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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-413 / 90-81

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IN THE INTEREST OF D.G., A Child.

R.G., Maternal Grandmother,

Appellant.

Appeal from the Iowa District (Juvenile) Court for Black Hawk County, Stephen C. Clarke, Juvenile Referee.

The child's maternal grandmother has appealed the juvenile court's order placing the child in the guardianship and custody of the Iowa Department of Human Services. **REVERSED AND REMANDED.**

Carter Stevens of Beecher, Rathert, Field, Fister, Walker & Morris, Waterloo, for appellant.

Thomas J. Miller, Attorney General; Gordon E. Allen, Deputy Attorney General; and Judy Sheirbon, Assistant Attorney General; for appellee State.

Sharon Briner, Waterloo, guardian ad litem for child.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

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Ruby G., D.G.'s maternal grandmother, appeals a juvenile court order granting continued custody and guardianship of D.G. to the Iowa Department of Human Services (IDHS) for the purpose of making an adoptive placement of D.G. with his foster parents. Ruby challenges the court's finding that D.G.'s best interests would be better served by placing D.G. with a foster family than with his natural family. The guardian ad litem has not appealed. For reasons we set out below, we reverse the decision of the juvenile court.

In considering child custody issues, our foremost consideration is the best interests of the child. Iowa R. App. P. 14(f)(15). In ascertaining how the child's best interest will be served, we review the record de novo. Iowa R. App. P. 4. Accordingly, we are not bound by the trial court's findings of fact, but we will give them weight, particularly when the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7). Precedent is of little value to us as we must base our decision on the particular facts of each case. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). We therefore turn our attention to a detailed account of the facts in the case before us.

D.G., born in 1986, is the son of Emma G. and James H. D.G. was born ten weeks premature and suffered from low birth weight for several months afterward. James's whereabouts are unknown; he never exercised parental rights or duties. Likewise with D.G.'s older siblings, E.Q.G. (born 1979), J.D.G. (born 1982), and T.S.G. (born 1984), their respective fathers' whereabouts are unknown, and they never participated in raising the children. Emma frequently was unemployed and suffered from alcoholism; she participated in numerous public assistance programs to provide the children with basic necessities. Throughout the proceedings, the record indicates, Emma continued to abuse alcohol and made no serious effort to participate in therapy designed to improve her parenting skills or to help her overcome her alcoholism.

The record shows that D.G. may suffer from a very mild mental disability and that his verbal skills are below average. The record also indicates that D.G.'s emotional state may be somewhat delicate, though perhaps no more than a similar child with such a disfunctional family background, and that his social skills are underdeveloped. This has lead the experts who have observed D.G. to categorize him as a "special needs" child. In most other aspects, however, D.G. is a normal, happy child who has

normal problems, normal needs, and normal successes for a child of his age who has had so many obstacles to overcome.

IDHS became involved in this matter in 1986 upon receiving reports that Emma was failing to provide D.G. with necessary medical and nutritional care and sanitary conditions. After a couple of these reports and some investigation, IDHS petitioned the juvenile court on October 21, 1986, to adjudicate D.G. a child in need of assistance. See Iowa Code § 232 (1989). On November 3, 1986, IDHS petitioned for and the court ordered temporary removal of D.G. from Emma's custody. IDHS placed D.G. with John A. and Louise A., an IDHS-licensed foster care family, and D.G. has remained in their care since that time. (John and Louise have since expressed a desire to adopt D.G.) On November 7, 1986, IDHS amended its petition to include D.G.'s older siblings. The court ordered E.Q.G., J.D.G., and T.S.G. remain with their mother, but ordered IDHS to retain custody of D.G.

On March 2, 1987, the trial court ruled that D.G. and his siblings were children in need of assistance. See Iowa Code § 232.2(6)(g) (1987). The court ordered that custody and control of D.G. remain with IDHS and that custody and control of his siblings remain with their mother under the protective supervision of IDHS. On July 7, 1988, the trial court concluded that reasonable efforts had been made to

prevent or eliminate the need for removal of D.G. and his siblings from Emma's home and that remaining in her home would be detrimental to the interests of the children. The court ordered IDHS take custody of all of the children. It ordered D.G. remain in foster care and placed the older children with their grandmother Ruby. Since then, the household has consisted of Ruby, Ruby's daughter Quantella G., Ruby's granddaughter Deondra G., and Emma's children E.Q.G., J.D.G., and T.S.G.

On March 8, 1989, IDHS petitioned the court, asking that it terminate the parent-child relationships between D.G. and his parents. Ruby intervened seeking custody of D.G. and the right to adopt D.G. in the event Emma's rights were terminated. Finding that conditions had not changed and likely would not change for the better, the court terminated Emma's and James's parental rights on May 25, 1989. (In July, Emma died, apparently of natural causes.) Although the record is scant on both the temporary and final disposition of the other children, it appears the court entered similar orders with respect to the other children. The court ordered preadoption studies be performed, but also ordered that D.G. remain in foster care and his siblings remain in their grandmother's care.

The juvenile court conducted three days of hearings and considered innumerable reports on the permanent placement

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of D.G. The evidence indicates that Ruby has an extremely strong sense of familial relationship, has cooperated with IDHS to the best of her ability, and, despite a lack of financial resources, has made a sincere effort to prepare herself and her home for taking care of D.G. Her prime motivation seems to be keeping her family together, raising D.G. with his siblings. As one quarterly progress report dated a year before the termination hearing succinctly states, "[Ruby's] ability to parent children is not in question." The same therapist also states, "In Ruby's home, [D.G.] would surely have his basic needs met."

The record also shows that D.G. has numerous "special needs." These include social and emotional development. He also requires intensive learning activities to help him overcome his minor mental disability and improve his speech skills. To accomplish this, he needs a considerable amount of attention, perhaps the attention required of two children his age, and intensive instruction. The social workers, therapists, and teachers who are intimately acquainted with D.G.'s circumstances seem unanimous in their determination that environmental stimuli will play a critical role in D.G.'s development--or lack thereof.

Some of the social workers and therapists expressed concern about, first, Ruby's ability to provide the time and effort necessary for D.G.'s continued development and,

second, Ruby's ability to provide the proper environment and stimuli for a person with D.G.'s special needs. Specifically, they believe that at age 56, with a couple of teenagers and four children under the age of twelve in the house, Ruby may not be able to maintain household order while giving D.G. the necessary attention. Some suggest that other aspects of family life may deteriorate if she does give him the necessary attention or that Ruby would rely on the older children to help parent D.G. (IDHS rather grudgingly admitted, however, that this latter possibility would be natural even in a "normal" family situation.) The experts also questioned Ruby's ability to provide a stimulating environment or activities, i.e., books, games, toys. IDHS's adoption specialist, therefore, concluded that although "[Ruby] would be able to provide [D.G.] with a loving environment, . . . she does not possess the specialized parent skills necessary nor does she have the time to devote to [D.G.] one on one in order for him to develop to his fullest potential.

A family therapist who spent as much or more time with D.G. as any of the experts held many of the same reservations. Citing Ruby's ability as a provider of basic necessities, her great progress in meeting certain expectations established by IDHS, and the entire family's willingness to provide full-time care, the therapist

concluded that D.G. should be placed with Ruby.[1] She indicated that many of her early conclusions, and suggested that those of her colleagues, were drawn under the

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1. At the placement hearing, there was this candid exchange:

> [County Attorney:] Well, at the time you wrote this [quarterly report] in July you didn't feel that Ruby was the appropriate placement for [D.G.], right?
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> [Therapist:] Wrong. I questioned whether or not she was. And this has never been a black and white case, and it's been very difficult all along. At this time in the last few months I have seen tremendous and significant progress in the home. And my recommendation is that she be considered for the adoptive placement of her grandson.

We note also that there was this intriguing cross-examination of the same witness:

> [Guardian ad litem:] . . . Have you been under any pressure to change your recommendation in this case within the last month to six weeks?
>
> [Therapist:] I have certainly been asked for explanation as to why I would even consider recommend [sic] [D.G.] being adopted or living with his grandmother.
>
> Q. And who has been asking all the questions?
>
> A. DHS.
>
> Q. Wasn't there a special staffing called to get you to change your mind or --
>
> A. Yes.

Although we draw no conclusion about whether there was any inappropriate behavior in this case, we strongly condemn any party who is interested in matters as important as child custody and who undertakes activities inconsistent with the child's best interests. Any doubt about the integrity of these proceedings is too much. Cf. In re L.B.T., 318 N.W.2d 200, 201 (Iowa 1982) (stating interested parties' "rights must in the end yield to the best interests of the child." (citing In re Gustafson, 240 N.W.2d 674, 676 (Iowa 1976)).

difficult circumstances of Emma's recent death and mixed signals from IDHS and the courts about the final disposition of the children. She noted that the atmosphere had changed drastically for the better after Emma's death eliminated some of that uncertainty.

The juvenile court, on December 22, 1989, entered the order now in dispute. The court "conclude[d] that [IDHS had] established by clear and convincing evidence that the best interests of the child would be served by following the recommendation of the Department of Human Services [to place the guardianship and custody of D.G. with IDHS for suitable adoption]." Ruby contends the court was in error in not finding that D.G.'s best interests would be served by placement with her, D.G.'s maternal grandmother, who has custody of his three siblings. She also wishes to adopt the child. We thus are faced with the difficult problem of determining the proper post-termination placement of D.G.

Our only statutory guidance appears to be in Iowa Code section 232.117(3) (1989):

> If the court terminates the parental rights of the child's natural or adoptive parents, the court shall transfer the guardianship and custody of the child to one of the following:
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> a. The department of human services.
> b. . . . .
> c. A relative or other suitable person.

We have little else to direct us except the best interests of the child. Our legislature apparently did not foresee that we would be faced with competing petitions for permanent placement of a child after termination of

parental rights, with a relative pitted against IDHS. Neither do we find much help in our case law.

In In re A.C., 415 N.W.2d 609 (Iowa 1987), a proceeding to terminate parental rights, the supreme court stated:

> The State has the duty to assure that every child within its borders receives proper care and treatment . . . . In re Dameron, 306 N.W.2d [743,] 745 [(Iowa 1981)]. . . . Child custody should be quickly fixed and little disturbed. In re Kester, 228 N.W.2d 107, 110 (Iowa 1975). . . .

Id. at 613. In In re Blackledge, 304 N.W.2d 209 (Iowa 1981), in which the natural mother challenged placement of her children with their natural father, the mother's former spouse, after a child in need of assistance adjudication, the supreme court stated, "The legislative intent is that children be kept in their homes when possible. [See Iowa Code] § 232.1. The integrity of the family must be taken seriously." The supreme court also noted in In re A.M.S., 419 N.W.2d 723, 734 (Iowa 1988), that "siblings should not be separated without good and compelling reasons." Much of this is directed towards maintaining the natural nuclear family, and D.G.'s grandmother and his siblings are the closest thing we have in this case to a nuclear family.

In In re J.R., 315 N.W.2d 750, 752 (Iowa 1982), the supreme court held that the juvenile court had erred in denying the childrens' natural grandparents the right to intervene in proceedings to terminate parental rights and place the children. The court rejected the juvenile court's finding and the State's argument that the natural

parents might reappear and take the children. Id. The court reversed, stating:

> The grandparents testified they would not permit that to happen . . . ; [however,] an anonymous adoption, it was concluded, would be best for the children. While there is concededly a risk in providing an opportunity for future neglect by their parents, the quality of the proposed home in this case and the desirability of maintaining an identity with the children's natural family outweigh the benefits of an anonymous adoption. We conclude the best interests of the children will be served by placement with their grandparents.

Id. Ruby contends that all of this authority should lead us to the presumption that it is in the best interests of the child to remain in his natural family unless the court can show some identifiable harm or prejudice to the child. We are not prepared, however, to go so far. While we recognize the importance of family and the needs of family members, we note that these proceedings are governed by the best interests of the child. As we note below, maintenance of family relationships is only one of many factors to be considered.

In In re L.B.T., 318 N.W.2d 200 (Iowa 1982), in which the court was faced with competing adoption petitions, the supreme court considered nine factors that they and the trial court found important in adoption proceedings:

> (1) the respective age and education of the prospective parents;
> (2) their financial abilities, with special consideration to medical and educational expenses;
> (3) the advantages to be offered by a two-parent family when contrasted with a single-parent family;

> (4) the comparative ability of the parties to give the child love, attention, and kindness;
> (5) the physical structure and adequacy of the two homes;
> (6) whether or not siblings should be kept together;
> (7) the comparative ability of the two families to discipline the child, to inspire, nurture and educate him and develop his thinking processes; . . .
> (8) the availability of other relatives to assist and support the adoptive parent-child relationship[; and
> (9) any bonding attachments made between the families and the child].

Id. at 201.

Both the State and Ruby urge us to consider the L.B.T. factors. The parties are convinced that these factors are more favorable to their respective causes. Both the State and the juvenile court place great reliance on a comparison of the foster home with Ruby's home and a finding based thereon that D.G. should remain in the State's care, presumably in John and Louise A.'s custody. Although there are no adoption petitions pending, this is a sufficiently similar situation for these factors to aid our analysis; however, a couple of problems emerge.

First, given the State's vast resources, the comparison between the foster home and Ruby's home is almost unfair. We have stated many times that although the child's materialistic well being may be a consideration, custody cannot be determined on the basis of the prospective guardian's affluence. Second, both the juvenile court and the State place much stock in the fact that D.G. has bonded with his foster parents. This presents us with a very

delicate problem. Although we believe bonding is an important factor, we believe the juvenile court placed far too much emphasis on this in its decision.[2]

In a somewhat analogous situation, the supreme court commented:

> Unfortunately, the court's decision seems to have been influenced by a comparison of [the natural mother's] home with the [natural] father's. . . . Presumably every foster home will provide good care. The parent's right to have a child returned, however, is not measured by comparing the parent's home to the foster home or an ideal home. Rather the parent's right is established by negating the risk of recurrence of harm.

Blackledge, 304 N.W.2d at 212-13. We do not have a natural parent's rights in this case; consequently, neither do we have a risk of recurrence of harm. Nevertheless, we find in this the notion that we must look critically at our comparison of the different potential homes for the child.

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2. The Supreme Court addressed these very difficult problems in In re A.C., 415 N.W.2d 609 (Iowa 1987). The court stated, "To some it may seem innocent, even a good thing, to offer a permanent love to the child under temporary care. But unselfish temporary parents recognize that such a bonding is not kind." Id. at 614. We recognize that it is not necessarily inappropriate for such bonds to develop or for foster parents eventually to adopt children in their care. But, again, the Supreme Court wisely noted, "Temporary foster relationships must be designed with the knowledge they will almost certainly end in separation. The children often return to their natural parents. Often another solution must be found." Id. (emphasis added). Although this case is markedly different from A.C.--the evidence shows only that the foster parents have expressed and interest in adopting, we believe the infusion of such foster care comparisons may be too heavily relied upon.

Although as a grandparent Ruby has no legal right to guardianship and custody of D.G., these principles lead us to the conclusion that Ruby is at least entitled to a level playing field when such comparisons are made.[3] Id.; see also L.B.T., 318 N.W.2d at 201.

Upon reviewing the record de novo, we agree with Ruby that when properly balanced the factors indicate that D.G. should be placed with her. Ruby has already demonstrated that her age does not significantly affect her ability to parent effectively, and this seems a result of the fact that although she is not highly formally educated, she has a large amount of parenting experience. We have already indicated that we discount financial abilities somewhat because well being in the material sense is not a terribly significant factor. It is necessary for the prospective family to be able to provide food, shelter, clothing, medical, and education care, and both the State and Ruby have demonstrated their abilities to provide these necessities. As for the physical adequacy of the

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3. Although grandparents have no legal rights to assume guardianship and custody of their grandchildren, in the normal situation, we would not think twice about a grandmother seeking custody, irrespective of a child's disabilities. We would think it highly unusual for IDHS to intervene. But for Emma's failure to care properly for her children, IDHS would have no involvement at all, and there would be no one to object. We recognize that there has been a tremendous upheaval in the lives of these family members and that this is not the "normal" situation. We should be careful, however, to separate Emma's indiscretions and not to follow meretricious impulses in further disrupting this family.

structure, no one disputes the fact that Ruby's home is adequately furnished and maintained.

There was some discussion at the placement hearing about D.G.'s need for a male role model. Neither side here makes much of the single-parent issue on appeal, so neither will we. Certainly, the lack of a second parent in the household will not reduce the love, attention, and kindness that D.G. will receive. Moreover, there is abundant evidence that there will be numerous relatives and immediate family members to assist and support the adoptive relationship.

We have already discussed bonding attachments. We noted that the juvenile court may have placed too much importance on D.G.'s attachment with the foster family. The record, however, shows clearly that D.G. has also bonded with his grandmother and his siblings despite the difficult and unusual circumstance of being separated from them virtually full time. That bonding took place during D.G.'s weekly visits and his occasional overnight visits to Ruby's home is a testament to their resolve. It is clear from the record, moreover, that whatever anxiety D.G. suffered during his early visits--during the most disruptive time of his young life--has now dissipated. We are persuaded that this bonding is important for D.G., and all concerned for that matter. Both sides here agree that it is important that these siblings should be kept together.

Finally, we examine the comparative ability of the two families to discipline the child, to inspire, to nurture, to educate him, and to develop his thinking processes. The record very clearly indicates that either the State or Ruby will be able to provide these important parenting functions. The questions, though, are whether Ruby can provide the extra care necessary to meet D.G.'s special needs, and in the final analysis, whether this so outweighs the other factors that D.G. should remain in foster care.

The juvenile court concluded that D.G. may suffer some regression in his educational development "if the current educational program . . . is not continued with the same level of intensity and continuity." We do not think we should be so easily cowed into permanently severing the family ties here based on the vague sociological labels placed on this child. In fact, all the evidence shows is that D.G. was perhaps nine months behind average development a year and a half ago, in the midst of this family's turmoil and well before his mother died in July 1989. After months of specialized preschool instruction from the Area Education Agency, the teachers, therapists, and social workers agree that he has shown vast improvement just since July 1989. With continued instruction and, presumably, IDHS's continued supervision, we find nothing in the record to indicate that placing D.G. with his grandmother would be detrimental. Given such a willing and able person who is prepared to make the necessary

sacrifices, we cannot find this a compelling reason to separate D.G. from his siblings, nor can we find that it outweighs the other factors discussed.

Based on this de novo review of the record, then, we find that it is in the best interest of D.G. to place him in the guardianship and custody of the intervenor-appellant, his grandmother Ruby G. We therefore reverse the decision of the juvenile court, and we remand for proceedings in accordance with this opinion.

REVERSED AND REMANDED.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, J. (dissenting)

I respectfully dissent. As the majority points out, in considering child custody issues, our foremost consideration is the best interests of the child. Even though we review the record de novo, we give weight to the trial court's findings of fact, especially when the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

In this matter, the juvenile court considered "innumerable reports" and conducted three days of hearings. During the three days of hearings, the juvenile court had an opportunity to fully and thoroughly assess the demeanor and credibility of witnesses, to assess the available options before it, and to consider the best interests of D.G. The juvenile court was in a situation superior to our own, in that we are confined to a written record.

The juvenile court determined the best interests of D.G. would be served by allowing D.G. to remain with the foster parents with whom he had integrated and who have three years' experience in providing for his special needs and not the maternal grandmother. In my review of the record I find no satisfactory reason to overturn the findings of the juvenile court or to override its judgment. I would affirm.