FILED
APR 28 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-107 / 91-1444

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

C.I., Paternal Grandmother,

Appellant.

Appeal from the Iowa District Court for Dubuque County Jane Mylrea, Juvenile Referee.

Paternal grandmother has appealed transfer of child's custody, control and guardianship to the Department of Human Services. **REVERSED AND REMANDED.**

Andrea J. Beacham of Day & Beacham, Dubuque, for appellant grandmother.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellee State.

Dirk J. Hamel of Norman, Gilloon & Wright, Dubuque, guardian ad litem for the child (appellee).

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

SACKETT, J.

This case focuses on the abilities of a forty-two-year-old grandmother to parent her grandchild. The issue in this appeal is whether the trial court was correct in removing a six-year-old child from the appellant's, his paternal grandmother's, home. The child's parents had consented to termination of their parental rights with the understanding the child would be adopted by appellant. The child, who was six years old, had lived with appellant and her children, his aunts, for three and one-half years before he was abruptly removed for placement with an alleged better adoptive family.

The issue is not the appellant's ability to care for the child. The issue is whether the child should have been removed so as to find him a better home. The appellant was an adequate caretaker. The child, while overweight, was healthy and well adjusted. The appellant's home was adequate. She clearly loved and was bonded to the child, and he loved and was bonded to her.

We first review the lengthy history of the case. The child, born in October 1983, was determined to be a child in need of assistance in 1986. On September 30, 1987, his custody was placed with the appellant. The appellant was separated from her spouse. The mother of six children, she did not work outside the home but relied on aid to dependent families and other government programs to support her family. A home study was conducted which showed the

appellant had separated from her husband because he had a problem with alcohol. A case permanency plan dated September 28, 1988, recommended custody of the child remain with the appellant. At a dispositional hearing on May 16, 1989, the court found that "All parties envision that the existing custodial arrangements will become permanent." In July 1989 the Department of Human Services recommended to the court and it was agreed the parents would terminate their parental rights to the child, the appellant would seek to adopt him and the department would support such a move. In August 1989 the court ordered custody of the child remain with the appellant and ordered the department to conduct a home study and make a recommendation as to whether the appellant was a suitable potential adoptive parent. The court order stated if she was a suitable adoptive parent, "The parties contemplate that the parents will terminate their parental rights to the child and he will be adopted by appellant." On January 18, 1990, a case permanency plan submitted by the department stated the appellant "was approved by the Department of Human Service adoptive home study to adopt the child."

A petition for termination of parental rights was filed on January 23, 1990, and the parents voluntarily relinquished their parental rights so that the paternal grandmother, appellant, could adopt the child, and the Department of Human Services recommended that placement with the appellant be made permanent. A dispositional

rehearing on January 24, 1990, provided that custody of the child would continue with the appellant, and the parties anticipated this would be an agreed termination with adoptive placement with appellant. On February 7, 1990, an order was entered terminating the parents' parental rights. A case permanency plan was sent to the court in July 1990. The plan indicated the child was living with the appellant and appeared to be very happy and secure in this placement. A review hearing in July 1990 continued custody with the appellant, noting she had already had custody of the child for two years, and that "Upon completion of a home study, which is expected to be done within the next two weeks, an adoption petition will be filed by the appellant."

On October 23, 1990, at a dispositional review hearing, the court approved custody remaining with appellant. A case permanency plan of February 1991 stated, "The child is in the process of being adopted by appellant." The report said the appellant had obtained a physical examination for the child and had cooperated with the Area Education Association about any mental disability; that the appellant was excused from attending nurturing classes, and she had cooperated with the department and the Visiting Nurses Association. The visiting nurses' homemaker services had been terminated because they found no need to continue. At a dispositional hearing on April 23, 1991, the court noted the appellant had had custody of the child for about three

years, and the department had not approved the home study, but the feeling of continuity and the familiar bond is such that further services are being offered in order to reconsider the appellant as a proper adoptive home for the child. The appellant was ordered to complete nurturing classes successfully, despite the fact she earlier had been excused from the classes. She was to have in-home counseling provided by Lutheran Social Services, and her husband, who did not live with her, would undergo a substance abuse assessment.

The court determined at the next hearing if there was not sufficient improvement, then other placement options would be considered. The case was set for October 23, 1991. However, on July 11, 1991, the State made a motion for a hearing asking the court to transfer custody of the child from appellant to the department for suitable adoptive placement. The report contended the appellant did not take the nurturing classes, and her estranged husband had not had an alcohol abuse assessment and the appellant had not attended school conferences or been honest with the department. The matter came on for hearing, and on September 9, 1991, over three and one-half years after the initial placement with the appellant, the child was transferred to the department for placement in family foster care and preadoptive placement. The appellant and her family were very upset about the move. However, despite her own feelings, when the workers came for the

child she considered his best interests and assured him he would be safe in foster care.

Appellant challenges the move. She contends there has been no change in her circumstances since the time the child was placed with her, and that there was no basis to order the move. She contends there are biological ties between her and the child, and there is substantial bonding and love between her and the child and between the child and her children. Appellant has been willing to proceed with the adoption since before the child's parental rights were terminated.

Our review of the issue before us is de novo. To modify a custody or placement requires a substantial change in circumstances. In re R.F., 471 N.W.2d 821, 824 (Iowa 1991); In re J.F., 386 N.W.2d 149, 152 (Iowa App. 1986). The appellant contends there has been no change in her circumstances. She does not profess to be able to provide a traditional adoptive home.[1] She contends she has provided the child with a loving and caring environment, and her situation is the same as it was when the child was originally placed with her for adoption. She also contends

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1. Nontraditional adoptive homes need to be recognized for the wealth of parenting skills many may frequently possess, particularly for special needs children. See Hartman, Some Key Practice Issues in the Adoptive Placement of Children With Special Needs, in Adoption of Children With Special Needs: Issues In Law and Policy 57 (E. Segal ed. 1983).

that family ties and substantial bonding make the move not in the best interests of the child.

The trial court, in terminating the placement, cites concerns about the commitment of the appellant to the child, her failure to cooperate with counseling, her failure to participate in parenting and nurturing programs, a doubt as to her motivation to change the environment the child was in, the fact the appellant's children have not graduated from high school, the alcoholism of the grandfather, who the appellant does not live with but who she continues to associate with, and the appellant's lack of insight into her parental deficiencies and the need for change. We agree with the grandmother, her current living situation is the living situation that existed when the child was originally placed with her over three and one-half years prior to the removal.

The court recognized the child's family bond to the appellant and the other family members, but found "the attachment to his current family setting does not outweigh the benefit the child would have if adopted by a loving, nurturing, supportive family who can offer him the education and family opportunities and care that he deserves."

The State and guardian ad litem argue the move was properly made. They do not contend the child will suffer harm in the appellant's home; rather their position is the child should have a better home.

Everyone, including the appellant, recognizes her home has deficiencies. She has only an eighth-grade education. She has not worked outside the home since 1982, but cares for the financial needs of her family with ADC and assistance programs. She has been married to her husband for twenty years; but they have been separated for ten years because of his drinking problem. She does not use physical punishment. Her home is clean and the child is happy. He was described by one worker as a child with "a quick smile." He is not a discipline problem. There were concerns about his intelligence when he first came under appellant's care, but under her care he has developed normal intelligence.

Appellant argues the child's parents agreed to termination of their parental rights with the understanding appellant would adopt the child and his family ties would be maintained. She points out when the termination was contemplated, reports reflected the appellant's home would be approved as an adoptive home. The appellant contends there is no change in her living conditions. She contends the removal was because of a change in attitudes brought about by changes in the Department of Human Services' personnel.

This child under State care was placed with appellant over three and one-half years before his removal. The voluntary termination of parental rights was accomplished because the child's parents understood the appellant was to

adopt the child. The placement with the appellant was subject to supervision. There has been extensive supervision. The appellant has cooperated for a long time. There is no evidence of abuse or lack of love or care. The child is happy and secure, although a bit overweight.[2] After a three and one-half year placement, the appellant was directed to correct things that had never before been identified as problems. Suddenly there was concern with the child's weight, even though he had always been overweight, and a number of family members were overweight. The State contends appellant was resistant to the planned weight reduction.[3]

The alcoholism of the grandfather, who did not live in the home, suddenly became a factor the appellant was charged with correcting. The appellant was ordered to attend parenting and nurturing classes. She had been excused from the classes. The curriculum of the class is not in evidence. The State has not told us what appellant was expected to learn in class. Appellant has raised six children. There are no reported serious illnesses, injuries, or health problems. Appellant has maintained an adequate and clean home, and fed her family on a very

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2. There is a reference that on January 18, 1990, he was twenty pounds overweight.

3. The grandmother was criticized because she told an older daughter to put some food up rather than leaving it down and telling the child not to eat the food. This type of judgment call by a caretaker should not be subject to State scrutiny.

limited budget. The record before us does not support the State's argument her failure to attend parenting and nurturing classes justified the child's removal.

We are not able to dismiss as easily as the trial court and the guardian ad litem the trauma of removing a six-year-old child from the only home he has ever known where there is substantial bonding between him and his grandmother and aunts.[4]

Appellant's home was criticized for being chaotic, and for being a home where the children were parenting each other. One familiar with large families recognizes the value to a younger child of nurturing of siblings and the chaos and confusion a large family generates. These factors do not justify removing a child from the home.

Best interest is a term frequently used and rarely defined. While we all want what is best for children, placement decisions cannot just be based on finding the best homes. One commentator suggests that "an extreme

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4. "How much more strain is put upon the child who is uprooted and thrust among strangers with whom he has no mutual history? How is it possible to convince a child of his own worth after removing him from a family which is said to be unworthy, but with whom he identifies?

When any child, vulnerable as the season's first snowflake, is handed into a strange atmosphere, even into a rare, sensitive and caring environment, the question which afflicts the newcomer is always, 'If I wasn't good enough for my own family, which they say is no good, how can I be accepted here, before strangers?' Tragically, the question is unanswerable and perseveres under the skin, in the viscera through the days, hours, and years into adulthood." Edna McConnell Clark Found., Keeping Families Together: The Case For Family Preservation at iv (1985).

interpretation of the best interest rule could lead to the redistribution of the entire minor population among the worthier members of the community." Simpson, The Unfit Parent: Conditions Under Which A Child May Be Adopted Without The Consent Of His Parent, 39 U. Dt. L.J. 347, 355 (1962). We cannot find adoption by a different family is in the child's best interest. Adoptive homes come with no guarantees. Unresolved conflicts and the realities of life see sudden changes in persons' living situations and marriages.

We agree with the appellant that the move was the result of a difference in the attitudes of new workers assigned to the case. The problem with making value judgments about home settings is there is no way to predict where this child may most likely succeed. His new adoptive home may be better in some ways. But to place him there demands severing extremely strong bonding. We know children suffer from the termination of a relationship. These uncertainties weigh against removing this child from his long-term relationship with his biological family when the motivation for the removal is only to find a "better" home with biological strangers.

We cannot under this record justify the removal of the child from appellant's care. We reverse the order directing removal and remand to the trial court to order custody returned to the appellant.

Costs on appeal are taxed to the State.

REVERSED AND REMANDED.

Oxberger, C.J., concurs; Habhab, J., specially concurs.

HABHAB, J. (Specially concurring)

I concur only in the result reached by the majority.