IN THE COURT OF APPEALS OF IOWA

No. 6-041 / 05-1787
No. 6-117 / 06-0083
Filed July 12, 2006

IN THE INTEREST OF A.C.,
Minor Child,

A.C., Minor Child,
Appellant,

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

The guardian ad litem appeals from the district court order placing the child with her paternal great-grandparents. **REVERSED AND REMANDED.**

Jennifer Olsen of Olsen Law Office, Davenport, guardian ad litem for appellant minor child.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, William E. Davis, County Attorney, and Gerda Lane, Assistant County Attorney, for appellee State.

Cheryl Newport of Newport & Newport, P.L.C., Davenport, for intervenor-foster parents.

Neill Kroeger, Davenport, for appellee mother.

Jean Capdevila, Davenport, for appellee father.

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

MAHAN, J.

The guardian ad litem appeals the district court's order modifying the dispositional order and placing the minor child with her paternal great-grandparents in Illinois. We reverse the order of the district court and remand for further proceedings.

I. Background Facts and Proceedings.

A.C., born in April 2004, is the daughter of Casey and Maurice. She was removed from Casey's care in February 2005 due to the presence of methamphetamine in her system, Casey's substance abuse, and the presence of a sex offender in the home. Maurice has been incarcerated in Illinois at all times during this proceeding. Maurice's grandparents, Sereatha and Roger, came forward at the time of A.C.'s adjudication as a child in need of assistance (CINA) to request placement with them in Illinois. A.C. was instead placed in foster care in Iowa to avoid hindering reunification efforts with Casey. She was adjudicated CINA in March 2005. While Casey initially cooperated well with reunification services, her efforts began to wane in June 2005. Casey stopped attending substance abuse treatment, gave drug screens positive for controlled substances, stopped working, and failed to maintain her residence. The Iowa Department of Human Services (DHS) requested Casey check into inpatient treatment in July 2005 due to her relapse. Instead, Casey fled to Sereatha and Roger's home in Illinois.

During the pendency of the CINA case, there were concerns from the DHS and other parties about Sereatha and Roger as a possible placement for A.C. The concern was due to their ages, their past abilities to parent, the current

residence of Maurice's sister, Teri, in Sereatha and Roger's home, and Sereatha and Roger's indications that they will allow Casey and Maurice to see A.C. and foster a relationship with her in their care. A home study on Sereatha and Roger was conducted through Lutheran Social Services of Illinois. The report, dated May 2, 2005, approves Sereatha and Roger for placement but fails to address the concerns listed above. The modification hearing was held on October 11, 2005, where Sereatha and three service providers testified. The juvenile court ordered modification of the dispositional order on October 20 and ordered placement with Sereatha and Roger no later than December 1, 2005. The guardian ad litem now appeals. The supreme court has issued a stay of the transfer of custody pending outcome of this appeal.

II. Scope of Review.

We conduct a de novo review of CINA proceedings. *In re H.G.,* 601 N.W.2d 84, 85 (Iowa 1999). We give weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses, but we are not bound by these findings. Iowa R. App. P. 6.14(6)(*g*). Our overriding concern in such cases is always the best interests of the children. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). We also recognize that Chapter 232 favors relative placements over non-relative placements. *See In re N.M.*, 528 N.W.2d 94, 97 (Iowa 1995).

III. Change in Placement.

The guardian ad litem argues on appeal that the juvenile court erred when it determined that Sereatha and Roger's home was an appropriate placement for A.C. Specifically, the guardian ad litem contends the juvenile court erred in

(1) determining the placement was appropriate; (2) determining the placement was in the child's best interests; and (3) exposing the child to future risk of unsupervised contact with her parents. We agree.

The county attorney, DHS, and the guardian ad litem were all in agreement in opposing the child's placement with Sereatha and Roger for several reasons.[1] First, it is clear the home study on which the district court relied was vastly incomplete. It failed to address how Sereatha and Roger would protect A.C. from her parents' substance abuse, how they would provide boundaries between A.C. and her parents, or how they would handle contact from A.C.'s father.

Second, Sereatha and Roger have made poor parenting decisions in the past. Two of their grandchildren, whom they raised, have substance abuse problems and significant criminal histories. They also allowed a minor and a sex offender to live together and have intimate relations in their home.

Third, Sereatha and Roger have indicated to service providers that they will foster a relationship between A.C. and her father once he is released from prison, even though he is both a convicted sex offender and drug abuser and has neither participated in services nor had a relationship with her in the past. Sereatha testified at the hearing that she would not allow A.C. contact with her father until he had "proven" himself and the court allows. Letters from Maurice,

[1] At the dispositional hearing, the State, through the DHS, was represented by the county attorney. However, on appeal, the attorney general has defended the juvenile court's decision. There is no explanation why the attorney general has failed to advance the position taken by the county attorney and the DHS. Therefore, the county attorney joined in the brief submitted by the guardian ad litem

however, indicate he remains in contact with his grandparents and intends to move into their home and establish a relationship with his daughter.

Finally, Sereatha and Roger themselves have no relationship with A.C. Though one service provider testified they asked for custody of A.C. early in the case, they never asked about visitation.

We therefore agree with the county attorney, DHS, and the guardian ad litem that A.C. should not be placed with Sereatha and Roger. We have also reviewed the intervention issue and conclude that the juvenile court did not abuse its discretion in denying the motion for the foster parents to intervene. First of all, we note that the right of intervention is not unconditional. Second, we agree with the county attorney that the foster parents' rights have been adequately represented by the guardian ad litem. If the foster parents disagree that their rights are being adequately represented, they can file another petition for intervention. The juvenile court's ruling placing A.C. with Sereatha and Roger is reversed and remanded.

REVERSED AND REMANDED.

Vogel, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

I agree with the majority that the juvenile court did not abuse its discretion in denying the motion of the foster parents to intervene. I recognize, as the foster parents argue, that they have a statutory right to intervene under Iowa Code section 232.91 (2005), which includes foster parents in the list of those who "may petition the court to be made a party to proceedings under this division." I disagree with the foster parents' argument that they fall within the language of Iowa Rule of Civil Procedure 1.407(1)(*a*), which provides "[w]hen a statute confers as unconditional right to intervene." While the language of section 232.91 allows foster parents to petition to be made a party, it does not give them an unconditional right to intervene.

I also recognize the foster parents are suitable persons to be considered for placement under section 232.102(1), and thus fall within the language of the rule as having an interest in the proceedings.

The foster parents reason that under *A.G.*, 588 N.W.2d 403, 404 (Iowa 1998), we should reverse. In *A.G.*, 588 N.W.2d at 404, the court reversed a juvenile court decision that had denied a grandmother the right to intervene in a child in need of assistance proceeding and in doing so said:

> Iowa Code section 232.102(1)(a) allows the juvenile court to consider placing a child in need of assistance in the custody of a "relative or other suitable person." This statutory provision gives A.S., as A.G.'s grandmother, a "legal interest" in the outcome of the dispositional hearing. Moreover, this interest would be directly affected by the court's decision on custody in the CINA proceeding. Therefore, under rule [1.407] A.S. had a right to intervene, leaving no room for a discretionary denial of intervention by the juvenile court.

Iowa Rule of Civil Procedure 75 was applicable when the supreme court decided *A.G.* This rule was amended in 1997. Before amendment, rule 75 provided:

> Any person interested in the subject matter of the litigation, or the success of either party to the action, or against both parties, may intervene at any time before trial begins, by joining with plaintiff or defendant or claiming adversely to both.

We must look to current rule 1.407(1) which addresses intervention of right:

> (1) *Intervention of right.* Upon timely application, anyone shall be permitted to intervene in an action under any of the following circumstances:
>
> *a.* When a statute confers an unconditional right to intervene.
>
> *b.* When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The comment to the rule notes the amendments in the language "allow the trial court more discretion in determining whether to allow intervention." Iowa R. Civ. P. 1.407, cmt.

I therefore conclude the court did not abuse its discretion in denying the motion to intervene for several reasons: (1) the foster parents' right of intervention is not unconditional; (2) the interests of the foster parents are adequately represented by the guardian ad litem, who seeks to maintain Alexis's placement with the foster parents' and (3) the matter was appealed before the juvenile court acted on the motion for intervention, and the supreme court has

allowed the foster parents to intervene on appeal.[2] I find no reason to reverse the juvenile court on this issue.

I dissent insomuch as I agree with the State that the decision of the juvenile court should be affirmed.

At the time Alexis was found to be a child in need of assistance, her paternal great-grandparents, Sereatha and Roger, requested she be placed with them in Illinois. The Department of Human Services placed Alexis in foster care instead, because it thought placement with Sereatha and Roger in Illinois would hinder reunification efforts with her mother Casey, who lived in Iowa.

Casey stopped participating in services aimed at reunification. Sereatha and Roger participated in a home study that concluded they "would provide a loving and stable home" for Alexis. Maurice renewed his request for modification of the dispositional order and asked that Alexis be placed with Sereatha and Roger. Sereatha testified at the hearing on modifying the dispositional order that she would protect Alexis from her parents and comply with court orders. The court made a finding it believed Sereatha. It also expressly accepted the opinion of the Illinois service worker who did the home study that the great-grandparents "would provide a loving and stable home." The court considered the age and health of Sereatha and Roger, that they parented three of their grandchildren, and the concerns the Department of Human Services and the guardian ad litem

[2] At the time the juvenile court heard and ruled on the motion to intervene, the matter at issue was before the appellate courts. The supreme court allowed the foster parents to intervene in the appellate proceedings. The question of whether the juvenile court had jurisdiction to hear the motion to intervene is not raised and I find it unnecessary to address it.

expressed about placing Alexis with Sereatha and Roger. The court ordered that custody of Alexis be placed with Sereatha and Roger.

The guardian ad litem and the foster parents argued the juvenile court did not properly consider the ability of the great-grandparents to parent Alexis, given their parenting history, age, and health. They also argued the court did not properly consider the opinions of the Department of Human Services concerning placement.

The State responded that the juvenile court expressly found the testimony of Sereatha and the home study worker to be credible, and the appellate courts give weight to such credibility determinations. It argued "the guardian ad litem has not provided this court with sufficient reason to substitute its judgment for that of the juvenile court."

From my de novo review of the record, I find the juvenile court carefully considered the evidence before it, including the concerns of the guardian ad litem and the Department of Human Services. It believed Sereatha when she testified she would obey court orders and protect Alexis from her parents. The guardian ad litem made numerous citations to letters from the father indicating his desire to be with his daughter and to be a part of her life as evidence Alexis will be at risk of harm from contact with her parents if placed with Sereatha and Roger. I have considered the father's letters. They were written during the period when the Department was still pursuing reunification with the mother. I give deference to the juvenile court's credibility determination concerning Sereatha. She has recognized Alexis needs to be protected from her parents.

The juvenile court believed the home study conclusion that the great-grandparents can provide Alexis with a "loving and stable home." *See In re N.M.*, 528 N.W.2d 94, 97 (Iowa 1997) "[C]hapter 232 favors relative placements over nonrelative placements."). The guardian ad litem argues the age and health of the great-grandparents means Alexis will not have them available to parent her when she is an adolescent. The guardian ad litem also asserts the home study did not evaluate Sereatha and Roger's daughter-in-law, who is listed as the contingent caretaker for Alexis. The daughter-in-law is a registered nurse who has two older children. The home study adequately evaluated the proposed placement of Alexis with her great-grandparents. Giving appropriate weight to the express credibility findings of the court, I would affirm the dispositional order of October 20, 2005. The juvenile court set a time period for transfer of custody which may no longer be reasonable. I would remand to the juvenile court to revisit this issue.