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IN RE INTEREST OF DAMIEN S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. JESSICA S., APPELLANT, AND JERRY S., APPELLEE AND CROSS-APPELLANT.

815 N.W.2d 648

Filed June 26, 2012. No. A-11-941.

1. **Judgments: Appeal and Error.** When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions.
2. **Juvenile Courts: Parental Rights.** It is clear from the language of Neb. Rev. Stat. § 43-279.01 (Reissue 2008) that the juvenile court must advise a parent of the nature of the proceedings, the possible consequences of such proceedings, and the rights the parent is entitled to during the proceedings.
3. ____: ____. At a detention hearing, the only matter to be considered is whether a child should continue to be detained in the custody of the Department of Health and Human Services pending further juvenile court proceedings.
4. ____: ____. The juvenile court need not necessarily advise a parent of the information contained in Neb. Rev. Stat. § 43-279.01 (Reissue 2008) and, in particular, of the possible consequences after adjudication, during a parent's initial appearance in juvenile court, or during an initial detention hearing. Instead, a juvenile court must provide such advisement prior to or at an adjudication hearing where a parent enters a plea to the allegations in the petition.
5. **Juvenile Courts: Parental Rights: Proof.** Continued detention pending adjudication is not permitted under the Nebraska Juvenile Code unless the State can establish by a preponderance of the evidence at an adversarial hearing that such detention is necessary for the welfare of the juvenile.
6. **Juvenile Courts: Parental Rights.** A detention hearing is a parent's opportunity to be heard on the need for removal and the satisfaction of the State's obligations.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Affirmed.

Susan Reff, of Hightower Reff Law, L.L.C., for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer C. Clark, and Erin Hurley, Senior Certified Law Student, for appellee State of Nebraska.

Susanne M. Dempsey-Cook, of Dempsey-Cook Law, for appellee Jerry S.

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

IRWIN, Judge.

I. INTRODUCTION

Jessica S. appeals and Jerry S. cross-appeals from an order of the juvenile court, which order granted the Department of Health and Human Services (Department) continued custody of their son, Damien S., and provided that placement of Damien was to be outside of Jessica's and Jerry's homes. On appeal, Jessica asserts that the juvenile court erred by failing to advise her of her statutory rights pursuant to Neb. Rev. Stat. § 43-279.01 (Reissue 2008). In addition, she challenges the sufficiency of the evidence to support the juvenile court's order granting the Department's continued custody of Damien. On cross-appeal, Jerry also challenges the sufficiency of the evidence to support the juvenile court's order. For the reasons set forth herein, we affirm the order of the juvenile court granting the Department continued custody of Damien.

II. BACKGROUND

Jessica and Jerry have three children together. This appeal involves only their youngest child, Damien. Jessica's and Jerry's parental rights to their two older children were involuntarily terminated by the juvenile court in December 2010.

Damien was born in May 2011. At the time of his birth, Jessica disclosed to hospital staff that her parental rights to her two older children had recently been involuntarily terminated. As a result of Jessica's disclosure, the Department was contacted concerning Damien's birth.

Melissa Humphrey, an employee of the Department, contacted Jessica at her home in May 2011, immediately after she and Damien were released from the hospital. At that time, Jessica and Damien were residing with Adrian B., Jessica's boyfriend. Jessica indicated that she and Jerry were still legally married, but that Jerry was incarcerated as a result of a domestic violence incident which had occurred between the two of them in March 2011.

At that May 2011 meeting, Jessica discussed with Humphrey the circumstances surrounding the termination of her parental rights to her two older children. She indicated that during the pendency of the juvenile court proceedings involving those

children, she had been struggling with her mental health, as she had been diagnosed with bipolar disorder. She stated that she was not in the "right frame of mind" and was not taking any medication. Jessica also disclosed that during that time, she was still involved with Jerry, and that their relationship entailed extreme domestic violence. Jessica indicated that she had been using marijuana on a regular basis.

Jessica told Humphrey that despite her past problems, she wanted to do everything she could to maintain custody of Damien. She reported that she had obtained a protection order against Jerry and planned on initiating divorce proceedings. She also reported that she was working on enrolling in domestic violence classes and that she was receiving therapy and medication to treat her bipolar disorder. Jessica stated that she was no longer using marijuana.

Ultimately, Humphrey concluded that Damien's basic needs were being met in Jessica's home and, as a result, determined that it was safe to leave Damien in Jessica's care. Humphrey did recommend that Jessica participate in an intensive family support program, which Jessica agreed to do.

Approximately 1 month after the May 2011 meeting with Jessica, Humphrey received another report regarding Jessica and Damien. On June 23, Adrian telephoned Humphrey to report that he and Jessica had a disagreement, that Jessica's moods were very unstable, and that Adrian did not know what to do. Humphrey went to Adrian and Jessica's home later that day to assess Damien's current safety. At that meeting, Jessica admitted that she and Adrian had not been getting along. She also admitted that she had stopped taking her medication because it was making her too tired. She explained that when she stopped taking the medication, her moods had become unstable. Jessica agreed to see a doctor to discuss her medication options and to assist her in taking her medications again. After this meeting, Humphrey again determined that Damien was safe in Jessica's care.

On September 29, 2011, Humphrey received a third report regarding Jessica and Damien. This report revealed that Jessica and Adrian had been involved in a domestic violence incident. Humphrey met with Jessica about this report on September 30.

Jessica reported that she and Adrian had been drinking and then got into a disagreement. Adrian began calling her vulgar names and grabbed Jessica and bit her lip. Jessica required stitches on her lip as a result of the bite. When Adrian assaulted Jessica, she was holding Damien in her arms. Jessica admitted that this was not the first domestic violence incident that had occurred between her and Adrian.

Adrian was arrested and incarcerated after this incident, and Jessica was forced to move out of his home. At that time, Jessica was unemployed and unable to financially support herself. She indicated that she planned on moving in with a childhood friend. Jessica also indicated that she no longer wanted to be in a relationship with Adrian and that she planned on obtaining a protection order against him.

After the meeting with Jessica, Humphrey conducted an investigation into Jessica's new living arrangements. Humphrey discovered that Jessica's friend's home was not an appropriate place for Damien, because Jessica's friend was also currently involved with the Department and the juvenile court system.

Humphrey also attempted to make contact with Jerry, who had been released from jail on September 13, 2011. Jessica had indicated that she no longer had any contact with Jerry and did not know his current whereabouts. Humphrey was unable to locate Jerry to notify him of the situation with Damien.

On September 30, 2011, the State filed a petition with the juvenile court alleging that Damien was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), because Jessica had engaged in domestic violence with Adrian in the presence of Damien and because previous juvenile court proceedings involving Jessica's two older children were unsuccessful in that those proceedings had resulted in her parental rights to those children being terminated. The petition also alleged that Damien was a child within the meaning of Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2010), because Jessica had substantially and continuously or repeatedly neglected and refused to give Damien or Damien's siblings necessary parental care and protection. Finally, the petition alleged

that termination of Jessica's parental rights was in Damien's best interests.

On that same day, the juvenile court entered an ex parte order granting the Department temporary custody of Damien. The court's order indicated that placement of Damien was to exclude Jessica's and Jerry's homes. The court scheduled a detention hearing for October 12, 2011, to determine whether the custody order should remain in effect.

On October 6, 2011, prior to the scheduled detention hearing, the State filed a supplemental petition alleging that Damien was a child within the meaning of § 43-247(3)(a), because Jerry engaged in domestic violence with Jessica when she was pregnant with Damien and because previous juvenile court proceedings involving Jerry's two older children were unsuccessful in that those proceedings had resulted in his parental rights to those children being terminated. The supplemental petition also alleged that Damien was a child within the meaning of § 43-292(2), because Jerry had substantially and continuously or repeatedly neglected and refused to give Damien or Damien's siblings necessary parental care and protection. Finally, the petition alleged that termination of Jerry's parental rights was in Damien's best interests.

On October 12, 2011, a detention hearing was held. At the hearing, the State indicated that it was requesting that Damien remain in the Department's custody. Jessica and Jerry indicated that they wished to contest the State's request.

The State presented the testimony of Humphrey. Humphrey testified about her contacts with Jessica and Damien. She testified that after meeting with Jessica in September 2011, she determined that Damien would be at risk for harm if he was returned to Jessica's or Jerry's care. Humphrey indicated that Jessica has demonstrated an inability to be involved in a healthy relationship with a significant other and that her choice of relationships has placed Damien at risk for harm. In addition, Jessica is currently choosing to live in a home that she knows is not suitable for Damien and she does not have any source of income. Humphrey testified that Jerry has been incarcerated for the majority of Damien's life as a result of a domestic violence incident between Jessica and Jerry when Jessica was

pregnant with Damien. Jerry has not provided any information to establish that he has received any therapy or assistance in overcoming his problems with domestic violence. In addition, Humphrey had no information about Jerry's current residence or employment situation.

After Humphrey testified, Jessica called to testify a family permanency specialist who met with Jessica on a few occasions between May and September 2011. Additionally, she worked to set up visitation between Jessica and Damien after Damien was removed from Jessica's care. The family permanency specialist testified that she had been to Jessica's current residence and had determined that Jessica's supervised visits with Damien could take place at that location.

At the close of the evidence, the juvenile court entered an order finding that it would be in Damien's best interests to remain in the temporary custody of the Department. The court went on to find that it would be contrary to Damien's health, safety, or welfare to be returned to the home of Jessica or Jerry at this time.

Jessica appeals and Jerry cross-appeals from the juvenile court's order. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

III. ASSIGNMENTS OF ERROR

On appeal, Jessica asserts that the juvenile court erred by failing to advise her of her statutory rights pursuant to § 43-279.01. In addition, she challenges the sufficiency of the evidence to support the juvenile court's order granting the Department continued custody of Damien.

On cross-appeal, Jerry also challenges the sufficiency of the evidence to support the juvenile court's order granting the Department continued custody of Damien.

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 trial court's findings; however, where the evidence is

in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

[1] When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007).

2. Jessica's Appeal

(a) Advisement of Rights

On appeal, Jessica alleges that the juvenile court erred in failing to advise her of her statutory rights pursuant to § 43-279.01 prior to the start of the October 2011 detention hearing. We find that Jessica's assertion has no merit. Based upon our reading of the language in § 43-279.01 and the limited purpose of a detention hearing, we conclude that the juvenile court's failure to advise Jessica of her rights prior to the October 2011 hearing did not constitute an abuse of discretion. We further conclude that the rights provided in § 43-279.01 do not necessarily have to be read to a parent at an initial detention hearing, but instead must be read to a parent at some point in time prior to the parent's entry of a plea to the allegations contained in the petition, which typically occurs at an adjudication hearing.

Section 43-279.01 provides in pertinent part:

> (1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 . . . and the parent or custodian appears with or without counsel, the court shall inform the parties of the:
>
> (a) Nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295;
>
> (b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer;
>
> (c) Right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent or custodian guilty of any crime;

> (d) Right to confront and cross-examine witnesses;
>
> (e) Right to testify and to compel other witnesses to attend and testify;
>
> (f) Right to a speedy adjudication hearing; and
>
> (g) Right to appeal and have a transcript or record of the proceedings for such purpose.
>
> (2) After giving the parties the information prescribed in subsection (1) of this section, the court may accept an in-court admission, an answer of no contest, or a denial from any parent or custodian as to all or any part of the allegations in the petition. The court shall ascertain a factual basis for an admission or an answer of no contest.

[2] It is clear from the language of the statute that the juvenile court must advise a parent of the nature of the proceedings, the possible consequences of such proceedings, and the rights the parent is entitled to during the proceedings. See, *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001); *In re Interest of Billie B.*, 8 Neb. App. 791, 601 N.W.2d 799 (1999). However, the statute does not explicitly state exactly when such an advisement must be given.

Before we discuss when the information provided in § 43-279.01 must be provided to a parent, we note that at the October 2011 detention hearing, Jessica had counsel, exercised her right not to testify, cross-examined the State's witness, and called her own witness to testify. In addition, she filed an appeal from the court's detention order and, as a part of that appeal, requested and received a transcript and record of the proceedings held in the juvenile court. As such, the only pertinent information in § 43-279.01 that Jessica may not have been aware of was the "[n]ature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295." Essentially, Jessica may not have been aware of the possible consequences or dispositions after adjudication, including the possibility of termination of her parental rights.

In her argument on appeal, Jessica asserts that the juvenile court was required to provide her with an advisement of all of the information contained in § 43-279.01, including the

possible consequences after adjudication, when she appeared in court for the October 2011 detention hearing. In making this assertion, Jessica does not point to any specific language in the statute. Rather, she appears to assume that the advisement must be given during a parent's first appearance before the juvenile court. There is nothing to support Jessica's reading of the language contained in § 43-279.01.

In fact, our reading of the statute supports a different conclusion. The statute appears to indicate that the advisement does not necessarily have to be given at a parent's first appearance, but instead must be given at some point in time prior to a parent's entering a plea to the allegations in the petition. Specifically, we point to the language contained in § 43-279.01(2), which states that after the court informs a parent of the information in § 43-279.01(1), it may proceed to accept the parent's plea to the allegations in the petition. A plea to the allegations in the petition is typically provided at an adjudication hearing. As such, the language in § 43-279.01(2) suggests that a court need only advise a parent of the statutory rights prior to the adjudication hearing.

We previously discussed our understanding of § 43-279.01 in *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001). There, this court concluded that the language contained in § 43-279.01(2) "means that a juvenile court should accept a parent's in-court admission only after informing the parties as to the nature of the proceedings and the possible consequences or dispositions, including termination of parental rights." 10 Neb. App. at 583, 634 N.W.2d at 297. We went on to explain that a juvenile court's failure to inform a parent of the information contained in § 43-279.01 prior to an admission to the allegations in the petition would be "fatal to the adjudication." 10 Neb. App. at 584, 634 N.W.2d at 297.

Furthermore, the Nebraska Supreme Court has also previously discussed when a juvenile court must advise a parent of the information contained in § 43-279.01. In *In re Interest of N.M. and J.M.*, 240 Neb. 690, 696, 484 N.W.2d 77, 81 (1992), the court indicated:

> It is clear . . . that adequate notice of the possibility of the termination of parental rights must be given

> in adjudication hearings before the juvenile court may accept an in-court admission, an answer of no contest, or a denial from a parent as to all or any part of the allegations of the petition before the juvenile court.

This discussion appears to imply that the crucial point in time for the advisement of statutory rights is at the adjudication hearing and not at the initial detention hearing. We find further support for this implication when we examine the purpose of a detention hearing as compared to later hearings held during juvenile court proceedings.

[3] A detention hearing serves a very limited purpose. At a detention hearing, the only matter to be considered is whether a child should continue to be detained in the Department's custody pending further juvenile court proceedings. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). A detention hearing occurs prior to the juvenile court's taking jurisdiction over a juvenile and prior to a parent's coming within the direct purview of the juvenile court. In addition, the decisions made at a detention hearing are only temporary in nature as the detention order will be revisited at the adjudication hearing. See *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). Because of the limited purpose of a detention hearing, a parent's rights and interests are different than at later juvenile court proceedings. See *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

[4] Based upon our reading of § 43-279.01 and the limited purpose of a detention hearing, we conclude that the juvenile court need not necessarily advise a parent of the information contained in § 43-279.01 and, in particular, of the possible consequences after adjudication, during a parent's initial appearance in juvenile court, or during an initial detention hearing. Instead, a juvenile court must provide such advisement prior to or at an adjudication hearing where a parent enters a plea to the allegations in the petition. We do note that while an earlier advisement of those rights may not be necessary, it is a matter of good practice to advise a parent of the information contained in § 43-279.01 at the earliest possible time. Here,

we find that the juvenile court did not abuse its discretion in failing to advise Jessica of all of the information contained in § 43-279.01 at the October 2011 detention hearing. The juvenile court can still advise her of that information in a timely fashion prior to or at the adjudication hearing.

(b) Custody and Placement of Damien

Jessica also alleges that the juvenile court erred in finding sufficient evidence to warrant the Department's continued custody of Damien. Upon our de novo review of the record, we find that the juvenile court did not abuse its discretion in ordering that the Department retain custody of Damien pending further juvenile court proceedings.

[5,6] Neb. Rev. Stat. § 43-254 (Cum. Supp. 2010) sets forth the requirements for continuing to withhold a juvenile from his or her parent pending adjudication, and it provides, in part, as follows:

> If a juvenile has been removed from his or her parent [without a warrant as a result of concerns for the juvenile's safety], the court may enter an order continuing detention or placement upon a written determination that continuation of the juvenile in his or her home would be contrary to the health, safety, or welfare of such juvenile and that reasonable efforts were made to preserve and reunify the family if required under subsections (1) through (4) of section 43-283.01.

Continued detention pending adjudication is not permitted under the Nebraska Juvenile Code unless the State can establish by a preponderance of the evidence at an adversarial hearing that such detention is necessary for the welfare of the juvenile. *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998). A detention hearing is a parent's opportunity to be heard on the need for removal and the satisfaction of the State's obligations. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

A review of the record from the October 2011 detention hearing reveals that the State presented sufficient evidence to demonstrate that continued placement of Damien in Jessica's home would be contrary to his health, safety, or welfare. In

addition, there was evidence that reasonable efforts to preserve and reunify the family were not required pursuant to Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2010).

The evidence presented at the detention hearing revealed that a few months prior to Damien's birth, Jessica's parental rights to her two older children were involuntarily terminated, because she was unable to overcome her struggles with mental health issues and a drug problem and because she continued to be involved in an abusive, volatile relationship with Jerry. After Damien's birth, Jessica continued to struggle with her mental health issues. She did not take her medication on a consistent basis, even though she knew that such inconsistency affected her moods and her ability to care for Damien. In addition, Jessica became involved in another abusive relationship. This relationship resulted in Jessica's becoming injured while she was holding Damien, and as Jessica admitted, this was not the first instance of abuse in the course of that relationship.

Jessica lost her housing, was unemployed, and was unable to support herself and Damien. She chose to move into a home with a friend who she knew was also involved with the juvenile court system and who was not approved of by the Department. As a result, she is unable to provide safe and stable housing for Damien. Taken together, this evidence is sufficient to establish that the continued detention of Damien is necessary for his health, safety, and welfare.

The evidence also revealed that reasonable efforts to preserve and reunify the family were not required. Section 43-283.01(4) provides, in part, "Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that . . . [t]he parental rights of the parent to a sibling of the juvenile have been terminated involuntarily." The uncontradicted evidence presented at the detention hearing demonstrated that Jessica's parental rights to her two older children, Damien's two older siblings, were terminated in December 2010. As such, it is clear that reasonable efforts were not required in this instance. However, we note that the evidence demonstrated that although it was not required, the Department did provide Jessica with reasonable

efforts to preserve her family. A Department worker repeatedly met with Jessica after Damien's birth to check on her progress and to assist her in maintaining a stable and safe lifestyle. The Department also provided to Jessica the opportunity to participate in an intensive family support program.

Upon our de novo review of the record, we conclude that the juvenile court did not abuse its discretion in ordering that the Department retain custody of Damien pending further juvenile court proceedings. The evidence revealed that the continued detention of Damien is necessary for his health, safety, and welfare and that reasonable efforts to preserve and reunify the family were not required. Accordingly, we affirm the order of the juvenile court.

3. Jerry's Cross-Appeal

In Jerry's cross-appeal, he also alleges that the juvenile court erred in finding sufficient evidence to warrant the Department's continued custody of Damien. Jerry's assertion has no merit. Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant the Department's continued custody of Damien.

As we discussed more thoroughly above, in order to continue the Department's custody of Damien, the juvenile court had to find that the continued detention of Damien in Jerry's home would be contrary to his health, safety, or welfare and that reasonable efforts were made to preserve and reunify the family if required under subsections (1) through (4) of § 43-283.01. A review of the record from the October 2011 detention hearing reveals that the State presented sufficient evidence to warrant the Department's continued custody of Damien.

In December 2010, Jerry's parental rights to his two older children were involuntarily terminated. Shortly after that time, Jerry was arrested and jailed after being involved in a domestic violence incident with Jessica. Jerry remained in jail at the time of Damien's birth in May 2011 and through September. When Jerry was released from jail, he did not have any contact with Damien, and the Department was unable to locate Jerry to notify him of Damien's removal from Jessica's care despite its best efforts. As such, at the time of the detention hearing,

Jerry had not had any contact with Damien since his birth. Additionally, there is no indication that Jerry had sought treatment for his domestic violence issues or that he had corrected any of the issues that had resulted in the termination of his parental rights to his older children. There was also no indication that Jerry was employed and able to provide for Damien or that he had safe and stable housing that was appropriate for Damien. Taken together, this evidence is sufficient to establish that the continued detention of Damien is necessary for his health, safety, and welfare.

The evidence also revealed that reasonable efforts to preserve and reunify the family were not required pursuant to § 43-283.01(4). As in Jessica's case, the uncontradicted evidence presented at the detention hearing demonstrated that Jerry's parental rights to his two older children, Damien's two older siblings, were terminated in December 2010. As such, it is clear that reasonable efforts were not required in this instance.

Upon our de novo review of the record, we conclude that the juvenile court did not abuse its discretion in ordering that the Department retain custody of Damien pending further juvenile court proceedings. The evidence revealed that the continued detention of Damien is necessary for his health, safety, and welfare and that reasonable efforts to preserve and reunify the family were not required. Accordingly, we affirm the order of the juvenile court.

V. CONCLUSION

Upon our de novo review of the record, we affirm the order of the juvenile court which granted the Department continued custody of Jessica and Jerry's son, Damien, and provided that placement of Damien was to be outside of Jessica's and Jerry's homes.

AFFIRMED.