IN THE COURT OF APPEALS OF IOWA

No. 2-983 / 12-1387
Filed November 29, 2012

IN THE INTEREST OF D.H.,
Minor Child,

K.H., Intervenor,
Appellant.

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

A child's biological uncle appeals from the denial of his petition for removal of guardian and change of custody. **AFFIRMED.**

Alan Wilson of Miles Law Firm, Corydon, for appellant.

Thomas J. Miller, Attorney General, Katherine S. Miller-Todd, Assistant Attorney General, and Richard F. Scott, County Attorney, for appellee State.

Robert Bozwell of Bozwell Law Office, Centerville, for appellees foster parents.

Debra George of Griffing & George Law Firm, Centerville, attorney and guardian ad litem for minor child.

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

POTTERFIELD, P.J.

K.H., biological uncle of D.H., appeals from the denial of his petition for the removal of the Department of Human Services (DHS) as guardian for D.H. and request to have custody of D.H. placed with him. He contends the juvenile court's failure to remove DHS as guardian and place the child with him was in error, as he is D.H.'s relative and the department was required under federal law to prefer placement with a relative. We find the appeal is moot, but we reach the merits of the appeal and find the juvenile court properly declined to remove DHS as guardian and place D.H. in the care of K.H.

1. Facts and Proceedings

D.H. was born in 2009 prematurely with severe medical issues affecting his lungs. He was adjudicated CINA at two months old due to reports of domestic violence and exposure of D.H. to illegal drug use in his biological parents' home. For the first nineteen months of his life, D.H. was on around-the-clock oxygen, and he may require further oxygen treatment as he grows older. When D.H. was six months old, he was released from the hospital. At seven months old, he was removed from his mother's home and placed in a foster care home, where he has remained for over two years. The juvenile court terminated the parental rights of D.H.'s biological mother and father on November 9, 2011. The court placed custody and guardianship of D.H. with DHS for pre-adoptive care. This court affirmed the termination order. *In re D.H.*, No. 11-1875, 2012 WL 163002 (Iowa Ct. App. Jan. 19, 2012).

A December 2009 review of the foster home found D.H.'s foster parents well-equipped for both foster care and adoption of up to two children under the age of six. D.H.'s foster parents are unrelated to D.H.

During the proceedings resulting in termination of the parental rights of D.H.'s biological parents, K.H. sought to establish contact with DHS to express interest in adopting D.H. K.H. requested an Interstate Compact home study be performed to evaluate his North Dakota home for adoption of D.H. This report denied that the home was appropriate for D.H., due to the temperament of the family's large dog, back problems experienced by K.H.'s wife, and the isolation of the family. Also of concern was that all five members of K.H.'s family had contracted MRSA at one time. At the termination hearing, K.H. and his wife presented testimony rebutting the negative home study. DHS, as the child's guardian, requested custody of D.H. remain with DHS, which was granted. The court noted D.H.'s strong bond with his foster parents. K.H. also requested a second home study be conducted. This was not done.

K.H. then moved to remove DHS as guardian and have custody of D.H. placed with him, citing the inaccuracy of the home evaluation and his relation to D.H. K.H. also contended none of the paternal relatives were contacted by DHS regarding the termination proceedings. When asked about whom DHS had spoken with, the DHS adoption specialist assigned to D.H.'s case stated that a list of both paternal and maternal relatives contacted regarding the case accompanied the file when it was transferred to her. The court denied K.H.'s motion, finding removal improper because DHS did not act unreasonably, and that transfer of custody was improper due both to the negative home study and

because D.H. had been placed for two years with his foster family who was seeking adoption and was the only family D.H. had known.

After its decision to deny the motion by K.H. to remove DHS as guardian and have custody placed with him, our supreme court denied a request for stay of the action for adoption of D.H by his foster parents. On August 9, 2012, a final adoption decree was issued and the adoption of D.H. by his foster parents was finalized.[1] K.H. appeals from the proceedings seeking to remove DHS as guardian and have D.H. placed with him.

2. Analysis

The State and D.H.'s guardian ad litem (GAL) urge that because adoption of D.H. has been finalized, the appeal by K.H. in this case is moot. They reason that the outcome of this appeal would have no effect on the pre-adoptive placement of D.H. with his foster parents, nor would it affect the former award of custody of D.H. with DHS.

An appeal will be moot if it no longer presents a judiciable controversy because the issue "has become academic or nonexistent." *In re D.C.V.*, 569 N.W.2d 489, 494 (Iowa 1997). In order to evaluate whether a claim is moot, we ask whether our decision "would be of force or effect in the underlying controversy." *Id.* An appeal will generally be dismissed if a judgment "will have no practical legal effect upon the existing controversy." *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 679 (Iowa 1998). However, we will still consider an appeal on the merits, despite its lack of effect on the underlying controversy, where the

[1] We note while this information is technically outside of the record, it may be considered to establish mootness. *In re L.H.*, 480 N.W.2d 43, 45 (Iowa 1992).

issue is a matter of public importance and the problem is likely to recur. *Id.* In deciding whether to accept such a case we will consider whether the action is of a nature that it will often be moot before reaching an appellate court. *Id.*

We agree that a decision regarding the pre-adoptive issues appealed here would have no bearing on the underlying controversy, since the adoption of D.H. has already been finalized. Because there has been an adoption, preadoptive decisions regarding placement and custody are no longer issues that will have practical legal effect.

However, we choose to reach the merits of this case. Termination and adoption proceedings may proceed quickly, so that there is no time for appeal from a post-termination order. Thus, such orders will frequently become moot prior to appeal. We also find the issue before us—whether special weight should be given in an adoption proceeding to a relative of a child whose parents have had their rights terminated—is one of public importance.

We review actions seeking to remove DHS as guardian and challenging custody placement de novo. *In re E.G.*, 738 N.W.2d 653, 654 (Iowa Ct. App. 2007). We review the facts and law and adjudicate rights anew, but give weight to the findings of fact of the juvenile court. *Id.* The court's core role in these proceedings is to ensure placement is in the best interests of the child. *Id.* at 657; Iowa Code § 232.1 (2011).

K.H. urges us that the Adoption and Safe Families Act of 1997 "mandates that [DHS] place a child with a relative versus a third party." Our supreme court has previously stated a rigid interpretation of the Act mandating family placement over consideration of the health and safety of the child is in error.

> [T]he family preservation concept which guided our general national policy for the last two decades was found to be detrimental to children in some cases. Consequently, the Adoption and Safe Families Act of 1997, Public Law 105–89, 111 Statutes 2115 (codified as amended in scattered sections of 42 U.S.C.), now broadens the focus of reunification to place greater emphasis on the health and safety of the child, and mandates a permanent home for a child as early as possible. *See* 42 U.S.C. § 675(5)(C).

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

Iowa's legislature has enacted a preference for relatives during the CINA proceedings.

> Iowa Code section 232.99 requires the court to make "the least restrictive disposition appropriate considering all the circumstances." The home of a relative is considered less restrictive than placement in a private agency, facility or institution or placement with the department of human services. *Id.* §§ 232.99(3), .102(1). Thus, chapter 232 favors relative placements over nonrelative placements.

In re N.M., 528 N.W.2d 94, 97 (Iowa 1995). If parental rights are terminated, however, Iowa Code section 232.117(3) lists the options for transfer of guardianship and custody of children.

> 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.

Iowa Code § 232.117(3). There is no preference indicated in this section between subsections (a) through (c). *See id.*; *accord In re R.J.*, 495 N.W.2d 114, 117 (Iowa Ct. App. 1992) ("There is no statutory preference for a relative [post-

termination]. The paramount concern is the best interest of the children."). This comports with our supreme court's interpretation of the Adoption and Safe Families act in *C.B.*, as well as Iowa Code section 232.1, which states: "[t]his chapter shall be liberally construed to the end that each child . . . shall receive . . . the care, guidance and control that will best serve the child's welfare." Iowa Code § 232.1; *C.B.*, 611 N.W.2d at 493.

Next, K.H. asserts our precedent in *In re E.G.*, 745 N.W. 2d 741, 744 (Iowa Ct. App. 2007), stands for the proposition that children should not be placed "with foster parents for the purposes of adoption when there are capable and responsible members of the child's biological family willing, ready and able to take custody of the child and adopt the child." He also faults DHS for failing to contact any of the paternal relatives during the CINA proceeding.[2]

K.H.'s characterization of *E.G.* is misplaced. The guardian in *E.G.* recommended a different family than the foster mother for adoption, where the foster mother failed to express a desire to adopt until after DHS made significant efforts to find an adoptive home for the child. *E.G.*, 745 N.W. 2d at 744. The juvenile court placed the child with the foster mother. *Id.* Our court held that in determining placement for the child, the court "invaded the right and duty of the guardian to choose a specific placement." *Id.* at 744. Here as well, it is the department's duty and right to choose the placement for D.H. *See id.*; *see also*

[2] It is unclear whether DHS did contact any paternal relatives, since K.H. failed to raise this issue before the juvenile court during the CINA proceeding. Instead, the court properly found DHS's actions as guardian of D.H. after termination to be reasonable after reviewing the list of contacted relatives.

Iowa Code § 232.2(21) (finding guardian's role is to "make important decisions which have a permanent effect on the life" of the child).

D.H. has spent almost his entire life in a suitable adoptive home. Both our code and the Adoption and Safe Families Act recognize the important element of time, especially with children this young. *C.B.*, 611 N.W.2d at 493. Also fundamental to the child's best interests in adoptive placement is where the child has developed a bond. *In re A.H.*, 519 N.W.2d 425, 427 (Iowa Ct. App. 1994) ("We recognize the trauma a child suffers when severed from strong family bonds."). DHS did not act unreasonably in carrying out its duties as guardian including recommending continuing placement of D.H. with his foster parents. *See E.G.*, 745 N.W.2d at 744. Upon our de novo review of the record, we find the juvenile court properly declined to remove DHS as guardian of D.H. and continued placement with his foster family for adoption.

AFFIRMED.