

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF PATIENCE I.

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IN RE INTEREST OF PATIENCE I., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

LANEESHA J., APPELLANT.

Filed May 4, 2010. No. A-09-1024.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY,
Judge. Affirmed.

Leslie A. Christensen, of Family & Juvenile Law Omaha, Christensen & Madara-
Campbell, for appellant.

Donald W. Kleine, Douglas County Attorney, and Sarah M. Moore for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

This is a juvenile proceeding in which the State alleges that Patience I. is a child under the age of 18 years who is lacking in proper parental care by reason of the faults and habits of Laneesha J., her mother, and is therefore subject to the jurisdiction of the juvenile court pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). At the time its original petition was filed, the State obtained an ex parte order granting immediate temporary custody of Patience to Nebraska's Department of Health and Human Services (the Department), pending a detention hearing. The ex parte order was based upon information that Laneesha had been admitted to an Ohio hospital for residential psychiatric evaluation.

After a hearing, the juvenile court entered an order finding that Patience was a child within the meaning of § 43-247(3)(a) and that she should remain in the custody of the Department.

Laneesha appeals from the juvenile court's order. On appeal, she alleges that the juvenile court erred in granting the initial, ex parte, temporary custody order; violated her right to due process by failing to hold a timely detention hearing; and failed to follow the procedures outlined in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2008). In addition, she alleges that the court erred in finding that the State presented sufficient evidence to prove that Patience was a child within the meaning of § 43-247(3)(a) and that Patience should remain in the custody of the Department. Both parties waived oral argument. As such, this case was submitted without oral argument pursuant to Neb. Ct. R. App. P. § 2-111(E)(6) (rev. 2008).

For the reasons set forth below, we affirm the order of the juvenile court in its entirety.

II. BACKGROUND

These proceedings involve Laneesha's daughter, Patience, born in August 1998. In April 2009, the Department received a referral from the Child Protective Service's hotline regarding Patience. The referral was assigned to an initial assessment worker, Rebecca Wood, for investigation. As a part of that investigation, Wood met with Patience and Laneesha. Wood learned from Patience that during a supervised visitation with Laneesha's other children, Laneesha believed that one of the children was "tapped" so that others could listen to Laneesha's conversations. Laneesha then gave that child medicine which she referred to as "candy."

During Wood's interview with Laneesha on May 12, 2009, Laneesha denied these allegations; however, she did indicate that she was concerned about the people who had been supervising her visits with the children. She said that her ex-husband's parents supervised the visits and that they were involved with the Hell's Angels gang. Laneesha also indicated that her ex-husband was a "Hell's Angels associate." Laneesha indicated that she believed that the Hell's Angels were "after her." Laneesha told Wood that the Hell's Angels had previously raped her, killed her, and then brought her back to life. She also told Wood that "they're constantly stalking her and her family, that they have broken into her home and that they've had her house tapped before so they can hear what she's doing."

After Wood's interview with Laneesha, Wood was concerned about Laneesha's mental health, particularly because Laneesha had informed her that "she had postpartum psychosis and that she had been on medication before for hearing voices but that she was currently off medication." Laneesha did provide to Wood a letter dated May 11, 2009, from a Dr. Dunlap, who stated that Laneesha did not currently require medication.

Despite the information in the letter from Dr. Dunlap, Wood referred Laneesha for a psychological evaluation with a Dr. Stankus. Laneesha completed the evaluation during June and July 2009. During this time, Wood continued to have contact with Laneesha. Laneesha continued to indicate that she had concerns about the Hell's Angels. Wood spoke with Laneesha's ex-husband about Laneesha's concerns. After Wood's conversation with him, Wood believed him to be "appropriate in providing adequate and sufficient care for the two children that he had with Laneesha."

Wood received the results of the psychological evaluation in August 2009. Based on the results of the evaluation, Wood determined that it was necessary to remove Patience from Laneesha's home. Before Wood could initiate the necessary paperwork, however, she received a voicemail from Laneesha telling Wood that she was in a hospital in Ohio because she got lost on the Ohio turnpike. Laneesha told Wood that she had been on her way to Washington, D.C., to try and get the president to help her with the Hell's Angels. Laneesha indicated that a man who she believed to be involved with the Hell's Angels drove up next to her and pointed a gun at her. Laneesha pulled over to the side of the road and attempted to get someone's attention for help. The police arrived and took Laneesha to the hospital and placed Patience into foster care in Ohio.

Wood spoke with Laneesha the day after she received the voicemail. Laneesha indicated that she had been given a prescription that she was supposed to fill at a local pharmacy. She indicated that she was very angry with Wood because Wood had not protected her from the Hell's Angels. Wood observed that Laneesha's emotions were "all over the place."

On August 7, 2009, the State filed a petition alleging that Patience was a child within the meaning of § 43-247(3)(a) because she lacked proper parental care in that Laneesha "requires inpatient assessment and evaluation, leaving her unable to care for [Patience and] placing [Patience] at risk for harm." The State also filed a motion for temporary custody, which was granted by the juvenile court. The court placed Patience in the temporary custody of the Department. At this time, Patience remained in Ohio in foster care.

A detention hearing was held on August 12, 2009. This hearing was continued because the State had been unable to locate Laneesha to provide her with notice of the hearing. It is clear that at the time of this hearing, Patience remained in Ohio. On August 26, 2009, Laneesha appeared before the juvenile court. She denied the allegations in the petition. The juvenile court attempted to address the issue of whether Patience should remain in the Department's custody, but was informed that Patience still remained in Ohio and that the State was trying to determine if Ohio would voluntarily transfer jurisdiction back to Nebraska. The juvenile court indicated that the detention issue was "not ripe."

Patience returned to Nebraska in mid-September 2009. On September 22, 2009, after Patience returned to Nebraska, the juvenile court entered an order scheduling a detention hearing for October 7, the same day as the adjudication hearing.

Laneesha was not present at the October 7, 2009, hearing. Her counsel indicated that she had advised Laneesha not to appear because she did not want her to be called as a witness. The State offered the testimony of one witness, Wood. After the presentation of evidence, the juvenile court found that Patience was within the meaning of § 43-247(3)(a) and determined that Patience should remain in the custody of the Department.

Laneesha appeals here.

III. ASSIGNMENTS OF ERROR

Laneesha assigns six errors on appeal, which we renumber and consolidate to five errors. Laneesha alleges that the juvenile court erred in (1) granting the ex parte temporary custody order, (2) violating her right to due process by failing to hold a timely detention hearing, (3) failing to follow the procedures outlined in the UCCJEA, (4) finding that Patience is a child

within the meaning of § 43-247(3)(a), and (5) finding that Patience should remain in the custody of the Department.

IV. ANALYSIS

1. 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 Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). 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.*

2. TEMPORARY CUSTODY ORDER

Laneesha alleges that the juvenile court erred in entering the ex parte temporary custody order. Specifically, Laneesha alleges that the court erred in granting the State's motion for temporary custody because the affidavit filed in support of the State's motion was based on hearsay and was insufficient to support a finding that removal of Patience from Laneesha's custody was immediately necessary.

An ex parte temporary custody order keeping a child's custody from his or her parent for a short period of time is not a final order. *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds*, *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). Therefore, because this court is without jurisdiction to consider orders which are not final in nature, we are without jurisdiction to consider Laneesha's argument that the court erred in granting the temporary custody order.

3. TIMELY DETENTION HEARING

Laneesha alleges that the juvenile court violated her right to due process by failing to hold a timely detention hearing after entry of the temporary custody order. She alleges that 60 days elapsed between the entry of the temporary custody order and the detention hearing and that such delay is unreasonable. Because Patience remained in the custody of the State of Ohio until September 2009, we cannot say that the delay between the entry of the ex parte order in August 2009 and the detention hearing in October 2009 was unreasonable or a violation of Laneesha's right to due process.

The State may not unreasonably delay in providing a parent a meaningful hearing after entry of an ex parte temporary custody order. See *In re Interest of R.G.*, 238 Neb. at 423, 470 N.W.2d at 792 ("the 14 days elapsing between the entry of the ex parte order and the hearing poise the procedures employed in this case on the brink of unreasonableness").

The juvenile court entered the ex parte temporary custody order on August 7, 2009. It is clear from the record that at that time, Patience was in "protective custody in the State of Ohio." As such, while the August 7 order purported to give the Department immediate custody of Patience, Patience was actually in the custody of the State of Ohio.

Despite Patience's absence from Nebraska, an initial detention hearing was held on August 12, 2009, only 5 days after entry of the temporary custody order. This hearing was

continued because the State had been unable to locate Laneesha to provide her with notice of the hearing. However, it is clear that at the time of this hearing, Patience remained in Ohio.

On August 26, 2009, Laneesha appeared before the juvenile court. The court attempted to address the issue of whether Patience should remain in the Department's custody, but was informed that Patience still remained in Ohio and that the State was trying to determine if Ohio would voluntarily transfer jurisdiction back to Nebraska. The juvenile court indicated that the detention issue was "not ripe."

Patience returned to Nebraska in mid-September 2009. On September 22, the juvenile court entered an order scheduling the detention hearing for October 7, the same day as the adjudication hearing.

While approximately 60 days passed between the entry of the ex parte temporary custody order and the October 2009 detention hearing, the entry of the ex parte temporary custody order did not coincide with the Department actually obtaining physical custody of Patience. Rather, the Department obtained physical custody of Patience over a month after the ex parte order was entered. In mid-September, Patience was returned to Nebraska and placed in the custody of the Department in a relative's home. A detention hearing was held approximately 2 to 3 weeks after Patience's return to Nebraska and was scheduled to coincide with the previously scheduled adjudication hearing.

In light of the somewhat unusual circumstances present in this case, we do not find that the elapsed time between the entry of the ex parte order and the detention hearing was unreasonable or a violation of Laneesha's due process rights.

4. COMPLIANCE WITH UCCJEA

Laneesha asserts that the juvenile court erred in failing to follow the procedures outlined in the UCCJEA. Specifically, she alleges that the juvenile court erred in its refusal to contact and communicate with the Ohio court even though it was aware that the Ohio court had made a prior child custody determination and erred in determining that it had subject matter jurisdiction in the matter for purposes other than temporary emergency jurisdiction.

Jurisdiction over a child custody proceeding is governed exclusively by the UCCJEA. See Neb. Rev. Stat. § 42-351(1) (Reissue 2008). This court has previously held that a case brought under § 43-247(3)(a) fits the definition of a child custody proceeding under the UCCJEA. *In re Interest of Maxwell T.*, 15 Neb. App. 47, 721 N.W.2d 676 (2006). See also § 43-1227(4). Here, the State filed a petition alleging that Patience was within the meaning of § 43-247(3)(a). As such, the juvenile court proceedings were child custody proceedings and the UCCJEA was applicable.

In analyzing Laneesha's assertion that the juvenile court did not follow the procedures outlined in the UCCJEA, we must examine some of the provisions of the act in detail.

Pursuant to the UCCJEA, an initial child custody determination means the first child custody determination concerning a particular child. § 43-1227(8). A court has jurisdiction to make an initial child custody determination only if

- (1) this state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the

commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(2) a court of another state does not have jurisdiction under subdivision (a)(1) of this section, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum . . . and:

(A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(3) all courts having jurisdiction under subdivision (a)(1) or (a)(2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child . . . or

(4) no court of any other state would have jurisdiction under the criteria specified in subdivision (a)(1), (a)(2), or (a)(3) of this section.

§ 43-1238. A child's home state is defined in the UCCJEA as

the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

See § 43-1227(7).

Once an initial child custody determination has been made by a state, that state retains continuing, exclusive jurisdiction over the determination until the state relinquishes jurisdiction or until the child and the child's parents permanently reside in another state. See § 43-1239.

Although the state which made an initial custody determination retains jurisdiction, another state may acquire temporary emergency jurisdiction if the child is present in that state and the child has been abandoned or if it is necessary in an emergency to protect the child. § 43-1241. However, the state with temporary emergency jurisdiction can only enter a temporary order and must immediately communicate with the court in the other state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. *Id.*

Laneesha argues that the Ohio court made an initial child custody determination on August 7, 2009, when it granted a motion to enter an ex parte temporary custody order and awarded temporary custody of Patience to the Sandusky County Department of Job and Family Services. Laneesha asserts that because Ohio made this initial determination, it retained exclusive jurisdiction over the matter and Nebraska could only acquire temporary emergency jurisdiction.

Although Laneesha argues in her brief to this court that the August 7, 2009, order of the Ohio court was the first filing concerning Patience's custody, such is not clear from the record. The juvenile court also filed its ex parte temporary custody order granting custody of Patience to the Department on August 7. Because the order from the Ohio court is not time stamped, we do

not know which order was filed first in time. As such, we do not know which order was the initial child custody determination.

Moreover, pursuant to the UCCJEA, the Ohio court lacked jurisdiction to enter an initial child custody determination. It is clear from the record that Nebraska is Patience's home state. Patience resided in Nebraska with Laneesha since birth. At the time of the proceedings, Patience was approximately 10 years old. As such, she had resided in Nebraska for well over 6 months prior to the commencement of the juvenile court proceedings. The juvenile court had jurisdiction to make an initial custody determination pursuant to § 43-1238(a)(1).

Accordingly, regardless of which temporary custody order was filed first, Nebraska was the only state to have jurisdiction to enter the initial custody determination. The August 7, 2009, temporary custody order entered by the juvenile court is the initial custody determination, and the court possessed continuing, exclusive jurisdiction over the matter. Laneesha's assertions to the contrary lack merit.

5. ADJUDICATION

Laneesha argues that the juvenile court erred in finding that Patience was a child within the meaning of § 43-247(3)(a). Specifically, she alleges that the State failed to meet its burden of proof at the adjudication hearing.

Section 43-247(3)(a) grants the juvenile court jurisdiction over any juvenile

who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile.

To obtain jurisdiction over a juvenile, 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 Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). At 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 B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005); *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002).

The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase. *In re Interest of Brian B. et al., supra.*

In this case, the State alleged that Patience lacked proper parental care because Laneesha "requires inpatient assessment and evaluation, leaving her unable to care for [Patience and] placing [Patience] at risk for harm." Upon our de novo review of the record, we find that the State presented sufficient evidence to prove the allegations in the petition by a preponderance of the evidence.

Before we discuss the evidence presented at the adjudication hearing, we address Laneesha's assertion that the juvenile court improperly admitted and considered hearsay testimony. Neb. Rev. Stat. § 43-279 (Reissue 2008) provides that at an adjudication hearing, the admissibility of evidence shall be governed by "the customary rules of evidence in use in trials without a jury." The "rules of evidence" referred to in § 43-279 are the Nebraska rules of evidence. See *In re Interest of J.L.M.*, 234 Neb. 381, 451 N.W.2d 377 (1990). Because the Nebraska rules of evidence control at an adjudication hearing, hearsay is not admissible. See *State v. Egger*, 8 Neb. App. 740, 744, 601 N.W.2d 785, 791 (1991) ("[i]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence").

At a dispositional hearing, including a detention hearing, the Nebraska rules of evidence do not apply and hearsay evidence may be admissible. See *id.*

The October 7, 2009, hearing was an adjudication hearing and a detention hearing. The juvenile court explained the effect of holding the two hearings simultaneously as follows:

I want to make an observation at this point in time. We're doing two things here. We're adjudicating on a petition where hearsay evidence is not to be considered by the Court. At the same time, we are having a continued protective custody detention hearing where by statute the Court is to consider hearsay evidence. We're going to have a little bit of a balancing act during these proceedings [I]f we have to, we'll try to specify for the record what is being heard simply for one purpose or the other.

The juvenile court's statement explaining the admissibility of certain evidence at the October 7, 2009, hearing is a correct statement of the law. However, in Laneesha's brief to this court, she appears to assert that the court did, in fact, consider inadmissible hearsay evidence in its determination of whether Patience was within the meaning of § 43-247(3)(a).

In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence. See *State v. Patman*, 227 Neb. 206, 416 N.W.2d 582 (1987). Other than her generalized assertions, Laneesha does not provide any specific evidence that the juvenile court considered inadmissible hearsay evidence during the adjudication portion of the hearing. Moreover, in our de novo review of the record, we only consider admissible, relevant evidence in determining whether Patience is within the meaning of § 43-247(3)(a).

We must also note that although it appears that the juvenile court considered Laneesha's absence at the adjudication hearing as evidence against her, upon our de novo review, we do not consider Laneesha's absence as evidence. The record indicates that Laneesha voluntarily waived her right to appear based on her counsel's advice. Counsel informed the court that she was concerned that if Laneesha appeared, she would have been called as a witness by the State. Because Laneesha's absence was apparently a result of her counsel's advice, we do not consider Laneesha's absence as evidence that she was unwilling to participate in the juvenile court proceedings.

The properly admitted evidence presented at the adjudication hearing revealed that Laneesha suffered from delusions from at least April to August 2009. During this time, she repeatedly expressed an unfounded belief that she was being harassed by the Hell's Angels gang.

She indicated that she was raped, killed, and brought back to life by members of the gang. She believed that she was being constantly followed and that people were listening to her conversations. In fact, she believed that one of her children was “bugged” by the Hell’s Angels. Laneesha informed Wood in May 2009 that she had previously taken medication because she heard voices, but that she was no longer taking such medication.

Laneesha acted on her delusions when she attempted to drive to Washington, D.C., with Patience to contact the president about her problem with the Hell’s Angels. She was taken into custody by the Ohio authorities when they found her on the Ohio turnpike and she informed them that a member of the Hell’s Angels gang drove up next to her in a van and pointed a gun at her.

This evidence establishes that Laneesha was suffering from a mental health problem from April through August 2009. However, the adjudication hearing was not held until October 2009. As a result, there is a gap between the time of the adjudication hearing and the time the evidence establishes Laneesha suffered from a mental health problem. In light of this gap, we agree with the juvenile court that “the evidence is somewhat thin.”

Although the evidence presented at the hearing is “thin,” we must analyze all of the evidence in light of the underlying purpose of adjudication proceedings. As we explained above, the purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. When we consider the purpose of the hearing together with the evidence presented by the State, we find that there is sufficient evidence to warrant a determination that Patience is within the meaning of § 43-247(3)(a). We affirm.

6. CONTINUED DETENTION

Laneesha argues that the juvenile court erred in continuing custody of Patience with the Department after the October 7, 2009, hearing. Specifically, Laneesha contends that the State failed to meet its burden of proof at the detention hearing.

The October 7, 2009, hearing was a detention hearing as well as an adjudication hearing. As such, the court’s determination that Patience should remain in the custody of the Department was made in light of its simultaneous decision that Patience was a child within the meaning of § 43-247(3)(a) because of Laneesha’s mental health problems. The juvenile court has broad discretion as to the disposition of children who are found to be neglected under § 43-247(3)(a). See *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985).

In the previous section, we found that the juvenile court did not err in determining that Patience was a child within the meaning of § 43-247(3)(a). As such, the court had broad discretion in determining whether to award the Department continued custody of Patience. Upon our de novo review, we find that the juvenile court did not err in determining that Patience should remain in the custody of the Department.

V. CONCLUSION

We affirm the order of the juvenile court. We find that the juvenile court did not err in determining that Patience is a child within the meaning of § 42-247(3)(a) or in determining that Patience should remain in the custody of the Department.

AFFIRMED.