

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Tiffany N.,
a child under 18 years of age.

)
)
)

No. A-13-255.

In re Interest of Tyler N.,
a child under 18 years of age.

)
)
)

No. A-13-0256.

In re Interest of Tyson N.,
a child under 18 years of age.

)
)
)

No. A-13-0257.

State of Nebraska,

)

MEMORANDUM OPINION

Appellee,

)

AND

JUDGMENT ON APPEAL

v.

)

FILED

Tracy G.,

)

FEB 26 2014

Appellant.

)

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

INBODY, Chief Judge, and PIRTLE and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Tracy G. appeals from the order of the county court for Dodge County, sitting as a juvenile court, terminating her parental rights to her three minor children. The cases have been consolidated for consideration on appeal. Finding no merit to Tracy's arguments, we affirm the decision of the juvenile court.

BACKGROUND

Tracy is the mother of the three children at issue here: Tyler N., born 1999; Tiffany N., born 2000; and Tyson N., born 2002. At the same time the juvenile court terminated Tracy's



parental rights to the children, it terminated the parental rights of the children's father. Because he has not appealed that decision, we will not address him any further.

Tyler, Tiffany, and Tyson were removed from Tracy's care on September 24, 2009 after Tracy was cited for driving under the influence and admitted she had left the children at home alone. Tracy was convicted of second offense driving under the influence and driving with a suspended license, and was sentenced to 18 months to 3 years' incarceration. The children were placed in foster care and adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

Prior to the current juvenile case, Tyler, Tiffany, and Tyson had previously been in the custody of the Nebraska Department of Health and Human Services (DHHS) for several years. They were originally removed from Tracy's care in October 2002 when she was incarcerated for driving with a suspended license. They were adjudicated under § 43-247(3)(a) at that time. The children were reunited with Tracy three times during the case before it was closed in June 2006. Between June 2006, when the case was closed, and September 2009, when the children were removed pursuant to this case, Child Protective Services received five separate reports regarding the children. One report alleged physical abuse and neglect of Tyler, one alleged

physical neglect of Tyson, and three related to domestic violence between Tracy and the children's father.

In this case, the State filed a supplemental motion to terminate Tracy's parental rights on March 23, 2012. The termination hearing took place over 7 days between June 29 and September 27, 2012.

During the pendency of this case, Tracy participated in many services. She successfully completed inpatient substance abuse treatment as well as intensive outpatient treatment, which was a condition of her parole. She attended numerous parenting classes, anger management classes, therapy and counseling sessions, victim impact classes, domestic violence classes, and cognitive thinking programs. After she successfully completed the terms of her parole in July 2011, she found and has maintained stable housing for herself and a stable source of income. She successfully applied for Social Security Disability benefits based on her diagnoses of an anxiety disorder, post-traumatic stress disorder, and a back injury. She also receives Medicaid and food stamps every month. Tracy cleans houses to earn extra money, and in exchange for cleaning a church, she receives occasional assistance with other monthly bills. Tracy also participated in frequent supervised visitation with all three children, totaling approximately 30 hours per week.

Despite Tracy's participation with these services, throughout the case DHHS had ongoing concerns about two portions of Tracy's case plan: whether Tracy was maintaining her sobriety and her ability to safely parent her children. Tracy was required to submit to alcohol and drug testing twice a week to monitor her sobriety. She tested positive for benzodiazepines on three occasions, admitting to taking a friend's Xanax on one of those days because she was having high anxiety. She also tested positive for alcohol on August 30, 2011; September 17, 2011; May 14, 2012; May 29, 2012; June 2, 2012; and June 9, 2012.

Tracy admitted that she relapsed in September 2011 and drank alcohol on two occasions, but she denied intentionally consuming alcohol at any other time. She blamed her other positive tests on household items containing alcohol such as hemorrhoid cream, cough medicine, antibacterial gel, and mouthwash. According to the toxicologist from the laboratory that processed Tracy's urine samples, incident exposure to alcohol can cause a positive test result; however, if the level of ethyl glucuronide (EtG) in a urine sample is greater than 500 nanograms per milliliter (ng/mL), incidental exposure is extremely unlikely. The EtG levels of Tracy's positive tests in August 2011 and May and June of 2012 were 10,000 ng/mL, 1010 ng/mL, 532 ng/mL, 387 ng/mL, and 544 ng/mL, respectively.

Besides the positive tests, a very high number of Tracy's other samples were considered "dilute" or "abnormally dilute." Dilution levels are based on the level of creatinine, a byproduct that is present in all urine. Creatinine levels are used to determine whether a urine sample is valid. As the concentration of creatinine in the urine decreases, testing results are compromised, meaning that there may be false negative results. A urine sample that tests negative for substances but is considered dilute is essentially not accurate. Any level of creatinine less than 20 milligrams per deciliter (mg/dL) is considered to be a dilute sample. A level less than 2 mg/dL is considered abnormally dilute, or not consistent with normal human urine. The toxicologist testified that the average creatinine level in the urine of 4,330 females tested during a study was 106 mg/dL, so setting 20 mg/dL as the level at which a sample is considered dilute is being "quite cautious."

Of Tracy's 26 samples analyzed by the laboratory between June 2011 and May 2012, only 4 had greater than 20 mg/dL of creatinine to be considered valid samples. The remaining 22 samples were either dilute or abnormally dilute. Tracy denied intentionally diluting her samples and claimed that she was drinking a lot of fluids because her medications made her thirsty. According to the toxicologist, a person would have to drink 4 to 5 liters of water over 4 to 5 hours of time for a

sample to become dilute. He testified that there is no legitimate explanation for an abnormally dilute sample, but "dipping" the container into the toilet is a method used to introduce water into a sample. A family support worker who administered a test on Tracy in November 2011 wrote in her visitation notes that Tracy cursed and indicated displeasure that she was being watched and that the toilet water was being colored blue by a toilet tab. However, a different family support worker who administered tests on Tracy beginning in January 2012 testified that she never observed Tracy "dip" the container in the toilet water.

In addition to the urinalysis results, there were other things that caused DHHS to question whether Tracy was maintaining her sobriety. Tracy was ordered to attend Alcoholic Anonymous (AA) meetings on a weekly basis and provide verification to the case manager. Tracy reported that she was attending meetings two or three times per week but failed to provide any proof of her attendance prior to February 24, 2012. She was also ordered to locate a sponsor through AA, but she would not provide the name of her sponsor to the case manager until April 2012.

During the case, DHHS also had ongoing concerns about Tracy's ability to safely and appropriately parent the children. There was extensive testimony presented at the termination

hearing regarding a "safe hold" that Tracy used on Tyson to calm him down when he lost control. Tracy testified that she learned how to utilize that technique in a parenting class, and one of the visitation aides testified that she instructed Tracy on it as well. However, according to the case manager, there were extensive discussions during team meetings about the inappropriateness of using the hold on Tyson.

There were concerns about Tracy's use of physical force with the children beyond just the "safe hold." On more than one occasion, she dragged one of the boys from one room of her house to another. On several occasions, she grabbed Tyson by the jaw or mouth. A visitation aide saw Tracy grab Tyson and physically hold him down in a timeout. Another aide witnessed Tracy grab Tyson by the mouth and push his head into a corner in an attempt to get him to stand in the corner for a timeout. The children's foster parents and therapist expressed concerns to the case manager about the children returning from visits with bruises and scratches and reporting rough handling by Tracy.

The children's therapist, Connie Baker, testified that she thought the physical force Tracy used with the children was unsafe and not healthy, particularly because the children had disclosed to her that Tracy had physically abused them in the past. The children began seeing Baker in September 2011, and Tracy and the children began family therapy with Baker in

November 2011. Baker testified that before they could attempt, through family therapy, to rebuild the bond between Tracy and the children, they had to break through the children's anger, resentment, and questions, all stemming back to the physical abuse.

Tracy denied physically abusing the children to Baker and claimed that the children were being brainwashed. But the children told Baker that as far back as they could remember, Tracy was physically abusive to them, and the abuse typically occurred when there was alcohol involved. Tyler told Baker that Tracy would hit him, beat him, punch him, and push him down. He said that he and Tyson had run away from home out of fear for their safety because Tracy "beat the crap out of" them. Tiffany said that Tracy pulled her hair and dragged her through the house. Tyson told Baker that Tracy would physically drag him around, push him, hit him, and "smack" him. All three children expressed fear of returning to live with Tracy because of physical violence. Incidentally, Tracy admitted at the termination hearing to hitting her children in the past, including hitting them with a belt and pulling their hair.

During family therapy, Baker observed that Tracy made excuses for her behavior and alcohol use. In the early sessions, Tracy just went through the motions because she did not feel that she needed to be there and was only participating because

she was ordered to. Baker decided to terminate family therapy in May 2012 because it had become too hostile. According to Baker, the focus got lost, Tracy continued to insist that the children were being brainwashed, and the children were becoming further upset. Baker said it became counterproductive and traumatizing every week to have such a chaotic environment. Baker did not believe, at that point, that Tracy was fit to parent her children.

The DHHS case manager testified that she never felt comfortable allowing Tracy to have unsupervised visits with the children because of the frequency and extent of the physical force she used on the children even while being supervised during visits. Tracy suffers from anxiety and sees a mental health therapist as well as a psychiatrist. She also is prescribed anti-anxiety medication. However, the case manager never saw an improvement in Tracy's anxiety. There were reports from visitation aides that Tracy continued to yell at the children, call them names, and use obscene language around them, particularly when she became frustrated with their behaviors.

An incident that occurred on March 11, 2012 was particularly concerning to DHHS. When the visitation aide and children arrived at Tracy's house that day for visitation, the house was in disarray. The oven was broken and there was glass all over the floor, there were cigarette butts on the floor and

smoke throughout the house, and there were two holes in the wall, a broken chair, and various items thrown throughout the house. Tracy appeared disheveled and tired. The children were upset by the scene, and Tiffany began crying telling Tracy, "This is not helping Mom; this is not going to get us home." Tyler and Tyson thought Tracy was drinking again. A urine sample was taken from Tracy the following day, but it leaked in transit and was unable to be analyzed.

Tracy told the visitation aide that she had gotten angry the previous night after talking on the telephone with her older daughter and slammed the oven door shut, which cracked the glass. Then she got more upset and touched it with her foot, and all the glass fell out onto the floor. As she walked past the dining room table, she said she kicked a chair and it broke. As she then walked into her bedroom, she said she hit two metal candle holders, and they hit the wall, leaving holes in the wall.

The children were very upset by this incident and discussed it on several occasions during therapy with Baker. They told her they thought Tracy was drinking again but were struggling to reconcile what Tracy told them happened with what they thought happened. When Baker asked Tracy about the incident, Tracy said that she had gotten upset because she took some food out of the oven, spilled it, slammed the door, broke the glass, and then

got further upset and lost control. Baker suggested to Tracy that perhaps she should look into additional anger management or parenting classes, but Tracy was not receptive to the suggestions.

All three children testified at the termination hearing. Tyler testified that he believes Tracy loves him and she shows him affection. But when asked if he loved Tracy, he replied, "Yeah, but I don't really -- some things are hard to explain . . ." He then explained that Tracy would make promises and not keep them. For example, he said one night she would beat them for no reason and in the morning when they had bruises and cuts and told Tracy what she did, she would promise never to do it again, but it would happen again the next night. Tyler testified that he would love to live with Tracy again if there was a guarantee that she would not abuse him at all. But he would feel like he was taking a gamble by going home, and it could turn out really well or turn out terribly.

Tiffany testified that she loves Tracy "very much" and "absolutely" thinks Tracy loves her. Tiffany would like to live with Tracy again. Tyson testified that he does not love Tracy and does not think she loves him, although he admitted that she tells him she loves him. When asked if there was anything he wanted to say, Tyson responded, "My mom has abused me over the

years, and I really don't want to live with her. I want to go live with [my foster parents]."

A DHHS case worker who worked with Tracy and the children from March 2011 until November 2011 testified that during the time she was on the case, she did not see any improvement in Tracy's parenting skills. On the contrary, she saw Tracy struggling with her ability to parent the children. The case manager who took over the case in November 2011 described Tracy's progress from that point until the termination hearing as "minimal." She did not believe that Tracy was fit to parent her children because of her anxiety and frustration level and because the anger that she exhibited around the children was not healthy for them. The case manager expressed concern that if the children were placed back with Tracy, they would be physically abused again. She believed that terminating Tracy's parental rights would be in the children's best interests because they need stability and permanency.

Baker was asked how remaining "in limbo" would affect the children. She replied that it would be "horrible" for them and she did not think their situation was going to be better by staying in limbo. Rather, she believed the children would "get worse" by having more anxiety and more mood swings because of the uncertainty of what will happen and feeling like they have no control in the situation. Baker testified that the children

need to be able to go on with their lives, and "it would be awesome if it could be with [Tracy]. But if it can't because of whatever reasons, at this point in their lives, while they're still young enough to have a childhood, they need to be given an opportunity to find good, permanent homes."

The juvenile court entered an order terminating Tracy's parental rights to Tyler, Tiffany, and Tyson on February 28, 2013. The court found that the State met its burden of proof with respect to Neb. Rev. Stat. § 43-292(6) and (7) (Cum. Supp. 2012). The court also found that termination was in the children's best interests. The juvenile court stated, "Children cannot wait in hope that their parents will eventually take the steps necessary for reunification with their children when the children have already waited in vain for such change to take place." Tracy timely appealed to this court.

ASSIGNMENTS OF ERROR

Summarized and renumbered, Tracy assigns that the juvenile court erred in (1) finding that the State proved Neb. Rev. Stat. § 43-292(6) by clear and convincing evidence, (2) finding that terminating her parental rights was in the children's best interests, (3) placing emphasis on Tracy's history, (4) placing emphasis on the results of drug and alcohol testing, and (5) terminating her parental rights.

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. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010). However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

Statutory Grounds for Termination.

In Nebraska statutes, the bases for termination of parental rights are codified in § 43-292. Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Sir Messiah T. et al.*, *supra*.

In its order terminating Tracy's parental rights to the children, the juvenile court found that the State had met its burden of proof with respect to § 43-292(6), because reasonable efforts to preserve and reunify the family have failed to correct the conditions leading to the children's adjudication, and § 43-292(7), because the children had been in an out-of-home placement for 15 or more months of the most recent 22 months.

Tracy concedes that the children have been in an out-of-home placement for 15 or more months of the most recent 22 months. The children were removed from Tracy's home on September 24, 2009. At the time the supplemental motion to terminate parental rights was filed on March 23, 2012, the children had been in an out-of-home placement for 30 months. At the time the termination hearing concluded on September 27, 2012, the children had been in an out-of-home placement for 36 months. Our de novo review of the record clearly and convincingly shows that grounds for termination of Tracy's parental rights under § 43-292(7) were proved by sufficient evidence.

If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010). Therefore, this court need not review termination under § 43-292(6). Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the children's best interests.

Best Interests.

Tracy next asserts that the juvenile court erred in finding that termination of her parental rights is in the children's best interests. In cases where termination of parental rights is based solely on § 43-292(7), the Nebraska Supreme Court has held that appellate courts must be particularly diligent in their de novo review of whether termination of parental rights is, in fact, in the child's best interests. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). In such a situation, because the statutory ground for termination does not require proof of such matters as abandonment, neglect, unfitness, or abuse, as other statutory grounds do, proof that termination of parental rights is in the best interests of the child will require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as those enumerated in the other subsections of § 43-292. *Id.*

Tyler, Tiffany, and Tyson were in an out-of-home placement for 30 months before the State filed the supplemental motion to terminate Tracy's parental rights. During that time, Tracy failed to make substantial, significant progress on her case plan. Although we cannot definitely conclude whether Tracy was using alcohol based on the dilute and abnormally dilute tests, the high number of dilute tests certainly calls her sobriety into question, and as the juvenile court noted, they made it

difficult for DHHs to monitor her sobriety and cooperation with the case plan. The questionable test results coupled with Tracy's unwillingness to timely provide proof of her AA attendance or the name of her sponsor raise further questions as to her compliance with the case plan.

Perhaps more concerning was Tracy's continued use of physical force to discipline the children, especially considering her anxiety disorder. The case workers never saw any improvement in Tracy's anxiety, and numerous visitation aides noted Tracy's frustration with the children when they would misbehave. The capacity for Tracy's anger to quickly get out of control was displayed in the March 11, 2012 incident surrounding the broken oven. It is notable that DHHS never felt comfortable allowing Tracy to have unsupervised parenting time, despite the generous amount of parenting time she had with the children every week and the length of time the case was pending. The fact that the children expressed fear of returning to Tracy due to past physical violence is also concerning.

Tracy had the opportunity to rebuild the bond with her children through family therapy, but failed to take advantage of that opportunity. She denied the children's claims of abuse to Baker, made excuses for her own behavior, and thought therapy was a waste of time. She continually minimized any concerns about her behavior and refused to accept responsibility for her

actions. A family support worker noted on March 22, 2012 that "Tracy does not take accountability in the damages she has done to the children, especially emotionally."

Before this case began in September 2009, Tyler, Tiffany, and Tyson had each previously spent 44 months in the custody of DHHS, albeit with sporadic reunions with Tracy. Combining the amount of time the children previously spent as wards of the State with the 36 months they had spent in foster care by the end of the termination hearing in this case equates to 80 months spent out of Tracy's custody. This amounts to more than 6 years, or over half of the children's lives.

Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). When a parent is unable or unwilling to rehabilitate himself or herself with a reasonable time, the child's best interests require termination of parental rights. *Id.* Based on our de novo review of the record, we find that termination of Tracy's parental rights is in the best interests of the children.

Remaining Assignments of Error.

Tracy also assigns that the juvenile court erred in placing emphasis on her history. We disagree because Nebraska appellate courts have recognized that one's history as a parent speaks to one's future as a parent. See, *In re Interest of Sir Messiah T.*

et al., 279 Neb. 900, 728 N.W.2d 320 (2010); *In re Interest of Andrew S.*, 14 Neb. App. 739, 714 N.W.2d 762 (2006). Thus, the juvenile court did not err in relying on Tracy's history when terminating her parental rights.

Additionally, Tracy argues that the juvenile court erred in placing "great weight" on her drug and alcohol tests. We disagree with the characterization that the juvenile court placed "great weight" on the alcohol testing results. In its order the juvenile court concluded that due to the frequency of dilute or abnormally dilute test results, it was not possible for DHHS to establish a reliable time period of Tracy's sobriety to demonstrate her compliance with the case plan and ensure the safety of the children for unsupervised visitation or placement with Tracy. Contrary to Tracy's interpretation, we do not read the juvenile court's order to definitively conclude that Tracy had not been maintaining her sobriety. Rather, the court noted that the dilution of the samples rendered the results questionable as to whether, in fact, she had been using alcohol. Regardless, even without considering the results of the alcohol tests, as we described above there was sufficient evidence presented to terminate Tracy's parental rights based on the ongoing safety concerns of her ability to parent the children.

Because the State proved by clear and convincing evidence statutory grounds for terminating Tracy's parental rights and

that termination was in the children's best interests, we conclude that the juvenile court did not err in terminating Tracy's parental rights to Tyler, Tiffany, and Tyson.

CONCLUSION

For the foregoing reasons, we affirm the decision of the juvenile court.

AFFIRMED.