

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF WENDI L.

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IN RE INTEREST OF WENDI L., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

MARIA L., APPELLANT.

Filed July 27, 2010. No. A-10-021.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH,
Judge. Affirmed.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellant.

Donald W. Kleine, Douglas County Attorney, and Sean Lavery for appellee.

SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Maria L. appeals from the decision of the separate juvenile court of Douglas County adjudicating her daughter, Wendi L., pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Wendi was born in April 1992. Her parents are Saul L. and Maria. When Wendi was 16 years old, her father, Saul, subjected her to inappropriate sexual contact. Wendi told Maria about the abuse. Although Maria wanted to call the police, Wendi asked her not to because she did not want Saul to go to jail. The next day, on September 22, 2008, Wendi reported the sexual abuse to the Omaha Police Department. Maria was cooperative with the police department and participated in a “one-party consent call” to Saul, during which Saul admitted touching Wendi inappropriately. Criminal charges were filed against Saul on November 13. On April 29, 2009, Saul pled no contest to third degree sexual assault on a child and attempted first degree sexual

assault. He was later sentenced to 2 to 3 years' imprisonment for each conviction, sentences to run concurrently, with 277 days' credit for time served.

The State filed a petition with the juvenile court on May 1, 2009, alleging that Wendi is within the meaning of § 43-247(3)(a) by reason of the faults or habits of her mother, Maria, because (1) Saul subjected Wendi to inappropriate sexual contact; (2) Maria failed to protect Wendi from Saul; (3) Maria failed to provide Wendi with proper parental care, support, and/or supervision; and (4) due to the above allegations, Wendi is at risk for harm. The petition also alleged that Wendi is within the meaning of § 43-247(3)(a) through the faults or habits of her father, Saul. Because Saul is not part of this appeal, we will not further address any pleadings or orders relating to him.

According to an order filed on May 21, 2009, the first appearance and detention hearing was held on May 20. At that hearing, Maria entered a plea of denial to the allegations in the petition. The State moved for immediate protective custody, and Maria did not object. The juvenile court found that (1) due to exigent circumstances, it would be contrary to Wendi's health, safety, or welfare to be returned home; (2) reasonable efforts had been made to prevent or eliminate the need for removal; and (3) it is in Wendi's best interests to be placed in the temporary custody of the Department of Health and Human Services (DHHS). The juvenile court ordered that Wendi be placed in the temporary custody of DHHS and that Maria was to have supervised visitation one time per week.

On September 29, 2009, the State filed its second amended petition as to Maria, alleging that Wendi is within the meaning of § 43-247(3)(a) because (1) Saul was convicted of attempted first degree sexual assault and sexual assault in the third degree in regard to Wendi; (2) Maria failed to protect Wendi from Saul; (3) Maria failed to provide Wendi with proper parental care, support, and/or supervision; (4) Maria failed to maintain a supportive environment for Wendi after Wendi disclosed that she had been subjected to inappropriate sexual contact by Saul; and (5) due to the above allegations, Wendi is at risk for harm.

An adjudication hearing was held on December 7 and 21, 2009. In its order filed on December 22, the juvenile court found that the allegations of the second amended petition were true. The juvenile court adjudged that Wendi is a child as defined by § 43-247(3)(a) insofar as Maria is concerned by a preponderance of the evidence. The juvenile court ordered Wendi to remain in the temporary custody of DHHS.

Maria has timely appealed from the December 22, 2009, adjudication order.

ASSIGNMENTS OF ERROR

Maria alleges that the juvenile court erred in (1) finding there was a preponderance of evidence that Wendi came within the meaning of § 43-247(3)(a); (2) failing to conduct the proceedings in a fair and impartial manner and thereby violating Maria's due process rights; (3) allowing 8 months to elapse between the time of the filing of the petition and the adjudication hearing; and (4) allowing the therapist's testimony, because there was no evidence that the Spanish/English interpreter used during therapy was qualified to accurately translate.

STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008). However, when the evidence is in conflict, the appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.* In reviewing questions of law, an appellate court reaches conclusions independent of the lower court's ruling. *Id.*

ANALYSIS

Delay Before Adjudication Hearing.

Maria argues that the juvenile court erred in allowing 8 months to elapse between the time of the filing of the petition and the adjudication hearing. The petition was filed on May 1, 2009, the second amended petition was filed on September 29, and the adjudication hearing as to Wendi and Maria began on December 7. Thus, a little more than 7 months passed between the filing of the original petition and the beginning of the adjudication hearing. However, Maria has calculated the 8 months by stating that Wendi was taken into protective custody after a court hearing on April 21 (such hearing is not in our record) and that the adjudication hearing, which began on December 7, concluded on December 21.

Wendi cites us to *In re Interest of D.M.B.*, 240 Neb. 349, 355-56, 481 N.W.2d 905, 911 (1992), which states:

An adjudication hearing in regard to D.M.B. was not held until July 20, 1989, more than 8 months after the child was taken into “temporary detention” and “temporary custody.” A parent and a child, both being parties, have a right to a speedy adjudication hearing. See Neb. Rev. Stat. § 43-279.01(1)(f) (Reissue 1988). A delay of 8 months between the time a child is “temporarily” taken from the child’s parent until the child and parent are given the evidentiary safeguards of an adjudication hearing cannot be condoned, even when, as here, the parties agreed to repeated continuances. Keeping a child in limbo for 8 months by way of a “temporary” custody order on the basis of hearsay does not instill confidence in the integrity and fairness of our juvenile justice system. To preserve the integrity of the juvenile justice system, a juvenile court judge must control his or her docket to prevent long delays in the processing of juvenile cases.

In *In re Interest of D.M.B.*, 20-month-old D.M.B. was placed in foster care on November 11, 1988, the same day her mother, T.B., was arrested for sexually assaulting D.M.B.’s sisters. On November 14, without stating a factual basis for its “boilerplate” order other than that a probation officer investigated the nature and circumstances of the events surrounding the child’s being taken into custody, the juvenile court released D.M.B. to the custody of DHHS for placement. The original petition was filed on November 28. At a temporary detention hearing that same day, there was hearsay evidence that T.B. had sexually molested her children, including D.M.B. Without reciting the facts upon which its ruling was based, the juvenile court continued the temporary custody of D.M.B. pending an adjudication hearing. In December 1988, sexual abuse charges against T.B. were dismissed in criminal court. The adjudication hearing was not held until July 20, 1989. At that time, the original petition was amended to remove any

reference to sexual misconduct by T.B., and the amended petition failed to state that T.B.'s poor parenting skills had any effect upon D.M.B. or that her conduct placed D.M.B. at risk--T.B.'s poor parenting skills were alleged with respect to only D.M.B.'s three siblings, in that T.B. had failed to comply with the juvenile court's recommendations in regard to D.M.B.'s three siblings which resulted in the termination of T.B.'s parental rights in such siblings. Nonetheless, the juvenile court found D.M.B. to be a child within the juvenile court's jurisdiction. The juvenile court stated that in light of T.B.'s plea, there was no need to go into a factual explanation because the court "is well aware of the previous dealings at the other docket involving the three siblings.'" *Id.* at 358, 481 N.W.2d at 912 (emphasis omitted).

On appeal, the Nebraska Supreme Court noted that (1) there was no indication in the record that T.B. was present in chambers when the juvenile court judge apparently made some kind of factual determination which resulted in the juvenile court's purportedly acquiring jurisdiction of D.M.B. and (2) the record did not reflect that T.B. was ever informed of the facts from the "other docket" upon which the juvenile court, at least partially, purportedly acquired jurisdiction over D.M.B. The Nebraska Supreme Court found that on the record before it, neither the State's petition as amended nor the facts in the amended petition admitted by T.B. supported an adjudication that D.M.B. was a juvenile covered by the provisions of § 43-247(3)(a). Thus, even though the Nebraska Supreme Court noted that an 8-month delay was too long when temporary custody was obtained on the basis of hearsay, the adjudication was reversed with directions to dismiss for lack of jurisdiction.

In the instant case, Wendi was apparently first taken into protective custody on April 21, 2009. At the custody court hearing on May 20, the State offered the affidavit of Genevieve Nassa, formerly known as Genevieve Nanfito (Nassa), a protection and safety worker with DHHS, in support of Wendi's continued placement with DHHS. Nassa's affidavit states that at an intake dated April 6, 2009, Wendi reported an incident between her and Saul. Wendi reported

getting ready for a court appearance when her father entered her room, pushed her on the bed and grabbed her breast. He said they were his and that she needs to stay at home to get sex not go out on the street. He then grabbed his penis and told her that she knows she wanted him since she was little. Then he said he would buy her a vibrator so she would stay off of the streets.

Nassa's affidavit states that Wendi reported disclosing the incident to her mother approximately 1 month after the incident. Nassa stated that as a result of this incident and an investigation by the Omaha Police Department, Saul was arrested and charged with "Sexual assault/child-3rd degree and Sexual assault/minor-1st degree," and he is awaiting sentencing. Nassa's affidavit states that Wendi also reported feeling "like [she] has very little emotional support from her family. They blame her for her father's incarceration and talk bad about her to others. Even her mother reports not to believ[e] her due to all the problems that she has been involved in over the past two years." Nassa's affidavit states that Maria reported that she did not think that Wendi was lying about the allegations against Saul, but Maria feels torn because she does not think that Saul would be capable of this. Maria and her two sons continue to visit Saul one to two times per week, and she hopes Saul can get out of jail soon. Nassa stated:

Though the family reports that they would rather be living together, the home environment is clearly not supportive of Wendi and what she has gone through with her father. Even though Saul is awaiting his sentencing it appears that Maria continues to stand by his side as evidence[d] by her own reports that she wished he could come home, and her continued visits with him as he is incarcerated.

Keeping in mind that *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992), did not explicitly establish a bright-line rule regarding delays between temporary custody orders and adjudication hearings, that case is also distinguishable from the instant case. Unlike in *In re Interest of D.M.B.*, a proper factual basis was presented in support of Wendi's temporary placement with DHHS. Furthermore, the allegations contained in both the original and second amended petition provided sufficient basis for the juvenile court to assert jurisdiction over Wendi. An 8-month delay in this case, while hardly ideal, is not grounds for reversal. Wendi was a 17-year-old girl taken into temporary custody based on evidence that her father sexually abused her. Her father was eventually convicted and sentenced for such sexual abuse. In *In re Interest of D.M.B.*, *supra*, the child was only 20 months' old, and thus at a well-known crucial stage for bonding and attachment, and there was no criminal conviction as occurred here. Wendi remained in temporary custody based upon sufficient evidence supporting the allegations contained in the petition, and she was ultimately found to be a child within the meaning of § 43-247(3)(a). See, also, *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000) (Neb. Rev. Stat. § 43-278 (Reissue 2008) provides that adjudication hearing shall be conducted within 90 days after petition is filed; however, Nebraska Supreme Court has held that § 43-278 is directory, not mandatory, and as such, provision does not mandate that case be dismissed if adjudication is not completed within 90 days). We do not find that the delay is sufficient grounds for reversal.

Testimony of Susan Coffey.

At an adjudication hearing, the admissibility of evidence is governed by the customary rules of evidence in use in trials without a jury. *In re Interest of O.L.D. and M.D.D.*, 1 Neb. App. 471, 499 N.W.2d 552 (1993). In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *Id.*

Maria argues that the juvenile court erred in admitting Susan Coffey's testimony because there was no evidence that the Spanish/English interpreter used during therapy was qualified to accurately translate. While this is the assigned and argued error, the objection at trial asserted "hearsay" in addition to claiming that the interpreter was "not certified in any way to be interpreting." Thus, we take the assigned error and argument to be an abandonment of the hearsay objection and address the matter of the interpreter's qualifications.

Coffey is a licensed mental health practitioner who provided counseling services to Wendi beginning on April 4, 2009. Once Wendi disclosed the sexual abuse by her father, they discussed such abuse. Wendi and Coffey also discussed how Wendi had been treated in her

mother's home since that time. After meeting with Wendi, Coffey met with Maria. But because Maria does not speak English, and Coffey does not speak Spanish, the only way Coffey and Maria could communicate was through an interpreter. Maria Valencia-Vega interpreted for Coffey and Maria. Neb. Rev. Stat. § 27-604 (Reissue 2008) provides that an interpreter is subject to the provisions relating to qualification as an expert. And Neb. Rev. Stat. § 27-702 (Reissue 2008) states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

And “[given] the broad wording of this standard, no specific certification, schooling, or other qualifications are required of an interpreter.” 27 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6054 at 364 (2d ed. 2007) (discussing standard in Federal Rule 702, upon which Nebraska’s Rule 702 is patterned). “In the usual case, an interpreter’s qualifications will be sufficient if she is shown to be fluent both in English and the language or other manner of communication employed by the witness.” *Id.* at 364-65.

In *U.S. v. Gonzalez-Remirez*, 561 F.3d 22 (1st Cir. 2009), a detective “decoded” intercepted telephone calls between the defendant and another individual, conducted in English. According to the detective, the telephone calls concerned the delivery of cocaine. The detective later had a telephone conversation in Spanish with the defendant, who confessed his involvement in a drug operation. At trial, the defendant claimed that the detective’s testimony should have been excluded because he was not sufficiently proficient in Spanish such that his translation of the defendant’s confession could be deemed accurate. The district court conducted voir dire, during which it was determined that Spanish is the detective’s native language, that he speaks it fluently and understands multiple dialects, and that Spanish is spoken in his own household. The detective also testified that he served as a translator many times. The detective had no formal Spanish education since grammar school and was not a certified translator or interpreter. On appeal, the First Circuit Court of Appeals found no abuse of discretion in the court’s decision to allow the detective’s testimony because the court was presented with considerable evidence of his fluency. The First Circuit Court noted that the defendant provided no legal support for his apparent theory that only certified translators may provide such testimony, nor could the First Circuit Court locate any. The First Circuit Court said that the defendant’s argument was “one more properly directed to the weight of the evidence, not its admissibility.” *Id.* at 29.

Valencia-Vega testified that her languages of origin are both English and Spanish. She testified that she has spoken both languages her entire life. She learned to speak Spanish at home and English at school. Valencia-Vega testified that she is fully able to read and write both languages. She reads, writes, and speaks Spanish in her daily affairs. Valencia-Vega is an administrative secretary at a 90-percent Spanish-speaking elementary school. Valencia-Vega has translated for Omaha Public Schools for 8 years, for Project Harmony a “couple of times,” and for Coffey 7 to 10 times. Valencia-Vega provided translation services to Coffey and Maria on approximately six occasions, the first occurring on April 14, 2009. Valencia-Vega testified that she accurately translated what was said and had no difficulty translating or understanding what

either party was saying. Valencia-Vega testified that both Maria and Coffey appeared to fully understand what was being translated. Any issues concerning Valencia-Vega's qualification to interpret go to the weight of the evidence, not its admissibility. That said, on the record before us, she was clearly qualified to provide translation services to Coffey and Maria. This assignment of error lacks merit.

Fairness and Impartiality of Proceedings.

Maria argues that the juvenile court failed to conduct the proceedings in a fair and impartial manner and thereby violated her due process rights. She sets forth 10 "errors and/or irregularities" by the juvenile court from the hearings on December 7 and 21, 2009: (1) directing Wendi to look at the court during direct and cross-examination and not allowing the minor child to look at her mother; (2) directing counsel to limit questioning to events occurring prior to May 1, 2009; (3) making a judicial determination from the bench during the pendency of the proceedings that failing to "create a supportive home environment" was analogous to failing to provide proper parental care; (4) failing to question Coffey in a fair and impartial manner; (5) not allowing Coffey to fully answer questions posed by the court without interruption from the court; (6) essentially telling Coffey that her answers were incorrect; (7) announcing to the witness that the court "was not angry" but "frustrated" when the witness gave an answer; (8) questioning Coffey about events at the December 7, 2009, hearing when the court previously did not allow counsel to make similar inquiry; (9) leading Coffey during questioning; and (10) directing the State in the questioning of Nassa.

A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). Furthermore, "[o]ne cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong." *Mooney v. Gordon Memorial Hosp. Dist.*, 268 Neb. 273, 682 N.W.2d 253 (2004) (plaintiff made no complaint about fairness or impartiality of district court judge until after adverse judgment was rendered). We have reviewed the 10 "errors and/or irregularities" set forth by Maria and compared such with her citations to the record. In regard to nine of the alleged errors/irregularities, Maria made no objection to the juvenile court. Thus, with the exception of alleged error No. 2 above, Maria has waived any error.

Maria has properly preserved the claim of error concerning the juvenile court's directing counsel to limit questioning to events occurring prior to May 1, 2009, the date of the original petition. Maria's counsel did not specifically object to this limitation, but, rather, counsel sought a point of clarification from the court. When counsel pointed out that the amended petition was filed on September 29, the juvenile court inquired as to whether there was any new information that was not in the original petition. Counsel responded that an allegation--that Maria had failed to create a supportive home environment for Wendi--was added in the amended petition. When the juvenile court asked how that was different from the allegation in the amended petition (i.e., that Maria failed to provide proper parental care, support, and supervision), counsel responded, "I don't believe it's all that different, Your Honor." We fail to see how the juvenile court's limiting of evidence to events occurring prior to May 1, 2009, the date of the original petition, constitutes a failure by the juvenile court to conduct the hearing in a fair and impartial manner.

Maria has shown no prejudice by such limitation, and we find none. This assignment of error is without merit.

Sufficiency of Evidence.

Maria argues that the juvenile court erred in finding there was a preponderance of evidence that Wendi came within the meaning of § 43-247(3)(a). Section 43-247 states in relevant part: “The juvenile court in each county as herein provided shall have jurisdiction of: . . . (3) Any juvenile (a) . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian[.]” In *In re Interest of Dylan Z.*, 13 Neb. App. 586, 594, 697 N.W.2d 707, 716 (2005), this court said:

The rights of the parent and the child are protected separately by the adjudication and dispositional phases of juvenile proceedings. . . . Allegations in a petition brought under § 43-247(3)(a) are brought on behalf of the child, not to punish the parents. . . . The purpose of the adjudication phase is to protect the interests of the child. . . . The parents’ rights are determined at the dispositional phase, not at the adjudication phase.

(Citations omitted.) And “[a]t the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence.” *In re Interest of Heather R.*, 269 Neb. 653, 663, 694 N.W.2d 659, 667 (2005).

The evidence is that Maria has failed to provide Wendi with proper parental care. Nassa, who works for DHHS, testified that she received an intake regarding Wendi on April 6, 2009, and that Maria admitted visiting Saul in jail. Nassa stated that this is concerning because it sends a “pretty significant message” to Wendi and it puts Wendi at risk for harm of revictimization if Saul gets out of jail. Nassa testified that Maria was concerned that Saul would be deported as a result of his incarceration, which concerned Nassa because Maria seemed more worried about Saul than Wendi.

Despite Saul’s convictions, Wendi testified Maria visits Saul in jail, often taking Wendi’s two brothers with her. Wendi testified that when Maria and her brothers go visit Saul, she feels lonely and sad. Wendi testified that Maria has never asked her how she feels about Maria visiting Saul. Maria also talks to Saul on the telephone. Wendi testified that on one occasion, Maria told Wendi and her brothers that Saul was crying and wanted to come home.

Wendi testified that after the abuse allegations, Maria continued contact with Saul’s family, who is not supportive of Wendi. Wendi testified that her father’s family is mad at her and said she is lying about what happened. Wendi testified that once each week Maria went to visit Saul’s family or had them over to her house--and we note this would have to have occurred prior to Wendi’s removal. Wendi testified that when Saul’s family was at her house, she stayed in her room because the family would not talk to her. Wendi testified that her relationship with Maria improved when they started going to therapy, which was before Wendi’s removal. Wendi also testified that once she was not living at home, “things started to get better.”

Coffey testified that if Maria and Wendi’s two brothers were visiting Saul in jail before Wendi was in foster care, it would indicate a lack of support for Wendi. Coffey testified that the visits would also send conflicting messages to Wendi’s brothers about what happened to Wendi. Coffey testified:

I believe Wendi truly believes that she was not getting the support she needed emotionally at the time and was very distraught. Her thinking was distorted, and it carried over into her school behaviors And she believed that she was not supported. That her family -- her father's family did not approve of her. In fact, disowned her and talked bad about her all the time.

Coffey also testified that Maria is still visiting Saul and that it "has had a really negative effect on Wendi recently." We note that at oral argument, Maria's counsel argued there was no evidence of how many times Maria visited Saul in jail, and that while Nassa testified that Maria visited Saul two to three times per week, such visits could have only been for 1 week. In addition to Nassa's testimony, the record before us includes Wendi's testimony that Maria visited Saul in jail once a week, although she did not specify how many weeks such visits occurred. At the continued adjudication hearing on December 21, 2009, which was 8 months after Wendi's removal on April 21, 2009, Coffey testified that Maria was still visiting Saul. Bearing in mind that Saul has been convicted of third degree sexual assault and attempted first degree sexual assault of Wendi, we agree with the core of Coffey's testimony that Wendi's mother should be supportive of Wendi rather than her abuser. Moreover, Maria's continued contact and relationship with Saul is harmful to Wendi's emotional health and gives the appearance that her mother has chosen Wendi's abuser over her--which poses a risk to Wendi's well-being. We find that grounds for the adjudication were shown by the requisite standard of proof. Thus, we affirm.

CONCLUSION

For the reasons stated above, we find that the juvenile court properly took jurisdiction over Wendi under § 43-247(3)(a).

AFFIRMED.

IRWIN, Judge, participating on briefs.