

Case No. A 19-215

IN THE NEBRASKA COURT OF APPEALS

IN THE INTEREST OF JEREMY U.

Child Under Eighteen Years of Age

APPEAL FROM THE SEPARATE JUVENILE COURT
FOR DOUGLAS COUNTY, NEBRASKA

Honorable Chad Brown
Juvenile Court Judge

BRIEF OF APPELLANT

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STATEMENT OF THE BASIS OF APPELLATE COURT 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 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 notice of intention to appeal was filed February 28, 2019 thus conferring jurisdiction upon the Appellate Court.

STATEMENT OF THE CASE

Nature of the Case:

Jeremy U. (hereinafter “Jeremy”), Ashton M. (hereinafter “Ashton”), and Savannah M. (hereinafter “Savannah”) are children under eighteen years of age. Tiffany Gardner (hereinafter “Ms. Gardner”) is the mother of each child.

On October 30, 2018, the Separate Juvenile Court for Douglas County, Nebraska, before the Honorable Christopher E. Kelly, began the proceedings with a first appearance and protective custody detention hearing. (5:12-16) At this first appearance, the State of Nebraska (hereinafter “the State”) asked for continued protective custody to exclude the mother’s home. (9: 12-16)

On November 21, 2018, the continued protective custody hearing was held in the Separate Juvenile Court for Douglas County, Nebraska, before the Honorable Chad Brown. (16: 17-21) At this continued protective custody hearing, the State asked for continued protective custody. (19:19-22) The court found that exigent circumstances existed and concluded that Ashton and Savannah be placed in the temporary custody of the Department of Health and Human Services, placement to exclude Ms. Gardner’s home. (20:13-18)

On December 7, 2018, the same court began proceedings on a motion to continue the adjudication hearing. (29:17-19) At this hearing, Ms. Gardner chose to renege her prior decision to plead nolo contendere and instead have the allegations adjudicated. (29:20-25; 30:1-3)

On February 11, 2019, the Honorable Chad Brown again began proceedings upon the motion of Ms. Gardner’s motion for a formal pretrial hearing. (35:22-25) The court scheduled the formal adjudicative proceeding for February 14, 2019.

On February 14, 2019, held in the same courtroom, the formal adjudicative proceeding began. The State called Kelci Christensen and Maranda Buckley as witnesses. After both of these

witness' testimony, the juvenile court found that there was insufficient evidence to support a finding that the juveniles came within *Neb. Rev. Stat. § 43-247(3)(a)* due to Ms. Gardner's use of alcohol and/or controlled substances [did not] place said juveniles at risk for harm, and, Mr. Medina had not failed to provide said juveniles with safe, stable housing. (Petition: A, C, D) The State now appeals the juvenile court's dismissal of the Petition.

The Issues Tried to the Court:

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 Ms. Gardner and Mr. Medina were concerned.

How Issues Were Decided:

The juvenile court found that there was insufficient evidence to support a finding that the juveniles came within the meaning of *Neb. Rev. Stat. §43-247(3)(a)*, stating that the evidence did not support a finding that the children were at risk of harm due to Ms. Gardner's use of alcohol and/or controlled substances. Specifically, the juvenile court found the following not true by a preponderance of the evidence: 1) Ms. Gardner's use of alcohol and/or controlled substances placed the juveniles at risk of harm; due to the allegation, the juveniles were at risk for harm; 2) Mr. Medina failed to provide Savannah with safe, stable housing. (Petition: A, C, D). The juvenile court did find the following true by a preponderance of the evidence: 1) Ms. Gardner failed to provide the juveniles with proper parental care, support, supervision, and/or protection, and Ms. Gardner failed to provide the juveniles with safe, stable housing; 2) Mr. Medina's use of alcohol and/or controlled substances placed Savannah at risk for harm and; due to the allegation, Savannah was at risk for harm. (Petition: A, B, C, D) The juvenile court dismissed the State's petition for a lack of evidence.

Scope of Review:

Juvenile cases are reviewed *de novo* on the record, and the Appellate Court is required to reach a conclusion independent of the juvenile court’s findings. *In re Interest of Michael R.*, 11 Neb. App. 903, 662 N.W.2d 632 (2003). However when the evidence is in conflict, the Appellate Court will consider and give weight to the fact the lower court observed the witnesses and accepted one version of the facts over the other. *Id.* In reviewing questions of law arising under the Nebraska Juvenile Code, an Appellate Court must reach conclusions independent of the lower court’s ruling. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672.

ASSIGNMENT OF ERRORS

I.

The Separate Juvenile Court of Douglas County erred when it found that Ms. Gardner’s use of controlled substances did not place the juveniles at risk of harm due to insufficient evidence.

II.

The Separate Juvenile Court of Douglas County erred when it found that Mr. Medina did not fail to provide Savannah M. with safe, stable housing.

PROPOSITIONS OF LAW

I.

The juvenile court in each county shall have jurisdiction of: (3) Any juvenile (a) who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian. *Neb. Rev. Stat. § 43-247(3)(a)(3).*

II.

The purpose of the adjudication phase is to protect the interests of the child. *In re Laticia S.*, 21 Neb. App. 921, 844 N.W.2d 841 (2014).

III.

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.*, 286 Neb. 250, 835 N.W.2d 674 (2013).

IV.

If evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused. *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992).

V.

Because the court is not required to wait for disaster, “identifying specific evidence of harm or risk of harm is unnecessary.” *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998).

VI.

It is not the intent or purpose of the juvenile code to require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction. If it is reasonable to assume that injury will occur absent action by the court, then the court may assume jurisdiction and act accordingly. *In re Interest of W.C.O.*, 220 Neb. 417, 370 N.W.2d 151 (1985).

VII.

The finder of fact may draw reasonable inferences from the facts and circumstances proved. *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995).

VIII.

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. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013).

IX.

Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

X.

Parents who use hard drugs may be unable to meet even the basic needs of their children...[because] hard drugs can lead to erratic behavior that places the safety and well-being of their children at risk. For example, the immediate effects of...methamphetamines include[s] hyperstimulation and an amplified sense of euphoria. *In re Carrdale H. II*, 18 Neb. App. 350 (dissent)

XI.

“Abandonment” for the purpose of § 43-292 (1), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of J.L.M.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

STATEMENT OF FACTS

Procedural History:

On October 22, 2018, the State filed a Petition alleging Jeremy, Ashton, and Savannah came within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)(3)* in that the children lacked proper parental care by reason of the faults or habits of Ms. Gardner, their mother, because of her use of controlled substances placed the juveniles at risk for harm; Ms. Gardner failed to provide said juveniles with proper parental care, support, supervision, and/or protection; Ms. Gardner failed to

provide the children with safe, stable housing; and due to those allegations, the children were at risk for harm.

On October 30, 2018, the Separate Juvenile Court for Douglas County, Nebraska, before the Honorable Christopher E. Kelly, began the proceedings with a first appearance and protective custody detention hearing. (5:12-16) At this first appearance, the State of Nebraska (hereinafter “the State”) asked for continued protective custody of all three children to exclude the mother’s home. (9: 12-16) The motion could not be decided that day so the proceeding was continued to the Honorable Chad Brown at a later date. (11:22-25)

On November 21, 2018, the continued protective custody hearing was held in the Separate Juvenile Court for Douglas County, Nebraska, before the Honorable Chad Brown. (16: 17-21) At this continued protective custody hearing, the State asked for continued protective custody. (19:19-22) Referring to Exhibit No. 1, the court found that exigent circumstances existed and concluded that Ashton and Savannah be placed in the temporary custody of the Department of Health and Human Services, placement to exclude Ms. Gardner’s home. (20:13-18) On December 7, 2018, the same court began proceedings on a motion to continue the adjudication hearing. (29:17-19) At this hearing, Ms. Gardner chose to renege her prior decision to plead nolo contendere and instead to have the allegations adjudicated. (29:20-25; 30:1-3)

On February 11, 2019, the Honorable Chad Brown again began proceedings upon the motion of Ms. Gardner’s motion for formal pretrial hearing. (35:22-25) At this proceeding, the court scheduled the formal adjudicative proceeding for February 14, 2019.

On February 14, 2019, held in the same courtroom, the formal adjudicative proceeding began. The State called Kelci Christensen and Maranda Buckley as witnesses. After both of these witness’ testimony, the juvenile court found that there was insufficient evidence to support a

finding that the juveniles came within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)*, specifically, there was insufficient evidence to show that Ms. Gardner's use of controlled substances place[d] said juveniles at risk for harm, and, Mr. Medina had not failed to provide said juveniles with safe, stable housing. (Petition: A, C, D) Specifically, the juvenile court found the following not true by a preponderance of the evidence: 1) Ms. Gardner's use of alcohol and/or controlled substances placed the juveniles at risk of harm; due to the allegation, the juveniles were at risk for harm; 2) Mr. Medina failed to provide Savannah with safe, stable housing. (Petition: A, C, D). The juvenile court did find the following true by a preponderance of the evidence: 1) Ms. Gardner failed to provide the juveniles with proper parental care, support, supervision, and/or protection, and Ms. Gardner failed to provide the juveniles with safe, stable housing; 2) Mr. Medina's use of alcohol and/or controlled substances placed Savannah at risk for harm and; due to the allegation, Savannah was at risk for harm. (Petition: A, B, C, D) The juvenile court dismissed the State's petition for a lack of evidence.

Factual History:

The adjudication hearing regarding the State's petition affecting Ms. Gardner was held on February 14, 2019. The State called Kelci Christensen (hereinafter "Christensen") as the first witness. (44:23-24) Christensen stated that she was at that time an employee at Omni Inventive Care, but before that, she was a Child and Family Services Specialist at the Department of Health and Human Services (hereinafter "DHHS"). (45:15-22) Christensen stated that prior to her employment at Omni Inventive Care, which began on November 29, 2018, she had worked at DHHS for a little over a year, beginning in September of 2017. (45:23-25; 46:1-4) Christensen stated she received forty hours of training a week for four months as a child family specialist, beginning at the commencement of her employment and continued to have ongoing training

accumulating to twenty-four hours after the initial four months of training. (46:5-19; 57:21-23) She stated the topics covered in her initial training she received regarded child trauma, child abuse and neglect, domestic violence, sexual abuse, and a significant amount of training dealing with drug abuse. (46:20-25; 47:1) Christensen further testified that regarding drug usage, specifically with respect to the use of methamphetamine, she received training about how drugs affect the body, children, newborn children, and signs and symptoms of how to determine whether a person is using drugs. (47:7-11; 15-17) As a result of this training, Christensen testified that she was able to determine when a child is at risk for harm. (47: 21-25) In conjunction with Christensen's duties as an initial assessment worker, she determined the risk of harm with which children are faced when there is a call made to the DHHS' hotline concerning potential child abuse or neglect. (48:23-25; 49:1-11) Christensen testified that when she investigated allegations made to the hotline, she formed opinions and concluded whether children were at risk for harm by looking at factors such as child vulnerabilities, age of the children, disabilities, parental abilities, parental disabilities, drug usage, and the living arrangements of the child. (49:12-24)

Christensen stated she received an intake regarding Ms. Gardner because she had just given birth to a son with methamphetamine in her system. (50:4-20) During her investigation, Christensen learned from Ms. Gardner herself that the latter had used methamphetamine almost daily for thirteen years, including within the week of her son's birth. (52:21-23; 54:14-17; 55:6-10) Testifying to there being a spectrum of drug use that causes concerns about a parent's ability to parent, Christensen stated that a parent under the influence of methamphetamine cannot appropriately parent due to the inebriation and manic state the drug causes, and those who are under the influence of methamphetamine often make inappropriate decisions. (59:4-6; 60:9-14;

17-19) Christensen stated that Ms. Gardner had legal custody of all three of her children, thus categorizing the children as vulnerable children in Ms. Gardner's custody, albeit legal custody. (62:2-5; 16-19) When asked by the State whether Christensen formed an opinion that the children would be at a risk for harm in Ms. Gardner's custody, Christensen answered in the affirmative due to Ms. Gardner's drug use and Ms. Gardner's own admission that she believed her newborn son, Jeremy, would test positive for methamphetamine. (63:21-25; 65:1-5)

On cross-examination, Christensen testified about the Temporary Delegation of Parental Powers Form, stating that they are forms which allow a parent to designate another person to temporarily care for the parent's children. (79:20-23; 82:10-12) Christensen stated that Ms. Gardner found someone to care for her son because Ms. Gardner knew that she would be unable to properly care for her newborn son due to her drug use. (68:15-20) Furthermore, on cross examination, Christensen testified that, at least to one of Ms. Gardner's children, the grandmother had cared for Savannah for two to three years, long enough that Ms. Gardner "would [have] fe[lt] guilty if she just were to uproot them out of her – Tina's care." (93:2-7) On redirect examination, and with no statutory knowledge, Christensen stated that a parent can revoke the temporary delegation of parental powers whenever the parent chooses to do so, and the person holding the temporary delegation has no legal recourse to cease the parent taking the child. (96:7-8; 97:1-6) The State connected the freely revocable nature of the delegation with Ms. Gardner's methamphetamine use reiterating Christensen's testimony stating that persons under the influence of methamphetamine do not make appropriate decisions and a fourteen-year use of methamphetamine is categorized as a severe category. (97:8-11; 98:3-17) Christensen stated that the potential act of a methamphetamine-induced parent taking their child from one holding temporary delegation of powers is an example of risk. (100:4-6)

The State also called as a witness, Maranda Buckley. (hereinafter “Buckley”) Buckley, a PromiseShip employee since January 2, 2018, described her training on how to complete structured decision making, risk assessments, safety assessments, drug addictions, child wellbeing and child safety. (108:12-20) Buckley testified that as a part of her duties, she looks for certain factors determining the safety and risk children face, specifically, whether parents can take placement of the children, whether parents can properly care for them, and whether parents can meet the children’s needs. (109:2-10) Buckley, who was on Savannah’s case, was familiar with Mr. Medina and stated, in her opinion, referring to the affidavit she made and signed, Savannah would be at risk of harm if placed with Mr. Medina because he did not have a house, did not have income, and would therefore be unable to meet the needs of Savannah. (109:11-18; 113:4-17) Furthermore, referring to her conversations conducted with Mr. Medina, Buckley stated that Mr. Medina barely spoke to his two children and barely saw them. (117:22-25; 118:1-3) Despite informing Buckley that he would accept help to secure custody of his children, Mr. Medina did not attempt to visit the children and had not responded to Buckley’s phone calls or texts. (118:17-25)

SUMMARY OF THE ARGUMENT

The juvenile court erred by finding 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 also erred by finding there was insufficient evidence offered by the State showing Mr. Medina failed to provide his daughter, Savannah, safe and stable housing when he was incarcerated throughout her life, he chose not to enter into any program or receive any assistance from PromiseShip, and he, upon his own

recognizance, chose not to communicate with his daughter. Therefore, the State respectfully requests this Court to vacate the order to dismiss, and remand the case for further review to determine whether the children are within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)*.

ARGUMENT

I.

THE JUVENILE COURT ERRED WHEN IT FOUND THAT MS. GARDNER'S USE OF CONTROLLED SUBSTANCES DID NOT PLACE THE JUVENILES AT RISK OF HARM DUE TO INSUFFICIENT EVIDENCE.

The issue here on appeal is whether the juvenile court erred when it did not find that Ms. Gardner's use of controlled substances led to a risk of harm to the children because Ms. Gardner placed her children in her parents' and a friend's temporary custody according to the Temporary Delegation of Parental Powers. For the reasons stated below, the juvenile court erred when it dismissed the State's argument that the children came within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)*.

The juvenile court in each county shall have jurisdiction of: (3) Any juvenile (a) who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian. *Neb. Rev. Stat. § 43-247(3)(a)(3)*. The purpose of the adjudication phase is to protect the interests of the child. *In re Laticia S.*, 21 Neb. App. 921, 844 N.W.2d 841 (2014). The State need not prove that the child has actually suffered physical harm, but the State must establish that without intervention, there is a definite risk of future harm, and therefore the juvenile court may properly take jurisdiction when evidence of the fault or habits of a parent indicates a risk. *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013); *see also, In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992). It is unnecessary for the State to identify specific evidence of harm or risk of harm, if it reasonable to assume injury absent court

intervention, the court may assume jurisdiction by drawing inferences from facts and circumstances presented.” *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998), *see*, *In re Interest of W.C.O.*, 220 Neb. 417, 370 N.W.2d 151 (1985), *see also*, *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995). The State must show an evidentiary nexus between a parent’s fault or habits and the risk for harm to the child. *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013). Parents who use hard drugs may be unable to meet even the basic needs of their children...[because] hard drugs can lead to erratic behavior that places the safety and well-being of their children at risk. *In re Carrdale H. II*, 18 Neb. App. 350 (dissent) (2010). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity, and a parent cannot intentionally withhold from a child, without just cause or excuse, the parent’s presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008), *see also*, *In re Interest of J.L.M.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

The State clearly proved by a preponderance of the evidence that the children came within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)*. Despite the children’s placement with Ms. Gardner’s parents and friend, the children’s interests are not protected because the children suffered by their mother’s drug use as evidenced by Ms. Gardner’s parents and friend temporarily caring for them and her newborn son’s testing positive for methamphetamine. Christensen testified to both Ms. Gardner admitting her drug use, even within the week of her newborn son’s birth, at the hospital and, because of the continued drug use, the children were cared for by others, not Ms. Gardner, for two to three years. (52:21-23; 54:14-17; 55:6-10; 93:2-7)

Furthermore, the State proved by a preponderance of the evidence that the children came within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)* because a fourteen-year-old habit of daily methamphetamine use indicates a risk to the children because, while the children are under only the temporary and freely revocable protection of the Temporary Delegation of Parental Powers, Ms. Gardner may choose at any point in time, whether sober or under a methamphetamine mania, to retrieve her children and return them to her home. Absent any court action, this reasonable situation can occur. Christensen testified that she would place Ms. Gardner in a severe category of drug use, the temporary delegation of parental powers is freely revocable and there is no legal recourse to impede its revocation, and a methamphetamine-induced parent taking their child from one holding temporary delegation of powers is an example of risk. (96:7-8; 97:1-6; 97:8-11; 98:3-17; 100:4-6).

Lastly, the State proved its case by a preponderance of the evidence because Ms. Gardner has intentionally chosen, for over two years, to continue to use methamphetamine instead of providing her children her presence, care, love, protection, maintenance, and opportunity for the display of affection, a course of conduct evidencing abandonment and compelling the children to await uncertain parental maturity. Christensen testified to Ms. Gardner's use of methamphetamine causing these deleterious effects on the children when she spoke of the children's temporary residences and the newborn son testing positively for methamphetamine. (52:21-23; 54:14-17; 55:6-10; 63:21-25; 65:1-5; 68:15-20; 93:2-7) Ashton, Savannah, and Jeremy have been deprived of their mother's care while being forced to await her uncertain maturity.

The juvenile court failed to accept the State's clearly demonstrated evidentiary nexus when it rejected connecting reasonable inferences from Ms. Gardner's daily fourteen-year use of

methamphetamine, her children's placement in a temporary and freely revocable manner, and, absent court intervention, the children can suffer additional harm by a retrieval, at any time, by a daily methamphetamine-user. In this way, the lower court erred when it referred to *In re Interest of Justine J.* as establishing a bright line rule. In *In re Interest of Justine J.*, the Nebraska Supreme Court found that the State had not proved by a preponderance of the evidence an evidentiary nexus between the neglect suffered by the children and a definite risk of future harm, not that the facts of the case showed the absence of a nexus. 286 Neb. 250 (2013). The court in *Justine J.* referred to cases in which the State failed to establish a nexus with a father's drug use and whether the child was affected in any way by the father's actions, *In re Interest of Carrdale H.*, 18 Neb.App. 350, 781 N.W.2d 622 (2010); with parents' consuming alcohol and impact on the children, *In re Interest of Brianna B. & Shelby B.*, 9 Neb.App. 529, 614 N.W.2d 790 (2000); and a mother's consumption of a nonprescribed morphine pill and effect on the child indicating a definite risk of future harm. *In re Interest of Taeven Z.*, 19 Neb.App. 831, 812 N.W.2d 313 (2012). The court in *Justine J.* concluded that because there was no evidence presented that the children were present during drug use or domestic violence, they did not suffer a risk of future harm. 286 Neb. 250, at 255. What the court in *In re Justine J.* did not take into account, however, was the absence of testimony from the younger children residing with their grandparents. While the two older children testified to the neglectful activities of their parents, the two younger children did not testify to the absence of a relationship or neglect from their parents on account of the drug use. In *State v. Kenny*, the court found the lack of an evidentiary nexus stating that "[h]ere, without additional evidence of the actual or potential effects of the domestic violence on [the children], there is insufficient evidence in the record to find that they were placed at risk for harm by [the father's] actions." 298 Neb. 306 (2017). Here, the (3)(a) adjudication included a

very clear evidentiary nexus: Ms. Gardner’s daily methamphetamine use caused a risk of harm to the children because, without court protective intervention, she is able to, due to the freely revocable nature of the Temporary Delegation of Parental Powers, withdraw her three children from their temporary care and place them back into the home of a daily methamphetamine-user. Furthermore, Ms. Gardner’s newborn son literally suffered a harm by testing positive for methamphetamine. Lastly, *State v. Kenny* referred to “potential effects” as evidencing a risk of harm. In line with that case, the State here has clearly established a reasonably potential risk, and an actual harm, with respect to the children. 298 Neb. 306, (2017). For these reasons, the juvenile court erred.

Furthermore, in the juvenile court’s order, it made findings that Ms. Gardner made a rational decision when she placed the children with others, that Christensen testified that Ms. Gardner eliminated the risk and safety concerns by signing the Safety Plan and TDPR Forms. (Order Findings: 1;17) However, the court also found that Christensen testified that if Ms. Gardner attempted to see, take, or threaten to take the children, then there would be a risk for harm, and also that Ms. Gardner had not seen the children for at least two years. (Order Findings: 3; 20) What the juvenile court failed to adduce is that, although Ms. Gardner chose to place her children with others, and the risk and safety concerns were eliminated, Ms. Gardner could, at any time, due to the freely revocable nature of the Temporary Delegation of Parental Powers, take her children from the temporary caregivers, and thus subject them to harm by her daily drug use. Additionally, the juvenile court did not take into account the fact that the newborn son tested positively for methamphetamine. Furthermore, while the juvenile court found that Ms. Gardner failed to provide the children with proper parental care, support, supervision, and/or protection, and she also failed to provide the children with safe, stable housing, all on account of her drug

use, the juvenile court did not find that Ms. Gardner's use of methamphetamine placed the children at risk for harm. (Order: 1; 3) The issue the juvenile court's order overlooked is the fact that the reason why the court was able to find Count I (B) (C) was due to Ms. Gardner's methamphetamine use. Thus, finding Count I (A) and (D) not proved is to say that (B) and (C) were also not met, which is contrary to the juvenile court's conclusions.

The State furthermore proved by a preponderance of the evidence that the children came within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)* when it posed a hypothetical question to Christensen in which she responded that, as long as the parent, no matter what the parent has previously done, has handed the child to a caregiver, that child is at no risk. (104:6-11) As a consequence of Christensen's logic, it would not matter if the parent has murdered another person, molested that child, attempted to murder that child, or had effectively abandoned that child, as long as the parent has placed that child with an appropriate caregiver under the Temporary Delegation of Parental Powers form, then that child is not at risk. However, Christensen testified that the potential act of a methamphetamine-induced parent taking their child from one holding temporary delegation of powers is an example of risk, thus Christensen contradicted herself. (100:4-6) DHHS' logical fallacy is the same as the juvenile court's: at any time, due to the freely revocable nature of the Temporary Delegation of Parental Powers, the parent in any of the hypothetical situations mentioned above may, at any time, retrieve their children from temporary caregivers and thus subject them to risk of harm.

Given the above stated facts, the lower court erred when it found that Ms. Gardner's use of controlled substances did not place the children at risk of harm due to insufficient evidence.

II.

THE COURT ERRED WHEN IT FOUND THAT MR. MEDINA DID NOT FAIL TO PROVIDE SAVANNAH M. WITH SAFE, STABLE HOUSING.

The second issue here on appeal is whether the juvenile court erred when it did not find that Mr. Medina's use of alcohol led to a risk of harm to the children because Savannah was placed in Ms. Gardner's parents' home according to the Temporary Delegation of Parental Powers. For the reasons stated below, the juvenile court erred when it dismissed the State's argument that Savannah came within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)*.

In *State v. Shawn T.*, the Nebraska Court of Appeals decided *de novo* whether a father's voluntary absence from his daughter, while in the physical custody of a drug addicted mother, constituted a lack of parental care by reason of the fault or habits of the father. 1995 Neb.App. 397. The court of appeals decided that, because the father allowed his daughter to remain in this environment, and because he could not provide assurance of his reliability to adequately supervise her, his fault or habits placed the child at risk for harm. *Id.* In the same manner, Mr. Medina, after his incarceration ended, did not answer Ms. Buckley's calls or texts, did not follow up with her regarding services she offered, nor did Mr. Medina attempt to make any contact at all with his daughter. By allowing his daughter to remain in the temporary custody of Ms. Gardner's parents, Mr. Medina has continued to allow his daughter to be at risk of harm. For this reason, the lower court erred when it found that Mr. Medina did not fail to provide Savannah M. with safe, stable housing.

In the juvenile court's order, it made findings that because the State failed to prove a risk of harm as to Ms. Gardner, a risk of harm as to Mr. Medina also failed, and also that, because Ms. Gardner placed the children with others, the State failed to show a nexus between the father's incarceration and a risk of harm. (Order Findings: 24; 25) What the juvenile court failed

to adduce is that, although Ms. Gardner chose to place her children with others, Ms. Gardner could take her children and subject them to harm by her daily drug use, a reality which Mr. Medina did nothing to remedy. The issue the juvenile court's order overlooked is the fact that the reason why the court was able to find Count I (A) and (B) was due to Mr. Medina's alcohol use. Thus, finding Count I (C) not proved is to say that (A) and (B) were also not met, which is contrary to the juvenile court's conclusions.

For these reasons, the juvenile court erred when it dismissed the State's argument that Savannah came within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)*.

CONCLUSION

For the aforementioned reasons, the Separate Juvenile Court erred in finding Ms. Gardner's use of controlled substances did not place the juveniles at risk of harm due to insufficient evidence, and when it found that Mr. Medina did not fail to provide Savannah M. with safe, stable housing. Thus, the State respectfully requests this Court to vacate the order to dismiss, and remand the case for further review to determine whether the children are within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)*.

Respectfully Submitted,
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Certificate of Service

I hereby certify that on Wednesday, May 29, 2019 I provided a true and correct copy of this *Brief of Appellant State* to the following:

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