

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF SIERRA W. ET AL.

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IN RE INTEREST OF SIERRA W. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,

V.

JOHN W., APPELLANT, AND LISA W., APPELLEE AND CROSS-APPELLANT.

Filed August 26, 2008. Nos. A-07-1231, A-07-1365.

Appeal from the Juvenile Review Panel, GERALD E. ROUSE, CARLTON E. CLARK, and GRATEN D. BEAVERS, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, ELIZABETH CRNKOVICH, Judge. Judgment of Juvenile Review Panel reversed and remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and Mona Lee Burton for appellant.

Donald W. Kleine, Douglas County Attorney, and Nicole Brundo Goaley for appellee State of Nebraska.

Kate E. Placzek for appellee Lisa W.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

John W. and Lisa W. appeal from an order of the juvenile court for Douglas County, denying them visitation with their children, and an order of the juvenile review panel, affirming the juvenile court's failure to adopt the State's rehabilitation plan to reunite John and Lisa with the children. For the reasons set forth below, we reverse, and remand with directions.

BACKGROUND

On April 30, 2007, the State filed an amended petition, alleging that Sierra W., born August 1, 1995; Baylee W., born May 8, 1997; and Skye J., born April 23, 2000, come within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), by reason of the faults or habits of John and Lisa. The State alleged that both John and Lisa have subjected Sierra to inappropriate and excessive discipline, placing all of the children at risk for harm. The record shows that Sierra and Baylee are John's biological children while Skye is Lisa's biological child. John and Lisa were married in November 2005. Concurrent with the filing of the petition, the State filed a motion requesting that all three children be removed from John and Lisa's home immediately. The court granted the State's motion. Subsequently, all of the children were placed in the same foster home.

On August 23, 2007, an adjudication hearing was held. In an order filed August 24, the juvenile court adjudicated all three children as coming within the meaning of § 43-247(3)(a), insofar as both John and Lisa are concerned, by a preponderance of the evidence. The court ordered that the children remain in the temporary custody of the Department of Health and Human Services (the Department) and granted John and Lisa visitation with the children.

A disposition and permanency plan hearing was held on October 12, 2007. The Department offered several exhibits into evidence including psychological assessments of John and Lisa, and reports from the children's counselor, the mental health therapist who is supervising the children's visits with John and Lisa, and the court-appointed special advocate, Elizabeth Watke. The Department also offered a summary of the children's interviews at Project Harmony, and the State's court report and case plan. The interviews of the children at Project Harmony and Watke's report were admitted into evidence by the court over Lisa and John's objections.

Stephanie Peterson, a licensed psychologist, stated in her report that she completed psychological examinations of both John and Lisa. Peterson noted that Sierra has a history of behavior problems and that in March 2007, her behavior problems escalated. Peterson stated John and Lisa started grounding Sierra and making her write sentences. Peterson noted that in Sierra and Baylee's interviews with Project Harmony, both girls described Sierra's restriction to her room and the requirement that she write sentences in order to eat with the family. Peterson stated that Sierra reported that both John and Lisa consume alcohol and that they hit her with their hands and a metal spatula.

Peterson stated that Lisa displays no signs of personality pathology and that assessments of Lisa's parenting skills, attitudes, and practices reflect a thoughtful, informed, and balanced approach to parenting. Peterson stated that Lisa expressed highly appropriate developmental expectations for the children. Peterson also stated that relative to the average parent, Lisa places an unusually high value upon the use of alternatives to corporal punishment.

Peterson stated that Lisa appears to be at high risk for reversing roles between parents and children in her family. Peterson stated that Lisa may perceive children as objects for adult gratification or use the children to meet her own needs. Peterson stated that Lisa is likely to treat the children as confidants and peers, and may expect the children to make her life better by providing the love, assurance, and comfort more appropriately sought from adult companions.

Regarding John, Peterson noted that John has been convicted of driving under the influence on three separate occasions and spent time in jail as a result. As a result, Sierra and Baylee were in the custody of the Department for a short time in 2004 because John's ex-wife was unable to care for them. John told Peterson that he successfully completed out-patient substance abuse treatment in 2004 in order to regain custody of his daughters and that he no longer drinks alcohol.

Peterson states that her assessment of John indicates no chronic disabling personality pathology, although John is unusually dependent upon others. Peterson stated that John is an informed, concerned, and motivated parent with an unusually strong capacity for empathy and a sound understanding of alternatives to corporal punishment for disciplining his children. Peterson stated that John's behavior should be carefully monitored for signs of ongoing alcohol abuse and an updated chemical dependency evaluation would be appropriate. Peterson stated that John may be experiencing low level depression marked by depressed mood, depressive worry, and a loss of energy.

Peterson concluded that John and Lisa and the children should participate in family therapy with a strong educational component addressing the nature of child abuse and neglect, the children's right to report abuse and neglect in order to seek safety, and the responsibility of adults within the family system to solve problems and protect children. Peterson stated that if John and Lisa are unwilling or unable to benefit from family therapy addressing these issues, reunification may be inappropriate.

In her report, Mary Byrd, a licensed mental health practitioner, stated that she has been counseling both Sierra and Baylee since June 2007. Byrd stated that Sierra expresses a lot of uncertainty about feeling safe if she would return home. Byrd stated that Sierra had expressed some concerns about a visit with John and Lisa in which she was given consequences for not doing a school workbook. Sierra also told Byrd that she feels like Lisa gives her "certain looks that she doesn't trust." Byrd also stated that Sierra does not feel like John and Lisa are being honest and questions whether they will change. Byrd stated that any and all contact Sierra has with John and Lisa should be supervised and that it may be necessary for Sierra to be excused from the supervised visits if she expresses concerns.

Regarding Baylee, Byrd stated that Baylee told her that she is scared to talk to her because she was told, presumably by John and Lisa, to say that she did not see anything. Byrd stated that Baylee has difficulty communicating with her siblings, especially Sierra, and that she is working with Baylee so that she can begin to express her feelings more openly and honestly.

The interviews that the children completed at Project Harmony show that the children were referred to Project Harmony because Sierra reported to her teacher that she had been hit by John on her leg with a metal spatula. Sierra told the interviewer that John and Lisa had been hitting her a lot with a wooden handle when she does not listen. Sierra stated that John and Lisa do not hit her sisters.

Sierra also stated that John and Lisa have not been feeding her, that she has to write 600 or 700 sentences to eat meals, and that she eats different meals than her sisters. Sierra said that she has to write sentences in her room and is not allowed to leave until she is done. Sierra stated that her sisters sleep on beds and that she sleeps on the floor because she wets the bed. Sierra told

the interviewer that when she wets the bed, she has to write sentences. Sierra also stated that she has to write 150 sentences to use the bathroom.

Sierra stated that John and Lisa yell and cuss at her and that John and Lisa never show her or tell her that they love her. Sierra told the interviewer that she had been talking about hurting herself and not wanting to live. Sierra denied ever trying to hurt herself. Sierra stated that she does not like her sisters because they hit her and call her names. Sierra reported that John and Lisa drink alcohol and that when they drink, they act like they are drunk. Sierra said that John and Lisa are meaner when they are drinking.

Baylee told the interviewer that John and Lisa are nice and that living with them is fun. Baylee said that John and Lisa never allowed Sierra to go out to dinner with them because Sierra has to write sentences. Baylee said that she does not get to play with Sierra because Sierra is always in her room. Baylee stated that she and Sierra argue and that Sierra had taken some of her Easter gifts and John and Lisa said she could "hurt" Sierra for it. Baylee stated that John and Lisa told her to punch Sierra in the stomach, but she did not do it. Baylee denied that John and Lisa ever hit her. Baylee stated that Sierra sleeps on the floor while she and Skye sleep in beds. Baylee told the interviewer that she and Sierra get along better now that they are in foster care. Baylee stated that visits with John and Lisa are fun and that John and Lisa now treat Sierra differently in that they are nice to her.

Skye stated she likes living with John and Lisa because it is fun. Skye stated that no one ever had to stay in their bedroom because they were in trouble, and she denied that anyone was ever not allowed to go out to eat. Skye stated that sometimes Sierra would eat in her room because she wanted to. Skye said that John and Lisa were nice to Sierra and that Sierra never had to write sentences after getting in trouble.

In Karen Davidson's report, she stated that beginning on September 15, 2007, John and Lisa began 2-hour therapeutic visitations with the children twice a week. Davidson is a mental health therapist who supervises the therapeutic visitations for John and Lisa's family. Davidson stated that overall, John and Lisa's visits with the children have been positive and most of the time the children appear happy and connected with both John and Lisa. Davidson stated that family discussions are usually appropriate and upbeat and that John and Lisa's family has a lot of strengths, humor being at the top.

Davidson states that John and Lisa still harbor a lot of resentment toward Sierra and her behavioral issues from the past. Davidson stated that she had been redirecting John and Lisa during visits and all of her redirections had been met with respect and cooperation. Davidson stated that it was imperative that John, Lisa, and the children be able to discuss what happened in the past, as there is clearly underlying anger and resentment. Davidson stated that she had asked both John and Lisa to begin attending individual therapy to address their own emotions so that they can be calm and appropriate with the children when discussing the past. Davidson stated that John and Lisa told her that they had planned to start counseling once their psychological testing was complete. Davidson recommended that therapeutic visitation continue so that John and Lisa can address the issues with Sierra.

In Watke's report dated October 9, 2007, Watke stated that she is the court-appointed special advocate for the children. Watke note that since Sierra's placement in foster care, Sierra has gained 15 pounds. Watke stated that according to the children's foster mother, the children,

especially Sierra, are especially difficult and unhappy after visits with John and Lisa. Watke stated that the children are doing well in their foster home and that Sierra has told her foster mother that she does not want to go home. Watke recommended that the children remain in the State's custody and Sierra and Baylee continue to receive mental health and therapeutic services.

Watke stated that the results of John and Lisa's psychological evaluations had not been shared with her and that to her knowledge, John and Lisa were not attending counseling. Watke stated that with the concerns raised by the children's Project Harmony interviews, it was her recommendations that the children's visits with John and Lisa be suspended until further review indicates that the visits are not detrimental to the children's recovery.

In the court report and case plan, the Department noted that John and Lisa were currently participating in therapeutic family visitation twice a week and that it is in the children's best interests for visitation to stay as it is. The report states that since the children were removed, both John and Lisa had been compliant with the Department's requests. The caseworker noted that she was "not clear if [John and Lisa] fully understand how the type of discipline that has been used has affected the girls." The worker also noted that John and Lisa appear to believe that they had done nothing wrong and that Sierra's behavior warranted the type of physical discipline they were using. The report also states that the goal for John and Lisa is that they learn to use nonphysical discipline and parenting techniques for Sierra.

The report recommended that all three children remain in the custody of the Department, that Sierra and Baylee continue to participate in therapy, that visits remain therapeutically supervised, that John and Lisa participate individually in therapy, that John and Lisa follow the recommendations of their psychological evaluation, that family therapy is started once Byrd and Davidson agree that the children are ready, and that John complete an updated chemical dependency evaluation.

On October 24, 2007, the juvenile court filed an order stating that it did not adopt the State's plan of reunification, and referred the case back to the Department for a new plan. The court also stated that neither John nor Lisa could visit the children.

Both John and Lisa appealed the court's failure to adopt the State's plan of reunification to a three-judge review panel. In an order filed December 7, 2007, the juvenile court review panel affirmed. John appeals and Lisa cross-appeals from the review panel's decision as well as from the juvenile court's order denying them visitation with their children. These appeals have been consolidated.

ASSIGNMENTS OF ERROR

In their appeals, John and Lisa both argue that the juvenile court erred in (1) failing to adopt the Department's case plan and court report recommending reunification of John and Lisa with the children, (2) finding that neither John nor Lisa can have visitation with the children, and (3) admitting the children's interviews at Project Harmony and Watke's report into evidence.

ANALYSIS

In their appeals, John and Lisa both argue that the juvenile court erred in failing to adopt the Department's case plan and court report recommending reunification of John and Lisa with the children. The record shows that in its plan, the Department recommended several services for

John and Lisa, including therapeutic visitation for John and Lisa and the children. In its order, the juvenile court directed the Department to come up with a new plan and stated that John and Lisa could not have visitation with the children.

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 Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007). While Neb. Rev. Stat. § 43-285 (Reissue 2004) grants a juvenile court discretionary power over a recommendation proposed by the Department, it also grants preference in favor of such proposal. In order for a court to disapprove of the Department's plan, a party must prove by a preponderance of the evidence that the Department's plan is not in the child's best interests. The court may modify the plan, order that an alternative plan be developed, or implement another plan that is in the juvenile's best interests. § 43-285; *In re Interest of Vincent P.*, 15 Neb. App. 437, 730 N.W.2d 403 (2007).

In the instant case, no party introduced evidence showing that the Department's plan is not in the children's best interests. The Department noted that fair progress had been made to alleviate the causes of out-of-home placement and that John and Lisa had completed a parenting class, had undergone psychological evaluations, and had been having visitation with the children. The Department's report also states that John and Lisa had been compliant while working with the Department.

The Department's plan recommends that the children remain in the custody of the Department, that John and Lisa participate in individual therapy and follow the recommendations of their psychological evaluations, that family therapy is started once Byrd and Davidson agree that the girls are ready, and that John complete an updated chemical dependency evaluation. Additionally, the Department recommended that John and Lisa continue to receive therapeutic visitation with the children as it is in the children's best interests.

John and Lisa argue that the juvenile court erred in admitting the children's interviews with Project Harmony and Watke's report over their objections. John and Lisa contend that the court's admission of this evidence violates their due process rights and that the juvenile court used the evidence contained in these reports to support its decision not to adopt the Department's plan. Specifically, John and Lisa argue that since the juvenile court's ruling amounted to a termination of their parental rights, the level of due process applied in termination of parental rights cases should be applied to the instant case.

We have held that hearings regarding rehabilitative plans in juvenile cases are dispositional hearings, in which Nebraska rules of evidence do not apply, and due process safeguards at a disposition or detention hearing are less than those required at a hearing regarding termination of parental rights. *In re Interest of Daniel W.*, 3 Neb. App. 630, 529 N.W.2d 548 (1995), *reversed on other grounds* 249 Neb. 133, 542 N.W.2d 407 (1996).

Once there has been the adjudication that a child is a juvenile within the meaning of the Nebraska Juvenile Code, the foremost purpose or objective of the Nebraska Juvenile Code is promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parent(s) where continuation of such parental relationship is proper under the law. *In re Interest of J.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). To accomplish such goal and fashion a dispositional remedy beneficial to the juvenile, a judge

should have access to the best available evidence which is relevant, reliable, and trustworthy concerning a correct disposition for the juvenile. *Id.*

Assuming without deciding that both the Project Harmony interviews of the children and Watke's report, which references these interviews, were admissible, we note that the Department clearly did not offer this evidence to show that its plan of reunification was not in the children's best interests. Clearly, at the time of the hearing, the Department was arguing that John and Lisa should receive services in order to reunite them with the children. Therefore, we do not decide whether John and Lisa's due process rights were violated by the admission of these reports because even with the admission of these reports, there is no evidence offered by any party showing that the Department's plan is not in the children's best interests.

We do note though that the juvenile court violated John and Lisa's rights when it failed to adopt the Department's plan and directed the Department to come up with a new plan. In effect, by failing to adopt the Department's plan of reunification and not allowing John and Lisa visitation with the children, the juvenile court effectively began to proceed toward terminating John and Lisa's parental rights. The trial court did not have the authority to do so given that no party produced any evidence showing that the Department's plan to reunify John and Lisa with the children is not in the children's best interests. Therefore, we reverse the court's decision and remand the cause with directions that the juvenile court either adopt the Department's plan of reunification or, at a minimum, hold an additional hearing, allowing the parties, including Lisa and John, the opportunity to provide additional evidence regarding whether reunification is in the children's best interests.

CONCLUSION

After reviewing the record, we conclude that the juvenile court erred in failing to adopt the Department's case plan and court report recommending reunification of John and Lisa with the children and in finding that neither John nor Lisa can have visitation with the children. Therefore, we reverse the juvenile court's order and remand the cause with directions for the juvenile court to adopt the Department's plan of reunification and allow John and Lisa to visit the children as indicated in the Department's plan or, in the alternative, that the juvenile court hold another hearing on the question of whether the Department's plan of reunification is in the children's best interests.

REVERSED AND REMANDED WITH DIRECTIONS.