

IN THE COURT OF APPEALS OF IOWA

No. 8-301 / 08-0035
Filed May 14, 2008

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

**L.M., Intervenor,
Appellant.**

Appeal from the Iowa District Court for Appanoose County, William S. Owens, Associate Juvenile Judge.

Linda appeals a juvenile court ruling denying her petition to intervene in post-termination proceedings. **REVERSED AND REMANDED.**

Debra George, Centerville, for intervenor appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Robert Bozwell, County Attorney.

Kevin Maughan, Albia, for minor child.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Linda appeals a juvenile court ruling denying her petition to intervene in post-termination proceedings. We reverse and remand.

I. Background Facts and Proceedings

Nathan, born in 1998, was removed from his drug-addicted parents in 2005. He was placed with his step-mother, Theresa. Theresa sought and obtained permission from the Department of Human Services to have her friend, Linda, babysit Nathan. Nathan began spending more and more time with Linda, who willingly and lovingly cared for him. In August 2006, Theresa allowed Nathan to move in with Linda but did not disclose this fact to the Department. Nathan remained with Linda for approximately seven months.

About two weeks before a hearing on the State's petition to terminate the parents' rights to Nathan, Theresa informed the Department she no longer wished to care for Nathan. The Department obtained an order removing Nathan from the care of Theresa or her "designee." Nathan was placed in foster care. The juvenile court subsequently terminated the parents' rights to Nathan and that decision was affirmed on appeal. *In re N.S.*, No. 07-446 (Iowa Ct. App. Aug. 8, 2007).

After the termination decision was issued, Linda filed a petition to intervene and an application for guardianship and custody of Nathan.¹ The juvenile court declined to decide the guardianship application until the

¹ Our court has held that a petition at this juncture is timely. *In re C.L.C.*, 479 N.W.2d 340, 344-45 (Iowa Ct. App. 1991).

intervention petition was decided. The court denied the petition following an evidentiary hearing.

The juvenile court acknowledged Linda had “a relationship with Nathan,” but did not find that it qualified her as “interested” in the litigation. The court reasoned that her relationship was “based largely on deception and fraud.” The court concluded,

[t]o allow an intervention in this case would reward [Linda] for conspiring to deceive the Court as to who Nathan’s true caretaker was. In addition, it would reward her for violating well established Court orders that limited [the father’s] contact with Nathan.

Linda appealed.²

Review of a court’s denial of a petition to intervene is for errors of law. *In re H.N.B.*, 619 N.W.2d 340, 343 (Iowa 2000). Some discretion is vested in the juvenile court to determine whether the petitioner is sufficiently “interested” in the litigation to permit intervention as provided by Iowa Rule of Civil Procedure 1.407. *In re Estate of DeVoss*, 474 N.W.2d 539, 541 (Iowa 1991).

In assessing “interest,” a court must be certain the applicant has asserted a legal right. *H.N.B.*, 619 N.W.2d at 343. Here, that right is found in Iowa Code section 232.117(3) (2007), which provides in pertinent part:

If the court terminates the parental rights of the child’s parents, the court shall transfer the guardianship and custody of the child to one of the following:

• • • •

c. A parent who does not have physical care of the child, other relative, or other suitable person.

² Linda requested a stay of further proceedings. The Iowa Supreme Court denied the request, citing a response from the State. That response does not appear to have been included in the record.

(Emphasis added).

We first address the juvenile court's determination that Linda violated court orders limiting the father's contact with Nathan. Preliminarily, we note that Linda was not a party to the child-in-need-of-assistance proceedings and no order other than the temporary removal order was expressly or impliedly directed at her. The orders that addressed the father's visitation rights essentially adopted the Department's recommendations set forth in its case plans. One of those case plans stated Theresa was not to "allow Nathan to have any contact with [his father] that is not approved by the Department." The Department recommended the father "participate in supervised/unsupervised visitation at the discretion of the Department of Human Services."

The district court found that Theresa and Linda "were allowing [the father] to have 'daily' telephone contact with Nathan." As noted, the court concluded this contact was unauthorized. However, the record reflects the Department was aware of and acquiesced in telephone conversations between Nathan and his father. Specifically, a Department report stated,

Theresa has allowed Nathan to talk to [his father] on the phone and has comforted Nathan, helping him to understand that his father has a sickness and that is why he is in prison and not with him right now. Nathan seems to accept this answer.

The report also stated, "[Nathan's father] and Theresa have good communication and have demonstrated the ability to put Nathan's needs first." There is no indication in the report that the Department disapproved of this telephone contact. Indeed, the quoted statements suggest the Department deemed these contacts healthy.

At the termination hearing, the Department's social worker was asked about the telephone contacts. She neither stated nor implied that the telephone contacts were unauthorized. She simply testified "I do believe that [the father] did have phone conversations with Nathan when he was with Theresa, and I understand that he has had some phone conversations with him since he's been in prison."

With respect to in-person contacts between Nathan and his father, the case plan noted that the father failed to fully avail himself of all the supervised visits arranged for him and his continued lack of interest would jeopardize the father-son bond. At the termination hearing, the father testified he had some unauthorized visits with Nathan at Theresa's house. These visits necessarily ended when he was incarcerated in August 2006. Nathan's father did not testify that he had any unauthorized contacts with Nathan at Linda's house. The Department social worker assigned to the case implied that he had no such contacts. When asked whether Nathan had contact with his father while with Linda, the social worker responded, "[b]y phone, yes."

Based on this record, we conclude that, even if Linda was aware of and subject to the visitation provisions of the juvenile court orders, she did not violate them.

We turn to the juvenile court's determination that Linda engaged in deception and fraud when she failed to tell Department personnel that Nathan was staying with her. While the Department was aware Linda was babysitting Nathan, the record supports the juvenile court's determination that no one immediately informed the Department of Linda's more extensive involvement with

the child. We do not condone this non-disclosure and we agree Linda must share the blame, even though she was not a party to the child-in-need-of-assistance proceedings. But blame is not the issue. The critical inquiry is what is in the best interests of the child. *H.N.B.*, 619 N.W.2d at 344. The child's best interests are assessed by considering "the closeness of the relationship between the child in interest and the intervenor" and whether the child has a strong bond with other prospective adoptive parents. *Id.*

It is undisputed that Nathan shared a close bond with Linda. The Department social worker assigned to the case stated, "I think [Nathan] wants to continue seeing Linda because he enjoys being with Linda." She continued, "Nathan regards her as a grandmother figure." And, she stated that when she removed Nathan, "he was visibly shaken in losing his contact with Theresa and had asked me if he'd be able to keep seeing Theresa and Linda."

According to Linda, she had known Nathan for "five, six years." She explained her reason for assuming Nathan's care as follows:

[Nathan's father] told me he was going to prison and that Theresa didn't want Nathan, she was going to put him up for foster care, and I said, 'No, I will take Nathan' 'cause I consider Nathan my grandson.

She pointed out that she cared for Nathan without compensation from the Department and she did so because she "didn't want him to go to strangers."

At least two-and-a-half months before the termination hearing, Linda made the Department aware of her interest in serving as a foster or adoptive parent for Nathan. The Department responded by requesting a release of information from Nathan's father. He provided a signed release within two weeks of the request.

After receiving the release, the Department did not initiate a home-study or take other steps to facilitate Nathan's placement with Linda. According to the Department social worker, this option was not considered because termination was imminent. Meanwhile, Linda contacted the social worker every day for about a two-week period to see if she could adopt Nathan. She left voice-mail messages but none were answered. These actions were further evidence of Linda's close relationship with Nathan.

We turn to the second factor cited in *H.N.B.*, the existence of other prospective adoptive parents "who maintain a strong relationship with the child" relative to the prospective intervenor. *H.N.B.*, 619 N.W.2d at 344. Nathan spent two weeks with his new foster parents prior to the termination hearing. There is no indication that he previously had any contact with them. At the hearing on the motion to intervene, held four months after the termination hearing, the Department did not offer any evidence that the foster parents or other individuals had expressed an interest in adopting Nathan. The only evidence adduced at that hearing came from Linda's witnesses.

One of the witnesses, an expert who evaluated Linda and her home for twenty to twenty-five hours, stated that when Nathan went to live in Linda's home, "Linda acted in the role of a parent, providing all of the support from getting him up in the morning to being a parent figure to setting limits to allowance to making arrangements for school." He continued,

[Nathan] felt safe with her, he felt protected, and he enjoyed his time with her. They had a lot of fun, and those are the kinds of things that when we teach the PS-MAPP class, we talk to potential foster and adoptive parents. It's a crucial area in adoption, is building attachment, and I believe Linda did it unwheelingly (sic). It

was a natural for her. She loves kids, and she saw him reaching out for her, and she took that role knowing that he needed that.

In a report prepared for the court, the expert stated the removal,

had to be difficult for Nathan and not in his best interest to be removed suddenly from a home he had lived in for over six months and from a grandmother figure he had come to know and trust over three and half years.

He recommended Nathan be placed with Linda and noted Linda was “more than willing to collaborate with the Department of Human Services around ongoing monitoring and supervision of Nathan’s placement.” He continued,

I believe that whatever guidelines that Department of Human Services sets, Linda will follow them. Even without the guidelines, I know that Linda would never, ever knowingly place Nathan at any risk or harm.

We cite the details of this report because they are relevant to the question of whether Linda “established a family relationship with” Nathan. *Id.* While the evidence may also be relevant to the question of Linda’s suitability as a guardian, “[w]e express no opinion” on this issue. See *In re A.G.*, 558 N.W.2d 400, 455 (Iowa 1997).

Based on the evidence summarized above, we conclude Linda had a legal right as a “suitable person” under Iowa Code section 232.117(3) and a concomitant “interest” in intervening. Accordingly, we conclude the juvenile court erred and abused its discretion in denying Linda’s motion to intervene. We find it unnecessary to address the remaining issues raised by Linda. “This case is reversed and remanded to the juvenile court for further proceedings consistent with this opinion.” *Id.*

REVERSED AND REMANDED.

Vaitheswaran and Eisenhauer, JJ. concurring. Miller, P.J., concurring specially.

MILLER, J. (concurring specially)

Theresa and Linda were well-acquainted friends. Linda was aware that the Department was involved in Nathan's life, and that Theresa was receiving money as Nathan's custodian.

Linda was a close friend of Theresa. Theresa was not to allow Nathan to have any contact with his father unless approved by the Department. Nathan's father testified that Theresa was "just there for [the Department's] eyes" and that despite the court order Theresa *and Linda* allowed him frequent contact with Nathan by telephone. It thus seems highly likely that Linda was well aware that Nathan's father was not to have unapproved contact with Nathan, and yet participated in allowing the prohibited contact.

Linda assumed Nathan's physical care for about seven months, from August 2006 until he was removed from Theresa's legal custody in March 2007. Linda testified she did not disclose to anyone the fact Nathan was living with her, because she was afraid if she did so he would be removed from her home. This testimony strongly suggests she knew her action in keeping Nathan in her home for that seven months was improper.

The record shows that Nathan and Linda have a strong and loving relationship. If that relationship had been developed solely during the seven months that she improperly kept him in her home, then based on the reasoning and result in *In re H.N.B.*, 619 N.W.2d 340 (Iowa 2000) I would tend to agree with the juvenile court, concluding that any legal interest of Linda's was based solely on deception and fraud and insufficient to render her a "suitable person" to be custodian and guardian and thus to intervene post-termination. I am, however,

convinced the record shows Nathan's relationship with Linda existed for several years before the seven months in question, and was already a strong and healthy relationship before he began living with her in August 2006. Under such circumstances I agree that based on the reasoning and result in *In re H.N.B.*, Linda had sufficient legal interest in the post-termination proceedings to be a "suitable person" under section 232.117(3)(c) and thus entitled to intervene. I therefore concur in the result reached by the majority.