

IN THE COURT OF APPEALS OF IOWA

No. 8-591 / 08-0873

Filed July 30, 2008

**IN THE INTEREST OF J.S.,
Minor Child,**

L.T.S., Father,
Appellant,

R.S., Mother,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

A mother and father appeal separately from the district court's order modifying disposition and removing one of their children from their care.

AFFIRMED.

James Peters, Independence, for appellant father.

Emily Carr of Gallagher Law Firm, P.C., Waterloo, for appellant mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kathleen Hahn, Assistant County Attorney, for appellee State.

Melissa Anderson-Seeber, Waterloo, for minor child.

Considered by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

A mother and father appeal separately from the district court's order modifying disposition and removing one of their children from their care. We affirm.

I. Background Facts and Proceedings.

Loren¹ and Roberta have four children: Zachary, Deanna, Dayna, and James. James was born in February 2004, and only his placement is at issue in this appeal. Loren and Roberta are married, but they are represented by separate counsel and raise separate issues on appeal.

The parents first came to the attention of the Iowa Department of Human Services (Department) on August 15, 2006, when the Department received a report that Loren had struck or bit Dayna, in Roberta's presence, after both parents had consumed alcohol to the point of intoxication. At that time, the family lived in Manly, Worth County, Iowa. The report was determined to be founded.

Subsequently, the State filed a petition alleging the children to be children in need of assistance (CINA). On October 18, 2006, the court adjudicated the children CINA pursuant to Iowa Code section 232.2(c)(1) and (2), with the consent of the parties. The court proceeded to disposition upon the waiver of the parties, and ordered that Deanna and Dayna be placed in foster care, and that Zachary and James remain in their parents' care with supervision by the Department.² The court further ordered the parents to have psychological

¹ Loren is a member of the Chippewa Indian Tribe (Tribe). As such, the Federal and Iowa Indian Child Welfare Acts apply to his children. The Tribe was given notice pursuant to the Acts and intervened in the proceedings before the district court.

² Zachary is now an adult and does not live in his parents' home.

evaluations and follow any subsequent treatment recommendations, and that James have an evaluation and participate in protective day care.

Thereafter, the parents came before the court for numerous hearings.³ Following a November 2006 modification hearing, the court again ordered Loren and Roberta to complete substance abuse evaluations. Loren was also ordered to complete a psychological evaluation. The parents were required to follow any treatment recommendations made by their evaluators. Neither Loren nor Roberta completed substance abuse evaluations following this order, but both had psychological evaluations. Both evaluations recommended that Loren and Roberta participate in family therapy and individual therapy; however, the doctor noted that they would likely resist the referrals.

After another review hearing, the court entered an order on April 18, 2007, which required Loren and Roberta to complete substance abuse evaluations. The court also ordered that the parents abstain from using illegal drugs and alcohol and follow the recommendations of their psychological evaluations.

On June 30, 2007, Loren was arrested for disorderly conduct and given a preliminary breath test, which showed a blood alcohol level of .260. Following the arrest, the Department's caseworker filed a report with the court expressing concern that Loren continued to drink excessively. The caseworker also reported that Loren had not completed a substance abuse evaluation or complied with drug testing as previously ordered by the court. Based upon the Department's update, the court then scheduled a modification hearing.

³ Each time the court found that James remained a CINA.

Just before the modification hearing commenced in July 2007, Loren and Roberta submitted to substance abuse assessments. No substance abuse treatment was recommended for Roberta. However, Loren's evaluation stated that recommendations were pending the receipt of referral documents from the Department, because Loren was confused about why he was referred for the evaluation. Later, Loren was discharged from treatment due to a lack of readiness on his part to resolve his problems. The discharge recommendations stated that Loren was to follow the mutually identified recovery plans and make a mental health appointment with the possibility of medication benefits.

Following the modification hearing, the court found that Loren had continued to drink, and that both Roberta and Loren had refused to provide samples for drug and alcohol testing as ordered. The court noted that Loren and Roberta had completed substance abuse evaluations, but had delayed compliance. Additionally, the court found that Loren and Roberta had not followed recommendations made for the benefit of James. The court ultimately determined that James should remain in his parents' care with continuing supervision by the Department. Loren and Roberta were required to abstain from the use of illegal drugs and provide samples for drug and alcohol testing every time they were requested to do so. The order further provided that Loren and Roberta were to follow the recommendations of their substance abuse evaluations.

On October 16, 2007, the Department filed an updated report with the court, again requesting that James be removed from Loren and Roberta's care. The report noted that Loren had been arrested for public intoxication on

September 16, 2007. The report further stated that at a family team meeting, Loren accused Roberta of having a drinking problem. The report noted that the Department caseworker had asked Roberta to complete a second substance abuse evaluation, but she refused. The court then set the matter for another modification hearing.

On November 7, 2007, following the modification hearing, the court ordered that James be removed from his parents' care and be placed in foster care. However, the court ordered that James's removal would be deferred if Loren and Roberta met several conditions, including that Loren immediately arrange and keep his appointments for his mental health evaluation, that he follow all recommendations for treatment, that the parents abstain from the use of alcohol and illegal drugs, and that Roberta arrange for substance abuse evaluation and follow its recommended treatment. The court order stated that if Loren or Roberta failed to meet any of these conditions, James would be removed from their care.

On November 14, 2007, Loren submitted to a second psychiatric evaluation. His doctor diagnosed him as having adjustment disorder with depression and anxiety, and alcohol abuse. The doctor's plan of care stated that the doctor wanted to see Loren in two weeks as an outpatient, and he also referred Loren to another doctor for counseling. Loren did not follow-up with his doctor or go to counseling as recommended.

On November 30, 2007, Roberta submitted to second substance abuse evaluation. The counselor recommended that Roberta abstain from all mood altering substances not prescribed by a physician and that she participate in a

substance abuse education program. She did not participate in any program immediately following the evaluation.

Thereafter, Loren and Roberta moved to Waterloo. As a result, their case was transferred to Black Hawk County and the court there set the matter for a dispositional review hearing. On December 31, 2007, the Department filed a report to the court again recommending that James be placed in foster care. After the hearing, the court entered its permanency review order on March 17, 2008, finding that James should remain in his parents' care with supervision by the Department. The court noted that Loren stated a willingness to be further evaluated by a mental health provider and that he would follow any recommendations for treatment. The court further noted that Roberta stated she was also willing to comply with the recommendations for substance abuse aftercare. The court then ordered Loren to cooperate and comply with mental health treatment, Roberta to comply with recommended substance abuse aftercare, and both parents to cooperate with random drug testing and participate in a family team meeting.

On April 24, 2008, the Department filed a motion for modification of disposition, requesting that James be removed from Loren and Roberta's care and placed in foster care. The motion essentially asserted that the parents had not complied with the court's March 17, 2008 permanency review order. The motion stated that Loren did not participate in the scheduled family team meeting, and that Loren had told the Department's caseworker that he was unwilling to follow through with mental health services as recommended. Additionally, the motion stated that Loren initially refused to provide a sample for

drug and alcohol testing, but consented two hours later and then failed to produce enough sample to be tested. The motion stated concerns remained regarding Loren's unwillingness to address his mental health issues and the impact this had on his ability to safely parent James.

The matter came on for hearing on May 9, 2008. Roberta appeared at the hearing with counsel and Loren appeared pro se. James's guardian ad litem and Loren's Tribe's representative both agreed with the Department's recommendation that James be removed from his parents' care. In support of removal, the State offered into evidence an updated case report completed by the Department. Roberta's counsel indicated that she had received the report prior to the hearing, but objected to the report based upon alleged omissions, misrepresentations, and factual errors contained in the report. Loren testified that he received the report just prior to the hearing and did not voice any objections to the report, though he testified that he disagreed with the report's statements regarding James's schooling, and consequently went to the school prior to the hearing to confront James's teachers about it.

In addition to the Department's report, the State introduced into evidence the recent report by the court appointed special advocate (CASA), without any objection by the parties. The CASA's report stated that James was in need of six caps on his teeth, and that Roberta had been aware of this problem for three months but had not done anything to correct the problem. Additionally, the CASA's report stated that Loren had missed the family team meeting and there were concerns that Loren had failed to go to counseling. The report did note that Loren did see a counselor on May 1, 2008. Similarly, the report stated that

Roberta had not attended substance abuse counseling. The CASA's report recommended that Loren and Roberta be given extensive parenting counseling and that any further failure to follow Department and court ordered directions should result in James's removal from their care.

Roberta testified that she had learned of James's dental problems in January or February of 2008, but did not schedule the appointment until the day of the hearing. Additionally, Roberta testified she went to a substance abuse aftercare program a few days prior to the hearing and would be going back the following week. Loren testified he had seen a mental health counselor once, and had an appointment to return the following week.

On May 14, 2008, the juvenile court entered its order modifying disposition. The court ordered that James be removed from Loren and Roberta's custody. The court noted that Loren had not obtained mental health treatment as previously ordered. The court also pointed out that Loren had not sought counseling until after the motion to modify had been filed and had only been to one appointment. The court further found that neither parent was participating in any substance abuse aftercare programming as recommended. The court also found that James's dental hygiene had been neglected, finding that James had significant dental problems which Loren and Roberta did not attempt to remedy until the day of the hearing. The court then concluded:

The State has presented clear and convincing evidence that the child will continue to suffer adjudicatory harm if left in the custody of his parents. Their failure to provide a proper degree of care in supervising and caring for the child has produced harmful effects, including but not limited to poor dental health. The court agrees with the [CASA], who states in part as follows: "While James is not in any danger of physical abuse, he does face a degree of neglect

that I, as a CASA, find unacceptable.” Both the child’s guardian ad litem and the social worker representing the tribe asked the court to act to protect the child and remove him from his parents’ care. The court now concludes that the court is left with no other alternatives.

Loren and Roberta appeal, but assert separate claims. Loren contends that he was deprived of due process because he was not provided adequate notice of the May 9, 2008 modification hearing and because he was not provided any notice of the contents of the Department’s last report presented to the court at the hearing. Roberta asserts that there was no evidence that a material and substantial change in circumstances existed justifying change in custody since there was no evidence of physical abuse and the parents had substantially complied with the court’s requirements. Additionally, Roberta contends that the State failed to offer the mother reasonable efforts to preserve the family unit, such as referrals for programs that would address her parenting skills.

II. Scope and Standards of Review.

Our scope of review in CINA proceedings is de novo. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). We give weight to the juvenile court’s findings of fact, but we are not bound by them. *Id.* Our overriding concern is the best interest of the child. *In re E.H. III*, 578 N.W.2d 243, 248 (Iowa 1998).

III. Claims on Appeal.

A. Loren’s Claims.

Loren first contends he was deprived of due process because he was not provided adequate notice of the hearing on the State’s motion to modify disposition. However, Loren appeared at the modification hearing, and he did

not raise this issue before the court at the hearing. Consequently, we conclude that this issue was not preserved for our consideration on appeal.

Loren next asserts that he was not provided any prior notice of the contents of the Department's report submitted to the court the day of hearing. At hearing, Loren did not raise this issue before the court. In fact, Loren testified he had received the report prior to the hearing, and as a result of the report's contents, he confronted James's school teachers regarding the statements in the report. Consequently, we conclude that this issue was also not preserved for our consideration on appeal.

B. Roberta's Claims.

Roberta asserts that there was no evidence that a material and substantial change in circumstances existed justifying change in custody since there was no evidence of physical abuse and the parents had substantially complied with the court's requirements. Additionally, Roberta contends that the State failed to offer the mother reasonable efforts to preserve the family unit, such as referrals for programs that would address her parenting skills. For the reasons that follow, we disagree.

Iowa Code section 232.103(1) (2007) provides for modification of a dispositional order prior to its expiration. The party seeking modification of a dispositional order must show that the circumstances have so materially and substantially changed that a modification is in the best interest of the child. *In re D.S.*, 563 N.W.2d 12, 14 (Iowa Ct. App. 1997). If clear and convincing evidence shows a substantial change in circumstances since a dispositional order, the child's best interests may require a change in placement. *See id.*; *In re C.D.*, 509

N.W.2d 509, 511 (Iowa Ct. App. 1993). We consider the child's long-range as well as immediate interests. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). The parents' past performance provides insight into this determination. *Id.* Part of our focus may be on parental change, but the overwhelming bulk of the focus is on the child and his needs. *In the Interest of A.S.T.*, 508 N.W.2d 735, 737 (Iowa Ct. App. 1993).

On our de novo review, we find that clear and convincing evidence establishes there has been a substantial change in circumstances which necessitates removing James from the home. In December 2006 and on numerous occasions thereafter, the district court warned the parents that James might be removed if they did not participate in treatment and follow any treatment recommendations as ordered. Since the commencement of this case, Loren and Roberta have only taken steps to comply with the court's orders after the State sought to remove James from their home because of their lack of cooperation. The record demonstrates the parents have persistently failed to follow the treatment recommendations of their counselors. The parents' failure to follow the court's earlier admonitions clearly constitutes a substantial change in circumstances. The record also reveals that James has significant dental health issues, which his parents have ignored. Roberta acknowledged that she had known James's dental problems for some time, but she did not schedule a dental appointment until the day of the modification hearing. The record also reveals that James suffers from a variety of developmental delays. Loren and Roberta's failure to follow court orders and attend to James's dental health and other needs establishes James would be at risk if left in his parents' home. Consequently, we

agree with the district court that there has been a substantial change in circumstances which necessitated removing James from the home.

Roberta also asserts that the State failed to offer her reasonable efforts to preserve the family unit, such as referrals for programs that would address her parenting skills. However, Roberta did not assert this issue before the court at the modification hearing. Consequently, we conclude that this issue was not preserved for our consideration on appeal.

IV. Conclusion.

Because we find that clear and convincing evidence establishes there has been a substantial change in circumstances and that the parents' other claims were not preserved, we affirm the district court's decision to modify the dispositional order and remove the child from Loren and Roberta's care.

AFFIRMED.