IN THE COURT OF APPEALS OF IOWA

No. 3-1024 / 13-1185
Filed November 6, 2013

**IN THE INTEREST OF I.G.M., A.M., and C.M.,
Minor Children,**

**G.C., Intervenor,
Appellant.**

Appeal from the Iowa District Court for Scott County, Christine Dalton, District Associate Judge.

A grandmother appeals an order declining to remove the Department of Human Services as guardian of certain children. **AFFIRMED.**

Jason Reiper of Reiper Law Firm, Des Moines, for appellant intervenor.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Michael J. Walton, County Attorney, and Julie A. Walton, Assistant County Attorney, for appellee State.

Marsha Arnold, Davenport, attorney and guardian ad litem for minor children.

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

VAITHESWARAN, P.J.

We are asked to review an order declining to remove the Department of Human Services as guardian of certain children.

I. Background Proceedings

A juvenile court terminated a mother and father's parental rights to three children. The termination order placed the children "in the custody and guardianship of the Department of Human Services." The parents and the mother's mother appealed.

While the appeal from the termination order was pending, the grandmother filed a post-termination motion in the juvenile court to have the department removed as guardian of the children. Following an evidentiary hearing, the juvenile court denied the motion. The court stated that "[g]uardianship shall continue with the Iowa Department as the Guardian." The grandmother filed a notice of appeal from that order.

Meanwhile, this court affirmed the termination of parental rights order. *In re I.M., A.M., & C.M.*, No. 13-0499, 2013 WL 2638069, at *4 (Iowa Ct. App. June 12, 2013). Within that opinion, the court affirmed the denial of the parties' request "to consider the maternal grandmother as an alternative placement for the children." *Id.* The court agreed with the juvenile court's finding that such a placement would not be in the children's best interests. *Id.* The court reasoned that the grandmother "will continue to put her daughter's needs and desires ahead of those of her grandchildren." *Id.*

Based on this termination opinion, the State moved to dismiss the grandmother's appeal of the post-termination order denying her request for a

change of guardian. The grandmother resisted the motion and filed a petition for writ of mandamus seeking an order that the juvenile court "not [] grant any pending or yet to be filed Petition for Adoption regarding the children-in-interest." The Iowa Supreme Court ordered the State's motion to dismiss the appeal submitted with the appeal.

II. Motion to Dismiss

"The juvenile court [is] statutorily responsible after termination of . . . parental rights, not only for initially assigning a guardian and custodian for [the child], but also for continuing supervision and monitoring of him consistent with his best interests." *In re E.G.*, 738 N.W.2d 653, 656 (Iowa Ct. App. 2007) (citations omitted). This responsibility flows from Iowa Code section 232.117(3) (2013), which states:

> If the court concludes that facts sufficient to sustain the petition have been established by clear and convincing evidence, the court may order parental rights terminated. 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:
> a. The department of human services.
> b. A child-placing agency or other suitable private agency, facility or institution which is licensed or otherwise authorized by law to receive and provide care for the child.
> c. A parent who does not have physical care of the child, other relative or other suitable person.

The responsibility also flows from Iowa Code section 232.117(6)-(9), which provide for ongoing post-termination court supervision.

Once a guardian is named, Iowa Code section 232.118(1) allows an interested party or the court on its own motion to apply for removal of the guardian. Following notice and a hearing, "the court having jurisdiction of the

child" may remove the court-appointed guardian and appoint another pursuant to section 232.117(3).

The State essentially argues that the juvenile court did not have "jurisdiction" of the child when the grandmother moved to remove the department as guardian. The State premises its argument on the grandmother's prior appeal from the termination decision. It asserts that the appeal divested the juvenile court of jurisdiction. *See Christiansen v. Bd. of Educ. Exam'rs*, 831 N.W.2d 179, 189 (Iowa 2013) ("Ordinarily, the filing of a notice of appeal divests the trial court of jurisdiction . . . ."). In making this argument, the State concedes the juvenile court may consider "collateral issues" while an appeal of a termination ruling is pending, but contends the issue the grandmother raised in her motion for change of guardian was identical rather than collateral to the issue she raised on appeal from the termination decision.

We disagree. The grandmother's post-termination motion sought the removal of the department as guardian of the children; the termination appeal sought to have the children placed with the grandmother. The issues were technically distinct. In speaking to the juvenile court, the county attorney articulated the distinction as follows:

> You are precluded from reconsidering your original judgment because your original judgment is on appeal right now. You are not precluded from seeing if the evidence shows, since you made that judgment, has there been a substantial change in circumstance, has the Department neglected the children's best interest, or have they been unreasonable in their efforts.

Because the post-termination issue as framed in the juvenile court was different from the issue on appeal, we conclude the present appeal is not moot and we proceed to the merits.

III. Removal of Department as Guardian

The grandmother argues the department should have been removed as guardian because (1) it did not act "in the best interests of the children by failing to act reasonably or responsibly in securing a permanent home for the children," and (2) "a substantial change of circumstances has occurred to justify removing [the department] as guardian for the minor children."

The grandmother's first argument blurs the distinction between the issue on appeal of the termination order and the issue as framed by the county attorney at the hearing on the post-termination motion. Citing her background and credentials, she argues "[s]he is willing and able to care and provide for these children." This argument is essentially a rehash of her contention that she was a viable placement option for the children at the time of termination.

As noted, this court addressed the question of whether the juvenile court should have placed the children with the grandmother. *See I.M*, 2013 WL 2638069, at *4. Our ruling, issued before the juvenile court decided the change-of-guardian motion, became the law of the case on this question. *State ex. rel. Goettsch v. Diacide Distribs., Inc.*, 596 N.W.2d 532, 537 (Iowa 1999) ("The doctrine of the law of the case represents the practice of courts to refuse to reconsider what has once been decided."); *In re D.W.*, 385 N.W.2d 570, 583 (Iowa 1986) (noting one aspect of a court of appeals decision became law of the

case). We decline to revisit the grandmother's assertion that the children should have been placed with her.

That said, the grandmother's first argument also addresses the question of whether the department, as guardian of the children, acted in the children's best interests. This is an appropriate question for consideration. *See In re D.H.*, No. 10-1313, 2010 WL 4484849, at *4 (Iowa Ct. App. Nov. 10, 2010) (setting forth standards for evaluating assertion that guardian should have been removed, including children's best interests).

The grandmother specifically argues that retention of the department as guardian was not in the children's best interests because the department employee in charge of the case showed bias towards her and conveyed that bias to the person conducting a home study. The juvenile court acknowledged the existence of bias but found that the bias was based on "actual knowledge and personal experience" and "upon the department's dealings with and professional opinions of [the grandmother] as a permanent placement for her grandchildren." On our de novo review, we agree with this assessment.

The department initially had no concerns with the grandmother and advocated for placement of two of the three children with her. For four months after the child-in-need-of-assistance action was initiated, the oldest child lived with the grandmother and her own mother, who was also in the grandmother's home. At that point, the juvenile court transferred the oldest child to the child's father, who was caring for the second child. When the youngest child was born, the juvenile court placed him with the maternal grandmother. Eventually, he was moved to foster care.

The department's view of the grandmother changed over time based on several factors. First, the oldest child told an individual supervising visits that she was in a car accident when the grandmother was driving. Second, the department stated that the grandmother was attempting "to disrupt the [children's] placement with their father." Third, the department claimed that the grandmother "demonstrated a pattern of not only enabling [the mother] but . . . undermin[ing] the Department, [service provider], and her daughter."

The third factor is based on several incidents. The grandmother disappeared with the oldest child for a weekend after the child was ordered removed from her care. She also left the children with her son, without department approval and showed preferential treatment towards the oldest child. Finally, the department asserted that the grandmother allowed the children to be with their mother on an unsupervised basis.

The grandmother strenuously disputed this last assertion, noting that on one of the cited occasions, she was at a medical appointment with the youngest child and, unbeknownst to her, the father dropped the oldest child off at her home to be cared for on an unsupervised basis by the mother. The father acknowledged that he left the children at the grandmother's house when he had nowhere else to take them, lending some support to the grandmother's version of events. Accordingly, we decline to consider this incident.

Even without this incident, the other cited evidence is sufficient to support the juvenile court's conclusion that the department's claimed bias was based on documented incidents of concern.

This conclusion disposes of the grandmother's additional assertion that the department poisoned the well by conveying its biased views to the person in charge of conducting a home study. Additionally, we agree with the juvenile court that the investigator did not simply rely on the department's assertions but considered the statement of another witness who recommended against transferring custody of the children to the grandmother. In sum, the department's interactions with the home-study investigator did not show that it acted contrary to the children's best interests.

We turn to the question of whether there was a substantial change of circumstances warranting a change of guardian. *See id.* (referring to this factor). The department employee in charge of the case testified at the hearing on the grandmother's removal motion, as did others. Virtually all the testimony related to the grandmother's request for placement of the children. As discussed, that issue was resolved on appeal of the termination ruling and the grandmother presented scant, if any, new evidence supporting the removal of the department. We concur in the juvenile court's conclusion that "[t]he placement and potential adoptive home decision by the Department has not changed from the permanency hearing . . . . There has been no substantial change in circumstances to justify removal of the Department as the Guardian."

We affirm the juvenile court's denial of the grandmother's motion to remove the department as guardian and, accordingly, deny the grandmother's petition for writ of mandamus.

AFFIRMED.