

IN THE COURT OF APPEALS OF IOWA

No. 3-004 / 12-2092
Filed February 13, 2013

**IN THE INTEREST OF A.R., A.F., A.F., and A.F.,
Minor Children,**

V.R., Father,
Appellant,

M.F., Mother,
Appellant.

Appeal from the Iowa District Court for Des Moines County, Michael Dieterich, District Associate Judge.

A father and mother appeal separately from the order removing their children from the mother's custody. **AFFIRMED ON BOTH APPEALS.**

Peter Hansen, Burlington, for appellant father of A.R.

Stephanie Schultz of Swanson, Engler, Gordon, Benne & Clark, L.L.L.P., Burlington, for appellant mother.

Alan Waples, Burlington, for father of A.F.

Ryan Gerling of Cray, Goddard, Miller, Taylor & Chelf, L.L.P., Burlington, for father of A.F.

Shane Wiley of Hirsch, Adams, Putnam, Cahill, Rashid & Wiley, Burlington, for father of A.F.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Patrick C. Jackson, Des Moines County Attorney, and Luke Hansen, Assistant County Attorney, for appellee State.

Reyna Wilkens, Fort Madison, for minor children.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

A father and mother appeal from an order removing their children from the mother's custody. They contend the court erred in modifying the dispositional order without finding a material and substantial change in circumstances and the evidence does not support the children's removal. We affirm on both appeals.

The mother has four children by four fathers. The mother and children became involved voluntarily with the Iowa Department of Human Services in March 2011 based on concerns about the mother's drug use and the children's exposure to her use. The family received family-centered services. In February 2012, based on the mother's continued drug use, the State petitioned to have the children adjudicated in need of assistance. In April 2012 all four children were adjudicated in need of assistance under Iowa Code section 232.2(6)(c)(2) (2011) in an uncontested adjudicatory hearing. The parties waived notice, and the court immediately held a dispositional hearing. The court permitted the mother to retain custody of the children subject to the protective supervision of the Iowa Department of Human Services. It ordered the mother to cooperate with and participate in all services deemed appropriate and to abstain from alcohol and illegal drugs.

The oldest child reported, and the mother admitted, the mother continued to use marijuana. The mother also was not cooperating with and participating in services consistently. In early October the State filed a motion for a six-month review hearing. A few days later, the mother was arrested for possession of marijuana. A week after the mother's arrest, the State filed a notice of request for removal. At the end of October, at the time of the review hearing and hearing

on the request for removal, the court granted a brief continuance based on the unavailability of the mother's attorney.

The review hearing and hearing on the request for removal occurred in early November. The court listed services provided in an attempt to maintain the children in the home and found the "extraordinary" services had not been successful because the mother refused to participate in them or to make "a long-term lifestyle change to provide a safe and stable home for the children." It further found:

[P]lacement of the children in relative care is necessary because of the mother's refusal to abstain from illegal substances, the mother's lack of consistent participation in services provided by the Department, the mother's refusal to participate in consistent counseling and mental health services for her and her children, lack of appropriate supervision of the children in the home, the parents' refusal to make significant lifestyle changes to provide a safe and stable home for the children, and none of the children's fathers are options for placement of their respective children.

The court concluded there was good cause to remove the children, the department had made extraordinary efforts to maintain the children in the home, "continued removal" of the children from their home was "the result of a determination that return of the children to the parents' home would be contrary to the welfare of the children," reasonable efforts had been made "to make it possible for the children to return home," and "this disposition is the least restrictive in the circumstances and in the best interest of the children." The court ordered the children placed with their maternal grandfather. The order scheduled a review hearing for January 15, 2013.

Our review of juvenile court proceedings is de novo. See *In re T.E.*, 796 N.W.2d 447, 453 (Iowa Ct. App. 2011). We review both the facts and the law

and adjudicate rights anew on the issues properly presented. *In re A.G.*, 708 N.W.2d 85, 90 (Iowa Ct. App. 2005).

Mother. The mother contends the court improperly modified the disposition and considered the wrong standard for removal.

At the hearing, the court was considering both a requested review of the disposition and the request for removal. The mother's attorney recognized the request for removal was an issue to be tried and, after the State rested, made a motion to deny the request based on failure to meet the burden of proof. After the court implicitly denied the mother's motion, the mother presented her witnesses.

The court's ruling makes it clear the court approached the hearing as if it were a review hearing under Iowa Code section 232.102(9), which applies to review of dispositions transferring custody of a child. See Iowa Code § 232.102(9) (providing for "a periodic dispositional review hearing for each child *in placement pursuant to this section*" (emphasis added)). Although one of the issues in the hearing was whether the children should be removed from the mother's custody, the court's order found "*continued removal*" of the children from their home was "the result of a determination that *return of the children to the parents' home* would be contrary to the welfare of the children," reasonable efforts had been made "to make it possible *for the children to return home.*" (Emphasis added.) Because this was not a review of a prior transfer of custody under section 232.102, the court should not have applied that standard to its consideration whether the children should be removed. Furthermore, if this had been a review under section 232.102, the court's decision to transfer custody of

the children to the maternal grandmother would be improper. See *In re K.B.*, 753 N.W.2d 14, 16 (Iowa 2008) (holding a juvenile court “is not authorized to change custody at a review hearing”).

The State argues the removal was pursuant to section 232.95, which addresses temporary removal of a child “pending a final order of disposition.” Iowa Code § 232.95(2)(a), (b). This section does not apply because the court had already issued its final order of disposition.

We are left with section 232.103 as a basis for the hearing. Even though the statutory language does not mention “review,” the legislature provided, at least when considering review hearings under section 232.102(9), “a hearing held pursuant to section 232.103 satisfies the requirements for initial dispositional review.” See *id.* § 232.102(9)(c). The court’s ruling, although not expressly modifying or vacating the dispositional order or substituting its order for the dispositional order, had the effect of modifying the original order or substituting the order for the dispositional order. We consider substance over form. See, e.g., *DeKlotz v. Ford*, 332 N.W.2d 110, 113 (Iowa Ct. App. 1982) (“The particular label . . . is not conclusive. It is the substance not the form which is controlling.” (citations and internal quotation marks omitted)).

We have held a party seeking a modification of the custody provisions of a prior dispositional order must show the circumstances have so materially and substantially changed that the best interest of the child requires such a change in custody. See *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). The court did not apply this standard when considering the evidence.

In our de novo review,¹ however, applying the proper standard, we find clear and convincing evidence supports the court's transfer of custody. Since the dispositional order, the mother has violated the order² at a minimum by not participating in services to address her substance abuse, not abstaining from alcohol or illegal drugs, and not allowing the children to be tested for exposure to illegal drugs. The effects of her substance abuse on the family have increased. She was arrested and jailed for possession of marijuana and drug paraphernalia. She left the children in the supervision of an unapproved caretaker. She denied her substance abuse placed the children at risk. We conclude the circumstances have so materially and substantially changed the best interests of the children require a change in custody. See *D.G.*, 704 N.W.2d at 458. The transfer of custody will free the mother to concentrate on her issues, while protecting the children from the risk of continued adjudicatory harm, such as lack of supervision. Accordingly, we affirm the order modifying disposition by transferring custody to the maternal grandfather.

Father. The oldest child's father, who is serving a life sentence, contends the court erred in finding the children were at imminent risk of harm if they remained in the mother's home and in changing the children's placement without modifying the dispositional order. The father lacks standing to make the first claim because it relates to the mother. See *id.* at 460 (stating one parent cannot

¹ We need not remand for the court to apply the correct standard as we would in a criminal case where our review is for correction of errors at law, such as when a court does not apply the "weight of the evidence" standard set forth in *State v. Ellis*, 578 N.W.2d 655 (Iowa 1998). See generally *In re A.K.*, ___ N.W.2d ___, 2013 WL 50219, at *3-4 (Iowa 2013) (discussing de novo review of juvenile proceedings and some benefits of not applying a more-deferential scope of review).

² The guardian ad litem suggested contempt proceedings would be appropriate instead of removing the children.

assert facts or legal positions pertaining to the other parent). As to the second claim, we have already affirmed the court's modification of disposition by transferring custody.

AFFIRMED ON BOTH APPEALS.