

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF MARIAH R. ET AL.

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IN RE INTEREST OF MARIAH R. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

TANJA R., APPELLANT.

Filed February 23, 2010. No. A-09-655.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge.
Affirmed.

Christopher A. Furches, of Furches Law Office, and David P. Kyker for appellant.

Gary Lacey, Lancaster County Attorney, and Alicia B. Henderson for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Tanja R. appeals from an order of the separate juvenile court of Lancaster County, adjudicating her minor children as juveniles under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). For the reasons set forth herein, we affirm.

BACKGROUND

Tanja is the mother of four minor children, Mariah R., born in October 1991; Ashley L., born in April 1994; Justin L., born in June 1997; and Felicity L., born in January 1999. On September 12, 2008, the State filed a petition in the separate juvenile court of Lancaster County, alleging that the children were within the meaning of § 43-247(3)(a) in that they lacked proper parental care by reason of the faults or habits of Tanja. The petition alleged that despite having a history of engaging in acts of domestic violence with Andrew S., as of August 20, 2008, Tanja

continued to have contact with Andrew in the family home in the presence of her children. The petition further alleged that Tanja is unable or unwilling to take appropriate steps to ensure the children are not exposed to acts of domestic violence and that Tanja's actions place the children at risk of harm.

On September 30, 2008, the State filed a motion for emergency temporary custody of the children. In the accompanying affidavit, Jessica Neff, a caseworker with the Department of Health and Human Services (the Department), set forth allegations of domestic violence. The juvenile court entered an ex parte order for temporary custody placing Tanja's minor children in the custody of the Department.

On October 15, 2008, the Department recommended, and all parties stipulated, that it was in Mariah's best interests that she be returned to Tanja. As a result, a safety plan was developed to get Mariah returned to Tanja's care and Tanja agreed to the plan. The safety plan included the requirement that Tanja would not allow the children to have any contact with Andrew and that Andrew would not be allowed in Tanja's home. Tanja claimed that Andrew was not living in her home at the time. The safety plan also provided that Tanja would cooperate with in-home safety services provided by Cedars Youth Services 24 hours a day. At that time, Ashley's whereabouts were unknown and Justin and Felicity were to remain in foster care.

Arrangements were made for Mariah to be returned to the home at 5 p.m. on October 15, 2008, by a Cedars Youth Services' worker. About an hour before Mariah was to return home, Tanja called Lyndee Haertel, her caseworker, and told her that Andrew needed to return to her home to obtain some of his belongings. Upon Haertel's arrival around 5 p.m., she knocked on the door to Tanja's apartment and received no response. Haertel called Tanja's cellular telephone, and Andrew answered. Andrew indicated that he and Tanja were in the parking lot behind Tanja's apartment building. Haertel located Tanja and Andrew, and both were upset with the fact that Andrew was required to leave the home. Andrew stated that he had no other place to go, and Tanja did not disagree. This was contrary to Tanja's statement earlier that day that Andrew was not living at her home. Based on Andrew's indication that he would not be leaving Tanja's home, Haertel called off Mariah's change of placement. Tanja and Andrew indicated to Haertel that arrangements could be made for Andrew to vacate the home by the following day and that Mariah could return home then. Haertel agreed and told Tanja that Mariah would be brought to the home the next day, October 16, after the Cedars Youth Services' worker picked her up from school.

On October 16, 2008, Mariah arrived at the family home with the Cedars Youth Services' worker at 3:30 p.m. Upon their arrival, the two were met by Andrew, who was standing in the doorway to the apartment. Andrew was upset and indicated that he did not have to leave the apartment until 5 p.m. Both Tanja and Andrew claimed that they believed Andrew could remain in the home until 5 p.m. that day, at which time Mariah would be brought to the home. Because of Andrew's refusal to leave Tanja's home, Mariah was again unable to return home and she had to go back to foster care.

A few days later, a team meeting was held to determine what to do next. Haertel, Tanja, and Andrew were present at the meeting, as well as other individuals. At the meeting, Andrew indicated that he was not willing to leave Tanja's home on a permanent basis. Tanja was not in favor of Andrew's having to leave either, and at no time did she tell him that he needed to move

out so Mariah could return home. Further, Tanja insisted that Andrew does not technically live with her, but, rather, just spends a lot of time at her home. However, both parties indicated that Andrew did not have anyplace else to stay. At the conclusion of the team meeting, no agreement was reached in regard to Andrew's leaving Tanja's home, and accordingly, no safety plan was developed that would permit Mariah to return home.

On October 21, 2008, the Ponca Tribe of Nebraska filed a motion to intervene stating that Ashley is a member of the Tribe and that Justin and Felicity are eligible for membership based on their biological father's membership. The juvenile court granted the Tribe's motion to intervene.

On December 1, 2008, the State filed an amended petition alleging that Tanja's four children lacked proper parental care by reason of the fault or habits of Tanja or that the children were in a situation dangerous to life or limb or injurious to the health or morals of said children, in that, despite having a history of engaging in acts of domestic violence with Andrew, as of September 28, Tanja continued to have contact with Andrew in the family home in the presence of one or more of said children; that as of October 16, Tanja continued to permit Andrew to be in the family home, even though that act kept Mariah from being placed back in the family home; and that Tanja is unable or unwilling to take appropriate steps to ensure that said children are not exposed to acts of violence or the effects of violence, including, but not limited to, domestic violence. The amended petition also included the additional allegations that must be pled pursuant to the Nebraska Indian Child Welfare Act (ICWA), Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008), when an Indian child is involved. Specifically, the amended petition alleged that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the children by Tanja is likely to result in serious emotional or physical damage to the children. See § 43-1505(4) and (5).

On December 16, 2008, the matter came on for hearing for adjudication on the amended petition. The hearing was continued on four additional dates and concluded on March 23, 2009. At the hearing, the State presented evidence regarding incidents of domestic abuse between Tanja and Andrew. Two individuals who do not know either Tanja or Andrew testified regarding an incident they observed in the early morning hours of September 20, outside the witnesses' homes. Both witnesses heard someone screaming and went outside to see what was going on. Both witnesses observed a vehicle parked in the middle of the street with a male and female inside. The two witnesses identified Tanja at trial as the female they observed in the vehicle. Tanja was sitting in the passenger side of the vehicle with the door open and her feet partly out of the car. The witnesses testified that they saw Tanja struggling with the male in the vehicle and that she was trying to pull herself out of the car by holding on to the upper part of the doorframe. The male in the vehicle had his arm around Tanja's waist and was pulling her back inside the vehicle. The witnesses heard Tanja screaming and pleading with the man to let her go and let her get out of the vehicle. The witnesses testified that when they approached the vehicle, the male drove away with Tanja still partially out of the car. At that point, the witnesses called the police and relayed the vehicle's license plate number.

Lincoln police officer Cassandra Nissen testified that after the witnesses called in the license plate number, police officers located the vehicle in the parking lot at Tanja's apartment

building. After investigation by the police, Tanja and Andrew were found to be the individuals engaged in the struggle in the vehicle. Nissen testified that when she arrived on-scene, Tanja had a cut above her left eye which appeared to be fresh. Tanja told Nissen she had gotten into a fight with another female at a party earlier that evening. Tanja refused to allow Nissen to photograph her injury. Tanja admitted to Nissen that she was at the location where the witnesses observed the vehicle parked in the street and admitted that she and Andrew were arguing, but she denied that there was a physical altercation.

Tanja testified at the hearing that she got the cut above her left eye when two girls were arguing and Tanja got hit while they were fighting. Tanja testified that she got angry and that Andrew made her leave the house they were at. She testified that Andrew tried to keep her from going back into the house where she got hit. Tanja denied that Andrew was restraining her in the car, and she claimed that they were both outside the car and Andrew had his arm around her waist.

Lincoln police officer Jesse James Hilger testified regarding an incident that occurred on June 21, 2007, at 2:25 a.m. Hilger was dispatched to Tanja's apartment based on an anonymous caller reporting domestic abuse. Tanja was outside her apartment when Hilger arrived, and Tanja told him that she had a physical altercation with Andrew. Tanja told Hilger that during the assault, Andrew pinched her very hard on the cheek and on her chest and punched her in the leg. Hilger testified that Tanja had visible injuries, which he photographed, including scratches on her chest and welts on her leg with skin scraped off. As a result of this incident, Andrew was charged with assault and, ultimately, convicted of disturbing the peace.

Justin, who was 11 years old at the time of the hearing, testified that in May 2008, he told his school counselor about an argument Tanja and Andrew had in which there was yelling, pushing, and shoving between the two of them. Justin testified that he was in his bedroom when this occurred. Justin testified that he did not actually see any pushing or shoving at the time of the argument, but that he could hear something hitting the wall.

Justin testified about another incident that occurred shortly after the May 2008 incident. Justin testified that Tanja and Andrew were fighting in Tanja's bedroom and that Tanja told Mariah to call the police. Justin testified that Felicity was crying because she was worried about Tanja and that he held her back to keep her from going into Tanja's bedroom. He also testified that Andrew stopped Mariah from calling the police. Justin testified that he was not in the same room where the argument took place. He testified that at some point during the argument, he walked by Tanja's room to use the bathroom and saw either Tanja or Andrew being pushed.

After Justin made his report to the school counselor in May 2008, Neff, a caseworker with the Department, conducted an initial assessment of the children's safety in their home. As part of that assessment, Neff interviewed Justin regarding his report to the school counselor. Neff testified that Justin told her that he did not feel safe in his home because of Andrew living there. Neff also spoke with Felicity, who expressed fears about Andrew. Neff testified that she attempted to speak with Tanja about Justin's report to his counselor, but Tanja was not willing to cooperate. Neff also testified that in conducting her assessment of the children's safety, she discovered incidents of past family violence.

Neff testified that based on her assessment of the children's safety, she determined that the four children were living in an unsafe environment due to domestic violence and fear of their

living environment. Neff testified that it was not just physical harm that made the environment unsafe, but also emotional harm from the violence.

Mariah testified that Tanja and Andrew argue two to three times a week, usually in Tanja's room. Mariah testified that she has gone into Tanja's room to see if she was "ok."

Tanja admitted that Andrew has been incarcerated on two occasions as a result of domestic disputes between the two of them, one of which occurred in March 2004 and the other in June 2007. She also admitted that she knew Andrew has been convicted of domestic violence against other women, and has had protection orders entered against him which he has violated. Tanja further admitted that as of September 29, 2008, she continued to allow contact between her children and Andrew in the home, and that as of October 16, she continued to permit Andrew to be in the home. Tanja also testified that she married Andrew on February 28, 2009.

There was also evidence presented of physical altercations between Tanja and Mariah. One incident, which occurred several years before the hearing, involved Tanja hitting Mariah with a plastic hanger. The other incident happened in February 2007 and involved an argument between Tanja and Mariah that turned physical. Both Tanja and Mariah had injuries as a result. Mariah claimed that Tanja was choking Mariah as a result of Mariah's hitting Tanja. Tanja denied choking Mariah.

Mariah's, Felicity's, and Justin's therapists testified at the hearing. These witnesses were qualified as experts. Mariah's therapist, Kera Frederick, testified that Mariah exhibits behaviors consistent with someone who has experienced domestic violence in the home, such as mood disorders, anxiety, substance abuse issues, eating disorders, self-harming behavior, and tolerance toward abusive behavior. Frederick also testified that Mariah is mimicking Tanja's relationship with Andrew in that Mariah was in a very controlling and self-destructive relationship with a boyfriend. Frederick testified that she has concerns of emotional and physical harm to Mariah from witnessing ongoing domestic abuse if she is returned home. Frederick testified that in order for Mariah to be returned home, Tanja would need to create a safe and stable environment free of domestic abuse. Frederick specifically testified that for Mariah to safely return home, Andrew should not live in the home.

Felicity's therapist, Jennie Cole-Mossman, testified that Felicity exhibits harm consistent with other children who have been exposed to domestic violence. Cole-Mossman testified that Felicity has been experiencing nightmares and hallucinations which involve acts of violence perpetrated against herself and Tanja. Cole-Mossman believes that the dreams and hallucinations are manifestations of anxiety and that Felicity's anxiety is caused by her witnessing domestic violence. Cole-Mossman testified that Felicity would be at risk of serious emotional or physical harm if returned to Tanja's care.

Justin's therapist, Stacey Werth-Sweeney, testified that Justin exhibits behaviors consistent with a child who has witnessed domestic violence, including self-blame, irritability, frustration, threats toward his sisters, and aggressive behavior toward his peers. Werth-Sweeney testified that returning Justin to Tanja's home would likely result in serious emotional or physical harm to Justin.

Following the adjudication hearing, the juvenile court entered an order finding that the allegations of the amended petition were true by clear and convincing evidence and that the children are children as defined by § 43-247(3)(a). The court also found that the State had proved

the relevant ICWA requirements for out-of-home placement of the children. Specifically, the juvenile court found that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the children by Tanja is likely to result in serious emotional or physical damage to the children.

ASSIGNMENTS OF ERROR

Tanja assigns, restated, that the juvenile court erred in (1) finding that her children came within the meaning of § 43-247(3)(a) and (2) finding that there was sufficient evidence to conclude that the children were at risk of emotional or physical harm if returned to Tanja's custody.

STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009). 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. *Id.*

ANALYSIS

Tanja assigns that the juvenile court erred in finding that her children came within the meaning of § 43-247(3)(a). Specifically, she argues that there was insufficient evidence to support a finding that she had exposed her children to acts of domestic violence because the children did not see any physical violence between Tanja and Andrew as they were never in the same room or locations where the altercations occurred.

The evidence showed that there is a history of domestic violence between Tanja and Andrew over the past several years, some of which occurred in the home when the children were there. Tanja testified that there was an incident in March 2004 that resulted in Andrew's being incarcerated. Tanja claims the incident occurred outside and that the children were asleep inside the home. Hilger, a police officer, testified about an incident in June 2007 that occurred at Tanja's home which resulted in Andrew's being convicted of disturbing the peace. Justin testified about two incidents that occurred in and around May 2008, both of which occurred in Tanja's apartment while the children were home.

The most recent domestic violence incident occurred in September 2008. This incident did not occur in the family home, but it did occur shortly before the amended petition was filed and shows that domestic violence between Tanja and Andrew continues to be an issue. Although Tanja denied that the September 2008 incident occurred in the manner as described by the two witnesses to the incident, the juvenile court found the two witnesses totally credible and found Tanja's testimony regarding the incident not credible. 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, and we do so here. See *In re Interest of Shayla H. et al.*, *supra*.

Although the children have generally not seen the incidents of domestic violence, the evidence shows that the children have been adversely affected by their exposure to domestic

violence between Tanja and Andrew. Neff testified that the children were living in an unsafe environment due to the domestic violence and fear of their living environment. Frederick and Werth-Sweeney, Mariah's and Justin's therapists, respectively, testified that Mariah and Justin exhibit behaviors consistent with children who have witnessed domestic abuse. For Mariah, the behaviors included mood disorders, anxiety, substance abuse, eating disorders, self-harming behavior, and tolerance toward abusive behavior. Mariah was also in a controlling and self-destructive relationship with a boyfriend. Justin's behaviors included self-blame, irritability, frustration, threats toward his sisters, and aggressive behavior toward his peers. Cole-Mossman, Felicity's therapist, testified that Felicity has been experiencing nightmares and hallucinations which involve acts of violence perpetrated against her and Tanja. Cole-Mossman believes that the dreams and hallucinations are manifestations of anxiety and that Felicity's anxiety is caused by her witnessing domestic violence.

The evidence also shows that despite Tanja's history of domestic violence with Andrew, Tanja continued to have contact with Andrew in the family home in the presence of the children, and even permitted him to continue living in the family home. By permitting Andrew to remain in the home, Tanja did not follow through with the safety plan established by the Department, and as a result, Mariah was not placed back in the home. The Department made several efforts to put the plan in effect, but Tanja failed to comply. Further, before the conclusion of the adjudication hearing, Tanja and Andrew got married despite her knowledge that her relationship with Andrew is the reason for the hearing. Such actions show that Tanja is unable or unwilling to take appropriate steps to ensure that her children are not exposed to acts of violence or the effects of violence. Based on our de novo review, we conclude that the allegations of the amended petition are true by clear and convincing evidence and that the juvenile court did not err in adjudicating the children.

Tanja also argues under her first assignment of error that the evidence of physical altercations between her and Mariah is insufficient to adjudicate the children pursuant to § 43-247(3)(a). The juvenile court did not rely on or even mention the evidence of physical altercations between Tanja and Mariah in its findings and did not adjudicate on that basis. The juvenile court adjudicated the children based on the history of domestic abuse between Tanja and Andrew and her continued contact with him. We have concluded that there is clear and convincing evidence to support the allegations in the amended petition in regard to Tanja's continued contact and relationship with Andrew and to adjudicate the children on that basis. Accordingly, there is no need for us to discuss this argument further.

Tanja next assigns that the juvenile court erred in finding that there was sufficient evidence to conclude that the children were at risk of emotional or physical harm if returned to Tanja's custody. Section 43-1505(5) of the ICWA provides:

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Tanja does not contest that the witnesses tendered as experts, i.e., the children's therapists, were qualified experts under the ICWA. Tanja argues only that there was insufficient evidence to

conclude that continued custody of the children by Tanja would likely result in serious emotional or physical damage to the children. All three therapists testified that the children have suffered harmful effects due to their exposure to domestic violence. Further, all three therapists believe that each respective child is likely to suffer emotional or physical harm if they are returned to Tanja's home.

In addition to the expert testimony, Neff testified that she concluded, based on her safety assessment, that the children were living in an unsafe environment. She further stated that it was not just the physical harm that made the environment unsafe, but also the emotional harm from being exposed to the violence.

Based on the expert testimony, as well as the totality of the evidence, we conclude that there was clear and convincing evidence that continued custody of the children by Tanja was likely to result in serious emotional or physical damage to the children. Tanja's second assignment of error is without merit.

CONCLUSION

Based on our de novo review, we conclude that there is clear and convincing evidence to support the allegations in the amended petition and to support a conclusion that continued custody of the children by Tanja was likely to result in serious emotional or physical damage to the children. Therefore, the juvenile court's order adjudicating Tanja's children under § 43-247(3)(a) is affirmed.

AFFIRMED.