitations with the children throughout this case, but has never progressed beyond supervised visitations. The testimony revealed that Elizabeth has trouble managing all of her children at one time, does not have much interaction with the children during visits, does not discipline the children, and often fails to supervise the children during visits. Several witnesses testified that Elizabeth shows little initiative and relies on the workers to do things for her (e.g., supervise and discipline the children, help her find employment, and help her find housing).

In its order filed on January 30, 2012, the juvenile court terminated Elizabeth's parental rights to Ngunar, Utong, and Nyachay. Although the juvenile court did not specifically state the grounds for termination, the court's written narrative in its decision shows that the reasons for termination were § 43-292(2), (6), and (7)--and in their briefs, both parties agree that these were the reasons for termination. Furthermore, the juvenile court expressly found that termination of Elizabeth's parental rights was in the best interests of Ngunar, Utong, and Nyachay. Accordingly, the juvenile court terminated Elizabeth's parental rights to the three children pursuant to § 43-292(2), (6), and (7) and found that termination was in the children's best interests. Elizabeth has timely appealed the juvenile court's termination of her parental rights.

## ASSIGNMENTS OF ERROR

Elizabeth assigns that the juvenile court erred when it (1) failed to advise her of her rights and possible consequences at the adjudication hearing, (2) failed to advise her of her rights and possible consequences at the termination of parental rights hearing, (3) found clear and convincing evidence that her parental rights should be terminated under § 43-292(2), (4) found clear and convincing evidence that her parental rights should be terminated under § 43-292(6), (5) found clear and convincing evidence that her parental rights should be terminated under § 43-292(7), (6) found clear and convincing evidence that termination of her parental rights is in the best interests of the minor children, and (7) overruled her various objections and admitted certain exhibits into evidence over objection.

## 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). When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007).

## ANALYSIS

### *Failure to Give Advisement of Rights at Adjudication Phase.*

Elizabeth argues that her due process rights were violated by the juvenile court's failure to advise her of her rights and possible consequences at the adjudication hearing. At her first appearance on September 16, 2008, Elizabeth was not represented by counsel. The court, through an interpreter, stated to Elizabeth that a petition had been filed against her. The court then advised Elizabeth of her right to remain silent, to have a lawyer, to confront and cross-examine witnesses, to subpoena witnesses, and to appeal. She was also advised that if the State proved its case, then the juvenile court would have to decide what should happen to the children, and that the juvenile court could permit the children to remain in her home subject to supervision of DHHS; commit the children to the care of some suitable institution; commit the children to the care of a suitable family; or most likely, commit the care and custody of the children to DHHS. When asked if she understood her rights, Elizabeth said that she did not understand. When asked what she did not understand, she said she did not "understand the petition against me because it is not [indiscernible]." The court appointed a lawyer to represent Elizabeth and entered a denial to the allegations in the petition.

The adjudication hearing was held on December 4, 2008. Elizabeth was represented by counsel and an interpreter appeared via telephone. At this hearing, Elizabeth was not advised of any rights, nor was she advised of the possible consequences or dispositions of the proceedings. She admitted the petition's allegation that her children were in a situation dangerous to life or limb, or injurious to their health or morals.

Neb. Rev. Stat. § 43-279.01 (Reissue 2008) provides:

(1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 . . . the court shall inform the parties of the:

(a) Nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295. [Sections 43-288 to 43-295 address orders as to juveniles, including possible termination of parental rights.]

(b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer;

(c) Right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent or custodian guilty of any crime;

(d) Right to confront and cross-examine witnesses;

(e) Right to testify and to compel other witnesses to attend and testify;

(f) Right to a speedy adjudication hearing; and

(g) Right to appeal and have a transcript or record of the proceedings for such purpose.

(2) After giving the parties the information prescribed in subsection (1) of this section, the court may accept an in-court admission . . . .

In *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 583, 634 N.W.2d 290, 297 (2001), we said: “Section 43-279.01(2) means that a juvenile court should accept a parent’s in-court admission only after informing the parties as to the nature of the proceedings and the possible consequences or dispositions, including termination of parental rights.” And in *In re Interest of N.M. and J.M.*, 240 Neb. 690, 696, 484 N.W.2d 77, 81 (1992), the Nebraska Supreme Court said that “adequate notice of the possibility of the termination of parental rights must be given in adjudication hearings before the juvenile court may accept an in-court admission . . . from a parent as to all or any part of the allegations of the petition before the juvenile court.”

Elizabeth was not advised of any rights at the adjudication hearing. Nor was Elizabeth informed that a potential consequence of the court’s finding that her children were juveniles within the provisions of § 43-247(3)(a) was that her parental rights could be terminated. Therefore, if there had been an appeal of the original adjudication, the juvenile court’s failure to inform Elizabeth of the potential consequences of the juvenile proceeding before accepting her admission to the allegations would have been fatal to the adjudication, as the adjudication was based on Elizabeth’s admission. See *In re Interest of Brook P. et al.*, *supra*. However, Elizabeth did not appeal the juvenile court’s initial adjudication. Generally, it has been held that adjudication and disposition orders are final, appealable orders. See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). And appeal of a final order must be made within 30 days after the entry of such order. Neb. Rev. Stat. § 25-1912 (Reissue 2008); Neb. Rev. Stat. § 43-2,106.01 (Cum. Supp. 2012). Further, in the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction. *In re Interest of Brook P. et al.*, *supra*. Accordingly, this assignment of error is without merit.

#### *Failure to Give Advisement of Rights at Termination Phase.*

Elizabeth argues that her due process rights were violated by the juvenile court’s failure to advise her of her rights and the consequences of termination of parental rights at the termination phase of the proceedings.

In *In re Interest of Brook P. et al.*, *supra*, the parents were not advised at the adjudication hearing of the potential consequences of the juvenile proceeding before the court accepted their admission to the allegations. However, the parents did not file a direct appeal from the adjudication order. Therefore, on appeal, this court determined that the parents were unable to question the existence of facts upon which the juvenile court asserted jurisdiction. However, we then proceeded to determine whether the juvenile court had jurisdiction to terminate parental rights without a prior advisement at the adjudication phase of the proceedings. We said: “Due to the defect in the adjudication proceedings, we treat the first proceeding as the functional equivalent of ‘no prior adjudication’ . . . .” In *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 586, 634 N.W.2d 290, 298 (2001). However, it is not necessary to adjudicate a child prior to the termination of parental rights under § 43-292(1) through (5), as long as due process safeguards are met. See *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999). We note:

Unlike § 43-292(6) and (7), § 43-292(1) through (5) do not require, imply, or contemplate juvenile court involvement, including adjudication, prior to the filing of the petition for termination of parental rights. Instead, subsections (1) through (5) each concern historical actions or conditions of the parents such as abandonment, neglect, unfitnesses, and mental deficiency. There is no requirement of longitudinal involvement of the juvenile court under § 43-292(1) through (5), much less a prior adjudication. Under § 43-291, an original petition may be filed seeking termination of parental rights and the juvenile court acquires jurisdiction of the termination proceeding brought on by an original action under § 43-247(6) without prior juvenile court involvement, except where required by the Nebraska Juvenile Code.

*In re Interest of Joshua M. et al.*, 256 Neb. at 609-10, 591 N.W.2d at 566.

As we found previously, Elizabeth was not advised at the adjudication hearing of the potential consequences of the juvenile proceeding before the court accepted her admission to the allegations. Thus, “[d]ue to the defect in the adjudication proceedings, we treat the first proceeding as the functional equivalent of ‘no prior adjudication’ . . . .” *In re Interest of Brook P. et al.*, 10 Neb. App. at 586, 634 N.W.2d at 298. Accordingly, we treat this as an original action to terminate Elizabeth’s parental rights under § 43-292(2), remembering that an original action cannot be filed under § 43-292(6) or (7). See *In re Interest of Joshua M. et al.*, *supra*.

Section 43-247(6) states that the juvenile court shall have jurisdiction of the proceedings for termination of parental rights as provided in the Nebraska Juvenile Code. And § 43-279.01(1) states that when “termination of parental rights is sought pursuant to subdivision (6) . . . of section 43-247,” the juvenile court “shall” inform the parties of the nature of the proceedings and the possible consequences or dispositions, including termination of parental rights, as well as their rights (e.g., right to counsel, right to remain silent, right to confront and cross-examine witnesses, right to testify and to compel other witnesses to attend and testify, and right to appeal). We have reviewed the record to ensure that Elizabeth was accorded her statutory due process rights after the State filed its motion to terminate--particularly with respect to the matter of the advisement of her rights and the possible consequences of the motion to terminate. We find nothing in the record--either the bill of exceptions or the transcript--to indicate that Elizabeth was advised of her rights and the possible consequences of the motion to terminate

after the State filed such motion. The State has suggested that such advisement may have occurred at a review hearing held April 18, 2011, but that hearing was not part of our record. In order to ensure that our review and decision was complete and accurate, we issued an order to show cause requiring the production and filing of a supplemental bill of exceptions for that hearing. Having now reviewed that hearing transcript, we determine the required advisement was not then made. Because Elizabeth was not given the required advisements under § 43-247.01(1), she was not accorded her statutory due process rights, and therefore, the termination of Elizabeth's parental rights under § 43-292(2) was improper.

Our finding that Elizabeth was not accorded her statutory due process rights at the termination phase of these proceedings is dispositive of this case. Therefore, we do not reach the merits of Elizabeth's remaining assignments of error. See *In re Estate of Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

#### CONCLUSION

For the reasons stated above, we find that Elizabeth was not accorded her statutory due process rights, and therefore, the termination of Elizabeth's parental rights under § 43-292(2) was improper. Accordingly, we reverse the juvenile court's order terminating Elizabeth's parental rights to Ngunar, Utong, and Nyachay and remand the cause to the trial court for further proceedings.

REVERSED AND REMANDED FOR  
FURTHER PROCEEDINGS.