

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Tristan C.,)
A child under 18 years of age.)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Nicole W.,)
)
Appellant.)

No. A-13-0067

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

AUG 23 2013

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

MOORE and PIRTLE, Judges, and MULLEN, District Judge, Retired.
MULLEN, District Judge, Retired.

Nicole W. appeals from the decision of the county court for Hall County, sitting as a juvenile court, adjudicating her child, Tristan C., pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

BACKGROUND

Tristan, born on June 21, 2012, is the biological child of Nicole. The State alleged that Michael is Tristan's biological father, and Michael admits that he is Tristan's father. However, the juvenile court found that paternity has not been established. Nicole and Michael never married. While still in the hospital following his birth, Tristan tested positive for Methadone and was exhibiting withdrawal symptoms. Nicole tested positive for methamphetamine, marijuana, and opiates.



000034438NSC

The State filed a petition on June 27, 2012, alleging that Tristan was within the meaning of § 43-247(3)(a) by reason of the faults or habits of his "parent, guardian or custodian." At the bottom of the petition, under "name & address of parent/custodian" it listed both Nicole and Michael at the same address in Grand Island. The State alleged: (1) on June 27, Tristan lacked "proper parental care by reason of the fault or habits of his or her parent, guardian or custodian, to wit: exposing the child to a controlled substance" and (2) on January 27, Tristan was "in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile, to wit: being exposed to a controlled substance."

The juvenile court filed an ex parte custody order on June 25, 2012. The juvenile court found that "the parents appear to be drug addicts; don't have suitable stable residence for child." The juvenile court granted temporary custody and placement of Tristan to the Nebraska Department of Health and Human Services (DHHS).

An order titled "initial/detention hearing/mother" was filed on September 4, 2012. The order notes that Nicole denied the allegations in the petition. The adjudication hearing was set for December 3. The initial/detention hearing for Michael was continued to August 23.

In an order filed on October 4, 2012, the juvenile court found that there was no record or evidence establishing the paternity of Tristan. Therefore, the court ordered Michael to submit to genetic testing.

An adjudication hearing was held on December 27, 2012. Neither Nicole nor Michael appeared at the adjudication hearing, but both were represented by counsel. On the State's request, the court took judicial notice of Neb. Rev. Stat. § 28-405 (Cum. Supp. 2012), which lists both Methadone and methamphetamine as controlled substances.

Dr. Gary Settje testified that he was called to take care of Tristan when he was born because the parents had just moved from Iowa and did not have a doctor for Tristan. Dr. Settje testified that when he interviewed Nicole about her health history, Nicole said she took Methadone during her pregnancy, but that she had stopped taking it 1 month prior to delivery. Because Tristan had symptoms of withdrawal and Nicole had been on Methadone, Dr. Settje asked for a pediatric consult and Dr. Boon ordered a urine screen.

Jill Hibbs, a medical technologist in the laboratory at St. Francis Medical Center, testified that she performed a drug screen on Tristan's urine. The laboratory results, which were received into evidence as exhibit 3, showed that Tristan tested

positive for Methadone on June 23, 2012. Hibbs testified that Tristan did not test positive for any other substance.

Dr. Settje testified that if Nicole had stopped using Methadone a month prior to delivery, as she claimed to have done, Tristan would not have testified positive for Methadone. Dr. Settje testified that it is not ideal to take Methadone during pregnancy because it is physically addictive, and an infant exposed to Methadone in the womb will go through withdrawal. However, Dr. Settje testified that it can be medically appropriate to take Methadone during pregnancy if the mother is physically addicted to narcotics. Dr. Settje testified that it is not recommended to take a woman off of Methadone during pregnancy. Rather, if the woman is taking Methadone, it is recommended to continue taking it during pregnancy and then "withdrawal the baby" after birth. Dr. Settje testified that doctors generally do not prescribe Methadone for more than 1 month at a time, and most of the time it is prescribed on a weekly basis. Dr. Settje testified that you cannot take Methadone without a prescription, unless you are getting it on the street.

Dr. Settje testified that Nicole told him that she did not have custody of an older child, and that an aunt had custody of that child. Nicole told Dr. Settje that she was going to go through drug treatment and that the aunt would take Tristan. Dr.

Settje testified that he spoke to the aunt, Donna Groenke, and that she agreed to take Tristan. According to Dr. Settje, Groenke followed him out of Nicole's room and wanted to talk to him. Michael and Nicole followed Groenke out of the room, began yelling at her and got in her face. Dr. Settje testified that Nicole and Michael wanted Groenke to leave the hospital. Dr. Settje testified that Nicole was screaming at the aunt to leave, saying: "I'm not going to let you take care of this baby. You're not going to ever touch this baby. I don't want you to have anything to do with the baby. Get out of here." Dr. Settje testified that security had to be called.

Donna Groenke, Nicole's aunt, testified that Nicole moved to Grand Island in late April or early May 2012. Groenke testified that when Nicole first moved to Grand Island, they saw each other regularly. The day after Nicole moved to Grand Island, she asked Groenke to hold her Methadone for her, and gave Groenke a bottle with 10 pills in it. Groenke testified that Nicole took the bottle back from her 4-5 days later. Groenke testified that Nicole's goal was to get off Methadone by herself.

Groenke testified that when Nicole moved to Grand Island, she said that she abused Methadone by "shooting it up." Nicole said that she would crush the Methadone, make it into a liquid, and then inject it. Groenke testified that she was with Nicole

when she went to the hospital to deliver Tristan. Groenke testified that when the nurse went to put Nicole's IV in, Groenke saw "marks" all over Nicole's wrists. Groenke testified that the marks looked like those of Groenke's ex-husband, who was an intravenous drug user. Groenke testified that she texted her daughter, whom Nicole had been staying with. Her daughter responded with a picture of a Methadone bottle, a spoon, and a needle.

Groenke testified that she asked to speak to Dr. Settje outside of the hospital room. She testified that Michael and Nicole were very upset, yelled, and told her to get back in the room.

Groenke testified that she observed Nicole with Tristan in the hospital. Groenke testified that Nicole did not have a whole lot of physical contact with Tristan and did not seem too interested in him.

Dawn Splattstoesser, a registered nurse at St. Francis Medical Center, testified that she cared for Tristan in the Neonatal Intensive Care Unit (NICU). She testified that Nicole was open about her Methadone use, and said she had quit taking Methadone 1 month prior to delivery based on a doctor's recommendation. Splattstoesser testified that Nicole was appropriate with Tristan, and that she had no concerns with Nicole's mothering. Splattstoesser testified that she witnessed

the yelling incident between Michael, Nicole, and Groenke. She testified that Nicole and Michael did not want Groenke talking to Dr. Settje. Splattstoesser testified that she had to call hospital security.

Splattstoesser testified that Michael got really defensive when being questioned by the police and child protective services. She testified that the police officer and the child protective services worker asked if they could drug test Nicole and Michael, and both agreed to a drug test. But Splattstoesser testified that Michael and Nicole left the NICU and came back towards evening, "way later than they were supposed to." Splattstoesser testified that when they returned, Nicole and Michael were taken to a NICU room for a drug test, but that Michael refused the test.

Collette Evans, an initial assessment worker with DHHS, testified that the DHHS child abuse hotline received an intake regarding Nicole and Tristan. The intake reported concerns of drug use by Nicole, alleged that Nicole used Methadone due to addiction, reported that Nicole said she needed treatment, and reported concerns that Tristan was going through withdrawal. Evans testified that she had 2 to 3 contacts with Nicole and also had contact with Michael. Evans testified that she learned early on that Nicole had another child removed from her custody in Iowa, and Evans contacted the Iowa caseworker. Evans

testified that Nicole was not straightforward when answering questions. For instance, Nicole repeatedly said that she voluntarily left her other child with her mother in Iowa, and Nicole denied child protective services/court involvement.

Evans testified that Groenke reported concerning information with regard to how Nicole was using Methadone. Evans testified that she, Evans, observed 2 track marks on Nicole's forearm. She described the marks as "long, skinny, bruised marks on her arms," consistent with needle injection. Evans testified that the bruises were "red and purplish," and appeared fresh.

Evans testified that Nicole admitted an addiction to opiates and that she was prescribed Methadone. Evans testified that Nicole provided a pill bottle prescribed by an Iowa physician. The prescription was dated 1½ months prior and was for 1 week worth of pills; there were no Methadone pills in that bottle at the time Evans saw the bottle. Evans testified that Nicole said she had a more current prescription, but that she was unable to locate it. Nicole also told Evans that doctors told her she could continue taking Methadone while pregnant.

Evans testified that she asked Nicole to provide a urinalysis (UA) because the hospital staff was concerned that Nicole was using drugs. Nicole refused Evans first request, saying that she was not using. When Evans made a second request for a UA within a day of the first request, Nicole agreed. Evans

gave Nicole a DHHS UA kit. The UA kit is a plastic cup, and has two layers with tabs in between the layers. The tabs each test for a different drug. The side of the cup shows the test results. Evans testified that she watched Nicole provide a urine specimen and that Nicole tested positive for methamphetamine, marijuana, and opiates. Evans testified that she spoke to an Omaha Methadone clinic and learned that a person using Methadone would not test positive for methamphetamines. However, Evans testified that the hospital gave Nicole Tylenol with codeine, and that codeine is an opiate that could show a positive opiate test on the UA kit. Evans testified that the DHHS UA kit cannot be verified by a laboratory. Evans testified that she could not make a request for an updated UA because Nicole left for Iowa and did not return phone calls.

Evans testified that she talked to the county attorney and created an affidavit to request Tristan's removal. Evans felt removal was necessary because Nicole admitted a drug addiction and the need for treatment, she was deceptive throughout her interview, her UA tested positive for drugs, there were indications Nicole was injecting Methadone, and she had no stable house to live in.

Todd Dvorak, an investigator with the Grand Island Police Department testified that he went to St. Francis Medical Center on June 27, 2012, to investigate the DHHS intake regarding

Tristan. Dvorak testified that the nursing staff was concerned that Nicole might be under the influence of drugs, and that she might be sneaking out of the intensive care unit to ingest drugs. Dvorak testified that he spent approximately 30 minutes with Nicole. Dvorak observed Nicole with Tristan. He testified that Nicole appeared to be appropriate with Tristan and he observed no safety concerns--although Tristan was in an incubator at the time. Dvorak testified that during the interview, Nicole did not appear to be under the influence of any drugs. He testified that Nicole said she had been taking Methadone for 2 to 2½ years in order to not take illegal street drugs. Dvorak testified that Nicole said the Methadone was prescribed, but she did not have proof of a prescription. Dvorak testified that he spoke to two of Nicole's doctors in Iowa, but could not confirm that Nicole had an active prescription for Methadone.

After the State rested its case, Nicole's attorney offered exhibit 2, a "Hair 5 Drug Panel" test of Nicole collected on August 31, 2012. The test was done by OMEGA laboratories in Mogadore, Ohio, at the request of "Iowa DHS - Svc Area 5 - Dallas Co." The exhibit was received without objection. The Hair 5 Drug Panel tests for: amphetamines - methamphetamine, ecstasy (MDMA), MDA; cocaine - cocaine/cocaine metabolites; opiates - codeine, morphine, heroin metabolite; phencyclidine (PCP); and

THC metabolite (marijuana). Nicole tested negative for each drug tested. Under report notations, it says "1.5 inches in length (approximately 0-90 day time frame)."

At the end of the adjudication hearing, the Court stated that there was not enough evidence for the court to find by preponderance that Michael is Tristan's father. Michael's counsel agreed. The Court then said:

Now, with respect to mom, mom's own testimony -- not her testimony -- her own statements are enough for this Court to adjudicate. She admits that she has a drug problem and she needs something to do with it -- needs to do something about it. And when asked, okay, well, what are you going to do with the baby? Well, my aunt will take care of it. And then we get into a big fight with the aunt and we know that the aunt's not going to take care of it.

So just -- and I'm not -- you know, whether the second drug test is accurate or not, by her own admissions -- and the key is, it's not only that she's on methamphetamine -- or not methamphetamine, Methadone, it's by her own statement that she is using it in a abuse way by not taking her prescriptions but by pounding it down and injecting it.

And that is different than somebody -- you know, when this all started, I thought, gee, we're taking away a kid because mom's just taking a prescription drug that people don't like. But then we get into how she's taking it, she admits she's got a problem. The kid has to go through a withdrawal ordeal.

So there's clearly -- I believe, the allegations of both have been proven by a preponderance of the evidence.

Continued placement of the child in a parental resident (sic) is not appropriate because paternity is not established to the Court's satisfaction.

In its order filed on December 27, 2012, the juvenile court found that the allegations had been proven by a preponderance of the evidence and adjudicated Tristan to be within the meaning of § 43-247(3)(a). The court found that Tristan should remain in the custody of DHHS. The order also noted that paternity had not been established. Both Nicole and Michael, despite the court's finding that paternity has not been established, appeal the adjudication order.

ASSIGNMENTS OF ERROR

Nicole assigns that the juvenile court erred in finding that the State had proven by a preponderance of the evidence that Tristan was a child as defined under § 43-247(3)(a).

Michael assigns that the juvenile court lacked jurisdiction because the pleadings and evidence at the adjudication hearing did not justify the court accepting jurisdiction.

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 Kendra M.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

ANALYSIS

Michael assigns that the juvenile court lacked jurisdiction because the pleadings and the evidence at the adjudication did not justify the juvenile court accepting jurisdiction. However, Michael does not specifically argue that the allegations in the petition were insufficient for the juvenile court to consider adjudication. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007). Thus, we only consider whether the evidence at the adjudication hearing justified that court accepting jurisdiction of Tristan--an issue assigned and argued by both Michael and Nicole.

The purpose of the adjudication phase is to protect the interests of the child. *In re Interest of Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010). At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under Neb. Rev. Stat. § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence, and 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 Cornelius K.*, *supra*.

The petition alleged that Tristan (1) lacked proper parental care by reason of the fault or habits of his or her parent, guardian or custodian, to wit: exposing the child to a controlled substance"; and (2) was "in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile, to wit: being exposed to a controlled substance." The evidence showed that Tristan was born with Methadone in his system and was experiencing withdrawal symptoms. Methadone is a controlled substance. See § 28-405. While Methadone can be legally prescribed during pregnancy, Nicole was unable to provide proof of a current prescription. Dr. Settje testified that doctors generally do not prescribe Methadone for more than one month at a time, and most of the time it is prescribed on a weekly basis. Evans testified that Nicole provided a pill bottle prescribed by an Iowa physician. The prescription was dated 1½ months prior to Tristan's birth and was for 1 week worth of pills--and there were no Methadone pills in that bottle at the time Evans saw the bottle. Nicole reported to numerous witnesses that she had stopped taking Methadone 1 month prior to delivery. Dr. Settje testified that if Nicole had stopped using Methadone 1 month prior to delivery, as she claimed to have done, Tristan would not have testified positive for Methadone. Furthermore, Nicole admitted to Groenke

that she abused Methadone by "shooting it up," and at least two witnesses observed track marks on Nicole's arm.

Based on the evidence before us, it appears that Nicole was taking Methadone, a controlled substance, without a current prescription. As a result, Tristan was born with Methadone in his system and experienced withdrawal symptoms. Accordingly, there is sufficient evidence that Tristan (1) lacked proper parental care by reason of the fault or habits of his or her parent, guardian or custodian, to wit: exposing the child to a controlled substance"; and (2) was "in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile, to wit: being exposed to a controlled substance." Upon our de novo review, we conclude that adjudication of Tristan as a child within the meaning of § 43-247(3)(a) due to the faults or habits of Nicole is proper.

We note that in their briefs, both Nicole and Michael argue that while Evans testified that Nicole tested positive for methamphetamine, marijuana, and opiates, that UA test was not confirmed by a laboratory. They argue that the laboratory verified 5 drug panel hair follicle analysis collected on August 31, 2012, showed no drugs in Nicole's system--and that test went back 90 days from collection which would cover the dates of the non-laboratory verified test. Nicole and Michael's reliance on the hair follicle analysis is misplaced. The 5 drug panel hair

follicle analysis did not test for Methadone. And as stated previously, Nicole's use of Methadone, a controlled substance, without a current prescription, caused Tristan to experience withdrawal symptoms. Accordingly, adjudication of Tristan as a child within the meaning of § 43-247(3)(a) due to the faults or habits of Nicole is proper.

CONCLUSION

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

AFFIRMED.