

IN THE COURT OF APPEALS OF IOWA

No. 1-880 / 11-1361
Filed November 23, 2011

**IN THE INTEREST OF C.E., C.P., and C.P.,
Minor Children,**

**B.L.P., Mother,
Appellant.**

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

A mother appeals a permanency order regarding legal custody and
guardianship of her children. **AFFIRMED.**

Donna Ruth Beary of Beary's Law Office, Des Moines, for appellant
mother.

Thomas J. Milller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Lisa Holl, County Attorney, and Seth J. Harrington, Assistant County
Attorney, for appellee State.

Mary Baird Krafka of Krafka Law Office, Ottumwa, for appellee father of
C.E.

Robert E. Breckenridge of Breckenridge, P.C., Ottumwa, for appellee
father of C.P. and C.P.

Samuel K. Erhardt, Ottumwa, attorney and guardian ad litem for minor
children.

Considered by Sackett, C.J., and Vogel and Eisenhauer, JJ.

VOGEL, J.

Brandy appeals the district court's permanency order placing legal custody of C.E., born 2003, with her father, Chadd, pursuant to Iowa Code section 232.104(2)(d)(2), and legal custody and guardianship of twins C.P. and C.P., born 2000, also with Chadd, pursuant to Iowa Code section 232.104(2)(d)(1). The district court also granted the motion to transfer jurisdiction of the guardianship proceedings to the probate court under Iowa Code section 232.104(7). We find that clear and convincing evidence supports that the children could not be returned to Brandy's home, and that the district court did not abuse its discretion in denying Brandy's motion for the appointment of a separate guardian ad litem for the children prior to the permanency hearing. We affirm.

I. Background Facts and Proceedings.

The Iowa Department of Human Services (DHS) became involved with this family in April 2010, based on allegations that Brandy, the mother of C.E., C.P., and C.P., was in a relationship with Jeremy, a registered sex offender.¹ It was reported that Jeremy had been at Brandy's home at least three times, and that Brandy had also been to Jeremy's home. Shortly after DHS received the

¹ Jeremy's status as a sex offender flows from the juvenile court's disposition following his guilty plea for "gross sexual imposition" in Ohio when he was thirteen years old; at the time of the permanency hearing Jeremy was twenty-three years old. In a report completed by psychologist Luis Rosell, Jeremy's criminal history was listed as follows:

- 2005 – Cashed a check that was stolen. Probation and drug classes. He noted the conviction was expunged from his record.
- 2009 – Living to[o] close to a school and Failure to Register—received probation which was completed.
- 2009 – Charge[d] with Indecent Contact with a Child—Was in jail for a year while waiting for disposition on the charge of indecent conduct with a minor and lascivious acts.

initial report, Jeremy was taken into custody after cutting off a monitoring ankle bracelet. On April 14, 2010, Brandy agreed that if Jeremy was released from jail, he would not have contact with the children. Jeremy was in jail for approximately three weeks; when he was released, he listed Brandy's address as his place of residence.

At a meeting with the children on the evening of May 21, 2010, DHS learned that Brandy and Jeremy had married earlier that day and with the children in attendance. After the meeting, Brandy agreed over the phone to the voluntary placement of all three children with C.E.'s father, Chadd.² On October 6, 2010, the parties stipulated that the children were in need of assistance under Iowa Code section 232.2(6)(c)(2) (2009) (parent's failure to exercise reasonable care in supervising child) and (n) (parent or guardian's mental capacity or condition, imprisonment, or drug or alcohol abuse results in child not receiving adequate care). In a dispositional order entered November 2, 2010, the district court ordered "[t]hat legal custody of the children shall remain with Chadd . . . with the department to monitor those placements on behalf of the court."

A permanency hearing was held over the course of three days—May 3, May 12, and June 3, 2011. The district court agreed with DHS's assessment that the children were at risk in Jeremy's presence. It found:

[Were] C.P., C.P., and C.E. Jeremy's children, the department's duties would be quite different as would the court's inquiry. The fact remains, however, these are not Jeremy's children, and Brandy

² Brandy had never been married to Chadd, nor C.P. and C.P.'s father Cleo, who the record indicates has not seen the twins for several years, is believed to be in prison, and is a registered sex offender. Brandy and Chadd lived together for approximately nine years, and as Cleo had never been a part of C.P. and C.P.'s life, Chadd served as a father figure to the two boys.

became involved and later married Jeremy knowing full well her relationship with him would be under great scrutiny by the department [and] the court. Armed with that knowledge, Brandy has pressed forward and maintained and defended her relationship with Jeremy, and in doing so has essentially chosen that relationship with Jeremy over that of her children.

The district court held that the “least restrictive alternative available,” which was also appropriate and in the best interests of the children, was to place legal custody of C.E. with her father Chadd, pursuant to Iowa Code section 232.104(2)(d)(2), and legal custody and guardianship of C.P. and C.P. also with Chadd, pursuant to Iowa Code section 232.104(2)(d)(1). Brandy appeals.

II. Scope of Review.

Our review of permanency orders is de novo. *In re A.T.*, 799 N.W.2d 148, 150 (Iowa Ct. App. 2011). We review both the facts and the law and adjudicate rights anew on the issues properly presented. *Id.* at 150–51. We review the district court’s decision regarding the appointment of a separate guardian ad litem for an abuse of discretion. *In re A.T.*, 744 N.W.2d 657, 662 (Iowa Ct. App. 2007).

III. Analysis.

A. Constitutional Claims.

Brandy raises eleven issues on appeal. Eight of the issues relate to alleged violations of Brandy’s constitutional rights, including equal protection, due process, and claiming cruel and unusual punishment. In identifying how she preserved error on each of her constitutional claims, Brandy merely states, “failure of the [c]ourt to apply basic legal principle invalidates decisions” and, “via

testimony.” The State responds that Brandy failed to preserve error on any constitutional argument.

We find that none of Brandy’s constitutional claims were preserved for appeal, as she failed to raise these claims in district court, and “issues must ordinarily be both raised and decided by the district court before we decide them on appeal.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); see *In re S.V.G.*, 496 N.W.2d 262, 264 (Iowa Ct. App. 1992) (reviewing a father’s appeal of a permanency order and stating, “[w]e have repeatedly held matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal”). Therefore, only three issues remain for our appellate review.

B. Evidentiary Standard.

Brandy argues the district court applied the wrong evidentiary standard in determining whether the children could be returned to her care. Under Iowa Code section 232.58(4)(c), the district court must find by “clear and convincing evidence” that the child cannot be returned to the child’s home, before entering a permanency order transferring guardianship and/or custody of a child. Brandy pointed to the permanency order, wherein the district court concluded, “The evidence fails to establish by a preponderance thereof the children can return home safely.” However, two paragraphs prior to that statement, the district court correctly stated, “That the burden of proof for any transfer of custody case is upon the Petitioner, the State, by clear and convincing evidence.”

Although the district court articulated conflicting evidentiary standards, we find on our de novo review and as discussed below, the State proved by clear

and convincing evidence that the children could not be returned to Brandy's home.

C. Statutory Grounds.

Brandy next contends the district court's decision is not supported by "substantial" evidence, and that it erred in finding:

- a. that "services were offered to the child's family to correct the situation that led to the child's removal". [sic]
- b. that Chad[d] would be providing the "children with a safe and more stable home" than to be returned to their Mother.
- c. fault with Mom for going back on her word and allowing her children to be exposed to Jeremy when Mom's uncontroverted testimony was that she "never let her children be alone with Jeremy" and no testimony exists that they were.
and when
- d. it overlooked or discounted Jeremy's uncontroverted testimony that Dr. Rosell had access to all his criminal records and was orally advised of same during Jeremy's evaluation with Dr. Rosell when the court concluded that Jeremy must not be honest.

What Brandy fails to understand is that she has put her relationship with Jeremy ahead of her relationship with her children such that her children cannot be returned to her home. Iowa Code § 232.58(4)(c). Brandy began dating Jeremy, knowing by his admission to her, that he had a conviction as a juvenile for an incident that occurred less than ten years prior, which classified him as a sex offender. Discounting Jeremy's past actions, Brandy pursued that relationship, and then ignoring DHS's cautionary advice, abruptly married Jeremy on May 21, 2010. Later that day, Brandy agreed the children could reside with Chadd.

A March 25, 2010 report prepared by Kelly Price, Probation/Parole III for the Eighth Judicial District Department of Correctional Services, and sent to DHS social worker Amanda Seymour, placed Jeremy at a moderate-to-high risk level to reoffend. When Jeremy was asked by psychologist Dr. Luis Rosell in March

2011 to rate himself on a scale from zero to ten on the likelihood that he would commit a future sex offense, Jeremy rated himself a one, explaining “I can never say never.” While Jeremy went on to explain how things were different now than in the past, it is still concerning that even Jeremy remains uncertain regarding his propensity to commit a future sex offense. Moreover, when asked at the permanency hearing whether she feels that Jeremy poses any threat to the children, Brandy responded by saying, “I’d like to [think not], but the whole thing of it is, is that you can never be too sure.”

The district court explained, “Despite [Brandy’s] representations regarding the nature of her relationship with Jeremy, and her pledge that she would not expose the children to him, Brandy married Jeremy in a ceremony at the courthouse with the children present.” While Jeremy has not participated in visits with the children since their removal, and Brandy has made an effort to redirect conversations with the children regarding Jeremy, prior to the children’s removal in May 2010, all three children individually informed a DHS worker that Jeremy utilized a crawl space in Brandy’s home to hide from DHS workers during visits. Further, the district court questioned whether the risk assessment completed by Dr. Rosell in March 2011, which assessed Jeremy at a “low risk” to reoffend, could have been affected by Jeremy and Brandy’s dishonesty. The record reflects that Dr. Rosell was contacted to evaluate Jeremy in the fall of 2010. In September 2010, DHS worker Seymour, who after receiving permission from Jeremy, called Dr. Rosell and provided Jeremy’s history. Seymour reported that Jeremy had not disclosed his entire history to Dr. Rosell, and Dr. Rosell was unwilling to work with Jeremy if he was in denial. Jeremy stated he would not

admit anything just to get help from Dr. Rosell, and would find someone else to evaluate him. However, by the time of the DHS report on January 27, 2011, it was noted that Jeremy was going to contact Dr. Rosell again. In considering Dr. Rosell's evaluation, the district court noted:

It is worthy of note that while Dr. Rosell interviewed both Jeremy and Brandy nowhere in that interview do either admit [to] Jeremy hiding in Brandy's home to avoid detection, nor do they mention Jeremy lying to police about the location of his residence when he was released from jail. Jeremy also never mentioned being charged and later convicted for failing to register as a sex offender, or for violating residency requirements. There is no way to know whether these facts would have impacted Dr. Rosell's ultimate conclusion that Jeremy poses a "low" risk to reoffend, but the omissions call into question Jeremy's assertion in the report that he has learned to be "honest about things."

While there is a conflict in the record as to whether Jeremy continues to pose a threat to the children, Brandy has chosen to gamble with her children's safety to continue having Jeremy in her life.³ The district court well understood these young children are defenseless should Jeremy perpetrate abuse upon them. On our de novo review, we find clear and convincing evidence supports that the children cannot be returned to Brandy's care.

D. Appointment of Guardian Ad Litem.

Brandy next argues the district court violated Iowa Code section 232.89(4) when upon motion, it failed to appoint a separate guardian ad litem (GAL) prior to

³ In his risk assessment evaluation, Dr. Rosell contemplated whether Jeremy's risk should be calculated based on his juvenile offenses, or the more recent adult charge. He noted, "How [t]o conduct a risk assessment in this specific case is difficult for the following reasons. Should [Jeremy] be seen as a juvenile sex offender based on his history of juvenile offending or be viewed as an adult sex offender even though the accusation and charge was later dismissed. Because of the dismissal of his adult charge I believe it is more appropriate to see him as a juvenile offender because scoring him on the Static-99 would overestimate his risk as he would obtain several points that are more prejudicial than probative."

the permanency hearing to advocate the children's personal preferences.⁴ The State responds by stating the district court exercised its discretion in refusing to appoint counsel for the children. The district court denied Brandy's motion based on the lack of evidence in support of her motion.

In defining the role of the GAL, Iowa Code section 232.89 states:

2. Upon the filing of a petition, the court *shall* appoint counsel and a guardian ad litem for the child identified in the petition as a party to the proceedings.

4. The same person *may* serve both as the child's counsel and as guardian ad litem. However, the court *may* appoint a separate guardian ad litem, if the same person cannot properly represent the legal interests of the child as legal counsel and also represent the best interest of the child as guardian ad litem, or a separate guardian ad litem is required to fulfill the requirements of subsection 2.

(emphasis added). The initial question in determining whether a separate GAL should be appointed is whether one GAL "can properly represent the legal interest of [the children] and also represent [their] best interest[s]." *A.T.*, 744 N.W.2d at 662. This court has also stated:

it would appear that the older, more intelligent, and mature the child is, the more impact the child's wishes should have, and a child of sufficient maturity should be entitled to have the attorney advocate for the result the child desires.

Id. at 663. In determining whether the appointment of a separate attorney is necessitated, we then consider the child's manifestation of his wishes, and his maturity. *Id.* In this case, C.P. and C.P. were eleven at the time of the

⁴ On April 6, 2011, Brandy filed a motion to have an attorney appointed for the children. The county attorney and the children's court appointed attorney resisted the motion. On May 3, 2011 Brandy filed a motion for the appointment of a separate guardian ad litem for the children, to replace the erroneous April 2011 motion requesting a separate attorney be appointed for the children, rather than a correct request that a separate guardian ad litem be appointed.

permanency hearing, and C.E. was seven. The children did not testify at the hearing, nor did the court note their maturity level. The GAL, Sam Erhardt, did inform the court of each child's preferences regarding who they would like to live with, and also relayed that only one of the twins, and not the other twin nor C.E., knew what a "bad touch" was.

Upon reviewing Brandy's motion for the appointment of a separate GAL to represent the children's best interests, the district court concluded,

In this case, though the guardian ad litem reported the children have an opinion about where they may wish to live, none of them testified. The only testimony regarding the maturity level of the children, and their level of understanding was from Ms. Moss who indicated she did not believe the children were old enough to appreciate the risks posed by residing with a registered sex offender. Accordingly, given the lack of evidence presented in support of the motion the request by the mother for a separate guardian ad litem should be overruled and denied.

Based on our review of the record, we find the district court did not abuse its discretion in denying Brandy's motion for the appointment of a separate GAL.

We therefore affirm the district court's permanency order.

AFFIRMED.