CASE NO. A-08-000919

IN THE SUPREME COURT OF NEBRASKA

IN RE INTEREST OF ANGELICA L. and DANIEL L.,
MINOR CHILDREN UNDER 18 YEARS OF AGE

THE STATE OF NEBRASKA,

Plaintiff-Appellee,

vs.

MARIA L.,
NATURAL MOTHER of the MINOR CHILDREN

Defendant-Appellant.

APPEAL FROM THE JUVENILE COURT OF
HALL COUNTY, NEBRASKA

Case No. JV05-152
The Honorable Philip M. Martin, Jr., County Judge

AMICUS BRIEF OF LEGAL MOMENTUM IN SUPPORT OF APPELLANT

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I. Interests of the Amicus

Legal Momentum's Immigrant Women Program (IWP) works nationally to improve legal options for immigrant women in family court proceedings. In its work with immigrant women and immigrant victims of domestic violence, IWP has been instrumental in promoting language access to family courts including our work with the National Center for State Courts on improving access for limited English proficient persons to protection order courts.

II. Fundamental Importance of the Parent Child Bond

A parent has a fundamental, constitutional right to the care, custody, and control of his or her child, absent a compelling state interest. *Santosky v. Kramer,* 455 U.S. 745, 747 (1982). As this Court has characterized the matter, "the right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child." *In re Interest of Mainor T.*, 267 Neb. 232, 243, 674 N.W.2d 442, 454-55 (2004). A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a "commanding one." *In re Interest of Aaron D.*, 269 Neb. 249, 258-59, 691 N.W.2d 164, 172 (2005). Parental rights cannot be terminated unless the evidence clearly and convincingly shows the existence of at least one statutory ground permitting termination, and that termination is in the child's best interests. *In re Interest of Rebecka P.*, 266 Neb. 869, 876, 669 N.W.2d 658, 664 (2003).

A. Termination of parental rights must follow statutory grounds

Central to the court's decision to terminate Maria's parental rights was its reliance on the statutory grounds for termination under Nebraska law, in Neb. Rev. Stat. § 43-292. These grounds are § 43-292(6), "reasonable efforts to preserve and reunify the family . . . have failed to correct the conditions leading to the determination," and § 43-292(7), "The juvenile has been in

an out-of-home placement for fifteen or more months of the most recent twenty-two months" and, in either case, that termination is in the child's best interests.

Section 43-292(7) operates mechanically and, unlike other grounds, does not require the State to offer evidence of any specific fault on the part of a parent. *See In re Interest of Aaron D.*, 269 Neb. 249, 260-61, 691 N.W.2d 164, 173 (2005). Thus, when the State proceeds under § 43-292(7), this Court's de novo review "must be particularly diligent" of whether termination is, in fact, in a child's best interests. *Id.* Where termination of parental rights is sought pursuant to subsection (7), proof that termination is in a juvenile's best interests will require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as grounds enumerated in the other subsections of § 43-292, including subsection (6). *In re Interest of Aaron D.*, 269 Neb. at 261, 691 N.W.2d at 173.

Any presumption against the parent in these grounds, and particularly subsection (7), raises the likelihood that they are unconstitutional as drafted or as applied. In *In re H.G., a Minor*, 757 N.E.2d 864 (Ill. 2001), the Illinois Supreme Court invalidated as unconstitutional a statutory presumption of unfitness that, like § 43-292(7), was based solely upon the time the child had been in foster care, because it was not narrowly tailored to the compelling goal of identifying unfit parents. *Id.* at 871-72. The court specifically noted that among other infirmities, such a standard "fails to account for the fact that, in many cases, the length of a child's stay in foster care has nothing to do with the parent's ability or inability to safely care for the child but, instead, is due to circumstances beyond the parent's control." *Id.* at 872.

In terminating the rights of Maria, the court failed to follow the stricture of this Court that it "must respect a parent's '*commanding*' *interest* in the accuracy and justice of the decision to terminate parental rights." *In re Interest of Aaron D.*, at 261, 173 (emphasis added). The court

exhibited only grudging respect for Maria's rights, and its ruling tilted toward punishing her for the "barriers" that she "erected." (T77, T82) These "barriers" relate almost solely to the difficulties posed by her legal status as an undocumented immigrant. (T77.[1]) This aspect of the court's analysis permeates its discussion of both reunification efforts and the best interests of the children. Yet, the court largely ignored any responsibility the State and the court have in providing required services and language access to limited English proficient parents.

B. Reunification Efforts

This Court has held that immigration status alone is an impermissible basis for the termination of parental rights. *See In re Interest of Aaron D.*, 269 Neb. 249, 251, 691 N.W.2d 164, 167 (2005). The quality of a person's parenting is unrelated to that parent's citizenship or immigration status. As in *Aaron D.*, the court allowed its focus on the mother's immigration status to distract it from its statutory obligations to consider the Department of Health and Human Services' ("DHHS") intervention and the mother's efforts at reunification.

The mother, Maria, is a Guatemalan. Her native language is Quiche, spoken by the majority of the Mayan Indians of Guatemala. (10:11-12.) Maria understands only a "little bit" of Spanish. (10:10, 16-17.) Her efforts at complying with DHHS's parenting and reunification plan are set forth at pages 20-23 and 25-26 of the Appellant's Opening Brief. Discussion of these efforts in the court's opinion is focused almost solely on the "bottom line" fact that she did not successfully *complete* the agency's plan rather than upon Maria's progress toward reunification. (T77) In contrast, the court focused at length on the efforts DHHS made in pursuit of reunification. The court lauded DHHS for its "reasonable" efforts "under the

[1] The court specifically said: "Being in the status of an undocumented immigrant is, no doubt, fraught with peril and this would appear to be an example of that." (T78)

circumstances" in attempting parental reunification.[2] The court excused DHHS from having to deliver an otherwise required level of services to this immigrant mother because of her limited English proficiency, immigrant status, and finally, her deportation – and in spite of the fact that she went to extraordinary efforts to attain reunification with her children. These efforts included securing humanitarian parole into the United States, which is granted in extremely limited circumstances. The lowered expectations of the court are especially troubling in light of the repeated failures of DHHS to provide meaningful language access to Maria. The language barriers faced by Maria were largely unrecognized by the court, *see infra*.

The Court held the difficulties of bridging distance and culture against the mother, whose efforts were devalued, dismissed, or not even mentioned.[3] Moreover, the court not only held the mother to the usual standard for making reunification efforts, it cited her deportation status as an aggravating circumstance:

- "No suggestion is made as to how the Department is to put services in place when the mother resides in Guatemala." (T77)
- "It is perhaps more accurate to note that the primary obstacle was that the mother was deported from Hall County, where her children were, and that *distance* posed an *unavoidable* problem." (T78) (Emphasis added)

[2] "The testimony of Ms. Hannah impresses this Court that under the circumstances and barriers with which she had to work, which were caused by the mother's legal status, Ms. Hannah essentially bent over backwards to attempt to communicate and work with the mother in this case." (T77.) And then, "Under the circumstances the actions on the part of the Department of Health and Human Services appear to be more than reasonable." (T78)

[3] Even though DHHS failed to contact the mother for close to a year, Opening Brief at p.8, the court stated that "the mother's witness and friend Mr. William Vasey knew how to contact the Department of Health and Human Services to inquire about any questions or confusions she might have had." (T77)

The court excused DHHS from making statutorily required reunification efforts because, while the mother was involved with DHHS, she was ultimately removed from the United States and was ordered not to return. The court not only refused to give the mother consideration for overcoming significant hurdles in trying to secure reunification with her children, it dismissed the importance of the services the mother was able to obtain in spite of "unavoidable" hurdles.

Given the paramount importance of the mother's rights, the dramatic differentiation—between the court's lenience in determining what was reasonable on the part of the state and its refusal to credit and sufficiently weigh Maria's reunification efforts—has the practical effect of shifting the burden away from the state to prove sufficiency of its reunification efforts as a predicate to establishing clear and convincing evidence of the parent's failure to make efforts at reunification. This shift impermissibly lowers the standard for terminating the rights of parents whose primary impediment to compliance with a reunification plan results from deportation.

The court's opinion effectively lowers the state's burden in another important way. The DHHS decision to continue jurisdiction of the children at the time their mother was deported was not subject to the same standard of review or protection of parental interests as an ultimate determination on parental rights. As the court noted in *In re B and J, Minors*, 756 N.W.2d 234, 241-42 (Mich. Ct. App. 2008), in situations where a parent's deportation results in "unavoidable" obstacles to reunification (T78), the state's continued exercise of jurisdiction at the time the parent is deported can effectively constitute a *de facto* termination of a parent's rights.

It is thus especially important that courts exercise a probing review of the procedures and efforts utilized by the state to effectuate reunification in cases where those efforts have almost certainly been hampered by deportation. Likewise, parents must be given due consideration of their reunification efforts in spite of daunting barriers posed by distance and culture. Otherwise,

the initial decision to keep children of deported parents in the United States could effectively terminate parental rights, depriving both parents and children of their fundamental due process right to a judicial determination. That original "temporary" and frequently informal decision not to allow children to live with their parents abroad would effectively terminate parental rights without a judicial finding based on a showing of clear and convincing evidence. Such a result violates the parents' substantive due process rights. *Id.* at 242; *Santosky,* http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1982113139 at 748; *In re H.G., a Minor*, 757 N.E.2d at 871-72. *See also*, Section III, *infra*.

C. Best Interests of the Children

In determining the best interests of the children, the court insisted that it was not making a decision based on the grounds of "ethnocentrism" or class. (T80) However, much of its discussion of the "best interests" of the child was based, simply, on the Court's assumptions about what the children's experiences might be if they lived in Guatemala, in comparison to what the children would experience in their foster family, growing up as American citizens.

When an alien-parent's minor child is a United States citizen, and the alien-parent is deported, it is the parent's prerogative whether to take the minor child along or to leave the child in this country. *Liu v. United States Dep't of Justice,* 13 F.3d 1175, 1177 (8th Cir. 1994); *see also Newton v. Immigration & Naturalization Service,* 736 F.2d 336, 343 (6th Cir. 1984). If DHHS had not continued to exercise jurisdiction over the children, the mother would have been able to take the children with her to Guatemala, and there would have arisen no cause for termination of her rights.

It is important to recognize the rights of non-citizen parents over their dependent children who are United States citizens, because some of the factors cited by the court as being against the

children's best interests are circumstances that a parent might view as *good* reasons for moving the family to her native country, in order to preserve the continuity of their family's heritage. These include, in particular, the lack of existing relationship with biological siblings in Guatemala, and the child's asserted indifference or unfamiliarity with living in Guatemala. Using these factors only to *support* termination of a parent's rights devalues the "commanding interest" of the mother, and her social, cultural and biological ties with her children. Moreover, failing to address the potential harm to the children in the loss of any potential contact with their biological siblings and cultural heritage ignores important interests of the *children*. Specific risks to children associated with loss of contact with a biological parent can include:

- Permanent cut-off in family ties results in a grief-type experience, as though there were the death of a loved one.
- The usual life passages such as adolescence, marriage, childbirth, deaths, or divorce often reactivate the feelings of separateness from the family of origin.
- With adoption, some children are at risk of losing intimate contact with and connection to their family, ethnic, or cultural heritage.[4]

[4] *See* Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*," 22 N.Y.U. Rev. L. & Soc. Change 397, at 414-15 (1996) (cites omitted). Research shows further that:

> Although infants evidence no interest in biological ties . . ., this should not be taken as an indication that ties to the family of origin will have no meaning to these infants as they grow and develop. . . . Yet, there are special psychological connections that children have with their parents of origin, regardless of whether the parents of origin are absent or present. The family of origin is a source of identity for the child--the child may resemble the parents of origin and may share personality traits or even health problems with them. . . . These ideas and feelings typically do not emerge until preadolescence, and can take on a dramatic form in adolescence. It is during the ages of six through eighteen that adopted children are likely to become troubled by the adoption, grieve the loss of the family of origin, and may exhibit psychological, behavioral, and academic problems. *Id.* at 409.

(continued…)

Other factors cited by the court, such as disruption of school placement or continued association with a foster family are nearly *inevitable* any time return to the parent is effectuated. These factors cannot be given equal weight with the mother's interests and, standing alone, do not overcome the mother's rights given that the current school placement and the relationship with the foster family in this place were largely brought about by the foster placement in the first instance. Attaching greater importance to those factors because the mother would take the children to live with her in Guatemala would improperly take the mother's ethnicity or national origin into account in making a decision. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

The court's failure to accord proper weight to the mother's interests is shown by its careful consideration of Daniel's relationship to his foster brother, juxtaposed against its dismissal of the value of any potential relationship with his biological brothers in Guatemala. The court elevated the importance of the foster family relationships and devalued the mother's interests in her relationship to her children, and the children's relationships with their other family members in Guatemala, as well as with their mother (which it minimized;T75, T81).

Balancing the rights of a biological parent against the interests of third parties, such as a foster family, has been held to improperly encroach on the prerogatives of the biological parents.

(continued)

Finally, "when children are to be adopted as a result of some perceived inadequacy in their parents, a significant risk of a negative impact on the child's identity and self-esteem results. When the message is that the parents were inadequate to provide care and the child cannot visit or even see the family of origin, the child must either disconnect psychologically from the family of origin, with the resultant loyalty conflict, or accept some injury to their self-esteem for maintaining some identification with the 'defective' family." *Id.* at 415. *See also,* Kools, *Adolescent Identity Development in Child Care,* 46 Family Relations 263, 268 (1997) (Finding linkage to one's family and past important for adolescents to forge an understanding of identity).

In *Troxel v. Granville*, 530 U.S. 57 (2000), the United States Supreme Court emphatically confirmed that a court cannot favor the interests of third parties, (in *Troxel*, grandparents) in overriding the rights of a parent. "So long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69. While the court might respond that the mother here had been found unfit,[5] in fact, the legal standard for analyzing the "best interests" under § 43-293(7) is specifically *not* premised on a finding of lack of fitness, but the expiration of an arbitrary time period. Thus, in order to pass constitutional muster, the court must consider and give great deference to the mother's interests, and to the potential harm to the children of the loss of continued access to their mother, their family and their shared heritage.[6] Instead, the court minimized those interests and even, at times, dismissed them outright.

The difference between what the court actually did and what it ought to have done is anything but subtle. The Court's decision has profound emotional and long term consequences

[5] The court made a finding of "unfitness" as alternative grounds for termination (T75) that is not supported by "clear and convincing evidence." The court devotes several perfunctory paragraphs to this finding, but never articulates the legal standard that it used. It found Maria to be unfit "without necessarily endorsing this legal analysis," and its findings are disconnected from the circumstances that gave rise to the initial removal. For instance, the court relied on the mother's failure to get prenatal care and the premature birth of her daughter as evidence of her unfitness. The court later stated that the mother's care was merely "unacceptable/indifferent" at the time of removal. (T82) The Court failed to identify the role that Maria's limited English proficiency, coupled with her inability to read or fully speak or understand English or Spanish, had on the circumstances that initially led to removal of the children from her custody.

[6] In *In re H.G., a Minor*, 757 N.E.2d at 873, the Illinois Supreme Court noted that if the court does not adequately consider parental interests, including circumstances beyond the parent's control, it might find that a parent is "abundantly fit," but "that the child's best interests will not be served by returning the child to the parent's home." It found this outcome to be intolerable when grounds for termination are based only the passage of an arbitrary time period.

for both mother and children. Rather than placing the unparalleled interests of the biological parent at the apex of the rights and interests involved in making its decision, the court appeared to put those interests – at best – on an even playing field with alternatives that precluded parental involvement, that is, the children's continued residence in the United States. The court's analysis reduced the interests of the mother as a parent in a manner that is not permitted under Nebraska state law, under the United States Constitution or under United States legal precedents.

III. Requirement of Sufficient Notice Was Not Met

In addition to tipping the scales against the interests of the parent, the court ignored DHHS' failure to adequately communicate the case plan, as required by law. That fundamental due process flaw was ignored in the termination opinion. On this basis alone, the termination order should be reversed.

A. DHHS Failed to Adequately Communicate the Case Plan

DHHS is obligated to develop and implement a case plan in a way that takes into account the circumstances, needs, and barriers to the family, and that is material to correcting the conditions that otherwise would lead to the termination. *See, e.g., In re the Interest of L.J., J.J., J.N.J.*, 220 Neb. 102 (1985); *In re Interest of Aaron D.*, 269 Neb. 249 (2005). Moreover, as a recipient of federal funds, DHHS is obliged to provide oral interpretation and translation of written materials to limited English proficiency ("LEP") persons, such as Maria. 65 Fed. Reg. 52762 (Aug. 30, 2000). In providing services "the starting point is an individualized assessment" by DHHS of the mother's knowledge and communication skills.[7]

Because a "fundamental liberty interest … is implicated when the State attempts to

[7] *See also* Nebraska Department of Health & Human Services, Limited English Proficiency (LEP) Language Assistance page at: http://www.hhs.state.ne.us/lep.htm ("Nebraska LEP").

terminate the relationship between a parent and a child[,] state intervention to terminate the parent-child relationship *must* be accomplished by procedures meeting the requisites of the Due Process Clause." *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 458-59 (1999) (emphasis added). Nebraska case law has confirmed that it would be inappropriate to terminate parental rights where a parent was "provided with substandard information." *In re Interest of Deztiny C.*, 15 Neb. App. 179, 187-88, 723 N.W.2d 652 (Neb. App. 2006). Not providing information in a language that the mother understands is akin to providing substandard information. Thus, as a matter of basic rights and due process, DHHS must provide a parent with adequate notice of the requirements imposed on them that they must comply with in order to regain custody of their children. To satisfy due process requirements in this case, DHHS should have provided Maria with a copy of the case plan in her native language, Quiche, and should have had the case plan interpreted for her in her native language.

The evidence in this case, however, shows that DHHS never provided Maria with a written copy of the case plan, nor did DHHS provide her with a full oral interpretation of the case plan. (T76-T78) Rather, DHHS read only portions of the plan to Maria, and only in Spanish. Not only did the case plan ignore the fact that Maria faced language barriers in communicating effectively in, or understanding English or Spanish, DHHS failed to take into account the circumstances, needs, and issues of her family, such as the fact that limited financial resources, geographic distance from her children, and fewer service providers offering the types of services required by the case plan. *Id.*

Because DHHS has the burden to provide adequate notice of the requirements for reunification to the parent (*In re L.J., J.J., J.N.J.*, 220 Neb. at 114), it failed to meet its obligation to communicate the case plan in a manner that would enable Maria to appreciate and understand

its consequences. It is not the parent's obligation to find a way overcome significant barriers to understanding the case plan. *Id.* As such, the court's reliance on insufficient communications from DHHS is a fundamental violation of due process and the order should be reversed.

B. Failure to Consider the Language Barrier Supports Reversal

This Court has recognized that failures to provide adequate notice invalidate the bases for a termination order.[8] As this Court concluded in the case of *Aaron D.*, when deciding whether the "opportunities for compliance [with the case plan] may have been limited" a feeble effort at communicating the case plan has been found to invalidate the basis for termination of parental rights. 269 Neb. at 261. Of particular import in *Aaron D.* was the fact that DHHS did not provide the mother with a case plan in her native language until almost a year after the child had been removed. *Id.* The consequences of the DHHS's omission were obvious: "[The mother] testified that she had been provided with case plans in English, that the requirements had been explained to her in Spanish [her native language], 'and [that] they basically just told me what they wanted, and it wasn't until [the interpreter] actually read the whole thing to me in Spanish, that I thought I had made some mistakes.' Even after the case plans were provided in Spanish, [the mother] testified that there were still many words she did not understand." *In re Aaron D.*, 269 Neb. at 257.

[8] *See also* Uekert *et al.*, "Serving Limited English Proficient (LEP) Battered Women: A National Survey of the Courts' Capacity To Provide Protection Orders" (National Institutes of Justice June, 2006). The Nebraska Minority and Justice Task Force has noted with concern that some judges in Nebraska have refused to appoint an interpreter for civil cases, despite state law that requires such appointments. *See* Neb. Rev. Stat. § 25-2403. The goal of these requirements is to facilitate a party's actual participation in the court process, which is not achieved if the interpreter does not speak the party's native language.

The facts of Maria's case are analogous. The court ignored her inability to read or write in English or Spanish, and her limited ability to understand spoken Spanish, but nevertheless found that Maria had been adequately notified of her responsibilities when "the case plans were read orally to the respondent in Spanish to her on the telephone." (T77[9]) The court also improperly shifted DHHS' burden of communicating the case plan to Maria (T76)—focusing instead on her failure to *complete* a plan she did not (and could not) comprehend (T76-T79); and this perceived failure was clearly significant, if not determinative, in the court's finding that she had made insufficient progress toward reunification. (T77) The failure to give adequate weight to any of these facts in its order makes the court's position abundantly clear: "Being in the status of an undocumented immigrant is, no doubt, fraught with peril and this would appear to be an example of that fact." (T78)

As noted above, the failure to develop and implement a case plan in a way that takes into account the circumstances, needs, and barriers of the family will not support a termination case. *In re Aaron D.*, 269 Neb. at 264. Failure to do so means that termination would be inappropriate. *In re Dezziny C.*, 187-88. Moreover, shifting the burden from the state to the parent to obtain adequate notice of reunification requirements is especially inappropriate where the parent is challenged with having only a first grade education, is illiterate, does not speak English, speaks Spanish only as a second language, and was never provided with a copy of the case plan. *Mainor T.*, 267 Neb. 232. For these reasons alone, the termination order should be reversed.

[9] *See also* Opening Brief at 7: "At the initial hearing, it was noted that Maria's primary language is Quiche, spoken by the majority of the Mayan Indians of Guatemala. (10:11-12). Maria stated she understood a "little bit" of Spanish, and could understand Spanish but not if a high level language of Spanish was used. (10:10, 16-17)." *Id.*

IV. Conclusion

The court below failed to value and protect the parental bond between Maria and her children and ignored multiple violations of her due process rights. The court impermissibly lowered the standard for terminating the rights of parents whose primary impediment to compliance with a reunification plan results from deportation. The court ignored the fact that DHHS failed to adequately communicate the case plan in a language the mother could understand, and failed to assure that Maria had an opportunity to understand and comply with a reunification plan communicated to Maria in her native language. The court then relied on non-compliance with the reunification plan as a basis for termination of Maria's parental rights. The Department knew Maria did not understand English and had only a rudimentary understanding of Spanish; this deliberate ignorance was compounded by the Court's failure to probe *at all* whether notice was adequate. This fault could have been easily remedied, but it was not. As a result, reversal of the termination order is appropriate.

RESPECTFULLY SUBMITTED this 8th day of April, 2009.

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