IN RE INTEREST OF KENDRA M. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. LISA G., APPELLANT.

814 N.W.2d 747

Filed June 15, 2012. No. S-11-695.

1. **Judges: Recusal: Appeal and Error.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
2. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions 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.
3. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
4. **Judges: Recusal.** Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.
5. **Judges: Recusal: Proof.** In order to demonstrate that a trial judge should have recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
6. **Judges: Recusal: Presumptions.** A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
7. **Parental Rights: Proof.** In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010) exists and that termination is in the child's best interests.
8. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.
9. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court gives statutory language its plain and ordinary meaning.
10. **Parental Rights: Proof.** The fact that a child has been placed outside the home for 15 or more months of the most recent 22 months does not demonstrate parental unfitness.
11. ____: ____. Only one statutory ground for termination need be proved in order for parental rights to be terminated.
12. **Constitutional Law: Parental Rights: Proof.** A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.

13. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.
14. **Child Custody: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
15. **Parental Rights.** The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.

Appeal from the County Court for Merrick County: LINDA S. CASTER SENFF, Judge. Affirmed.

Rachel A. Daugherty, of Myers & Daugherty, P.C., L.L.O., for appellant.

Lynelle Homolka, Merrick County Attorney, for appellee State of Nebraska.

Matthew C. Boyle, of Lauritsen, Brownell, Brostrom & Stehlik, guardian ad litem for appellant.

Jerom E. Janulewicz, of Mayer, Burns, Koenig & Janulewicz, guardian ad litem.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Lisa G., the biological mother of Kendra M., Matthew G., and Katrina G., appeals from an order of the county court for Merrick County, sitting as a juvenile court, terminating her parental rights to the three minor children. Paternal rights are not at issue in this case. We affirm.

BACKGROUND

The facts relevant to the issues in this appeal span a period of several years. Because resolution of the appeal is highly dependent upon these facts, we recount them in some detail.

Family Members and Relationships

Lisa has given birth to eight children, including two sets of twins. Her first children, twin girls, were born in July 1994. Kendra was born in March 1996, Matthew in June 1998, and Katrina in September 1999.

In October 2008, Lisa gave birth to another set of twin girls, Dakota S. and Destiny S., and her son Johnathan F. was born in October 2010. Mark F. is Johnathan's father and Lisa's current boyfriend. Dakota, Destiny, and Johnathan reside with Mark and Lisa, and Lisa's parental rights with respect to those three children are not at issue in this case.

Lisa's mother is Paula B. At all relevant times, Robert L. was Paula's boyfriend. Teresa R. and Gregory R. (Greg) are the court-appointed guardians of Kendra, Matthew, and Katrina.

Lisa's History With Nebraska Department of Health and Human Services

The twin girls born in 1994 were twice hospitalized in the months following their births. Lisa's visits to the hospital were minimal, and she showed little interest in the twins. Petitions to adjudicate each twin based on Lisa's neglect were filed in Red Willow County, Nebraska, in November 1994. Lisa failed to make progress on her case plan, and her parental rights to the twins were terminated in August 1998. The order terminating Lisa's parental rights was appealed and affirmed by this court.[1]

In November 1998, when Matthew was nearly 5 months old and Kendra was 2 years old, the Nebraska Department of Health and Human Services (DHHS) received a report regarding the condition of Lisa's home. An investigation revealed that the home contained dog excrement and was filled with junk. The home's source of heat was an unguarded stove that presented a burn hazard to the children. Lisa cleaned the home, but the stove remained unguarded. Lisa thereafter refused to let DHHS officials into her home.

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[1] *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999).

Due to ongoing concerns with the condition of the home, Lisa's lack of cooperation with DHHS, and Kendra's slow development, a juvenile petition with respect to Kendra and Matthew was filed in Clay County, Nebraska, in January 1999. The children were adjudicated in March and placed in the legal custody of DHHS but remained in Lisa's care.

In June 1999, Lisa reported suspicions that Kendra, then 3 years old, had been sexually molested. Lisa reported that in mid-January, Kendra began stripping herself and acting out sexually following a night she spent with Paula and Robert. Kendra apparently said, "'Bob did it.'" Robert was charged with sexual assault, but the case was later dismissed. Robert was a registered sex offender, and Lisa had been warned by several parties prior to this time not to leave the children alone with him. The juvenile case filed in January 1999 was dismissed on May 16, 2000. At the time, Lisa was seeing to the children's needs and was employed.

In October 2004, a DHHS employee visited Lisa's home after receiving a report of a red mark under Kendra's eye. Despite Kendra's claim that Paula caused the bruise by intentionally hitting her, the report was closed as unfounded. During the visit, Lisa told the DHHS employee that she and the children were living with Paula and Robert. The employee told Lisa that Robert was a convicted sex offender and that the conviction stemmed from sexually assaulting young boys similar in age to Kendra and Matthew. Lisa allegedly responded by stating that she had no concerns about Robert and felt that Robert was falsely convicted of the crimes. Lisa denied ever saying that Robert was falsely accused, but admitted she knew as of October 2004 that Robert had a sexual assault conviction. Lisa also testified that Robert was not living with her in October 2004 and that although Paula moved in with her at a later date, she did not allow Robert to also live with her and the children.

Adjudication of Kendra, Matthew, and Katrina

On February 15, 2005, Lisa went to a community agency seeking relocation assistance and reported that Robert had

sexually assaulted the children. Lisa reported that a few days earlier, she had heard Robert hit Matthew and then take him into the bathroom. She heard Matthew screaming "'stop'" and "'no.'" At the same time, Paula was physically assaulting Kendra and Lisa was trying to stop that assault. Lisa reported that when Matthew came out of the bathroom, he was pulling up his pants. Lisa further reported that she left the children alone with Paula and Robert following this incident, but she later denied doing so.

Following Lisa's report, the children were interviewed. Kendra and Matthew disclosed physical and sexual abuse, and Katrina disclosed physical abuse. Paula and Robert were each charged with sexual assault of a child and felony child abuse. Robert entered a plea of no contest to the felony child abuse charge, for which he was sentenced to 4 to 5 years' imprisonment. Paula pled no contest to misdemeanor child abuse and was sentenced to 75 days' imprisonment.

The three children were removed from Lisa's care on February 16, 2005. The petition which commenced this proceeding was filed on February 23 and alleged that Kendra, Matthew, and Katrina were juveniles as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), because they lacked proper parental care. The children have not resided with Lisa since February 16.

Case Plans and Lisa's Progress Prior to Guardianship Placement

Following the children's February 2005 adjudication and removal, several case plans with a permanency objective of reunification were adopted. The case plans required Lisa to schedule and complete a psychological evaluation, to seek out medical or psychiatric help to determine if she needed antidepressant medication, and to participate in individual counseling. The case plans further required Lisa to maintain regular contact with the case manager, to complete a multiweek parenting class, to participate in supervised visits with the children, to demonstrate age-appropriate parenting and activities, to not associate with any person with a current criminal record or a past record of violent or sexual crimes, and to schedule and

complete a parenting assessment. Lisa was also required to maintain gainful employment and an appropriate residence, to not reside with other adults, and to make and maintain a budget. As of March 3, 2006, Lisa was substantially complying with all of these requirements.

But by September 25, 2006, Lisa's progress had declined. Sometime between March 3 and September 25, Lisa stole $750 from a neighbor, while the children were watching, during an unsupervised visit. During this time, Lisa also sent the children to neighbors' homes to ask for money and cigarettes during unsupervised visits. These incidents caused Lisa to lose her weekly, unsupervised visits. She was also convicted of theft and sentenced to 2 years' probation for stealing the $750, and lost her job as a result of her arrest. By May, Lisa was unable to pay rent, and she moved into a shelter. She left in August, against the advice of professionals, and moved in with a man who had twice been convicted of domestic assault and had protection orders against him from two different women. During this time period, Lisa was having difficulty following budget advice and had taken on obligations she could not afford.

Lisa found employment on November 20, 2006, but was unable to work regularly due to an arm injury, and her employment was terminated on January 21, 2007. Lisa was employed again for a 1-week period in May, but as of July 16, she had not found other employment.

In September 2006, Lisa moved into a motel with a man who was on probation for driving under the influence, third offense. She lived with him until January 2007, when he was jailed for a probation violation. Lisa then moved into a shelter, where she resided until she moved into an apartment in June. She received assistance for June and July rent from DHHS and other agencies.

In a court report dated July 16, 2007, DHHS recommended termination of Lisa's parental rights, based upon the extensive services it had provided, Lisa's lack of progress, and the children's 29-month out-of-home placement. The report explained that Lisa was given every possible service in and out of her community and that she was no closer

to providing a safe, stable home for her family than when the case was opened. Those services included assistance in obtaining employment, visitation services, gas vouchers, motel vouchers, referrals to community agencies, counseling, and psychological evaluations. In July 2007, the court found that Lisa had not followed the case plan, but did not order any specific disposition.

In October 2007, Lisa began "helping out a neighbor . . . with rides," but stopped when she learned that he was on "'furlough.'" The neighbor had an extensive criminal history which included drug offenses, burglary, assault, receiving stolen property, and possession of a deadly weapon by a felon. Lisa had begun another job in late July 2007, but was dismissed in December for not being available to work, not showing up for scheduled shifts, and demanding too much time off. Lisa moved to a mobile home in Chapman, Nebraska, in October 2007, but by January 2008, she was behind on rent and utility bills, and she was evicted.

In January 2008, the children's therapist wrote a letter to the court addressing the potential termination of parental rights. The therapist opined that if Lisa's rights were terminated, the children would be devastated and their progress would be disrupted. The therapist noted the children had a strong bond with Lisa and opined that termination was not in their best interests.

The court did not terminate Lisa's parental rights in 2008, but did change the permanency objective from reunification to guardianship. Teresa and Greg were proposed as guardians, and in February 2008, the children began transitioning from foster care into Teresa and Greg's home. Lisa was advised to "step back" to allow the children to bond with Teresa and Greg. But visits between Lisa and the children were scheduled during the transitional period, including three in February 2008 that Lisa failed to attend. Visits were then put on hold until Lisa contacted DHHS in June, and two or three visits occurred between June and July.

A new case plan and a progress report were prepared in July 2008, requiring Lisa to regularly participate in scheduled, supervised visits. Lisa contacted the caseworker in August to

inform her she was on bed rest due to her pregnancy. She gave birth to Dakota and Destiny in late October 2008. Kendra, Matthew, and Katrina came to the hospital to visit Lisa and the babies.

At the time of the birth, Lisa was living at a motel with Dakota and Destiny's father. Around this time, Lisa was accused of theft of services for overreporting her hours while housekeeping at the motel. The allegation was dropped when Lisa paid $150 in restitution. Lisa, Dakota and Destiny's father, and Dakota and Destiny moved to another residence in January 2009.

Guardianship Placement and Lisa's Progress Thereafter

On January 21, 2009, Teresa filed a petition requesting that she and Greg be appointed as the children's guardians. Lisa consented to the appointment, and Teresa and Greg were appointed guardians on March 4. The caseworker noted that since being placed in Teresa and Greg's home in February 2008, the children had improved, had good grades, and were happy.

The caseworker's involvement ended when the guardians were appointed, and DHHS stopped providing services to Lisa at that time. Lisa testified she had not been subject to a case plan since the guardianship went into effect. At about this time, Lisa began working part time, 15 to 20 hours per week, earning $6 per hour plus tips. She worked for that employer through February 2011, when she sought and obtained full-time employment.

Lisa left the father of Dakota and Destiny and began residing with Mark and his son in July 2009. After Mark's son left the residence in August, Mark disclosed to Lisa that his son had been convicted of molesting his younger siblings. Mark's son occasionally visited the residence after that, but Dakota and Destiny were never left alone with him.

Johnathan was born in October 2010. In February 2011, Lisa, Mark, Dakota, Destiny, and Johnathan moved into a four-bedroom house, which could be converted to have five bedrooms. Lisa and Mark share the $900 monthly rent.

Since January 2011, Mark has been employed as a maintenance worker, earning $15 per hour. At her new full-time job, Lisa earns $4 per hour as a server and $10 per hour as a supervisor.

Despite progress in other areas of her life, Lisa's visits with the children became sporadic after the guardians were appointed. In April 2009, Lisa and Teresa scheduled a visit with the children at a therapist's office, but Lisa canceled the visit. Lisa then did not contact Teresa to arrange visitation for almost 1 year. On April 1, 2010, Teresa, Kendra, Matthew, Katrina, Lisa, Dakota, and Destiny attended a family therapy session. Judy Melius, the children's new therapist, conducted the session. One purpose was to further Lisa's relationship with the children to allow for more visits. The children had requested overnight visits with Lisa, and Melius wanted to ensure that the children were ready and that Lisa was in agreement. Early in the session, Lisa and the children were reminiscing and laughing. But Lisa later became angry. Lisa explained she was upset with Teresa and DHHS and started raising her voice. Melius observed that Matthew was becoming visibly upset, and Melius ended the session.

Melius then cautioned Teresa that further visits between Lisa and the children would not be in the children's best interests. But the children told Teresa that they wanted a relationship with Lisa, Dakota, and Destiny, and Lisa was again permitted to see her children on April 7 and 8, 2010.

Events Leading to Lisa's Request to Terminate Guardianship

On April 8, 2010, Teresa took the children to visit Lisa in Hastings, Nebraska. During the visit, Katrina told Teresa that Greg had touched her with his hand under her shirt while tickling her. Teresa responded, "'I don't believe you. If that [were] true, I would be the first one to report it.'" Lisa heard this exchange. Teresa allowed Lisa to leave with the children, but told her not to take them outside of the Hastings city limits. Lisa testified that the children continued to insist that the incident described by Katrina had occurred. Lisa took them to Grand Island, Nebraska, where they spoke with

police. After interviewing the children, Greg, and Teresa, officials determined that the allegations of abuse were unsubstantiated and that the children were safe in the care of their guardians.

After this episode, the guardians did not allow further contact between Lisa and the children. On October 28, 2010, Lisa filed a motion requesting that the guardianship be terminated and on January 12, 2011, moved to establish visitation with the children.

Hearing on Lisa's Motion to Establish Visitation

The court held a hearing on the motion to establish visitation on February 24, 2011. In deposition testimony received at the hearing, Melius discussed the effects of visits between Lisa and the children. She explained the visits caused Kendra to speak with the tone of a small child and to withdraw in therapy sessions, resulted in increased anger for Matthew, and led to nightmares, anger outbursts, and uncontrollable crying for Katrina. Melius also testified that when asked, the children said they were not interested in further visits with Lisa. Melius opined that based on the children's statements and the effects of visits described above, further visitation was not in the best interests of Kendra, Matthew, or Katrina. Melius had been the children's therapist for approximately 2½ years at the time of this testimony. Following the hearing, the court denied visitation, finding it would not serve the best interests of the children.

Motion to Terminate Parental Rights and Lisa's Psychological Evaluation

On March 28, 2011, the guardian ad litem for the children filed a motion to terminate parental rights. The motion set out five separate statutory grounds supporting termination and averred that termination of Lisa's parental rights was in the children's best interests. One of the statutory grounds challenged Lisa's mental health.

On March 29, 2011, Lisa underwent a psychological evaluation performed by John Meidlinger, Ph.D., a clinical

psychologist. Meidlinger had previously evaluated Lisa in 2005 and 2007. His 2011 evaluation suggested a mild or moderate level of defensiveness, which he "frequently found in persons taking [the evaluation] test for forensic purposes." The evaluation also suggested an attempt by Lisa to describe herself in a "somewhat unrealistically positive light." Meidlinger opined that Lisa's behavior could lapse due to some very painful early life experiences. His diagnoses included adjustment disorder with depressed mood, which was based on Lisa's sadness about her situation; uncomplicated bereavement due to missing her children; possible bipolar disorder; and a personality disorder. The personality disorder was an "Axis II" diagnosis, whereas the others were "Axis I" diagnoses. Axis I diagnoses are reflective of a person's current functioning and are often treatable; Axis II diagnoses reflect more stable difficulties, such as difficulties in relationships, personal functioning, self-esteem, and mood regulation, and are of long duration.

Meidlinger based the personality disorder diagnosis on Lisa's instability of self-concept and mood; unpredictability; difficulty in maintaining long-term, positive functioning; tendency to fall into dependent relationships with destructive males; difficulty controlling impulses; gaps in moral development; and difficulty putting the needs of her children ahead of her own. He had reached the same diagnosis in 2005 and 2007, and at those times, the diagnosis was also based in part on Lisa's narcissistic tendencies and unstable relationships with men. Meidlinger testified that the nature and severity of a personality disorder dictate whether the disorder impairs an individual's ability to parent.

Based on his evaluation, Meidlinger recommended exercising "great caution" in returning the children to Lisa. He opined that while she was stable at the time of their meeting, that was likely "to be changeable over time." He testified that the odds were high that she would be unable to maintain a stable relationship and that her past behavior was the best predictor of how her life would change in terms of stability if she were not in a relationship.

Hearing on Motions to Terminate Guardianship and to Terminate Parental Rights

On June 23 and 24, 2011, the court held a hearing on Lisa's motion to terminate the guardianship and the motion of the children's guardian ad litem to terminate parental rights. Before testimony was adduced, Lisa made an oral motion for recusal of the judge, which was based on the fact that in August 1993, while employed as a deputy county attorney, the judge had signed an amended information charging Robert with sexual assault of a child. The judge overruled the motion, stating on the record that she had no independent recollection of the case and that she may have only been signing paperwork on her supervisor's behalf.

Testimony was then adduced. Teresa testified the children had adjusted well to living in the guardians' home. As of June 23, 2011, Kendra was 15 years old and had just completed the eighth grade. She had been diagnosed as "moderately mentally handicapped" and was seeing Melius on an ongoing basis. She requires close monitoring because of issues with understanding personal boundaries and interacting with other children. Kendra has an individualized educational plan and receives special help in all subjects.

Matthew was 13 years old at the time of the hearing. Teresa described him as "very bright" and "family focused." Katrina was 11 years old, and while an individualized educational plan was still in place for her, it had been minimized because she had been doing very well. Teresa testified that other than the pending proceeding, she did not foresee anything that would cause the children to no longer be able to live with her. Teresa opined that termination of Lisa's parental rights was in the children's best interests. She explained that her home provided stability and security for the children.

Melius' deposition testimony from the prior hearing was reoffered and received. Melius opined that it would not be in the best interests of any of the three children to have contact with Lisa, because they did not wish to have such contact and because the children's prior anger and behavioral issues would be likely to return. She testified unequivocally that

termination of Lisa's parental rights would be in the best interests of Matthew and Katrina because of Matthew's need for permanency and Katrina's fear of renewed contact with persons who had harmed her in the past. With respect to Kendra, Melius testified that it "would be in her best interest to have stability," which would allow her to continue to mature and to not have "periods of time where . . . she is regressing, struggling at school, withdrawing."

Lisa testified at the hearing that she was in the most stable period of her life. She had three children at home, a good job and residence, and a support group. She said that she had no difficulty taking care of herself or her young children in the 3 years preceding the hearing and that her mental health had been stable. She had not been on medication, nor did she need therapy during this time period. She admitted to having pain, but said it did not prevent her from parenting her young children. She said she no longer needed her mother or her family and felt it was in the children's best interests to be placed with her and their younger siblings.

Lisa testified that she had no difficulty meeting her financial obligations. She pays $50 per month in child support for each of the three adjudicated children. As of June 2011, she was $150 in arrears. She explained this arrearage occurred when she took time off from work to have Johnathan.

Evidence of Mark's history was also adduced at the hearing. While he had not consumed alcohol in the past few years, his license had been previously suspended due to a driving under the influence conviction, and he had been involved in two bar fights. He was arrested for an alleged sexual assault, but the charges were later dropped. He was also charged with possession of drug paraphernalia, which he explained to Lisa was because he had taken the blame for his son. During his years with Lisa, Mark has had no issues with the law.

Tonya Taylor, a former agency-level foster care provider, testified on Lisa's behalf. As of June 2011, Taylor had known Lisa and Mark for about 3 years, and she typically saw Lisa three to four times per week. She testified that based on her specialized training in foster care, she had no concerns about Lisa's interactions with her three young children. She testified

that the children were well fed and had age-appropriate toys and that the house was clean. She had never seen Lisa place the children in danger and testified that Lisa was careful about the people to whom she entrusted her children. She also said that Mark appeared to be an appropriate parent. She had not observed anything indicating that Lisa or Mark had a drug or alcohol problem. She stated that she had known Lisa to always be employed and that while Mark had been laid off twice in recent years, he had always soon found new employment.

Order Terminating Parental Rights

On July 22, 2011, the court denied Lisa's motion to terminate the guardianship and terminated her parental rights. In summarizing the facts, the court noted that it did not find parts of Lisa's testimony to be credible. The court found by clear and convincing evidence that four separate grounds listed in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010) supported terminating Lisa's parental rights.

First, the court concluded that Lisa had substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection. The court found that even though services were provided to Lisa, she was unable to maintain stable employment or housing for several years following the removal of the children. The court also found that Lisa had missed scheduled visits with the children in February 2008 and April 2009 and that while Lisa requested visits in June 2008, she had stopped those visits by the end of the month.

The court next found that following the children's adjudication under § 43-247(3)(a), reasonable efforts to preserve and reunify the family under the direction of the court were made, and that Lisa failed to correct the conditions leading to the adjudication. The court noted that although Lisa had been provided with extensive services, she was still not in a position to care for her children 2½ years after removal; that Lisa had failed to maintain a job or housing and continued to associate with men who had criminal histories or habits not conducive to living with children; and that the permanency

goal was changed because Lisa was unable to provide "even minimal care."

The court further determined that because the children had been out of Lisa's home since February 2005, they had been in an out-of-home placement for 15 or more months of the most recent 22 months.

Finally, the court found Lisa was unable to discharge her parental duties due to a mental illness or deficiency for which there were reasonable grounds to believe would continue for a prolonged and indeterminate period. The court gave weight to the adjustment mood disorder, bipolar disorder, and personality disorder diagnoses, and to Meidlinger's opinion that great caution should be exercised in returning the children to Lisa. The court also distinguished Lisa's recent stability, stating it was "not really that stable" and noting Mark's criminal history.

The court found by clear and convincing evidence that termination of Lisa's parental rights was in the children's best interests. The court noted that the children were doing well in their current placement, which gave them love, consistency, and stability; that the children told their therapist they did not want contact with Lisa; and that Lisa's "recent limited stability" did not overcome the years of neglect and instability. Lisa timely appealed from this order.

ASSIGNMENTS OF ERROR

Lisa assigns, summarized and renumbered, that the county court erred in (1) finding, by clear and convincing evidence, that (a) Lisa had substantially and continuously or repeatedly neglected and refused to give parental care and protection to her children; (b) following the children's adjudication under § 43-247(3)(a), reasonable efforts to preserve and reunify the family failed to correct the conditions leading to the determination; (c) the children had been in an out-of-home placement for 15 or more months of the most recent 22 months; (d) Lisa was unable to discharge her parental responsibilities because of a mental illness or mental deficiency for which there were reasonable grounds to believe would continue for a prolonged and indeterminate period; and (e) termination of

Lisa's parental rights was in the best interests of the children; (2) denying Lisa's motion to terminate the guardianship; and (3) failing to grant Lisa's motion for recusal.

STANDARD OF REVIEW

[1] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.[2] An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.[3]

[2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[4] 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.[5]

[3] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[6]

ANALYSIS

Motion for Recusal

[4-6] Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.[7] Here, Lisa argues that the judge's impartiality could reasonably be questioned and that the judge was biased because she signed a document in 1993 relating to a criminal case against Robert. In order to demonstrate that a trial judge should have

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[2] *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012).

[3] *Id.*

[4] *In re Interest of Ryder J., ante* p. 318, 809 N.W.2d 255 (2012); *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011).

[5] *In re Interest of Ryder J.*, *supra* note 4.

[6] *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011).

[7] Neb. Rev. Code of Judicial Conduct § 5-302.11(A). See *Tierney v. Four H Land Co.*, 281 Neb. 658, 798 N.W.2d 586 (2011).

recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[8] In addition, a party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[9]

There is nothing in the record indicating that the trial judge had any involvement in Robert's criminal prosecution other than signing the amended information, and no evidence contradicted her statements that she did not remember the case. It was likely that the judge would not have remembered the case, considering the amended information was filed more than 17 years prior to the June 2011 hearing. No reasonable person would have questioned the judge's impartiality under these circumstances. Accordingly, we conclude that the judge did not abuse her discretion in denying Lisa's motion for recusal.

Statutory Grounds for Termination

[7] In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests.[10] As noted, the trial court found by clear and convincing evidence that four of the statutory grounds existed, including the circumstance described in § 43-292(7)—that "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." It is undisputed that the three children have not resided with Lisa since they were removed from her custody in 2005. But Lisa and her guardian ad litem argue that for the 22 months preceding the termination hearing, the

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[8] See *Nolan, supra* note 2.

[9] See, *id.*; *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

[10] See *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

children were in a guardianship placement, which should not be considered an "out-of-home placement" under § 43-292(7) in that it was a temporary placement to which Lisa specifically agreed. They argue it would be bad policy to characterize a guardianship placement as an "out-of-home placement" which, if of sufficient duration, could constitute grounds for terminating parental rights.

[8,9] As we have often noted, it is the Legislature's function through the enactment of statutes to declare what is the law and public policy.[11] Here, the Legislature has used the phrase "out-of-home placement" in defining a statutory ground for termination of parental rights. That phrase is not specifically defined in the Nebraska Juvenile Code, but absent anything to the contrary, we give statutory language its plain and ordinary meaning.[12]

When a child is adjudicated pursuant to § 43-247(3)(a), as is the case here,

> the court may permit such juvenile to remain in his or her own home subject to supervision or may make an order committing the juvenile to (1) the care of some suitable institution, (2) inpatient or outpatient treatment at a mental health facility or mental health program, (3) the care of some reputable citizen of good moral character, (4) the care of some association willing to receive the juvenile embracing in its objects the purpose of caring for or obtaining homes for such juveniles . . . (5) the care of a suitable family, or (6) the care and custody of [DHHS].[13]

Further,

> [w]hen the court awards a juvenile to the care of [DHHS], an association, or an individual in accordance with the

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[11] *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011); *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011).

[12] *In re Interest of Spencer O.*, 277 Neb. 776, 765 N.W.2d 443 (2009); *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999).

[13] Neb. Rev. Stat. § 43-284 (Reissue 2008).

> Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, association, or individual to whose care he or she is committed.[14]

These children have been placed out of the parental home since 2005, first in DHHS' custody and then in the custody of Teresa and Greg. There is no principled basis for concluding that the first was an "out-of-home placement," but the second was not. Lisa's agreement to the appointment of Teresa and Greg as guardians did not change the nature of the placement, which was outside of her home.

[10] We are also not persuaded by the argument that characterizing the guardianship as an "out-of-home placement" would somehow undermine the "temporary" nature of a guardianship for a child adjudicated pursuant to § 43-247(3)(a). In many such cases, any form of out-of-home placement is originally intended as a temporary step toward reunification of the family. But when reunification has not occurred after the passage of time determined by the Legislature, the child's need for permanency may necessitate other measures, up to and including termination of parental rights. And parental rights cannot be terminated solely based on the duration of the out-of-home placement, because it must also be shown that the parent is unfit and that termination is in the best interests of the child.[15] The placement of a child outside the home for 15 or more months of the most recent 22 months under § 43-292(7) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum level of fitness.[16] The fact that a child has been placed outside the home for 15 or more months of the most recent 22 months does not demonstrate parental unfitness.[17]

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[14] Neb. Rev. Stat. § 43-285(1) (Cum. Supp. 2010).

[15] See, § 43-292; *In re Interest of Ryder J., supra* note 4.

[16] *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009); *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

[17] *Id.*

[11] Only one statutory ground for termination need be proved in order for parental rights to be terminated.[18] Because we conclude that there is clear and convincing evidence that all three juveniles have been in an out-of-home placement for 15 or more months of the most recent 22 months, we need not discuss the other statutory grounds which the court found to exist in this context, and we proceed to the issues of best interests and fitness.[19]

Best Interests of Children and Parental Fitness

[12-15] In addition to proving a statutory ground, the State must show that termination is in the best interests of the child.[20] A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.[21] There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.[22] The term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests.[23] In discussing the constitutionally protected relationship between a parent and a child, we have stated, "'Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance

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[18] *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000); *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000).

[19] See *In re Interest of Michael B. et al., supra* note 18.

[20] See, *In re Interest of Ryder J., supra* note 4; *In re Interest of Sir Messiah T. et al., supra* note 10.

[21] *In re Interest of Ryder J., supra* note 4.

[22] *Id.* See, also, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *In re Interest of Xavier H., supra* note 16.

[23] *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.'"[24] The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.[25]

Based upon her own testimony and that of Taylor, Lisa argues that her life has stabilized to the point where she is now able to care for the children who are the subject of this case, in addition to her other three young children. But this court is not prohibited from considering prior events when determining whether to terminate parental rights,[26] and despite evidence of Lisa's current stability, we cannot ignore what has transpired during the parental relationship. While Lisa had these children in her care, she exposed them to health hazards and permitted them to live with a convicted sex offender who abused more than one of them. And before the children were placed in the guardianship, Lisa stole from a neighbor in their presence and lived with men who had criminal backgrounds. In the years DHHS was working with her, Lisa was also unable to provide a stable home for the children, despite receiving services designed to assist her in doing so.

While in recent years Lisa has been able to maintain a suitable residence and employment, this corresponds with the time period in which she has been living with Mark. Meidlinger's expert opinion is particularly relevant in this regard. Based upon the personality disorder diagnosis, he opined that Lisa was unstable in terms of self-concept and mood, was unpredictable, and had difficulty in maintaining long-term, positive functioning. He opined that the odds were high that Lisa would be unable to maintain a stable relationship with an adult partner, and when asked what would occur if Lisa were not in such a relationship, he stated that the "best predictor . . . would be her past behavior," which included an instability with work

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[24] *Uhing v. Uhing*, 241 Neb. 368, 375, 488 N.W.2d 366, 372 (1992) (quoting *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990)).

[25] *In re Interest of Ryder J., supra* note 4.

[26] See *In re Interest of Hope L. et al., supra* note 23.

and relationships and an inability to focus on the needs of her children. Meidlinger further opined that Lisa's most recent period of stability was not predictive of her future stability and that based upon a broader view of her life history, she was "likely to have less stability in relationships; less stability in her own emotional functioning and more difficulty [in] making . . . good long-term decisions for herself. She is also impaired from dealing with problems by her own desire to see everything as being okay." No expert testimony was offered to rebut Meidlinger's opinion.

We also place considerable weight on the testimony of Melius, the children's therapist, who stressed the children's need for stability. Melius testified that the children became anxious at the thought of a change in their current placement and that Katrina feared that reunification would put her in contact with those who had abused her in the past. Melius opined, explicitly with respect to Matthew and Katrina and implicitly with respect to Kendra, that termination of parental rights would be in their best interests.

Based upon our de novo review of the record, we find clear and convincing evidence that Lisa's personal deficiencies have prevented her from performing her reasonable parental obligations to Kendra, Matthew, and Katrina in the past, and would likely prevent her from doing so in the future. Accordingly, the presumption of fitness has been rebutted. We also find that it was shown by clear and convincing evidence that termination of Lisa's parental rights would be in the children's best interests. Because we conclude that the lower court did not err in terminating Lisa's parental rights to Kendra, Matthew, and Katrina, we need not address Lisa's contention that the court erred in denying her motion to terminate the guardianship.

CONCLUSION

For the reasons discussed, we affirm the judgment of the county court, sitting as a juvenile court.

AFFIRMED.