

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF NATURE B.

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

STATE OF NEBRASKA, APPELLEE,

v.

WANDA T., APPELLANT.

Filed June 28, 2011. No. A-10-1133.

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, Judge.
Affirmed in part, and in part reversed and remanded with directions.

Regina T. Makaitis for appellant.

Donald W. Kleine, Douglas County Attorney, Jordan Boler, and Austin Vandever,
Senior Certified Law Student, for appellee.

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

MOORE, Judge.

INTRODUCTION

Wanda T. appeals from an order of the juvenile court of Douglas County adjudicating her daughter, Nature B., to be a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) by a preponderance of the evidence, and continuing Nature's placement with her father, Christopher B. On appeal, Wanda argues that the juvenile court erred in finding that Nature comes within the meaning of § 43-247(3)(a), ordering Wanda to comply with a rehabilitation plan, and continuing Nature's placement with her father. After reviewing the record, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

On April 13, 2010, the State filed a petition alleging that Nature, a 12-year-old girl, was a minor child within the meaning of § 43-247(3)(a) due to the lack of proper parental care or habits of Wanda. Specifically, the petition alleged that Wanda subjects Nature to threatening and/or physical discipline; Wanda failed to protect Nature from inappropriate threats and physical discipline by Nature's stepfather, Hosea T.; and Wanda failed to provide proper parental care, support, and/or supervision for Nature.

On the same date, the State filed a motion for temporary custody, requesting an order placing Nature in the custody of the Nebraska Department of Health and Human Services (Department) for placement in foster care. The juvenile court granted the State's motion.

On May 5, 2010, Christopher filed a petition for leave to intervene, stating that he is Nature's biological father and that he and Nature have a significant and longstanding beneficial relationship. Subsequently, the juvenile court granted Christopher's motion to intervene. On June 3, Christopher filed a motion for a change in Nature's placement. Christopher stated that he lives in Ohio and requested that Nature be placed in his care. Christopher's motion for a change of placement was heard on July 15, although no evidence was adduced at the hearing. The court granted Christopher's motion and placed Nature in Christopher's care.

An adjudication hearing was held on October 25, 2010. Nature testified that prior to being placed in foster care, she resided with her mother, stepfather, and six older siblings. Nature stated that in February 2010, Hosea struck her with a belt buckle, causing her nose and mouth to bleed. Hosea also struck Nature on the back as she was going up the stairs to find her mother. Nature testified that Hosea struck her with his belt because he was "really mad at her for getting in trouble at school" and that he really wanted to "beat her ass." Nature stated that she showed Wanda her injuries and that Wanda replied she had "been hit with a belt wrong." Wanda did not help Nature with her injuries. Nature testified that Hosea had hit her more than 12 times since she was 5 years old, although she could not remember many details.

Nature also testified about several instances in which Wanda struck her. Nature stated that on one occasion, Wanda had "whooped" Nature with a belt 15 times on her "butt" and back with her clothes off as a result of being suspended from school. Nature testified about another occasion in which Wanda struck her 12 times with a belt on her "butt" while she had clothes on. Nature testified that in February 2010, Wanda told her that "one of these days, I'm going to take a gun and shoot you in the back of your head because you're always getting into trouble at school." Nature testified that as a result, she is scared of Wanda and Hosea, and she stated that she is afraid they will physically harm her.

The record shows that Nature contacted Child Protective Services (CPS) on April 12, 2010, and that Omaha police officers removed Nature from her home the same day.

Officer Troy Liebe of the Omaha Police Department testified that he and his partner arrived at Nature's home to investigate after she called CPS. Liebe stated that while he and his partner were speaking to Nature, Wanda arrived at the residence and began yelling at the officers and telling them they had no business being there. After Liebe's partner attempted to stop Wanda from entering the residence, Hosea physically pushed Liebe's partner. Liebe stated that Wanda

was taken into custody at that time and that she was arrested for interfering with the investigation and not cooperating with law enforcement officers.

Liebe stated that he decided that it would be in Nature's best interests to place her into the immediate custody of the Department. Liebe stated that his decision was based on the conversation he had with Nature and on Hosea's and Wanda's reactions. Liebe stated that it would not be safe for Nature to remain in the care and custody of Wanda or Hosea.

Jessie Krzycki, an initial assessment worker with the Department, testified that on April 12, 2010, she received an intake regarding Nature and met with Nature at her school for an appointment. Krzycki stated that Nature reported she had been physically abused by Wanda and Hosea. Krzycki stated that she spoke with a doctor who had treated Nature at the hospital and that the doctor stated Nature was having suicidal ideations and was "self-harming." Krzycki stated the doctor told her that Nature's behavior was caused by Nature's being in the home of Wanda and Hosea. Krzycki testified that Nature would be at risk for harm if she remained in the custody of Wanda and Hosea.

Wanda testified at the hearing and denied that she or Hosea had ever hit Nature. Wanda also stated that she did not tell Nature she was going to shoot her with a gun.

At the conclusion of the adjudication hearing, the trial court found by a preponderance of the evidence that Nature was a minor child within the meaning of § 43-247(3)(a) because Wanda repeatedly abused Nature, both verbally and physically; Wanda failed to protect Nature from inappropriate threats and physical discipline by Hosea; and Wanda failed to provide Nature proper parental care, support, and supervision.

Immediately after the adjudication hearing, the juvenile court held the dispositional hearing. The State entered into evidence a case plan and court report dated October 20, 2010; a service coordination judicial update by the Nebraska Families Collaborative dated October 12, 2010; a counseling report for Nature; and urinalysis test results for Hosea. Wanda offered into evidence Ohio juvenile court records regarding Christopher and Nature.

The court report recommended that Nature remain in the care and custody of the Department for appropriate care and placement, to include Christopher's home. The specifics of the case plan and court report will be set forth in further detail below.

After the dispositional hearing, the juvenile court entered an order on October 26, 2010, reiterating its finding that Nature is a child within § 43-247(3)(a). The juvenile court also adopted the Department's case plan and court report, stating that it is in Nature's best interests to remain in the temporary care and custody of the Department for continued appropriate care and placement, to exclude Wanda's and Hosea's home and to include the home of her father, Christopher. The court found that there was insufficient evidence offered at the disposition hearing to warrant removal of Nature from Christopher and stated that Nature's placement with Christopher would continue. Wanda appeals from the court's October 26 order.

ASSIGNMENTS OF ERROR

On appeal, Wanda argues that the juvenile court erred in (1) finding that Nature comes within the meaning of § 43-247(3)(a), (2) ordering Wanda to comply with a rehabilitation plan, and (3) continuing Nature's placement with her father, Christopher.

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 Ramon N.*, 18 Neb. App. 574, 789 N.W.2d 272 (2010).

ANALYSIS

Adjudication and Rehabilitation Plan.

On appeal, Wanda argues that the juvenile court erred in finding that Nature comes within the meaning of § 43-247(3)(a). At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child, 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 the statute. *In re Interest of Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010).

Ultimately, the purpose of the adjudication phase is to protect the interests of the child and ensure the child's safety. *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002). When establishing that a child comes within the meaning of § 43-247(3)(a), it is not necessary for the State to prove that the child has actually suffered physical harm, only that there is a definite risk of future harm. *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000).

In its petition, the State alleged that Nature came within the meaning of § 43-247(3)(a) because she lacked proper parental care by reason of the faults or habits of her mother. Specifically, the State alleged that Wanda subjected Nature to threatening and/or physical discipline; Wanda failed to protect Nature from inappropriate threats and physical discipline by Hosea, and Wanda failed to provide proper parental care, support, and/or supervision for Nature.

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. Nature testified about several specific instances of inappropriate physical discipline by both Wanda and Hosea, that Wanda did not care for Nature's injuries after Hosea struck Nature in the face with a belt buckle, that Wanda had threatened Nature, and that Nature was afraid of both Wanda and Hosea.

A juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988); *In re Interest of John T.*, 4 Neb. App. 79, 538 N.W.2d 761 (1995). Because there was sufficient evidence to adjudicate Nature, the juvenile court did not err in ordering Wanda to comply with a rehabilitation plan.

Nature's Placement With Christopher.

Wanda also argues that the trial court erred in adopting the Department's plan recommending that Nature remain in Christopher's home.

The case plan and court report dated October 20, 2010, recommended that Nature remain in the care and custody of the Department for appropriate care and placement to include Christopher's home. Although Wanda did not testify in the dispositional phase of the hearing,

Wanda's counsel advised the court that Wanda was very concerned about the placement of Nature with her father. Wanda's counsel argued that it is not in Nature's best interests to be placed in Christopher's home due to Christopher's violent history and the fact that Christopher and his wife are physically disciplining Nature.

The court report contains information that Nature is being spanked in Christopher's home and that Christopher has a violent history. Specifically, the court report refers to a June 24, 2010, Interstate Compact for the Placement of Children home study request made by the Department to the Ohio Department of Jobs and Family Services (Ohio Department). The Ohio Department returned the home study on August 20, denying Nature's placement with Christopher given that Nature's placement was made prior to approval from the Interstate Compact for the Placement of Children and because of Christopher's criminal and CPS history.

The home study goes on to state that an investigation with Ohio's CPS was completed in 2001 or 2002 due to domestic violence between Christopher and his wife, which was "substantiated for abuse/endorsement." Christopher was referred to an anger management program to deal with his anger issues, but Christopher did not complete the program. Apparently, Nature was living with Christopher at that time. Given the domestic violence allegations, Nature was returned to her mother and moved back to Omaha. The home study shows that a second investigation with Ohio's CPS was completed in 2003, also due to domestic violence between Christopher and his wife. That case was closed as "unsubstantiated" as the family denied the allegations.

The home study notes that Christopher lied during the home study interview regarding his past involvement with CPS, his criminal history, and his history of domestic violence. The home study's summary states that "this home has been designated as a 'worker hazard' for any Children Services worker going into the home due to [Christopher's] violent history." The home study also shows that Christopher had an outstanding warrant for his arrest dated September 7, 2010, due to a ticket for driving under a suspended license.

April Carlson, Nature's case manager with the Department and author of the court report, stated in the report that she and a Department service coordinator had received permission to travel to Ohio once a month to visit with Nature and her family. Carlson stated that she traveled to Christopher's home in September 2010 and addressed the concerns of the home study with Christopher and his wife. Christopher denied the allegations of domestic violence, stating it was something that happened in their past and reported that he and his wife now have a strong, positive relationship and have not experienced any aggression and assaults between the two of them. Carlson stated that she spoke with Nature privately and that Nature reported no concerns of domestic violence between her father and his wife.

Carlson also stated that while Nature was initially very excited about being placed with her father, during the September 2010 interview, Nature was physically and verbally upset about her placement. Nature talked about wanting to return to Omaha and stated that she did not want to return to her mother's home. Nature also reported that her father and his wife had spanked her for not acting appropriately in school and that she has no privacy in her father's home due to her three half brothers and one half sister constantly wanting her attention. Nature stated that her family in Ohio loves her, but said that she does not feel welcome in their home. Carlson stated that she spoke to Christopher and his wife regarding Nature's report of spankings. Carlson stated

that both Christopher and his wife admitted to spanking Nature with an open hand. Carlson stated that she informed them that they cannot use physical discipline on Nature due to her being a ward of the State.

In the Nebraska Families Collaborative report, a service coordinator also expressed concerns about Nature's placement in her father's home. In his report, he stated that it would be difficult to recommend that Nature remain placed in her father's home for a number of reasons, including Christopher's lack of contact with Nature for the past 6 to 7 years, allegations of past domestic violence between Christopher and his wife, and Nature's own unhappiness with her placement there.

The Ohio juvenile records show that in March 2000, Wanda and Christopher agreed that Christopher would have custody of Nature. In March 2002, Wanda filed a motion for a change in Nature's custody, alleging that since they had entered into the custody agreement Christopher had been charged with domestic violence against his wife.

In June 2002, the Ohio juvenile court granted Wanda's motion to change Nature's custody, finding that a material change of circumstances had occurred and establishing that a change in Nature's custody was in Nature's best interests. The juvenile court stated that in November 2001, CPS removed Nature from Christopher's custody because Nature allegedly witnessed an act of domestic violence by Christopher against his wife. The court stated that in order for Nature to be returned to his care, Christopher was required to attend parenting classes and an anger management program. The court noted that Christopher did not comply with these requirements. The Ohio court stated that since 1999, Christopher had been arrested at least 10 times and had spent 51 days in jail during the same period. The court also stated that although Christopher had only one conviction for domestic violence, Christopher's sister, his friend, and his wife all testified at the modification hearing regarding incidents involving Christopher and his violent behavior.

After the dispositional hearing, the juvenile court adopted the Department case plan and court report stating that it is in Nature's best interests to remain in the temporary care and custody of the Department for continued appropriate longterm placement, to exclude Wanda's and Hosea's home and to include the home of Christopher. The juvenile court stated that there was insufficient evidence offered at the dispositional hearing to warrant Nature's removal from Christopher's home.

On appeal, Wanda argues that the juvenile court erred in finding that the State's plan recommending that Nature continue to live with Christopher is in Nature's best interests.

The standard in the instant case is set out in Neb. Rev. Stat. § 43-285(2) (Cum. Supp. 2010), which states in pertinent part:

Following an adjudication hearing at which a juvenile is adjudged to be under subdivision (3) of section 43-247, the court may order the department to prepare and file with the court a proposed plan for the care, placement, services, and permanency which are to be provided to such juvenile and his or her family. The health and safety of the juvenile shall be the paramount concern in the proposed plan. . . . If any other party, including, but not limited to, the guardian ad litem, parents, county attorney, or custodian, proves by a preponderance of the evidence that the department's plan is not in the juvenile's best interests, the court shall disapprove the department's plan. The court may

modify the plan, order that an alternative plan be developed, or implement another plan that is in the juvenile's best interests.

While the foregoing statute grants the juvenile court discretionary power over a plan proposed by the Department, it also grants preference in favor of such plan. *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995). In order for the court to disapprove the Department's plan, a party must prove by a preponderance of the evidence that the Department's plan is not in the child's best interests. *Id.*

We note that although the foregoing provisions of § 43-285(2) are applicable to the instant case, the Nebraska Legislature recently amended § 43-285(2) to effectively remove the presumption of preference in favor of the Department's plan and the requirement that a party opposing the plan prove by a preponderance of the evidence that the Department's plan is not in the child's best interests. See 2011 Neb. Laws, L.B. 648 (approved by Governor May 4, 2011).

Thus, the question in this case is whether Wanda proved by a preponderance of the evidence that the Department's plan to continue Nature's placement with Christopher was not in Nature's best interests. On this record, we conclude that the evidence is sufficient to show that the Department's plan recommending Nature's placement with Christopher is not in Nature's best interests. We base our decision on the evidence in the court report and other exhibits received at the dispositional hearing; specifically, Christopher's history of domestic violence, Nature's removal from Christopher's home in 2002, Nature's expressed desire in September 2010 not to live with Christopher, the fact that Christopher and his wife are physically disciplining Nature, and the denial of Nature's placement with Christopher in the Ohio home study. A review of the record shows that there is more credible evidence against the plan to place Nature with Christopher than there is in support of the plan. See *In re Interest of John T.*, 4 Neb. App. 79, 538 N.W.2d 761 (1995) (approval of Department's plan reversed on appeal).

After a de novo review of this record, we conclude that the juvenile court erred in approving the Department's plan. Therefore, we reverse that portion of the juvenile court's order adopting the Department's recommendation that Nature remain with Christopher. Upon remand, the court may modify the Department's plan, order that an alternative plan be developed, or implement another plan that is in Nature's best interests.

CONCLUSION

After reviewing the record de novo, we conclude that the juvenile court did not err in adjudicating Nature to be a child within the meaning of § 43-247(3)(a) or in ordering Wanda to comply with a rehabilitation plan. The juvenile court did err in adopting the Department's plan recommending that Nature remain with Christopher given that the evidence offered at the dispositional hearing proved by a preponderance of the evidence that Nature's placement with Christopher is not in Nature's best interests. That portion of the juvenile court's October 26, 2010, order is reversed, and the cause is remanded with directions. The balance of the juvenile court's order is affirmed in all respects.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.