

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF DAKOTA L. 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 DAKOTA L. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

CHRISTINE T., APPELLANT.

Filed March 24, 2009. No. A-08-1090.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY,  
Judge. Reversed and remanded with directions.

Sandra Stern for appellant.

Donald W. Kleine, Douglas County Attorney, and Renee L. Mathias for appellee.

CARLSON and MOORE, Judges.

MOORE, Judge.

**INTRODUCTION**

The separate juvenile court of Douglas County terminated Christine T.'s parental rights to her five minor children. Christine now appeals and argues that the juvenile court violated her due process rights when it conducted the termination hearing while neither she nor her attorney was present. For the following reasons, we agree, and we now reverse, and remand with directions.

**BACKGROUND**

Christine is the mother of the five minor children involved in the present case: Chastidy T., born in 1994; Dakota L., born in 1995; Darius L., born in 1996; Corice L., born in 1999; and Mary L., born in 2002. William L. is the children's biological father. The children have been within the jurisdiction of the juvenile court since December 2004. Much of the juvenile court's

proceedings since that time are irrelevant to this appeal, and therefore, we highlight only the proceedings which are relevant.

On April 26, 2007, Christine's attorney moved to withdraw. The same day, the juvenile court granted the motion and appointed David Tarvin to represent Christine.

On January 25, 2008, the State filed a motion to terminate both Christine's and William's parental rights. With regard to Christine, the motion alleged that termination was in the children's best interests and that statutory conditions had been met pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 2008). The motion contained a notice that the termination hearing would be held on April 21, 2008. Tarvin was personally served with the motion and notice on January 25. The juvenile court judge noted at the termination hearing that

in my review, the court record would show--clearly show that the mother was personally served with notice of this hearing, [and] apparently resides in California. Personal service was effectuated there on March 19, 2008, according to the return of service which is file stamped April 18, 2008 in the court file.

Our record does not contain this filing.

On March 31, 2008, an application for temporary suspension of Tarvin's license to practice law was filed with the clerk of the Nebraska Supreme Court. On April 9, the court ordered Tarvin to show cause why his license to practice law should not be temporarily suspended.

The termination hearing was held on April 21, 2008, and neither Christine nor Tarvin appeared. The juvenile court noted that Christine and Tarvin were absent, clarified that the proceeding still applied to both parents, and then proceeded with the hearing. Three witnesses testified for the State, and William testified in his own behalf. On April 22, the court entered an order that terminated Christine's parental rights to the minor children.

On May 7, 2008, the Nebraska Supreme Court indefinitely suspended Tarvin's license to practice law because he failed to respond to the order to show cause. The record does not reflect that Tarvin gave notice to either the juvenile court or Christine that his license to practice law in Nebraska had been suspended.

On May 27, 2008, the juvenile court, after being advised that Tarvin had been suspended, entered an order which appointed present counsel to represent Christine in this matter. On August 8, Christine filed a motion to set aside the April 22 termination order due to irregularities in the termination proceeding. The motion stated that Christine sought relief because her attorney did not appear at the termination hearing to represent her and was subsequently suspended from the practice of law. As such, Christine alleged that she was prejudiced because she was unrepresented at the hearing. The juvenile court heard the motion on September 18. Following the attorneys' arguments, the juvenile court stated, "I am swayed by the fact that [Christine] was personally served with notice and chose not to appear and has really not been active in this matter at all. So the motion is overruled." On September 19, the juvenile court entered an order that denied Christine's motion to set aside the termination order. Christine now appeals that September 19 order.

## ASSIGNMENT OF ERROR

Christine asserts, restated, that the juvenile court erred when it denied her motion to set aside its April 22, 2008, order which terminated her parental rights.

## 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 Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.* In reviewing conclusions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Walter W.*, 14 Neb. App. 891, 719 N.W.2d 304 (2006).

## ANALYSIS

We note at the outset that a juvenile court has the same authority as a district court to vacate, modify, or set aside its own judgments or orders both during and after the end of the term. Neb. Rev. Stat. § 43-2,106.02 (Reissue 2008); Neb. Rev. Stat. § 25-2001 (Reissue 2008).

Christine asserts that the juvenile court erred when it denied her motion to set aside its April 22, 2008, order which terminated her parental rights. She specifically argues that (1) the juvenile court violated her due process rights when it held the termination hearing although both she and her attorney were absent; (2) her due process rights were violated because she was not represented by an attorney during the 30-day time period for appeal of the juvenile court's April 22, 2008, termination order; and (3) to remedy this due process violation, this court should reverse the juvenile court's September 19, 2008, order and order a new termination hearing.

We first address Christine's argument that the juvenile court violated her due process rights when it held the termination hearing, although both she and her counsel failed to appear. At the September 18, 2008, hearing on the motion, the juvenile court denied the motion and stated, "I am swayed by the fact that [Christine] was personally served with notice and chose not to appear and has really not been active in this matter at all."

The parent-child relationship is afforded due process protection, and consequently, procedural due process is applicable to a proceeding for termination of parental rights. *In re Interest of Joseph L.*, 8 Neb. App. 539, 598 N.W.2d 464 (1999). The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Id.* When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker. *Id.*; *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). In Nebraska, parents have a statutory right to be represented by counsel during proceedings to terminate parental rights. See, Neb. Rev. Stat. § 43-279.01(b) (Reissue 2008); Neb. Rev. Stat. § 43-272 (Reissue 2008). While not absolute, parents have a constitutional due process right to counsel

during termination proceedings in some instances as well. *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *In re Interest of Joseph L.*, *supra*. Determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law. *In re Interest of Joseph L.*, *supra*. As such, in considering whether Christine’s due process rights were violated when the court proceeded with the termination hearing in the absence of both her and her attorney, we must reach a conclusion independent of the juvenile court’s ruling. See *In re Interest of Walter W.*, *supra*.

In *In re Interest of L.V.*, the Nebraska Supreme Court determined that a parent’s physical presence at a hearing to terminate parental rights is unnecessary, “provided that the parent has been afforded procedural due process for the hearing to terminate parental rights.” 240 Neb. at 416, 482 N.W.2d at 258. In *In re Interest of L.V.*, the parent received notice of the termination hearing and was represented by counsel throughout the proceeding. The court also found that the procedure utilized throughout the termination proceeding by the county court surpassed the requirements of procedural due process applicable to the case. The court in *In re Interest of L.V.* held that the parent had received procedural due process.

We decided essentially the same question that Christine presents in the present case in *In re Interest of Joseph L.*, *supra*. In *In re Interest of Joseph L.*, the court held a multiple-day termination proceeding. On the first day of the proceeding, the mother was unable to attend but had called her attorney’s office to ensure she would be represented at the hearing. Although her attorney was apparently unable to attend, another attorney from the same office appeared and informed the court that the mother would not attend the hearing. The court then excused the attorney and proceeded to take evidence and otherwise conduct the hearing. No witnesses were called on the mother’s behalf, no cross-examination was conducted on her behalf, and no evidence was offered on her behalf during that proceeding. After the first day of the termination proceeding, the court noted the irregularity in the proceeding and attempted to remedy it by ordering that it be transcribed and sent to the mother’s counsel. The termination proceeding continued for two additional days during which both the mother and her counsel were present and the mother also testified. The mother subsequently moved the juvenile court for a new trial due to her and her attorney’s absence from the first day of the proceeding. The juvenile court denied that motion, and the court noted that both the mother and her attorney received notice of the hearing and that although the mother was not present and was not represented on the first day of the hearing, “[t]he evidence that was presented in her absence and the absence of [her attorney] she confirmed during her testimony. . . .” *Id.* at 548, 598 N.W.2d at 471. On appeal, we held, however, that

These ad hoc efforts by the court to rectify what it obviously recognized as seriously flawed proceedings are simply insufficient to cure those flaws. For a hearing of this gravity to proceed without the presence of either the party or his or her counsel rises to one of those “fundamental flaws, which never have been thought harmless” . . . .

*Id.* (quoting *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (holding that subsequent conviction cannot cure flawed grand jury process)). We concluded that “the absence of both [the mother] and her counsel from that proceeding, regardless of whether she

had been put on adequate notice, compels a finding that her due process rights were violated.” *Id.* at 547, 598 N.W.2d at 470.

In the instant case, the termination hearing lasted only 1 day and neither Christine nor her attorney was present for any of the proceeding. During the hearing, evidence was presented, including testimony from the State’s three witnesses and William, who testified in his own behalf. However, no witnesses were called, no cross-examination was conducted, and no evidence was offered on Christine’s behalf. In our de novo review, we conclude that Christine’s procedural due process rights were not protected where her attorney failed to appear at the termination hearing. Further, the fact that Tarvin was suspended from the practice of law during the 30-day appeal period following the termination hearing, without having filed a notice of appeal or notifying the juvenile court or Christine of his suspension, resulted in Christine’s being unrepresented. This amounted to a further deprivation of Christine’s due process rights. As such, we conclude that the juvenile court erred when it denied Christine’s motion to set aside its April 22, 2008, order terminating her parental rights to the five children. We reverse the juvenile court’s September 19 order and remand the cause with directions to grant Christine’s motion to set aside the termination order relative to her parental rights and for further proceedings.

#### CONCLUSION

In our de novo review, we conclude that the juvenile court erred when it denied Christine’s motion to set aside its April 22, 2008, order terminating her parental rights. Accordingly, we reverse the juvenile court’s September 19 order and remand the cause with directions to grant Christine’s motion to set aside and for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

SIEVERS, Judge, participating on briefs.