

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF SIRE E. ET AL.

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

STATE OF NEBRASKA, APPELLANT,

V.

CALLIE H., APPELLEE.

Filed February 24, 2009. No. A-08-906.

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, Judge.
Affirmed in part, and in part reversed and remanded for further proceedings.

Donald W. Kleine, Douglas County Attorney, and Martin J. Conboy IV for appellant.

Thomas C. Riley, Douglas County Public Defender, and Ann C. Marcuzzo for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

The State of Nebraska appeals the decision of the Douglas County Separate Juvenile Court unsatisfactorily dismissing Callie H. from family recovery drug court and terminating its jurisdiction over Callie and her minor children. For the reasons set forth herein, we affirm in part, and in part reverse and remand for further proceedings.

STATEMENT OF FACTS

Callie is the natural mother of Sire E., born April 10, 1992; Akeeme H., born March 10, 1993; Cahllil P., born November 6, 2002; and Hezekiah H., born April 13, 2006. On April 25, 2006, the State filed a petition alleging that the minor children were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) for the reasons that Hezekiah tested positive for cocaine at birth; Callie's use of alcohol and/or controlled substances placed the minor children at

risk for harm; Callie has failed to provide the children safe, stable, and appropriate housing; and due to those allegations, the minor children were at risk for harm. That same day, the State filed a motion for temporary custody which was granted by the juvenile court. On June 14, the juvenile court adjudicated the children after Callie admitted to the allegations, except for the allegation regarding housing, which was dismissed by the State. During the adjudication hearing, the juvenile court ordered Callie to undergo a chemical dependency evaluation and supervised visitation was ordered.

On June 30, 2006, the juvenile court authorized extended and overnight visitation between Callie and Hezekiah at Callie's inpatient treatment facility. The juvenile court further determined that, following at least 3 weeks of unsupervised weekend visitation between Callie and Hezekiah, Hezekiah's placement would transition to include the location of Callie's current inpatient treatment facility. However, at a September disposition and permanency planning hearing, the juvenile court noted that it was in the children's best interests to remain in the temporary care and custody of DHHS for continued appropriate care and placement to exclude the home of the mother.

In May 2007, Callie began participation in the family recovery drug court. On November 21, the juvenile court entered an order determining that the placement of the children shall include the parental home. On July 8, 2008, a family recovery drug court review hearing was held, at which hearing the guardian ad litem stated that it was her recommendation, based upon Callie's positive drug screens, that Callie be discharged from drug court and that the children be removed from the parental home due to risk of harm. The county attorney agreed with the guardian ad litem's recommendations and stated that he had additional concerns regarding Callie's prior involuntary manslaughter conviction involving the death of one of her children in an apartment fire and Callie's ongoing drug use during the time that the children have been in the parental home which leaves the minor children at risk for harm. The juvenile court indicated that if removal of the minor children was going to happen, it was incumbent upon counsel to file the necessary pleadings, and that if there was any evidence of exigent circumstances, a motion should be filed. Placement of the minor children was continued in the parental home, and the next court date was set for July 15 with evidentiary hearings to be held regarding Callie's positive drug screens.

On July 15, 2008, the matter came on again for a family recovery drug court review hearing. The State made an oral motion for placement review regarding the minor children. The court stated:

Well, it's been a week since obviously last Tuesday, and everything you know now, I guess you - certainly, I'm assuming it's based on these positive drug screens. Everything you know now, you knew then. And, matter of fact, some of this stuff we've known for months in terms of her performance.

So, you know, I'm not inclined to schedule anymore hearings on this, and I don't see the point in having to go back to a regular docket.

If she can't be successful in recovery court where it's all this hands-on accountability, how is she going to be successful where she only has to come to court once every three months, four months, six months? To me, it just defies logic.

DHHS was not prepared to submit an affidavit at the time of the hearing showing the reasons and/or exigent circumstances that existed requiring the removal of the minor children from the parental home. The court announced its ruling which is journalized in a court order dated July 18, 2008. The juvenile court found that the court acquired jurisdiction in this case on April 25, 2006; that Callie admitted that Hezekiah tested positive for cocaine at birth and that her use of alcohol and/or controlled substances placed her minor children at risk for harm; that Callie had been in family recovery drug court since approximately May 2007, during which time she has had positive drug screens for cocaine and has receive several sanctions for noncompliance; that there has been a substantial failure on Callie's part to make progress and she is not motivated to truly make progress and that she has failed to internalize the things that have been made available to her by way of her recovery; and that any progress Callie has made has been woefully inadequate, when the court factors in the services that have been afforded her, as well as the length of time that she has been in family recovery drug court. The juvenile court dismissed and terminated Callie unsatisfactorily from family recovery drug court, terminated the juvenile court's jurisdiction, relieved DHHS of responsibility in this matter, and canceled the evidentiary hearing that was to be held. The State has timely appealed.

ASSIGNMENTS OF ERROR

The State contends that the juvenile court erred in refusing to allow the deputy county attorney to make an oral motion for placement review and in terminating jurisdiction over the family.

STANDARD OF REVIEW

Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002); *In re Interest of Lawrence H.*, 16 Neb. App. 246, 743 N.W.2d 91 (2007). A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002); *In re Interest of Lawrence H.*, *supra*.

ANALYSIS

The State contends that the juvenile court erred in refusing to allow the deputy county attorney to make an oral motion for placement review and in terminating jurisdiction over the family.

At the July 15, 2007, family recovery drug court review hearing, the deputy county attorney made an oral motion for placement review to remove the minor children from Callie's home. The juvenile court refused to consider this oral motion. The record before this court reflects that the minor children were initially removed from Callie's care because her drug and/or alcohol use placed them at risk for harm. Even though the minor children were returned to Callie's home in November 2007, Callie's struggle with drugs has continued as evidenced by her repeated positive drug screens for cocaine since the children's return to her care. Due to the

potential risk of harm to the minor children, the juvenile court erred in failing to entertain the motion for change of placement and setting a hearing thereon at a later date in order to allow the county attorney to file the report and notice of placement change with the court and provide adequate notice to Callie as required by Neb. Rev. Stat. § 43-285(3) (Reissue 2008).

Although we are cognizant that in *In re Interest of Kevin K.*, 274 Neb. 678, 685, 742 N.W.2d 767, 773 (2007), the Nebraska Supreme Court stated that “[t]here is no statutory requirement that in all cases, termination of jurisdiction must be shown to be in the best interests of the juvenile,” in that case, the sole basis for the juvenile court’s acquisition of jurisdiction over the child no longer existed at the time that the court terminated jurisdiction. In contrast, in this case, it is without question that the conditions still exist that brought the minor children within the juvenile court’s jurisdiction and it was admitted that those conditions placed the minor children at risk for harm. Based upon our de novo review of the record, as we are required to do, we find that, in this case, it is in the best interests of the minor children that the juvenile court retains its jurisdiction over them.

CONCLUSION

The portion of the juvenile court’s order unsatisfactorily dismissing Callie from family recovery drug court is affirmed. However, because the record established that Callie’s drug use had brought the minor children within the juvenile court’s jurisdiction, the conditions placed the minor children at harm, and the condition continued as of the date of July 15, 2007, hearing, the juvenile court erred in failing to entertain the State’s motion to change the minor children’s placement by setting a hearing date and time thereon and in terminating its jurisdiction over the family. Therefore, the portion of the juvenile court’s decision terminating jurisdiction over Callie and her minor children and relieving DHHS of responsibility in this matter is reversed and this cause is remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND
REMANDED FOR FURTHER PROCEEDINGS.