

CASE NO. S-19-0215

IN THE NEBRASKA SUPREME COURT

IN RE INTEREST OF JEREMY UNDERWOOD, et al.,

Children Under Eighteen Years of Age

APPEAL FROM THE SEPARATE JUVENILE COURT OF
DOUGLAS COUNTY, NEBRASKA

The Honorable Chad Brown
Presiding Juvenile Court Judge

BRIEF OF APPELLEE
BRIEF ON CROSS-APPEAL
TIFFANY GARDNER
Natural Mother.

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BASIS OF JURISDICTION

Appellant's statement of the basis of jurisdiction is accepted as correct by Appellee.

STATEMENT OF THE CASE

A. Nature of the Case

On October 22, 2018, a Juvenile Neglect Petition was filed with respect to the Tiffany Gardner (hereinafter Appellee) regarding children Jeremy U. (hereinafter Jeremy), Ashton M. (hereinafter Ashton), and Savannah M. (hereinafter Savannah). (T1). An ex parte motion for immediate custody was filed by the state to remove Jeremy (T4), and a separate motion for protective custody filed to remove Ashton and Savannah from the custody of the Appellee on October 22, 2018 (T3). An ex parte order was entered on October 22, 2018 removing Jeremy from the care and custody of the Appellee and placing him in the temporary care and custody of the Nebraska Department of Health and Human Services (NDHHS) for placement to exclude the home of the Appellee (T7). The first appearance and protective custody hearing was held on October 30, 2018 (5:12-16; T22). At this hearing, the Appellee did not resist continued detention as to Jeremy, however, did resist as to Ashton and Savannah (11:10-15; T22). The court ordered Jeremy Underwood to remain in the temporary custody of the DHHS/PromiseShip and to exclude the home of the Appellee (12:23-25, 13:1-4; T22)., and continued the detention hearing as to Ashton and Savannah (11:23-25; T22). The continued detention hearing as to Ashton and Savannah was held on November 21, 2018 (16:17-21; Supp. T3). The Appellee did not resist continued detention of Ashton and Savannah at that time (17:18-19, 20:1-3; Supp. T3) and the children were ordered to remain in the temporary care and custody of the NDHHS to exclude the home of the Appellee (20:13-18; Supp. T3). (20:13-18)

The adjudication hearing was set for December 7, 2018 (27:9-11; Supp. T3), however, continued upon motion of the Appellee to February 15, 2019 (29:17-19, 32:17-18, 33:20-21; Supp. T6, Supp. T10, Supp. T13). A supplemental neglect petition was filed as to Brandon Medina (hereinafter Mr. Medina), the biological father of Savannah, along with ex parte motion for immediate custody and ex parte custody order placing Savannah in the temporary custody of NDHHS with respect to the father on January 14, 2019 (T14, T17, and T20). A protective custody hearing was held as to the father and Savannah on February 6, 2019 wherein the court ordered that Savannah remain in the temporary custody of NDHHS for continued care and placement, to exclude the home of the father (T22). The adjudication hearing was moved up from February 15, 2019 to February 14, 2019 on motion and order of the court (T18). On February 11, 2019, a formal pretrial hearing was held (35:22-23; T24) and the adjudication hearing remained set for February 14, 2019 as to the Appellee and also set for adjudication hearing as to the father (36:11-13, 37:19-20; T24).

The continued adjudication hearing was then held on February 14, 2019 before the Honorable Judge Chad M. Brown, in the Separate Juvenile Court, Douglas County, Nebraska (41:1-2; T25). At the February 14, 2019 adjudication hearing, the state presented testimony from Kelci Christensen (45-105) and Maranda Buckley (108-118), however, only the testimony of Ms. Christensen was submitted with respect to the Appellee.

The court subsequently entered its order dated February 19, 2019 (T25) and its nunc pro tunc order on February 22, 2019 (T30). The court found that it had jurisdiction over the matter. The court further found that that the allegations that the Appellee had failed to provide her children with proper parental care, support, supervision and/or protection and that Appellee had failed to provide her children with safe, stable housing (Count I B and C of the Petition) were

true by a preponderance of the evidence; that the allegations that the Appellee use of alcohol and/or controlled substances places her children at risk for harm (Count I A and D of the Petition) were dismissed due to insufficient evidence; that the allegations that the father has failed to provide his child, Savannah, with proper parental care, support, supervision, and/or protection and has failed to provide Savannah with safe, stable housing are true by a preponderance of the evidence; That the allegation that Savannah was at risk for harm (Count I C of the Supplemental Petition) is dismissed due to insufficient evidence (T25). The court further ordered that due to insufficient evidence to prove risk of harm, the matter was dismissed and the jurisdiction of the Court terminated, and the responsibility of NDHHS also terminated (T25).

B. Issues Decided by the Separate Juvenile Court of Douglas County:

The issue tried before the juvenile court at the time of adjudication was whether Jeremy, Ashton, and Savannah came within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)* insofar as Appellee and Mr. Medina were concerned. More specifically, the issue tried was whether the State proved by a preponderance of the evidence that without intervention, there was definite risk of future harm to Jeremy, Aston, and Savannah by reason of the fault or habits of Appellee and Mr. Medina, while Ashton and Savannah were living with their grandparents and arrangements were made for Jeremy to reside with a family friend upon his birth;

C. How the Issues Were Decided by the Separate Juvenile Court of Douglas County:

The juvenile court determined that there was insufficient evidence to support a finding that the juveniles came within the meaning of **Neb. Rev. Stat. §43-247(3)(a)**. The court determine that the allegations that the Appellee had failed to provide her children with proper parental care, support, supervision and/or protection and that Appellee had failed to provide her children with safe, stable housing (Count I B and C of the Petition) were true by a preponderance

of the evidence; and that the allegations that the father has failed to provide Savannah with proper parental care, support, supervision, and/or protection and has failed to provide Savannah with safe, stable housing are true by a preponderance of the evidence (Count I A and B of the Supplemental Petition).

However, the court determined that there was insufficient evidence to find that Jeremy, Ashton, and Savannah were at risk of harm due to the Appellee's use of alcohol and/or controlled substances (Count I A and D of the Petition) and dismissed the allegations. The court further determined that Savannah was not at risk for harm with respect to Mr. Medina (Count I C of the Supplemental Petition) and dismissed the allegation. The court further ordered that due to insufficient evidence to prove risk of harm, the matter was dismissed and the jurisdiction of the Court terminated, and the responsibility of NDHHS also terminated.

D. Scope 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. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *In re Interest of Meridian H.*, 281 Neb. 465, 475, 798 N.W.2d 96, 104 (2011), see also *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of Anthony G.*, 6 Neb. App. 812, 578 N.W.2d 71 (1998).

An appellant court reviews juvenile cases de novo on the record and reaches its conclusion independently of the juvenile court's findings. 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. *In the Interest of Sloan O.*, 291 Neb. 892, 870 N.W.2d 110 (2015).

PROPOSITIONS OF LAW

I. THE DOCTRINE OF STARE DECISIS IS BASED ON PUBLIC POLICY, IS ENTITLED TO GREAT WEIGHT, AND SHOULD BE ADHERED TO UNLESS REASON REASONS THEREFOR DO NOT EXIST, ARE CLEARLY ERRONEOUS OR MISCHIEVOUS, OR UNLESS MORE HARM THAN GOOD WILL RESULT FROM DOING SO. *Gilmore Const. Co. v. Miller*, 213 Neb. 133, 327 N.W.2d 628, (1982) (dissent) citing *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965); *Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall*, 166 Neb. 588, 90 N.W.2d 50 (1958).

II. IT IS WELL ESTABLISHED THAT WHILE THE STATE NEED NOT PROVE A CHILD HAS ACTUALLY SUFFERED PHYSICAL HARM, NEBRASKA CASE LAW IS CLEAR THAT AT A MINIMUM, THE STATE MUST ESTABLISH THAT WITHOUT INTERVENTION, THERE IS A DEFINITE RISK OF FUTURE HARM AND TO PROVE SUCH ALLEGATIONS BY A PERPONDERANCE OF THE EVIDENCE. *In re Interest of Justine J.*, 286 Neb. 250, 835 N.W.2d 674 (Neb. 2013) and *In re Lilly S.*, 298 Neb. 306, 903 N.W.2d 651, (2017)

III. A COURT NEED NOT AWAIT CERTAIN DISASTER TO COME INTO FRUITION BEFORE TAKING PROTECTIVE STEPS IN THE INTEREST OF A MINOR CHILD. *In re Lilly S.*, 298 Neb. 306, 903 N.W.2d 651, (2017) citing *In re Interest of S.L.P.*, 230 Neb. 635, 639, 432 N.W.2d 826, 830 (1988).

IV. TO SUPPORT ADJUDICATION, THIS COURT HAS REQUIRED AN EVIDENTIARY NEXUS BETWEEN A PARENT'S FAULT OR HABITS AND THE RISK FOR HARM TO THE CHILD. *In re Interest of Justine J.*, 286 Neb. 250, 835 N.W.2d 674 (Neb. 2013) and *In re Lilly S.*, 298 Neb. 306, 903 N.W.2d 651, (2017)

STATEMENT OF FACTS

Procedural History:

On October 22, 2018, a Juvenile Neglect Petition was filed with respect to the Appellee regarding children Jeremy U. (hereinafter Jeremy), Ashton M. (hereinafter Ashton), and Savannah M. (hereinafter Savannah). (T1). An ex parte motion for immediate custody was filed by the state to remove Jeremy (T4), and a separate motion for protective custody filed to remove Ashton and Savannah from the custody of the Appellee on October 22, 2018 (T3). An ex parte order was entered on October 22, 2018 removing Jeremy from the care and custody of the Appellee and placing him in the temporary care and custody of the Nebraska Department of Health and Human Services (NDHHS) for placement to exclude the home of the Appellee (T7). The first appearance and protective custody hearing was held on October 30, 2018 (5:12-16; T22). At this hearing, the Appellee did not resist continued detention as to Jeremy, however, did resist as to Ashton and Savannah (11:10-15; T22). The court ordered Jeremy Underwood to remain in the temporary custody of the DHHS/PromiseShip and to exclude the home of the Appellee (12:23-25, 13:1-4; T22), and continued the detention hearing as to Ashton and Savannah (11:23-25; T22). The continued detention hearing as to Ashton and Savannah was held on November 21, 2018 (16:17-21; Supp. T3). The Appellee did not resist continued detention of Ashton and Savannah at that time (17:18-19, 20:1-3; Supp. T3) and the children were ordered to remain in the temporary care and custody of the NDHHS to exclude the home of the Appellee (20:13-18; Supp. T3). (20:13-18)

The adjudication hearing was set for December 7, 2018 (27:9-11; Supp. T3), however, continued upon motion of the Appellee to February 15, 2019 (29:17-19, 32:17-18, 33:20-21;

Supp. T6, Supp. T10, Supp. T13). A supplemental neglect petition was filed as to Mr. Medina with respect to Savannah, along with ex parte motion for immediate custody and ex parte custody order placing Savannah in the temporary custody of NDHHS on January 14, 2019 (T14, T17, and T20). A protective custody hearing was held as to the Mr. Medina and Savannah on February 6, 2019 wherein the court ordered that Savannah remain in the temporary custody of NDHHS for continued care and placement, to exclude the home of the father (T22). The adjudication hearing was moved up from February 15, 2019 to February 14, 2019 on motion and order of the court (T18). On February 11, 2019, a formal pretrial hearing was held (35:22-23; T24) and the adjudication hearing remained set for February 14, 2019 as to the Appellee and also set for adjudication hearing as to the father (36:11-13, 37:19-20; T24).

The continued adjudication hearing was then held on February 14, 2019 before the Honorable Judge Chad M. Brown, in the Separate Juvenile Court, Douglas County, Nebraska (41:1-2; T25). On February 28, 2019, the Appellant filed its appeal from the trial court's order dated February 19, 2019.

Factual History:

At the February 14, 2019 adjudication hearing, the state presented testimony from Kelci Christensen (45-105) and Maranda Buckley (108-118), however, only the testimony of Ms. Christensen was submitted with respect to the Appellee.

Ms. Christensen testified that she was the Child and Family Services Specialist/Initial Assessment Worker (48:21-22) assigned to investigate and complete an initial assessment of the Appellee's family, specifically regarding the children Jeremy, Ashton, and Savannah (49:25; 50:1-7, 21-24; 74:17-22) due to allegations that the Appellee "had been positive for methamphetamine." (50:19-20). Jeremy is an infant and both Savannah and Ashton are under

the age of three (61:16-25). Ms. Christensen testified that all three children were in the legal custody of the Appellee but not in her physical custody at the time of Ms. Christensen's investigation (62:16-18), and that Ashton and Savannah were residing with the Appellee's mother, Tina Gardner (67:1-4; 92:21-24) for approximately two to three years (92:25; 93:1-2) with the permission of the Appellee (93:4-7; 93:17-19).

Ms. Christensen saw Jeremy and interviewed the Appellee the day of or the next day of Jeremy's birth in October 2018 and prior to the removal of the children, staying with the Appellee at the hospital for about six hours, and subsequently speaking with the Appellee four more times (51:15-20; 66:8-25). Ms. Christensen also visited Ashton and Savannah at the hospital (69:19-21) prior to the removal, and both children were observed to be appropriately dressed and in good health (71:18-25; 72:1). When asked on direct examination by the state as to what hospital she was at, Ms. Christensen testified that she did not recall which hospital (51:7-8). Ms. Christensen did not testify as to what city, county, or state that the hospital was located in. Ms. Christensen observed Ashton and Savannah to be comfortable with Appellee, their grandmother Tina Gardner, their grandfather Christopher Gardner, and appeared to be developmentally on track for their age (72:12-16). Ms. Christensen testified that she had no concerns for Ashton or Savannah (72:23-24). Ms. Christensen testified that she subsequently went to Tina Gardner's home where Ashton and Savannah resided and that she observed the bedroom where the children slept and their clothes (70:12-15; 71:7-20), observed the kitchen to be clean, and food stocked in the cabinets and refrigerator (73:10-24). Ms. Christensen had no concerns from her observations of any of the rooms in the house. (74:14-16). Ms. Christensen testified that Tina and her husband were providing food, clothes and living accommodations

without any type of subsidy assistance (93:13-16). Ms. Christensen did not testify as to what city, county, or state that Tina's home was located in.

Ms. Christen testified that during her interview of Appellee at the hospital, the Appellee told her "that she had been using drugs since she was very young and that she had most recently used within the week of the birth of her son, Jeremy Underwood, Jr." (52:19-25; 62:6-9) and that the Appellee told her that "marijuana and methamphetamine were the two main ones" (53:1). Ms. Christensen testified that the Appellee admitted to using drugs, more specifically methamphetamines on an almost daily basis since she was 14 years old (54:11-25, 55:6-10) and marijuana, not as frequently but pretty often (55:11-16). That the Appellee admitted to using recently and that she believed Jeremy would test positive for methamphetamine (65:1-5). Ms. Christensen further testified that the Appellee previously unsuccessfully completed treatment (56:103). Ms. Christensen testified that the Appellee had found Carolina Ordonez, a family friend, to care for Jeremy after his birth, due to Appellee's drug use, and until she could get clean (68:13-25; 78:1-9; 90:6-9; 102:4-5).

Ms. Christensen testified that when she met Appellee at the hospital, she discussed with the Appellee about working with Promiseship to assist her in getting into therapy, drug and alcohol therapy, and applying for housing and benefits (75:9-18). Ms. Christensen further testified that Appellee agreed to a safety plan that would allow her to retain legal custody of her children which involved Appellee participating in services, including domestic violence education, outpatient or inpatient therapy, getting a drug and alcohol evaluation done, and having Appellee's mother, Tina Gardner, to continue caring for Ashton and Savannah, and having Carolina Ordonez to care for Jeremy until she could get clean (76:3-15; 77:1-25; 78:14-16; 82:2-9; 84:5-7) in what was tantamount to a voluntary placement agreement (82:10-12). Ms.

Christensen testified that Appellee, Tina Gardner, and Carolina Ordonez signed the safety plan (78:17-18; 79:1-15). Ms. Christensen further testified that Appellee and Carolina Ordonez signed a temporary delegation of parental authority form as to Jeremy (80:1-10; 80:17-19; 80:23-25; 81:1-4) and that Appellee and Tina Gardner signed a separate temporary delegation of parental authority form as to Ashton and Savannah (80:11-16; 80:20-22; 81:5-11).

Ms. Christensen testified that despite the safety plan and temporary delegation of parental authority that was signed, the children were removed from the legal custody of the Appellee and that she was in disagreement with the removal (82:23). Ms. Christensen testified that her supervisor advised the county attorney who each child was supposed to be with (88:7-20). Ms. Christensen testified that she did not file an affidavit for removal of the children (51:21-23; 87:22-25; 88:1-2), but that the hospital social worker, Darcy Peterson, had signed the affidavit for removal as to Jeremy and provided that information to her and the county attorney (51:24-25; 52:1; 89:6-25). Ms. Christensen testified that the hospital social worker filed her affidavit with the county attorney either prior to the initial meeting with the Appellee or was in the process of filing by the time Ms. Christensen got to the hospital (52:2-9; 62:10-12; 94:15-18). Ms. Christensen testified that the affidavit for removal had not been filed nor an ex parte motion for temporary immediate custody had been ordered while she was meeting with the Appellee at the hospital (94:19-23) and that she found out, after their conversations earlier that day regarding the temporary parental delegation of powers, that the removal would occur that night about 6:30 (94:24-25; 95:1-9).

Ms. Christensen testified that she was in disagreement with the removal because “it’s policy of DHHS to offer a parent a safety plan first and give them a chance to succeed”... and that she “didn’t feel that it gave Tiffany a chance to enact any of the things we agreed upon in

our safety plan”... other than “temporary delegation of parental powers and the physical custody of the children being in the designated safety plan participants’ physical care.” (82:25; 83:1-17).

Ms. Christensen further testified that she subsequently concluded her investigation and the department determined that the allegations were unfounded (84:21-25; 85:1-2) because she “had not determined that abuse or neglect happened due to Tiffany showing appropriate parenting by knowing that she, at that time, could not care for her children physically because of her drug use and placing them with appropriate parents who could make sure that their- - that her children received everything that they needed in order to be happy and healthy. And so, in the department’s eyes, that’s not child abuse or neglect.” (85:4-11). Ms. Christensen testified that at the time of the removal the children were not in immediate risk for harm or safety due to the safety plan that was in place and the assignment of Appellee’s parenting authority pursuant to that plan (86:5-13; 91:18-25; 93:23-25).

Ms. Christensen testified that “safety is the immediate concern of safety for a child” (99:3-5) and “risk is more long term...we would consider a child at risk for harm if we foresaw future.” (99:14-21). Ms. Christensen testified that if a parent was under the influence of methamphetamine and was going to go and take their child from an appropriate care-giver would be an example of safety (99:25; 100:1-3) and the potential of parent doing so would be an example of risk. (100:4-6). However, Ms. Christensen also testified “as long as the parent has continued to leave that child with an appropriate caregiver, that that is not risk for harm.” (101:15-16). That Appellee stated to her that the children were with Tina Gardner for 2-3 years, and that “it was long enough that she would feel guilty if she just were to uproot them from her”. (93:2-7). Ms. Christensen testified that if a “parent has never come to even attempt to take child

away from that caregiver, I would have no reason to believe that they ever would...” (102:16-20) and that there would be no risk for harm (102:21-24).

Ms. Christensen testified that there were no prior CFS investigations regarding the Appellee (83:18-25; 84:1). Also, that after the removal, Ashton and Savannah remained in the care of Tina Gardner (84:11-12), Jeremy was placed with Carolina Ordonez (84:13-15) and eventually placed with Tina Gardner as well (84:16-17).

The court subsequently entered its order dated February 19, 2019 (T25) and its nunc pro tunc order on February 22, 2019 (T30). The court determined that the allegations that the Appellee had failed to provide her children with proper parental care, support, supervision and/or protection and that Appellee had failed to provide her children with safe, stable housing (Count I B and C of the Petition) were true by a preponderance of the evidence; that the allegations that the Appellee use of alcohol and/or controlled substances places her children at risk for harm (Count I A and D of the Petition) were dismissed due to insufficient evidence; that the allegations that the father has failed to provide his child, Savanah, with proper parental care, support, supervision, and/or protection and has failed to provide Savanah with safe, stable housing are true by a preponderance of the evidence; That the allegation that Savanah was at risk for harm (Count I C of the Supplemental Petition) is dismissed due to insufficient evidence (T25, T30). The court further ordered that due to insufficient evidence to prove risk of harm, the matter was dismissed and the jurisdiction of the Court terminated, and the responsibility of NDHHS also terminated (T25).

In support of its order dismissing the matter and relieving NDHHS of further responsibility, the Court specifically found that the Appellee made a rational decision to place Savannah and Ashton, with her parents; that the placement of Savannah and Ashton were

appropriate in that they had a home to live in, a bed, clothing and food; that at the time of the removal that the minor children, Savannah and Ashton, had not been living with the mother, and that the mother had not seen them for at least two years (T25). The court further found that *In Re Justine J.* 286 Neb. 250 (2013) was controlling in this case; and that the State had not shown any risk of harm to Savannah and Ashton; that the State's only witness to testify did not believe the children were at risk of harm (T25).

That as for the minor child, Jeremy Underwood (T30), the Court found that the State failed to establish by a preponderance of the evidence as to the specific elements of risk of harm; that the State's only witness testimony showed that there was not a risk of harm to Jeremy Underwood because the mother had made a rational decision to find a suitable care taker due to her continued methamphetamine addiction; that the mother had exhibited this rational thinking on at least three occasions, coinciding with her three children (T25, T30).

The Court further found that this family has never been involved with child protective services before; that while Ms. Christensen testified that the children would be at a risk of harm if in the mother's physical custody, she did testify that they would not be at a risk in the legal custody; that Ms. Christensen specifically stated that these children were not at risk for harm and testified that she was surprised to learn that an Affidavit for removal had been filed by someone else; That the evidence showed that Ms. Christensen spent at least 6 hours shortly after the birth of the minor child, Jeremy Underwood, discussing services, to include a Safety Plan and Temporary Delegation of Parental Rights forms (TDPR); that the mother signed all forms; that Ms. Christensen further testified that she did not support removal as this both violated the Nebraska Department of Health and Human Services' policy to give parents a chance to work with services and to work towards rationally eliminating the risk and safety concerns; That Ms.

Christensen also testified that she felt the mother had eliminated the risk and safety concerns by signing the Safety Plan and TDPR Forms; That Ms. Christensen also testified that the mother has made no previous attempts to see or take custody over the minor children Savannah and Ashton in the last two years; That Ms. Christensen testified that she did not believe these children were at risk for harm; That Ms. Christensen further testified that should the mother attempt to see the children, take the children, or threaten to take the children, then there would a risk for harm; That contrary to the State's arguments concerning the flimsy nature of the TDPR forms, *Neb.Rev.State 30-2604*, allows for " ... parents to delegate care, *custody* and property ... ", furthermore, the Supreme Court even has the TDPR forms on its website for parents to easily access; That in the end, the State is essentially asking the Court to not believe their witness as to risk of harm; That this Court will only make findings on the evidence presented at the Adjudication hearing; That because the State has failed to prove risk of harm as to the Petition, the Court finds that the Supplemental Petition is insufficient likewise; That it logically flows that if the mother has taken steps to alleviate the risk of harm by placing the minor child, Savannah, with her grandparents and she has remained there for two years, then the State has failed to show any nexus between the father's incarceration and risk of harm..."

ARGUMENTS

I.

THE SEPARATE JUVENILE COURT OF DOUGLAS COUNTY DID NOT ERR WHEN IT FOUND THAT THE APPELLEE'S USE OF CONTROLLED SUBSTANCES DID NOT PLACE THE JUVENILES AT RISK OF HARM DUE TO INSUFFICIENT EVIDENCE.

As the juvenile court found, *In re Interest of Justine J.* 286 Neb. 250 (2013) is controlling in this case. *In re Interest of Justine J.*, is current, established and direct legal precedent that is clearly on point and persuasive. "One of the values of legal precedent in a

society governed by laws is that the certainty created allows a member of that society to accurately and safely anticipate the consequences of specific conduct. While we do not slavishly adhere unnecessarily to precedent for its own sake, the doctrine of stare decisis is based on public policy, is entitled to great weight, and should be adhered to unless reasons therefor do not exist, are clearly erroneous or mischievous, or unless more harm than good will result from doing so. *Lincoln Woman's Club v. City of Lincoln*, supra; *Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall*, 166 Neb. 588, 90 N.W.2d 50 (1958).” *Gilmore Const. Co. v. Miller*, 213 Neb. 133, 327 N.W.2d 628, (1982) (dissent). Based on legal precedent, the facts of this case, and the force of reason, this court must uphold the trial court’s decision.

It is well established that while the State need not prove that a child has actually suffered physical harm, Nebraska case law is clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm and to prove such allegations by a preponderance of the evidence. *In re Interest of Justine J.*, supra.

The issue presented on appeal in *In re Interest of Justine J.* was whether the State proved by a preponderance of the evidence that without intervention, there was **definite risk of future harm** to two children, Moses and Elijah, by reason of the fault or habits of their parents, Shawna and Jarrod, while the boys were living with their grandparents. The court of appeals found that the parties had conceded, and the court affirmed the adjudication order as to two children, Sylissa and Justine, that were in the parent’s care, however, found that the State failed to meet its burden as to Moses and Elijah who resided with their grandparents. The court of appeals relied upon three court of appeals cases, *In re Interest of Carrdale H.*, 18 Neb.App. 350, 781 N.W.2d 622 (2010), *In re Interest of Brianna B. & Shelby B.*, 9 Neb.App. 529, 614 N.W.2d 790 (2000), and *In re Interest of Taeven Z.*, 19 Neb.App. 831, 812 N.W.2d 313 (2012).

In *In re Interest of Carrdale H.*, the court held that the State failed to prove by a preponderance of the evidence the petition's allegation that the father's use of drugs placed said child at risk for harm where the State failed to adduce any evidence regarding whether the father was charged with a crime, whether the father had any history of drug use in or out of the child's presence, whether the child was present when the father possessed the drugs, or whether the child was affected in any way by the father's actions. In *In re Interest of Brianna B. & Shelby B.*, 9 Neb.App. 529, 614 N.W.2d 790 (2000), the court concluded that the State failed to adduce

evidence to show that the children lacked proper parental care, despite evidence that the parents had consumed alcohol in the presence of the children, where there was no evidence to show that the children were impacted by the parents drinking. And finally, In *In re Interest of Taeven Z.*, 19 Neb.App. 831, 812 N.W.2d 313 (2012), the court held that there was no evidentiary nexus between the consumption of drugs by the mother and any definite future risk of harm to the child in where there was no evidence that the child was affected by the mother's taking nonprescribed pills or any evidence that the mother's taking the pill placed the child at risk.

In *In Re Justine J.*, the Court of Appeals concluded, based on the foregoing cases, “that the State did not adduce sufficient evidence to support the adjudication of Moses and Elijah. It is uncontested that the State met its burden as to the adjudication of Sylissa and Justine. However, there is no evidence that Moses and Elijah were present for Shawna's and Jarrod's drug use or domestic violence. In fact, the deposition testimony of both Sylissa and Justine indicates that Moses and Elijah were living with their grandparents. Sylissa's and Justine's testimony establishes that their grandparents provided a safe environment for Moses and Elijah. Therefore, although the living situation provided by Shawna and Jarrod to Sylissa and Justine was sufficient to adjudicate the children, the State failed to prove by a preponderance of the evidence an evidentiary nexus between the neglect suffered by Sylissa and Justine and any definite risk of future harm to Moses and Elijah.”

Despite the Appellee’s admitted drug usage, having used drugs from a young age of 14 up until the week of Jeremy’s birth (52:19-25; 53:1, 54:11-25, 55:6-10, 55:11-16, 62:6-9, as with the children in *In Re Justine J.*, there was no evidence presented by the state that Ashton and Savannah were present for the Appellee’s drug use. In fact, as in *In Re Justine J.*, Ashton and Savannah were not in the physical care of the Appellee but rather resided with their grandmother and grandfather, with the Appellee’s permission, for approximately 2-3 years prior to the state filing its petition (62:16-18; 67:1-4; 92:21-24; 92:25; 93:1-7; 93:17-19).

As in *In re Interest of Justine J.*, the evidence adduced from Ms. Christensen was that the grandparents provided a safe environment for Ashton and Savannah, with no concerns regarding the home that they resided in (72:23-24), that the children had bedrooms, the home

was clean and the kitchen well stocked with food, and that Tina and Christopher were providing food, clothes and living accommodations without any type of subsidy assistance (70:12-15; 71:7-20, 73:10-24, 74:14-16, 93:13-16), and that the children were observed to be well cared for, appropriately dressed and in good health (71:18-25; 72:1), and Ms. Christensen observed Ashton and Savannah to be comfortable with Tina and Christopher, and appeared to be developmentally on track for their age (72:12-16). In addition, in this case, the Appellee agreed to and signed a safety plan and a temporary delegation of parental authority form allowing Tina to continue caring for Ashton and Savannah while she sought drug treatment, effectively reducing any future risk of harm (76:3-15, 77:1-25, 78:4-16, 78:17-18, 79:1-15, 80:11-16, 80:20-22; 81:5-11, 82:2-9, 84:5-7, 82:10-12). Based on the foregoing, there was no nexus between the Appellee's drug use and any risk of harm to the children that that drug use posed. And even if the state would have proved that Jeremy was neglected due to the Appellee's drug use, based on the foregoing, the state would have been unable to provide a nexus between any neglect suffered by Jeremy and any definite risk of future harm to Savannah and Ashton. As in *In re Interest of Justine J.*, the State has simply failed to prove by a preponderance of the evidence an evidentiary nexus between the Appellee's drug usage, the alleged neglect suffered by Jeremy, and any definite risk of harm to Ashton and Savannah.

As to Jeremy, there was in fact no evidence proffered by the state at the adjudication hearing that Jeremy was physically affected by the Appellee's drug use. The state incorrectly states in its brief that Jeremy tested positive for methamphetamines. Ms. Christensen testified that the Appellee admitted to using recently and that she believed Jeremy would test positive for methamphetamine (65:1-5), but there was no medical or drug testing evidence presented at trial that any drugs were in fact found in Jeremy's system at the time of his birth. As in the cases

relied upon by *In re Interest of Justine J.*, there was no evidence presented by the State that showed that the Appellee's drug use had affected Jeremy in any way or placed the child at risk of harm. See *In re Interest of Carrdale H.* (State failed to prove by a preponderance of the evidence the petition's allegation that the father's use of drugs placed child at risk for harm where the State failed to adduce any evidence regarding.... whether the child was affected in any way by the father's actions), *In re Interest of Brianna B. & Shelby B.*, 9 Neb.App. 529, 614 N.W.2d 790 (2000) (State failed to adduce evidence to show that the children lacked proper parental care, despite evidence that the parents had consumed alcohol in the presence of the children, where there was no evidence to show that the children were impacted by the parents drinking), and *In re Interest of Taeven Z.*, 19 Neb.App. 831, 812 N.W.2d 313 (2012) (no evidentiary nexus between the consumption of drugs by the mother and any definite future risk of harm to child where there was no evidence that the child was affected by the mother's taking nonprescribed pills or any evidence that the mother's taking the pill placed the child at risk). Also, as with Ashton and Savannah, Appellee agreed to and signed a safety plan and a temporary delegation of parental authority form allowing her family friend, Carolina, to continue caring for Jeremy while Appellee sought drug treatment, effectively reducing any definite future risk of harm (76:3-15, 77:1-25, 78:4-16, 78:17-18, 79:1-15, 80:1-10; 80:17-19; 80:23-25; 81:1-4, 82:2-9, 84:5-7, 82:10-12).

The state argues that the juvenile court erred by finding that there was insufficient evidence offered by the State showing that Ms. Gardner's use of controlled substances did not place the juveniles at risk of harm merely because she placed the children in the care of others according to a freely revocable Temporary Delegation of Parental Powers. The juvenile court did not rely solely on the executed temporary delegation of parental powers when

determining that the juveniles were not at risk for harm. The state has ignored the plethora of other evidence that the juvenile court relied upon in making its determination that despite the Appellee's drug use, the juveniles were not at risk for harm. As stated above, Ashton and Savannah did not reside with the mother and was not present during her drug use, and resided in a caring environment with Tina and Christopher. And there was no evidence that Jeremy was affected physically in any way due to the Appellee's drug use leading up to his birth or after, there was no medical evidence presented at trial that Jeremy tested positive for methamphetamines.

Also, the Appellee not only signed a temporary delegation of parental powers form to authorize Tina and Carolina to care for her children, but also was agreeable to and signed a safety plan which, Ms. Christensen testified, reduces future risk. Ms. Christensen testified that there were no prior CFS investigations regarding the Appellee when the safety plan was created (83:18-25; 84:1). Ms. Christensen testified that "it's policy of DHHS to offer a parent a safety plan first and give them a chance to succeed..." (82:25; 83:1-17). Ms. Christensen testified that at the time of the removal, the children were not in immediate risk for harm or safety due to the safety plan that was in place and the assignment of Appellee's parenting authority pursuant to that plan ((82:25, 83:1-17, 86:5-13, 91:18-25, 93:23-25), where Ashton and Savannah remained in the care of Tina Gardner (84:11-12) and Jeremy was placed with Carolina Ordonez (84:13-15).

The state emphasizes that a parent that is on drugs, including methamphetamines, is prone to erratic decision making in an attempt to draw a nexus between the Appellees drug use and definite risk of future harm, however, in this instance the evidence presented at trial showed and the court correctly found that the Appellee made rational decisions regarding

the care of her children despite her drug use (T25). As the trial court found, the State's only witness testimony showed that there was not a risk of harm to Jeremy Underwood because the mother had made a rational decision to find a suitable caregiver due to her continued methamphetamine addiction; that the mother had exhibited this rational thinking on at least three occasions, coinciding with her three children (T25, T30). Ms. Christensen testified that it is difficult for a parent to appropriately parent while under the influence of methamphetamine and often make inappropriate decisions (60:9-19; 61:1-7; 97:8-11). Ms. Christensen testified that a 14-year daily use of methamphetamine would be in the severe category of concerns (98:3-5, 17). Ms. Christensen opined that children under the age of three are vulnerable while in custody of parents under the influence of methamphetamine (62:2-5) and that the Appellee's children would be at risk for harm in their mother's custody based on her drug use (63:21-24). **However, Ms. Christensen also testified that she "had not determined that abuse or neglect happened due to Tiffany showing appropriate parenting by knowing that she, at that time, could not care for her children** physically because of her drug use and placing them with appropriate parents who could make sure that their- - that her children received everything that they needed in order to be happy and healthy. And so, in the department's eyes, that's not child abuse or neglect." (85:4-11). Put simply, Ms. Christensen's testimony showed that the Appellee had a history of making appropriate decision on behalf of her children despite her drug use.

Appellee's appropriate decision making is reflected not only in having Ashton and Savannah reside with Tina and in arranging the care of Jeremy with Carolina, but also by signing the temporary delegation of parental authority and the safety plan. Ms. Christensen testified that by a parent signing over temporary delegation of parental powers it allows another person "to care for their child: to take them to the doctor, to take them to

school, those type of things: and that if a parent decides that that were to go away, then that could be revoked” (96:3-8; 97:1-2) and that it does not prevent a parent from removing a child from a person so assigned (97:3-7). However, Ms. Christensen also testified that “safety is the immediate concern of safety for a child” (99:3-5) and “risk is more long term...we would consider a child at risk for harm if we foresaw future.” (99:14-21). Ms. Christensen testified that if a parent was under the influence of methamphetamine and was going to go and take their child from an appropriate care-giver would be an example of safety (99:25; 100:1-3) and the potential of parent doing so would be an example of risk. (100:4-6). Ms. Christensen also testified “as long as the parent has continued to leave that child with an appropriate caregiver, that that is not risk for harm.” (101:15-16). Ms. Christen previously testified that the Appellee stated to her that Ashton and Savanah were with Tina for 2-3 years, and that “it was long enough that she would feel guilty if she just were to uproot them from her” (93:2-7). Ms. Christensen testified that if a “parent has never come to even attempt to take child away from that caregiver, I would have no reason to believe that they ever would...” (102:16-20) and that there would be no risk for harm (102:21-24). There was simply no evidence that Ms. Christensen had ever attempted to remove Ashton and Savanah from Tina’s care, which in turn shows that she would not attempt to remove Jeremy from Carolina’s care. Without a showing that Ms. Christensen has threatened or attempted to remove her children from Tina’s care, the state is unable to show that there is immediate risk of harm to Ashton and Savanah, and thus unable to show an immediate risk of harm to Jeremy.

The state lastly argues that it has established a nexus between the Appellee’s drug abuse and risk of harm by connecting what it proposes are reasonable inferences from the Appellee’s drug use and her being able to retrieve the children from their placements at any time. And that

Ms. Gardner’s newborn son literally suffered a harm by testing positive for methamphetamine. In support of the state’s argument, the state references *In re Lilly S.*, 298 Neb. 306, 903 N.W.2d 651, (2017), which the state incorrectly cited as *State v. Kenny*, 298 Neb. 306, (2017), in its brief.

In *In re Lilly S.*, 298 Neb. 306, 903 N.W.2d 651, (2017) the court cited *In re Justine J.*, stating “While the State need not prove that the child has actually suffered physical harm, Nebraska case law is clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm. *In re Interest of Justine J. et al.*, supra. The State must prove such allegations by a preponderance of the evidence. *Id.*”

The court in *In re Lilly S.* found that the only evidence supporting domestic violence allegations between the mother and father consisted of in-court testimony from the mother, Ashley, that the father, Kenny, pushed her once while outside the children’s presence. The court found that “...a court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child.” See *In re Interest of S.L.P.*, 230 Neb. 635, 639, 432 N.W.2d 826, 830 (1988). The court found that “...a child need not witness domestic violence or be in the vicinity in order to be placed at risk for harm. For example, if a child observed the subsequent results of domestic violence or was otherwise made aware of the domestic violence, this could constitute a risk for harm to the child.” The court went on to say “But to support adjudication, this court has required an evidentiary nexus between a parent's fault or habits and the risk for harm to the child. See *In re Interest of Justine J. et al.*, supra.” The court determined that “...without additional evidence of the **actual or potential effects** of the domestic violence on Lilly and Vincent, there is insufficient evidence in the record to find that they were placed at risk for harm by Kenny's actions. Therefore, we conclude that the juvenile

court erred in finding sufficient evidence that the children were at risk for harm due to any faults or habits of Kenny and that it erred in adjudicating the children on that basis.” While the State need not prove that a child has actually suffered physical harm, Nebraska case law is clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm. *In re Interest of Lilly S. & Vincent S.*, supra. In the present case, the Appellee’s drug use and the mere fact that the Appellee could revoke the temporary delegation of parental power is not enough to show a nexus to risk of harm where there was a safety plan in place, the Appellee has made appropriate decisions despite her drug use, and there was no evidence of any prior attempts by the Appellee to remove Ashton and Savannah from Tina’s care, and thus making it unlikely that she would have attempted to remove Jeremy from Carolina’s care. Neither Ashton or Savannah observed or were in the vicinity of the Appellee’s drug use, and there was no evidence presented by the state showing that Ashton and Savannah were subject to some residual effects of that drug use. Finally, there was no evidence that Jeremy was physically affected by the mother’s drug use.

Ultimately, the state’s sole witness testified that in her opinion the children were not at risk for harm due to the foregoing. As the court found, “in the end, the State is essentially asking the Court to not believe their severe witness as to risk of harm” (T25). In fact, the state concedes in its own brief that “Ms. Gardner chose to place her children with others, and the risk and safety concerns **were eliminated...**”

Therefore, the Appellee respectfully requests this Court uphold the juvenile court’s order to dismissing this matter.

CONCLUSION

The juvenile court did not did not err when it found that the appellee's use of controlled substances did not place the juvenile at risk of harm due to insufficient evidence. For the foregoing reasons, Appellee respectfully prays that the Court of Appeals for the State of Nebraska affirm the lower court's order from the February 14, 2019 adjudication hearing, dismissing this matter due to insufficient evidence to prove risk of harm and terminating jurisdiction.

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BASIS OF JURISDICTION

The jurisdiction of this Court is invoked per statutes, which provide in relevant part that, “[a]ny final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from the district court to the Court of Appeals. The

appellate court shall conduct its review in an expedited manner and shall render the judgment and write its opinion, if any, as speedily as possible.” *Neb. Rev. Stat. § 43-2,106.01* (R.S. Supp. 2014). Pursuant to *Neb. Rev. Stat. § 43-2,106.01*, in order for the Court of Appeals to acquire jurisdiction, it must first be established that the order from the juvenile court is a final order. *Neb. Rev. Stat. § 25-1902* provides a definition for final orders, which may be vacated, modified or reversed by the Court of Appeals. *Neb. Rev. Stat. § 25-1902* states that a final order must be one of the following three types: (1) an order affecting a substantial right in an action, when such an order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding; or (3) an order affecting a substantial right upon a summary application in an action after judgment. *Neb. Rev. Stat. § 25-1902*. A juvenile court proceeding is a "special proceeding" for appellate purposes. To be appealable, the order in the special proceeding must affect a substantial right. It is well settled that a judicial determination made following adjudication in a special proceeding which affects the substantial rights of parents to raise their children is a final, appealable order. *In re Interest of Tabatha R.*, 255 Neb. 818 (1998). The Juvenile Court of Douglas County order of February 19, 2019, from which this appeal is taken, is a final order affecting a substantial right of a party and the state’s notice of intention to appeal was filed February 28, 2019 thus conferring jurisdiction upon the Appellate Court. The Appellee files her Cross-Appeal.

STATEMENT OF THE CASE

A. Nature of the Case

The Nature of the Case as cited in Appellee’s brief is incorporated herein by reference.

B. Issues Decided by the Separate Juvenile Court of Douglas County:

The Issues Decided by the Separate Juvenile Court of Douglas County as cited in Appellee's brief is incorporated herein by reference

C. How the Issues Were Decided by the Separate Juvenile Court of Douglas County:

How the Issues Were Decided by the Separate Juvenile Court of Douglas County as cited in Appellee's brief is incorporated herein by reference

D. Scope of Review:

Scope of Review as cited in Appellee's brief is incorporated herein by reference

ASSIGNMENT OF ERRORS

I.

THE JUVENILE COURT ERRED WHEN IT FOUND THAT THE JURISDICTION OF THE COURT IN THIS MATTER ARE PROPER.

II.

THE JUVENILE COURT ERRED WHEN IT FOUND THAT THE APPELLEE HAD NOT SEEN HER CHILDREN, ASHTON AND SAVANAH, FOR TWO YEARS.

III.

THE JUVENILE COURT ERRED WHEN IT FOUND THAT THE ALLEGATIONS THAT THE APPELLEE HAD FAILED TO PROVIDE HER CHILDREN WITH PROPER PARENTAL CARE, SUPPORT, SUPERVISION AND/OR PROTECTION AND THAT THE APPELLEE HAD FAILED TO PROVIDE HER CHILDREN WITH SAFE, STABLE HOUSING (COUNT I B AND C OF THE PETITION) DUE TO HER FACTS OR HABITS WERE TRUE BY A PERPONDERANCE OF THE EVIDENCE.

PROPOSITIONS OF LAW

I. AN APPELLATE COURT HAS THE POWER AND DUTY TO DETERMINE WHETHER THE APPELLATE COURT HAS JURISDICTION OVER THE MATTER BEFORE IT WHEN LACK OF JURISDICTION IS APPARENT ON THE FACE OF THE RECORD, YET THE PARTIES FAIL TO RAISE IT, IT IS THE DUTY OF A REVIEWING COURT TO RAISE AND DETERMINE THE ISSUE OF JURISDICTION SUA SPONTE. *In re Interest of Joeylann H.*, 6 Neb.App. 472, 574 N.W.2d 185, (1998) citing *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996).

II. WHERE THE COURT FROM WHICH AN APPEAL WAS TAKEN LACKED JURISDICTION, THE APPELLATE COURT ACQUIRES NO JURISDICTION. *In re Interest of Joshua M.*, 4 Neb.App. 659, 548 N.W.2d 348, (1996)

III. IT IS WELL ESTABLISHED THAT WHILE THE STATE NEED NOT PROVE A CHILD HAS ACTUALLY SUFFERED PHYSICAL HARM, NEBRASKA CASE LAW IS CLEAR THAT AT A MINIMUM, THE STATE MUST ESTABLISH THAT WITHOUT INTERVENTION, THERE IS A DEFINITE RISK OF FUTURE HARM AND TO PROVE SUCH ALLEGATIONS BY A PREPONDERANCE OF THE EVIDENCE. *In re Interest of Justine J.*, 286 Neb. 250, 835 N.W.2d 674 (Neb. 2013) and *In re Lilly S.*, 298 Neb. 306, 903 N.W.2d 651, (2017)

STATEMENT OF FACTS

The Statement of Facts, including the procedural and factual history, as cited in Appellee's brief is incorporated herein by reference.

SUMMARY OF ARGUMENTS

The juvenile court erred in finding that it has jurisdiction over this matter where the state failed to offer evidence showing that the alleged events occurred in Douglas County, Nebraska. The juvenile court also erred in finding that the Appellee has failed to see her children, Ashton and Savannah, for two years absent evidence showing this fact. And the juvenile court erred in finding that the Appellee dismissing the father's motion for custody and relieving the NDHHS of any further responsibility. In addition, the juvenile court erred in finding that the Appellee failed to provide her children with proper parental care, support, supervision and/or protection and failed to provide safe, stable housing by preponderance of the evidence where the Appellee had placed her children, Ashton and Savannah, with her parents for their care and made arrangements for the care of Jeremy with a family friend.

ARGUMENT

I.

THE JUVENILE COURT ERRED WHEN IT FOUND THAT THE JURISDICTION OF THE COURT IN THIS MATTER ARE PROPER.

An appellate court has the power and duty to determine whether the appellate court has jurisdiction over the matter before it. When lack of jurisdiction is apparent on the face of the record, yet the parties fail to raise it, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte. In *re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996), see also, *In re Interest of Joeylann H.*, 6 Neb.App. 472, 574 N.W.2d 185, (1998). Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *In re Interest of Joshua M.*, 4 Neb.App. 659, 548 N.W.2d 348, (1996)

The juvenile court did not have jurisdiction because there was a no evidence presented at the time of the trial that any of the acts or events alleged in the state's petition occurred in Douglas County, NE. Ms. Christensen testified that she saw Jeremy and interviewed the Appellee the day of or the next day of Jeremy's birth in October 2018 and visited Ashton and Savannah at the hospital (51:15-20, 66:8-25, 69:19-21) prior to the removal. However, when asked on direct examination by the state as to what hospital she was at, Ms. Christensen testified that she did not recall which hospital (51:7-8). Ms. Christensen did not testify as to what county or state that the hospital was located in. Further, Ms. Christensen testified that she subsequently went to Tina Gardner's home where Ashton and Savannah resided and observed the condition of the home (70:12-15, 71:7-20, 73:10-24, 74:14-16). However, Ms. Christensen did not testify as to what county or state that Tina's home, where Savannah and Ashton resided, was located in. There was simply no evidence presented by the state during the trial as to where the alleged incidents in its petition occurred, and without that evidence, the court cannot find that it has jurisdiction in this matter.

II.

THE JUVENILE COURT ERRED WHEN IT FOUND THAT THE APPELLEE HAD NOT SEEN HER CHILDREN, ASHTON AND SAVANAH, FOR TWO YEARS.

The juvenile court found that the Appellee had not seen her children, Ashton and Savanah, for two years. However, there was no evidence presented at the trial showing that the Appellee had not seen or visited Ashton and Savanah for two years or any length of time. Ms. Christensen's testimony at trial was that Ashton and Savanah had resided with Tina with Appellee's permission, for approximately 2-3 years prior to the state filing its petition (62:16-18;

67:1-4; 92:21-24; 92:25; 93:1-7; 93:17-19) but does not include any evidence regarding whether there was contact or not during that period of time.

III.

THE JUVENILE COURT ERRED WHEN IT FOUND THAT THE ALLEGATIONS THAT THE APPELLEE HAD FAILED TO PROVIDE HER CHILDREN WITH PROPER PARENTAL CARE, SUPPORT, SUPERVISION AND/OR PROTECTION AND THAT THE APPELLEE HAD FAILED TO PROVIDE HER CHILDREN WITH SAFE, STABLE HOUSING (COUNT I B AND C OF THE PETITION) DUE TO HER FAULTS OR HABITS WERE TRUE BY A PERPONDERANCE OF THE EVIDENCE.

The juvenile court erroneously found that the allegations that the Appellee had failed to provide her children with proper parental care, support, supervision and/or protection and that Appellee had failed to provide her children with safe, stable housing (Count I B and C of the Petition) due to her faults or habits were true by a preponderance of the evidence (T25). The evidence presented at the trial demonstrated that the Appellee did, in fact, provide Ashton and Savannah with appropriate housing and proper parental care, support, and supervision, by leaving Ashton and Savannah with Tina and by authorizing her to care for Ashton and Savannah, and by arranging for and authorizing Carolina to care for Jeremy, the Appellee has provided Jeremy with appropriate housing and proper parental care, support, and supervision (76:3-15, 77:1-25, 78:4-16, 78:17-18, 79:1-15, 80:11-16, 80:20-22; 81:5-11, 82:2-9, 84:5-7, 82:10-12).

While the State need not prove that a child has actually suffered physical harm, Nebraska case law is clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm. *In re Interest of Justine J.*, 286 Neb. 250, 835 N.W.2d 674 (Neb. 2013), see also *In re Interest of Lilly S. & Vincent S.*, 298 Neb. 306, 903 N.W.2d 651, (2017),

The evidence adduced from Ms. Christensen was that the grandparents provided a safe environment for Ashton and Savannah, with no concerns regarding the home that they resided in (72:23-24), that the children had bedrooms, the home was clean and the kitchen well stocked with food, and that Tina and Christopher were providing food, clothes and living accommodations without any type of subsidy assistance (70:12-15; 71:7-20, 73:10-24, 74:14-16, 93:13-16), and that the children were observed to be well cared for, appropriately dressed and in good health (71:18-25; 72:1), and Ms. Christensen observed Ashton and Savannah to be comfortable with Tina and Christopher, and appeared to be developmentally on track for their age (72:12-16). In addition, in this case, the Appellee agreed to and signed a safety plan and a temporary delegation of parental authority form allowing Tina to continue caring for Ashton and Savannah while she sought drug treatment, effectively reducing any future risk of harm (76:3-15, 77:1-25, 78:4-16, 78:17-18, 79:1-15, 80:11-16, 80:20-22; 81:5-11, 82:2-9, 84:5-7, 82:10-12). In regards to Jeremy, as with Ashton and Savannah, Appellee agreed to and signed a safety plan and a temporary delegation of parental authority form allowing her family friend, Carolina, to continue caring for Jeremy while Appellee sought drug treatment, effectively reducing any definite future risk of harm (76:3-15, 77:1-25, 78:4-16, 78:17-18, 79:1-15, 80:1-10; 80:17-19; 80:23-25; 81:1-4, 82:2-9, 84:5-7, 82:10-12). Because the Appellee made arrangements for Ashton and Savannah, as well as Jeremy, to have appropriate housing, care, support, and supervision, the state failed to prove that the children were neglected. There was also no evidence presented by the state showing that the mother failed to provide any care, support, and supervision to Ashton and Savannah while they resided with their grandparents. Finally, there was no evidence presented by the state showing that Jeremy had drugs in his system or was affected in any way due to the Appellee's drug use. This case is same or very similar to **In re**

Interest of Justine J., 286 Neb. 250, 835 N.W.2d 674 (Neb. 2013), wherein the court determine that there was not sufficient evidence to adjudicate two children that resided with their grandparents, were cared for, and where provided a safe environment. The court also determined that because of the children's living situation, the state was unable to show by a preponderance of the evidence an evidentiary nexus between the neglect suffered by the children that were in the parents care and the children that were residing with their grandparents. In the present case, there was insufficient evidence to adjudicate Ashton and Savannah because they lived with there grandparents, there was insufficient evidence to adjudicate Jeremy because there is not evidence regarding the affect drugs had on his system and because of the arrangements made by the Appellee for his continued care, and finally there was insufficient evidence to draw a nexus between Jeremy's condition at birth and Ashton and Savannah who resided with their grandparents.

CONCLUSION

The juvenile court erred in finding that it has jurisdiction over this matter where the state failed to offer evidence showing that the alleged events occurred in Douglas County, Nebraska. The juvenile court also erred in finding that the Appellee has failed to see her children, Ashton and Savannah, for two years absent evidence showing this fact. And the juvenile court erred in finding that the Appellee dismissing the father's motion for custody and relieving the NDHHS of any further responsibility. In addition, the juvenile court erred in finding that the Appellee failed to provide her children with proper parental care, support, supervision and/or protection and failed to provide safe, stable housing by preponderance of the evidence where the Appellee had placed her children, Ashton and Savannah, with her parents and made arrangements for the care of Jeremy with a family friend. For the foregoing reasons, Appellee respectfully prays that the

Court of Appeals for the State of Nebraska affirm the lower court's order from the February 14, 2019 adjudication hearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the **28th day of July 2019**, a true and correct copy of the above foregoing Appellee's Brief and Appellee's Brief On Cross-Appeal was sent by electronic delivery/email to: Tony Hernandez, deputy county attorney, tony.hernandez@douglascounty-ne.gov; Jamie Cooper, guardian ad litem, jamie@johnsonpeknylaw.com; and Jerri James, HHS attorney, Jeri.James@nebraska.gov; Jacki Barfield, attorney for father, Jbarlaw@aol.com.

/s/Reginald Young

Reginald Young, Attorney

Certificate of Service

I hereby certify that on Sunday, July 28, 2019 I provided a true and correct copy of this *Brief of Appellee TiffaWith Cross Appeal* to the following:

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