

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF ANTONIO A., JR.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF ANTONIO A., JR., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

VICTORIA A., APPELLANT.

Filed May 18, 2010. No. A-09-1055.

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

Lisa Ferguson Lozano for appellant.

Gary E. Lacey, Lancaster County Attorney, Shellie D. Sabata, and Michelle Clarke,
Senior Certified Law Student, for appellee.

IRWIN and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Victoria A. appeals from an order of the juvenile court for Lancaster County adjudicating her minor child, Antonio A., Jr. (Antonio Jr.), as lacking proper parental care. On appeal, Victoria contends that the juvenile court erred in adjudicating Antonio Jr. under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). For the reasons set forth below, we affirm.

BACKGROUND

Victoria is the mother of Bianca H., born in February 2003; Eternity H., born in December 2004; Justice H., born in November 2007; and Antonio Jr., born in October 2008. Antonio H. and Victoria are the parents of all four children.

On August 14, 2008, the State filed a petition alleging that Antonio Jr. was a child as defined by § 43-247(3)(a). Specifically, the State alleged that it had previously adjudicated Bianca and Eternity under § 43-247(3)(a) and that it had recently filed a petition to terminate Antonio's and Victoria's parental rights to Bianca and Eternity. The State noted that it had also recently filed a petition to adjudicate Justice under § 43-247(3)(a) and terminate Antonio's and Victoria's parental rights to Justice. The State stated that a plan to correct the issues leading to Bianca's and Eternity's adjudication had been developed and that both Antonio and Victoria had failed to comply with the conditions of that plan. The State also stated that visitation between Antonio and Victoria and the older three children had been suspended. The State alleged that Antonio's and Victoria's actions place Antonio Jr. at risk for harm.

Hearings on the State's motion to adjudicate Antonio Jr. were held in 2009 on April 23 and 30; May 4, 5, 7, and 15; and June 15 and 24. Antonio Jr.'s adjudication hearings were consolidated with the hearings on the State's motions to terminate Victoria's and Antonio's rights to Bianca and Eternity.

On September 23, 2009, the juvenile court adjudicated Antonio Jr. to be a child as defined by § 43-247(3)(a) due to him lacking proper parental care by reason of the fault or habits of Victoria and Antonio.

On the same date, the court ordered that Victoria's and Antonio's parental rights be terminated to Bianca, Eternity, and Justice. In separate memorandum opinions, we affirmed the termination of Antonio's and Victoria's parental rights to Bianca, Eternity, and Justice. See, *In re Interest of Bianca H. & Eternity H.*, case No. A-09-1056; *In re Interest of Bianca H. & Eternity H.*, case No. A-09-1057; *In re Interest of Justice H.*, case No. A-09-1060. This appeal involves only the adjudication of Antonio Jr. Victoria appeals. Antonio does not appeal the adjudication of Antonio Jr.

ASSIGNMENTS OF ERROR

On appeal, Victoria contends that the trial court erred in adjudicating Antonio Jr. to be a child as defined by § 43-247(3)(a).

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

On appeal, Victoria contends that the trial court erred in adjudicating Antonio Jr. as lacking proper parental care. The record from the hearings on Antonio Jr.'s adjudication shows that Victoria began a relationship with Antonio in approximately June 2001. Their relationship was marked by severe violence and abuse. In February 2002, Antonio became angry when Victoria provided him assistance when he started to overdose on methamphetamine. In the home that they shared, Antonio punched and kicked Victoria and then hit her with a piece of wood and

burned her with a cigarette. Victoria also reported that Antonio injured her nose when he kicked her in the head. Victoria had her older son in her care at that time. He was born in January 2002, just a few weeks prior to these incidents. Victoria also described another incident where Antonio threatened to put a plastic bag around her older son's head if Victoria did not locate Antonio's cellular telephone within 30 seconds.

Victoria's older son and her older daughter, who was born in November 1999, were adopted by relatives in 2002 after Victoria relinquished her parental rights. Both of these older children had been previously adjudicated by the juvenile court for Lancaster County. Antonio is not the father of these older children.

In May 2005, Victoria contacted the police and reported several violent acts by Antonio that occurred on February 6, 2005. Victoria indicated that she waited to report this violence because Antonio kept Bianca with him at all times when he left the home, knowing that Victoria would not leave him without her daughters. Victoria testified that on or about February 6, Antonio drove her north of Lincoln, pulled over to the side of the road, and proceeded to beat and strangle her.

Specifically, Victoria testified that Antonio hit her with his open and closed fists, causing swelling to her entire face. Victoria also reported that Antonio attempted to strangle her with an extension cord and that he pinned her down between the seats of their van, punching and kicking her in the face. Antonio also used a key to "carve" Victoria "up and down the side of [her] body."

Additionally, as part of the same incident, Victoria reported that Antonio stabbed her over 50 times in the leg with what looked like an ice pick. Antonio broke Victoria's thumb in two places and broke her wrist while she was trying to block the blows to her head using her hands. Antonio also hit Victoria with a broken brush, causing a gash on her stomach. Although nearly 3 months had passed by the time Victoria reported these incidents to the police, Victoria still had visible bruising and scabs that were observed by the police. Shortly after Antonio and Victoria returned home from this incident, Antonio squeezed Victoria's fingers with a pair of pliers.

After Antonio was arrested for the above-described acts, Victoria did not cooperate with the criminal prosecution of Antonio and wrote letters to the Lancaster County Attorney's office, Antonio's attorney, and the judge to request that the charges be dropped. Given Victoria's lack of cooperation, Antonio was not convicted of any crimes stemming from these acts of violence against Victoria.

In February 2006, Victoria reported that Antonio hit her in the back of the head. Victoria went to the hospital for treatment, and law enforcement was contacted by hospital personnel. Earlier in the evening, Antonio also struck Victoria with a broom and a closet pole. The record shows that Antonio's beating of Victoria was so severe that the broom handle eventually broke. Again, Victoria refused to cooperate with the prosecution of Antonio. Subsequently, the court deemed Victoria to be in contempt of court for failure to appear and testify pursuant to a subpoena. Antonio was incarcerated from June 27, 2006, to January 12, 2007, for the assault and for possession of methamphetamine.

Antonio's drug use and violence brought him into contact with law enforcement on several other occasions. On September 3, 2008, Antonio was sentenced to 7 days in the Gage

County jail for contempt of court due to his behaviors toward a judge during a sentencing hearing. On February 21, 2009, Antonio was arrested on several outstanding warrants. When Antonio was released from the Lancaster County jail on April 30, he was taken into federal custody on an indictment for conspiracy to distribute methamphetamine. At the time of the termination hearings, Antonio was unable to give any indication as to when he would be released from federal custody.

Victoria has never obtained a protection order against Antonio even though the court ordered her to do so. Although Victoria indicates she attempted to obtain a protection order, she did not follow through.

Victoria testified that Antonio was not violent toward her in front of Bianca and Eternity, but she did state that Antonio's violence toward her could harm the children emotionally. The record shows that Bianca is aware of the physical abuse inflicted upon Victoria by Antonio. Bianca has spoken to her psychologist, Dr. Corrie Davies, about "mean daddy" making Victoria's hand bloody or hurting Victoria. Davies testified that when talking about these issues, Bianca often became tearful. Bianca also drew a picture and told her classmates that she drew Victoria's arm red because her "monster daddy had cut [Victoria's] arm and made her bleed and go to the hospital."

Bianca and Eternity began seeing Davies in July 2006. They first met once or twice per month. At that time, Eternity had severe biting and aggressive behaviors at daycare. Davies stated that initially there were some concerns about Eternity's bullying in her preschool program and her ability to stay focused, but overall Eternity had made "good progress" and her aggressive behavior had improved. Davies recommended a very structured environment for Eternity, with consistency and predictability.

When Bianca first began seeing Davies, she was not following directions and was also exhibiting aggressive behavior and language. In April 2008, Bianca was evaluated by a neuropsychologist because she was having speech delays, mild memory impairments, and some fine motor deficits. However, her behavior has improved since that time. Davies' current diagnosis of Bianca consists of depressive disorder, not otherwise specified. Davies opined that Bianca, like Eternity, needs structure and consistency.

For several weeks prior to the termination hearings for Bianca and Eternity, Davies met with Bianca every week or every other week, with Eternity joining them for family therapy sessions. Davies stated that it was critical that a permanency plan be implemented for Bianca and Eternity so both girls can have the opportunity to experience a safe, secure, and permanent home as soon as possible. Davies testified that it was not in Bianca's and Eternity's best interests to be reunified with Victoria given the domestic violence Victoria experienced at Antonio's hands. Davies testified that returning any of Victoria's children to a home where domestic violence was likely to continue would be traumatic to the children and cause significant psychological damage to the children.

Diane Arpan, the caseworker with the Department of Health and Human Services (the Department) assigned to Bianca and Eternity's case, testified that in 2006, Victoria was participating in supervised visitation with a family support worker and Bianca and Eternity. In early 2007, visitation was changed to therapeutic visitation, a more restrictive visitation, to involve a therapist with the girls' behaviors and Victoria's redirection. Arpan testified that this is

the highest level of visitation provided when children are placed out of the home. Shortly thereafter, Arpan and Davies recommended a suspension of Victoria's visitation. This recommendation was based upon the fact that Bianca's and Eternity's behaviors were going downhill at the visits and in the foster home after visitation.

The court suspended Victoria's visitation with Bianca and Eternity on February 19, 2007. Arpan testified that since that time, the Department has never recommended that visitation resume because it feels that visitation with Victoria is not in the children's best interests. The record shows that both Bianca's and Eternity's behaviors have improved and stabilized since discontinuing visits with Victoria.

Arpan testified that in August 2006, a team meeting was held by the Department and Victoria was present. At the meeting, Victoria indicated that she was afraid of Antonio and wanted to move to Sidney, Nebraska, before he was released from incarceration. Victoria referred to Antonio as "crazy and capable of doing anything," and she stated that she did not want to have contact with him any longer. Arpan testified that she started to build up services so the children could be potentially relocated to Sidney. Arpan was supportive of the plan and started searching for a foster home in the area. She also looked for therapeutic services for Bianca and Eternity, as well as for Victoria in that area.

Arpan testified that in December 2006, she discovered that Victoria was not being honest about her plan to move to Sidney. At that time, Arpan questioned Victoria about visiting Antonio at the Nebraska State Penitentiary. Victoria claimed that she was merely bringing diapers to Antonio's sister who was visiting Antonio in prison. Arpan testified that when she told Victoria that she knew that she was visiting Antonio the maximum number of times allowed per week, Victoria hung up the telephone on her.

Arpan testified that at the January 2007 team meeting, Victoria explained that she went to visit Antonio to ask why he "did the things to her he did" and to "get answers." Victoria did not deny that she visited Antonio frequently. Arpan testified that at a hearing in August 2007, Victoria testified that she would discuss matters involving their children with Antonio. Arpan stated that Victoria also told her that she visited Antonio twice a week and would walk to the prison or a friend would take her.

Arpan testified that she had never seen any convincing evidence that Victoria and Antonio are no longer in a relationship. Arpan stated that Victoria's children are in need of some form of permanency and that Victoria cannot provide the children with permanency. Arpan stated that it is not in Bianca's and Eternity's best interests to continue in foster care because they had already been in foster care for over 3 years.

The record shows that in September 2008, the district court for Lancaster County sentenced Victoria to 12 to 18 months' imprisonment with the Nebraska Department of Correctional Services for felony theft by shoplifting. This was not Victoria's first conviction. On October 28, 2005, Victoria was sentenced to 30 days in jail for a misdemeanor theft by shoplifting, which was reduced from a felony. Just 1 month later, Victoria was fined \$150 for theft by shoplifting. Victoria also has several other police contacts, including 10 arrests for driving on a suspended license.

While Victoria was serving her felony sentence at the women's correctional center in York, Nebraska, Antonio Jr. was born and was immediately removed from Victoria's care.

Antonio Jr. has resided in one foster home since his birth. Antonio Jr. has not had visitation with either parent since he was born. Victoria did not request visitation with Antonio Jr. for several months, due to her incarceration, but when she did so, the Department recommended that no visitation occur between Antonio Jr. and Victoria. This was due to Victoria's continued contact with Antonio and Victoria's lack of completion of any of the recommendations of the juvenile court in the case involving Bianca and Eternity. Additionally, the record shows that prison staff in York monitored Victoria's contact with Antonio via telephone. These telephone calls included statements by Antonio about taking Antonio Jr. out of the state and statements that they needed to "get rid of" Arpan.

At the time of the adjudication hearings for Antonio Jr., Olivia Biggs, the children's new caseworker, was still not in a position to recommend visitation between Victoria and Antonio Jr. Biggs stated that she could not recommend visitation until Victoria complied with a psychological evaluation and an assessment was completed by a child psychologist regarding Antonio Jr.'s best interests. Biggs was also concerned that Victoria had not had visitation with any of her children since April 2007 and had not cared for any of her children in her home since July 2005.

Victoria had been released from prison by the time the termination hearings were held. Victoria testified that she had not had any contact with Antonio after Antonio's arrest in February 2009. The State provided evidence to the contrary. The State's evidence showed that 191 telephone calls were placed by Antonio from the Lancaster County jail to Victoria's telephone number from February to April 2009. Victoria testified that she did not think that this "counted" as contact because she was merely acting as a "phone operator." Victoria stated that Antonio's relatives paid for part of her telephone bill for her help.

The Department produced evidence showing that Victoria made poor progress over the years that her older children have been in the custody of the Department. Other than participating in some initial evaluations, Victoria never successfully completed any of the requirements set out in her court-ordered plan, including receiving individual therapy, obtaining gainful employment, and maintaining an appropriate residence. Additionally, the Department often did not know where to reach Victoria. Victoria did complete a psychological evaluation in June 2009, near the end of the termination proceedings.

Dr. Robert Arias, a psychologist, recommended the termination of Victoria's parental rights as to Bianca and Eternity because of the length of time that their case has been ongoing without any apparent progress. He noted that Victoria shows a persistent disregard for the mental and/or physical safety of her children by repeatedly failing to protect them from exposure to her extremely violent significant other and has continued to persist in repeated telephone calls with Antonio while he was incarcerated.

Based on this evidence, the juvenile court adjudicated Antonio Jr. to be a child as defined by § 43-247(3)(a), stating that Antonio Jr. lacked proper parental care by reason of the fault or habits of his mother and father. The court also found that Victoria's and Antonio's actions place Antonio Jr. at risk for harm.

Neb. Rev. Stat. § 43-1505(5) (Reissue 2008) 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.

Victoria does not argue that the State failed to prove that her continued custody of Antonio Jr. is likely to result in serious emotional or physical damage to Antonio Jr.

On this record, we conclude that the allegations in the State's petition are true by clear and convincing evidence and that due to those allegations, Antonio Jr. is at risk for harm. Although Antonio Jr. has not suffered harm, it is recognized that if evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused. *See In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992). Reviewing the evidence in its totality, we conclude that the juvenile court did not err in finding that the allegations contained in the amended petition were true by clear and convincing evidence and that Antonio Jr. comes within the meaning of § 43-247(3)(a).

CONCLUSION

Based on our de novo review, we conclude that there is clear and convincing evidence to support the allegations in the amended petition. Therefore, the juvenile court's order adjudicating Antonio Jr. under § 43-247(3)(a) is affirmed.

AFFIRMED.

SIEVERS, Judge, participating on briefs.