

IN THE COURT OF APPEALS OF IOWA

No. 2-1174 / 12-2078
Filed February 13, 2013

**IN THE INTEREST OF K.S.,
Minor Child,**

**K.S., Minor Child,
Appellant.**

Appeal from the Iowa District Court for Clinton County, Phillip J. Tabor,
District Associate Judge.

The attorney/guardian ad litem for a child appeals the juvenile court's
permanency orders approving a reunification plan for the mother and child.

AFFIRMED.

Stephen D. Haufe of Frey, Haufe & Current, P.L.C., Clinton, for appellant
minor child.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Mike Wolf, County Attorney, and Cheryl Newport, Assistant County
Attorney, for appellee State.

Matthew L. Noel, The Noel Law Firm, P.C., Dubuque, for appellee mother.

Considered by Doyle, P.J., and Mullins and Bower, JJ. Tabor, J., takes no
part.

DOYLE, P.J.

The attorney/guardian ad litem (GAL) for a child appeals the juvenile court's permanency orders approving a reunification plan for the mother and child. We affirm.

I. Background Facts and Proceedings.

B.S. is the mother and T.M. is the biological father of K.S., born in May 2011. In a prior appeal, discussed below, we set forth the background facts of the case as follows:

The child at issue was temporarily removed from the mother's care upon discharge from the hospital only two days after the child's birth in May 2011. At the time of birth, the child had two older half-siblings who were in the custody of the Iowa Department of Human Services (DHS) after having been removed from the mother's care. In March 2011, the mother had successfully completed a residential substance abuse treatment program and moved into an apartment. Approximately one month later, she was discharged from the aftercare program for failure to attend her scheduled sessions. DHS has been involved with the family since 2009 and had ongoing involvement primarily because of the mother's use of illegal drugs and history of relationships involving domestic abuse.

At a removal hearing on June 6, 2011, the juvenile court found the child could be returned to the mother because the mother had completed a clean drug test and had agreed to abide by a no-contact order with the child's father, against whom there was a recent finding of physical abuse of the mother's older two children.

On June 15, 2011, a service provider went to the mother's apartment to talk with the mother about posting on the father's Facebook wall in spite of the no-contact order. The worker's written statement indicates that when she arrived at the mother's apartment, the father was in the kitchen and the mother was in her bedroom with the child packing a basket. The mother's written statement says the father entered her house and would not leave, so she was packing clothes to leave with the child. The mother admitted to communicating with the father via Facebook but stated she did not realize this was a violation of the no-contact order.

At a subsequent visit to the mother's house on June 16, 2011, police found drug paraphernalia and noted the odor of marijuana in the mother's apartment. The mother claimed the

paraphernalia belonged to a man she allowed to stay at her place from time to time. DHS was not aware of this man's presence in the mother's life. This individual later claimed ownership of the drug paraphernalia. The mother and child were tested for drugs, and both were clean.

Following these incidents, the child was removed from the mother's care June 17, 2011, and has not returned to her care since. In its removal order filed August 1, 2011, the court wrote, "The Court specifically notes the child was returned to the mother's care with the specific understanding there would be a no-contact order with [the child's father] and that there would be no substances in her life. Both of these conditions were violated by the mother."

The child was adjudicated to be in need of assistance on August 1, 2011. On August 10, 2011, the court terminated the mother's rights to her two older children who are not at issue in this case. The termination was based largely on the mother's history of choosing paramours who were substance abusers and physically abused both her and her children. The court found the children could not be reunited with their mother "due to the mother's inability to protect the children from her abusive paramours." On August 30, 2011, the mother told a case provider she would not resume her relationship with the father of K.S. once the no-contact order was lifted because she felt it was his fault her parental rights to the two older children had been terminated.

On October 7, 2011, the mother called the police to report a domestic assault. The police arrived and found the child's father hiding in a closet in the mother's apartment. He was arrested for domestic assault. The police report states the mother reported her live-in boyfriend, the child's father, had physically abused her. The police report noted a valid no-contact order was in effect between the mother and father. The report further details that the mother "stated she was going to her mother's place for the night due to [the father] possibly coming back to the residence since he has a key." The mother signed a police report indicating she had been physically abused by the child's father, her "live in boyfriend."

At the trial for termination of the mother's parental rights to the child at issue in this case, the mother and the father both testified they were not living together when the incident occurred on October 7, 2011. The mother testified she never told the officer the child's father lived with her and stated the officer lied. She testified she had not lived with the father since June 2011. In November 2011, the father told a service provider he had been living with the mother since she moved into her apartment (in March 2011), had a key to the place, and also had been at her place the day the drug paraphernalia was found. The father later denied this, saying the service provider had misunderstood him. The mother testified against the father in the criminal trial that resulted from the

domestic incident. In that trial, the mother testified that at the time of the domestic assault incident, she was not living with the father, although he did come over at times.

In a permanency order filed December 13, 2011, the juvenile court found, "Since our last hearing [September 2011], there has been another incident of domestic violence between the mother and the father, and there has been continued violation of the no contact order. The child cannot be returned safely to either parent at this time." Based on the parents' lack of progress to rectify the circumstances that led to the adjudication of the child as a child in need of assistance, the court found a hearing should be scheduled to determine whether parental rights should be terminated. On January 9, 2012, the State filed a petition for termination of parental rights.

Throughout the pendency of these proceedings, the mother's visits with the child were supervised. The mother testified at the termination trial that she had two supervised visits per week with the child for two hours each. The mother consistently attended the visits and, with the exception of a few minor issues, was appropriate and loving with her child. The mother was consistently employed and had appropriate housing for the child. The mother also regularly attended the child's doctor appointments.

The mother asked for increased visits with her child on more than one occasion. The DHS case manager testified the mother did not receive increased parenting time because of her behavior during visits, noting a few minor incidents and also the mother's attitude that she would do what she wanted with her child and did not have to listen to service providers' parenting suggestions. Several care providers noted the mother was not receptive to parenting suggestions and would do things in direct opposition to their suggestions.

At the termination trial on January 30, 2012, the mother testified she was involved in an intimate relationship with a man she met through Facebook in December 2011. She knew very little about the man, including whether he had a criminal history, and testified, "It is not a relationship . . . it's just sex." The mother also testified she had been involved in domestic violence counseling for approximately two months. She testified she met with her counselor once per week, but she did not tell her counselor about her new relationship.

The mother admitted to using synthetic marijuana, K2, in March 2011, but testified she had otherwise not used drugs for fifteen months. The DHS caseworker assigned to the case agreed the mother had not had a positive drug screen since March 2011.

The child's foster mother testified at the termination trial that she saw the mother with the child's father at Wal-Mart on December 24, 2011. The mother and father both denied this. They

each testified the last time they had talked to one another was the October 7, 2011 incident.

The DHS case manager filed an affidavit recommending termination of the mother's parental rights. At the conclusion of the trial, the [GAL] acknowledged the mother had made improvements but also noted problems persisted. The [GAL] therefore recommended termination, stating the child had waited long enough.

On January 31, 2012, the juvenile court entered an order terminating the father's parental rights but dismissing the State's petition as to the mother. The court found,

[T]he mother's situation in this child's case is different than the case where her rights to her previous children were terminated. The mother has resolved her issues of substance abuse. The mother has resolved her relationship issues and is currently receiving counseling for domestic violence and for relationship issues. The mother is employed. The mother has an appropriate home, and while the mother is not always fully cooperative with the providers, there is no indication that the mother has ever put the child at risk.

The court concluded the State had not proved by clear and convincing evidence grounds for termination of the mother's parental rights.

In re K.S., No. 12-0269, 2012 WL 1247151, at *1-4 (Iowa Ct. App. April 11, 2012) (internal footnotes omitted). The juvenile court's ruling also set a date for a subsequent hearing and ordered DHS to provide a case plan for reunification.

The GAL and the State appealed the court's dismissal of the petition as to the mother, arguing grounds for termination of her parental rights were proven and termination was in the child's best interests. See *id.* at *4. Thereafter, the State filed a motion before the juvenile court for a new termination of parental rights trial. It alleged the mother and biological father had lied at the termination of parental rights hearing when they testified they were not together at the store in December. Because the appeal of the petition's dismissal was pending, the

juvenile court determined it had lost jurisdiction to hear the State's motion at that time.

On April 11, 2012, this court affirmed the juvenile court's ruling declining to terminate the mother's parental rights. See *id.* at *5. We ultimately found the "the mother showed an ability and willingness to respond to services provided and, as a result, the circumstances that led to the adjudication of the child did not continue to exist at the time of the termination trial," and therefore "the State did not prove that the child [could not] be returned to the mother's custody at the present time." *Id.* at *4-*5. In summary, we further explained that

[b]ecause of the mother's consistent ability to properly care for the child and her improvements related to her drug abuse and involvement in violent relationships, we find the State has not proved grounds to terminate under any of the grounds asserted in its petition. Accordingly, we find the district court did not err in dismissing the petition as it related to the mother while continuing the underlying child-in-need-of-assistance case.

Id. at *5. A special concurrence was also filed, agreeing "the State failed to prove the necessary elements to terminate the mother's parental rights," but noting the child's safety could be in jeopardy if the child was returned to the mother's care too soon. *Id.* at *5-*6. *Procedendo* was issued on April 30, 2012.

Following our affirmance, the mother filed a motion for rule to show cause in juvenile court. The motion stated there had not been a new permanency plan filed in the case as the juvenile court had previously ordered, and she requested the State be held in contempt. The motion also stated the mother's visitation had not been increased. The State resisted, noting it had previously filed a motion for new trial on the basis of "the mother's dishonesty, under oath, regarding her ongoing relationship with [the biological father] and her continuing contact with

[him].” Its motion reported the biological father had been found criminally guilty of violating the no-contact order for being with the mother at Wal-Mart in December 2011, and the mother similarly had been found guilty for aiding and abetting the violation of the no-contact order for the same incident. The State argued the mother knowingly violated the no-contact order, and the court was unaware of this new evidence, which needed to be heard fully on its merits. To that end, the State subpoenaed a domestic violence counselor to testify as to the mother statements to the counselor concerning her relationship with the biological father. In response, the mother filed a motion to quash the State’s subpoena.

On May 29, 2012, a review hearing and a contested motion hearing was held before the juvenile court, wherein the court heard arguments on the State’s motion for a new trial, the mother’s motion to quash, and the mother’s motion to show cause. The following day, the court entered its order denying the State’s motion for new trial, determining “that the ground for the motion for a new trial was newly discovered evidence, and the court found there was none.” The court also granted the mother’s motion to quash. Concerning the mother’s motion to show cause, the court generally agreed a new case plan for family reunification had not been established as it had directed, but the court held the matter in abeyance until September 2012 at which time DHS was to submit a family reunification case plan.

The mother’s visitation was increased in June, and she had progressed to unsupervised visitation by August 2012. The mother improved her compliance with the case plan and her cooperation with service providers. However, there

were also reports that the mother was still having contact with the biological father, causing DHS, service providers, and the GAL concerns about the mother's honesty.

A review hearing was held in September 2012, and the mother was called to the stand at the hearing. On examination by the State, the mother was asked if she had seen the biological father, and if so, when. The mother's counsel objected, noting the State had informed him the mother was going to be charged criminally if she had violated the no-contact order. The mother's counsel advised the mother to assert her Fifth Amendment right against self-incrimination, and the mother followed his advice.

On examination by the GAL, the mother admitted she had asked a DHS worker whether it was okay to take the child to visit with the biological father's sister and grandmother. The mother testified she was curious about whether it was okay, and she believed it was in the child's best interests for the child to know about her heritage. She also testified she had two pictures of the biological father in her apartment at that time, though the child was in both pictures.

In support of its argument that the mother had been seeing the biological father, the State called as a witness a woman who was a relative of a former boyfriend of the mother. The witness testified that she and her sister were at a gas station in August 2012, and she saw the biological father at the station. The witness testified she had a conversation with him, and she left the store after purchasing her items. She testified she had no other further contact with the biological father that day, and she did not see the mother that day.

The witness's sister testified that while she waited in the car, she observed through her rearview mirror the mother pull up to a gas pump behind her. She testified she saw the biological father get out of the vehicle. She testified she also saw him coming out of the gas station, and though she did not know where he went after coming out of the station, he appeared to go back from the way he came. However, she also testified she pretty much stopped paying attention after she looked in the rearview mirror and saw it was the mother in the car behind her.

The DHS case worker testified the mother had failed to provide a requested sample for urinalysis testing in August, which was a concern to the worker. The worker also testified she believed the no-contact order had been violated based upon the witnesses' testimony. It was DHS's recommendation that the child remain in foster care and that the mother participate in more domestic violence counseling. The worker requested a review hearing be set in thirty days.

Following the hearing, the juvenile court entered its review order. Concerning the testimony that the mother and biological father had been seen together at the gas station, "and also the fact that much of that was made in [DHS's case plan]," the court commented that

there has been no finding of a court that there is any a violation of a no-contact order [by the mother]. The court heard the testimony of the two witnesses, and it is not clear in this court's mind whether or not there was a violation of any no-contact order. The lesson the court hopes all parties draw from this is that [the mother] will abide by the no-contact order, and if there is an issue, [the mother] will have a safety plan to get herself out of any situation where she comes in contact with the party she is protected from or get herself out of any potentially dangerous situation.

The court approved DHS's case plan, and it set a review hearing for November 2012.

On October 10, 2012, the GAL filed his Rule 1.904(2) motion. The motion stated witnesses had observed the mother having contact with the father, referring to the witnesses that testified at the prior review hearing. Additionally the GAL cited the mother's testimony that she had pictures of the "unfit" biological father in her apartment and her testimony requesting the child have a visit with the biological father's family. The GAL requested the court to amend and enlarge its conclusions and findings to find the mother continued to have contact with the biological father and that she would continue to have contact with the biological father in the future. The GAL requested the court modify its order to find that reunification efforts no longer needed to occur and that the State should file a termination of parental rights petition again as to the mother. The motion was denied.

Following the November review hearing, the juvenile court entered its review order noting the mother had been cooperating with services and had had clean drug tests, and DHS expected overnight visits to commence shortly. The court also noted the GAL continued to have reservations about reunification in this case, and the court noted the GAL's concerns from his oral report. However the court found the existing case plan should be continued with the goal of reunification of the child with the mother.

The GAL now appeals the juvenile court's September and November 2012 permanency review orders approving DHS's reunification case plan.¹

II. Scope and Standards of Review.

Our review of permanency orders is de novo. *In re K.C.*, 660 N.W.2d 29, 32 (Iowa 2003). We have a duty to "review both the facts and the law and adjudicate rights anew." *Id.* We give weight to the juvenile court's findings of fact, particularly its credibility determinations, but we are not bound by them. Iowa R. App. P. 6.904(3)(g); *see also K.C.*, 660 N.W.2d at 32.

We note that the parent-child relationship is constitutionally protected. *See Quilloin v. Walcott*, 434 U.S. 246, 255, (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). However, "[t]he best interests of the child are paramount to our decision." *K.C.*, 660 N.W.2d at 32. In evaluating the best interests of a child, "[t]he primary considerations are 'the child's safety,' 'the best placement for furthering the long-term nurturing and growth of the child,' and 'the physical, mental, and emotional condition and needs of the child.'" *In re P.L.*, 778 N.W.2d 33, 37 (Iowa 2010). We "afford a rebuttable presumption that the best interest of a child is served when custody is with the natural parents." *In re N.M.*, 491 N.W.2d 153, 156 (Iowa 1992); *see also* Iowa Code § 232.1 (2011) (giving preference to a child's own home); *K.C.*, 660 N.W.2d at 32 (Iowa 2003).

III. Discussion.

On appeal, the GAL argues the evidence clearly and convincingly established contact between the mother and biological father continued to occur

¹ Because the State took no position on the underlying issues in the juvenile court and did not file a notice of appeal, the State does not make an argument on appeal.

despite the no-contact order in the case and despite the termination of the biological father's parental rights. The GAL complains the juvenile court drew the wrong inferences from the testimony concerning their continued contact, noting the testimony of the eyewitnesses, admissions by the mother of photographs of the father in her apartment, and the mother's exercise of her Fifth Amendment rights.

Upon our de novo review, we find no error in the juvenile court's adoption of DHS's reunification case plan in its permanency review orders. The court was in the best position to observe the witnesses' testimony. It is clear that the juvenile court found them unpersuasive, and this was the court's prerogative. See *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996) ("The trier of fact—here, the district court—has the prerogative to determine which evidence is entitled to belief."). Although we are not bound by the court's finding, we find no reason to overcome it based upon two witnesses that were not clear upon whether they saw the mother and the biological father together. Beyond those witnesses, there was no specific testimony confirming the two together beyond the December 2011 incident, of which the juvenile court was fully aware in May 2012. We note, as the GAL points out, a court in a civil case may draw an adverse inference from one's failure to testify after asserting his or her Fifth Amendment right not to testify. See *Craig Foster Ford, Inc. v. Iowa Dep't of Transp.*, 562 N.W.2d 618, 623-24 (Iowa 1997). However, "the drawing of the inference [is] not mandatory, but at the discretion of the factfinder." *Giltner v. Stark*, 219 N.W.2d 700, 715 (Iowa 1974). Given the mother's substantial

progress in other areas in the case, we decline to reverse the juvenile court's orders.

Furthermore, even assuming *arguendo* the grounds for filing a petition for termination of the mother's parental rights are supported, or the case has reached the point where "the rights and needs of the child [have risen] above the rights and needs of the parents," we find the child's rights and needs are best served in the circumstances before us by reunification with the mother. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997), *overruled on other grounds by P.L.*, 778 N.W.2d at 39; *see also P.L.*, 778 N.W.2d at 39-40. We recognize the principles of limiting patience with parents, following statutory timeframes, not suspending "the crucial days of childhood" to wait for parents, and not letting a child languish in long-term foster care. *See In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000); *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987); *J.L.W.*, 570 N.W.2d at 781. The case before us, however, is not one in which the mother has not acted to overcome her problems or waited until the eleventh hour to change. We note, as the juvenile court did, that the mother has made significant progress in improving her life. At the time of the last review hearing, the mother was progressing to overnight visits with the child and was substance free. The evidence shows that she wants another chance to parent her child to demonstrate that she can be a good parent.

We find the result of the permanency hearings at issue here clearly reflect the child's best interests, society's concern for the child's safety and need for a permanent home, and society's strong interest in preserving the natural parent-child relationship. *See In re J.E.*, 723 N.W.2d 793, 801 (Cady, J., concurring

especially); *see also* *Zvorak v. Beireis*, 519 N.W.2d 87, 88 (Iowa 1994); *Northland v. Starr*, 581 N.W.2d 210, 212 (Iowa Ct. App. 1998). We have no doubt that the mother's further progress will be observed, and should it be confirmed the mother is again involved with the biological father or in another domestically violent relationship, the State and the GAL will bring the matter to the juvenile court's attention.

IV. Conclusion.

Based upon our thorough de novo review of the record, we decline the GAL's request to modify the juvenile court's reunification goals set forth in its two last permanency orders.

AFFIRMED.