IN THE COURT OF APPEALS OF IOWA

No. 1-640 / 11-0953
Filed August 10, 2011

IN THE INTEREST OF J.B.,
Minor Children,

W.B., Father,
Appellant,

K.B., Mother,
Appellant.

Appeal from the Iowa District Court for Muscatine County, Gary P. Strausser, District Associate Judge.

A mother and father appeal the juvenile court's modification of its permanency order. **AFFIRMED.**

Timothy K. Wink of Schweitzer & Wink, Columbus Junction, for appellant-father.

Sara Strain Linder of Tindal Law Office, P.L.C., Washington, for appellant-mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Alan Ostergren, County Attorney, and Korie L. Shippee, Assistant County Attorney, for appellee.

Joan Black, Iowa City, attorney and guardian ad litem for minor child.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

TABOR, J.

A mother and father appeal the juvenile court's modification of its permanency order to command a cessation in visitation with their seven-year-old son, J.B. The parents contend the modification ruling failed to follow the remand order of this court, applied the wrong standard, and lacked factual support in the record. Because our responsibility when reviewing the modification of a permanency order is to look solely at the best interests of the child, we affirm the visitation restriction.

I. Background Facts and Proceedings

The juvenile court adjudicated J.B. as a child in need of assistance (CINA) on October 15, 2008, based on the parents' failure to provide an adequate degree of supervision or appropriate living conditions under Iowa Code sections 232.2(6)(c)(2) and (g) (2009).[1] A December 4, 2008, dispositional order placed J.B. with his maternal grandmother. The DHS changed J.B.'s placement in June 2009, moving custody to the couple who previously served as foster parents for J.B.'s mother. J.B. remained in that foster home throughout these proceedings.

On May 24, 2010, the juvenile court issued a permanency order for J.B., then age six. The court noted that the parents continued to reside in a motel with two of their children, who slept on the floor. The court observed that the parents had not made progress in rectifying the situation that led to J.B.'s adjudication as

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[1] J.B. has four siblings. The juvenile court's decision whether to terminate parental rights to his younger brothers S.B. and A.B. was pending at the time of the June 9, 2011 hearing at issue in this appeal. Parental rights to his sister H.B. were terminated by prior order of the court. The court previously placed his half-sister K.G. in the custody of her father.

a CINA. The court concluded that return to the parent's home was contrary to J.B.'s welfare.

The State filed a petition to terminate parental rights to J.B. on August 9, 2010. On October 27, 2010, the juvenile court denied the petition, concluding there was not clear and convincing evidence to justify termination, and granted the parents six months to work toward reunification. On November 9, 2010, the State filed a motion requesting reconsideration of the original ruling and a reopening of the record, citing Iowa Rule of Civil Procedure 1.904(2). On November 10, 2010, the district court granted the State's motion to "reconsider and reopen the record" on the issue of termination. The court's November 10, 2010 order also addressed a factual error alleged by the State. The juvenile court heard additional evidence on December 1 and December 8, 2010.

On January 28, 2011, the juvenile court issued an order terminating parental rights. The parents appealed from the termination order, contending that the juvenile court erred in granting the State's motion to reconsider and in taking additional evidence. We reversed, concluding the juvenile court lacked authority to reopen the record and reconsider its denial of termination based on the State's November 9, 2010 motion. *In re J.B.*, No. 11-0232 (Iowa Ct. App. April 27, 2011). We noted that the appropriate procedure for the State would have been to file a new petition alleging grounds for termination. *Id.* After invalidating the January 28, 2011 order terminating parental rights, we ordered the parties to proceed in accordance with the juvenile court's October 27, 2010 order, as amended on November 10, 2010. *Id.* That order modified the

permanency goal to grant the parents an additional six months to work toward reunification with J.B.

Once jurisdiction of this matter returned to the juvenile court, the State moved to "modify the disposition." The State's May 27, 2011 motion explained that J.B. had not seen his parents since January 2011 and his therapist advised the DHS that resuming visits "may cause emotional damage to the child." The parents resisted the motion to modify, arguing that our decision instructed the parties to proceed with the visitation plan established in the October 27, 2010 order. After hearing testimony from J.B.'s therapist and DHS workers, the juvenile court ordered: "Visitation between [J.B.] and his parents shall cease." The court further noted:

> [N]o party has sought modification/change of the permanency goal. Therefore, the permanency goal shall remain to return the child to the custody of his parents. Visitation is but one service toward reunification.

The parents appeal the court's June 10, 2011, order.

II. Scope and Standards of Review

We review a juvenile court's decision to modify a permanency order de novo. *In re N.M.*, 528 N.W.2d 94, 96 (Iowa 1995). We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re A.S.T.*, 508 N.W.2d 735, 737 (Iowa Ct. App. 1993). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *Id*.

> [O]ur responsibility in a modification of a permanency order is to look solely at the best interests of the children for whom the permanency order was previously entered. Part of that focus may

> be on parental change, but the overwhelming bulk of the focus is on the children and their needs.

Id.

III. Discussion

The parents contend that ceasing visitation is contrary to this court's remand order. The mother invokes the "law of the case" doctrine to support her position that the juvenile court erred in straying from its October 27, 2010 order and modifying visitation. We do not believe that the "law of the case" doctrine applies here. Under that doctrine, a decision on appeal is final as to all issues decided in it and binding on the parties in subsequent appeals. *State v. Grosvenor*, 402 N.W.2d 402, 405 (Iowa 1987). But the doctrine deals only with the legal principles announced. *Id.* The trial court is not bound if the facts are materially different in subsequent proceedings. *Id*.

In our April 2011 decision, we determined that once the juvenile court denied the State's petition for termination, it lacked authority to reopen the record and reconsider the evidence based on the State's motion citing Iowa Rule of Civil Procedure 1.904(2). We followed *In re J.J.S.,* 628 N.W.2d 25 (Iowa Ct. App. 2001) in reversing the termination decision and remanding the case. *In re J.B.*, No. 11-0232 (Iowa Ct. App. April 27, 2011). We ordered the parties to return to the last valid permanency order. *Id.* But our directive to "proceed in accordance with the court's October 27, 2010 order, as amended in the order issued November 10, 2010," *id.*, did not prohibit the juvenile court from considering a motion to modify its permanency order under Iowa Code section 232.104.

An order in a juvenile proceeding may be modified if the petitioner shows a "substantial change in material circumstances" and that the modification would be in the best interests of the child. *In re C.D.*, 509 N.W.2d 509, 511 (Iowa Ct. App. 1993). In *C.D.*, the mother sought modification of the visitation provisions of the case permanency order. *Id*. at 512. "A permanency order may provide restrictions upon the contact between the children and the children's parent, consistent with the best interest of the children." *Id*. (citing section 232.104(4)). In *C.D.*, the evidence showed the mother continued to act inappropriately during visits. *Id.* In light of that, we concluded that the mother failed to show a material and substantial change of circumstances that would warrant modification of the visitation provisions and the modifications requested were not in the children's best interests. *Id.* at 513.

In our de novo review in the instant appeal, we find that the State established a substantial change of circumstances since the juvenile court entered its October 27, 2010 order. Specifically, the State offered the testimony of Ann Giovanazzi, who had been providing J.B. with therapy for one year. In Ms. Giovanazzi's opinion, resuming visitation with his parents would prove "devastat[ing]" to J.B.

> He has been able to change and grow and learn, and he does not want to go back to the way things were. Through the process of play we have worked toward him moving forward in his life and being successful. I don't think that he would do very well at all with resuming visits, because, for him, the underlying idea is I'm going back to mom and dad's.

The juvenile court found Ms. Giovanazzi's testimony credible. We defer to that credibility finding. The court also relied on testimony from DHS worker Mindy

Eckert that the parents' fully supervised visits with their two younger children do not go well and are interrupted or stopped early because the parents are arguing. Focusing, as we must, on J.B. and his needs, we find modification of the permanency order to cease visitation with the parents to be warranted in this case.

The parents argue that cessation of visitation can only be accomplished by waiver of the requirement of reasonable efforts under Iowa Code section 232.102(12). We disagree. The power of the juvenile court in CINA proceedings includes determination of parents' visitation rights. *See In re K.R.*, 537 N.W.2d 774, 777 (Iowa 1995). The DHS is continuing to make reasonable efforts toward reunification by offering the parents other services. In fact, these parents have been receiving services nonstop for three years. As the juvenile court stated: "Visitation is but one service toward reunification."

The mother contends that the evidence at the modification hearing was not substantially different from the evidence at the termination trial and the only change in the family's situation was that visitation was suspended because of a wrongly decided termination. We understand the parents' frustration that if they cannot interact with J.B. they cannot move toward reunification. But we disagree that their only obstacle to reunification was the fact that they had not seen J.B. since January 2011. The record shows that the parents have had supervised visitation with two of J.B.'s siblings and have not been able to demonstrate a healthy relationship during those sessions. As the juvenile court noted: "[T]he parents consistently argue during visits." The court expressed concern that J.B.

would be emotionally damaged by exposure to such parental discord. We agree that the record supports that concern.

The State asserts on appeal that "[v]isits can certainly resume here as soon as the parents make some progress in their own lives." That assertion addresses the parents' argument that the appeal process was meaningless unless they are granted visitation as anticipated in the October 27, 2010 permanency order. In contrast to the conclusive nature of an order terminating parental rights, the modification of a permanency order directing that visitation cease could be temporary. As the juvenile court explained, the permanency goal remains reunification of J.B. with his parents. The parents still have a chance at this late date to show they are capable of providing a stable and nurturing environment for their son. But given the parents' continuing struggle to maintain civility during supervised visitations with their two younger children, we find that cessation of visitation is in J.B.'s best interests and affirm the modification order.

AFFIRMED.