IN THE COURT OF APPEALS OF IOWA

No. 1-614 / 11-0952
Filed August 10, 2011

**IN THE INTEREST OF B.M., B.M.,
A.C., M.C., P.C., and R.C.,
Minor Children,**

A.M., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Rachael E. Seymour, District Associate Judge.

A mother appeals the juvenile court's child in need of assistance disposition order placing her children with their father. **AFFIRMED.**

Don L. Williams, Des Moines, for appellant mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John P. Sarcone, County Attorney, and Cory L. McClure, Assistant County Attorney, for appellant State.

Charles E. Isaacson, Des Moines, for appellee father, G.C.

Jerry R. Foxhoven of Children's Rights Clinic, Des Moines, for appellee father, R.M.

Jonathan N. Garner of Hartung & Schroeder, Des Moines, attorney for minor children.

Michelle R. Saveraid of Youth Law Center, Des Moines, guardian ad litem for minor children.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Athena and Greg were married and had four daughters before they divorced in 1999. After the divorce, the four daughters lived primarily with Athena, but spent six weeks in the summer and every other weekend with Greg, who lived in Nebraska. Athena married Roger in 2009, and she and Roger have two sons.

The family came to the attention of the Iowa Department of Human Services (DHS) in February 2011 after two of the daughters reported Roger had regularly required them to submit to his exams of their vaginal areas. A third daughter later reported receiving similar exams. Following this discovery, the children were adjudicated children in need of assistance by stipulation of all parties. A no-contact order was put in place between Roger and the children, and he moved from the family residence.

On May 5, 2011, a contested disposition hearing was held. Athena requested that all children remain in her custody in the Des Moines area. Greg sought custody of his four daughters and was granted a concurrent jurisdiction order. At the time of the hearing, the four daughters were all teenagers and attended Johnston schools. Roughly three weeks remained in the school year.

The DHS caseworker assigned to work with the family testified she did not see any protective issues in Athena's home. The DHS case plan recommended the children remain in Athena's custody. When questioned about her recommendation for the three to four weeks remaining in the school year, the DHS caseworker testified she would not recommend moving the children and

"uproot[ing] them from school with the last three weeks."[1] The children's attorney supported the desires of all four daughters to stay in Iowa for the end of the school year. He noted that one of the children had expressed a desire to move to Omaha with Greg once the school year finished. The children were scheduled to begin their six-week summer vacation with their father in Omaha on June 3, 2011. The children's guardian ad litem testified she believed there was a risk of further adjudicatory harm if the children remained in Athena's care. She testified it was in the children's best interests to be placed with Greg.

On June 3, 2011, the juvenile court entered an order placing Greg's four daughters in his custody. Athena appeals, asserting: (1) the juvenile court did not place the children in the least restrictive placement; (2) there was no factual basis for the court's finding that continued placement of her four daughters with her would expose them to further adjudicatory harm; and (3) the juvenile court did not adequately determine the terms and conditions to which Athena would be subject to retain custody of the four children under Iowa Code section 232.101(1) (2011).[2]

II. Analysis

After a de novo review of the record, we find the juvenile court properly concluded that continued placement in Athena's care "would be contrary to the children's welfare due to sexual abuse by the step-father and mother's clear lack

[1] The juvenile court concluded the DHS caseworker changed her position on the record to support the daughters being placed in Greg's custody once the school year was over. The juvenile court did not file its order until after the school year had ended. Finding DHS's recommendations were rendered moot by the timing of the juvenile court's order, the State found it was precluded from filing a brief on appeal. Greg and the guardian ad litem filed briefs in response to Athena's appeal.

[2] Athena's appeal relates only to her four daughters with Greg.

of insight and failure to protect these children from further adjudicatory harm." Roger did not deny that he had conducted vaginal exams on Athena's daughters, though he did deny touching the girls anywhere except their inner thighs. Roger informed caseworkers that he had performed the exams to check for rashes and that, if asked, all four girls would report being checked for rashes. The girls informed caseworkers the exams took place on Roger's bed and involved Roger rubbing the area around the vaginal opening. At the disposition hearing, Athena testified she did not believe the exams were sexual in nature and did not believe Roger had sexually abused the girls.

At the time of the hearing Roger did not live in the family home because of the no-contact order. However, Athena visited Roger frequently, often spending nights with him at the expense of spending time in the family home. The week of the disposition hearing, Athena had not seen her children for over three days, as she had been spending her nights with Roger and her days at work. Athena argues she maintained a balance between Roger and the children so that reunification could be more readily accomplished.

Athena failed to communicate with the children's grandmother and their father regarding issues that affected the children's safety. She failed to timely inform the children's grandmother, who lived in the family home and regularly cared for the children when Athena was gone, of the sexual abuse by Roger. She also failed to tell Greg that one of the children had potentially been sexually assaulted by someone at school. As a result of this incident, the child was suspended from school for three days: a Thursday, a Friday, and the following Monday. The children were in Greg's care over the weekend that fell in the

middle of the suspension, but Athena did not inform Greg of the incident or the resulting suspension. Athena testified she did not inform Greg of these safety concerns out of fear he would try to take the kids from her.

We find Athena's continued denial that her husband's actions constituted sexual abuse, her failure to provide caretakers with information relevant to her children's safety, and her frequent absence from the children's lives while she spent time with Roger place the children at risk to suffer further adjudicatory harm. *See In re J.E.*, 723 N.W.2d 793, 802 (Iowa 2006) (Cady, J., concurring specially) (identifying safety as a defining element in a child's best interests); *In re L.B.*, 530 N.W.2d 465, 468 (Iowa Ct. App. 1995) ("It is essential in meeting a child's needs that parents recognize and acknowledge abuse."). Because Athena did not recognize the abuse her children had suffered and failed to take necessary steps to provide for their safety, the district court properly concluded placement outside Athena's home was necessary.

We further find the juvenile court properly considered all the circumstances of this case, including the necessity for placement outside Athena's home, and made the least restrictive disposition appropriate, placing the children with their noncustodial father. This placement is in compliance with Iowa Code section 232.99(4).

Finally, we conclude the juvenile court was not required to determine the terms and conditions to which Athena would be subject pursuant to section 232.101(1). First, section 232.101(1), by its express language, would only apply if Athena had retained custody of the children, which she did not. Because the court found Athena could not retain custody of the children, it was not required by

section 232.101(1) to determine terms and conditions to which Athena would be subject. Second, section 232.101(1) describes an order the court "may" enter and is therefore permissive, not mandatory. *See Hildenbrand v. Cox*, 369 N.W.2d 411, 417 (Iowa 1985) ("[T]he legislature has consistently used the word 'may' to designate permissive rather than mandatory action or conduct.").

We affirm the district court's order placing the four children at issue with their father.

AFFIRMED.