

IN THE COURT OF APPEALS OF IOWA

No. 7-534 / 07-1028
Filed September 6, 2007

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

D.W., Minor Child,
Appellant,

STATE OF IOWA,
Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard II, District Associate Judge.

The guardian ad litem and State appeal a permanency order entered by the juvenile court in child in need of assistance proceedings. **REVERSED AND REMANDED.**

Sally Weyer of Weyer Law Firm, P.L.C., Iowa City, guardian ad litem for appellant minor child.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Janet Lyness, County Attorney, and Kristin Parks, Assistant County Attorney, for appellant State.

Natalie Hope Cronk of Cronk & Murray, L.L.P., Iowa City, for appellee mother.

Ellen R. Ramsey-Kacena, Iowa City, for appellee intervenor grandmother.

W. Eric Nelson, Coralville, for the father.

Thomas Maxwell of Leff Law Firm, L.L.P., Iowa City, for intervenor foster parents.

Considered by Zimmer, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.**I. Background Facts & Proceedings**

Crystal and Dustin are the parents of D.W., who was born in January 2000. In early November 2005, Crystal and D.W. moved to Iowa from Missouri because Crystal was fighting with her in-laws. Shortly thereafter, on November 23, 2005, D.W. was removed from her care by the Department of Human Services. Dustin was in prison in Missouri. Prior to entering prison, Dustin was physically abusive to both Crystal and D.W. D.W. was placed in foster care in Iowa.

On January 11, 2006, D.W. was adjudicated to be a child in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(c)(2) and (n) (2005). On February 14, 2006, the juvenile court entered an order granting the request of the paternal grandmother, Debra, for a home study of her residence in Missouri. The dispositional order, entered on March 8, 2006, provided the Department of Human Services "may engage in concurrent planning which includes a relative placement of the child with his paternal grandmother."

On June 21, 2006, the State filed a motion requesting the waiver of reasonable efforts under section 232.103. The guardian ad litem (GAL) joined in that motion. Meanwhile, Dustin's attorney requested the State be found in contempt for failure to obtain a timely home study regarding Dustin's mother, Debra. Crystal filed a request for visitation. Before an order was entered on any of these motions, the Missouri home study was completed in August 2006. The home study noted Debra had been in an abusive relationship for many years, but

had gotten divorced in 2003. The home study recommended that Debra be licensed as a relative care provider for her grandson. Debra filed an application to intervene in September 2006, and asked to be considered as a placement option for D.W.

A hearing on the pending motions was held on October 18, 2006. Kara Magnison, a therapist, testified D.W. had bonded with his foster parents. The hearing was not concluded on that day, but was reconvened on April 2, 2007. At that hearing, the attorney for the father was permitted to make a lengthy "professional statement" concerning his view of the evidence and argue that the child should be placed with Dustin's mother. Debra testified she would like to have D.W. placed in her care. She stated that at times when Dustin was drinking she was afraid of him. Debra takes medication for depression. The social worker for the Department testified concerning the waiver of reasonable efforts.

In the meantime, between the two hearing dates, the juvenile court granted Debra's motion to intervene. In December 2006, the State filed a petition to terminate the parents' rights. Coincidentally, D.W.'s father was released from prison and placed on parole. He lives in the same town in Missouri as Debra, and she has visited him several times since his release.

An order granting the request to waive reasonable efforts was filed on May 10, 2007. The order provided, "The Department shall plan for placement of the child with his paternal grandmother." However, pending further proceedings, the child was to continue in his present placement. The State and the GAL filed motions asking the court to reconsider the order directing the Department to start

planning to place D.W. with Debra. Additionally, in May 2007, Debra filed a request for a specific visitation schedule and a timetable to have D.W. placed in her care.

A hearing was held on May 15, 2007. Megan Heitzman, D.W.'s therapist, testified D.W. had increased aggression since he had started having visits in Missouri with Debra. She stated D.W. had bonded with his foster family, and removing him from that environment could detrimentally impact his ability to bond in the future. Heitzman testified it would be "incredibly traumatic" to D.W. to remove him from his foster family. She stated it would be detrimental to D.W. to return him to the community where he was abused by his father. She also stated it was imperative that D.W. have no contact with his father. Heitzman testified "it would be in [D.W.'s] best interests to remain with his foster family permanently and have continuing visitation and contact with his grandmother." At the end of the hearing, the juvenile court stated it wanted to know if the foster parents were interested in adopting, and set the matter for a further hearing.

Proceedings resumed on June 11, 2007. Prior to the hearing the foster parents intervened in the case. Heitzman continued to recommend that D.W. remain in his foster home. She stated that following a visit to Missouri D.W. had increased anxiety, a regression in speech, and displayed encopresis. D.W. indicated to Heitzman that he wanted to remain with his foster family, and had told his grandmother this in Heitzman's presence. The foster mother testified that they were interested in adopting D.W.

The juvenile court entered a permanency order on June 13, 2007, ordering that D.W. be placed in the care of his paternal grandmother on June 22, 2007. The court determined that it was preferable to place D.W. with a member of his biological family, and that D.W.'s best interests did not "trump" this preference. The court stated that "hopefully he can deal with it." The GAL and the State appeal the juvenile court's order.

II. Standard of Review

Our scope of review in juvenile court proceedings is de novo. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). Although we give weight to the juvenile court's factual findings, we are not bound by them. *Id.* Our primary concern is the best interests of the child. *In re E.H.*, 578 N.W.2d 243, 248 (Iowa 1998).

III. Interlocutory Appeal

The mother and paternal grandmother contend the appeals in this case are interlocutory in nature. They claim the court's order was not final because the court set the matter for a review hearing, and noted a petition to terminate the parents' rights was pending.

A permanency order directing a county attorney to institute termination proceedings is not a final appealable order. *In re W.D.*, 562 N.W.2d 183, 186 (Iowa 1997). In this case the permanency order did not direct the county attorney to institute termination proceedings, but termination proceedings had already been initiated at the time the permanency order was filed. As discussed in *In re T.R.*, 705 N.W.2d 6, 11 (Iowa 2005), custody of the child will not be finalized until after the termination hearing. "In effect, the change of custody

provision in the permanency order will inure or be subsumed in the final termination order in the termination proceeding.” *T.R.*, 705 N.W.2d at 11. For this reason, the custody provision in the permanency order is not final. *See id.*

The GAL sought permission to bring an interlocutory appeal as an alternative to her notice of appeal. *See* Iowa R. App. P. 6.2(1). Furthermore, the State’s notice of appeal may be considered as an application for interlocutory appeal. Iowa R. App. P. 6.1(4). An interlocutory appeal may be granted based on a “finding that such ruling or decision involves substantial rights and will materially affect the final decision and that a determination of its correctness before trial on the merits will better serve the interests of justice.” Iowa R. App. P. 6.2(1).

Generally, we are reluctant to grant interlocutory appeals in juvenile court cases because delays in such cases are antagonistic to the child’s best interests. *T.R.*, 705 N.W.2d at 12. In the present case, however, speed in determining the proper placement of D.W. is imperative, and the delay in waiting until after the termination proceedings to address the alleged improprieties in the juvenile court decision would not benefit the child. For this reason we grant the request for an interlocutory appeal in this case.

IV. Merits

The State and GAL contend the juvenile court failed to act in D.W.’s best interests. They point out D.W.’s therapist testified it would be detrimental to D.W. to place him in Debra’s care. They dispute that a preference to place a child with relatives outweighs compelling evidence that the child’s best interests require

placement elsewhere. The GAL also raises concerns about the procedural posture of the case at the time of the court's ruling.

The order of June 13, 2007, is captioned a "Review/Permanency Order." The pertinent provisions of section 232.104(2)(d) permit the juvenile court to enter an order to (1) transfer guardianship and custody of the child to a suitable person, or (2) transfer custody of the child to a suitable person for the purpose of long-term care. Prior to entering such an order, however, the court must make a determination that termination of the parent-child relationship is not in the child's best interests. Iowa Code § 232.104(3). The court made no such finding in this case. We question whether the court's order was a valid permanency order based on the lack of findings required by section 232.104(3).

Furthermore, section 232.104(2)(d) refers to a "suitable person." This section does not create a statutory preference for relatives. This section does not contain language similar to that found in section 232.99(4), which provides the court "shall make the least restrictive disposition appropriate considering all the circumstances of the case." In dicta, the supreme court has indicated that the home of a relative is considered a less restrictive placement than that of a foster home. *In re N.M.*, 528 N.W.2d 94, 97 (Iowa 1995). Section 232.104(2)(d) does not make any reference to a "least restrictive disposition" and does not refer to relatives. We believe that under section 232.104(2)(d), a relative should be given the same consideration as any other "suitable person" and is not entitled to preferential status.

In reaching this conclusion, we note that in section 232.99(4), the juvenile court is seeking what is hopefully a short-term placement for a child until the parents are able to resume the child's care. After termination of parental rights, however, section 232.117(3) gives no statutory preference to placement with a relative. *In re R.J.*, 495 N.W.2d 114, 117 (Iowa Ct. App. 1992). In considering a long-term placement for a child, the child's best interests must prevail. *In re J.M.W.*, 492 N.W.2d 686, 690 (Iowa 1992); *In re L.S.*, 483 N.W.2d 836, 840 (Iowa 1992). A permanency order under section 232.104(2)(d) is a long-term placement, and we conclude the child's best interests must be the guiding determination of the child's placement.

In this case, the juvenile court found the child's best interests did not "trump" the court's obligation to place the child with a relative. Clearly, the child's best interests must always take precedence over other considerations in determining the best placement for the child.¹ Our primary concern in any juvenile court proceeding is the best interests of the child. *E.H.*, 578 N.W.2d at 248. We determine the juvenile court improperly focused on considerations other than the child's best interests.²

¹ Thus, even if the order in question is determined to be a modification of the dispositional order, under section 232.102(1), the child's best interests must prevail over a categorization of the parties seeking the child's placement as relatives or non-relatives.

² Besides the issue concerning whether the grandmother should be preferred as a placement because she was a relative, there were several complaints by the mother, father, and grandmother that the Department should have acted sooner to place the child with the grandmother. These complaints are largely irrelevant because they do not address our overriding concern – the best interests of the child.

In passing, we note the juvenile court states the Department should have carried out the dispositional order and sought placement of the child with the grandmother in August 2006, as soon as the home study was completed. The dispositional order stated the Department *may* engage in concurrent planning which included relative placement.

In this case there was clear and unequivocal evidence that it would be in D.W.'s best interests to remain with his foster parents. Kara Magnison and Megan Heitzman, therapists, testified D.W. was very bonded with his foster parents. There was evidence it would be "incredibly traumatic" to D.W. to remove him from the foster home. Heitzman testified D.W. exhibited anxiety, a regression in speech, and encopresis following visits to Missouri. She testified D.W. associated living in Missouri with the physical abuse he suffered at the hands of his father. She stated it was imperative that D.W. have no contact with his father. Debra now lives in the same town as the father since his release from prison. Although Debra stated she was sometimes afraid of her son when he was drinking, she has remained in contact with him.

We also have concerns about the fact that when D.W. lived with Debra for five or six months in Missouri, after he had been removed from the parents' home by Missouri officials, Debra was involved in an abusive relationship, but testified she believed this had no impact on D.W. Furthermore, there was much tension between Debra, Crystal and Dustin while D.W. was in Debra's care, and D.W. was placed in foster care. At the time D.W. was removed from Crystal's care, a report states Crystal had moved from Missouri because she fought all the time with her in-laws, which would have included Debra.

On our de novo review of the evidence, and considering D.W.'s best interests, we determine D.W. should not have been removed from the care of the

There was no requirement in the dispositional order that the Department place the child with the grandmother. The dispositional order was not actually modified until the court's order of May 10, 2007. Even if the Department had acted improperly, however, this does not bypass the paramount consideration in this and every juvenile court case – *the best interests of the child*.

foster parents. We reverse the decision of the juvenile court placing D.W. in the custody of the paternal grandmother, Debra, and remand for further proceedings.

REVERSED AND REMANDED.