

IN THE COURT OF APPEALS OF IOWA

No. 1-647 / 11-0956
Filed September 8, 2011

**IN THE INTEREST OF G.C., J.C., J.N.,
T.C., and E.R.,
Minor Children**

B.N., Mother,
Appellant,

K.C., Father,
Appellant.

Appeal from the Iowa District Court for O'Brien County, David C. Larson,
District Associate Judge.

A mother and father separately appeal a juvenile court order denying their joint motion to modify a prior dispositional order in a child-in-need-of-assistance proceeding. **AFFIRMED.**

John M. Sandy of Sandy Law Firm, P.C., Spirit Lake, for appellant-mother.

Shawna L. Ditsworth of Ditsworth Law Office, Spirit Lake, for appellant-father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Micah J. Schreurs, County Attorney, and Robert E. Hansen, Assistant County Attorney, for appellee.

Tisha M. Halverson of Klay, Veldhuizen, Bindner, DeJong, DeJong & Halverson, P.L.C., Paullina, attorney and guardian ad litem for minor children.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

MULLINS, J.

A mother and father separately appeal a juvenile court order denying their joint motion to modify a prior dispositional order in a child in need of assistance (CINA) proceeding. Both parents argue that a substantial and material change in circumstances was shown such that the children could be returned to either of their care. The mother also argues that she has not received reasonable reunification services. For the reasons stated herein, we affirm.

I. Background Facts and Proceedings.

Five children are at issue in the present case: J.N. (born November 2002), J.C. (born June 2004), G.C. (born December 2005), E.R. (born October 2007), and T.C. (born April 2010).¹ The mother and father of the children are not married, and their relationship has been tumultuous. In 2006, the parents were the subject of a founded child protective assessment arising out of an incident of domestic violence that occurred in the presence of the children.

Throughout this case, the father has had limited interaction with the children. He lives in Nebraska, and has not come to Iowa because of an outstanding arrest warrant within the state. The mother is the children's primary caregiver. Due to a severe closed head injury suffered in a car accident as a child, the mother has short-term memory issues and her general cognitive ability is within the borderline range of intellectual functioning.

On June 25, 2010, the Iowa Department of Human Services (DHS) received reports that the mother was not providing T.C. with proper nourishment

¹ The mother and father have another child, an older daughter. She currently lives with the father in Nebraska and is not at issue in this case.

and that she was overwhelmed in parenting all of her children. It was alleged that the children were very active and had behavioral issues related to aggression. It was also reported that the mother's lack of supervision allowed the children to be very physical with each other resulting in several injuries including bruises, scratches, and bite marks. DHS met with the mother to discuss the allegations, and entered into a safety plan permitting the mother's parents to stop in over the weekend to make sure the children were being properly supervised. However, the day after signing the safety plan, the mother left Iowa with the children. Accordingly, DHS filed an application for an ex parte removal order, which was granted.

On July 1, 2010, the children were found at their father's home in Nebraska. With the aid of local agencies, the children were removed from the father's home, returned to Iowa, and placed with maternal relatives.

On July 6, 2010, the State filed a petition alleging the five children to be CINA under Iowa Code sections 232.2(6)(b), (c)(1), (c)(2), and (n) (2009). The petition came to hearings on July 21 and August 4, 2010. During the hearings, evidence was presented regarding a two-hour supervised visit that occurred at a park. It was reported that during the visit the mother focused most of her attention on T.C. The mother had limited interaction with the older children, and at times, had her back completely turned to them. The two oldest children were noted to have fought constantly, hitting, kicking, choking, biting, and spitting each other without the mother intervening or disciplining them. The mother also

watched as the DHS worker chased down one of the children after he ran into the road.

Additional evidence from the children's mental health counselor showed that the two oldest children scored very high on the Connors rating scale, and needed to be further evaluated for ADHD. The mental health counselor believed that the two oldest children needed increased structure and one-on-one attention as well as attachment, bonding, and trauma therapy. In order to better meet the needs of those children, the counselor recommended that they be removed from relative care and be placed into family foster care.

Following the noon recess of the August 4 hearing, the parties reached an agreement regarding adjudication, pre-dispositional placement, and pre-dispositional services. Under the stipulation accepted by the juvenile court, the children were adjudicated CINA under Iowa Code section 232.2(6)(c)(2). The two oldest children (J.N. and J.C.) were placed in foster care, while the three youngest children (G.C., E.R., and T.C.) were returned to the mother's care under DHS protective supervision. The court also ordered the initiation of services, which included a mental health evaluation for the mother and the two oldest children, family safety, risk, and permanency services, best care for better babies for T.C., and a home study on the father's home in Nebraska.

Contested dispositional hearings were held on October 15, 22, and November 2, 2010. Following the hearings, the juvenile court took the matter under submission. However, on November 3, DHS filed an emergency ex parte removal order for the three children still in the mother's custody. DHS alleged

that the mother continued to struggle to supervise the three children in her care. The shelter where the mother was residing reported that the children were leaving the shelter and running into the street daily and that the mother was unaware that the children were in the street or had even left the shelter. The children also continued to have injuries and bruises due to their aggressive and rough play. Concerns were also raised that T.C. was developmentally delayed because the mother was only breastfeeding him and not supplementing with any formula and was not giving him enough floor time.

On November 10, 2010, the juvenile court entered a CINA dispositional order finding:

The children's mother . . . suffered a brain injury as a child, and, as a result, she has some short-term memory issues, and her cognitive functioning is below average. The four older boys are very active and have behavioral issues related to aggression. At times, [the mother] is overwhelmed by the children's behaviors, and due to her decreased parenting abilities, she is unable to multi-task and appropriately supervise all five children at the same time. [J.N.], [J.C.], and [G.C.] in particular present behavioral challenges, and they require above average parenting abilities. The four older boys continuously have excessive bruising and injuries as a result of their rough play, and they place themselves in danger when not being appropriately supervised. In relation thereto, when [the mother's] attention is on providing for [T.C.], she is often unaware of what the older boys are doing, resulting in little or no supervision. After removal of [J.N.] and [J.C.] from [the mother's] care, there was some improvement in [the mother's] supervision of the three children in her care, but even with three children, [the mother] becomes overwhelmed at times, and she is not able to properly supervise and provide appropriate care for [G.C.] and [E.R.] when her attention is on [T.C.]

Due to the safety issues regarding a continued lack of supervision, the juvenile court determined that G.C. and E.R. should be removed from the mother's care and placed into DHS custody for placement in family foster care.

However, the juvenile court also found that with appropriate services, the mother was capable of providing appropriate supervision for T.C. on a one-on-one basis, and therefore T.C. remained in her care.

In January 2011, Nebraska denied the home study for possible placement of the children with the father. Around this same time, DHS received a report that J.N. had been slapped by his foster parent, but the allegation could not be confirmed.

On February 24, 2011, the mother and father filed a joint motion for modification of the dispositional order requesting the four oldest children be returned to the mother's care. In the alternative, the parents requested that custody of the children be placed with the father or in family foster care in Nebraska. Combined review and modification of disposition hearings were held March 30 and April 25, 2011.

At the time of the hearings, the mother was receiving weekly visits with the children. These visits required two providers and were still described as chaotic. Although there were improvements shown both in the mother's parenting and in the children's behaviors during the visits, the children continued to be very aggressive and physical with each other and the mother continued to struggle with awareness, supervision, intervention, and follow through. The children's mental health counselor, the two visit supervisors, and the DHS case worker all testified that none of the four older children could be returned to the mother's care at that time. However, the Best Care for Better Babies worker testified that she has no concerns regarding the mother's supervision of T.C., and that she

believed the visit supervisors were interjecting themselves too much during the visits and were being too “nit-picky.”

It was also shown at the hearing that since each of the four older children’s removal and placement in foster care, they have been moved between several foster homes. However, the moves, in part, were necessitated by the children’s behavioral issues. At the time of the hearing, none of the children were placed in the same foster home together.

On June 14, 2011, the juvenile court filed a CINA review hearing order denying the parents request for modification. The juvenile court stated:

In the present case, although progress toward reunification has been made, there has not been a substantial change in material circumstances sufficient to support a finding that it would be in the best interest of [the four older children] to return to their mother’s custody at the present time. The Iowa Department of Human Services presented substantial evidence that if the children are returned to their mother’s custody, the original adjudicatory harm of lack of appropriate supervision would continue to exist. Further, under the circumstances of this case, the court concludes that it would be contrary to the welfare of the children to be returned to their mother’s custody at the present time.

Under the father’s alternative request for custody, the court determined that due to his limited contact with the children since their removal and the denial of the home study by Nebraska, it was not in the children’s best interest to be placed in his custody at the present time. Accordingly, the court denied the parents’ modification request and continued the placement of the four oldest children in foster care with visitation at the discretion of DHS. T.C. remained in his mother’s care. The mother and father now separately appeal.

II. Standard of Review.

Our review of CINA proceedings is de novo. *In re K.B.*, 753 N.W.2d 14, 15 (Iowa 2008). Although we are not bound by them, we give weight to the district court's findings of fact, especially when considering credibility of witnesses. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). Our fundamental concern is the best interests of the children. *Id.*

III. Analysis.

A. Modification. Both parents argue the juvenile court erred in not modifying the prior dispositional order to return custody of the four older children to either of their care. In order to modify custody provisions of a prior dispositional order, the party seeking the modification must show the circumstances have so materially and substantially changed that the best interests of the children require such a change in custody. *In re D.G.*, 704 N.W.2d 454, 458 (Iowa Ct. App. 2005); *In re C.D.*, 509 N.W.2d 509, 511 (Iowa Ct. App. 1993).

Upon our review, we find the parents have failed to show a substantial and material change in circumstances. Rather, the record shows that the mother's progress has not reached a point where the children can be safely returned to her care. There continue to be concerns regarding her ability to properly supervise the children, and to intervene when the children's behaviors become physically aggressive. Although the mother is actively participating in services, is progressing, and is able to meet T.C.'s needs, the evidence shows that she continues to be overwhelmed when she has all five of her children placed into

her care. The children's special needs continue to require two people to help supervise during visitations. The best interests of the children do not require a change in custody to the mother at the present time.

For the father, Nebraska denied the father's home study. Thus, the children cannot be placed into his care. See Iowa Code § 232.158(3)(d). Although he raises several concerns with the thoroughness of the study, specifically, that the workers never meet him personally or visited his home, there is no evidence in the record that he has appealed Nebraska's determination.

B. Reasonable Reunification Efforts. The mother also asserts that she has not received reasonable reunification efforts, because she has not been given unsupervised visitation. However, the mother did not request unsupervised visitation prior to the modification of disposition hearing. Accordingly, this issue was not preserved for our review. *In re A.A.G.*, 708 N.W.2d 85, 91 (Iowa Ct. App. 2005) (holding that DHS has an obligation to make reasonable efforts toward reunification, but a parent has an equal obligation to demand other, different, or additional services prior to the hearing).

Nonetheless, even if this issue had been preserved, we would find that due to the lingering concerns regarding the mother's ability to sufficiently supervise her children and meet their safety needs, unsupervised visitation is not consistent with the best interests of the children at the present time. See Iowa Code § 232.102(7) (providing the State has the responsibility to "make every reasonable effort to return the child to the child's home as quickly as possible consistent with the best interests of the child"); *id.* § 232.102(10)(a) (stating a

child's health and safety are the paramount concerns in making reasonable efforts); see also *In re M.B.*, 553 N.W.2d 343, 345 (Iowa Ct. App. 1996) (stating the reasonable efforts concept broadly includes a visitation arrangement "designed to facilitate reunification while protecting the child from the harm responsible for the removal"). As the district court aptly observed in its modification order:

Visitation for the four older boys has not progressed beyond supervised visitation, and, at present, still requires two visitation supervisors to be present during visits for the children with their mother. During visits, [the mother] is able to meet the children's physical needs such as providing meals, but she still struggles with providing structure, consistency, and supervision.

Supervised visitation ensures the children safety while also providing help as the mother continues to improve her parenting skills. Accordingly, we find the State is making reasonable efforts with the current visitation arrangement.

IV. Conclusion.

For the foregoing reasons, we affirm the decision of the juvenile court denying the parents' joint motion for modification of the dispositional order requesting the four oldest children be returned to either of their care.

AFFIRMED.