

IN THE COURT OF APPEALS OF IOWA

No. 9-1027 / 09-1683
Filed December 30, 2009

**IN THE INTEREST OF A.A. and A.A.,
Minor Children,**

**N.D.M., Mother,
Appellant.**

Appeal from the Iowa District Court for Washington County, Randy DeGeest, District Associate Judge.

A mother appeals a juvenile court permanency order transferring the legal custody of her children from their maternal grandmother to their father.

AFFIRMED.

Kathryn J. Salazar of Day, Meeker, Lamping, Schlegel & Salazar, Washington, for appellant mother.

Michael W. Fay of Fay Law Offices, Cedar Rapids, for appellee father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and Barbara A. Edmondson, County Attorney, for appellee State.

Katie Mitchell of Tindal Law Office, P.L.C., Washington, for minor children.

Patricia Lipski, Fairfield, for intervenor.

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

VAITHESWARAN, J.

A mother had twins, born in 2008. Shortly thereafter, she was hospitalized for treatment of postpartum depression and the State applied to have the children temporarily removed from her care. The juvenile court granted the application, placing temporary legal custody with the children's maternal grandmother.

Two months after the application was granted, the twins' mother was allowed to move into her mother's home and was allowed to have contact with her children as long as she was supervised by her mother. Over the next year, the mother complied with mental health and other services authorized by the Department of Human Services and developed a strong bond with her children.

In September 2009, the mother attempted suicide. The Department, which had been working to reunite the mother with her children, recommended a transfer of legal custody from the twins' grandmother to their father. Following a permanency hearing, the juvenile court adopted this recommendation and entered a transfer order. The mother appealed.

On appeal, the mother contends the court erred in (1) "finding it was in the children's best interests to transfer custody to the father" and (2) "conducting a permanency hearing and entering the type of order it did as the children resided with the mother throughout the case and were never removed from the home." Our review of these issues is de novo. Iowa R. App. P. 6.907.

I. The ultimate consideration in a child-in-need-of-assistance proceeding is the best interests of the child. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). The record reflects that the father was actively involved in the children's lives, exercising unsupervised overnight visitation from Saturday morning to Tuesday

morning every alternating week and from Monday morning to Tuesday morning in the other week. Although the mother asserts that the father was twice investigated for child abuse against the children, the record reveals the State withdrew the allegations against the father contained in its child-in-need-of-assistance petition and the Department expressed no safety concerns with the father's care of the children. Additionally, the children's guardian ad litem changed her recommendation from reunification with the mother to transfer of legal custody to the father based on his "ability to properly care for the boys." She noted the father had "sufficient space for the family" in his two-bedroom apartment, had "appropriately parented" the children, and had already made arrangements for childcare. Finally, the father acknowledged the children's attachment to the mother and maternal grandmother and said he was willing to afford them the same type of liberal visitation he had previously exercised.¹ For these reasons, we conclude the children's best interests were served by the order transferring their legal custody to the father.

II. The mother asserts that the children were never "removed" from the home of their mother, as she lived in the same household as the children. We assume without deciding that this issue was preserved for our review. Turning to the merits, we believe *In re J.O.*, 675 N.W.2d 28 (Iowa Ct. App. 2004) is controlling. There, the mother and father argued that the child was not out of the mother's physical custody for the requisite period of time prior to termination because, "although he was placed in [the grandmother's] legal custody, [the mother] lived in the same household as [the grandmother] and [the child] until two and a half

¹ The district court ordered visitation with the mother at the discretion of the Department.

months prior to the termination hearing.” *J.O.*, 675 N.W.2d at 30. This court held, “Under no interpretation could [the mother] be said to have legal or physical custody of [the child] after the court removed him from her custody.” *Id.* The court reasoned that “[t]he removal cannot be circumvented extrajudicially. No amount of contact with the child rises to the level of physical or legal custody without a judicial determination and an order returning the child to the parent.” *Id.* Based on *J.O.*, we find the mother’s argument unpersuasive.

We affirm the entry of a permanency order transferring legal custody of the twins from their maternal grandmother to their father.

AFFIRMED.