

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Trenity D.)
and Surenity D.,)
Children under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Andrea D.,)
)
Appellant.)

No. A-13-864

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

APR 04 2014

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

INBODY, Chief Judge.

INTRODUCTION

Andrea D. appeals the order of the separate juvenile court of Douglas County adjudicating her two minor children, Trenity D. and Surenity D., as children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

STATEMENT OF FACTS

On April 25, 2013, the State filed a petition alleging that Trenity and Surenity were children within the meaning of § 43-247(3)(a) and were lacking proper parental care by reason of the faults or habits of Andrea. Specifically, the petition alleged that Andrea's use of alcohol and/or controlled substances and history of mental health issues placed the children at risk for harm. Additionally, the petition alleged that Andrea had failed



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to provide the children with safe, stable, and appropriate housing and had failed to provide proper parental care, support, and supervision.

The adjudication hearing was held on September 26, 2013. At the hearing three exhibits were received without objection: Trenity's birth certificate, Surentity's birth certificate, and the deposition of Dr. Sharon Hammer, taken in lieu of live testimony.

Christyn Niroomand-Rad (Rad) testified that she is a medical social worker for the neonatal intensive care unit (NICU) and high-risk pregnancies at the Nebraska Medical Center. Rad testified that her employment responsibilities are dedicated to those in the NICU in order to provide an initial assessment, determine needs, provide plans and gather information to prepare for the discharge of the infant. Rad testified that she also assesses the infant to determine eligibility for medical benefits. Rad testified that on April 23, 2013, she became familiar with Andrea after she delivered a baby the day before, after a report that Andrea had a history of mental health concerns and a positive drug screen for amphetamine upon her admission for delivery.

Rad spoke with Andrea who "indicated that she had figured that she'd be positive for methamphetamine." Andrea reported to Rad that she was a "retired user" but had not intentionally used

methamphetamine for the last 14 months. Andrea indicated that two days before her delivery, Andrea had attended a party where she was given water laced with methamphetamine. Andrea told Rad that once she tasted the water, she knew there was methamphetamine in it by the way it tasted. Andrea further reported to Rad that at that same party, she had oral sex with a male who she believed was under the influence of methamphetamine and she thought that may have caused her to test positive as well. Andrea also indicated to Rad that she had struggled with "mental health concerns" since she was a child and was under the care of a psychiatrist for a variety of diagnoses including bipolar disorder, social phobias, borderline schizophrenia, depression, and multiple personality disorder. Andrea told Rad that she was being treated for depression and was managing the others on her own. Andrea reported that she had daily auditory and visual hallucinations, and that her personalities conversed daily. Andrea also explained that Trenity was aware of her different personalities and was "getting to know them."

Angie Morehead, a DHHS initial assessment worker, testified that on April 24, 2013, Morehead received an intake regarding Trenity and Surentity, after Andrea had just given birth to Surentity, who was born 8 weeks premature. First, Morehead investigated any past involvement with Andrea and CPS, and then she talked with the hospital social worker and visited Surentity

in the hospital. She then proceeded to Andrea's home to investigate the allegations of drug use and mental health issues. Upon her arrival at Andrea's home, Morehead observed that the residence was cluttered with objects stacked against the wall standing taller than Trenity and that there were medications and lighters within Trenity's grasp. Andrea was concerned about the danger of all of the objects stacked along the wall and that Trenity could reach the lighters and medication, which at 15 months old, she should not have access to. Andrea reported to Morehead that she had accidentally drank some water with methamphetamines in it, but that she had not used methamphetamines herself for over a year. Andrea explained that she had gone to a friend's home to get some children's clothing when she used the "wrong bottle of water" that her friends were using to clean their methamphetamine pipes. Andrea reported to Morehead that she had 47 different personalities and had been diagnosed with Type II bipolar disorder and depression. Andrea also discussed that she had blackouts, but that those did not occur frequently. Andrea indicated to Morehead that she hears voices on a daily basis and that those voices direct her to punch people and who to like or dislike. Over objection by Andrea's counsel that Morehead was not an expert and an extensive voir dire by counsel, Morehead testified that if the children were returned to Andrea they would be at risk of harm.

Dr. Sharon Hammer, a specialist in the psychiatric field of peripartum mental health, testified that she is Andrea's supervising psychiatrist and that Andrea had been a patient at her clinic since September 2011. Dr. Hammer testified that Andrea was originally referred to her clinic because she was pregnant and had a history of psychiatric hospitalization and bipolar diagnosis. Dr. Hammer testified that she was present for Andrea's initial visit, another visit in between, and Andrea's most recent visit in August 2013. Dr. Hammer testified that other medical residents in the clinic provided the remainder of direct care to Andrea.

At her initial visit, Andrea explained that she was suffering from mood problems, depression, irritability and anger outbursts. Andrea was evaluated and referred for follow-up visits, no medication was prescribed at that time. Andrea was diagnosed with bipolar disorder, polysubstance abuse, and borderline personality traits. Dr. Hammer explained that traits of borderline personality disorders include difficulty with forming attachments, frustration, narcissism, anger, and getting along with others. Dr. Hammer indicated that Andrea had a history, since the age of 14, of cutting. Dr. Hammer testified that the bipolar disorder is mood instability with periods of depression and manic symptoms such as increased levels of activity, decreased need for sleep, grandiosity, racing

thoughts, psychosis, anger, hallucinations, delusions, low mood, inability to function, and suicidal thoughts. Dr. Hammer testified that Andrea endorsed on the bipolar screening on every symptom, including additional symptoms such as decreased need for sleep, impulsivity, and being more socially outgoing. Dr. Hammer testified that at the time of Andrea's initial visit, she was drinking alcohol heavily, smoking marijuana on a daily basis, and had used methamphetamine; however, Andrea reported that she had not been using drugs or alcohol for the previous 10 weeks because she was pregnant.

After Andrea's first pregnancy, Andrea was prescribed Lexapro. Dr. Hammer explained that at various times throughout Andrea's treatment, she had also been prescribed an anticonvulsant mood stabilizer, an antidepressant drug, and an agitation drug. Also part of Andrea's treatment plan was social work intervention, trying to stabilize her living and financial situations, and to abstain from alcohol and drug use. When Andrea discovered she was pregnant a second time, she discontinued the use of all her medications. In April 2013, Andrea was seen by the consult psychiatrists in the inpatient unit when she was hospitalized and went into labor with her second child.

On cross-examination, Dr. Hammer testified that from April 2011 through December 2013, Andrea was not found to be a risk to

herself or others. Dr. Hammer testified that Andrea had cancelled a total of six visitations during that time and that none of those missed visitations were no-shows by Andrea. Dr. Hammer testified that it was not unusual for patients to cease taking their prescribed medications during a pregnancy and that having bipolar disorder, a personality disorder, or a history of mental history, in and of itself does not make a person unfit to parent.

On October 1, 2013, the juvenile court adjudicated the children as within the meaning of § 43-247(3)(a), finding that counts I and II (A, B, and C) of the petition were true by a preponderance of the evidence. The juvenile court dismissed Count II (D and E) for lack of proof, but found that it would be contrary to the health and safety of the children to be returned to the home. The court further found that it is in the best interests of the children to remain in the care and custody of the Nebraska Department of Health and Human Services (DHHS)/Nebraska Families Collaborative for care and placement. It is from this order that Andrea has timely appealed.

ASSIGNMENTS OF ERROR

Andrea assigns, rephrased and consolidated, that the juvenile court erred by qualifying the investigative worker as an expert and by adjudicating her minor children as children within the meaning of § 43-247(3)(a).

STANDARD OF REVIEW

An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Aaliyah M. et al.*, 21 Neb. App. 63, 837 N.W.2d 98 (2013). When the evidence is in conflict, however, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

ANALYSIS

Qualification of Expert Testimony.

Andrea contends that the juvenile court erred by finding that Morehead was qualified as an expert at "being able to identify risk of harm of children in the home." Brief for appellant at 20.

A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *In re Interest of Ramon N.*, 18 Neb. App. 574, 789 N.W.2d 272 (2010).

At the adjudication hearing, Morehead testified that she had been employed with DHHS as an initial assessment investigator for 4½ years, prior to which she received a bachelor's degree in criminal justice from the University of

Nebraska-Omaha. Morehead testified that she received training on how to recognize safety threats in the home, how to investigate allegations in intakes regarding risk of harm to children and is required to undergo continuing training requirements regarding risk of harm, safety threats, family services, and investigations. Morehead explained that she receives reports or intakes from Child Protective Services (CPS) and her job is to investigate the allegations. Once her investigation is completed, Morehead determines whether or not the child can remain safely in the home and whether a family needs services. Morehead testified that this determination is routine and occurs in every case that is investigated. Morehead testified that she has investigated 12 to 13 cases each month for the last 4½ years. Morehead testified that her investigations consist of reviewing previous family histories, meeting with the children, parents, and family members and gathering collateral information from schools and hospitals.

During her testimony, Morehead was asked by the State to give her opinion as to whether Andrea's children would be at risk of harm if returned to her care, and the following dialog ensued,

Q. In light of your education, your training, your experience, and your investigation of this intake, do you have a professional opinion as to whether Trenity and

Surenty would be at risk of harm if returned to the care of [Andrea]? Do you have an opinion?

A. Yes, I do.

Q. In forming your opinion as to whether they would be risk for harm, what are the factors that you took into consideration in formulating that opinion?

A. All of the information that was obtained during my investigation prior.

Q. Such as?

A. Such as the information in regards to [Andrea's] drug use, the conditions of the home, the collaterals that I had spoke with, as well as any prior - the prior investigations, as well as the positive hair test that was completed on Trenity.

[Counsel for Andrea]: Objection, foundation. Move to strike.

THE COURT: Sustained. Reference to the hair test is stricken.

[The State]: Your Honor, if this is going to her opinion - strike that.

Q. Any other concerns that - or any other factors that came into consideration in forming your opinion?

A. don't - I don't believe so.

Q. What is your opinion as to whether the children would be at risk for harm should they be returned to the care of [Andrea]?

[Counsel for Andrea]: Objection; foundation, relevancy. This is not - this is not an expert, has not been established to be an expert. No offense to Ms. Morehead, she's not an expert at anything, Judge.

THE COURT: She doesn't have to be an expert to give an opinion.

[Counsel for Andrea]: If the court is receiving it as a lay opinion, then anything that was used to rely on it that she's previously testified to would be hearsay.

THE COURT: It's overruled. You may answer.

[Counsel for Andrea]: Is it being received as an expert opinion, Judge, or a lay opinion?

THE COURT: Lay opinion.

. . . .

[The State]: Your Honor, may I inquire as to why it's not being received as an expert opinion? She's testified to her education, her training, number of risk for harm determinations she's made in her four-and-a-half-year career as part of her normal job and duties. I don't understand what would be lacking in qualifying her as an expert in making determinations of risk for harm for children.

THE COURT: Have you testified as an expert previously?

THE WITNESS: Yes, I have, Your Honor.

THE COURT: How many times?

THE WITNESS: I would have to make a guess. It's over - a dozen, Your Honor.

THE COURT: All right. And in what capacity have you testified as an expert?

THE WITNESS: I've testified in adjudications, as well as termination trials where parents' rights have been terminated.

THE COURT: All right. And are you saying, basically, that you testified in your present capacity as an intake investigator for the Department?

THE WITNESS: Yes, Your Honor.

THE COURT: And has the Judge, specifically, made findings in each of those instances that you qualified as an expert?

THE WITNESS: Yes, I believe so, Your Honor.

[Counsel for Andrea]: I'm still objecting as to foundation. There is no evidence of any of that.

THE COURT: I'm going to revisit my finding. She is - she's qualified as an expert and may render her opinion as such.

Based upon the record before this court, we cannot say that the juvenile court abused its discretion by allowing Morehead to testify as an expert regarding risk of harm to Andrea's children. Given Morehead's experience, background, knowledge, ongoing training, and experience with investigating Andrea's case, clearly she possessed specialized knowledge regarding the risk of harm assessment and the juvenile court's allowance of that testimony as such was not clearly erroneous.

Adjudication.

Andrea assigns that the juvenile court erred by adjudicating the children as within the meaning of § 43-247(3)(a) because the State failed to meet its burden as to Counts II (A, B, and C) of the petition. Count I provides that both children are under the age of 18 years old and are living in Douglas County, Nebraska.

To obtain jurisdiction over a juvenile at the adjudication stage, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Justine J.*, 286 Neb. 250, 835 N.W.2d 674 (2013). Section 43-247(3)(a) outlines the basis for the juvenile court's jurisdiction and grants exclusive jurisdiction over any juvenile "who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian."

The purpose of the adjudication phase is to protect the interests of the child. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001). The Nebraska Juvenile Code does not require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction. *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992). While the State need not prove that the child has actually suffered physical harm, Nebraska case law is clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm. *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008). The State must prove such allegations by a preponderance of the evidence. *Id.*

In this case, the evidence presented at the adjudication hearing indicated that Andrea has a history of drug and alcohol

abuse for engaging in the use of heavy alcohol, marijuana, and methamphetamine, as recent as 12 to 14 months prior April 2013, while Trenity was very young. The evidence presented indicated that although Andrea appeared to abstain from drug use during pregnancy, she was at a party wherein she ingested methamphetamine while pregnant, claiming that it was an accidental ingestion by drinking water containing methamphetamine or by having oral sex with a methamphetamine user.

We recognize that there has not been any actual physical harm to these children; however, the question is not whether the actual harm has occurred, but, rather, whether there is a definite risk of harm to the children. In the petition for adjudication, the State alleged in Count II, section (A), that it was Andrea's use of alcohol and/or controlled substances which places the children at risk for harm. The State proved by a preponderance of the evidence that Trenity and Surentity were under the age of 18 years old and lacked proper parental care by reason of the faults or habits of Andrea, specifically her use of alcohol and/or controlled substances. This evidence alone is sufficient to show a definite risk of harm as a result Andrea's use of alcohol and/or controlled substances such that this court should not wait for a disaster to befall these children. Contrary to Andrea's assertion that the State failed to meet its

burden because it failed to prove each assertion in the petition, the State is not required to prove all of the allegations set forth in the petition, and the evidence is sufficient to prove that Andrea's use of alcohol and/or controlled substances place the children at risk for harm. Therefore, we affirm the juvenile court's order of adjudication finding that Trenity and Surentity were children within the meaning of § 43-247(3)(a).

CONCLUSION

In conclusion, we find that the juvenile court did not abuse its discretion by qualifying the DHHS assessment worker as an expert and that the State proved by a preponderance of the evidence that Trenity and Surentity are children as defined by § 43-247(3)(a). Thus, the juvenile court did not err in adjudicating the children and the order of the juvenile court is affirmed.

AFFIRMED.