

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF ENRIQUE G.

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

STATE OF NEBRASKA, APPELLEE,

V.

TEVON S., APPELLANT.

Filed March 24, 2009. No. A-08-1136.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON,
Judge. Affirmed.

Shannon Prosocki for appellant.

Donald W. Kleine, Douglas County Attorney, David M. Wear, and Carolyn H. Curry,
Senior Certified Law Student, for appellee.

IRWIN, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Tevon S. appeals an order of the separate juvenile court of Douglas County adjudicating his son, Enrique G., to be a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006) in that he lacked proper parental care by reason of the fault and habits of Tevon. Based on the reasons that follow, we affirm.

BACKGROUND

Tevon and Xiomara G. are the parents of Enrique, born May 1, 2000. On May 21, 2008, a petition was filed alleging that Enrique came within the meaning of § 43-247(3)(a) due to the faults and habits of Xiomara. Following a motion for temporary custody, the court ordered Enrique removed from the parental home and ordered that the Nebraska Department of Health

and Human Services (Department) take custody of Enrique for appropriate placement, excluding Xiomara's home.

An amended petition was filed on June 6, 2008, alleging that Enrique came within the meaning of § 43-247(3)(a) due to the faults and habits of Tevon. The amended petition also restated the allegations against Xiomara that were set forth in the original petition. On June 25, a protective custody hearing was held, at which time the State made an oral motion to amend the amended petition by interlineation. The motion was granted, and as amended, the petition alleged that Enrique comes within the meaning of § 43-247(3)(a) because he lacks proper parental care by reason of the faults or habits of Tevon in that:

- A. [Tevon] is currently incarcerated making him unable to provide [Enrique] with safe, stable and appropriate housing.
- B. [Tevon] has failed to provide said child with proper parental care and support.
- C. Due to the above allegations, [Enrique] is at risk for harm.

Tevon entered a plea of denial to the allegations. The court found probable cause for Enrique to be placed in the temporary protective custody of the Department for appropriate care and placement, to exclude Tevon's home.

An adjudication hearing was held on August 27 and September 23, 2008. At the hearing, the State offered into evidence certified copies of "Payment History Reports" from the Department in regard to Tevon's child support obligation for Enrique. The reports showed that Tevon had not made a child support payment since July 2006 and that he was behind in payments by over \$26,000. Tevon objected to the admission of the reports based on hearsay. The objection was overruled, and the reports were entered into evidence.

Terra Stuart, the initial protection and safety worker assigned to Enrique's case, testified at the hearing. Stuart testified that in gathering information in regard to Enrique's case, she learned that Tevon was incarcerated at the time the amended petition was filed and that he was incarcerated for failure to pay child support for Enrique. Stuart testified that she spoke with Tevon once while he was in jail and a second time a few days after he was released from jail on June 7, 2008. Stuart testified, over Tevon's objection, that Tevon told her he was sent to jail for 90 days for failure to pay child support. Stuart testified that Tevon told her that he was ordered to pay child support for Enrique and that he was behind in his payments by \$23,000. Stuart testified that Tevon was not employed during the times she spoke with him. Tevon also informed Stuart that prior to his incarceration he was living with Xiomara and Enrique in the home from which Enrique was removed. Enrique was removed from Xiomara's care while Tevon was incarcerated. Tevon also told Stuart that he has always been involved in Enrique's life.

The evidence also showed that after Tevon was released from jail, he lived at the same home where he, Xiomara, and Enrique were living before he was incarcerated. At the time of the adjudication hearing, Tevon and Xiomara were living together in a different home.

Enrique testified that Tevon takes him to get his hair cut, but does not have to pay for it; has taken him to buy shoes and clothes, and sometimes takes him out to eat. Enrique also testified that Tevon sometimes takes him to football practice and to his football games.

On October 9, 2008, the juvenile court entered an order finding that the allegations in the amended petition in regard to Tevon are true by a preponderance of the evidence and that

Enrique is a child within the meaning of § 43-247(3)(a). In the court's order, it found that Stuart was a credible witness and that the testimony of Tevon was credible. The court also stated that although Tevon was not incarcerated at the time of the hearing, he could be incarcerated again because of his child support arrearage, and that the child support arrearage shows that he has failed to provide proper care for Enrique. In the same order, the juvenile court adjudicated Enrique in regard to Xiomara, but the present appeal only involves Tevon.

ASSIGNMENTS OF ERROR

Tevon assigns, restated, that the juvenile court erred in (1) stating that it found Tevon's testimony credible when Tevon did not testify, (2) allowing the payment history reports and Stuart's testimony into evidence, and (3) finding that the State proved the allegations in the amended petition by a preponderance of the evidence.

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.*

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. 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. *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

ANALYSIS

Tevon first assigns that the juvenile court erred in stating that it found his testimony credible when he did not testify. The juvenile court did mistakenly state that it found the "testimony" of Tevon credible, as he did not testify. However, Stuart testified about certain information that Tevon provided her. Stuart testified that Tevon told her he was incarcerated for 90 days for nonpayment of child support and that he was behind on his payments by \$23,000. The court stated that it found Stuart was a credible witness. It is apparent from the context of the order that in stating that it found the "testimony" of Tevon credible, the juvenile court was referring to the information Tevon provided to Stuart and that the court believed that Tevon was truthful to Stuart. Therefore, although the court mistakenly indicated that Tevon testified when he did not, such mistake does not amount to reversible error.

Tevon next assigns that the juvenile court erred in allowing the payment history reports and Stuart's testimony into evidence. Tevon objected to the admission of the payment history reports, which the court overruled. He argues that the reports were offered to prove contempt of court due to his delinquent child support payments. The court found that the payment history

reports were admissible under Neb. Rev. Stat. § 27-1005 (Reissue 2008) as certified public records. Section 27-1005 provides in part:

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with section 27-902 or testified to be correct by a witness who has compared it with the original.

The records in the instant case were certified copies of reports kept by the Department detailing Tevon's child support payments. We conclude that the payment history reports were admissible under § 27-1005 and that the juvenile court did not err in allowing them into evidence.

Tevon also made a hearsay objection to Stuart's testimony in regard to statements Tevon made about his incarceration, which the court overruled. As previously set forth, Stuart testified that Tevon told her he was incarcerated for failing to pay child support and that he was behind on his payments by \$23,000. Stuart's testimony about Tevon's statements is not hearsay because Tevon's statements fall under the category of admissions by a party opponent pursuant to Neb. Rev. Stat. § 27-801(4)(b) (Reissue 2008). Thus, the juvenile court did not err in allowing Stuart's testimony into evidence. Tevon's second assignment of error is without merit.

Tevon next assigns that the juvenile court erred in finding that the allegations contained in the amended petition were true by a preponderance of the evidence. 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. *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005). 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.*, *supra*. 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 B.R. et al.*, *supra*.

The amended petition alleged that Tevon "is currently incarcerated making him unable to provide said child with safe, stable and appropriate housing." Based on the evidence, Tevon was in jail when the amended petition was filed for failure to pay child support. Although he was not in jail at the time of the hearing on the amended petition, the evidence shows that he was still greatly behind in his child support payments. The juvenile court noted Tevon's child support arrearage as well as recognizing that he could go back to jail as a result of such child support arrearage. Tevon argues that the juvenile court erred in finding that he was behind in his child support and that he could be incarcerated in the future for nonpayment of child support. Tevon suggests that the juvenile court did not have subject matter jurisdiction to make such findings. However, such findings were supported by the evidence and the juvenile court had subject matter jurisdiction, as it did not find him in contempt for failure to pay child support. The juvenile court merely found, based on the evidence, that it was possible Tevon could be back in jail in the near future.

Aside from Tevon's child support arrearage, the evidence shows that Tevon cannot provide safe, stable, and appropriate housing for Enrique because Tevon does not have a place for Enrique to live. Before Tevon went to jail, he was living with Xiomara in the home from which Enrique was removed. Enrique's removal from Xiomara's care was based on the filthy

condition of the home, bottles of alcohol on the bedroom floor, marijuana located in the home, and inappropriate physical contact by Xiomara. At the time of the hearing, Tevon was living with Xiomara again, albeit at a different location from which Enrique was removed, but nonetheless with Xiomara. Enrique's placement by the Department is to exclude Xiomara's home.

The amended petition also alleged that Tevon failed to provide Enrique with proper parental care and support. Tevon argues that the only evidence presented by the State to support this allegation was Tevon's delinquent child support payments. He contends that the court failed to consider other emotional and financial means of support by Tevon in determining whether Tevon provided proper care and support for Enrique. The only evidence of Tevon's care and support is his statement to Stuart that he has always been involved in Enrique's life, and Enrique's vague testimony that Tevon would take him to get his hair cut but did not have to pay for it, has bought him shoes and clothes in the past, has taken him out to eat, and has taken him to football practice and games. However, this falls short of supporting a conclusion that Tevon is providing Enrique with proper parental care and support. Tevon has not paid child support since July 2006, went to jail for his failure to pay, and has failed to demonstrate that he has taken any steps to correct the child support situation since his release. Tevon told Stuart that he was not employed, and there was no evidence that he was employed at the time of the hearing or that he had any income that would allow him to support Enrique.

Therefore, we conclude that the allegations in the amended petition are true by a preponderance of the evidence and that due to those allegations, Enrique is at risk for harm. Although Enrique 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 a preponderance of the evidence and that Enrique comes within the meaning of § 43-247(3)(a).

CONCLUSION

The juvenile court properly found that the allegations in the amended petition were true by a preponderance of the evidence. Thus, we affirm the adjudication order of the juvenile court.

AFFIRMED.