

IN THE COURT OF APPEALS OF IOWA

No. 3-729 / 13-0883
Filed July 24, 2013

**IN THE INTEREST OF T.W.,
Minor Child,**

**S.B., Mother,
Appellant,**

**J.W., Father,
Appellant.**

Appeal from the Iowa District Court for Linn County, Susan F. Flaherty,
Associate Juvenile Judge.

A mother and a father separately appeal juvenile court orders.

AFFIRMED.

Cynthia S. Finley, Cedar Rapids, for appellant mother.

Mark D. Fisher of Nidey, Erdahl, Tindal & Fisher, P.L.C., Cedar Rapids, for
appellant father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Jerry Vander Sanden, County Attorney, and Kelly J. Kaufman, Assistant
County Attorney, for appellee State.

Kimberly Opatz, Cedar Rapids, attorney and guardian ad litem for minor
child.

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

POTTERFIELD, P.J.

A mother and a father separately appeal the juvenile court's order adjudicating their child as a child in need of assistance (CINA). The mother also appeals the order sustaining the emergency removal of the child. The father also argues the dispositional order continuing the child in the custody of the department of human services (DHS) with discretion to place T.W. with his parents on a trial basis was not the least restrictive placement.

Scope of review. Review of child-in-need-of-assistance proceedings is de novo. *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994). We give weight to the juvenile court's findings, especially with respect to the credibility of witnesses, but are not bound by them. *Id.*

Removal. The mother first contends the emergency removal was not justified under Iowa Code section 232.78 (2013). The mother argues that “[o]ther than the parent[s’] past actions, there was no current evidence that showed that T.W. would be in imminent danger if he were allowed to remain with his parents.” Central to all the parents’ arguments is their contention that it was error for the juvenile court to admit evidence from prior CINA and termination proceedings. Consequently, we must address this issue first.

“[I]f relevant and material, evidence from a termination proceeding may be admitted in a later CINA hearing to the extent of its probative value.” *In re C.M.*, 526 N.W.2d 562, 565 (Iowa Ct. App. 1994); see also *In re N.M.W.*, 461 N.W.2d 478, 480–81 (Iowa Ct. App. 1990) (holding evidence of a parent’s past actions that formed the basis of prior CINA proceedings may be considered in new CINA proceeding). We reject the parents’ contention the earlier matters were irrelevant

for purposes of determining whether T.W. was at risk of imminent harm. The previous CINA and termination proceedings concerned the two older children of the same parents.

“We gain insight into the child’s prospects by reviewing evidence of the parent’s past performance—for it may be indicative of the parent’s future capabilities.” *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994); accord *In re D.W.*, 791 N.W.2d 703, 709 (Iowa 2010). The parents’ past performance was summarized by the juvenile court:

[The mother] and [the father] both have an extensive history of abuse/neglect of children in their care. [The mother] has six prior founded reports of child abuse where she is the named perpetrator and [the father] has been determined to be the perpetrator of child abuse on four separate occasions. These incidents of abuse have involved primarily denial of critical care due to alcohol abuse/use of drugs by [the mother] and acts of domestic violence by both [the mother and the father]. [The mother] has a significant history of substance abuse, dating back to her teenage years. [Her] alcohol and drug abuse has been the primary reason that she has previously been unable to safely maintain a child in her care. [The parents] have had a lengthy but unstable relationship which began when they were both teenagers. Additionally, [the parents] each has an extensive history of criminal activity, multiple arrests and periods of incarceration which has interfered with their ability to be consistently available to care for their children. [The mother] has ongoing mental health issues and, historically, she has not consistently participated in the treatment recommended to address those issues.

These same parents had their parental rights terminated to two of their children in February 2012, which is not so remote in time as to decrease its probative value. “The State has the duty to see that every child within its borders receives proper care and treatment.” *In re L.L.*, 459 N.W.2d 489, 494 (Iowa 1990). The juvenile court would have been remiss in that duty if it did not consider the parents’ past difficulties in child rearing. In light of that extensive

history, as well as the evidence presented at the review hearing, the court did not err in sustaining the emergency removal of the child from the parents' custody, with a plan to return the child to the parents on a trial home placement "conditioned upon the placement of VICAP alcohol testing in the mother's home for a minimum of one time per day alcohol testing," and further conditioned upon "the parents' active participation in couple's counseling," compliance with "Plan B of the Post Removal Conference," and daily drop-ins.¹

Adjudication. At the adjudication hearing, the parents stipulated to the admission of the evidence and testimony from the removal review hearing. The juvenile court determined T.W. was a CINA pursuant to Iowa Code section 232.2(6)(c)(2), which defines a "[c]hild in need of assistance" as "an unmarried child [w]ho has suffered or is imminently likely to suffer harmful effects as a result of . . . [t]he failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child." The juvenile court found that while both parents were making significant efforts to change their behaviors, those efforts were "relatively new and untested." The court observed that the mother's "ability to maintain sobriety will be key to the parents' success at safely maintaining [T.W.] in their care," as would the father's "ability to manage his frustrations and anger."

On our de novo review, we agree with the juvenile court's finding the child remained at risk of inadequate care and its determination that additional time was necessary to determine if the parents' progress was to be trusted. The mother

¹ In any event, the removal issue would seem to be moot as "[a]ny error committed in granting the temporary ex parte order cannot now be remedied. We cannot go back in time and restore custody based on alleged errors in the initial removal order." *In re A.M.H.*, 516 N.W.2d 867, 871 (Iowa 1994).

argues that it was not in the child's best interest to be adjudicated CINA, but we conclude further court supervision can ensure the parents' continued efforts and the child's safety.

Disposition. The father notes that all parties agreed before the dispositional hearing the child should be returned to the parents' custody under DHS supervision. He contends the home trial had been going well "absent an isolated relapse by [the mother]," and the court erred in rejecting DHS's recommendation to return the child to the parents' custody after the dispositional hearing.

At the disposition hearing, it was made clear that the State's recommendation to return custody to the parents was based upon a protective service plan, which was not in place.² The juvenile court rejected the parties' agreement, noting the mother's recent relapse and the lack of access to needed services. The court continued custody of the child in DHS with placement with the parents. The court ordered DHS to immediately implement services. We affirm. See Iowa Code § 232.102(5) (stating custody of the child should not be transferred unless "child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available").

AFFIRMED.

² Services were not available for the parents until the child had a social security number. The State was responsible for obtaining the number under the circumstances of this case, and no social security number had yet been obtained.