IN RE INTEREST OF DAVID M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. HERENDIRA H., APPELLEE, MADISON COUNTY, NEBRASKA, INTERVENOR-APPELLANT, AND KATE M. JORGENSEN, INTERVENOR-APPELLEE.

808 N.W.2d 357

Filed December 20, 2011. No. A-10-968.

1. **Juvenile Courts: Guardians Ad Litem: Fees: Appeal and Error.** A juvenile court's decision concerning guardian ad litem fees is reviewed de novo on the record for an abuse of discretion.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Juvenile Courts: Guardians Ad Litem: Fees: Standing: Appeal and Error.** A county has standing to appeal an order awarding guardian ad litem fees in a juvenile action because the county wherein the juvenile court proceedings were had must pay such fees, and thus, the county has an interest in the outcome of such a case.
4. **Juvenile Courts: Pleadings.** Neb. Rev. Stat. § 43-274 (Reissue 2008) grants county attorneys the ultimate discretion regarding whether to file a petition alleging that a child is within the meaning of Neb. Rev. Stat. § 43-247(1), (2), (3), or (4) (Reissue 2008).
5. **Juvenile Courts: Actions: Dismissal and Nonsuit.** An action in juvenile court may be dismissed by a county attorney at any time prior to trial without leave of court.
6. **Juvenile Courts: Pleadings.** Pursuant to Neb. Rev. Stat. § 43-274 (Reissue 2008), a guardian ad litem does not have the authority to initiate a juvenile court case by filing a petition alleging a child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

Appeal from the County Court for Madison County: DONNA F. TAYLOR, Judge. Reversed and remanded for further proceedings.

Joseph M. Smith, Madison County Attorney, and Gail E. Collins for intervenor-appellant.

Harry A. Moore for intervenor-appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

This appeal concerns the determination of fees awarded to a guardian ad litem (GAL) for services rendered in a juvenile court action. Kate M. Jorgensen was appointed as GAL for David M., Miguel H., Edwin G., and Rogelio M. after the State filed a petition in the county court for Madison County, sitting as a juvenile court, alleging that the children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Ultimately, the county court dismissed the juvenile court proceedings after the court found there was insufficient evidence to demonstrate that the children could not be returned to their mother.

At the conclusion of the juvenile court proceedings, Jorgensen sought fees for her services as GAL. Madison County opposed Jorgensen's request, arguing that certain actions taken by Jorgensen during the proceedings were not authorized or were completed for an improper purpose, and should not be reimbursed. After a hearing, the county court awarded Jorgensen the sum of $4,110.18 for her services as GAL. Madison County appeals from this award. For the reasons set forth below, we reverse the county court's award of fees to Jorgensen and remand the case for a new hearing concerning Jorgensen's fees.

II. BACKGROUND

The issues raised in this appeal concern only the amount of fees awarded to Jorgensen for her services as GAL in the underlying juvenile court proceedings. However, in order to provide some context for the dispute concerning Jorgensen's fees, we briefly recount the factual and procedural background of the underlying juvenile case.

In May 2009, the State filed a petition in county court alleging that David, born in June 1997; Miguel, born in September 2001; Edwin, born in January 2005; and Rogelio, born in May 2006, were children within the meaning of § 43-247(3)(a) because there was no one available to care for them. Specifically, the petition alleged that the children's mother was currently in the Madison County jail and that their

fathers were residing in Mexico. At the same time the State filed the petition, it also filed a motion requesting that temporary custody of the children be granted to the Department of Health and Human Services (the Department). In support of that motion, the State submitted an affidavit which indicated that the children's mother, Herendira H., had been arrested and jailed for criminal impersonation after she admitted that she was in this country illegally and that she had been using someone else's identity in order to maintain employment. The county court granted the State's motion and awarded the Department temporary custody of the children. The court also appointed Jorgensen as the children's GAL.

Sometime after the State filed its petition, Herendira was deported to Mexico. She remained in Mexico during the pendency of these proceedings. Once in Mexico, Herendira contacted the Mexican consulate, which began to assist her in working toward reunification with her children. Herendira obtained appropriate housing in Mexico and completed a home study. In addition, she had regular and consistent telephone contact with the children.

In November and December 2009, the Department recommended that the children be reunited with Herendira in Mexico. The Department indicated that its investigation did not establish that Herendira had abused or neglected the children, but, rather, proved that Herendira had appropriately cared for the children, including providing for their medical and educational needs. In addition, the Department believed that any service that the family required could be provided in Mexico.

On December 10, 2009, the State filed a motion to dismiss its petition, based on the Department's investigation and recommendation. In that "Dismissal" motion, the State indicated it was requesting that the court "dismiss, without prejudice, the petition previously filed herein." The State also indicated that the dismissal was to be effective not immediately, but "at the point when the children are returned to Mexico to be with their mother." Jorgensen objected to the dismissal.

The next day, on December 11, 2009, the State filed an amended motion to dismiss. Under that "Amended

Dismissal" motion, the dismissal was intended to be effective immediately. After the State filed its amended motion to dismiss, Jorgensen filed a supplemental petition which alleged, among other things, that the children were within the meaning of § 43-247(3)(a) because they "have been emotionally, mentally and/or physically neglected by the mother and all of the juveniles suffer from severe developmental delays." The State filed a motion to quash the supplemental petition, arguing that a GAL does not have the authority to file such a petition. After a hearing, the county court found that Jorgensen, acting as the children's GAL, had the authority to file a supplemental petition. The court retained jurisdiction over the children and ordered that an adjudication hearing be held on the supplemental petition.

On February 17, 2010, a hearing was held. At the hearing, the county court addressed numerous motions filed by the parties, including a motion filed by Herendira asking the court to change the placement of the children pending the adjudication hearing. Herendira requested that the children be placed with her in Mexico. At the close of the hearing, the county court granted Herendira's request, finding that Jorgensen failed to demonstrate that placement of the children with Herendira would be contrary to their health, safety, and welfare. The court also found that there was not sufficient evidence to demonstrate that Herendira "did anything to cause the need for services, or that she did not seek out assistance to meet the special needs of her children." The county court recognized that by returning the children to Herendira in Mexico, the court would lose jurisdiction of the children; however, the court also recognized that the Mexican consulate had indicated its intent to provide the family with necessary services. The court's order effectively dismissed the case.

After the case was dismissed, Jorgensen sought attorney fees for her services as GAL. Madison County objected to Jorgensen's request. Specifically, the county objected to awarding fees to Jorgensen for any work she completed after the State filed its amended motion to dismiss on December 11, 2009. Madison County argued that after December 11, the county court no longer had the authority to continue

the proceedings, because the State dismissed the case and Jorgensen did not have the authority to file a supplemental petition to continue the court's jurisdiction. The county also alleged that the supplemental petition was "frivolous, contrary to law and wasteful."

In September 2010, the county court overruled all of the county's objections to Jorgensen's request for fees. The court approved fees of $4,110.18 to be paid to Jorgensen by Madison County. This amount includes reimbursement for work Jorgensen completed after December 11, 2009.

Madison County appeals from the county court's order awarding Jorgensen attorney fees in the amount of $4,110.18.

III. ASSIGNMENTS OF ERROR

On appeal, Madison County argues that the county court erred in awarding Jorgensen fees for any actions taken after the State filed its amended motion to dismiss on December 11, 2009, because such dismissal terminated the juvenile court proceedings concerning the minor children. In addition, Madison County argues that the county court erred in failing to find that Jorgensen's actions after the December 11 dismissal were unwarranted, unnecessary, and frivolous.

IV. ANALYSIS

1. Standard of Review

[1] A juvenile court's decision concerning GAL fees is reviewed de novo on the record for an abuse of discretion. See *In re Interest of Antone C. et al.*, 12 Neb. App. 466, 677 N.W.2d 190 (2004).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010); *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010); *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 776 N.W.2d 188 (2009).

2. County's Standing to Appeal

After Madison County filed its appeal with this court, Jorgensen filed a motion to summarily dismiss the appeal. In

her memorandum brief in support of the motion, Jorgensen argued that the appeal had not been docketed properly and that there was a "defect of parties" because it appeared that the State, rather than Madison County, was appealing from the decision concerning the amount of fees awarded to her. Jorgensen further argued that the State does not have standing to appeal from the county court's order awarding her fees and asked that we dismiss the appeal.

We overruled Jorgensen's motion for summary dismissal and allowed the case to continue, but before we address Madison County's assigned errors, we briefly digress to discuss the manner in which this case was docketed on appeal.

This court has previously addressed the proper manner to appeal from an order granting or disallowing GAL fees in a juvenile court case, *In re Interest of Antone C. et al.*, 12 Neb. App. 152, 669 N.W.2d 69 (2003), in which the minor children's court-appointed GAL filed an appeal after the juvenile court disallowed reimbursement for certain actions taken during the juvenile court case. When the GAL filed her appeal with this court, she did so under the caption of the juvenile court case: "In re Interest of Antone C." As a result, there was some confusion about whether the GAL was appealing in her capacity as the children's GAL or as an individual. *Id.* After determining that the GAL was, in fact, appealing in her individual capacity, we indicated: "[F]or future cases when a [GAL] desires to contest a disallowance of a [GAL] fee, the [GAL] is the appellant as an intervenor." *Id.* at 158-59, 669 N.W.2d at 75. In addition, we found that Douglas County, which was appearing in this court on the issue of the GAL's fees, should be designated as the intervenor-appellee. *Id.*

[3] In this case, there is some confusion about whether it is the State or Madison County which is appealing from the county court's order awarding Jorgensen fees for her services as GAL. This confusion appears to have been caused by the parties' docketing the case under the juvenile court case caption, "In re Interest of David M. et al." From our review of the record, it is clear that it is Madison County which is appealing from the county court's order concerning Jorgensen's fees. Madison County has standing to appeal from such an order

because the county wherein the juvenile court proceedings were had must pay fees awarded to a GAL, and thus, the county has an interest in the outcome of such a case. See Neb. Rev. Stat. § 43-273 (Reissue 2008). However, as we indicated in *In re Interest of Antone C. et al.*, 12 Neb. App. 152, 669 N.W.2d 69 (2003), Madison County should have indicated in the case caption that it was the appellant as an intervenor and that Jorgensen was the intervenor-appellee.

Having concluded that Madison County is the proper intervenor-appellant in this action, we now address its specific assigned errors.

3. Effect of State's Amended Motion to Dismiss

On December 10, 2009, the State filed a motion to dismiss its petition which alleged that the minor children were within the meaning of § 43-247(3)(a). In that "Dismissal" motion, the State indicated it was requesting that the court "dismiss, without prejudice, the petition previously filed herein." The State also indicated that the dismissal was to be effective not immediately, but "at the point when the children are returned to Mexico to be with their mother." Presumably, this conditional dismissal was fashioned in an effort to provide the children with continuous care until such time as they were returned to Herendira. The next day, on December 11, the State filed an amended motion to dismiss. Under that "Amended Dismissal" motion, the dismissal was intended to be effective immediately.

On appeal, Madison County contends that the State's amended motion to dismiss filed on December 11, 2009, effectively terminated the juvenile court proceedings involving these minor children and that as a result, the county court no longer had the authority to continue such proceedings. The county further contends that because the court no longer had any authority to continue the proceedings, Jorgensen no longer had any authority as the court-appointed GAL. The county asserts that Jorgensen should not be awarded fees for any action taken after the filing of the amended motion to dismiss.

We agree with the county's assertion that the juvenile court proceedings involving the minor children were terminated at the time the State filed its amended motion to dismiss.

[4] The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 through 43-2,129 (Reissue 2008 & Cum. Supp. 2010), does not specifically address whether a county attorney has the authority to unilaterally dismiss a juvenile court action. However, § 43-274 does grant county attorneys the ultimate discretion regarding whether to file a petition alleging that a child is within the meaning of § 43-247(1), (2), (3), or (4). In fact, § 43-274 provides only county attorneys with the authority to initiate a juvenile court action by filing such a petition. See § 43-274(1). By granting county attorneys such discretion, the Legislature clearly intended that they would play a pivotal role in the juvenile court proceedings.

[5] The Nebraska Supreme Court has held that an action in juvenile court may be dismissed by a county attorney at any time prior to trial without leave of court. See *In re Interest of Moore*, 186 Neb. 67, 180 N.W.2d 917 (1970). As such, when a county attorney files a dismissal in a juvenile court action, such dismissal occurs without any further action by the juvenile court; rather, such dismissal occurs by operation of law. We note that we cannot find any authority to suggest that the Supreme Court intended to place any qualifications or conditions on a county attorney's right to dismiss a juvenile court action prior to trial. See *id*. But see *Werner v. Werner*, 186 Neb. 558, 559-60, 184 N.W.2d 646, 647 (1971) ("[i]n an action for divorce, *until the trial court enters an order imposing some obligation*, the plaintiff has an unqualified right to dismiss his petition without leave of court, regardless of the nature of the pleadings on file" (emphasis supplied)).

In this case, the State filed its amended motion to dismiss on December 11, 2009, prior to the court's adjudicating the children to be within the meaning of § 43-247(3)(a) and prior to any trial. We conclude that the State had the unqualified authority to dismiss the proceedings at that stage of the case. As such, we conclude that the proceedings were dismissed by operation of law at the time the State filed the amended motion to dismiss.

Having found that the county court's jurisdiction in this case terminated on December 11, 2009, when the State filed its amended motion to dismiss, we next address whether Jorgensen, acting as the children's GAL, had the authority to reinstate the proceedings by filing a supplemental petition alleging that the children were within the meaning of § 43-247(3)(a).

4. GAL Had No Authority to File Supplemental Petition

Jorgensen filed her supplemental petition alleging that the children were within the meaning of § 43-247(3)(a) after the State filed its amended motion to dismiss. As such, as we discussed above, at the time Jorgensen filed the supplemental petition, there was no existing case concerning the minor children pending in the county court. In order to continue the proceedings concerning the minor children, a party, including a GAL, would have had to initiate a new, separate case. Thus, although Jorgensen entitled her filing as a "Supplemental Petition," in actuality, it was an original petition initiating a new action.

On appeal, Madison County alleges that Jorgensen, as the children's GAL, did not have the authority to initiate new, separate proceedings by filing a petition alleging that the children were within the meaning of § 43-247(3)(a). To the contrary, Jorgensen argues that she did have the authority to file such a petition pursuant to the language found in § 43-272.01(2)(h).

Two statutes provide authority for filing a petition in juvenile court. As we mentioned above, § 43-274(1) states:

> The county attorney, having knowledge of a juvenile in his or her county who appears to be a juvenile described in subdivision (1), (2), (3), or (4) of section 43-247, may file with the clerk of the court having jurisdiction in the matter a petition in writing specifying which subdivision of section 43-247 is alleged . . . .

Additionally, § 43-272.01(2)(h), which Jorgensen relies on, permits a GAL to "file a petition in the juvenile court on behalf of the juvenile."

This court has previously addressed the interplay between these two statutory provisions and whether pursuant to these statutes, a GAL has the authority to initiate a juvenile court case by filing a petition alleging that a child is within the meaning of § 43-247(3)(a). See *In re Interest of Valentin V.*, 12 Neb. App. 390, 674 N.W.2d 793 (2004). There, we stated:

> Although § 43-272.01 allows a GAL to file a petition in juvenile court, it does not address what type of petition, whereas § 43-274 expressly provides the specific method to be followed when filing a petition for adjudication under § 43-247(1) through (4). Clearly, at first blush, the statutes are in conflict. But, to the extent that there is a conflict between two statutes on the same subject, the specific statute prevails over the general statute. *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002). Moreover, when general and special statutory provisions are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same. *Id.* Thus, in accordance with these principles, we find that the portion of § 43-272.01 which allows a GAL to file a petition in juvenile court is merely a general statute allowing a juvenile court-appointed GAL to "petition" the juvenile court for various matters of relief on behalf of the juvenile, typically during the course of an already initiated and ongoing juvenile case. Thus, the general statute, § 43-272.01, must yield to the specific statute for institution of an adjudication proceeding . . . .

In re Interest of Valentin V., 12 Neb. App. at 393-94, 674 N.W.2d at 796.

[6] Section 43-274 allows only the county attorney to file a petition under specific circumstances, including those where the juvenile falls under the jurisdiction of the court based on § 43-247(3)(a), as Jorgensen alleged in her "Supplemental Petition." Pursuant to § 43-274, Jorgensen did not have the authority to initiate a juvenile court case by filing a petition alleging that the children were within the meaning of § 43-247(3)(a).

Because Jorgensen did not have the authority to initiate juvenile court proceedings with the filing of her "Supplemental

Petition," the proceedings involving the minor children ended when the State filed its amended motion to dismiss on December 11, 2009. After that time, the county court no longer had jurisdiction to conduct further proceedings concerning the minor children. See § 43-247. In addition, the county court no longer had the authority to continue Jorgensen's appointment as the children's GAL. See § 43-272.01. Accordingly, Jorgensen should not have been awarded any fees for actions taken after December 11.

The county court awarded Jorgensen $4,110.18 for her services as GAL in this case. Based on our review of the record, it is clear that a portion of these fees was for actions taken after December 11, 2009, and we conclude that the county court abused its discretion in awarding such fees to Jorgensen. We reverse the court's determination concerning Jorgensen's fees and remand the case back to the county court for a new hearing on the amount of fees due to Jorgensen.

5. Madison County's Other Assigned Errors

Because we have determined that the county court erred in its award of fees to Jorgensen for her work as the minor children's GAL after December 11, 2009, and have reversed its determination and remanded the case for a new hearing, we need not address Madison County's additional assigned errors, which assert that the county court erred in failing to find that Jorgensen's actions after the December 11 dismissal were unwarranted, unnecessary, and frivolous.

V. CONCLUSION

Because the juvenile proceedings involving the minor children ended on December 11, 2009, when the State filed its amended motion to dismiss, the county court erred in awarding Jorgensen fees for any work she completed as the children's GAL after December 11. Accordingly, we reverse the county court's award of fees to Jorgensen and remand the case for a new hearing concerning the award of GAL fees.

Reversed and remanded for further proceedings.