



for further proceedings consistent with this order.

¶ 3 E.M. was born on July 11, 2008. On October 26, 2009, her mother, Heather S., awoke to find E.M.'s three-month-old brother, A.M., unresponsive on the sofa. A.M. had suffocated to death. An autopsy revealed that A.M. had suffered numerous unexplained bruises, scratches, and bite marks. Charges were filed against both Heather S. and the father, Donald M., Jr., in the death of their son. Eventually, Heather pled guilty to aggravated battery of a child and was sentenced to 10 years in prison. Donald Jr. was convicted of first-degree murder and sentenced to 35 years.

¶ 4 On October 28, 2009, the State filed a petition alleging that E.M. was abused and neglected. The petition alleged that (1) Heather and Donald Jr. both had substance abuse problems that impaired their ability to provide E.M. with the care and supervision she needed, (2) both Heather and Donald Jr. engaged in acts of domestic violence, (3) Donald Jr. had an extensive criminal history, and (4) E.M. was at risk of physical injury due to the fact that her brother died of suffocation and was found to have multiple unexplained injuries. After a shelter care hearing, temporary custody of E.M. was given to DCFS, and E.M. was placed in foster care with her paternal grandparents, Donald M., Sr., and Christine M.

¶ 5 On May 18, 2010, the court entered an agreed adjudicatory order finding E.M. to be abused and neglected on the grounds that she lacked adequate support, education, and care, and there was a substantial risk of physical abuse. The court noted that its finding was based on the following facts: (1) both parents suffered from "serious heroin addiction," (2) Heather pled guilty to aggravated battery of a child in the death of E.M.'s sibling, and (3) Donald Jr. was convicted of first-degree murder in the death of the sibling. E.M. remained in DCFS custody placed in foster care with Donald Sr. and Christine.

¶ 6 On July 26, 2010, Donald and Christine filed a motion to intervene, alleging that they had a direct interest in the outcome of the case because they had physical custody of E.M. and wanted to adopt her. On August 6, 2010, the State filed a motion to remove E.M. from her current foster care placement. The motion alleged that the current permanency goal for E.M. was return to her home, and the foster parents had made statements indicating that they may be working against that goal. The petition further alleged that if parental rights were terminated, it would not be in E.M.'s best interests to be adopted by Donald and Christine and that the guardian *ad litem* (GAL) for the child supported her removal from her current placement.

¶ 7 On September 1, Heather's sister, Kimberly S. (Kim), filed a motion to intervene and a motion to strike DCFS as guardian. In her motion to intervene, Kim alleged that (1) Donald Jr.'s paternity had not been established, (2) Kim had an "extensive relationship" with E.M., and (3) it was in E.M.'s best interests for Kim to intervene and to adopt E.M. if parental rights were terminated. In the motion to strike DCFS as guardian, she alleged that (1) placement with Donald and Christine was not consistent with "the goal of the current case plan" and (2) DCFS failed to act in E.M.'s best interests by allowing the foster parents to interfere with her "established familial relationships."

¶ 8 On October 25, 2010, the court granted both motions to intervene. In a written order, the court found that the likelihood of Heather completing her service plan was "marginal" and that her earliest release date would occur when E.M. was 12 or 13 years old. The court further found that Donald Jr.'s lengthy prison sentence made it "impossible" for him to complete a service plan or act as a "resource for the child." The court went on to state that the most likely placement for E.M. would be either with Kim or with Donald and Christine. As such, the court concluded, it was in

E.M.'s best interest that both be allowed to intervene in the matter.

- ¶ 9 On January 14, 2011, Kim filed a motion to remove E.M. from her current foster home, raising allegations identical to those raised in the State's August 2010 motion to remove E.M. from her current foster home. On January 27, the State withdrew that motion. The court did not rule on either Kim's January 14 motion or her earlier motion to strike DCFS as guardian.
- ¶ 10 Prior to March 2011, Kim had visitation with E.M. Christine drove E.M. to Kim's house for one-hour visits every two weeks. The visits stopped in March 2011. On April 14, 2011, Kim filed a motion to establish visitation with E.M., alleging that continuing the visits was in E.M.'s best interests. On June 14, DCFS filed a motion to dismiss Kim's motion on the grounds that no statute or common law provided a right to visitation to Kim as the child's aunt. The court granted the motion to dismiss.
- ¶ 11 On November 11, 2011, the court held a dispositional hearing and entered an agreed order making E.M. a ward of the court and giving custody to DCFS. The court found that it was in her best interests to be made a ward of the court and that both parents were unfit because they were incarcerated and had not yet completed the tasks in their service plans. All parties present agreed to the dispositional order, including the GAL for E.M., the appellant here. However, neither Kim nor her attorney received notice of the hearing. Therefore, on February 6, 2012, Kim filed a motion to vacate the dispositional order, which the court granted on February 15. Meanwhile, the State filed a petition to terminate Heather and Donald Jr.'s parental rights in January 2012. Donald Jr. subsequently signed a consent to the adoption of E.M. by Donald Sr. and Christine.
- ¶ 12 The court held a new dispositional hearing on April 3, 2012. The State's lone witness was Shannon Austin, E.M.'s foster care caseworker. Austin is an employee of

Christian Social Services, a private agency that monitors foster care placements for DCFS under contract. She was assigned E.M.'s case on February 1, 2012, two months before the hearing. Austin first testified regarding the inability of E.M.'s parents to care for her. She testified that Heather's earliest possible release date would be June 10, 2018, and Donald Jr.'s earliest release date would be November 13, 2039. Austin testified that the service plans for both parents required them to undergo psychiatric evaluations and complete substance abuse counseling. In addition, Heather's service plan required her to complete domestic violence classes and Donald Jr.'s plan required him to complete an anger management course. Austin testified that Heather had completed only some of these tasks, and Austin had no record that Donald Jr. had completed any of them.

¶ 13 Austin further testified that E.M. had been in foster care with Donald Sr. and Christine for approximately two years and that E.M. was doing well under their care. She further testified that a bonding assessment had been conducted, which was favorable to Donald Sr. and Christine. Austin had no concerns about E.M.'s placement with them. Her recommendation was that E.M. remain a ward of the court and remain in foster care.

¶ 14 Austin was then asked about whether visitation with Kim and contact with other members of her family was in E.M.'s best interests. Austin testified that she believed allowing contact with family members was in E.M.'s best interests. She acknowledged that E.M.'s foster parents were not allowing visitation with Kim, but explained that she did not know whether the foster parents or DCFS decided to stop the visits. In response to questioning by the attorney for Donald and Christine, Austin testified that she did not know anything about Kim. Asked why she believed that allowing visits or contact was in E.M.'s best interest in light of this, she replied, "I can

just say that what I know for the last three months is that [Donald and Christine] are appropriately caring for [E.M.], and I think that it would be in [E.M.]'s best interests to try to get some type of relationship with the other side of the family in the future."

In response to questioning by Kim's attorney, Austin testified that there were no negative reports relating to Kim's interaction with E.M.

¶ 15 Kim's attorney informed the court that he intended to recall Shannon Austin to make an offer of proof regarding what she believed E.M.'s best interests entailed. The court stated, "Not now."

¶ 16 Heather then testified on behalf of Kim. She testified that E.M. was 15 months old when she was taken into foster care. Prior to that time, E.M. regularly spent time with both Kim and her paternal grandparents, Donald and Christine. Heather explained that E.M. often had play dates with Kim's children, and she spent time playing with a cousin named Austin while visiting Donald and Christine. Heather further testified that she and Donald Jr. got high "all the time" and could not "afford diapers and clothes." She testified that Kim helped her provide these things for both children and she was grateful to Kim for her help. She then stated, "The same with [Donald and Christine]." Finally, Heather testified that E.M. had a good relationship with Kim. She testified that the bond between E.M. and Kim was so strong that people might think that E.M. was Kim's own daughter.

¶ 17 Next, Kim took the stand. She testified that prior to E.M. being in foster care, she saw her once or twice a week, including overnight visits. She also testified that she helped care for E.M. Kim testified that she initially contacted someone at DCFS to request visitation with E.M. She was told that whether to allow visitation was up to the foster parents. However, DCFS did facilitate visitation. Kim testified that she and the other members of her household passed background checks conducted by DCFS and her

home was approved by DCFS. Caseworker Austin earlier testified that this is standard procedure before DCFS will facilitate visitation. After this process, E.M. visited Kim in her home for one hour once every two weeks.

¶ 18 Kim testified that the visits continued until March 24, 2011. At that point, she received a text message from Christine telling her to call Susie, who was E.M.'s foster care caseworker at the time. Kim attempted to reach Susie for two days. When she finally reached her, Susie told Kim about a discussion that took place during Donald and Christine's monthly foster care meeting with DCFS. Donald and Christine were told that if anything happened to E.M. during her visits with Kim, it would be their responsibility. They decided that they did not want that responsibility.

¶ 19 Kim was then asked about her ability to provide for and take care of E.M. if she were given custody. Kim testified that she has a bachelor's degree in elementary education and is employed as a kindergarten teacher. She testified that she has room in her home for E.M. and can afford to support her financially. She further testified that she is capable of taking care of E.M.

¶ 20 Kim was next asked if any other members of her family had tried to have visits with E.M. The attorney for Donald and Christine objected to this question, arguing that Kim's response would be hearsay. The court asked the relevance of the question. Kim's attorney replied, "I'm curious as to what DCFS is doing to facilitate the best interests of this child, which is part of this hearing." The court sustained the objection and told Kim's attorney that he could ask Shannon Austin what DCFS was doing to facilitate E.M.'s best interests when he recalled her later.

¶ 21 The GAL then began her cross-examination of Kim. She asked, "In your dealings with all of this since E.M. came into care, has there been anything that has concerned you that the foster parents have said either to you or in your hearing?" The court

inquired, "What time frame are you talking about, Ms. Polinske?" The GAL began to reply, "April 15 of 2010 to June 4—"whereupon the court interrupted and stated: "I'm not going to find that to be relevant, Ms. Polinske. If you have got something [from] the last six months or so, I'll entertain it." The GAL told the court, "Your Honor, it is very relevant to the hearing today based on—" again, the court interrupted. The court told the GAL: "Six months time frame is relevant. \*\*\* If you got it within the last six months, great. If not, we're done with this witness."

¶ 22 At this point, Kim's attorney argued: "Just for the record, this \*\*\* is not a six-month review. This is a dispositional hearing." The court stated, "We're through with this witness," and asked the GAL if she had any witnesses to call. Kim's attorney stated, "I haven't rested yet, Your Honor." The court replied, "I think that you have, sir."

¶ 23 Next, Donald M., Sr., took the stand. He testified that Cynthia McNamara of DCFS recommended that he and Christine discontinue E.M.'s visits with Kim. He did not know what McNamara's position was. He testified that this was the reason the visits stopped. The following colloquy then occurred:

"A. And this isn't—we didn't do this. We agreed to the visitations to begin with. They said that if something would happen to [E.M.] that we would be responsible for it, so it scared us. I mean we've been through enough of this stuff. We don't want anything to happen to her. And as far as everything goes, Kim, we have no problem with you, and you know that, and you know who we have problems with. Okay? Hon, we have not ever had a problem with you, never.

Q. [by counsel for Donald and Christine] Mr. [M.], what is the problem?

A. Well, I—

Q. Go ahead.

A. [Addressing Kim] Your father is a drug addict, and he admitted to doing

heroin with these kids, and my grandson died over it. That's what. Your father admitted—

THE COURT: Sir, have a seat. We're done with your testimony. Have a seat."

¶ 24 The court did not ask if any of the parties had additional witnesses to call or evidence to present. Instead, the court stated: "The court is going to find that the parents are unfit. Guardianship remains with the Department of Children and Family Services." The court noted that it would not direct DCFS as to either placement or visitation, but then stated that it would recommend "very strongly to both [Donald and Christine] that they allow visitation with Ms. [S]. From what I hear, she didn't do anything." Donald Sr. interjected, "She didn't."

¶ 25 The court continued its ruling, stating:  
"this is not about where the child eventually is going to live. We're all assuming that these parents will not have that opportunity. And that might very well be the case, but that is not before the court today, and that is why the court is unhappy with the direction of the attorneys in this case. \*\*\* You clearly all know that DCFS does the placement, not the court."

¶ 26 The court then addressed Kim's attorney, stating, "Mr. Dos Santos, go ahead and make your offer [of proof]." At this point, the judge left the courtroom. With the judge absent, counsel argued that multiple placement choices are available to the court at a dispositional hearing, including direct placement with Kim, Donald and Christine, or other family members, not just placement through DCFS. He further argued that the court failed to consider alternatives to DCFS or allow any party to present evidence that other dispositions would be appropriate.

¶ 27 After the judge returned to the courtroom, counsel called Shannon Austin to the stand and asked her what the best interest of the child means to her. The Assistant Attorney

General representing DCFS objected, arguing that the best interest is a standard that is defined by statute. The court sustained the objection. Kim's attorney argued, "I still have the right for an offer of proof." The court responded that the court reporter was present, told counsel to "have a nice time," and once again left the courtroom. Counsel did not attempt to question Austin further. However, he noted that, as a further offer of proof, he would offer the recordings of phone calls between Donald M. Jr. and his parents while Donald Jr. was in the Madison County jail awaiting sentencing. Next, the GAL argued that the child's background and family ties were among the factors to be considered by the court in determining the proper disposition in a juvenile case. She did not offer any additional evidence.

¶ 28 The court entered a written dispositional order the same day. In relevant part, the court found that (1) it was in E.M.'s best interests and consistent with her health, welfare, and safety to make her a ward of the court, (2) both parents were unfit because neither had successfully completed all of the tasks on their service plans, and (3) efforts had been made to keep E.M. in her home, but those efforts had not eliminated the need for her to be removed from her home. The court made E.M. a ward of the court and ordered that custody remain with DCFS.

¶ 29 The GAL filed the instant appeal on behalf of E.M. on April 9, 2012. We note that neither of the parents are parties to this appeal. We further note that Kim is not a party to this appeal.

¶ 30 The GAL first argues that the court abused its discretion in failing to consider evidence related to the best interests of E.M. As we have discussed at length, both the GAL and Kim attempted to offer proof that guardianship with DCFS was not in E.M.'s best interests because someone from DCFS interfered with visits between Kim and E.M. The GAL argues that the court abused its discretion by excluding this

evidence and by failing to consider E.M.'s ties to Kim and other members of her mother's family. See 705 ILCS 405/1-3(4.05)(c) (West 2010) (providing that a child's familial ties are a factor to be considered in assessing the child's best interest). The State, however, argues that the court's decision is supported by evidence in the record. We find that reversal is warranted by the court's failure to consider alternatives to custody with DCFS.

¶ 31 The primary issue for a trial court to consider in all custody cases is the best interests of the child. *In re Austin W.*, 214 Ill. 2d 31, 49, 823 N.E.2d 572, 583 (2005); *In re Violetta B.*, 210 Ill. App. 3d 521, 533, 568 N.E.2d 1345, 1352 (1991). All other issues—even the superior rights of the parents—are secondary to the child's best interests. *In re Austin W.*, 214 Ill. 2d at 50, 823 N.E.2d at 584; *In re Violetta B.*, 210 Ill. App. 3d at 533, 568 N.E.2d at 1352. In making this determination, the court must consider relevant factors, including the physical safety and welfare of the child, the child's background and familial ties, the child's sense of attachment, and the least disruptive placement available. *In re Austin W.*, 214 Ill. 2d at 49-50, 823 N.E.2d at 584 (quoting 705 ILCS 405/1-3(4.05) (West 2000)). Other crucial factors include " 'the nature and length of the child's relationship' " with her present caretakers and the impact that a change in placement might have on the child's emotional well-being. *In re Austin W.*, 214 Ill. 2d at 50, 823 N.E.2d at 584 (quoting *In re Violetta B.*, 210 Ill. App. 3d at 534, 568 N.E.2d at 1353).

¶ 32 On appeal, we will reverse a court's dispositional order only if the court's findings were against the manifest weight of the evidence or the court abused its discretion by choosing an inappropriate disposition. *In re April C.*, 326 Ill. App. 3d 245, 257, 760 N.E.2d 101, 110 (2001). However, we review the court's legal rulings *de novo*. *In re S.L.*, 2012 IL App (5th) 120271, ¶ 36, 980 N.E.2d 796 (citing *In re D.F.*, 201 Ill.

2d 476, 495, 777 N.E.2d 930, 941 (2002)), *appeal allowed*, No. 115424 (Ill. Jan. 22, 2013).

¶ 33 At a dispositional hearing, the court is required to make two distinct findings. First, the court must determine whether it is in the best interests of the child to be made a ward of the court. 705 ILCS 405/2-22(1) (West 2010); *In re Alexis H.*, 401 Ill. App. 3d 543, 551-52, 929 N.E.2d 552, 560-61 (2010). If so, the court then must determine what disposition best serves the child's interests. 705 ILCS 405/2-22(1) (West 2010). Possible dispositions include placement in the custody of a family member or other guardian (705 ILCS 405/2-27(1)(a) (West 2010)) or in the custody of DCFS (705 ILCS 405/2-27(1)(d) (West 2010)).

¶ 34 The court here did not consider any disposition other than giving custody of E.M. to DCFS. As previously discussed, the court gave all of the parties little to no opportunity to fully develop evidence they might have relating to the concerns Kim and the GAL had regarding DCFS custody of E.M. The court informed the parties that they were litigating matters that were not before the court because "DCFS does the placement, not the court." As we have explained, this statement does not accurately reflect the law. Because the court believed that it had no alternative other than to give custody of E.M. to DCFS, it did not consider whether any of the other alternatives would be a more appropriate disposition in this case. For this reason, we must remand this case so the court can determine which disposition would best serve E.M.'s interests.

¶ 35 We express no opinion as to whether the court's decision to give custody of E.M. to DCFS was appropriate and supported by the evidence. We do not know what disposition the court would have found appropriate had it considered alternatives to DCFS custody. We also need not address the GAL's arguments regarding the court's

evidentiary rulings. The court may well have ruled differently had it considered that alternatives to DCFS custody were possible. Thus, we conclude only that the court erred in failing to consider alternative dispositions.

¶ 36 The GAL next argues that the court erred in failing to put the factual basis underlying its conclusion into writing, as required by section 2-27(1) of the Juvenile Court Act of 1987 (705 ILCS 405/2-27(1) (West 2010)). Because we reverse the court's ruling on other grounds, we need not consider this issue.

¶ 37 For the foregoing reasons, we reverse the order of the court and remand for further proceedings consistent with this order.

¶ 38 Reversed; cause remanded for further proceedings.