IN THE COURT OF APPEALS OF IOWA

No. 9-669 / 09-0947
Filed August 20, 2009

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

STATE OF IOWA,
Appellant.

Appeal from the Iowa District Court for Crawford County, Donovan D. Schaefer, District Associate Judge.

The State appeals from the juvenile court permanency review order denying its request to waive reasonable efforts and begin termination proceedings. **AFFIRMED.**

Thomas J. Miller, Attorney General, Bruce Kempkes and Charles K. Phillips, Assistant Attorneys General, for appellant.

Reed H. Reitz of Reimer, Lohman & Reitz, Denison, for appellee mother.

Daniel A. Dlouhy of Brink & Sextro, P.C., Denison, for appellee father.

Thomas Gustafson, Denison, attorney for minor child.

Phyllis Harms, Storm Lake, guardian ad litem and CASA for minor child.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

The State appeals from the juvenile court permanency review order that denied the State's request to waive reasonable efforts and begin termination proceedings and that directed the State to continue reasonable efforts and increase visitation in order to achieve reunification. We affirm.

I. Background.

The child was removed from the mother's care in January of 2007 based on her substance abuse. The child was found to be in need of assistance in February. In May the court entered a dispositional order continuing the child's placement in foster care and ordering the parents to participate in substance abuse treatment. In June, the father began nearly a year of imprisonment. In November, following a review hearing, the court continued the child's placement until the child could be placed with the mother in a women and children's program. It further ordered the mother to participate in inpatient substance abuse treatment.

Following a permanency hearing in January of 2008, the court adopted the State's permanency plan, with a goal of transferring guardianship and custody of the child to a suitable person. The court waived reasonable efforts. In April, the paternal grandmother requested that the court grant concurrent jurisdiction for her to seek permanent guardianship of the child. She also moved to intervene. In May the court granted the request to intervene. Following a permanency review hearing, the court continued the child's placement in foster care and ordered supervised visitation for the parents and both grandmothers. In August,

the mother gave birth to another child who is not at issue in these proceedings and who has remained in her custody and care. She also completed substance abuse treatment and entered continuing care. In September, the mother moved to modify the disposition, seeking the child's return to her custody, based on her successful completion of substance abuse treatment. The court considered the motion at a permanency review/modification hearing in October.

At the hearing, the court heard testimony from several witnesses for the State, then recessed the hearing to another available date. Prior to reconvening the hearing a week later,

> the court called counsel, [the case manager], and the CASA representatives into chambers and advised them that, given the testimony and evidence of the State's witnesses, the court, upon consideration of that testimony, has determined that the present circumstances require reinstatement of reasonable efforts and modification of the dispositional order to allow increased visitation and possibility of reunification with one of the parents. The court advised participants that additional testimony on behalf of the parents was not necessary due to the court's consideration of the State's evidence.

During the hearing, the court requested that the case manager make new recommendations based on the court's decision announced in chambers. Following her new recommendations and ensuing discussion, "all parties stipulated to the verbal recommendations and amendments discussed in open court." The court then ordered the reinstatement of reasonable efforts, a minimum of three hours per week of visitation for each parent, with "the duration and frequency of visits to increase to possibly include unsupervised or overnight visits," and the "focus and purpose" of the visitation to be bonding in the parent-child relationship and parenting abilities of the parents.

A November bench review order, to address reasonable efforts, found "reasonable efforts have been made to achieve the permanency goal for the children in interest."

On February 25, 2009, "due to new developments requiring withdrawal of [the assistant county attorney] as special prosecutor,"[1] the review hearing was continued "to allow the Iowa Attorney General's Office to provide a new special prosecutor." The review hearing was continued twice more, and finally began in late April. At the end of the first day of the hearing, "[d]ue to time constraints and additional conflicting obligations, it was determined that the hearing would have to be recessed and reconvened on another date" at the end of May.

At the reconvened hearing, the State presented testimony from the CASA volunteer and a therapist/counselor, then rested its case. The court asked the foster parents if they had any statements to make. The foster father made a brief statement about their feelings for the child, their desire that the court make a decision in the child's best interest, and their support for the decision the court would make.

The court then stated it had heard enough testimony and evidence to make a decision.[2]

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[1] Counsel's motion to withdraw stated "it has become apparent that the Department of Human Services is unsatisfied with the undersigned's representation in this matter."

[2] This was the second permanency review hearing in a row in which the court ended the hearing after the State's evidence. The transcript of the latest hearing shows the State expressed concern to the court that this case likely would be appealed and that by ending the record after the State's evidence, appellate courts would not have a complete record for review on appeal. The court responded:

> I guess that responsibility would fall on my shoulders. I cut this off because I didn't feel the State's evidence was sufficient to adopt the

> At the time that [the child] was removed from [the mother's] home, there clearly was grounds for removal. . . .[B]ut we also have to consider what the situation is today. We cannot punish [the parents] for what they—what has happened in the past unless there is evidence that it is still happening.
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> . . . There has been a showing that [the parents] are both making progress in improving their lives and addressing the problems that led to the original removal and placement of [the child] in foster care. There is no doubt but that there is and should be extreme concern about adjustment issues for [the child], but I think those adjustment issues can be addressed. . . .
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> There may have been points in time in the past in this case where perhaps we would have been going the other way, and I think that we all are guilty of making an assumption at some point in this case that this was going to go to termination, and so everything has been focused in that direction and we have not been willing to accept the efforts of [the parents] in turning things around, and it seems to me that much of the information in the reports and testimony of witnesses tends to emphasize the negatives and minimize the positives.
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> Now, we have testimony of some concerns, but all of them are based on conjecture or what might happen or what we're afraid will happen, and, frankly, [neither parent has] really been given the opportunity to demonstrate their ability to care for [the child.] They've had limited visitation, and I understand that, again, we have to address the concern about the attachment issues and the

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> recommendations as set forth. I didn't think I needed any further testimony from the other parties, and if I made a mistake on that, I guess that will be determined.

The mother's attorney then stated:

> For purposes of clarification, I think that myself and [the father's attorney] would move the court for a directed verdict at the close of the State's evidence, that they haven't established their case. If you would want to note that and, whether you are ruling on that or not, that would be the—I would be—would be my next thing to do, so. . . .

The court replied:

> I guess it was a sua sponte ruling, directed verdict ruling, but I just felt that we'd gone long enough and that I didn't need to hear any more evidence based upon what I'd already heard.

We are affirming the decision in this case and are not in need of the evidence, however, we strongly suggest the better approach would be to take all the evidence, both to provide us with a complete record on appeal, and, more importantly, to give the juvenile court all the evidence and options from which to craft the best solution for the critical needs of children who are in need of the court's assistance.

> potential trauma for changing custody and returning [the child] to his parents, and . . . we're not going to make an abrupt change, . . . I don't think the State has demonstrated to me that at the present time, other than the concern about the adjustment and transition, which can be addressed by counseling and will be ordered by the court, that [the child] will suffer any imminent risk or harm by extending visitations and moving towards the reunification of [the child] with his parents.
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> . . . Both [parents] shall continue to have visitation, and I feel that it is the point in time where overnight visitations should begin and that the arrangements will have to be made.

In its June order following the review hearing, the court ordered continued efforts toward reunification, "mental health therapy to address reunification and transition issues" for the child, and overnight visitation for both parents "to begin immediately." A review hearing was set for late August. The State appealed.

II. Scope and Standards of Review.

We review permanency proceedings de novo. *In re K.C.*, 660 N.W.2d 29, 32 (Iowa 2003). We review both the facts and the law and adjudicate rights anew on the issues properly presented. *In re H.G.*, 601 N.W.2d 84, 85 (Iowa 1999). Although we give weight to the juvenile court's findings of fact, especially its credibility determinations, we are not bound by them. Iowa R. App. P 6.904(3)(*g*) (2009). The parent-child relationship is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15, 35 (1972). The best interests of the child control our decision. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). In evaluating the best interests of a child, we consider both immediate and long-term interests. *Id.* We "afford a rebuttable

presumption that the best interest of a child is served when custody is with the natural parents." *In re N.M.*, 491 N.W.2d 153, 156 (Iowa 1992).

III. Merits.

The State contends the court erred in not waiving reasonable efforts in this case. We reject this contention. The State argues the court erred in finding the parents "have made substantial improvement in their situation and have demonstrated both the ability and the desire to raise [the child] in their home and provide for his needs." From our review of the record, we agree with this finding. The mother has successfully completed substance abuse treatment and all aftercare. She has remained clean since before the October 2008 permanency review. The case manager expressed concerns about the mother's parenting skills, but when asked for specifics, only could say the mother was not always consistent with forms of discipline, but sometimes argued with the child instead of redirecting or stopping the child's behavior. She expressed a concern as to both parents about a lack of attachment, but we, like the juvenile court, view that not as a lack of parenting skills, but rather as a result of the lack of visitation allowed the parents and the amount of time the child has been kept out of parental custody. We find no cogent reason the child cannot be returned to a parent's care, with counseling to help the child adjust to the move.

The State asserts the court erred in finding the child's best interests did not require waiving reasonable efforts. The State makes this assertion without any evidentiary support other than the conclusory statement that "[t]he witnesses at the hearing and the supporting exhibits established just the opposite." We

have reviewed the testimony and the exhibits and agree with the court. Although the exhibits and testimony emphasize the negatives, it is clear the proffered negatives are either based on suspicion or conjecture or not the result of the parents' actions or inaction. Once the court reestablished the requirement for making reasonable efforts toward reunification at the October 2008 permanency review and set the goal as reunification instead of permanency through termination of parental rights, it does not appear the State was able to adjust its focus and to move expeditiously toward the stated goal. Visitation was not significantly increased. No overnight visitation was allowed. No trial home placement was made. All that occurred was a continued deterioration of the parent-child bond and attachment because of the separation. We cannot agree that the child's best interests are served by continuing the separation from the parents and by waiving further efforts at reunification. In addition, none of the statutory bases for waiving reasonable efforts exist. *See* Iowa Code § 232.102(12) (2009).

The State contends the court erred in elevating the interests of the parents above those of the child. We recognize the principles of limiting patience with parents, following statutory timeframes, not suspending "the crucial days of childhood" to wait for parents, and not letting a child languish in long-term foster care. *See In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000); *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987); *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997); *In re E.K.*, 568 N.W.2d 829, 831 (Iowa Ct. App. 1997); *In re R.L.*, 541 N.W.2d 900, 903 (Iowa Ct. App. 1995). The case before us, however, is not one in which the

parents did not act to overcome their problems or waited until the eleventh hour to change. Rather, this child has been kept in foster care beyond the statutory timeframe because the system was too slow to respond to changes ordered by the court.

The result of the permanency hearing at issue clearly reflects the child's best interests, society's concern for the child's safety and need for a permanent home, and society's strong interest in preserving the natural parent-child relationship. *See In re J.E.*, 723 N.W.2d 793, 801 (Cady, J., concurring specially); *see also Zvorak v. Beireis*, 519 N.W.2d 87, 88 (Iowa 1994); *Northland v. Starr*, 581 N.W.2d 210, 212 (Iowa Ct. App. 1998).

Even if this case has reached the point where "the rights and needs of the child [have risen] above the rights and needs of the parents," we find the child's rights and needs are best served in the circumstances before us by prompt reunification with one or both of his parents. *See E.K.*, 568 N.W.2d at 831. We affirm the juvenile court's decision and encourage the State to move quickly to reunite this child with his parents and to soften the stress of the child's transition home through appropriate therapy.

AFFIRMED.