IN THE COURT OF APPEALS OF IOWA

No. 9-880 / 09-1397
Filed November 25, 2009

IN THE INTEREST OF K.B.,
Minor Child,

E.B., Grandmother,
Appellant.

L.B., Mother,
Appellant.

Appeal from the Iowa District Court for Scott County, John G. Mullen, District Associate Judge.

A mother and grandmother appeal separately from the order terminating the mother's parental rights. **AFFIRMED.**

Patricia Rolfstad, Davenport, for appellant mother.

Cheryl Fullenkamp, Davenport, for appellant grandmother.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant Attorney General, Michael J. Walton, County Attorney, and Gerda C. Lane, Assistant County Attorney, for appellee State.

Justin Teitle, Davenport, for grandparent intervenors.

Stephen Newport of Newport & Newport, P.L.C., Davenport, for minor child.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Lynsey is the mother and Elizabeth is the maternal grandmother of K.B. (born 2001). They separately appeal the order terminating Lynsey's parental rights under Iowa Code sections 232.116(1)(e) and (f) (2009). For the reasons set forth herein, we affirm.

I. Background Facts and Proceedings

From the time of her birth, K.B. was primarily left in the care of Elizabeth, her maternal grandmother, as Lynsey, her mother, struggled with drug and alcohol abuse. On January 24, 2004, Lynsey consented to Elizabeth becoming the legal guardian and conservator of K.B. At the time, Lynsey was seventeen, she had recently been incarcerated for car theft, and K.B.'s father was deceased.

K.B. came to the attention of the Iowa Department of Human Services (DHS) on May 2, 2007, after K.B. reported that she and her cousin had been sexually abused by their maternal grandfather. At this time, Lynsey was still incarcerated. The subsequent investigation revealed that the maternal grandfather had three previous founded reports of sexual abuse involving Lynsey.

On May 23, 2007, the State filed a petition alleging K.B. was a child in need of assistance (CINA). On July 17, 2007, K.B. was adjudicated CINA pursuant to Iowa Code sections 232.2(6)(c)(2) and 232.2(6)(d) (2007). K.B. was allowed to remain in the custody of Elizabeth, subject to the supervision of DHS, and on the condition that the maternal grandfather had no contact with K.B.

Immediately following the reports of abuse, Elizabeth removed her husband (K.B.'s maternal grandfather) from the home and filed for a divorce.

However, approximately two months later, Elizabeth dismissed the divorce proceedings in the hope that counseling could reconcile their marriage.

Elizabeth was offered services, which included a psychological evaluation and individual counseling. During counseling, concerns were raised that Elizabeth was having "chronic" difficulty appreciating "the reality of what her husband has done with [Lynsey] in the past as well as [K.B.] more recently." There were concerns that Elizabeth was not going to be able to provide for K.B.'s emotional needs.

In late 2007, Lynsey was released from Mitchellville prison and placed into a residential correctional facility (RCF). At this time, DHS coordinated services through the RCF for Lynsey including parenting skills sessions, meetings with caseworkers and therapists, and visitation with K.B during Lynsey's furloughs. Lynsey was also provided substance abuse treatment through random drug screens and alcoholics anonymous and narcotics anonymous meetings.

Just days prior to her planned release in January 2008, Lynsey failed to return to RCF after her work release program one evening. Instead, Lynsey broke into Elizabeth's home, stole some electronics that she pawned for cash, and absconded to Florida with her boyfriend. As a result, Lynsey is now considered an escapee from RCF, and there is an outstanding warrant for her arrest. Lynsey also has a warrant from the State of Illinois for her arrest.

On February 20, 2008, a contested review hearing was held. At this time, the juvenile court removed K.B. from Elizabeth's care and placed her in the custody of her paternal grandparents. This order was appealed and reversed on jurisdictional grounds by the supreme court. *See In re K.B.*, 753 N.W.2d 14, 17

(Iowa 2008) (holding that the juvenile court lacked authority to modify custody at the review hearing).

On remand, K.B. remained in the care of the paternal grandparents pursuant to a temporary removal order. On July 29, 2008, DHS confirmed a report of denial of critical care and failure to provide proper supervision by Elizabeth following inappropriate sexual contact between K.B. and her cousin during visitation with Elizabeth. The next day a contested removal hearing was held where the district court determined K.B. should remain in the care of her paternal grandparents.

On September 17, 2008, a contested modification hearing was held. At this time, Elizabeth was noted as again having filed for a divorce and as having received a protective order to ensure that the maternal grandfather had no contact with K.B. Nonetheless, the court found Elizabeth to be "ill equipped to protect [K.B.] or assist her in dealing with the issues that surround sexual abuse." The district court also found that visitation between K.B. and Lynsey in Florida was "unrealistic" while she was a fugitive from Iowa. However, Lynsey was allowed to speak to K.B. by telephone, and Elizabeth was allowed in-person visitation. The district court concluded the best interests of K.B. required her continued placement in the care of the paternal grandparents.

In late October 2008, Elizabeth told DHS that she was reconciling her marriage with the maternal grandfather, and that she was going to stop the divorce proceedings, drop the protection order, and move into a new home with him. At this time, K.B. began to express in her therapy sessions discomfort and anxiety about being in a place where her maternal grandfather lived, even if he

was not there. K.B. also reported that she feared her maternal grandfather would "surprise" her at Elizabeth's home. As a result, visitations between Elizabeth and K.B. were changed to twice a month supervised only.

On January 23, 2009, the guardian ad litem visited Lynsey while he was on vacation in Florida. He noted that Lynsey had stable employment, and a "very nice and appropriate" home. He also informed Lynsey that if she resolved her legal issues, he would consider a guardianship arrangement. Otherwise, he would recommend a termination petition be filed.

On March 26, 2009, a contested permanency hearing was held. At the hearing, Lynsey was represented by counsel and was allowed to present testimony by long-distance telephone from Florida. However, she was not allowed to listen to the entire hearing over the phone line. Her explanation for her non-presence was as follows:

> Q. Lynsey, can you tell the Court why you are not able to be here and visit with [K.B.] at this time. A. I have warrants out of Iowa and Illinois, and if I go back there, I will be doing a pretty good length of time in prison.

Lynsey offered no prospect or timetable for resolving her legal issues and/or returning to Iowa. Following the hearing, the district court ordered the permanency plan changed to adoption by the paternal grandparents and for the State to file a petition for termination of parental rights.

Lynsey and Elizabeth appealed the permanency order. The supreme court treated the filing as a request for interlocutory appeal and denied the application. *See In re W.D. III*, 562 N.W.2d 183, 186 (Iowa 1997) (holding that a permanency order is not a final, appealable order).

A petition for the termination of parental rights was filed on June 2, 2009, and a contested hearing was held on August 27, 2009. Lynsey was present by telephone for the entire termination hearing. The evidence at the hearing showed that Lynsey had been speaking with K.B. by telephone for only two or three minutes a week on Sundays. DHS had established the Sunday at 6 p.m. timeframe for calls because calls were coming at inconvenient times. However, there was no limit on the duration of the calls. They lasted just a few minutes because "Lynsey was having a hard time engaging [K.B.] in the conversation." It was also undisputed that Lynsey had not provided any financial support to K.B., despite promises to do so.

Lynsey did not dispute at the hearing that K.B. should remain with the paternal grandparents. She simply wanted them to be made guardians in lieu of a termination of parental rights. She offered no prospect of returning to Iowa:

> I would love to go back to Iowa. I would love to go home to be with my daughter. As of right now, that is not possible. I have been trying to work things out, see if I can work out a deal and get things taken care of. If it was up to me, I would come back, but I am doing very well in Florida.
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> . . . .
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> I am doing better here than I was there. Everybody makes mistakes. If I could turn back time and never have left Iowa, I would, but all I can do is keep doing what I am doing.

On September 4, 2009, the juvenile court entered a brief order terminating Lynsey's parental rights. Lynsey and Elizabeth appeal separately.

II. Scope and Standard of Review

Our review of proceedings to terminate parental rights is de novo. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). We give weight to the juvenile court's

factual findings, but are not bound by them. Iowa R. App. P. 6.904(2)(*g*); *J.E.*, 723 N.W.2d at 798.

III. Mother's Appeal

Lynsey argues: (1) her due process rights were violated when she was not allowed to be present by phone for the entire permanency hearing; (2) the State failed to make reasonable efforts to reunite her with her child; and (3) termination is not in the best interests of K.B.

A. Due Process

Lynsey first asserts that her due process rights were violated when the court did not allow her to be present by telephone for the entire permanency hearing held on March 26, 2009. We find this issue to be both moot and without merit.

"An issue is moot if it no longer presents a justiciable controversy because it has become academic or nonexistent." *In re B.B.*, 516 N.W.2d 874, 877 (Iowa 1994) (quoting *In re Meek*, 236 N.W.2d 284, 288 (Iowa 1975)). Although Lynsey was not allowed to personally attend the entire permanency hearing by telephone, she was present by telephone for the entire termination hearing. The termination hearing determined her rights and was the final order of the juvenile court. *W.D. III*, 562 N.W.2d at 186.

In any event, Lynsey received notice of the permanency hearing and was allowed to present testimony. Moreover, Lynsey was represented by counsel, and her counsel was present for the entire hearing. *See In re J.S.*, 470 N.W.2d 48, 52 (Iowa Ct. App. 1991). In *J.S.*, we specifically held that an incarcerated parent did not have a due process right to attend a termination hearing, so long

as he received notice of the petition and hearing, he was represented by counsel, his counsel was present, and he had the opportunity to present testimony. *Id*. The same fundamentals of due process were met here. Accordingly, we reject Lynsey's due process claim. We hold that the State did not have an obligation to pay for a phone line so Lynsey, a fugitive from Iowa, could listen to the entire permanency hearing.

B. Reasonable Efforts

Lynsey also asserts the State failed to make reasonable efforts at reunification. Iowa Code section 232.102(7) requires the State to "make every reasonable effort to return the child to the child's home as quickly as possible consistent with the best interests of the child."

> [T]he reasonable efforts requirement is not viewed as a strict substantive requirement of termination. Instead, the scope of the efforts by the DHS to reunify parent and child after removal impacts the burden of proving those elements of termination which require reunification efforts. The State must show reasonable efforts as a part of its ultimate proof the child cannot be safely returned to the care of a parent.

In re C.B., 611 N.W.2d 489, 493 (Iowa 2000) (citations omitted).

Lynsey did not assert at the termination hearing that services had not been provided. Rather, her theme was that the status quo should be preserved, so she could continue to be a long-distance figure in K.B.'s life without actually supporting K.B. or doing the hard work of parenting her. Thus, we believe the issue of reasonable efforts is not preserved. *See In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997) (questioning whether parent preserved error on reasonable efforts claim when it was not raised at the termination hearing); *see also In re R.J.*, 495 N.W.2d 114, 117 (Iowa Ct. App. 1992) ("As a general rule, an

issue not presented in the juvenile court may not be raised for the first time on appeal.").

In any event, the record shows that Lynsey was offered numerous services while she was incarcerated, in anticipation of her release. She was provided services that included parenting skills sessions, substance abuse treatments, housing and job assistance, and meetings with therapists. As a result of her progress, Lynsey was actually being considered as a possible placement option upon her release. However, just days prior to her scheduled release, Lynsey made a choice to flee the state of Iowa. Lynsey's status as a fugitive is due to her own actions, and she cannot fault DHS for being unable to provide services to her at this point. *In re E.K.*, 568 N.W.2d 829, 831 (Iowa Ct. App. 1997).

Furthermore, by becoming a fugitive, Lynsey self-limited the services she could receive. Lynsey could not receive services in Iowa because she was subject to arrest and imprisonment here. Much like an incarcerated parent, as a fugitive, Lynsey must take full responsibility for the conduct resulting in her inability to visit K.B. *See In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994).

In addition, Lynsey's earlier requests for the initiation of an interstate compact with Florida were unreasonable. First, it would have no effect on the barrier that prevented reunification, i.e. Lynsey's fugitive status and threat of incarceration. Second, it would reward Lynsey for fleeing the criminal justice system of our state.

Nonetheless, even as a fugitive, Lynsey was allowed to contact K.B. by phone every week in an effort to maintain the parental bond. Based upon the situation that Lynsey has put herself into, we cannot say DHS did not make reasonable efforts toward reunification.

C. Best Interests of the Child

In addition, the State has shown by clear and convincing evidence that K.B. could not be safely returned to Lynsey's care and that termination is in K.B.'s best interests. As of the time of the termination hearing, K.B. was eight years old. During these eight years, Lynsey has not been K.B.'s primary caregiver. Lynsey has remained in Florida since January 2008 and has shown no real interest in returning. Lynsey has maintained only minimal contact with K.B. Her proposed plan at the hearing was not to have K.B. live with her, but essentially to preserve the status quo where K.B. remains in limbo. However, K.B. is in need of a safe and permanent home. *See J.E.*, 723 N.W.2d at 801 (Cady, J., concurring specially) ("A child's safety and the need for permanency are now the primary concerns when determining a child's best interests."). Children should not be made to wait for responsible parenting. *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990); *see also In re T.T.*, 541 N.W.2d 552, 557 (Iowa Ct. App. 1995) (discussing that temporary or even long-term foster care is not in a child's best interest, especially when the child is adoptable). "At some point, the rights and needs of the child rise above the rights and needs of the parents." *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). If parental rights are terminated, K.B. can be adopted by her paternal grandparents and attain permanency.

IV. Grandmother's Appeal

At the outset, it is important to note that Elizabeth does *not* argue that K.B. should be placed into her care. *See* Iowa Code § 232.117(3)(c) (granting grandparents the right to be considered for guardianship or custody following termination of parental rights); *see also In re J.R.*, 315 N.W.2d 750, 752 (Iowa 1982) (providing grandparents the right to intervene in termination proceedings to be considered for guardianship and custody). Rather, Elizabeth contends: (1) the termination of Lynsey's parental rights was improper because the State failed to prove the statutory grounds, (2) the State did not offer services and make reasonable efforts to reunify K.B. with Lynsey, (3) termination of Lynsey's rights were not in the best interests of K.B., and (4) Lynsey's due process rights were violated. In short, Elizabeth is arguing Lynsey's positions for her.

To have standing, "a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." *See Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004). Elizabeth's arguments do not raise "a specific personal or legal interest" of her own. Thus, Elizabeth cannot stand in the place of Lynsey and argue her parental rights and interests.

Moreover, "in termination of parental rights proceedings each parent's parental rights are separate adjudications, both factually and legally." *In re D.G.*, 704 N.W.2d 454, 459 (Iowa Ct. App. 2005). We have held that one parent does not have standing to assert the unique rights of the other. *Id*. at 459-60. We find this principle to be equally applicable to a grandparent attempting to assert the

rights of a parent. Therefore, Elizabeth has no standing to contest the termination of Lynsey's parental rights respecting K.B.

V. Conclusion

Having found no error committed by the juvenile court, we affirm the order terminating Lynsey's parental rights.

AFFIRMED.