

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF TYLER W.

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

STATE OF NEBRASKA, APPELLEE,

V.

HEATHER S., APPELLANT.

Filed October 30, 2012. No. A-11-1097.

Appeal from the County Court for Dawson County: CARLTON E. CLARK, Judge. Reversed and remanded with directions.

Jennifer D. Kearney and P. Stephen Potter for appellant.

No appearance for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Heather S. appeals from an order of the county court for Dawson County, sitting as a juvenile court, which granted Shane H., a nonrelative, guardianship of her son, Tyler W. We determine that the evidence does not support a finding that Heather is an unfit parent and that therefore, the juvenile court erred in granting Shane guardianship of Tyler. We reverse, and remand with directions to dismiss the guardianship action.

BACKGROUND

Heather is the biological mother of Tyler, who was born in December 2001. Shane has been a part of Tyler's life since he was a year old and is the only "father figure" Tyler has ever known, but he is not Tyler's biological father. Heather and Shane are the biological parents of Brycen H., who was born in April 2007.

In June 2010, Tyler and Brycen were living with Shane in Gothenburg, Nebraska, and were removed from his care and placed in the custody of the Department of Health and Human Services (the Department) after they were found to be living in a home that was dangerous to a child and where marijuana was being grown. Heather was not living in the home at the time, because she had moved out of the home in February 2010 and relocated to Colorado, after learning that Shane was having an affair.

After moving to Colorado, Heather lived with her mother in a place that did not allow children to reside. She enrolled in a medical assistant training program and began attending school full time. Heather testified that when she moved to Colorado, she left Tyler with Shane so Tyler could finish the school year at the same school, and that she and Shane agreed that she would come get Tyler and Brycen in July and take them to Colorado. The children were removed from Shane's home a few weeks before Heather planned to take them to Colorado.

On June 10, 2010, the State filed a petition to adjudicate Tyler alleging that he was found to be living in a home that was dangerous to a child, there was marijuana being grown in the home, and there was no food in the home. Tyler and Brycen were placed with Shane's parents, who live very close to Shane's home in Gothenburg.

On June 23, 2010, an adjudication hearing was held. Heather was present and represented by an attorney. She entered a denial to the petition, noting that there were not specific allegations against her. At the end of the hearing, the juvenile court found that the allegations in the petition to adjudicate were true by a preponderance of the evidence and found that Tyler came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

At the same hearing, evidence was presented regarding the custody of Tyler. As previously stated, Tyler and Brycen had been placed with Shane's parents. The caseworker for the Department indicated that the Department intended to transfer custody of Tyler to Heather once she got a permanent address and a home study was completed and approved. Heather was still living with her mother, but planned to move in with her boyfriend. The caseworker indicated that the boyfriend would have to pass a background check before Heather would be given custody. The court ordered that the children were to remain placed with Shane's parents.

A dispositional hearing was held on August 4, 2010, at which Heather was present with her attorney. Heather was living with her boyfriend in Colorado at the time, whom Tyler had met once. The caseworker indicated that the Department had started the process of getting Heather's residence approved for placement of Tyler and that Heather's boyfriend was cooperating with the Department. The caseworker anticipated the approval process would take 3 weeks to complete. The Department's permanency plan was reunification with Heather.

The evidence showed that Heather had seen Tyler twice between the time he was removed from Shane's care in June and the August 4 dispositional hearing, and had almost daily telephone contact with him. The State questioned why Heather was not making a greater effort to spend more time with Tyler if she wanted to get custody of Tyler. The State was also concerned that placement of Tyler with Heather would also mean placement with Heather's boyfriend, whom Tyler had met only once.

The caseworker agreed that it would be beneficial for Tyler to have more visits with Heather to allow him time to get used to Heather's being in a parental role again and to give Tyler time to feel comfortable around Heather's boyfriend. The caseworker explained that it was

difficult to plan more visits, however, due to Heather's living in Colorado and because she was studying to become a medical assistant so her visits had to be scheduled around her time in school. The caseworker testified that other than having more visits with Tyler, there was nothing else the Department was asking Heather to do before reunification could happen.

The caseworker also testified that Shane was visiting Tyler almost daily at Shane's parents' house and that the visits were going very well. She also testified that he was making significant progress on improving the conditions of his home.

The State supported the Department's permanency plan of reunification with Heather, but suggested that reunification not be done immediately upon approval of placement with Heather because there needed to be additional contact and an adjustment period between Tyler, Heather, and Heather's boyfriend. The guardian ad litem also expressed concern about immediate reunification with Heather upon approval of placement. The court indicated that if Heather were approved for placement, it would have no objections to Heather having custody of Tyler. However, based on the State and guardian ad litem's concerns, the court indicated that placement with Heather would not be approved without a hearing.

The parties returned to court on February 2, 2011, for a review hearing. Heather was again present at the hearing with her attorney. The caseworker testified that Heather was no longer living with her boyfriend and that she was back living with her mother, but intended to move in with her grandparents on a temporary basis. The caseworker testified that Heather was not approved for placement of Tyler in a home study that was completed in October 2010. The caseworker testified that if Heather moved in with her grandparents, another home study would have to be done, as well as background checks of the grandparents.

The caseworker also testified that in December 2010, Heather had contacted her and stated she no longer wanted to be considered for placement. However, in January 2011, Heather changed her mind and wanted to take the steps necessary to rectify the concerns noted in the home study. These included job stability, relationship stability, providing for basic needs, completing a drug and alcohol evaluation, and having an extended period of sobriety. Heather had completed the medical assistant training program in October or November 2010 and was looking for a job.

The caseworker indicated that the Department was considering Shane for placement of Tyler, but for the meantime was recommending that Tyler continue being placed with Shane's parents. The caseworker testified that Tyler and Shane have a strong bond, that Tyler and Brycen also have a strong bond, and that it would be detrimental to them if they were split up. The reports of the court-appointed special advocate and the guardian ad litem both recommended that Tyler remain in the custody of the Department, but that he be placed in Shane's home. The juvenile court determined that Tyler should remain in the custody of the Department and remain placed in the home of Shane's parents.

On May 24, 2011, the Department filed a motion for approval of placement change, asking the juvenile court to change Tyler's placement from Shane's parents' home to Shane's home. Brycen had been placed back in Shane's home on May 11. The Department had received an "exception" to place Tyler into Shane's home, which was necessary because Shane and Tyler were not related. Tyler was placed in Shane's home on May 31.

A review and permanency hearing was held on July 13, 2011. Heather was again present for this hearing, along with her attorney. The caseworker for the Department testified that Heather had completed all of the steps required of her by the case plan. However, the Department was not recommending placement with Heather, but, rather, was recommending that the Department continue to have custody of Tyler and that Tyler remain placed in Shane's home. The caseworker testified that since Tyler had been placed with Shane, everything had gone well and there had been no issues. The caseworker believed it was in Tyler's best interests to remain with Shane because it allowed him to stay in Gothenburg, the only home he has known, and allowed him to be with Brycen.

At the conclusion of the hearing, the court ordered that Tyler would remain in the custody of the Department and that he continue to be placed in Shane's care.

On November 15, 2011, Shane filed a petition for appointment of a guardian for Tyler. Heather filed an answer and objection to the guardianship. A hearing followed on November 28.

The guardian ad litem testified that it is in Tyler's best interests to grant Shane guardianship. She testified that Tyler is involved in activities and is well adjusted to his life in Gothenburg. The court-appointed special advocate also testified that she believed granting Shane guardianship of Tyler is in his best interests.

The caseworker testified that the Department is in favor of Shane's being Tyler's guardian and that it would be in Tyler's best interests. The caseworker also stated that the Department encourages keeping siblings together.

The caseworker further testified that Heather had completed all of the case plan goals and that Heather had been approved for placement in the most recent home study. She also testified that there were no current safety concerns if Tyler were placed with Heather, that there were no concerns as to whether Heather could provide permanency for Tyler, and that Heather expressed a sincere desire to have Tyler in her custody. The evidence showed that Heather had been living in her own apartment since June 2011, had been employed as a medical assistant since March, and had family support in Colorado from her mother and grandparents.

Shane presented evidence of Heather's parenting abilities to show why Tyler should not be placed in her care. Shane testified that on August 10, 2011, he had a voice mail message on his telephone from Heather. He testified that he believed Heather had unintentionally called him because the message was not directed at him, but, rather, consisted of Heather and another individual having an argument about a sexual act between the two of them. Shane testified that Heather sounded intoxicated.

Shane's mother, Katie H., testified that she heard the voice mail left on Shane's telephone by Heather. Katie agreed with Shane's testimony that Heather sounded intoxicated and further explained that the argument seemed to be about sexual acts Heather and another individual had engaged in, which acts Heather was angry about.

Shane also testified about an overnight visit that Heather had in April 2011 with Tyler and Brycen. Heather had stayed with the boys in a hotel in North Platte, Nebraska. Shane testified that in the morning, Brycen was sick and had a fever and needed to go to a hospital. Shane testified that instead of taking Brycen to the hospital, Heather called Shane's father to come get the boys in North Platte and then she went back to Colorado.

Katie also testified about Heather's visit in North Platte when Brycen was sick. She testified that Heather called and said someone needed to come to North Platte to get Brycen because he was sick and she did not think she could drive him back. Katie testified that when her husband arrived, he told Heather he was going to take Brycen to the hospital, at which point Heather left to go back to Colorado. As it turned out, Brycen was not admitted to the hospital and was sent home. Katie admitted that Heather had given Brycen medicine in the morning to reduce his fever and that his temperature was only 100.7 degrees Fahrenheit when he arrived at the hospital.

Katie further testified that when Heather and Shane lived together, there were times that Heather called her and asked her to take the boys for a short time because she needed a break.

Heather also testified and gave her version of what happened in April 2011 when Brycen was ill. She testified that she, Tyler, and Brycen had stayed in a hotel and had celebrated Brycen's birthday and Easter. She testified that Brycen woke up sick and had a fever. The hotel room was a complete mess, and she needed to clean it up. She testified that she did not believe she could get all their belongings packed up and get the room cleaned up before check-out time, while also taking care of Brycen, so she needed someone to come get Brycen. Heather testified that she did not think Brycen needed to go to the hospital.

In regard to the voice mail on Shane's telephone, Heather testified that she did not recall the message and that the testimony at the hearing was the first she had heard about it.

Heather also testified that the only reason she indicated in December 2010 that she did not want to be considered for placement of Tyler was because she had been advised by her caseworker to do so.

Heather testified that if Tyler were placed with her, she had no intention of ending the relationship between Tyler and Shane or between Tyler and Shane's parents.

The juvenile court found that based on the evidence presented, it was in Tyler's best interests to grant Shane guardianship of Tyler.

ASSIGNMENTS OF ERROR

Heather assigns, restated, that the juvenile court (1) lacked jurisdiction over Tyler because he was not adjudicated and (2) erred in granting Shane guardianship of Tyler.

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 Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011).

ANALYSIS

Adjudication of Tyler.

The juvenile court found that Tyler came within the meaning of § 43-247(3)(a) and adjudicated him based on allegations against Shane. Heather argues that because the allegations in the petition to adjudicate were directed against Shane and there was no adjudication pursued based on allegations against her, the juvenile court lacked a sufficient basis to adjudicate Tyler under § 43-247(3)(a), and that it never had jurisdiction to grant guardianship of Tyler.

Section 43-247(3)(a) provides in relevant part that the juvenile court shall have jurisdiction of any juvenile who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian. Heather argues that the court could not adjudicate Tyler based on allegations against Shane because he was not Tyler's parent, guardian, or custodian. To the contrary, when Tyler was removed from Shane's home, Shane had been Tyler's sole caregiver and provider for 4 months. Heather had moved to Colorado and voluntarily left Tyler in Shane's care and custody.

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 Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001). 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 Sabrina K.*, *supra*.

Therefore, the only question before the court at the adjudication hearing was whether Tyler, in his present living situation with Shane, lacked proper parental care by reason of the fault or habits of Shane. See, *id.*; § 43-247(3)(a). The juvenile court found that the allegations in the petition to adjudicate were true by a preponderance of the evidence and found that Tyler was a juvenile as described by § 43-247(3)(a). We conclude under our de novo review that the juvenile court was correct in finding a sufficient factual basis for the adjudication. Heather's first assignment of error is without merit.

Guardianship.

Heather next argues that the juvenile court erred in granting the guardianship over her objection, because the evidence fails to show that Heather is unfit to parent Tyler. The juvenile court granted Shane's petition based solely on a determination that the guardianship was in Tyler's best interests. However, the parental preference principle applies in guardianship proceedings that affect child custody, which requires an analysis of whether a parent is unfit or has forfeited his or her rights to the child. See *In re Guardianship of Elizabeth H.*, 17 Neb. App. 752, 771 N.W.2d 185 (2009). The juvenile court failed to consider whether Heather was unfit or had forfeited her rights to Tyler in determining whether to grant Shane guardianship of Tyler.

The parental preference principle establishes a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent. *In re Guardianship of Elizabeth H.*, *supra*. The principle provides that a parent has a natural right to the custody of his or her child which trumps the interest of strangers to the parent-child relationship and the preferences of the child. *Id.* Therefore, unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child. *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011). Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child. *Id.*

It has been held that an individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional

dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent. *In re Interest of Lakota Z. & Jacob H.*, *supra*.

In *In re Guardianship of Elizabeth H.*, 17 Neb. App. at 762, 771 N.W.2d at 193, this court considered the application of the parental preference principle to the initial appointment of a guardian as opposed to a guardianship termination proceeding and held as follows:

[I]t is axiomatic that the parental preference principle must also be applied to initially determine whether to appoint a guardian over a parent's objection. It follows that an individual who seeks appointment as a guardian over the objection of a biological or adoptive parent bears the burden of proving by clear and convincing evidence that the biological or adoptive parent is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require a court to deny the request for a guardianship.

Although the guardianship in *In re Guardianship of Elizabeth H.*, *supra*, arose under the Nebraska Probate Code, the Nebraska Supreme Court has held that the parental preference principle is equally applicable in a case where the children were adjudicated and under the jurisdiction of a juvenile court. See *In re Interest of Lakota Z. & Jacob H.*, *supra*. The *In re Interest of Lakota Z. & Jacob H.* court found that even if the appellants were correct in arguing that the best interests standard associated with juvenile adjudication somehow trumped the well-established law regarding the termination of a guardianship, the parental preference principle is still applicable, even to an adjudicated juvenile.

In the present case, the juvenile court failed to consider the parental preference principle and failed to determine whether the evidence supported a finding that Heather was unfit or had forfeited her right to custody of Tyler.

Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. See *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011). Evidence of unfitness should be focused upon a parent's ability to care for a child, and not any other moral failings a parent may have. *Id.* It is equally worth emphasizing, however, that evidence of unfitness should be focused upon a parent's present ability to care for a child and that evidence of a parent's past failings is pertinent only insofar as it suggests present or future faults (although in some instances, such evidence may be very pertinent). *Id.*

The only evidence presented at the guardianship hearing that reflected negatively on Heather's parenting abilities was the voice mail left on Shane's telephone, the overnight visit when Brycen was sick, and Katie's testimony that Heather called her on occasion to help with Tyler and Brycen. In regard to the voice mail, the evidence is not specific as to the content of the message and there is no indication as to how this one message makes her an unfit parent. As far as the visit when Brycen was sick, the evidence shows that Brycen was not seriously ill and that her decision to have someone else come get Brycen rather than drive him home herself did not put Brycen at risk of harm. Finally, Katie's testimony that Heather would call her and ask her to watch the boys certainly does not make her an unfit parent. The instances of Heather's parenting raised at the guardianship hearing clearly do not show that Heather is unfit. We are mindful of

the fact that the law does not require perfection of a parent. See *In re Interest of Lakota Z. & Jacob H., supra*.

There is little question that the alleged deficiencies in Heather's present ability to parent would not have justified removal of Tyler from Heather's home had those deficiencies been the bases upon which removal had been sought in the first place. See *id.*

At the time of the guardianship hearing, Heather had a full-time job, had an apartment that was large enough to accommodate Tyler and Brycen, and had family near her to provide support. The caseworker testified that Heather had been approved for placement by the Department in the most recent home study. She also testified that there were no current safety concerns if Tyler were placed with Heather, that there were no concerns as to whether Heather could provide permanency for Tyler, and that Heather expressed a sincere desire to have Tyler in her custody.

The record before us does not support a determination that Heather was unfit to have custody of Tyler at the time of the guardianship hearing. We further conclude that the record does not support a finding that Heather has forfeited her right to custody.

CONCLUSION

We conclude that the juvenile court properly adjudicated Tyler such that it had jurisdiction to grant guardianship of Tyler. We further conclude, however, that the juvenile court erred in granting Shane's petition for guardianship because the evidence does not support a finding that Heather was unfit or had forfeited her right to custody of Tyler. Accordingly, the judgment of the juvenile court is reversed and the cause is remanded with directions to the juvenile court to dismiss the guardianship action.

REVERSED AND REMANDED WITH DIRECTIONS.