



Practical Implications of *In re Interest of Angelica L. & Daniel L.*

Case Summary

In *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984 (2009), the Nebraska Supreme Court overturned the termination of parental rights to a Guatemalan mother, holding that the state had not proven that the mother was unfit based on the evidence of two incidents of alleged medical neglect. The two children had been removed from the mother's care in April 2005 following allegations that the mother failed to take her younger daughter to a follow up medical appointment for a respiratory infection. The mother, who was undocumented, misidentified herself to the police officer and social worker investigating the report and the mother was later arrested for providing the false name and was subsequently deported to Guatemala. The court held an adjudication hearing in the mother's absence and later adopted a standardized case plan at a dispositional hearing. The state never provided the mother with a written copy of the case plan in her native language (or any language), but rather explained the contents to her over the phone nearly five months after its adoption. The caseworker also told the mother that she would have to take initiative for arranging for services in Guatemala herself and failed to adequately monitor the mother's progress in compliance with the case plan. Contact between the mother and children occurred by telephone during this period.

The state filed a motion to terminate parental rights (TPR) based on the passage of 15 months since the children had been in foster care and based on the mother's failure to strictly comply with the case plan. At the termination proceeding, the state put on evidence from a clinical psychologist, the foster mother, the investigating officer, and various caseworkers. The mother was also in attendance, having obtained a humanitarian visa to participate in the hearing. The mother testified through an interpreter and also offered the testimony of a missionary on her behalf. The juvenile court terminated the mother's parental rights under Neb. Rev. Stat. § 43-292 (7) and (6). With regard to compliance with the case plan, the juvenile court concluded that despite obstacles, the Nebraska Department of Health and Human Services (HHS or the Department) went to great lengths to communicate the requirements of the plan and noted that there is no requirement that HHS lead a parent by the hand to services. The juvenile court also expressed concern about the children returning to Guatemala and the mother's undocumented status.

On appeal, the Nebraska Supreme Court held: 1) state courts have jurisdiction over child custody disputes when a parent faces involuntary deportation, 2) that notification to a foreign consulate is not a jurisdictional prerequisite in termination cases involving foreign nationals, and 3) that the state had not proven that it was in the best interests of the children to terminate parental rights because the mother was not unfit.

This case has important practical implications for juvenile cases concerning children and families involved in the immigration system and those facing language and cultural barriers. This case also provides important direction on the best interest standard as it relates to parental unfitness. These practical implications and the court's reasoning are set forth below.

Unfitness and Best Interests

This case provides another articulation of the unfitness standard in Nebraska and its role in the best interests determination in the context of termination proceedings. The Supreme Court reiterated that there is a presumption that reunification is in the best interests of children and that, in order to rebut this presumption, the state must prove that the parent is unfit. Stated another way, “the ‘best interests’ standard is subject to the overriding presumption that the relationship between parent and child is constitutionally protected” and the state cannot force the breakup of the family unless the state affirmatively shows that the parent is unfit. *Id.* at 1007.

Medical Neglect and 15/22

In this case, the Supreme Court determined that the state had not proven that the mother was unfit based on evidence of two allegations of medical neglect: primarily based on the allegation that the mother failed to take her younger daughter to a follow up medical appointment for a respiratory infection, and secondary evidence that the mother had not obtained medical care for the same child several years prior following the child’s premature birth. The Supreme Court noted that none of the state’s witnesses were ever asked about the mother’s unfitness and nothing in the record indicated that the mother was unfit. Instead, the state and the GAL relied on the argument that the two isolated incidents of a failure to provide medical care to the younger child was sufficient to TPR. The Supreme Court rejected this argument, citing the fact that the mother had routinely sought medical care for both children on other occasions, had demonstrated a willingness to learn how to avoid similar incidents in the future, and testified that she had access to medical care in Guatemala. In addition, the state did not rebut the evidence in two home studies which indicated that the mother was able to provide for the children’s basic needs in Guatemala and that she is a fit parent. Instead, the state presented evidence that it was in the children’s best interests to remain with the foster parents because living in Guatemala would put them at a disadvantage compared to the U.S. The Supreme Court stated that this was insufficient to overcome the presumption that reunification was in the children’s best interests and that the best interests standard “does not require simply that a determination be made that one environment or set of circumstances is superior to another.”

The Supreme Court also reiterated that the fact that a child has been in an out-of-home placement for 15 or more of the most recent 22 months does not by itself demonstrate parental unfitness.

Case Plan Compliance

The Supreme Court also rejected the state’s contention that the mother was unfit because she failed to strictly comply with the case plan, noting that the mother progressed and generally complied (e.g., she maintained phone contact with the children, is employed, maintain an adequate home, and could provide for the children’s basic needs) and any deficiencies did not establish unfitness. The primary deficiency identified by the state was that the mother did not comply with a psychological evaluation, yet the mother provided a letter from a Guatemalan official regarding the living conditions in Guatemala and was not informed that this was insufficient. Furthermore, there was nothing in the record to indicate any concern regarding the mother’s mental health and the caseworker admitted that the requirement was included in the plan as part of standard practice. The state also alleged that the mother did not complete a parenting class, yet the caseworker failed to monitor the mother’s progress or confirm that she did not actually do so. The Court noted that the mother’s “failure to follow the plan as thoroughly as DHHS desired is simply not probative of [the mother’s] fitness to parent.” *Id.* at 1012.

Take Home Message

This case serves as an important reminder that the state must *affirmatively prove* unfitness by clear and convincing evidence in all TPR cases, even though unfitness is not explicitly specified in Neb. Rev. Stat. § 43-292. For additional guidance on the unfitness standard, see *In re Interest of Xavier H.*, 274 Neb. 331 (2007).

Duties of HHS

This case also makes clear that it is HHS's responsibility to monitor compliance with the case plan. This responsibility should not be shifted entirely to the parent. Here, the record contained no evidence showing what effort the caseworker made to set up services in Guatemala. Instead, the worker communicated to the mother that she would have to set up services herself and testified that, due to the mother's location, she could not monitor the mother's progress. The Supreme Court noted that this essentially placed the burden on the mother to show she had met the case plan requirements.

It is also the responsibility of the state to try to effectuate reunification when doing so is in the best interests of the children. Here, the Supreme Court expressed concern about the length of time the children had been placed outside the home, but noted that this circumstance would not have existed had the state allowed the mother to take her children with her to Guatemala. The Supreme Court also noted that the children could have been released to the mother at the time she was released from custody and was awaiting deportation and that the government of Guatemala could have monitored the children's well-being while the mother complied with the case plan.

Jurisdictional Issues

The Supreme Court in this case held that state courts have jurisdiction over child custody disputes when a parent faces involuntary deportation and that notice to a foreign national minor's consulate is not a jurisdictional prerequisite in termination proceedings. Nevertheless, a concurrence joined by a majority of justices emphasized that consular notification is a critical component of promoting the child's best interests in applicable cases.

State Court Jurisdiction Over Custody Issues When a Parent Faces Deportation

With regard to the first issue, the Supreme Court noted that, although this court had never addressed the issue of whether state courts have jurisdiction over custody disputes when a parent faces involuntary deportation, case law from other jurisdictions indicates that such custody issues are in fact within the jurisdiction of state courts and not, as the mother argued, federal immigration jurisdiction. The Supreme Court noted that custody matters are squarely within a state court's jurisdiction and simply because a party faces deportation, federal immigration laws do not preempt the state court's authority to decide attendant custody issues, which "arises out of the power every sovereignty possesses as *parens patriae* to every child within its borders..." *Id.* at 1002.

Consular Notification

The question of whether consular notification is a jurisdictional prerequisite to TPR actions involving foreign nationals was also an issue of first impression. Neb. Rev. Stat. § 43-3804 requires the state to provide written notice to the appropriate consulate within ten days when a foreign national minor or a child having dual citizenship is taken into custody or the state becomes aware that a minor in its custody is a foreign national or has dual citizenship. Similarly, the Vienna Convention on Consular Relations requires the state to inform the appropriate consulate "without delay."

The Supreme Court noted that other jurisdictions have concluded that consular notification under the Vienna Convention is not a jurisdictional prerequisite or that state courts do not lose jurisdiction for failing to notify the appropriate consulate unless the failure to notify results in prejudice, and that, where there is actual notice, custody proceedings have not been invalidated based lack of violations of the Vienna Convention. Here, the Supreme Court noted that the record contained conflicting evidence regarding whether and when the Guatemalan consulate was provided notice of the case. The caseworker testified that she sent notification to the Guatemalan consulate but letters from the consulate indicated that they received no notice. In light of this conflicting evidence, the Supreme Court recognized the trial court as the finder of fact which observed the witnesses and did not find the trial court's determination that the state complied with the Vienna Convention to be error.

With regard to the more specific requirements of the state statute (requiring written notice within ten days), the Supreme Court stated that "to obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsections of § 43-247." *Id.* at 1004-1005. Accordingly, the Supreme Court concluded that § 43-3804 does not establish a prerequisite to juvenile court jurisdiction.

Concurrence

A concurrence written by Justice Gerrard and joined by Justices Heavican, Connolly and Stephan expressed concern about HHS's communications with the consulate in this case, although agreed with the majority that compliance with § 43-3804 is not jurisdictional and that HHS minimally satisfied the Vienna Convention. The concurrence noted however that such minimal compliance should not be the standard for HHS and juvenile courts. Instead, the concurrence observed that the Nebraska Legislature as well as the U.S. and 176 other governments have recognized that "the early and active involvement of a foreign consulate is beneficial where the welfare of a foreign juvenile is concerned." *Id.* at 1013. The concurrence noted that this case, which the concurrence stated represented "a rather startling departure from [the mother's] rights and the children's best interests," may have been much different had consular notice occurred at the beginning of the case. *Id.* Importantly, the concurrence emphasized that the involvement and full participation of a foreign juvenile's consulate should be regarded as an important component of promoting the child's best interest. On a practical level, the consulate can assist the child and the parents as well as HHS, the GAL, and the juvenile court by providing information to assist in determining best interests. Therefore, the concurrence stated that HHS should repeatedly attempt to make contact with the consulate and, if HHS does not, the GAL and the juvenile court should seek the notice and involvement of the consulate. In conclusion, the concurrence noted that HHS's treatment of this requirement as merely a legal technicality fell short of appropriate efforts to promote the child's best interests.

Along the same lines, the majority opinion also noted that the state's evidentiary failure to meet its burden on unfitness was related to the state's initial failures to involve the consulate and keep the family unified, stating that "[b]ecause the state did not make this effort, it has scant evidence to supports its claims that [the mother] was unable to care for her children." *Id.* at 1012.

Immigration and Cultural Issues

Finally, the Supreme Court was sensitive to the fact that the children in this case had spent all or nearly all of their life in the U.S. and that returning them to Guatemala would have serious impacts on them. However, the Supreme Court repeatedly emphasized that best interests "does not require simply that a determination be made that one environment or set of circumstances is superior to another." *Id.* at 1009. Here, in response to the state's argument that it was in the children's best interests to remain in the U.S. with their foster parents because "living in Guatemala would put them at a disadvantage compared to

living in the United States,” the court noted that “whether living in Guatemala or the United States is more comfortable is not determinative of the children’s best interests.” Specifically, the court articulated that, unless a parent proven unfit, “the fact that the State considers certain adoptive parents...or this environment ‘better,’ does not overcome the commanding presumption that reuniting the children with [the mother] is in their best interests – no matter what country she lives in.” *Id.*

Importantly, the Supreme Court also noted that the mother “did not forfeit her parental rights because she was deported.” *Id.* In addition, the court stated that the mother’s “attempt to bring herself and her child into the United States, in the belief that they would have a better life here” did not show “an appreciable absence of care, concern, or judgment.” *Id.* at 1007.

For additional analysis of these issues in a similar case, see *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232 (2004).

Please contact Appleseed if you have a case addressing this issue or related issues.