

IN THE COURT OF APPEALS OF IOWA

No. 1-323 / 11-0282

Filed June 15, 2011

**IN THE INTEREST OF C.M.F.,
Minor Child,**

**L.E., Grandmother,
Appellant,**

**C.E., Father,
Appellant.**

Appeal from the Iowa District Court for Cerro Gordo County, Gregg R. Rosenblatt, District Associate Judge.

The paternal grandmother of a child appeals the district court's refusal to place the child with her following termination of the parental rights of the child's mother and father. **AFFIRMED.**

Jennifer L. Steffens of Steffens & Grife, P.C., Marshalltown, for appellant grandmother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Carlyle Dalen, County Attorney, and Nichole M. Benes and Shawn R. Showers, Assistant County Attorneys, for appellee State.

Kim R. Snitker of Brown, Kinsey, Funkhouser & Lander, P.L.C., Mason City, for appellee mother.

Richard N. Tompkins of Tompkins Law Office, Mason City, for appellee father.

Mark A. Young of Young Law Office, Mason City, attorney and guardian ad litem for minor child.

Considered by Vogel, P.J., Vaitheswaran, J., and Mahan, S.J*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

The paternal grandmother of a child appeals the district court's order transferring guardianship and custody of the child to the Iowa Department of Human Services (DHS). She asserts the district court erred in not placing the child with her and the court should have granted her motion for concurrent jurisdiction to establish a guardianship of the child. Because we agree with the district court that the child's best interests were to continue her placement in the foster home under the guardianship and custody of DHS, and we find the district court did not abuse its discretion in denying the motion for concurrent jurisdiction, we affirm.

I. Background Facts and Proceedings

C.F., who is the subject of these proceedings, was born in May 2008. In July 2009, C.F. came to the attention of DHS. As she had been severely abused and neglected while in her mother's care, she was placed in foster care where she remained throughout the child-in-need-of-assistance and termination proceedings.

After C.F.'s removal, the mother was immediately offered services, but ultimately her parental rights were terminated in May 2010 and she did not appeal.

The father was initially unknown as the mother had not told him of C.F.'s existence, nor did she tell DHS workers who he was. In late 2009, it was discovered that Colby was C.F.'s father. He had problems of his own that interfered with his ability to parent C.F., namely a long history of criminal convictions and ongoing substance abuse, as well as mental health issues that

included anxiety disorder and depression. He was incarcerated at the time he discovered he was C.F.'s father, but upon his release in February 2010 he began exercising visitation with C.F. He was again incarcerated at the time of the termination hearing in November/December 2010. Colby's parental rights were also terminated and he does not appeal.¹

Lynn is the child's paternal grandmother. On November 10, 2010, she filed a motion to intervene and requested that the court consider her home for placement of C.F. The district court granted her motion. A hearing on the termination of Colby's parental rights and C.F.'s placement was held, during which several service providers, C.F.'s foster mother, and Lynn testified.

The evidence demonstrated that when C.F. was removed from her mother's care,² she had bruising all over her body and numerous broken bones in different stages of healing. She was also diagnosed as failure to thrive. The abuse and neglect she suffered was described as "horrific." Upon removal from her mother's care in July 2009, she was immediately placed in a foster home where she remained throughout the proceedings.

¹ Lynn filed a notice of appeal and request for a transcript at State expense, asserting that she was "without funds sufficient to pay for [the] expense" and attached a financial affidavit. On March 1, 2011, the district court denied her request because no statutory authority existed for it to order a transcript at State expense. That same day, Colby filed a notice of appeal and request for a transcript at State expense, asserting he was indigent and could not afford to pay for a transcript. Thereafter he did not pursue an appeal in any way, including not filing a petition on appeal.

² C.F. was adjudicated to be in need of assistance pursuant to Iowa Code section 232.2(6)(b) (2009) (parent or household member physically abused or neglected the child) and 232.2(6)(c)(2) (parent fails to exercise a reasonable degree of care in supervising the child). The court described the photographs that depicted C.F.'s injuries, including bilateral black eyes and bruises to C.F.'s head, back, buttocks, legs, and feet. The court further stated, "The number of bruises depicted on [C.F. is] alarming."

Since that time, Tracy Hodak has been designated the DHS social worker and case manager. Hodak testified the initial goal was for C.F. to be reunified with her mother and it was unknown who C.F.'s father was. In December 2009, when it was determined that Colby was C.F.'s father, Colby was incarcerated. Lynn immediately expressed an interest in having C.F. come live with her, but reunification efforts were still being made with the mother. Hodak explained it would not have aided those efforts for C.F. to be moved the significant distance from Mason City, where the mother was located, to Grinnell where Lynn was residing. Thus, Hodak did not request a home study for Lynn at that time. When Colby was released from prison in February 2010, he began exercising visitation with C.F., and Lynn participated in the visitation as well.

Hodak explained that in February 2010, when it became clear that reunification of C.F. and the mother was not likely, she began the process of requesting a home study for Lynn's home. Because Lynn, Colby, and Colby's sister were all living in Lynn's home at that time, all needed to participate in the home study. Hodak gave all three family members the forms necessary to begin a home study, but it appears from the record that there was some delay in some of the family members returning the forms. In May 2010, the request for the home study was denied based upon Lynn's criminal history (operating while intoxicated and possession of paraphernalia convictions)³ and Colby's extensive

³ Lynn later explained that she found Colby's marijuana pipe and kept it, which was later found by law enforcement. The court found there was no indication that Lynn uses or possesses marijuana, although she may have "displayed some lack of judgment regarding disposing the article of paraphernalia."

criminal history.⁴ See, e.g., Iowa Admin. Code. r. 441-113.13 (detailing the parameters of licensing a foster home).

On July 22, 2010, a review and permanency hearing was held and Colby and Lynn requested a home study. In the subsequent order filed August 2010, the court addressed their request, discussing Colby's history of incarceration for drug convictions and that since he was released from prison in February 2010 he had reported relapses to his substance abuse counselor and parole officer. Further, despite a court order directing Colby to submit to drug testing he had failed to do so, and he was currently residing in Lynn's home. The court found that continued placement in family foster care was in C.F.'s best interests. The court also ordered,

The Iowa Department of Human Services is directed to conduct an evaluation or study of [Lynn's] home to assess suitability of placement of [C.F.] . . . Said study will address the impact of [Colby] residing in the same home, and the impact of [Colby's] past drug use and criminal history on whether the home of [Lynn] would be an appropriate placement for [C.F.], given her special needs.

The home study was then completed in October 2010. It found Lynn to be an appropriate placement option, but Hodak did not believe the home study addressed the issue of Colby living in the same home. She stated that the home study addressed the issues surrounding the father "[v]ery minimally, if at all." Hodak expressed concern about C.F. being placed in Lynn's home because while Colby had lived in Lynn's home, he either continued to use illegal drugs or relapsed multiple times. She doubted whether Lynn could keep C.F. safe in the home. Moreover, she did not believe the report addressed C.F.'s special needs

⁴ The district court noted his convictions included assault, burglary, solicitation, and possession of a controlled substance.

resulting from the extensive abuse she had suffered, and doubted whether Lynn could adequately provide C.F. the special care she required. Further, because of the excellent care C.F. had received in the nurturing hands of the foster parents, she had achieved stability and it would be “very, very hard on her to transition to another home . . . at this point.”

Linda Schumaker, an Area Education Agency social worker, worked with C.F. She testified that C.F. has attachment issues and it would be extremely difficult to separate her from her foster parents because she had formed bonds with them. She also testified to the great progress that C.F. has made with her foster family, rarely self-harming, sleeping better, and having night terrors less frequently.

Sara Elwood had a nursing degree and experience in the mental health field. She was a family consultant and family safety, risk, and permanency services (FSRP) provider employed by Mid-Iowa Therapy Clinic, Inc., who worked with C.F. and Colby. She testified that C.F. was very bonded with her foster parents and she was concerned about separating C.F. from them. Additionally, she had concerns about placing C.F. with Lynn. Colby continued to use drugs while living with Lynn, and either Lynn was not aware of the gravity of the situation or turned her back on Colby’s continued use. In addition, Lynn had her own mental health problems and was unemployed. If C.F. was placed with Lynn, she would be required to take care of both her and C.F.’s mental health needs. Financial difficulty only adds another layer to the problems she must manage. Elwood did not recommend placing C.F. with Lynn.

Abbey Hall, a safety support worker for Mid-Iowa Family Therapy Clinic, supervised visits between Colby and C.F. She testified as to her observations of Lynn during the visits. Lynn had a bond with C.F., but it was difficult to have her “comprehend and follow the case goals that were laid out.” She also had some concerns over Lynn being “secretive” during the visits.

Edith Haenel, LICSW, MS, an independent clinical social worker who had not worked with C.F., testified that children who have suffered the extreme abuse as C.F. had, typically faced many challenges such as attachment disorder, neurological complications, and posttraumatic stress. She explained that some of the behaviors C.F. exhibited were common with children that had this diagnosis, such as self-inflicted injuries, pulling her own hair out, and night terrors. She stated that “average” parenting would not be adequate for a child who had suffered the type of abuse that C.F. had endured and recommended that C.F. not be removed from the foster home.

Teri Hoffstetter, the worker who completed the home study, had not met C.F. She testified that she addressed the impact of Colby living in Lynn’s home and C.F.’s special needs. She explained that Colby was receiving treatment for his mental health issues and that his drug use was not a concern to her. Yet, she admitted she was unaware that Colby was using illegal drugs at the time she completed her report and had she known, she would have asked that he leave the home and still approved Lynn as a placement option. She also stated she talked with Lynn about C.F.’s attachment disorder, but admitted “[i]t may not have gotten in the home study.” Finally, she stated she did not consider the criminal

history of anyone in the home because that is already considered by the DHS review board before a home study is granted.

Jan LeBahn, a family consultant and FSRP provider with Mid-Iowa Therapy Clinic provided services for Colby, but did not work with C.F. She testified that she “would have liked to have seen [Lynn] considered strongly” for placement, but acknowledged that C.F. had been in a stable living situation for a period of time. She then stated that Lynn reported that if she had custody of C.F., she would not let Colby around C.F. if Colby was using drugs. She also explained that although Colby relapsed into drug use at least five times from March 2010 to December 2010, Lynn “did not suspect that he was using or tell me that she suspected he was using.” LeBahn recommended C.F. be placed with Lynn.

Lynn, then age forty-six, testified she was unable to work and was on social security disability for anxiety and depression. She also testified that she was not aware Colby was using drugs and violating parole while living in her house. Further, if she had custody of C.F., then Colby would need to get his own place to live.

C.F.’s foster mother, who was formerly a FSRP provider, testified to the numerous issues C.F. had when she arrived in their home in July 2009, the work involved in stabilizing C.F., and the progress C.F. has made. She explained that it is very difficult for C.F. to adjust to change and she thrives on a consistent routine. C.F.’s foster parents were planning on filing a petition for adoption.

Finally, the guardian ad litem also filed a report, in which he stated it was not in C.F.'s best interests to be placed with the grandmother. He expressed concerns over Lynn's lack of transportation and financial resources, inability to keep her son out of her house, and her own mental health needs.

In February 2011, the district court denied the grandmother's request for placement and concurrent jurisdiction. It found,

[The grandmother] has been consistent in wishing to be a placement for [the child], and has made efforts to obtain placement. In other circumstances, her home would be a welcome and very appropriate option for placement. In this matter, [the child's] special needs, [the child's] history of stability in foster care, a history of instability on [the father's] part, and concerns with [the grandmother's] anxiety and depression and the responsibilities of being a "sole caretaker" for [the child] militate against placement in [the grandmother's] home. . . .

The Court believed that [the child's] best interests would be served by termination of the parental rights of her biological parents, and continued placement in the home of [the child's foster parents] with an eye toward her successful adoption. Not interrupting the stability which [the child] has been able to build on will be in her short, immediate, and long-term best interests.

Lynn appeals and asserts that the district court erred in not placing C.F. with her and not granting concurrent jurisdiction for the purposes of establishing a guardianship.

II. Analysis

"Our review of this case is de novo. . . . However, weight is accorded the findings of the juvenile court, particularly as to the credibility of witnesses." *In re L.S.*, 483 N.W.2d 836, 837 (Iowa 1992). "As in all juvenile proceedings, our fundamental concern is the best interests of the child." *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). As relevant to this case, Iowa Code section 232.117(3)(c) (2009) provides that upon the termination of parental rights, a court may transfer

guardianship and custody of a child to DHS or a relative. See *L.S.*, 483 N.W.2d at 839.

In its order, the district court detailed the evidence presented. The court weighed several factors and found it was in C.F.'s best interests to deny Lynn's request. As noted above, several workers involved with the case testified, of which some had differing opinions. Yet the majority of workers expressed concern over placing C.F. with Lynn. The main issue was that C.F. was neglected and severely abused during her first year of life and as a result, C.F. currently struggles with anxiety issues and attachment disorder. At the time of the hearing, C.F. had been in the foster home for eighteen months and had made significant progress in achieving trust and stability. The district court found and we agree, the weight of the evidence cautioned against moving C.F. from the only stable home that she has known, which would likely result in further emotional damage to C.F. The majority of the workers expressed concern over whether Lynn would be able to protect C.F. from Colby in the future. They expressed further concern because Lynn's own mental health issues were so severe that she was unable to be gainfully employed. She also lacked financial resources and had no transportation. While service providers who worked with Colby and Lynn testified that Lynn would be an appropriate placement, those service providers had not directly worked with C.F. Additionally, although Lynn stated she would keep Colby away from C.F. if he was using drugs, Lynn was not aware of Colby's continued drug use while he was living in her home. The district court had the advantage of listening to and observing the witnesses in evaluating the testimony and making credibility assessments. See *In re Marriage*

of Vrban, 359 N.W.2d 420, 423 (Iowa 1984) (explaining that a district court “is greatly helped in making a wise decision about the parties by listening to them and watching them in person” whereas “appellate courts must rely on the printed record in evaluating the evidence”). We find the district court’s findings were supported by the record and were focused on C.F.’s best interests. On our de novo review, we affirm.

The dissent examines each factor the district court weighed, and finds they are individually insufficient. In discounting the effect of moving C.F. from a safe and stable environment, the dissent finds the delay in obtaining a home study was so inexcusable that it is elevated above C.F.’s best interests. It is important to note that many factors caused a delay in obtaining a home study—initially it was not known that Colby was C.F.’s father, the reunification efforts with the mother who lived in Mason City prevented moving C.F. from the foster home in Mason City to Lynn’s home in Grinnell, and the home study was first denied based upon the criminal records of both Colby and Lynn. In any event, it is not appropriate to punish DHS for any delay at the expense of compromising C.F.’s emotional stability and best interests. Further, even though the home study found Lynn’s home to be an appropriate placement, that did not necessarily mean it was in C.F.’s best interests she be placed there. It is the district court’s assessment of C.F.’s best interests that determine her placement.

We find the district court wisely and appropriately continued guardianship and custody with DHS for purposes of continued placement in foster care, pending adoption. For the same reasons we find the district court did not abuse

its discretion in denying the request for concurrent jurisdiction to establish a guardianship. Therefore, we affirm.

AFFIRMED.

Mahan, S.J., concurs; Vaitheswaran, J., dissents.

VAITHESWARAN, J. (dissenting)

I respectfully dissent. The district court denied the grandmother's custody and guardianship request on the following grounds:

[The grandmother] has been consistent in wishing to be a placement for [the child], and has made efforts to obtain placement. In other circumstances, her home would be a welcome and very appropriate option for placement. In this matter, [the child's] special needs, [the child's] history of stability in foster care, a history of instability on [the father's] part, and concerns with [the grandmother's] anxiety and depression and the responsibilities of being a "sole caretaker" for [the child] militate against placement in [the grandmother's] home.

I believe the record does not support these grounds for denying the request. I will address each ground in turn.

A. Child's Special Needs

The department asserted and the district court found that the child's attachment issues militated against a transfer of placement from the foster parents to the grandmother. In my view, the record does not support this finding. A service provider who worked with the grandmother spoke at length about the grandmother's willingness to work on the child's special needs. She stated:

[The grandmother's] not blind to the fact that her granddaughter may have some special needs if she would come into her home given that she hadn't lived with her, you know, just all of that disruption for her; and we talked about, you know, her willingness to seek outside support, if it would be mental health counseling or involvement with AEA, you know, whatever it might be for her needs. So I believe she would be willing to do all the things that she would need to do for her. The other advantage for [the child] would be is that she would not have to go to daycare. [The grandmother] talked about if people believe that it would be in her best interest to go to a preschool-daycare setting because of the social needs, she totally would support that but she would not have to go to daycare, she would have one consistent person available to help her make that transition.

Notably, the grandmother was not a stranger to the child, having regularly visited her for almost a year.⁵ By the department's own admission, she was an active caregiver during the visits, and, as will be discussed more fully below, she was strongly recommended as a placement option by the professionals who worked most closely with her. For these reasons, I would conclude the child's attachment issues were not a basis for denying the grandmother's placement request.

B. Child's History of Stability in Foster Care

A department social worker cited the passage of time as the main reason for denying the grandmother custody of the child. The problem with this reasoning, in my view, is that the department was the primary cause of the delays in an early transition of the child to the grandmother's custody.

The department took no action on the grandmother's home study request,⁶ and objected to the child's placement with the grandmother after the court-ordered home study report found her home appropriate. By this time, sixteen months had elapsed since the child was placed with the foster parents and the department had yet to seriously consider the grandmother as a viable placement option. As a service provider testified,

I really would have liked to have seen her considered strongly. I believe that we definitely have a relative that is appropriate. And it is unfortunate that it has gone this long because, you know, we're

⁵ The department noted the child's leering of strangers, especially men. The grandmother was not a stranger and had no men living in her home other than her son, to whom the department granted visitation when he was not incarcerated.

⁶ The department contended it did not pursue the home study request because of the grandmother's criminal history. The department further contended the court should not have ordered a home study given that criminal history. The grandmother's criminal history will be addressed below in connection with her ability to function as sole caretaker.

talking about a little girl who's been in a stable living situation for several months, but I do believe that we have a relative that we should have realistically given more opportunities to be a part of this child's life and be considered to be a placement resource.

I would conclude the child's history of stability in foster care was not a basis for denying the grandmother's guardianship and custody request.

C. Father's History of Instability

The department suggested that the paternal grandmother enabled the illegal behaviors of her son and would allow him to have contact with the child even if such contact were prohibited. In my view, there is scant evidence to support this assertion.

A service provider who worked with the grandmother testified,

I do believe that . . . [the grandmother] could meet [the child's] needs, could protect her, would make that hard decision that she would need to make if her son, you know, once released from prison came back to the community and was not in a condition that he should be around his daughter.

Similarly, the service provider who conducted the home study reported:

[The grandmother] is willing to hold [the father] accountable for what DHS expects of her in relation to [the child.] She is willing to have him move out if he would make choices that are detrimental to [the child] and her placement with [the grandmother]. Neither [the grandmother] nor [the father] want to take any risks that would negatively affect [the child] from being able to live with [the grandmother]. [The father] wants [the grandmother] to be able to have [the child] come to live with her.

The department did not point to restrictions on the father's contact with the child or violations of restrictions by the grandmother. To the contrary, the department allowed the father to have weekly five-hour visits with the child when he was out of prison. Given the professional opinions that the grandmother would not compromise the child's safety by permitting contact with the father if that contact

were prohibited, I am not persuaded by this ground for denying her guardianship and custody request

D. Grandmother's Anxiety and Depression

The department asserted that the grandmother's mental health diagnoses would limit her ability to care for the child. The home study report refuted this assertion. It stated:

[The grandmother] has a variety of strengths such as: patience, caring, compassionate, the willingness to help others, loving, a great support system, the ability to deal with a variety of behaviors, a great advocate, responsible, and independent. [The grandmother] has had a lot of experience with children. [She] has been working with the FSRP worker with [the father] since March 2010. She actively participates in the services so she has a better understanding of what is going on with [the child's] case. She has gone with [the father] to visit [the child] on several occasions. She was the one who assisted [the father] with finding out if he was [the child's] father, after [the father] initiated DNA testing.

. . . .
The seven references, personal and professional, were all in favor of [the grandmother] having [the child] placed with her. This worker spoke to [the professionals] who are currently working with [the grandmother and father]. Jan is doing the FSRP services and has been going to [the grandmother's] home for the last seven months and does not express any concerns related to [the child] coming to live with [the grandmother]. [Darcy] has been doing outpatient substance abuse counseling with [the father] and... does not have any concerns related to [the child] living with [the grandmother].

QuakerDale recommends that the [grandmother] be approved as a potential relative placement for [the child] It is this worker's assessment that [the grandmother] will be able to follow through with any recommendations from DHS and the service providers.

Based on this report, I believe the department's concerns about the grandmother's caretaking abilities were unwarranted and not a basis for denying guardianship and custody.

E. Grandmother's Ability to Act as Sole Caretaker

Related to the previous ground, the department also suggested that the grandmother was ill-equipped to serve as "sole caretaker." In addition to her mental health diagnoses, which we have addressed above, the department cited the grandmother's limited resources and her criminal history. A service provider acknowledged that the grandmother had limited resources but did not consider this fact detrimental to her placement request. The grandmother's home was described as "nicely furnished and well maintained," and the home study report stated the grandmother would "be able to access services to assist her with caring for [the child] such as: title 19, food stamps, and WIC."

As for the department's concerns about the grandmother's criminal history, those concerns were addressed and rejected by the family support specialist who prepared the home study. The specialist noted that a 2006 conviction for possession of drug paraphernalia related to a marijuana pipe found in the son's bedroom. The grandmother testified that she opted to plead guilty and pay a \$50 fine rather than incur the costs of going to court. The grandmother's second conviction occurred in 2002 and was for operating a motor vehicle while intoxicated. She underwent a substance abuse evaluation and the evaluator recommended no treatment. No professional involved with these proceedings furnished evidence that the grandmother currently abused alcohol or drugs. For these reasons, I would conclude this ground for denying the grandmother's request for guardianship and custody was not supported by the record.

I would reverse that portion of the termination ruling denying the grandmother guardianship and custody of the child, and I would remand for entry of an order transferring guardianship and custody to the grandmother.