IN THE COURT OF APPEALS OF IOWA

No. 7-177 / 07-0294
Filed April 25, 2007

IN THE INTEREST OF T.R., R.P. AND K.B.,
Minor Children,

T.L.B., Mother,
Appellant**.**

Appeal from the Iowa District Court for Polk County, Carol S. Egly, District Associate Judge.

A mother appeals from the entry of a permanency order. **REVERSED AND REMANDED WITH DIRECTIONS.**

Andrea Flanagan of Sporer & Ilic, P.C., Des Moines, for appellant mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John P. Sarcone, County Attorney and Jon Anderson, Assistant County Attorney, for appellee State.

John Heinicke, Des Moines, for father of T.R.

Samantha Kain, Ankeny; for father of K.B.,

Joseph Renzo of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for father of R.P.

Robert Wright, Jr. of Wright & Wright Law Offices, Des Moines, for appellee intervenor.

Jessica Miskimins, Des Moines, guardian ad litem for the minor children.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

BAKER, J.

Tammy is the mother of Krystal, who was born in 1995, Rickie, born in 2000, and Tommy, born in 2002. The family first became involved with the Iowa Department of Human Services (DHS) in August of 2005, when it was reported that Tammy had tested positive for marijuana. On November 2, 2005, the children were adjudicated to be in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(c)(2) and (6)(n) (2005), but they remained in the care of Tammy. Following a review hearing in March of 2006, the court granted the State's request to remove the children from Tammy's care based on evidence that Tammy struggled with maintaining stable employment and housing, and that she was not providing consistent urinalyses.

On February 6, 2007, this case came on for a permanency hearing. Prior to that date social worker Michelle DeLong had provided the parties with a new case permanency plan in which she recommended that the children be returned to Tammy's custody. At that hearing, the State recommended reunification and asked that the court adopt the recommendations set forth in the case permanency plan. The children's guardian ad litem and the fathers of Krystal and Rickie objected to returning the children's care to Tammy. Following the hearing, the court denied the State's motion to return the children. Tammy has appealed from this ruling.

Subsequently, the children's guardian ad litem filed a motion to dismiss the appeal, contending the order at issue is not a "final judgment" for purposes of appeal. *See* Iowa R. App. P. 6.1(1). We conclude the permanency order in question here, which continued out-of-home placement, was a final adjudication.

We therefore deny the motion to dismiss. *Compare In re Long*, 313 N.W.2d 473, 476 (Iowa 1981) (holding a CINA adjudication *without disposition* is not a final appealable order).

Scope of Review. Our review of an order arising out of a CINA proceeding is de novo. *In re S.V.G.*, 496 N.W.2d 262, 263 (Iowa Ct. App. 1992). We review the facts and the law and adjudicate rights anew. *In re H.G.*, 601 N.W.2d 84, 85 (Iowa 1999). We give weight to the juvenile court's factual findings but are not bound by them. *In re E.H. III*, 578 N.W.2d 243, 248 (Iowa 1998).

Analysis. We first note that at the hearing on the State's motion, the State introduced five exhibits, consisting of documents such as the case permanency plan and reports from service providers. No testimony was advanced by any party present. Neither the children's guardian ad litem nor the objecting fathers presented any evidence; rather presenting their case simply by argument of counsel. Almost no authority is necessary for the proposition that arguments of counsel are not evidence, yet counsel for the children and the two objecting fathers chose to rely solely on argument. *See* Iowa Civil Jury Inst. 100.4 (instructing that "statements, arguments, questions and comments by the lawyers" are not evidence).

In denying the State's motion to return custody of the children to Tammy, the court cited a variety of factors including a lack of "long-term demonstration of stability or a consistency in housing, transportation . . . employment and sobriety." Tammy contends the evidence introduced at the hearing failed to

establish that, unless removal was continued, the children would suffer "adjudicatory harm."

In this regard, Iowa Code section 232.102(5)(a) provides:

> Whenever possible the court should permit the child to remain at home with the child's parent, guardian, or custodian. Custody of the child should not be transferred unless the court finds there is clear and convincing evidence that:
> (1) The child cannot be protected from physical abuse without transfer of custody; or
> (2) The child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available.

Upon our careful de novo review of the evidence presented at the hearing, including the exhibits, we conclude it falls far short of establishing that a return to Tammy's care would place the three children in danger of adjudicatory harm. The children's guardian ad litem expressed concerns that Krystal had attended at least six schools and that it would be disruptive to her to again change school settings. While indeed concerning, this is not grounds for adjudication. *See In re J.E.*, 723 N.W.2d 793, 801 (Iowa 2006) (Cady, J., concurring specially) ("A child's safety and the need for a permanent home are now the primary concerns . . . ."). Nor does Tammy's lack of a driver's license raise any adjudicatory concerns. Finally, like both DHS and the State, we find that Tammy is successfully addressing her previous drug use and has met all expectations placed on her in this regard. Not one witness took the stand and testified that any of the enumerated issues in section 232.2(6) are present or likely to be present**.** The record simply lacks evidence of a potential adjudicatory harm.

We are further guided by the maxim that the parents of a minor child, if suitable and qualified, are preferred over all others as the child's guardian and

custodian. *See* Iowa Code § 633.559; *In re Guardianship of Stodden*, 569 N.W.2d 621, 623 (Iowa Ct. App. 1997). The presumption of parental preference, however, is rebuttable. *Stodden*, 569 N.W.2d at 623. Here, the guardian ad litem, in advocating against a return to Tammy's care, bore the burden of proof to rebut the presumption that favors Tammy by establishing the parent is not a suitable parent and the children's best interests require the children to remain out of her care. *Id.* Due to the lack of evidence presented by the guardian ad litem, it would not be possible to find the presumption in favor of parental custody rebutted.

Furthermore, as noted above, the children's best interests are paramount. *In re J.L.W.,* 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). When determining what is best for a child, we consider both immediate and long-term interests. *Id.*

> [O]ur responsibility in a modification of a permanency order is to look solely at the best interests of the children for whom the permanency order was previously entered. Part of that focus may be on parental change, but the overwhelming bulk of the focus is on the children and their needs.

In re A.S.T., 508 N.W.2d 735, 737 (Iowa Ct. App. 1993). We must "take into account the strong societal interest in preserving the natural parent-child relationship." *In re Guardianship of Knell*, 537 N.W.2d 778, 781 (Iowa 1995).

Our review of the various reports and exhibits reveals a mother who has made progress in every aspect of her life, and who has met or exceeded the expectations of both DHS and the juvenile court in a number of areas. First, the lack of any likelihood of an adjudicatory harm, should they be returned, argues in favor of reunification with Tammy. Moreover, while Tammy does have a history of drug use, she appears to be successfully addressing that concern. Since

October of 2006, Tammy has provided consistent clean drug screens and completed treatment with MECCA Substance Abuse Services. The children are bonded with Tammy and visits with her were without problems. Reunification is in the best interests of the children.

Conclusion.

The State in a permanency hearing has the burden to show the children cannot be returned. In this case, the State not only did not meet that burden, but actually supported the return of the children to their mother. This was not done without basis, but rather on the recommendation of DHS. At the hearing, the State along with DHS, the mother, and one of the three fathers, all sought the return of the children to Tammy. The guardian ad litem and two of the fathers "expressed concerns." No evidence was taken. No expert testimony or reports were admitted to rebut the recommendation of DHS. Those expressing concern presented no evidence or testimony. It was upon this record that the juvenile court determined that the return of the children was not appropriate.

Where, as here, the State has not assumed the burden to show the children cannot be returned, some other party must assume that burden. That did not occur here. The Court, of its own volition, ignored both the recommendation of the State and DHS. Without any evidence recommending the continued removal of the children, the court found that reunification was inappropriate. Where no one has met the burden, the Court cannot find evidence of further adjudicatory harm sufficient to deny reunification. We therefore reverse and remand with directions to enter appropriate orders concerning the return of the children to their mother's care.

REVERSED AND REMANDED WITH DIRECTIONS.