

IN THE COURT OF APPEALS OF IOWA

No. 3-734 / 13-0972
Filed August 21, 2013

**IN THE INTEREST OF Z.F.,
Minor Child,**

**M.S., Father,
Appellant.**

Appeal from the Iowa District Court for Warren County, Kevin A. Parker,
District Associate Judge.

M.S. appeals the district court dispositional order placing his child, Z.F., in
the custody of the Iowa Department of Human Services (DHS) for continued
placement in family foster care. **REVERSED AND REMANDED.**

Jared Harmon of Carr & Wright Law Firm, P.L.C., Des Moines, for
appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, John Criswell, County Attorney, and Tracie Sehnert, Assistant County
Attorney, for appellee.

Gina Verdoorn of Taylor Law Offices, Des Moines, attorney and guardian
ad litem for minor child.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

BOWER, J.

M.S. appeals the district court dispositional order placing his child, Z.F., in the custody of the Iowa Department of Human Services (DHS) for continued placement in family foster care. M.S. argues the child should have been placed with the child's paternal grandparents. We find it is in Z.F.'s best interest to be placed with the paternal grandparents. Accordingly, we reverse the district court and remand for entry of an order placing the child with the paternal grandparents.

I. Background Facts and Proceedings

Z.F., the child in interest, was born in July 2012 and has a half sibling, M.F., who is approximately one year older. Following allegations of drug use and domestic abuse in the home, the children were removed from the care of their mother, C.K., on September 10, 2012. Both children were initially placed with the sister of an alleged biological father; however paternity tests later showed he was not Z.F.'s father. The children were then placed in family foster care, which continues. It was later determined Z.F. is the child of M.S. who was incarcerated at the time paternity was established.

C.K.'s parental rights were terminated on May 6, 2013. Having learned of the paternity of Z.F., DHS began contacting all of M.S.'s biological relatives including the paternal grandfather, R.W. Upon learning of Z.F., R.W. and his wife immediately expressed an interest in placement and started having lengthy unsupervised visits with Z.F. which have gone well. DHS conducted a background investigation and determined R.W.'s home was suitable for placement.

DHS filed a motion to modify placement asking that Z.F. be moved to R.W.'s home. Z.F.'s guardian ad litem resisted the motion. During the hearing the DHS caseworker testified in support of the modification. The guardian ad litem argued the bond between the half siblings warranted denial of the modification.¹

The district court denied the modification on June 3, 2013

II. Standard of Review

We review child in need of assistance proceedings de novo. *In re A.B.*, 815 N.W.2d 764, 773 (Iowa 2012).

III. Discussion

M.S. argues a substantial and material change in circumstances warrants modification, and the district court failed to order the least restrictive placement. The district court did not explicitly state whether there was a substantial change in circumstances to warrant modification, though it did find the best interests of the child required continued placement in family foster care as the least restrictive alternative.

A. Modification

¹ Iowa law recognizes the importance of the bond between siblings, and expresses a general preference for placing siblings together. See Iowa Code § 232.108(1) (2011) (requiring state agencies to make reasonable attempts to place siblings together). Our supreme court has held siblings should be kept together when possible. See *In re L.B.T.*, 318 N.W.2d 200, 202 (Iowa 1982). Iowa law also provides for a mechanism by which siblings who have been separated may petition for frequent visitation and interaction. Iowa Code § 232.108(3). The best interests of the child, however, remain the paramount concern. See Iowa Code § 232.108(4) (allowing the district court to suspend visitation when required by the well-being of the sibling); *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994) (child's best interests prevented establishing a relationship with a sibling).

To modify a custody determination, the moving party must show a substantial and material change in circumstances since the last disposition order was entered. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983); *Melchiori v. Kooj*, 664 N.W.2d 365, 368 (Iowa Ct. App. 2002). M.S. contends identity of a parent to the child constitutes a substantial and material change in circumstances. We agree. Until paternity was established, M.S. was unaware of the child and would have been unable to participate in court proceedings concerning Z.F. Taken in light of the previous uncertainty, establishing paternity of the child constitutes a substantial and material change in circumstances. See, e.g., *In re D.C.*, No. 09-1545, 2010 WL 200021, at *1 (Iowa Ct. App. Jan. 22, 2010) (finding a change in circumstances after father established relationship with child and indicated interest in custody after initial placement).

B. Best Interests

M.S. argues the law recognizes placement with a relative as less restrictive than placement with DHS. The guardian ad litem contends the law recognizes the importance of sibling relationships and placement with a sibling is the least restrictive alternative. The guardian ad litem also argues the best interest of Z.F. dictates placement with the half sibling with whom Z.F. has formed a bond.

Following a dispositional hearing, Iowa courts are required to “make the least restrictive disposition appropriate considering all the circumstances of the case.” Iowa Code § 232.99(4). The Code lists possible dispositions in sections 232.100 through 232.102, from least restrictive to most restrictive. Suspending

judgment is the least restrictive alternative. Iowa Code § 232.100. Transfer of legal custody and placement away from the parent is the most restrictive. *Id.* § 232.102. Within section 232.102 several alternatives are provided, including placement with another parent, relative, or suitable person; placement with a child-placing agency, facility or institution; or placement with the department of human services. *Id.* § 232.102(1)(a)(1)–(3). Our supreme court has previously interpreted these sections to favor placement with a blood relative over placement with DHS. *In re N.M.*, 528 N.W.2d 94, 97 (Iowa 1995). Because the best interests of the child must be the primary concern, the district court is not required to order placement with relatives over other alternatives. *See, e.g., In re T.H.*, No. 02-1844, 2003 WL 2153837, at *2 (Iowa Ct. App. July 10, 2003) (affirming placement in foster care over placement with grandmother).

The law in Iowa expresses a generalized preference for placing siblings together, and DHS is required to make a reasonable effort to do so. Iowa Code § 232.108. This section, by its plain terms, does not apply to the district courts. The term “relative” has also been defined as the parent of a half-sibling, further evidencing a general preference for keeping siblings in a common placement. Iowa Code § 232.2(46A).

Z.F. has a bond with the half-sibling as evidenced by testimony indicating the sibling’s protective nature. But in this case it is the best interests of Z.F. we are to address and not the best interest of the sibling as argued to the district court. Our concerns with maintaining this bond are reduced because of the cooperative relationship between R.W. and the foster family. We find the best

interests of Z.F. require placement with R.W. Though we recognize the removal is a hardship, Z.F. will be best served by establishing a home with relatives who recently have been and are likely to remain a part of the child's life. Establishing these bonds, at this very early age, is important. Accordingly, we reverse the order of the district court and remand for placement of Z.F. with R.W.

REVERSED AND REMANDED.