

IN THE COURT OF APPEALS OF IOWA

No. 0-760 / 10-1313
Filed November 10, 2010

**IN THE INTEREST OF D.H.,
Minor Child,**

**W.A. and B.A., Intervenors,
Appellants.**

Appeal from the Iowa District Court for Appanoose County, William S. Owens, Associate Juvenile Judge.

Foster parents appeal the juvenile court's order denying their "petition" to remove the Iowa Department of Human Services as the appointed guardian and custodian of their foster child after the child's parents' parental rights were terminated and the Department chose the child's grandparents as the child's adoptive home. **AFFIRMED.**

Julie De Vries of De Vries Law Office, P.L.C., Centerville, for foster parent intervenors/appellants.

Thomas J. Miller, Attorney General, and Charles K. Phillips, Assistant Attorney General, and Richard F. Scott, County Attorney, for appellee State.

Bryan J. Goldsmith of Gaumer, Emanuel, Carpenter & Goldsmith, P.C., Ottumwa, for grandparent intervenors.

Jonathan Willier, Centerville, for minor child.

Considered by Potterfield, P.J., Doyle, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

DOYLE, J.

Foster parents W.A. and B.A. appeal the juvenile court's order denying their "petition" to remove the Iowa Department of Human Services as the appointed guardian and custodian of their foster child, D.H., after the child's parents' parental rights were terminated and the Department chose the child's grandparents as the child's adoptive home. Upon our review, we affirm.

I. Background Facts and Proceedings.

D.H., born in June 2007, has "mild special needs," including allergies and some mental delay, including speech and hearing issues. D.H. was removed from his parents' care in January 2008. Thereafter, the child was adjudicated a child in need of assistance (CINA), and legal custody of the child was placed with the Iowa Department of Human Services (Department) for placement in foster care. The child's paternal grandfather, J.H., and the grandfather's wife, P.H., (grandparents) requested that the child be placed in their home. However, their request was denied after a relative home study was completed and their home was not approved for placement. The child was then placed with W.A., the child's great uncle, and W.A.'s wife B.A. (foster parents). The grandparents maintained contact with the child and attended court hearings during the CINA proceedings. Both the foster parents and grandparents intervened in the case.

On July 20, 2009, the juvenile court entered its order terminating the parental rights of the child's parents.¹ In its order, the juvenile court ordered "[t]hat guardianship and legal custody of [the child] . . . be placed with the

¹ The order terminating the parents' parental rights, affirmed by this court on September 17, 2009, with procedendo issuing on October 5, 2009, is not at issue in this appeal.

[Department] for placement in foster care. The [D]epartment shall immediately make a referral of this case to the adoption unit,” and “[t]hat the [D]epartment shall submit a case permanency plan to the court and shall make every effort to establish a stable placement for [the child] by adoption or other permanent placement.” The court’s order noted that the child was adoptable and that both the foster parents and the grandparents indicated a desire to adopt the child. The child remained placed in the foster parents’ home.

On August 4, 2009, the foster parents filed a “Petition for Removal of Guardian [and] Petition for Custody and Guardianship.” Their petition, later amended, asserted that removing the Department as guardian would be in the best interests of the child and would expedite permanency for the child. The foster parents argued it was in the child’s best interests because they were suitable to be appointed as guardians and, due to their relationship with the child, they were the best suited to serve as the child’s custodians and guardians. Additionally, the foster parents asserted:

[The Department] has not fulfilled its duties as guardian and custodian. [The Department] has failed to protect the child from harmful environments and to follow professional recommendations regarding medical care. [The Department’s] plan to transfer the child to another relative creates a risk of exposing the child to substance abuse, conflict, and criminal activity.

The foster parents also argued that granting them custody and guardianship would expedite permanency for the child, by maintaining stability for the child and, because the child continued to be placed with them, by preventing a waiting period prior to adoption. The grandparents resisted.

On August 10, 2009, the Department transferred the child's case to its adoption unit and assigned an adoption worker from that unit. The adoption worker was introduced to the child. The Department made recommendations concerning the case, including that the child remain in its custody and guardianship for purposes of adoption and that the child be registered on the adoption exchange until an adoptive family was identified. The Department continued working with a service provider for visitation with the grandparents. The Department continued to monitor the child's health, including allergy, speech, and hearing concerns.

Pursuant to the Department's policy, the Department considered both the foster parents and grandparents as potential adoptive parents, as both families had a significant relationship with the child. A relative home study was again performed on the grandparents' home, and that study was approved. Adoption home studies were then completed on both families and their homes, and both families were ultimately approved for adopting the child. The adoption home studies were not comparative studies, only a study of whether the family met the minimal requirements for providing for and adopting a child.

In December 2010, adoption interviews were set up by the Department with both families. The interviews were conducted by a panel consisting of six individuals selected by the Department: four employees of the Department, three of whom had no prior knowledge of the case other than being given the case report and home studies; a service provider; and the child's guardian ad litem (GAL). After the interviews, the panel met to select the final adoption candidate. After discussion, the panel was dead-locked three to three and unable to reach a

decision. The panel met again the following week, and it was decided four to two that the grandparents should be selected for the recommended adoptive placement. All four votes in favor of the grandparents were cast by the Department's employees.

On January 28, February 23, March 17, and April 1, 2010, a hearing was held on the foster parents' petition to remove the Department as guardian and custodian of the child. Testimony was given by numerous individuals involved in the case and the child's life, including Department workers, service providers, a day-care provider, doctors, persons who conducted home studies and bonding studies, as well as the foster parents and grandparents. The service provider who performed the first relative home study on the grandparents testified that he would not recommend placement with the grandparents based upon that previous study's findings, including the condition of the grandparents' home as having a flea and pet odor problem, among other things, as well as the grandfather's attitude at that time. The service provider acknowledged that that study had been conducted almost two years previously and he had not had any more contact with the family. Several witnesses testified the foster parents and the child were bonded. However, Department employees who participated in the adoption interviews and adoption determination generally testified that it was a close case, but most felt that the grandparents were better candidates for adoption. One Department employee testified that the grandparents' kinship with the child convinced him to select the grandparents; another testified that she felt the grandparents' expectations for the child and his future relationship with the grandparents were more realistic. The Department worker who performed the

second relative study and the service provider who provided the adoption home study both testified that the grandparents' home's condition had been improved and was no longer a concern for the child.

Briefs were submitted by the parties. The GAL joined with the foster parents' position and recommended that the court transfer guardianship from the Department to the foster parents. The GAL argued that it was in the child's best interests to transfer guardianship to the foster parents. Ultimately, the GAL argued the Department erred in selected the grandparents as the adoption candidate, asserting the Department ignored or minimized serious concerns regarding the grandparents and that the adoption selection process was a sham.

The grandparents and the State filed briefs in resistance. Both the grandparents and the State argued that the foster parents failed to prove the Department acted unreasonably.

On August 16, 2010, the juvenile court entered its twenty-three-page detailed, thorough, and well-reasoned order denying the foster parents' "petition." The court noted that the Iowa Code section governing the removal of a guardian, Iowa Code section 232.118(1) (2009), did not indicate a burden of proof required to remove a guardian. The court therefore considered three different possible standards by clear and convincing evidence or a preponderance of the evidence: a showing of a substantial change in circumstances; proof of unreasonable actions on the part of the Department; and the best interests of the child. The court ultimately found that the foster parents failed to establish the Department should be removed applying any of these standards. The court then dismissed the foster parents' "petition."

The foster parents now appeal.

II. Scope and Standards of Review.

“Our review of this juvenile case is de novo. We review both the facts and the law and adjudicate rights anew. Although we give weight to the juvenile court's findings of fact, we are not bound by them.” *In re E.G.*, 745 N.W.2d 741, 743 (Iowa Ct. App. 2007) (internal citations omitted).

III. Discussion.

On appeal, the foster parents, joined by the GAL, argue the juvenile court applied the wrong burden of proof in reviewing the foster parents' petition for removal. Alternatively, they argue that the Department did not act reasonably and responsibly in the case, nor did the Department act in the child's best interests. For the following reasons, we disagree.

A. Different Standards.

In enacting chapter 232 the legislature enunciated the purposes of Iowa's juvenile justice laws in providing the

chapter shall be liberally construed to the end that each child under the jurisdiction of the court shall receive, preferably in the child's own home, the *care, guidance and control that will best serve the child's welfare and the best interest of the state*. When a child is removed from the control of the child's parents, the court shall secure for the child care as nearly as possible equivalent to that which should have been given by the parents.

Iowa Code § 232.1 (emphasis added).

If the child's parents' parental rights are terminated, Iowa Code section 232.117(3) requires the court to

transfer the guardianship and custody of the child *to one of the following*:

- a. The department of human services.

b. A child-placing agency or other suitable private agency, facility or institution which is licensed or otherwise authorized by law to receive and provide care for the child.

c. A parent who does not have physical care of the child, other relative, or other suitable person.

(Emphasis added.) The statute gives no preference to any person or entity listed in subsections a, b, or c.

Once a guardian had been appointed by the court, said guardian can be removed:

Upon application of an interested party or upon the court's own motion, the court having jurisdiction of the child may, after notice to the parties and a hearing, remove a court-appointed guardian and appoint a guardian in accordance with the provisions of section 232.117, subsection 3.

Id. § 232.118(1). However, neither section 232.118(1) nor section 232.117(3) set forth the circumstances upon which an application for removal may be granted or the burden of proof² required to sustain such an application. See Iowa Code §§ 232.117(3) & 232.118(1).

The foster parents argue the best interests of the child is the sole consideration in ruling on their application,³ as mandated by Iowa Code section

² We note that chapter 232 does set forth the burden of proof required in numerous other CINA matters. For example, to establish a child is a CINA or to transfer legal custody upon disposition, chapter 232 employs the clear and convincing standard. See Iowa Code §§ 232.96(2) (CINA adjudication) & 232.102(5)(a) (disposition). To modify a dispositional order, good cause is required to be shown, unless the request to modify is based on the child's alleged failure to comply with the conditions or terms of the order; then clear and convincing evidence is required. *Id.* § 232.103(5). A permanency order must be based upon convincing evidence. *Id.* § 232.104(3). The clear and convincing standard also applies to termination orders. *Id.* § 232.117(3). Additionally, this court has stated a substantial change in material circumstances is required to modify a dispositional order. See *in re C.D.*, 509 N.W.2d 509, 511 (Iowa Ct. App. 1993).

³ The statute allows for the filing of an "application" to removal the guardian. See Iowa Code § 232.118(1). "The label attached to a motion is not determinative of its legal significance; we will look to its content to determine its real nature." *Iowa Elec. Light &*

232.1. Conversely, the State and the grandparents argue the foster parents were required to establish that the Department acted unreasonably or irresponsibly as guardian to remove the Department as guardian, based upon language from our cases *In re E.G.*, 738 N.W.2d 653, 654 (Iowa Ct. App. 2007) (“*E.G. I*”), and *E.G.*, 745 N.W.2d at 742-44 (“*E.G. II*”).

The procedural history of *E.G.* is necessary to our analysis. In *E.G. I*, *E.G.*’s mother’s parental rights were terminated and his guardianship and custody was given to the Department. *E.G. I*, 738 N.W.2d at 654. The foster mother, who was aware prior to the termination that the Department was seeking an adoptive home for *E.G.*, did not seek to intervene at the time of the termination hearing, nor had she asked to be considered for adoptive placement. *Id.* However, three months later, the foster mother filed a motion to intervene, which was granted. *Id.* The foster mother then filed a petition for custody of *E.G.* *Id.*

The Department in *E.G.* ultimately chose an adoptive home other than the foster mother’s home, a decision *E.G.*’s GAL disagreed with. *Id.* The GAL filed a request for stay of removal. *Id.* The next day, the court ordered that *E.G.* should not be moved from his placement with the foster mother until the court decided *E.G.*’s custody. *Id.* at 564-65.

The State then filed a motion seeking reconsideration of the court’s order granting the foster mother’s intervention, which the court denied. *Id.* at 565. The State next filed a motion to dismiss the foster mother’s petition for custody,

Power Co. v. Lagle, 430 N.W.2d 393, 395 (Iowa 1988). Although the foster parents filed a “petition,” we consider their filing, based upon section 232.118(1), to be an “application,” and therefore treat it as such.

contending the Department had been appointed guardian and custodian of the child and the foster mother only sought custody. *Id.* Following a hearing, the juvenile court found that E.G. should remain in the foster mother's care, and the court then approved the adoption of E.G. by the foster mother as in the child's best interests. *Id.* The State appealed, asserting the juvenile court overstepped its authority when it directed the specific adoptive home for the child. *Id.* We agreed and vacated the court's adoption order and remanded the case, finding:

The evidence shows the *Department was responsibly discharging its duties as guardian.* It found an adoptive home for [E.G.] that the juvenile court found to be "highly qualified," a finding with which we agree. We affirm the guardianship of the Department and reverse the juvenile court's order placing the child with [the foster mother].

Id. (emphasis added).

After *E.G. I* was remanded, the foster mother petitioned the juvenile court for guardianship and custody of E.G. *E.G. II*, 745 N.W.2d at 742. E.G.'s GAL later moved to have guardianship transferred from the Department, pursuant to Iowa Code section 232.118(1), to either the GAL or the foster mother, arguing it was in E.G.'s best interests to expedite permanency for E.G. *Id.* at 742-43. The juvenile court granted both motions and awarded guardianship of E.G. to the GAL and custody to the foster mother. *Id.* at 743. The State appealed. *Id.*

On appeal, we observed that the juvenile court's termination of the guardianship of the Department was not based on any proof of *unreasonable actions* on the part of the Department. *Id.* at 744 (emphasis added). Further, we noted that both the foster mother and the family the Department selected to adopt E.G. would provide adequate adoptive homes for E.G. *Id.* at 743. However, we found that the juvenile court erred in terminating the Department's

guardianship of E.G. because, “by placing custody of the child with [the foster mother], the district court invaded the duty and right of the guardian to choose a specific placement for E.G.” *Id.* at 744. We explained:

The [juvenile] court’s finding was based on its belief that adoption of [E.G.] by [the foster mother] was in [E.G.]’s best interests. However, in this case, there is not only one, but two, situations that would be in [E.G.]’s best interests. While [the foster mother] has done a wonderful job of raising [E.G.] to this point and there is no evidence that she would not continue to do so, it also appears that the adoptive home chosen by the Department would also serve [E.G.]’s best interests.

The foster care system is designed to provide temporary, not permanent, homes for children. This is to facilitate the goals of reunification with the parents or placement in a relative’s home. We certainly recognize the bond that is developed between a foster parent and child. We also recognize that a bond between the foster parents and the child signifies a good foster home. However, if every foster parent who formed a bond with a child were given enforceable rights to the children, it would upset the goals of the system. The legitimate permanency goals of the guardian, the Department in this case, cannot be disrupted merely because a foster mother decided, at the last hour, that she wished to adopt the child.

[The foster mother] was aware of the Department’s efforts to find adoptive placement. She failed to intervene or otherwise express her desire to adopt [E.G.] until after the Department had made significant investments in locating an appropriate adoptive home for [E.G.]. *There is no evidence the Department in any way failed in its guardianship duties or in looking out for [E.G.]’s best interests.* The permanency review order is reversed and remanded to juvenile court with directions to reinstate guardianship of [E.G.] with the Department.

Id. (emphasis added).

B. Applicable Standard.

Neither Iowa Code section 232.117(3) nor section 232.118(1) provide any guidance concerning the circumstances upon which an application for removal of guardian may be granted nor is the burden of proof required to sustain such an application set forth. See Iowa Code §§ 232.117(3), 232.118(1). With no

guidance articulated in sections 232.117(3) or 232.118, the juvenile court considered various alternative standards its analysis. Like the juvenile court, we agree that the foster parents failed to meet their burden under any of the standards considered by the juvenile court.

1. Reasonableness of the Department's Actions.

The juvenile court found that the Department, acting as D.H.'s guardian, "acted both diligently and swiftly in its efforts to establish permanency for [the child]." Additionally, the court concluded there was insufficient evidence to sustain a finding by clear and convincing evidence, or by even a preponderance of evidence, that the Department, acting as the child's guardian, acted unreasonably or irresponsibly in selecting the grandparents as the child's adoptive placement. We agree.

After the child's parents' parental rights were terminated, the Department moved immediately towards finding an adoptive family for the child. Both the foster parents and grandparents expressed a desire to adopt the child. The grandparents have been a part of the child's life since birth and continue to be active in the child's life, and the foster parents had provided the child a safe and stable home during the CINA proceedings. The Department had a new relative home study done on the grandparents' home before it would even consider that family as an adoptive option, and a competent Department worker found the home was now suitable for relative placement. Adoption home studies were performed and both homes were found suitable for adoptive placement.

Although there were some concerns regarding placement with the grandparents, the court agreed with the State that although the grandparents

may not offer overwhelming economic advantages, they were capable of offering the child a home and supervision throughout adulthood. After our thorough review of the record, we are satisfied that either home would provide a satisfactory adoptive home for this child.

The Department interviewed both families, and a decision, although not unanimous, was reached. There was no evidence that the Department did not follow its protocol in reaching its decision, nor that the Department acted unfairly, impartially, or unreasonably in making the decision. There was no evidence the Department in any way failed in its guardianship duties. We therefore conclude the juvenile court did not err in denying the foster parents' application to remove the Department as the child's guardian based upon the Department's actions.

2. Best Interests.

Additionally, we agree with the juvenile court that the child's best interests did not require removal of the Department as the child's guardian and custodian. Like in *E.G. II*, there is not only one, but two, families that would provide a suitable adoptive home for the child. Here, there is no question that the foster parents have done a wonderful job of raising the child to this point and there is no evidence that they would not continue to do so, but the adoptive home chosen by the Department would also sufficiently serve the child. The foster parents and GAL do not agree with the Department's decision, but there is simply no evidence that the Department in any way failed in looking out for the child's best interests. We therefore conclude the juvenile court did not err in denying the foster parents' application to remove the Department as the child's guardian based upon the best interests of the child.

3. Substantial Change in Circumstances.

Finally, the juvenile court found that the foster parents also did not establish, by either clear and convincing evidence or a preponderance of the evidence, that there had been a substantial change in circumstances to remove the Department as guardian. The juvenile court noted that modification requests, including those made by a parent or child for a less or equally restrictive disposition, required a showing of a material and substantial change in circumstances. The court found that the foster parents request to remove the guardian could be viewed as a request to modify the termination order, which placed the child in the guardianship and custody of the Department.

The foster parents have not appealed on this ground. However, upon our review, we agree with the juvenile court that there was insufficient evidence to sustain a finding by clear and convincing evidence, or by even a preponderance of evidence, that there had been a substantial change in circumstances to remove the Department as guardian. We therefore conclude the juvenile court did not err in denying the foster parents' application to remove the Department as the child's guardian based upon a showing of substantial change in circumstances.

IV. Conclusion.

Because we find the juvenile court did not err in denying the foster parents' application to remove the Department as the child's guardian based upon the actions of the Department, the child's best interests, or a showing of a substantial change in circumstances, we affirm the judgment of the juvenile court.

AFFIRMED.