

IN THE COURT OF APPEALS OF IOWA

No. 3-882 / 13-1177
Filed September 18, 2013

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

H.J., Mother,
Appellant,

K.J., Minor Child,
Appellant.

Appeal from the Iowa District Court for Scott County, Christine Dalton,
District Associate Judge.

A mother and child appeal separately from the permanency review order
placing the child with the father. **AFFIRMED ON BOTH APPEALS.**

Patricia A. Rolfstad, Davenport, for appellant mother.

Timothy J. Tupper, Davenport, for appellant child.

Steven W. Stickle of Stickle Law Firm, P.L.C., Davenport, for father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Michael J. Walton, County Attorney, and Julie Walton, Assistant County
Attorney, for appellee State.

Christine Frederick of Zamora, Taylor, Woods & Frederick, Davenport,
guardian ad litem for minor child.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

EISENHAUER, C.J.

A mother and child appeal separately from the permanency review order changing the child's placement from foster care to placement with the father. The mother contends the court erred in changing the permanency goal from reunification with her to placement with the father because (1) the State did not prove the child could not be returned to the mother's care at that time or in the near future and (2) transfer of custody is not in the child's best interests. The child, born in 1999, contends the court erred in transferring custody because (1) it did not have statutory authority to change custody at a review hearing and (2) the State did not prove a material and substantial change in circumstances. We affirm on both appeals.

The child was placed in the mother's custody in 2004 when the parents divorced. The father moved to Texas, where he still lives. The mother and her children came to the attention of the department of human services in May 2011 based on concerns this child's younger sibling was failing to thrive and the home was filthy and unsanitary. The children were removed from the mother's care in August,¹ placed in family foster care, and adjudicated children in need of assistance in December. The mother was charged with felony child endangerment.² Her criminal case, continued several times, remained pending at the time of the May 2013 permanency review hearing giving rise to this appeal.

¹ The mother gave birth to another child in September. That child was also removed from the mother's care and placed in family foster care. Neither the infant nor the younger child are at issue in this appeal.

² The court described the pre-removal circumstances in its August 2012 permanency order.

The home was replete with urine and animal feces, clutter, rotten food, unwashed clothing and dishes, piles of trash, and other unsanitary

Throughout these proceedings, the mother has refused to acknowledge she did anything wrong. She blames the condition of the house on an adult daughter, who also lived with her. She blamed the condition of the younger child on that child. The mother exercised supervised visitation with the child in interest. The court twice denied her requests for increased visitation because of her lack of progress in therapy. She participated in therapy, but refused to sign releases so the department and the therapist could exchange information. The child in interest is closely bonded with the mother, but is in intense therapy to address the abuse suffered at the mother's hands, the abuse the child was told to perpetrate against the younger child, and possible sexual abuse.

When the father was informed of the proceedings, he had no relationship with this child, but he made efforts to start and develop a relationship. He made phone calls and visited the child in Iowa. The child visited the father in Texas. The father completed a favorable interstate compact home study to be approved as a placement for the child. He also made arrangements for individual counseling for the child and family-centered services for both of them. He completed a mental health evaluation and parenting classes, and he was willing to participate in individual counseling if it is believed to be necessary.

conditions. Both children were home schooled but there were no education materials available. [The younger child] was systematically abused by [the mother] and she involved [the older child] in the abuse. Both children were medically neglected. Luckily, only [the older child's] teeth suffered. [The younger child], on the other hand, was near starvation. She was a failure to thrive in dire need of medical care. She was routinely locked in her room without food, water, or toilet privileges. [The mother] required [the older child] to follow her directions and participate in the "punishment" of [the younger child].

Following a contested permanency review hearing in May 2013, the court changed the child's placement from foster care to placement with the father. The court found termination of the mother's parental rights was not appropriate, noting no party requested termination and the child "strenuously" objected to termination. The court found the child could not be returned to the mother's care because the mother had failed to address the circumstances leading to the child's removal and adjudication. The court further found continued placement in foster care as another planned permanent living arrangement was not the least-restrictive placement for the child. In deciding to place the child with the father, the court found:

[The child] has a father who cares for him. [The father] has committed no adjudicatory harm. He has made great efforts to establish a relationship with his son and to arrange a safe and secure placement for his son in his custody. Placement with the father is a family placement to which the court gives a strong preference. Additionally, placement in the custody of the father allows [the child] to maintain a relationship and contact with his mother.

The court ordered the child placed in the father's custody under the department's supervision, approved the case plan proposed by the department, provided for supervised visitation with the mother, and granted the district court concurrent jurisdiction so the father could seek permanent custody. The mother and the child both appeal.

We review a juvenile court's permanency order de novo. *In re N.M.*, 528 N.W.2d 94, 96 (Iowa 1995). We examine the entire record and adjudicate rights anew on the issues properly preserved and presented. See *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.*

Mother. The mother contends the court erred in changing the permanency goal to placement with the father “because the State did not show by clear and convincing evidence [the child] cannot be returned to the home of his mother now or in the immediate future.” She argues placing the child with her or in foster care as another planned permanent living arrangement is in the child’s best interests, while placing the child with the father is not. She further argues she has complied with case plan requirements, is able to care for the child properly, and can provide a safe, stable home for the child. She contends the court’s reference to her pending trial for felony child endangerment as a basis for not returning the child to her care shows the court and the department have already determined her guilt.

Under Iowa Code section 232.104(2) (2013), after a permanency hearing the court “shall do one of the following:”

- a. Enter an order pursuant to section 232.102 to return the child to the child’s home.
- b. Enter an order pursuant to section 232.102 to continue placement of the child for an additional six months at which time the court shall hold a hearing to consider modification of its permanency order. An order entered under this paragraph shall enumerate the specific factors, conditions, or expected behavioral changes which comprise the basis for the determination that the need for removal of the child from the child’s home will no longer exist at the end of the additional six-month period.
- c. Direct the county attorney or the attorney for the child to institute proceedings to terminate the parent-child relationship.

d. Enter an order, pursuant to findings required by subsection 3,^[3] to do one of the following:

(1) Transfer guardianship and custody of the child to a suitable person.

(2) Transfer sole custody of the child from one parent to another parent.

(3) Transfer custody of the child to a suitable person for the purpose of long-term care.

(4) If the department has documented to the court's satisfaction a compelling reason for determining that an order under the other subparagraphs of this paragraph would not be in the child's best interest, order another planned permanent living arrangement for the child.

In August 2012 the court held a permanency hearing and continued the child's placement in foster care to allow additional time for the mother to regain custody. See Iowa Code § 232.104(2)(b).⁴ The court ordered, "The permanency goal remains reunification. However, the concurrent plan is placement with his father."

Nearly a year later, the mother still had not made adequate progress in therapy or in acknowledging her part in the circumstances leading to the children's removal. She blames others and refuses to accept responsibility. We agree with the court the child cannot be returned to the mother's home, the services offered have not corrected the situation, but termination is not in the child's best interests. See *id.* § 232.104(3)(a)-(c). Having found convincing evidence of all the elements of section 232.104(3), the court had limited options

³Subsection three provides:

Prior to entering a permanency order pursuant to subsection 2, paragraph "d", convincing evidence must exist showing that all of the following apply:

a. A termination of the parent-child relationship would not be in the best interest of the child.

b. Services were offered to the child's family to correct the situation which led to the child's removal from the home.

c. The child cannot be returned to the child's home.

⁴ The 2013 and 2011 versions of section 232.104 are identical.

before it. See *id.* § 232.104(2); see also *id.* § 232.99(4) (listing placement options from least- to most-restrictive). Under the circumstances of this case, especially since the court already had allowed the mother additional time to work toward reunification, the only real option was to enter an order under section 232.104(2)(d). Transferring custody from one parent to the other was the least-restrictive placement. See *id.* § 232.99(4); see also *id.* § 232.104(2)(d)(2). We affirm the decision of the court to place the child with the father.

Child. The child contends the court exceeded its authority in placing him with his father and the State failed to prove a material and substantial change in circumstances. See *In re Leehey*, 317 N.W.2d 513, 516 (Iowa Ct. App. 1982). The child contends the only options available to the court at a review hearing are to extend the prior order or to return the child to the parent who had custody of the child before removal. See Iowa Code § 232.101(9). The father contends error was not preserved because no challenge to the court's authority was made in the review hearing. Without a transcript of the hearing, we are unable to determine whether a challenge was made.

However, we need not rely on error preservation to dispose of the issue because we conclude the court acted properly within its authority. If this were only a review or modification of a dispositional order under sections 232.102 or 232.103, there might be merit to the child's contentions. See, e.g., *In re K.B.*, 753 N.W.2d 14, 16 (Iowa 2008); *Leehey*, 317 N.W.2d at 516. However, this was primarily a review of the permanency order entered in 2012. See *id.* § 232.104(2)(b) (providing for review of the order allowing a parent more time for reunification). Consequently, the court correctly set forth the statutory options

available to it under section 232.104 and entered an appropriate order after making the required findings. See *id.* § 232.104(2), (3). This claim fails. We affirm the permanency review order.

AFFIRMED ON BOTH APPEALS.