IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF ADDISON F. ET AL.

IN RE INTEREST OF ADDISON F. ET AL.,
CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,
V.
BRANDY C., APPELLANT.

Filed March 13, 2012. No. A-11-782.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Appeal dismissed.

Matthew C. Boyle, of Lauritsen, Brownell, Brostrom & Stehlik, for appellant.

Robert J. Cashoili, Deputy Hall County Attorney, for appellee.

Susan M. Koenig, of Mayer, Burns, Koenig & Janulewicz, guardian ad litem.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was submitted without oral argument on the court's own motion. Brandy C., biological mother of Addison F.; Carmella F.; Dallas F., Jr.; and Adreanna F., children under 18 years of age, appeals an order of the county court for Hall County, sitting as a juvenile court, sustaining a motion of the guardian ad litem to stop visitation pending hearing on an amended motion to terminate parental rights. Because we find that the order to stop visitation in this case was not a final, appealable order, we dismiss the appeal.

II. BACKGROUND

The four children involved in this case are all less than 6 years of age. The family came to the attention of the Department of Health and Human Services (DHHS) in June 2010 when hotline calls were received reporting that Brandy was not providing for the children, including a lack of diapers, formula, and appropriate parenting. The family was placed in a shelter in Hastings, Nebraska, but was asked to leave after 1 week because Brandy did not follow the shelter's rules. DHHS was able to get the family placed in a shelter in Grand Island, Nebraska, but Brandy was again asked to leave after approximately 1 week because she did not follow the shelter's rules. Brandy placed the children into a respite facility.

On June 29, 2010, a petition was filed seeking juvenile court jurisdiction over the children. The children were placed in foster care in July. Brandy initially had visitation with the children three to four times per week, but struggled to parent the children during the visits. The visitation worker reported that Brandy paid attention to only one child during the visits and ignored the other three. Brandy's last visit with the children before the instant proceedings was in January 2011.

Case plans entered in November 2010 and May 2011 included strategies and goals to assist Brandy in removing barriers to achieving reunification. The case plans indicated that barriers to reunification included Brandy's lack of parental willingness and ability to parent, "low functioning" of Brandy, lack of visitation, housing issues, and employment issues.

Brandy did not appear for scheduled visitation during the last week of January 2011. In February, DHHS lost contact with Brandy and DHHS' case report characterized her as having "disappeared" and having been "missing." Brandy did not have contact with DHHS until July, after the instant proceedings were commenced, when Brandy called the caseworker. The caseworker testified that when Brandy made contact in July, she indicated that she had been living in a homeless shelter in Lincoln, Nebraska.

In May 2011, the State filed a motion to terminate Brandy's parental rights. The State alleged that Brandy had substantially and continuously or repeatedly neglected the children and refused to give them necessary parental care and protection; that Brandy was unfit to parent by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior; that reasonable efforts to preserve and reunify the family had failed to correct the conditions leading to out-of-home placement; and that Brandy had subjected the children to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. The State filed an amended motion to terminate parental rights in June.

On or about July 27, 2011, Brandy contacted the caseworker and requested visitation with the children. This was the first contact DHHS had with Brandy since February and was the first request from Brandy for visitation.

On July 29, 2011, the guardian ad litem filed a motion seeking to stop visitation pending hearing on the State's motion to terminate parental rights. The guardian ad litem alleged that visitation was not in the best interests of the children, alleged that Brandy had not had contact with the children since February, and noted that a hearing on the motion to terminate parental rights was scheduled for September 26.

A hearing was held on the motion to stop visitation on August 12, 2011. At the hearing, the caseworker testified and the court received affidavits from the caseworker and the guardian ad litem concerning the history of the case, Brandy's lack of contact with both the children and DHHS, and whether visitation would be in the best interests of the children. The caseworker testified that one visit was conducted the week prior to the hearing and testified that Brandy spent a lot of the visit with one child, that two of the children did not want anything to do with Brandy and "just played on their own," and that the other child "had no idea who [Brandy] was and clung very much to the foster dad."

In her affidavit, the caseworker averred that it was not in the best interests of the children to commence visitation, that there was no indication that Brandy had made any progress relative to any of the goals in the case plan, and that two of the children had been involved in counseling to address issues of abandonment and anger resulting from the prior lack of contact with Brandy. In her affidavit, the guardian ad litem averred that Brandy had had no contact with the children for approximately 6 months, that a hearing was scheduled on the motion to terminate parental rights, and that visitation in the interim would be disruptive and damaging to the children.

On August 23, 2011, the court entered an order sustaining the motion to stop visitation. This appeal followed.

III. ANALYSIS

Brandy has appealed the lower court's order stopping visitation pending hearing on the State's motion to terminate parental rights. On appeal, she alleges a number of errors, including challenges to the guardian ad litem's acting in a dual role of advocate and witness; the lower court's receipt of evidence containing hearsay; the sufficiency of the evidence to support stopping visitation; and the lower court's alleged de facto termination of parental rights by stopping visitation. The State and the guardian ad litem both assert that this court lacks jurisdiction to hear these issues, however, because the order stopping visitation was not a final, appealable order.

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 Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006). 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. *Id.* The State correctly notes that we are without jurisdiction to entertain appeals from nonfinal orders. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

Among the three types of final orders which may be reviewed on appeal is an order made during a special proceeding and affecting a substantial right. Neb. Rev. Stat. § 25-1902 (Reissue 2008). See *In re Guardianship of Sophia M., supra*. A proceeding before a juvenile court is a special proceeding for appellate purposes. *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

The Nebraska Supreme Court has addressed whether orders denying visitation affect a substantial right on at least two prior occasions. See, *In re Guardianship of Sophia M., supra* (holding order denying visitation was not final); *In re Interest of Clifford M. et al., supra* (holding denial of motion for visitation was not final). But see *In re Interest of Zachary W. & Alyssa W.*, 3 Neb. App. 274, 526 N.W.2d 233 (1994) (holding order granting visitation to

grandparents was final). The Supreme Court has also addressed whether other orders entered during the course of a juvenile proceeding affect a substantial right and are final, appealable orders. See, *In re Interest of R.G., supra* (holding ex parte detention order was not final but that later detention order was final); *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989) (holding order requiring participation in psychological therapy was final); *In re Interest of C.D.A.*, 231 Neb. 267, 435 N.W.2d 681 (1989) (holding that order refusing withdrawal of no contest answer at adjudication was not final); *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985) (holding adjudication order was final); *In re Interest of J.M.S.*, 218 Neb. 72, 352 N.W.2d 186 (1984) (holding predisposition order placing juvenile in correction facility for observation was not final).

The Nebraska Supreme Court has made it clear that the question of whether a substantial right of a parent is affected by an order entered in a juvenile proceeding is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed by the order. *In re Interest of R.G., supra*.

In *In re Interest of Clifford M. et al., supra*, the juvenile court initially terminated parental rights, which also resulted in termination of the biological mother's visitation with her children. The termination order was reversed on appeal, and the matter was remanded to the juvenile court. The State then filed a second motion to terminate parental rights. In addition to filing a responsive pleading moving to dismiss the termination petition, the biological mother moved to have visitation restored. The juvenile court denied both the motion to dismiss and the motion for visitation, and the biological mother appealed.

On appeal, the biological mother argued, as Brandy does in the present case, that denial of visitation was tantamount to termination of her parental rights. The Supreme Court disagreed and concluded that on the facts of the case, the denial of her motion for visitation did not affect a substantial right and, therefore, was not appealable. *In re Interest of Clifford M. et al., supra*. In so concluding, the Supreme Court noted that the terms of the case plans in the case included a number of concerns and goals and that achieving reunification was not dependent solely on whether the mother engaged in visitation with her children, but, rather, on her overall progress in meeting the reasonable goals of the case plans. *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000). The Supreme Court also noted that the order denying visitation did not purport to terminate visitation permanently and that the mother remained free to gain visitation rights upon a showing that visitation would be in the best interests of the children. *Id.* The Supreme Court also noted that the pending termination proceedings were not based upon lack of visitation or abandonment, but, rather, based on the length of time the children had been in out-of-home placement, the mother's sexual abuse of the children, and her failure to protect the children from sexual and other abuse by her boyfriend. *Id.* The Supreme Court concluded that the mother's habits, not the suspension of visitation, perpetuated the out-of-home placement of the children and thus the denial of visitation in the context of that case did not affect a substantial right. *Id.*

In *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006), the maternal grandparents of a minor child sought to be appointed guardians of the minor child. A final hearing on the guardianship application was scheduled. The biological mother moved for

visitation. Within the month before the final hearing was scheduled to be held, the trial court denied the biological mother's motion for visitation, and the biological mother appealed.

On appeal, the Nebraska Supreme Court noted that the order denying visitation did so pending a final hearing, scheduled to occur approximately 3 weeks later. The Supreme Court also noted that the lower court had explained that prior visitation had been unsuccessful and that with only 3 weeks until the final hearing and resolution of the guardianship issue, very little would be gained by attempting to implement another visitation arrangement. The Supreme Court held that because the order "effectively denied visitation only until the final guardianship hearing, the length of time that [the biological mother's] relationship with [the minor child] was to be disturbed was brief, and the order was not a permanent disposition." *Id.* at 139, 710 N.W.2d at 317. The Supreme Court concluded that the visitation order did not affect a substantial right and was not a final, appealable order. *In re Guardianship of Sophia M., supra*.

We conclude that the facts of the present case support the conclusion that the order stopping visitation did not affect a substantial right of Brandy and was, therefore, not a final, appealable order. Like the situation presented in *In re Interest of Clifford M. et al., supra*, Brandy's potential reunification with her children and the pending motion to terminate her parental rights are based on a variety of factors and habits of Brandy that extend beyond mere contact with her children. Although her lack of contact is certainly a significant factor, the case plans in this case include important goals concerning her willingness and ability to parent, housing issues, and employment issues, which are not dependent on visitation. Like the order in *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000), the order sustaining the motion to stop visitation in this case did not purport to terminate visitation permanently. Rather, the order merely sustained a motion that was based, in large part, on the pendency of a hearing scheduled to be held approximately 1 month after the order was entered. As in *In re Interest of Clifford M. et al., supra*, there is no indication in this record that Brandy could not, if successful in defending the motion to terminate her parental rights, be granted visitation upon a showing that it is in the best interests of the children.

The record in the present case also indicates that, like the situation in *In re Guardianship of Sophia M., supra*, prior attempts at visitation--even an attempt within the week before the hearing on the guardian ad litem's motion to stop visitation--had been largely unsuccessful. Before Brandy disappeared and stopped making contact with DHHS for almost 6 months, the visitation worker reported problems with the visits that included Brandy's largely ignoring three of the children and spending time with only one. Brandy then disappeared and failed to appear for at least one scheduled visit, not providing any information to DHHS about where she was going. During the one visit scheduled prior to the hearing in the instant proceeding, the record indicates that Brandy again focused her attention on only one child, that two of the children were disinterested in having contact with Brandy, and that the fourth child did not know who Brandy was. There is no indication that anything meaningful would be gained by attempting to implement visitation during the short period of time before the scheduled hearing on the motion to terminate parental rights.

The subject matter of the order in this case largely preserved what had been the status quo for nearly 6 months in the lives of these very young children, and did so when a more permanent hearing on the future of the children and their relationship with Brandy was scheduled to occur in

approximately 1 month. The duration of time that Brandy's relationship with the children would have been affected by this order was short, especially in comparison to the duration of time during which the relationship was affected by Brandy's choice to have no contact with the children. There is nothing in the record to suggest that, if successful in defending the termination of her parental rights, Brandy would be unable to secure visitation rights upon a showing that it would be in the best interests of the children. On these facts, we conclude that the order stopping visitation did not affect a substantial right of Brandy and, therefore, was not a final, appealable order.

IV. CONCLUSION

We find that the order stopping visitation did not affect a substantial right of Brandy and was, therefore, not a final, appealable order. The appeal is dismissed.

APPEAL DISMISSED.