

**IN THE COURT OF APPEALS OF IOWA**

No. 3-324 / 13-0314

Filed April 24, 2013

**IN THE INTEREST OF W.C., A.C., J.M.,  
G.M., and M.M.,  
Minor Children,**

**J.M., Father,  
Appellant.**

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Appeal from the Iowa District Court for Linn County, Barbara H. Liesveld,  
District Associate Judge.

James, father of W.C., A.C., J.M., G.M., and M.M. seeks a reversal of the  
juvenile court order that denied his requests for modification. **AFFIRMED.**

Edward Crowell, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney  
General, and Rebecca Belcher, Assistant County Attorney, for appellee.

Cynthia Finley, Cedar Rapids, for mother.

Annette Martin, Cedar Rapids, attorney and guardian ad litem for minor  
children.

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

**DANILSON, J.**

James, father of W.C., A.C., J.M., G.M., and M.M. seeks a reversal of the juvenile court order that denied his requests for modification. Finding no error, we affirm.

**I. Background Facts and Proceedings.**

James and Tammy married in March 2007. They parent five children from blended families. Seven-year-old A.C. accused her step-father James of sexual abuse in February 2011. The parties stipulated to adjudicating the children in need of assistance (CINAs) on the ground of parental unwillingness to provide treatment for a child's emotional damage, pursuant to Iowa Code section 232.2(6)(f) (2011), on August 9, 2011.

The Department of Human Services (DHS) found that James committed second degree sexual abuse. James denied the allegations and appealed the determination. DHS later agreed to amend the assessment to find the perpetrator was "unknown" and removed James from the sex abuse registry. However, a DHS caseworker testified that by listing "perpetrator unknown" on the assessment they did not rule out James. The department remained concerned because A.C. identified him as the perpetrator.

The juvenile court left the children in Tammy's custody under DHS protective supervision and prohibited James from living in the home and having any contact with A.C. until her therapist and the guardian ad litem found it appropriate. The court later authorized contact between James and A.C. under the supervision of her therapist. While initially the two visits seemed positive,

after re-exposure to James, A.C. “completely shut down.”<sup>1</sup> As a result, the therapist testified at the June 18, 2012 hearing on James’ motion to modify that she did not believe it was in A.C.’s best interest to see James or for him to return to the family home. Moreover, the therapist expressed concerns that Tammy was pressuring A.C. to say that she wants James to return home.

After an August 17, 2012 hearing on James’ motion to modify, the court ordered him to obtain a psycho-sexual evaluation, finding it had insufficient information to determine whether it was in A.C.’s best interest to allow James to be in the home. James objected to the requirement and made several additional requests.<sup>2</sup> In an enlarged order, the court again denied James’ motion, noting the finding of the department “is not the same as a finding that [James] was not the perpetrator of any sexual abuse as to [A.C.], only that by agreement on appeal that the perpetrator in this instance is listed as unknown.” In response to James’ demands for the court’s authority, it noted:

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<sup>1</sup> A.C. refused to speak with the school counselor beginning the day after her first supervised visit with her father. She began sucking her thumb and isolating herself at school. She refused to talk in individual therapy.

<sup>2</sup> James requested a finding that DHS had failed to make reasonable efforts to maintain the family. In a February 5, 2013 review order, the court found DHS made reasonable efforts, including:

drop-in services, supervised visitation/services, individual counseling for the mother, James [ ] and the children, protective day-care, day treatment (Four Oaks), family team meeting, mental health evaluation, Behavioral Health Intervention Services . . . supervision and services through the Department of Human Services, family safety, risk and permanency services, and family support worker. Further, no party has requested additional services or assistance other than the following: James’ request for increased visitation and decreased supervision of that visitation, James’ request for authority for ordering the psycho-sexual evaluation, James’ request for a list of case plan expectations from DHS, and the parents’ request for a time and date certain on which James may visit W.C. to assist in his home schooling.

A child's health and safety shall be the paramount concern in making a determination about whether to return custody to a parent. At any dispositional review hearing the court shall review the sufficiency of the services being provided and determine whether additional or more intensive services are needed to facilitate the safe return of a child to parental care. In the instant case custody of the children is with the mother but not with the father. The parents are married. They wish to remain as a family unit with the goal being family reunification. In order to achieve this goal services are required wherein it would be possible to return custody of the children to the father. If the court determines services are needed, the court shall order said services to be provided as well as order the actions to be taken by the parent to correct the identified problems. The Court therefore exercising its inherent power to ensure the health and safety of the children herein and that appropriate services are provided to the family pursuant to Iowa Code Chapter 232 and further that it is in the best interests of the children to order additional services to accomplish the goals of the case ordered James complete a psycho-sexual evaluation and for [A.C.] to obtain a mental health evaluation.

On appeal, James argues the juvenile court order failed to satisfy the requirements of due process by announcing the authority under which it orders him to submit to a psycho-sexual evaluation. He further argues that the court should be bound by the conclusion of the amended DHS assessment, and thus the court would lack sufficient evidence that he poses a risk of sexual abuse. Alternatively, he argues DHS should be precluded from making requirements of him on the basis that he poses risk of sexual abuse because they agreed to remove him as the listed perpetrator. Finally, he asserts denial of modification and other requests was improper because he was compliant with the case plan and had positive visits.

## **II. Discussion.**

We review evidence in CINA proceedings de novo. Iowa R. App. P. 6.907; *In re K.B.*, 753 N.W.2d 14 (Iowa 2008). Although we are not bound by them, we

give weight to the district court's findings of fact, especially when considering the credibility of witnesses. Iowa R. App. P. 6.904(3)(g).

We acknowledge the parent-child relationship is constitutionally protected under the fourteenth amendment to the United States Constitution. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972); *In re K.L.C.*, 372 N.W.2d 223, 226 (Iowa 1985). But,

[t]he State's interest is clear as well. The State has an interest in protecting the health, safety and welfare of the children within its borders. As such, the parent's interest in maintaining the family unit is not absolute and may be forfeited by certain parental conduct. To abrogate the parent's protected interest, the State must meet the requirements of the fourteenth amendment due process clause.

*In re T.R.*, 483 N.W.2d 334, 337 (Iowa Ct. App. 1992) (citations omitted). The procedural safeguards of notice and an opportunity to be heard are written into the CINA statutory provisions. See *In re K.L.C.*, 372 N.W.2d at 226–27; see also *In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000); *In re T.R.*, 483 N.W.2d 334, 337 (Iowa Ct. App. 1992).

The modification of a dispositional order is provided for in Iowa Code section 232.103.<sup>3</sup> To modify a dispositional order, good cause must be shown.

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<sup>3</sup> Iowa Code section 232.103 provides in pertinent part:

1. At any time prior to expiration of a dispositional order and upon the motion of an authorized party or upon its own motion as provided in this section, the court may terminate the order and discharge the child, modify the order, or vacate the order and make a new order.

. . . .

4. The court may modify a dispositional order . . . and release the child if the court finds that any of the following circumstances exist:

- a. The purposes of the order have been accomplished and the child is no longer in need of supervision, care, or treatment.
- b. The purposes of the order cannot reasonably be accomplished.

*See id.* 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 interests 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).

James' contentions relate to the requirement that he undergo a psycho-sexual evaluation and the lack of progress in providing reasonable services such as expanded visitation. The State contends that James has not preserved error in respect to the evaluation. However, James is not appealing the initial order but rather contending that after the amended assessment, the juvenile court should have modified the dispositional order eliminating the requirement that he undergo a psycho-sexual evaluation. Accordingly, James has properly preserved error on this issue.

We agree with the juvenile court that under Iowa Code section 232.103, good cause to modify is not shown. While James may be following the case plan, two therapists he called as witnesses could not recommend contact with A.C. Amendment to the language of a DHS abuse assessment declaring the perpetrator of abuse "unknown" does not equate to a determination that James was not the perpetrator or rise to the level of material and substantial change.

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c. The efforts made to effect the purposes of the order have been unsuccessful and other options to effect the purposes of the order are not available.

d. The purposes of the order have been sufficiently accomplished and the continuation of supervision, care, or treatment is unjustified or unwarranted.

James does not contend that A.C. was not sexually abused and, to this date, no other individual has been identified as the perpetrator.

Moreover, we note the juvenile court has discretion to order examination of a parent if that person's ability to care for the child is at issue. Iowa Code § 232.98(2); see *In re E.W.*, 434 N.W.2d 898, 900-02 (finding the "trial court has discretionary power to order the parents of a child, adjudicated in need of assistance, to undergo a psychological examination if the parent's ability to care for the child is in issue" and "juvenile court appropriately maintained restrictive visitation pending psychological evaluation" when perpetrator of sexual abuse remained unknown). We believe the same reasoning applies to psycho-sexual evaluations.

Here, the court was more than justified in retaining the requirement of such an examination, where A.C. reported sexual abuse by James in very explicit detail, the child's behavior changed markedly after two supervised visits with James, and therapists testified that A.C. should not have contact with James and that he should not return to the family home. Clearly there are some difficulties in the relationship between James and A.C. as depicted by the evidence, and the evaluation may assist in resolving those issues. The evaluation may permit the case plan to move forward as James seeks.

James cites no authority for his contentions that both DHS and the juvenile court should be bound by the amended abuse assessment; thus, we decline to consider it here. Iowa R. App. P. 6.903(2)(g). Furthermore, we note the child was adjudicated on the ground of parental unwillingness to provide

treatment for A.C.'s emotional damage. The court would be abdicating its role to grant James increased visitation in light of the child's reaction to contact with him, without further evaluation. Finding no error, we affirm.

**AFFIRMED.**