IN THE COURT OF APPEALS OF IOWA

No. 2-1072 / 12-1844
Filed January 9, 2013

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

F.A., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

A great-grandmother challenges the juvenile court's order declining to reunify her with the child she adopted. **REVERSED AND REMANDED.**

Donald L. Williams, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellee.

Kimberly Ayotte of Youth Law Center, Des Moines, attorney and guardian ad litem for minor child.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

At the age of five, K.O. was adopted by her great-grandmother, Frances. Four years later, the juvenile court adjudicated K.O. as a child in need of assistance (CINA) because Frances had physically abused her. The court removed K.O. from Frances's home and placed the child with her biological grandmother, Katrina.

On October 1, 2012, the juvenile court held a permanency hearing at which the Department of Human Services (DHS) case worker recommended reunification between K.O. and Frances. The juvenile court rejected the DHS plan and ordered that permanency be established with K.O.'s grandmother Katrina. Frances challenges that order on appeal.

In our de novo review, we find K.O. should be returned to her adoptive home. We do not find convincing evidence in the record to support the juvenile court's determination that K.O. faces a risk of physical abuse if returned to Frances's custody.

I. Background Facts and Proceedings

K.O. was born in November 2002. Her biological parents voluntarily consented to her adoption by Frances, her great-grandmother, in October 2007.

On October 7, 2011, K.O. arrived at her Des Moines elementary school with bruising and redness on her arms and back. She told her third-grade teacher that Frances, her adoptive mother, "smacked" her repeatedly because she did not gather up her socks and get dressed for school fast enough. K.O. reported that morning was not the first time that Frances had hit her.

The juvenile court approved the DHS application to remove K.O. from Frances's home. The court adjudicated K.O. as a CINA on November 16, 2011. The DHS placed K.O. with her biological grandmother Katrina and her grandmother's husband.

K.O. started weekly therapy sessions on November 22, 2011. The therapist diagnosed K.O. with an adjustment disorder. The therapist also worked with Frances to prepare her for an "accountability" session with K.O. At that session, Frances was supportive of K.O. and took full responsibility for the physical abuse she inflicted on the child. The therapist also worked to ease the tension in the relationship between Katrina and her mother, Frances, because that conflict upset K.O.

The juvenile court held dispositional hearings on December 20, 2011, and June 19, 2012, and continued K.O.'s placement with her grandmother, Katrina. In the summer of 2012, K.O. started having unsupervised visits with Frances three times per week. Also during the summer, K.O. had the chance to spend time with her two biological brothers, who live in Indiana. The boys stayed with their grandmother, Katrina, but also visited their great grandmother, Frances.

In the fall of 2012, K.O. expressed to her therapist a preference for remaining in Katrina's home, though the therapist believed that Frances and K.O. were "developing a deeper level of trust with one another by spending quality time together and by communicating feelings to one another."

On October 1, 2012, the juvenile court held a permanency hearing. The State told the court that the DHS recommended reunification of K.O. with her

adoptive mother, Frances. The guardian ad litem (GAL) requested "a permanency order to enter that would allow [K.O.] to remain in the long-term custody of her grandmother Katrina, where she's been for the past year." The GAL mentioned an "age factor" between K.O. and Frances—asserting Katrina was "better suited to provide care for her long term." Frances's attorney reminded the court that the great-grandmother was the adoptive mother of the child, and that she had complied with all of the DHS recommendations and was ready to have K.O. returned to her.

The court declined the DHS recommendation and ordered K.O. to stay with her grandmother Katrina. Frances appealed. The GAL filed a response to the petition on appeal in support of the juvenile court's ruling. The State filed a statement to this court reciting its client's position at trial that favored return of K.O. to the mother, but claiming that it "cannot make any filing on appeal."

II. Scope and Standards of Review

We review permanency orders de novo. *In re A.T.*, 799 N.W.2d 148, 150–151 (Iowa Ct. App. 2011). We examine both the facts and the law and determine rights anew on the issues properly presented. *Id*. While we give weight to the juvenile court's factual findings, we are not bound by them. *Id.* The child's best interest is our driving concern. *Id.*

III. Analysis

Following a permanency hearing, the juvenile court faces four options:

1. Return the child to the child's home.
2. Continue placement for an additional six months.
3. Direct the county attorney or the attorney for the child to pursue termination of parental rights, or

> 4. Enter an order placing custody with a suitable person for guardianship, long-term care or another permanent living arrangement for the child.

See Iowa Code § 232.104(2) (2011). The first choice, returning the child home, is the preferred outcome. *In re A.T.*, 799 N.W.2d 148, 151 n.6 (Iowa Ct. App. 2011). Where, as in the instant case, a juvenile court chooses the fourth alternative, the court must find convincing evidence that (1) termination would not be in the child's best interest; (2) services were offered to the family to correct the situation that led to the child's removal from the home; and (3) the child cannot be returned to the home. Iowa Code § 232.104(3)(c).

The juvenile court found the following:

> While [Frances] has engaged in requisite educational and safety prevention services, Court determines that this Child (who will turn ten years old in about a month) will best have her physical and emotional needs met in the home of her maternal grandmother [Katrina] where she has been placed and not that of her adoptive mother/maternal great grandmother. Child will better stay connected with her persons of importance (biological siblings and mother who reside out of state) if she lives with her maternal grandmother [Katrina]. And while [Frances] has made apparent strides and done what has been asked of her in the way of services, the Court is convinced that . . . there still is a very real risk that this Child would be subjected to physical abuse as a form of punishment if the child is solely in the care and custody of [Frances].

Frances argues on appeal that the juvenile court "failed to articulate the evidence it considered when concluding that there is a real risk of physical abuse of the child by her mother if left in her custody." We agree with Frances that the permanency order does not identify any exhibit or report supporting the finding that K.O. faces a continued risk of harm if returned home.

In our de novo review of the record, we find no backing for the juvenile court's finding. In fact, all the available evidence points to a positive change in Frances's approach to parenting. For example, a September 17, 2012 letter from K.O.'s therapist dispels any concern about abuse:

> [K.O.] has also seen Frances handle her frustrations at times in a very appropriate manner with no threat of any further harm to [K.O.]; and Frances has done well with calmly processing disagreements that have occurred.

The DHS caseworker reported that Frances completed parenting classes and "gained insight into how physical abuse is not an appropriate punishment and what other discipline options are appropriate for a child [K.O.'s] age."

The Family Safety, Risk and Permanency Services (FSRP) worker observed that Frances is "now more open and admitting" of her misconduct. Under the heading "Current or Potential Risks," the FSRP worker stated: "Frances has apologized to [K.O.] several times and knows what she did was wrong. Frances has also promised to never do it again." The FSRP worker reported no problems with K.O.'s overnight visits with Frances.

The court appointed special advocate (CASA) volunteer described the following positive interaction:

> [K.O.] was visiting Frances, and had returned home after school. . . . She was doing her geography homework with Nana's supervision and occasional help. Frances had dinner in the oven, and she and [K.O.] were planning to attend church after dinner. My visit was approximately one hour, and I had a chance to observe Frances and [K.O.] together with no other family members present. [K.O.] and Frances seem to have a very close relationship, showing lots of respect, affection, and humor toward each other. Frances is 75 but appears many years younger, both in energy and attitude.

The juvenile court decided that K.O.'s "emotional needs and sense of permanency and safety [were] being best met in the home of her maternal grandmother." But the question at the permanency hearing was not whether Frances or Katrina could provide K.O. with a better home. The question was whether K.O. could safely go home to live with Frances, her legal, adoptive parent. *See A.T.*, 799 N.W.2d at 151 n.6 (noting preferred choice under section 232.104(2)(a) is to return child home); *see also In re Guardianship of Stodden*, 569 N.W.2d 621, 623 (Iowa Ct. App. 1997) (highlighting preference in Iowa Code section 633.559 for placement with parent). The evidence at the permanency hearing did not overcome the preference for reunification.

The juvenile court also determined that K.O. would "better stay connected with her persons of importance (biological siblings and mother who reside out of state) if she lives with her maternal grandmother." Initially, we question the essential nature of K.O.'s continuing connection with the biological mother who gave her up for adoption to Frances. In addition, the record shows that when they were visiting for the summer from Indiana, K.O.'s brothers spent time at the homes of both their grandmother and their great-grandmother. But more importantly, as noted above, the question before the juvenile court was not whether K.O. would have more opportunities if she remained out of her adoptive home, but whether she could return to it.

In its conclusions of law, the juvenile court stated: "The burden of proof is on the Petitioner-State by convincing evidence." That conclusion would be correct if the DHS was advocating for a permanency order placing the child

outside the home under section 232.104(2)(d). *See In re A.D.*, 489 N.W.2d 50, 52 (Iowa Ct. App. 1992) (describing State's burden under Iowa Code section 232.104(3)(c) to show by convincing evidence that child cannot be returned home). But in this case, the DHS asked the court to return the child home under section 232.104(2)(a). The statute only applies the "convincing evidence" standard to orders placing children outside their home pursuant to section 232.104(2)(d). Iowa Code § 232.104(3). The State did not have a burden to prove by convincing evidence that K.O. could be returned home.

At the permanency hearing, the GAL assumed the burden to show K.O. could not be returned home. The GAL stated: "I'm not in agreement with the recommendations as set forth by the State regarding permanency." The GAL recommended K.O. be allowed to remain in Katrina's care because the grandmother was in the best position to provide emotional stability for K.O. in the long term. The GAL did not present evidence or exhibits. The GAL did not establish by convincing evidence that K.O. could not be returned home as required by section 232.104.

Before closing we address K.O.'s expressed desire to stay in Katrina's home. The GAL argues in her brief that K.O. "has verbalized consistently" to her therapist, the CASA, her GAL, and the court that she wishes to remain with her grandmother. K.O. was nine years old at the time of the permanency hearing. In termination cases, section 232.116(3)(b) allows a juvenile court to forego termination if a child is over ten years of age and objects to severing ties with his or her parent. Under section 232.116(2)(b)(2), in considering a child's integration

into a foster family, a juvenile court may look to the "reasonable preference of the child, if the court determines that the child has sufficient capacity to express a reasonable preference." Here, the juvenile court did not address K.O.'s capacity to express a placement preference.

We appreciate the GAL's efforts to communicate K.O.'s views, but we do not find that they dictate our result. As noted in the DHS report to the juvenile court, while K.O. feels comfortable in Katrina's home and believes that she has more opportunities there, the goal is reunification with Frances. K.O. does not express any concerns that she will be harmed if returned home, and, indeed, wishes for a continuing relationship with Frances.

The juvenile court's rejection of the DHS recommendation for reunification was not supported by convincing evidence. We conclude K.O. should be returned to Frances's care. We remand to the juvenile court for entry of an order consistent with this decision.

REVERSED AND REMANDED.